August 23, 2019

Via email (rule-comments@sec.gov)

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SEC File Number SR-FINRA-2019-012

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to further comment on SR-FINRA-2019-012 (as modified by Partial Amendment No. 1 thereto, the "Rule Change Proposal"), which sets forth extensive proposed amendments to FINRA Rule 5110 (the "Rule" and, as proposed to be amended by the Rule Change Proposal, the "Proposed Rule").[1]

This letter is submitted in response to the solicitation by the Securities and Exchange Commission (the "SEC") of additional comments in connection with the filing by FINRA of Partial Amendment No. 1 to the Rule Change Proposal ("Amendment No. 1")[2] and supplements our letter dated May 30, 2019 (the "May SIFMA Letter").[3] Accordingly, this letter focuses on certain continuing issues

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1 *See* SEC Release No. 34-86509 (July 29, 2019), 84 Fed. Reg. 37921 (August 2, 2019) (the "Amended Rule Change Filing"), available at https://www.sec.gov/rules/sro/finra/2019/34-86509.pdf; *see also* SEC Release No. 34-85715 (April 25, 2019), 84 Fed. Reg. 18592 (May 1, 2019).

2 *See* https://www.finra.org/sites/default/files/rule_filing_file/sr-finra-2019-012-amendment-no1.pdf. *See also* FINRA's Response to Comments dated July 11, 2019 ("Response to Comments"), available at https://www.finra.org/sites/default/files/rule_filing_file/sr-finra-2019-012-response-to-comments.pdf.

3 Available at https://www.sec.gov/comments/sr-finra-2019-012/srfinra2019012-5603986-185507.pdf.

* SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly one million employees, we advocate for legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association.

that we believe merit additional FINRA action and new issues raised by the modifications to the Rule proposed in Amendment No. 1.

Additional Comments on Rule Change Proposal:

1. Definition of "Bank"/Investment Grade Filing Exception

In response to comments submitted by the ABA's Federal Regulation of Securities Committee (the "ABA Committee") by letter dated May 30, 2019 (the "ABA Comment Letter"),[4] FINRA proposes to modify the definition of "bank" in paragraph (j)(2) of the Proposed Rule to explicitly include U.S. branches and agencies of foreign banks.[5] We agree that this is an appropriate and helpful change. However, by applying the bank definition broadly to the entire Rule rather than limiting its application to the provision of the Rule that contains the so-called "venture capital exceptions" (as is the case under the current Rule), we believe FINRA has inadvertently created a new and burdensome requirement that "foreign banks" must first apply to FINRA for an "exemption" before relying on the investment grade securities exception from filing contained in Proposed Rule 5110(h)(1)(A) (the "Investment Grade Filing Exception"). Such a requirement does not now, and would not under the Proposed Rule, apply to any other foreign entity seeking to rely on the Investment Grade Filing Exception.

In order to rectify this issue, we suggest that FINRA either:

> (i) modify Proposed Rule 5110(h)(1)(A) by adding "foreign bank" to the list of entities that may rely on the Investment Grade Filing Exception (*e.g.,* "securities offered by a bank, ***foreign bank***, corporate issuer, foreign government or foreign government agency that has outstanding unsecured non-convertible debt …"); or
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> (ii) modify Proposed Rule 5110(j)(2) such that the term "bank" means "a bank as defined in Section 3(a)(6) of the Exchange Act, a branch or agency in the United States of a foreign bank that is supervised and examined by a federal or state banking authority and otherwise meets the requirements of Section 3(a)(6) of the Exchange Act, or a foreign bank that ***(except for purposes of Rule 5110(h)(1)(A))*** has been granted an exemption under this Rule and shall refer only to the regulated entity, not its subsidiaries or other affiliates."

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4 *See* https://www.sec.gov/comments/sr-finra-2019-012/srfinra2019012-5602709-185469.pdf.

5 *See* 84 Fed. Reg. at 37929.

