June 6, 2017

Exclusively via email to pubcom@finra.org

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 17-14
Request for Comment on FIRNA Rules Impacting Capital Formation

Dear Ms. Mitchell:

The Securities Industry and Financial Markets Association ("SIFMA" or "we")[1] submits this letter to the Financial Industry Regulatory Authority, Inc. ("FINRA") in response to FINRA's request for comment set forth in Regulatory Notice 17-14 ("RN 17-14") addressing various aspects of its rules, operations and administrative processes impacting capital formation in the securities markets. SIFMA appreciates the opportunity to respond to this Regulatory Notice.

I. Introduction

SIFMA congratulates FINRA on its ten-year anniversary and agrees the time is right to reexamine FINRA's regulatory regime in light of current market realities and imperatives. We acknowledge and appreciate the extensive effort FINRA has made over the course of the past year to meet with and hear from interested parties, including our committee and many of its members. While Regulatory Notice 17-14 is only a small part of the widespread FINRA360 review, it represents an important opportunity to provide feedback on areas of regulation that are impeding the capital formation process without the corresponding benefit of meaningful investor

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

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protection. SIFMA believes the modifications and clarifications of the rules detailed below are critical to increasing the efficiency and effectiveness of FINRA's regulation of capital formation and will encourage and facilitate investment, while maintaining appropriate safeguards for investors. Our comments are organized by the order of the rules set forth in Regulatory Notice 17-14 and do not necessarily reflect their order of importance.

II. FINRA Rule 2242 Debt Research and Debt Research Reports

1. Analyst / Trader Communication

In our experience, FINRA's debt research rule has eroded the frequency and quality of interactions between debt research and trading desk personnel, putting both at a significant information disadvantage. The debt market is primarily a principal trading market and encompasses a very wide range of asset classes, each with unique characteristics that need to be considered in determining price. Given the relative complexity of the debt market and the breadth of debt security asset classes, debt research analysts need access to current market information from traders, and traders need research analyst input to accurately price positions for clients and manage firm risk. This is particularly acute when significant news stories or corporate events are announced, and the absence of guidance from an analyst can prejudice a trader's ability to price debt securities in real time. Additionally, the absence of this information negatively impacts the buyside's (*e.g.*, asset managers and pension plans) ability to make informed decisions on debt securities in their portfolios, exacerbating market liquidity in illiquid securities or during times of market stress.

Although FINRA permits certain interactions between research and trading, the discussion of permitted and prohibited activity in Supplementary Material .03 is confusing and does not go far enough to give firms comfort that certain communications are appropriate, thus discouraging debt analysts from engaging in even permissible interactions. Our principal concern in this regard is that given the diversity of securities comprising the debt market, Supplementary Material .03 should be revised to apply on a security-by-security (*i.e.*, CUSIP-by-CUSIP) basis. For example, Section .03(a)(2) provides that firms must prohibit "debt research analyst identifying or recommending specific potential trading transactions . . . that *are inconsistent with* such debt analyst's currently published debt research reports." (Emphasis added.) Unlike the equity market, where there is generally one security per issuer, a typical debt issuer will have hundreds of outstanding debt securities/CUSIPs trading at any given time. A firm may have a "Buy" rating on a debt issuer, but the firm's debt research reports will discuss only a fraction of the issuer's outstanding debt securities. If a particular debt security not discussed in a firm's debt research is viewed by an analyst as overpriced, it should not be "inconsistent with" the published research for a debt analyst to convey that information to a trader or make a "sell" recommendation to a customer for that specific security. Likewise, activities and communications permitted by Supplementary Material .03(b)(2) and (3) should be revised to make clear that an analyst's behavior is to be judged against the information contained in published debt research on a security-by-security basis.

