



*Invested in America*

April 13, 2017

The Honorable Mike Crapo  
Chairman, Senate Committee on Banking,  
Housing, and Urban Affairs  
534 Dirksen Senate Office Building  
Washington, DC 20515

The Honorable Sherrod Brown  
Ranking Member, Senate Committee on  
Banking, Housing, and Urban Affairs  
534 Dirksen Senate Office Building  
Washington, DC 20515

Dear Chairman Crapo and Ranking Member Brown,

On behalf of the Securities Industry and Financial Markets Association (SIFMA)<sup>1</sup>, I want to thank you for the opportunity to respond to your bipartisan request for legislative proposals to facilitate capital formation, economic growth, and job creation.

SIFMA believes that the time is right for a review of the financial regulatory framework put in place over the last several years. While the U.S. financial system is significantly stronger, better capitalized, and more resilient than it was in 2008, the economy has performed subpar as compared to prior post-recession periods. Small and mid-sized businesses have been the most disadvantaged by the impact of many of the new rules, which have curtailed the allocation of credit and capital. We believe several rules should be considered for recalibration to free up capital and increase lending capacity.

SIFMA welcomes the review currently underway at the Department of the Treasury to evaluate the coherence and effectiveness of financial regulations and believe it is consistent with the European Union's 2015 call for evidence on the impact of post-crisis financial regulations as well as efforts in Japan. We believe that in order to spur economic growth, capital formation and job creation there must be a rebalancing of the financial regulatory landscape.

We also believe there are many opportunities to enhance capital formation that will reduce regulatory burdens and support entrepreneurs while maintaining protections for investors. U.S. capital markets are a critical source of financing for businesses and governments— especially small and mid-sized businesses – and we are troubled by the continued decline in the number of public companies and the number of companies going public through initial-public offerings (IPOs). The number of publicly listed companies has declined from 7,322 in 1996 to just 3,671 last year, and in 2016 there were just 107 IPOs, down from a 1996 peak of 847. Congress should aggressively address these concerning trends by reassessing regulations to allow more businesses to access U.S.

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<sup>1</sup> 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 \$20 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).

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capital markets. We believe the proposals below will enhance entrepreneurs' access to financing, providing the opportunity for greater economic growth and job creation.

**First, Congress should extend several Jumpstart Our Business Startups Act (JOBS Act) accommodations that are currently available for Emerging Growth Companies (EGCs) to all issuers of public securities.** EGCs have made good use of the confidential filing and testing the waters provisions of the JOBS Act, as well as the streamlined requirements on producing audited, historical financial statements. Specifically, Congress should amend Sections 6(e) and Section 5(d) of the Securities Act to permit all issuers to file confidentially and test the waters. Congress should also amend Section 7(a) of the Securities Act and Section 13(a) of the Exchange Act to permit all first-time registrants to submit two rather than three years of audited financial statements in their registration. Amending the General Instruction to Form S-1, to permit all issuers to omit from pre-market filings any audited financial statements that are not required at the time of marketing, will also reduce the cost to companies of accessing capital markets.

Additionally, if certain smaller issuer exemptions are extended to a wider range of companies, Congress can encourage more companies to enter U.S. capital markets. Congress should adopt an SEC proposal from 2016 to raise the threshold on the "small reporting company" definition from \$75 million to \$250 million of public float. Congress should also consider permitting all issuers to use Forms S-3 and F-3 during their first year as a public company, and consider allowing certain business development companies (BDC's) to take advantage of the registration and offering-related accommodations currently available to other issuers. Finally, Congress should expand the Rule 139 safe harbor to allow continuing coverage by research analysts of any issuer, without such research constituting an offer for sale. By extending the aforementioned accommodations to broader sets of issuers, Congress can encourage more firms to raise capital in the public markets, which will grow the economy while simultaneously creating new opportunities for institutional and retail investors to benefit from those companies' success.

**Second, Congress should promote private investment and secondary market trading in restricted securities by amending the definition of accredited investor.** By extending the definition of accredited investor to any person licensed or registered as a broker or investment adviser, small companies can draw investment from a wider universe of investors. Congress should also require the SEC to develop alternative tests for determining who qualifies as an accredited investor. These reforms should be supplemented with a revision of the "bad actor" prohibition in Regulation D which have disproportionately acted as a deterrent to issuers. By revising the substance of scope of bad actor disqualifications to a) actions that cause material violations of securities laws and to b) company bad acts only, Congress can help fulfill the original intent of the JOBS Act.