2. Securities Acquired in a Public Offering by Participating Members

In the May SIFMA Letter, we requested clarification that any securities purchased by a participating member in a public offering at the public offering price will not be deemed underwriting compensation. FINRA has addressed this comment by providing that it would "interpret the Proposal not to include as underwriting compensation ***non-convertible securities*** purchased by the participating member in a public offering at the public offering price during the review period."[6] FINRA also proposes a modification to Supplementary Material .01(a)(7) to expressly incorporate this position in the Rule. However, FINRA says that it would consider acquisitions of "convertible securities" by a participating member with "negotiated or preferential terms" to be underwriting compensation. While SIFMA understands FINRA's concern with regard to convertible securities that are acquired by participating members on preferential terms relative to other investors in a public offering, we believe this concern can be better addressed (and, in so doing, actually [broaden the scope of securities acquired on preferential terms that are deemed underwriting compensation) by modifying Supplementary Material .01(a)(7) as follows rather than as proposed in Amendment No. 1:

> (7) common or preferred stock, options, warrants, and other equity securities, including debt securities convertible to or exchangeable for equity securities, beneficially owned, as defined in Rule 5121 by the participating members the value of which is determined pursuant to this Rule, and acquired during the review period, as defined in this Rule, except that ***any such securities*** purchased ***during the review period*** by a participating member in a public offering at the public offering price ***and without any preferential terms not offered to others purchasing in the public offering that are not participating members*** shall not be deemed underwriting compensation;

3. Filing of Engagement Letters

In the ABA Comment Letter, the ABA Committee noted that "[t]he Proposed Rule (like the current Rule) requires the filing of 'all documents relevant to the underwriting terms and arrangements,' including (among others) engagement letters. The [ABA] Committee believes that M&A and private placement engagement letters should expressly not be required to be filed, even if entered into within the review period, unless the letter contains a right of first refusal (or 'ROFR') for a future public offering (other than a ROFR that is limited to the issuer's IPO) or otherwise provides for securities-based compensation that may be deemed underwriting compensation for the public

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[6] 84 Fed. Reg. at 37927 (emphasis added).

offering under review."[7] The ABA Committee further stated that "this result should obtain under the wording of the current Rule and the Proposed Rule, but note that FINRA's Public Offering System (and staff interpretation) nonetheless requires the filing of all engagement letters entered into with the issuer during the review period even if the engagement provides solely for cash compensation for M&A services or for acting as a placement agent in a private placement and does not contain an ongoing ROFR."[8] FINRA declined to make any change to the Proposed Rule to address this comment, responding that it "continues to believe that M&A and private placement engagement letters should be required to be filed with FINRA so that it may determine if they impact the underwriting terms and arrangements for the public offering."[9]

SIFMA believes the concern expressed by the ABA Committee is valid. While SIFMA agrees with the requirement in the Proposed Rule that "all documents relevant to the underwriting terms and arrangements, including . . . any engagement letter" be required to be filed, SIFMA believes that FINRA's electronic filing system for public offerings (the "Public Offering System") and examination staff have effectively expanded this requirement to mandate the filing of ***all*** engagement letters with respect to the provision by participating members of any services entered into within the review period – ***even if such letters contain no terms that are relevant to the underwriting terms and arrangements for the subject public offering***. Accordingly, while a so-called "dual track" engagement letter that addresses, for example, both an M&A or a private placement transaction as well as a public offering subject to review under the Rule should of course be subject to the filing requirement, we do not believe that a stand-alone M&A and/or private placement engagement letter entered into within the review period should be subject to the filing requirement <u>unless</u> it contains provisions that actually relate to the underwriting terms and arrangements for the public offering under review (such as, *e.g.*, the inclusion of provisions for an ongoing ROFR or securities-based compensation that may be deemed underwriting compensation for the public offering or that otherwise set forth the distribution arrangements or agreed underwriting allocations or discounts for the public offering). Further, we do not believe that it is appropriate for FINRA to expand the requirement set forth in the duly SEC-approved Rule through the design of the Public Offering System, whose filing and representation requirements do not match the precise terms of the Rule. Thus, we urge FINRA to administer the filing requirement as written and either issue appropriate clarifying guidance as to the limited scope of

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[7] ABA Comment Letter at p. 2.

[8] *Id.*

[9] 84 Fed. Reg. at 37928.

the provision to just those documents that contain terms “relevant to the underwriting terms and arrangements” or fix the Public Offering System to mirror the precise filing requirements of the Rule.