Three additional clarifications of Supplementary Material .03 also would be helpful. First, it is difficult to understand the distinction between communication that cannot be

"inconsistent with" published research, as in Sections .03(a)(2) and (b)(2), and communication that must be "consistent with" published research, as in Section .03(b)(3). One term should be used consistently throughout the rule. Second, the rule should always permit a member to consider the context being discussed, including the objectives or time horizons, and how it is different than the context underlying the debt research analyst's published views. Members are currently expressly permitted to do this only in determining what is "consistent" under Section .03(b)(3). Third, Section .03(b)(2) provides that debt analysts are permitted to provide customized analysis, recommendations or trade ideas, provided that "any such communications are not inconsistent with the analyst's currently published *or pending* debt research." (Emphasis added.) There is no explanation of what "pending debt research" means, introducing significant uncertainty as to when or in what context a research analyst may change her view of a debt security. Applied as written, an analyst's discussion with a client that is consistent with then-published research later could be deemed inappropriate if the analyst's recommendation changes in a subsequent debt research report. We request that FINRA remove "or pending" from Supplementary Material .03 or, alternatively, clarify that "pending" means the imminent publication of a debt research report.

2. Roadshow Participation

Rule 2242 creates another significant information gap by prohibiting debt research analysts from participating in debt roadshows. Unlike equity roadshows, debt roadshows are almost always conducted through direct one-on-one calls or meetings with potential investors. Usually, there is no general dial-in number, no recording of the roadshow and the company doesn't conduct separate analyst teach-ins. Excluding debt research analysts from these one-on-one roadshows has reduced their ability to hear directly from an issuer's management team and creates an information vacuum. This is particularly harmful because, while most debt issuers conduct public quarterly earnings calls, only a few host fixed-income investor calls.

The ability of debt analysts to hear information directly from company management in real time is particularly important in debt offerings, because they often move very quickly. Except for the roadshow, there are few opportunities for analysts to hear from company management during what is often an intra-day offering process. In our experience, potential investors often call a debt analyst after the roadshow in order to discuss the issuer's presentation and ask some follow-up questions before making a decision to invest. Analysts find themselves in the difficult spot of having to explain to an investor that they weren't allowed to listen to the presentation and can't answer the questions asked. This has caused some investors to stop calling debt analysts, increasing the information deficit. In 2013,[2] SIFMA argued the debt research rule should allow debt analysts to passively attend company-sponsored roadshows as long as their presence is not announced to other participants, and they do not ask questions on the call. We reassert that argument now. Such passive attendance does not raise the concerns the

[2] *See* Letter from Kevin Zambrowicz, Managing Director, Associate General Counsel, SIFMA, to Marcia E. Asquith, Corporate Secretary, FINRA, dated Jan. 4, 2013, Section IV (available at http://www.finra.org/sites/default/files/NoticeComment/p197631.pdf) [last visited June 6, 2017] (the "2013 Comment Letter"). We reaffirm the statements made in the 2013 Comment Letter as they relate to debt research analyst participation in roadshows.

rule is designed to address and would greatly enhance the quality and accuracy of information available to debt research analysts and, through them, to investors.

3. Feedback on Analyst Performance

Principal traders also should be permitted to provide to management customer feedback on specific debt research analysts to assist in critiquing the quality of the customer experience and the usefulness of the debt research content. As detailed in Section V of our comment letter dated April 2, 2012 submitted in response to FINRA Regulatory Notice 12-09[3], principal debt traders often have the most meaningful customer contact, because customers do not always involve sales personnel when executing trades. Customer feedback is essential in the context of debt research. Quantitative performance measures are lacking. There are no specific price targets by which to judge a debt analyst's accuracy or "broker votes" by which to determine how a debt analyst is perceived by the market. This makes the rule's current prohibition on members using customer feedback obtained by principal debt traders even more burdensome and compromises a firm's ability to gather important information from its clients through the personnel with whom they have the most contact. Rule 2242 contains sufficient safeguards to protect feedback from principal debt traders from raising conflicts of interest, as described in the 2013 Comment Letter.

