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Invested in America

March 20, 2025

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1700 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 24-17
FINRA Requests Comment on Proposed Changes to Corporate Financing Rules

Dear Ms. Mitchell:

Further to our comment letter dated August 7, 2023 in response to Regulatory Notice 23-09[1] ("Regulatory Notice 23-09 Comment Letter"), the Securities Industry and Financial Markets Association ("SIFMA" or "we")[2] appreciates the opportunity to respond to the request for comment by the Financial Industry Regulatory Authority, Inc. ("FINRA") in Regulatory Notice 24-17 ("Regulatory Notice 24-17"),[3] which (i) proposes certain substantive and clarifying changes to FINRA Rules 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements), 5121 (Public Offerings of Securities With Conflicts of Interest) and 5123 (Private Placements of Securities) (collectively, the "Corporate Financing Rules"), some of which are in response to comments FINRA received in response to Regulatory Notice 23-09, and (ii) requests comments addressing, among other considerations, whether the proposed amendments improve and clarify sections of FINRA Rule 5110, improve the operation of FINRA Rule 5121 and result in material economic impacts, including costs and benefits, for investors, issuers and members.

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[1] *See* FINRA Regulatory Notice 23-09 (May 9, 2023), *available at* https://www.finra.org/rules-guidance/notices/23-09. SIFMA previously commented on Regulatory Notice 23-09. *See* letter from Joseph Corcoran to Jennifer Piorko Mitchell regarding FINRA Regulatory Notice 23-09 dated August 7, 2023, *available at* https://www.finra.org/sites/default/files/NoticeComment/SIFMA_8.7.23_23-09_Comment%20Letter.pdf (the "23-09 Comment Letter").

[2] 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 one million employees, we advocate on 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. We also provide a forum for industry policy and professional development. 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.

[3] *See* FINRA Regulatory Notice 24-17 (December 20, 2024), *available at* https://www.finra.org/rules-guidance/notices/24-17.

I. Introduction

SIFMA supports FINRA's ongoing efforts to review and consider changing its rules, including the Corporate Financing Rules, to increase efficiency and reduce unnecessary burdens on the capital raising process without compromising protections for investors and issuers. We acknowledge and appreciate the extensive effort FINRA has made over the years to meet with and hear from interested parties, including many of our members. Regulatory Notice 24-17 represents an important opportunity to continue to provide feedback on areas of regulation that may impede the capital formation process without the corresponding benefit of meaningful investor protection.

In this regard, SIFMA believes the modifications and clarifications of the Corporate Financing Rules detailed below are of significant importance to increasing the efficiency and effectiveness of FINRA's regulation of capital formation while continuing to promote transparency, establish important standards of conduct for its members, and maintain appropriate protections for investors and issuers.[4]

II. FINRA Rule 5110: Proposed New Supplementary Material .01(b)(23)

SIFMA supports the proposed FINRA Rule 5110 Supplementary Material .01(b)(23) safe harbor from the definition of underwriting compensation for equity securities that Participating Members acquire in connection with debt-for-equity exchange transactions,[5] and we agree that such exception would foster capital raising.

We believe, however, that the proposed conditions to satisfy the debt-for-equity exchange safe harbor, as currently drafted under proposed Supplementary Material .01(b)(23), would benefit from clarifying language that would align the requirements of the safe harbor with the typical structure of debt-for-equity exchange transactions. While there may be debt-for-equity exchanges that involve cash loans to issuers, we understand that many debt-for equity exchanges involve debt (e.g., loans, debt securities, or commercial paper) of a direct or indirect corporate shareholder of the issuer, which corporate shareholder transfers equity of the issuer in repayment of the debt of

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[4] Consistent with our comments set forth in the Regulatory Notice 23-09 Comment Letter, SIFMA supports FINRA's proposed treatment of non-convertible preferred securities acquired in a transaction related to a public offering at a fair price as underwriting compensation, but with no compensation value, similar to the treatment of non-exchangeable debt securities and derivative instruments under FINRA Rule 5110. SIFMA also supports the proposed expansion of the exemptions available under FINRA Rule 5123 to include offerings sold to investors meeting the categories of accredited investor for certain family offices and certain entities with assets under management in excess of $5 million, consistent with the SEC's treatment of those categories.