4. Look-Through Requirements for 5% Beneficial Owners That Are Funds

In the May SIFMA Letter, we noted that our members continue to encounter issues when trying to obtain beneficial ownership information from private investment funds and other vehicles with respect to the affiliations of limited partners. The ABA Committee raised similar concerns.[10] While the investment vehicle is generally willing to make representations in this regard as to itself and the general partner and investment manager of the vehicle, it is often reluctant to make representations as to limited partners having no investment discretion or significant ownership position (*e.g.*, 25%) in the vehicle. Moreover, these vehicles are often unwilling to disclose the identity of their limited partners in order for the firms to conduct additional diligence. FINRA has recognized similar issues with “look-through” requirements in the past (for example, in connection with Rule 5131) and we again urge FINRA to reconsider its position and offer relief or additional guidance in this context.

5. Venture Capital Exceptions

In the May SIFMA Letter, we commented on various aspects of the so-called “venture capital exceptions” of the Proposed Rule, including as to the unnecessarily broad definition of “institutional investor” and unnecessarily narrow scope of the new co-invest exception. While FINRA declined to accept our suggestions to modify these provisions, we continue to believe our comments are valid and, if implemented, would improve the utility of the venture capital exceptions without adversely impacting FINRA’s investor protection goals.

In response to our request for clarity as to the timing of the calculations necessary to determine the applicability of certain of the exceptions, FINRA stated that “whether an acquisition of the securities meets an exception must be determined before the required filing date.”[11] This response is helpful in that it does confirm that FINRA members need not reassess the availability of an exception ***after*** the required filing date. However, it still leaves ambiguity as to the period prior to the required filing date. For example, if a participating member acquires securities of the

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[10] *See* ABA Comment Letter at p. 2-3.

[11] 84 Fed. Reg. at 37929.

issuer in a private placement on the 179th day prior to the required filing date for a public offering and makes a determination at that time that the exception applies (because, among other things, the "institutional investor" thresholds have been met), must the participating member reassess whether the exception still applies on the day before the required filing date (when, for example, the institutional investor thresholds may have changed due to the issuer's mandate after the acquisition date of other FINRA members in the public offering)?[12]

As noted in the May SIFMA Letter, SIFMA believes that the determination of whether a securities acquisition qualifies for exclusion under one of the venture capital exceptions should be made at the time of the acquisition (which acquisition must be made prior to the required filing date as required by the relevant exception) and based on the participating member's knowledge at that time (including as to the involvement of other FINRA members in the public offering), and that a later reassessment on the day prior to the required filing date should not be necessary nor required for reliance on the exception. SIFMA urges FINRA to provide clarity on this issue by adding guidance in the Supplementary Material to the Proposed Rule that either confirms SIFMA's understanding or, if FINRA disagrees with SIFMA's view, states that the determination as to the availability of a particular venture capital exception must be made on the day prior to the required filing date.

6. Experienced Issuer Definition

In the May SIFMA Letter, we expressed significant concerns with respect to FINRA's proposed "experienced issuer" definition and urged FINRA to modify the definition to better align with terms used by the SEC in connection with its relevant registration forms. In particular, we noted that the terminology used by FINRA in the definition of "experienced issuer" differs meaningfully from the terminology used by the SEC for purposes of current Forms S-3, F-3 and F-10 and may create

[12] Under Proposed Rule 5110(i)(10), the term "institutional investor" means "any person that has an aggregate of at least $50 million invested in securities in its portfolio or under management, including investments held by its wholly owned subsidiaries; provided that ***no participating members*** manage the institutional investor's investments or have an equity interest in the institutional investor, either individually or in the aggregate, that exceeds 5% for a publicly owned entity or 1% for a nonpublic entity." (Emphasis added.)

With respect to satisfaction of certain thresholds relating to participation by "institutional investors": (i) Proposed Rule 5110(d)(2) requires that "institutional investors beneficially own at least 33% of the issuer's total equity securities, calculated immediately prior to the transaction" and "the transaction was approved by a majority of the issuer's board of directors (if the issuer has a board of directors) and a majority of any institutional investors, or the designees of institutional investors, that are board members" and (ii) Proposed Rule 5110(3) requires that "institutional investors, none of whom is an affiliate of a member participating in the offering, purchase at least 51% of the total number of securities sold in the private placement at the same time and on the same terms" and "an institutional investor was the lead negotiator or, if the terms were not negotiated, was the lead investor with the issuer to establish or approve the terms of the private placement."