4. Institutional Investor Exemption

The institutional investor exemption in Rule 2242 should apply to all investors that satisfy the suitability requirements of FINRA Rule 2111(b). The current rule provides an exemption from certain of its provisions for debt research provided to (i) qualified institutional buyers ("QIBs") that have satisfied Rule 2111(b)'s suitability requirements and (ii) "institutional accounts" as defined in Rule 4512(c), with affirmative assent to receive institutional research. In multiple comment letters over the past several years, we have expressed concern that the practical challenges of satisfying this exemption would render it "very difficult to implement."[4] Our prediction was accurate. The administrative costs involved in attempting to coordinate Rule 2111 status (determined on an account basis) with QIB status (determined on an investor basis) have rendered this exemption largely irrelevant to most broker-dealers. To our knowledge, most firms chose not to commit the time and resources required to implement this exemption, actually disadvantaging institutional clients that have made Rule 2111 representations that they are capable of, and are in fact, making independent investment decisions. Those investors are

[3] *See* Letter from Ira D. Hammerman, Senior Managing Director, General Counsel and Secretary, SIFMA, to Marcia E. Asquith, Corporate Secretary, FINRA, dated April 2, 2012, Section V (available at https://www.finra.org/sites/default/files/NoticeComment/p125934.pdf) [last visited June 6, 2017] (the "2012 Comment Letter"). *See also* the 2013 Comment Letter, Section III. We reaffirm the statements made in these comment letters as they relate to trader feedback on analyst performance.

[4] *See* letter from Kevin Zambrowicz, Associate General Counsel and Managing Director, and Sean Davy, Managing Director, SIFMA, to Brent Fields, Secretary, U.S. Securities and Exchange Commission, dated Dec. 15, 2014, Section II.I (available at http://www.sifma.org/issues/item.aspx?id=8589952556) [last visited June 6, 2017]. *See also* the 2012 Comment Letter, Section VII and the 2013 Comment letter, Section II. We reaffirm the statements made in each of these comment letters as they relate to the institutional investor exemption.

capable of analyzing institutional debt research and should not be prevented from receiving the tailored research.

III. FINRA Rule 5100 Series

A. Rule 5110 Corporate Financing Rule – Underwriting Terms and Arrangements

SIFMA's comments on Rule 5110 are set forth in its letter dated June 1, 2017, separately submitted to FINRA in response to FINRA Regulatory Notice 17-15 (the "SIFMA 5110 Comment Letter"). We ask that our separately submitted comments to Rule 5110 be read in conjunction with this letter given the significant interrelation between Rules 5110 and 5121 and the cross-incorporation by reference of key definitions used in the two rules.

B. Rule 5121 Public Offerings of Securities With Conflicts of Interest

SIFMA is concerned about three aspects of the FINRA conflicts of interest rule, and the unnecessary speedbumps they present to smooth execution of public capital markets transactions.

1. Qualified Independent Underwriter

Rule 5121(a)(1)(A) provides that a Qualified Independent Underwriter ("QIU") will be required (absent an exemption) if "the member(s) primarily responsible for managing the public offering [have] a conflict of interest." The reference to "primarily managing the public offering" continues to pose interpretive issues for member firms and ultimately imposes unnecessary burdens on the offering process. Taking a conservative approach and appointing a QIU increases the time and expense of a transaction: the issuer must be educated on the topic; a QIU must be identified and, in some cases, added to the transaction; additional provisions to the underwriting agreement must be negotiated; and new disclosure must be drafted and added to the offering document. We believe a more efficient, but equally effective, approach would be to require the designation of a QIU only in those situations in which the sole "lead" underwriter or bookrunner has, or *all* the lead managers or bookrunners have, a conflict of interest and no exemption is available.