[5] A debt-for-equity exchange transaction is typically structured as follows: (1) A Participating Member or its affiliate either makes a loan to a corporate shareholder of the issuer or owns or acquires existing debt (e.g., loans, debt securities, commercial paper) of the corporate shareholder of the issuer, (2) the corporate shareholder then exchanges equity securities of the issuer (the "exchange shares") for the debt of the corporate shareholder held by the Participating Member or its affiliate, and (3) the Participating Member or its affiliate then sells the exchange shares in a registered public offering through one or more underwriters (which may include the Participating Member that engaged in the debt-for-equity exchange). Without the proposed Supplementary Material .01(b)(23) safe harbor the exchange shares received by the Participating Member or its affiliate may fall within the definition of "underwriting compensation" in FINRA Rule 5110.

the corporate shareholder held by the Participating Member[6] or its affiliate. Accordingly, in Regulatory Notice 24-17, where the proposed safe harbor provides that the debt-for-equity exchange shall be structured to provide favorable tax treatment and economic benefits to issuer, this requirement should be expanded to provide that the transaction could be structured to provide such economic and tax benefits to a direct or indirect shareholder of the issuer.

In this regard, we respectfully request that FINRA considers the proposed changes to the conditions under which a Participating Member may rely on the debt-for-equity exchange safe harbor from the definition of underwriting compensation under proposed Supplementary Material .01(b)(23) set forth under **Exhibit A** hereto. We believe that the proposed changes to the text of the rule will provide greater clarity for issuers and members to which this safe harbor was meant to apply and would align the rule's requirements with the typical structure of debt-for-equity exchange transactions.

III. FINRA Rule 5121(a): Bona Fide Public Market Exception to the QIU Requirement

Under FINRA Rule 5121, a member may not participate in a public offering in which it has a conflict of interest unless (i) a qualified independent underwriter ("QIU") has participated in the offering or (ii) one of three conditions are met, including that the securities offered have a "bona fide public market."[7] "Bona fide public market" is defined to mean a market for a security of an issuer that has been reporting under the Securities Exchange Act of 1934, as amended (the "Exchange Act") for at least 90 days, is current in its reporting requirements, and whose securities are traded on a national securities exchange with an ADTV (as provided by SEC Regulation M)[8] of at least $1 million, provided that the issuer's common equity securities have a public float value of at least $150 million.[9] Regulatory Notice 24-17 notes that this "combination of conditions has created confusion and frequent interpretive questions regarding appropriate measurement periods, calculation methods and price points."

The proposed amendment to FINRA Rule 5121(a)(1)(A)(ii)(c) would replace the "bona fide public market" exception to the QIU requirement with a standard that requires the issuer to (i) have been reporting under the Exchange Act for ***one year***; (ii) be current in its reporting requirements; and (iii) have common equity securities in aggregate market value of ***at least $300 million*** (the

[6] For the avoidance of doubt, the debt is often held by an affiliate of the FINRA member, which affiliate would be captured in the definition of Participating Member.

[7] FINRA Rule 5121(a).

[8] Regulation M defines ADTV to mean "the worldwide average daily trading volume during the two full calendar months immediately preceding, or any 60 consecutive calendar days ending within the 10 calendar days preceding, the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, two full calendar months immediately preceding, or any consecutive 60 calendar days ending within the 10 calendar days preceding, the determination of the offering price."

[9] FINRA Rule 5121(f)(3).