more issues than the new definition was intended to resolve.[13] The ABA Comment Letter expressed similar concerns.[14]

While FINRA's statement in its Response to Comments that it considers "any guidance and interpretation issued by the SEC or FINRA to accompany the pre-1992 standards for Forms S-3 and F-3 and standards approved in 1991 for Form F-10 to be valid and illustrative for purposes of interpreting the defined term 'experienced issuer'"[15] is helpful, it is not exactly clear what this means, particularly when the definition of "experienced issuer" uses terms that have different definitions and scope under the Rule than those used for purposes of the SEC's registration forms. In addition, it is not clear whether FINRA means that members may only look to guidance and interpretations issued by the SEC and FINRA that existed at the time the pre-1992 standards were adopted, or whether guidance and interpretations issued thereafter in connection with the registration forms as they currently exist are also relevant.

Accordingly, we continue to believe that the "experienced issuer" definition's use of different terms, as well as the different definitions of like terms, could lead to confusion and increased costs for issuers and participating members as they attempt to make the calculations necessary to determine the availability of the experienced issuer filing exemption. For example, under the current Rule, FINRA members can easily look to whether or not an issuer has been Form S-3 eligible for at least three years and then determine whether the Rule's higher public float threshold has been met using traditional SEC definitional criteria. Under the new "experienced issuer" definition, however, FINRA members would technically need to perform entirely new calculations to determine market value and public float in accordance with FINRA's terms and definitions, which are markedly different from those used for SEC purposes. If FINRA's comment above as to the continued validity of SEC guidance and interpretations is meant to provide that FINRA members can continue to rely on SEC standards and defined terms for determining aggregate market value and public float, this position should be made more explicit.

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13 *See* May SIFMA Letter at pp. 7-8.

14 *See* ABA Comment Letter at p. 9-10. The ABA Committee also commented that the term "reporting history" in the experienced issuer definition should itself be defined. To the extent the definition of experienced issuer is not further modified to address our continuing comments, we agree that FINRA should clarify what is meant by "reporting history" for this purpose and address related issues such as, *e.g.*, the ability of a successor company to include the reporting history of its predecessor in order to satisfy the 36-month requirement.

15 Response to Comments at p. 16.

7. Independent Financial Advisers/Participation in a Public Offering

FINRA proposes to modify the definition of "participation" in a public offering to provide an exclusion for independent financial advisers only if another FINRA member is participating in the offering. In particular, FINRA would modify the definition set forth in Proposed Rule 5110(j)(16) as follows:

> **(16) Participate, Participation or Participating**
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> The terms "participate," "participation" or "participating" in a public offering means involvement in the preparation of the offering document or other documents, involvement in the distribution of the offering, furnishing of customer or broker lists for solicitation, or providing advisory or consulting services to the issuer related to the offering, but do not include:
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> …
>
> (B) advisory or consulting services provided to the issuer by an independent financial adviser, ***provided that another member or members is participating in the public offering***.

SIFMA does not believe that this additional condition is appropriate. In particular, SIFMA does not believe that an independent financial adviser that (per the express requirement in the definition set forth in Proposed Rule 5110(j)(9)) is not engaged in the solicitation or distribution of the offering should be deemed to be "participating" in a public offering – and thereby subject to the Rule's filing and other requirements – solely because no other FINRA member is participating in the offering. FINRA has not explained the rationale for this modification to the current Rule, and we do not believe its inclusion is justified.

8. Public Offering Definition

Proposed Rule 5110(j)(18) defines the term "public offering" to broadly mean "any primary or secondary offering of securities made in whole or in part in the United States pursuant to a registration statement, offering circular or similar offering document including exchange offers, rights offerings, and offerings of securities made pursuant to a merger or acquisition" and then excludes a number of different securities transactions that would not be deemed public offerings for purposes of the Rule's filing and other requirements. Among the express exclusions are securities transactions effected pursuant to the exemptions from registration with the SEC under the Securities Act of 1933 (the "Securities Act") provided by Section 4(a)(1), Section 4(a)(2) and Section 4(a)(5) thereof. In the ABA Comment Letter, the ABA Committee suggested for completeness that the list of transaction types expressly not included within the definition of

"public offering" should include securities offered and sold pursuant to Securities Act Section 4(a)(3) and Section 4(a)(4).