2. Definition of Control

The definition of "control" in Rule 5121 is not consistent either with the SEC's definition of control or with other FINRA measures of control, primarily because it establishes an unreasonably low control threshold at 10%. As a result, members and issuers have had to include as "affiliates" for purposes of the Rule 5121 analysis persons or entities they would not, under ordinary circumstances, consider to be within a "control" relationship. Accordingly, we believe FINRA should make this definition (and all those definitions used in Rule 5121 that incorporate this term via the definition of "affiliate") more manageable by referencing a more common control standard, such as the 25% threshold used for purposes of Form BD.[5] Should

[5] Form BD defines "control" as: "The power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any person that (i) is a director, general partner or officer exercising executive responsibility (or having similar status or functions); (ii) directly or

FINRA determine not to make this change, we propose that, at the very least, the reference in the current definition to beneficial ownership of preferred equity as a trigger for control be eliminated. Like subordinated debt (which was eliminated as an element of the control definition in 2014)[6], the beneficial ownership of preferred equity, in and of itself, is "not a meaningful measure of control or affiliation"[7] for purposes of Rule 5121.[8]

3. <u>*Bona Fide* Public Market</u>

The definition of "*bona fide* public market" also needs to be clarified. Read literally, the definition appears to say that a *bona fide* public market exists if the issuer of the offered securities has at least one series of securities "traded on a national securities exchange with an Average Daily Trading Volume (as provided by SEC Regulation M) of at least $1 million." However, we understand that FINRA staff have routinely expressed the view that the quoted language is intended to apply to the specific series of securities that are the subject of the public offering. If the staff's view is correct, we urge FINRA to take this opportunity to eliminate the continuing confusion as to the proper application of this provision and make appropriate changes to the definition to make the intention clear.[9]

C. Rule 5130 Restrictions on the Purchase and Sale of Initial Public Equity Offerings

Allocating shares of a new issue to investors, most commonly through the initial public offering ("IPO") process, is foundational to capital formation in the U.S. markets. We urge FINRA to revisit Rule 5130 to remove the requirement to obtain a written representation, expand the permitted investor base and clarify the rule's scope.

1. <u>Remove Written Representation Requirement</u>

The requirement that members obtain a representation from account holders prior to selling a new issue to any account should be deleted from Rule 5130. Instead, FINRA should mirror Rule 5131's approach to documentation by adding as Supplementary Material to Rule 5130 a safe harbor for compliance. The safe harbor should permit members to rely on a written representation obtained within twelve months of a sale of a new issue to satisfy Rule 5130(a), as they currently can to satisfy Rule 5131(b). The purpose of both rules is the same – to ensure that certain accounts are restricted from investing in new issues. However, violations of Rule 5130 are not limited to improper allocation of a new issue, but can occur simply because of a failure to obtain documentation. Such procedural failure should not trigger a violation of the rule as long as the actual allocations complied with Rule 5130.

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indirectly has the right to vote 25% or more of a class of a voting security or has the power to sell or direct the sale of 25% or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive upon dissolution, or has contributed, 25% or more of the capital, is presumed to control that company."

[6] We note that the term "subordinated debt" is no longer used in Rule 5121 and should therefore be deleted.

[7] SEC Release No. 34–71372 (Jan. 23, 2014).

[8] The "control" definition should be similarly modified in connection with Rule 5110.

[9] A simple fix would be to change the phrase "and *whose* securities are traded" to "and *which* securities are traded."

In adopting the safe harbor for Rule 5130, the indirect beneficial ownership provision of Rule 5131's Supplementary Material .02(b) also should be replicated. The written representation of a person authorized to represent an account that includes certain unaffiliated private funds should be sufficient for purposes of complying with Rule 5130 as it is for Rule 5131(b). Determining how far to look through an account to its beneficial owners is equally complex under both rules, thereby justifying the single representation approach.

Allowing members to apply consistent practices and procedures in allocating new issues and removing the documentation footfault in Rule 5130(b) would reduce the administrative burden and undue regulatory risk currently associated with new issues.[10]

2. Expand Exemption for Large Pension and Employee Benefit Plans

An explicit exemption for large pension and employee benefit plans should be added to Rule 5130(c). Currently, Rule 5130(c)(7) exempts certain U.S. ERISA plans from the restrictions of the rule (provided such plan is not sponsored solely by a broker-dealer), while (c)(8) exempts regulated state and municipal benefit plans. However, for more than ten years, FINRA consistently has granted exemptive relief to foreign pension and other employee benefit plans that do not meet the qualifications of the current plan exemptions, but are of sufficient size – both by number of participants and total assets - that such accounts cannot be used as a conduit for restricted persons to invest in new issues.[11] Large benefit plans face significant practical limitations in obtaining from its numerous participants or beneficiaries the information required to make a Rule 5130 certification, and because of this burden, some choose to avoid investments in new issues altogether, cutting off a potentially significant source of capital from companies that are just getting started.