"Proposed Standard").[10] Regulatory Notice 24-17 states "FINRA believes that an issuer's capital value and amount of public information available for investors are more appropriate measurements for purposes of the exception than a bona fide market test that focuses on liquidity and trading volume." FINRA states in Regulatory Notice 24-17 that it anticipates that these changes would "exclude approximately half of all exchange listed issuers" from being able to rely on the exception from the QIU requirement under the Proposed Standard but will ensure the issuer is followed to a meaningful degree by investors and the analyst community. The potential collateral consequences associated with this heightened standard include a substantial increase in circumstances requiring a FINRA filing and a substantial increase in the corresponding costs for the issuers and Participating Members, and potentially delay the capital formation process.

The Proposed Standard effectively raises an issuer's reporting requirements from 90 days to one year and doubles the market value of equity securities that the issuer must have for a Participating Member to rely on this exception. As a result, there will be an increased number of issuers that will not be able to satisfy the Proposed Standard and, absent any other available exception, the issuer will need to engage a Participating Member to serve as a QIU. Under FINRA Rule 5121, the participation of a QIU eliminates any FINRA filing exemption, requiring the payment of the FINRA filing fee, which is expected to increase from a maximum of $225,000 to $1,125,000,[11] and outside counsel fees would likely increase due to the additional time associated with the comment and review process associated with a FINRA filing.

In addition, engaging a Participating Member to serve as QIU will require additional time, especially if a conflict of interest is identified later in the deal process. In accordance with FINRA Rule 5121 and the proposed amendments set forth in Regulatory Notice 24-17, there must be sufficient time for (i) the conflicted member and the QIU to enter into a separate agreement that details the services to be provided by the QIU, (ii) the issuer and syndicate to update the deal documents to disclose the conflicting member and the participation of the QIU, and (iii) the QIU to have "appropriate time to complete its due diligence [on the issuer] prior to the commencement of sales",[12] which, individually or in the aggregate, may delay deal timing.[13] Moreover, it may be difficult for the issuer and Participating Members to satisfy these timing requirements in public offerings with compressed timelines, such as block trades. Therefore, introducing the heightened criteria associated with the Proposed Standard may have an unintended consequence of deterring

[10] Regulatory Notice 24-17 at 6.

[11] See Proposed Rule Change to Adjust FINRA Fees to Provide Sustainable Funding for FINRA's Regulatory Mission, SR-FINRA-2024-19, available at: https://www.finra.org/sites/default/files/2024-11/sr-finra-2024-019.pdf.

[12] *See* Attachment A to Regulatory Notice 24-17 at 21.

[13] This potential delay in deal timing may be compounded by the issuer's ability to omit the names of the underwriters from its initial draft registration statement filing with the SEC, which, in turn, may delay the FINRA's corresponding review of the public offering. *See* Division of Corporation Finance of the Securities and Exchange Commission, *Enhanced Accommodations for Issuers Submitting Draft Registration Statements*, March 3, 2025, available at: https://www.sec.gov/newsroom/whats-new/draft-registration-statement-processing-procedures-expanded.

capital formation when reduced but equally effective standards can still achieve FINRA's goals of rule clarity, sufficient public information regarding the issuer, and investor protection generally.

SIFMA therefore respectfully requests that FINRA considers the comments to the Proposed Standard under FINRA Rule 5121(a)(1)(A)(ii)(c) set forth as **Exhibit B** hereto, requiring the issuer to have: (i) 180 days of reporting history that is current and an aggregate market value in common equity of $150 million; or (ii) 90 days of reporting history that is current and an aggregate market value in common equity of $200 million. We believe that these requirements would provide additional flexibility to satisfy this QIU exception while achieving FINRA's objectives of rule clarity and ensuring that investors are provided sufficient information regarding the issuer. With respect to condition (i) above, a 180-day reporting period (as opposed to one year under the Proposed Standard) would cover two reporting cycles and provide sufficient information to investors. Issuers that are unable to meet the 180-day reporting history requirement may otherwise qualify for an exception with 90 days of reporting history and an aggregate market value of $200 million, maintaining the reporting requirements under the "bona fide public market" definition in the current FINRA Rule 5121, but increasing the capital value to align with FINRA's reasoning that an increased capital value would "ensure that the company is followed to a meaningful degree by investors and the analyst community."[14]

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SIFMA appreciates this opportunity to comment on Regulatory Notice 24-17 and thanks FINRA in advance for its consideration of this submission. SIFMA would be pleased to discuss any of these points further and provide additional information that would be helpful. Please do not hesitate to contact the undersigned or SIFMA's outside counsel, Jennifer Morton of Allen Overy Shearman Sterling US LLP, at (212) 848-5187.