SIFMA agrees with the ABA Committee that adding Sections 4(a)(3) and 4(a)(4) to the list of excluded transactions is appropriate and would help to avoid confusion for those not particularly familiar with the intended operation of the Rule. Section 4(a)(3) is an exemption that allows a dealer to offer and sell securities in ordinary secondary market transactions without registration under the Securities Act so long as it is no longer acting as an underwriter in respect of the security being offered and sold. Section 4(a)(4) permits a broker to execute transactions on an exchange or in the over-the-counter market in response to an unsolicited customer order without Securities Act registration. These transaction types are not among those that the Rule has ever sought to capture (indeed, if they were captured, that would effectively subject nearly all ordinary course secondary market activity to the Rule, which is certainly beyond the Rule's intended scope). Moreover, since these transaction types are not made pursuant to a registration statement or offering circular, they should already be excluded from the scope of the definition; expressly referencing them in the list of excluded transaction types would simply be a further clarification of this result.

9. Exemption from Underwriting Compensation for Bona Fide Market-Making Activities

In the ABA Comment Letter, the ABA Committee commented that, for purposes of clarity and consistency, FINRA should explicitly reference "bona fide market making activities" along with the exclusion for "bona fide customer facilitation activities" in proposed Supplementary Material .01(b)(21).[16] FINRA, however, declined to modify proposed Supplementary Material .01(b)(21) to address the ABA Committee's request.

We agree with the ABA Committee's comment and do not understand FINRA's rationale in declining to make the requested modification. Indeed, FINRA itself notes in its Response to Comments that "[a]cting as a bona fide market maker is distinguishable from acting as the underwriter in a public offering. Securities acquired by a member firm acting as a bona fide market maker would not constitute underwriting compensation under Rule 5110 because as a bona fide

[16] Proposed Supplementary Material .01(b)(21) provides an exclusion from underwriting compensation for "securities acquired in the secondary market by a participating member that is a broker-dealer in connection with the performance of bona fide customer facilitation activities; provided that securities acquired from the issuer will be considered 'underwriting compensation' if the securities were not acquired at a fair price (taking into account, among other things customary commissions, mark-downs and other charges)."

market maker the member is not acting as an underwriter."[17] This response clearly indicates that FINRA does not believe that securities acquired in the secondary market by a firm acting as a bona fide market maker should be captured as underwriting compensation for the public offering. Yet, in the Amended Rule Change Filing, when addressing the suggestions from commenters (among other things) that "bona fide market making activity" be excluded from capture as underwriting compensation, FINRA states that it "disagrees with these suggestions and believes that such compensation should be reported to FINRA as underwriting compensation."[18]

We are confused by the inconsistency between FINRA's clear statement in its Response to Comments and its contrary remark in the Amended Rule Change Filing. We call on FINRA to correct the record and explicitly include the reference to bona fide market activities in proposed Supplementary Material .01(b)(21). We believe the same rationale for exclusion from underwriting compensation that applies to bona fide customer facilitation activities by a participating member that is a broker-dealer applies equally to securities acquired in bona fide market making transactions by such a participating member in the ordinary course of its activities as a broker-dealer. We also note that the failure to include bona fide market making in the exception would essentially render the entire provision meaningless as firms have no practical ability to individually identify and separate securities acquired in the secondary market for customer facilitation purposes from those acquired in bona fide market making transactions.

10. De Minimis Exception to Itemized Disclosure

In the May SIFMA Letter, we suggested that FINRA consider including a *de minimis* exception to the itemized disclosure requirement in order to balance the administrative burdens placed on member firms while still promoting transparency with respect to significant elements of underwriting compensation.[19] Specifically, we proposed that participating members be permitted to disclose "a maximum aggregate value for items of underwriting compensation that do not individually or in the aggregate exceed the lesser of (i) $50,000 and (ii) 0.1% of the dollar amount of securities offered in the public offering."[20]

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[17] Response to Comments at p. 23.

[18] 84 Fed. Reg. at 37930.

[19] The itemized disclosure requirement would require participating members to disclose, in addition to the underwriting discount or spread, each individual item of underwriting compensation and ascribe a dollar amount to each such item.