A codification of FINRA's historic exemptive relief should be adopted to allow a pension or employee benefit plan having more than 1,000 participants to invest in new issues, provided such plan is not sponsored solely by a broker-dealer. The scope of this new exemption would be consistent with various current exemptions: common trust funds with investments from more

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[10] Additional opportunities for symmetry between Rule 5130 and Rule 5131 also should be considered. For example, the clarification described in Supplementary Material .01 of Rule 5131 that issuer directed allocations includes allocations directed by "the issuer, its affiliates, or selling shareholder" would be a helpful clarification to the scope of Rule 5130. Similarly, Rule 5130(e)'s anti-dilution exception should apply to the prohibition against "spinning" in Rule 5131(b).

[11] *See* Letter from FINRA to Marianne McKeon, Dewey Ballantine LLP, dated Nov. 9, 2006, (available at http://www.finra.org/industry/exemptive-letters/november-9-2006-1200am) [last visited June 6, 2017] (exempting the U.S. National Railroad Retirement Investment Trust from Rule 5130); Letter from FINRA to Edward A. Kwalwasser, Senior Counsel. Proskauer Rose LLP, dated Dec. 7, 2010, (available at http://www.finra.org/industry/exemptive-letters/december-7-2010-1200am) [last visited June 6, 2017] (exempting the Healthcare of Ontario Pension Plan Trust Fund from Rule 5130); Letter from FINRA to Kevin O'Connor, Partner, Picard Kentz & Rowe LLP, dated May 1, 2015 (available at http://www.finra.org/industry/exemptive-letters/may-5-2015-1200am) [last visited June 6, 2017] (exempting the U.S. National Railroad Retirement Investment Trust from Rule 5130 and 5131(b)); and Letter from FINRA to Amy Natterson Kroll, Partner, Morgan, Lewis & Bockius LLP, dated July 23, 2015, (available at http://www.finra.org/industry/exemptive-letters/july-23-2015-1200am) [last visited June 6, 2017] (exempting two foreign pension plans sponsored by Novartis AG from Rule 5130).

than 1,000 accounts ((c)(2)); insurance companies funded by premiums from more than 1,000 policyholders ((c)(3)); foreign investment companies that approximate U.S. mutual funds ((c)(6)); the current benefit plans exemptions ((c)(7) and (8)); and with FINRA's prior guidance. The benefits of an investment in a new issue by a large pension or employee benefit plan are spread among many participants, not funneled specifically to restricted persons who may be part of the plan. Accordingly, this new exemption will facilitate additional investment in new issues without compromising the integrity of new issue allocations.[12]

3. Raise the *De Minimis* Exemption Level

A similar change that could appropriately stimulate additional new issue investment is raising the *de minimis* exemption in Rule 5130 from 10% to 25%. When the *de minimis* exemption was proposed in 2003, a key justification for adoption was that under these circumstances non-restricted persons enjoy almost all of the benefit of the new issue investment.[13] The 10% threshold was an important first step toward liberalizing the rule and permitting accounts that are established primarily for the benefit of non-restricted persons to invest in new issues. Increasing the *de minimis* exemption to 25% would increase available capital for new issues while continuing to ensure that non-restricted persons receive most of the benefit of investment and that the account is not simply a conduit for restricted persons.