Sincerely,

Joseph Corcoran
Managing Director and Associate General Counsel
SIFMA

cc: Robert W. Cook, President and Chief Executive Officer, FINRA
Robert L.D. Colby, Chief Legal Officer, FINRA
Gabriela Aguero, Senior Vice President, Corporate Financing, FINR

[14] Regulatory Notice 24-17 at 6.

EXHIBIT A

FINRA Rule 5110 Supplementary Material .01(b)(23)

Below is the text of proposed Supplementary Material .01(b)(23) under FINRA Rule 5110. Proposed new language is bolded and blue; proposed deletions are in strikethrough and red.

Supplementary Material

(b) Participating members may receive payments from an issuer or another source during the review period that may be unrelated to a particular offering. Such payments generally would not be deemed to be underwriting compensation. The following list, while not comprehensive, provides examples of payments that are not deemed to be underwriting compensation:

(23) equity securities acquired by a ~~lender affiliated with a~~ participating member, **as defined in this Rule**, through a debt-for-equity exchange ~~that is sold by its affiliated member~~, if:

(A) the debt-for-equity exchange ~~was~~ **is** structured to provide economic and tax benefits to the issuer **of the equity securities or a shareholder of the issuer** and not **to** the ~~lender or affiliated member~~ **participating member**, except for the compensation in subparagraph (D) of this Supplementary Material .01(b)(23);

(B) ~~the affiliated member subsequently offered~~ all of the equity securities acquired by the **participating member are offered by the participating member or other member firms** ~~lender~~ in an offering following **or concurrent with** the debt-for-equity exchange;

(C) the terms negotiated in connection with the debt-for-equity exchange and the subsequent **or concurrent** equity offering were determined through arms' length negotiations based on the market price**s** of the **debt and** equity exchanged, subject to the compensation in subparagraph (D) of this Supplementary Material .01(b)(23);

(D) the ~~affiliated~~ **participating** member negotiated customary **underwriting** compensation **received or to be received by participating members in connection with a subsequent or concurrent** ~~for an~~ equity public offering **related to the debt-for-equity exchange**; and

(E) the equity public offering ~~was~~ **is** structured as a firm commitment offering.

EXHIBIT B

FINRA Rule 5121(a)(1)(A)(ii)

Below is the text of proposed FINRA Rule 5121(a)(1)(A)(ii). Proposed new language is bolded and blue; proposed deletions are in strikethrough and red.

(A) No member that has a conflict of interest may participate in a public offering unless the offering complies with subparagraph (i) or (ii).

(i) A qualified independent underwriter has participated in the offering and meets the requirements of paragraph (a)(3) of this Rule; or

(ii) The offering can meet one of the following conditions:

a. each member(s) that is primarily responsible for managing the public offering does not have a conflict of interest, is not an affiliate of any member that does have a conflict of interest, and meets the requirements of paragraph (a)(3)(A)(vi);

b. as of the required filing date, the securities offered are investment grade rated or are securities in the same series that have equal rights and obligations as investment grade rated securities; or

c. as of the required filing date, the securities are offered by an issuer that has **either**:

(i) been reporting under the Exchange Act for at least ~~one year~~ **180 days**, ~~(ii)~~ is current in its reporting requirements, and ~~(iii)~~ its common equity securities have an aggregate market value of at least $150 million**; or**

(ii) been reporting under the Exchange Act for at least 90 days, is current in its reporting requirements, and its common equity securities have an aggregate market value of at least $200 million.