[20] *See* May SIFMA Letter at p. 3.

FINRA rejected our proposal citing the conflicting view expressed by the North American Securities Administrators Association ("NASAA") that itemized disclosure may be beneficial for investors in better understanding the underwriting compensation paid to the participating members. FINRA also stated that "introducing a *de minimis* threshold below which itemized disclosure of underwriting compensation would not be required may result in purposeful division of underwriting compensation into amounts less than the threshold so as to avoid the itemized disclosure requirement."[21]

We believe that an exception along the lines we proposed, which was designed (through the "***lesser of***" formulation) to be a truly nominal amount relative to any particular public offering, would not undermine NASAA's concerns that investors be provided with sufficient information to assess the underwriting compensation being provided to participating members. With regard to FINRA's concern, our proposal expressly provided that the exception would apply to items of underwriting compensation that "***individually*** or ***in the aggregate***" do not exceed the threshold amount. Accordingly, our proposal would not allow a participating member to divide compensation amounts into smaller buckets in order to avoid the itemized disclosure requirement. Thus, we continue to believe that a *de minimis* exception is appropriate for certain smaller items of compensation that do not, individually or when aggregated together, reasonably present the concerns NASAA's comment and FINRA's response appear to be addressing and we urge FINRA to include such an exception to the itemized disclosure requirement.[22]

11. Nominal Gifts and Occasional Meals or Entertainment

In the ABA Comment Letter, the ABA Committee commented that "[b]ecause of the broad filing requirements of paragraph (b)(1) of the Proposed Rule, which now requires a 'description of each item of underwriting compensation received or to be received by a participating member,' as well as the guidance set forth in Supplementary Material .05 (requiring the inclusion of a dollar amount in respect of each individual item of compensation), we believe the requirement to separately disclose nominal gifts and occasional entertainment is overly burdensome, not helpful to investors and could lead to inadvertent compliance failures." In its Response to Comments, FINRA stated

[21] Response to Comments at p. 7.

[22] We note that the inclusion of a *de minimis* exception along the lines we have proposed could also resolve the issue addressed by our comment below with respect to "Nominal Gifts and Occasional Meals or Entertainment."

that "consistent with the current Rule, disclosure of non-cash compensation is needed for FINRA to have a complete understanding of underwriting compensation."[23]

SIFMA agrees that nominal gifts and occasional meals or other business entertainment that are provided in accordance with the limits set forth in proposed Rule 5110(f)(2)(A) and (B) should not be required to be separately itemized and disclosed as underwriting compensation and we urge FINRA to reconsider its position in this regard.[24] Is it really meaningful for investors or consistent with FINRA's investor protection mandate to require a firm to disclose in the underwriting section of the prospectus for a public offering that, *e.g.*, in connection with an on-site due diligence meeting, the issuer provided the bankers with lunch or dinner? That the issuer provided participants with a standard notepad and pen, branded with the company's logo, at a due diligence session?

SIFMA does not believe that FINRA has ever sought to require the disclosure of such items under the Rule and that an explicit exclusion for such items would simply be a codification of current practice. If FINRA's unwillingness to expressly exclude these items from underwriting compensation (and, as a consequence, require them to be individually itemized and ascribed a specific dollar amount) is meant to signify a change in current FINRA practice with respect to such items, then SIFMA strongly contends that the administrative burdens and costs that would be placed on member firms in an attempt to achieve technical compliance with the literal terms of the requirement are not justified.

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[23] Response to Comments at p. 21.

[24] Proposed Rule 5110(f)(2) provides (in pertinent part) that non-cash compensation arrangements permitted in connection with a public offering under the Rule are limited to: "(A) Gifts that do not exceed an annual amount per person fixed periodically by the Board of Governors [currently, $100] and are not preconditioned on achievement of a sales target [and] (B) An occasional meal, a ticket to a sporting event or the theater, or comparable entertainment which is neither so frequent nor so extensive as to raise any question of propriety and is not preconditioned on achievement of a sales target."

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We thank you for your consideration of our comments. If you have any questions with regard to this letter, please do not hesitate to call the undersigned at [redacted] or Dana Fleischman of Latham & Watkins LLP, our outside counsel for this matter, at [redacted].

Respectfully submitted,

Aseel M. Rabie
Managing Director and Associate General Counsel