4. Exempt Regulation S Offerings

New issues offered and sold outside the United States under Regulation S should be explicitly exempt from Rule 5130. Both Rule 5121 and Rule 5110 (in practice and in rule text recently proposed by FINRA in Regulatory Notice 17-15) exempt Regulation S offerings from the requirements of these rules. FINRA's oft-stated dual regulatory priorities of investor protection and fostering fair public capital markets are not present when members are participating in transactions conducted wholly offshore. Moreover, Rule 5130 already distinguishes between investors requiring the protections of the rule and those that do not by carving certain transactions out of the definition of new issue, including Rule 144A and Regulation D/Rule 506 transactions. Carving out offerings to offshore investors exempt from Securities Act registration under Regulation S would similarly be consistent with the appropriate scope of FINRA's investor protection , as well as with the U.S. Supreme Court's limit on the extraterritorial application of the federal securities laws.[14]

D. Rule 5131 New Issue Allocations and Distributions

We suggest that FINRA amend Rule 5131 to ensure that issuers receive the full amount of capital they expect to receive from their new issue transaction. Specifically, we recommend that Rule 5131(d)(3)(A) be revised to allow a small number of shares to be sold by the syndicate, with the profits donated to charity, when shares have been returned to the syndicate by a purchaser and are trading at a premium in the aftermarket. Such sale and donation are currently

[12] This new exemption should equally apply to the "spinning" prohibitions of Rule 5131(b).
[13] NASD Notice to Members 03-79, Mar. 23, 2004, p. 843 (available at http://www.finra.org/sites/default/files/NoticeDocument/p003046.pdf) [last visited June 6, 2017].
[14] *See* Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).

permitted only if no syndicate short position exists when the shares are returned. If there is a short position, the syndicate is required by the current rule to deduct that small number of returned shares from the outstanding overallotment option. This leads to negative deal optics and difficult conversations with the issuer who needs to understand why the overallotment option is not being exercised in full in connection with its otherwise successful offering. In our experience, the number of shares returned to the syndicate in this scenario is always very small, usually from retail misallocations. Instead of being forced to offset a short position with the returned shares, members should be given a *de minimis* option under Rule 5131(d)(3)(A) that allows them to sell returned shares in the secondary market and donate the profits anonymously to an unaffiliated charity, if the number of shares returned to the syndicate is 1% or less of the total size of the initial offering. This will allow members to deliver issuers the deal terms they expect, while ensuring the profits of returned shares are put to good use without any benefit to the member.

E. Trading Activity Fee

With respect to Trading Activity Fees ("TAF"), we respectfully reiterate our comments submitted to FINRA in response to FINRA Regulatory Notice 15-13.[15] It continues to be our view that FINRA should amend its by-laws to exempt on-exchange proprietary trading by a FINRA member from TAF. As FINRA acknowledges, these fees are collected in order "to recover the costs . . . of the supervision and regulation of members."[16] However, on-exchange trades are regulated primarily by the exchange upon which the trading takes place. Any regulation of an on-exchange trade that FINRA conducts is funded through a regulatory services agreement with the relevant exchange. The relevant exchange funds the payment under that agreement through fees charged to members of the exchange, of which the FINRA member is one. Because members have already paid fees to the relevant exchange, having to also pay TAF is duplicative.

More generally, we encourage FINRA to review its current fee structure more broadly to ensure there is currently an "equitable allocation of reasonable dues, fees, and other charges among members" as mandated by Section 15A of the Securities Exchange Act of 1934, as amended.

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[15] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated June 22, 2015, (available at http://www.finra.org/sites/default/files/notice_comment_file_ref/15-13_SIFMA_comment.pdf) [last visited June 6, 2017]

[16] FINRA Regulatory Notice 17-14, April 2017 (available at http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-14.pdf) [last visited June 6, 2017].

SIFMA appreciates the opportunity to comment on Regulatory Notice 17-14. SIFMA would be pleased to discuss any of these points further and to provide additional information you believe would be helpful. Please feel free to contact me at (212) 313-1118 or SIFMA's outside counsel, Elizabeth A. Chang of Cleary Gottlieb Steen & Hamilton LLP, at (212) 225-2652 if you have any questions or comments.

Sincerely,

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