**Third, Congress should promote greater liquidity in secondary market public resales by making several amendments to Rule 144.** These changes should include eliminating the 3-month lag post-exiting affiliate status, as well as setting 20% ownership as the presumptive dividing line between nonaffiliate and affiliate status for shareholders. Additionally, Congress should reduce the holding period for restricted securities of reporting issuers from 6 to 3 months and make Rule 144 available to investors faster. These changes to Rule 144 would eliminate

complex and unnecessary resale requirements and encourage more investment in U.S. public companies (and early stage companies that wish to go public). This should, in turn, encourage more companies to consider going public. Liquidity is critical for smaller firms to attract investment, and expanding liquidity will help smaller companies and the economy.

**Congress could also take steps to aid state and municipal issuers.** SIFMA believes that the recently introduced bill S.828, which would require Federal banking agencies to treat certain municipal securities as level 2B liquid assets, is another way that Congress can encourage growth through changes in the treatment of securities. SIFMA has long argued that investment-grade municipal securities satisfy regulators' liquidity criteria and should be treated as High-Quality Liquid Asset (HQLA)-eligible. S.828 will encourage bank investment in the U.S. municipal securities market and help state and local governments finance vital investment in domestic infrastructure. The measure will also improve liquidity in municipal securities markets and will especially help less-frequent issuers of municipal debt. It should be noted that a similar bill already passed the House of Representatives during 114<sup>th</sup> Congress on a voice vote.

We appreciate the bipartisan approach being taken towards capital formation legislation and welcome this chance to submit recommendations on improvements to U.S. capital markets. We look forward to engaging with the Committee in the future on these and other matters.

Sincerely,

A handwritten signature in blue ink that reads "Andy Blocker". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Andy Blocker  
Executive Vice President, Public Policy and Advocacy



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## **Potential Legislative Action to Improve Issuers' Access to the U.S. Capital Markets**

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. Our members are intimately engaged in both public and private capital markets and interact with business leaders and potential issuers daily. It is from this unique vantage point that we offer these suggestions to promote capital formation in a manner that encourages business investment and facilitates job creation while upholding investor protections.

### **I. Promoting increased access to the public capital markets for all issuers (JOBS II)**

#### **a. Extension of certain JOBS Act accommodations to all issuers**

*Rationale: Permitting companies to file registration statements confidentially allows them to take the time often needed during the SEC review process to consider whether to proceed with an offering without disclosing trade secrets to the market. Allowing companies to test the waters with investors decreases the risk of launching an unsuccessful offering. And reducing the burden associated with preparing additional financial statements (and obtaining an audit with respect to additional annual financial statements) decreases the cost to companies of doing a public offering. Emerging growth companies ("EGCs") have since 2012 taken advantage of these accommodations provided by the JOBS Act with positive effect. SIFMA members, however, interact with larger companies that experience many of the same frictions that can deter efficient and effective capital raising. Extending these provisions to a broader set of companies would encourage yet more companies to raise capital in the U.S. capital markets as a means to finance business investment, spur greater economic activity and facilitate job creation.*

- Confidential filing
  - Proposal: Amend Section 6(e) of the Securities Act to permit all issuers (regardless of size and so long as they were not public companies for at least 3 months prior to the initial confidential filing) to file confidentially
- Testing the waters
  - Proposal: Amend Section 5(d) of the Securities Act to permit *all* issuers, in the context of IPOs, to engage in oral or written communications with potential investors that are QIBs or institutional accredited investors to determine whether such investors might have an interest in a contemplated IPO

- Proposal: Amend Rule 163 under the Securities Act to allow prospective underwriters, authorized by the issuer, to make offers of *WKSJ* securities in advance of filing any registration statement without those offers violating Section 5 of the Securities Act
    - Background: Previously proposed (but not adopted) by the SEC ([Dec. 18, 2009](#))
- Two (rather than three) years of required audited historical financial statements
  - Proposal: Amend Section 7(a) of the Securities Act and Section 13(a) of the Exchange Act to permit all first-time registrants to submit two rather than three years of audited financial statements in their Securities Act registration statements and to limit required selected financial data (including in subsequent Exchange Act reports) to the periods included in such registration statement
- Exclusion of ultimately unnecessary financial statements from pre-marketing filings
  - Proposal: Amend Section II.C in the General Instructions to Form S-1 (and, when revised, the equivalent provision in Form F-1) to permit all issuers to omit from pre-marketing filings audited financial statements that won't ultimately be required at time of marketing

***b. Other reforms to reduce burden on issuers of accessing the public capital markets***

*Rationale: The U.S. securities registration system currently affords smaller companies accommodations to ease frictions associated with capital raising that can serve to discourage many companies from accessing the U.S. public capital markets, including certain burdensome disclosure-related and SOX 404 requirements. SIFMA members see opportunity to eliminate these same burdens for an expanded number of companies with significant upside potential for the U.S. public capital markets and our economy generally. In addition, eliminating the requirements to use Forms S-3/F-3 (other than being current in reporting, as described below) will, by facilitating subsequent public offerings, make entering the U.S. public capital markets via an initial public offering more attractive for all issuers. Business development companies ("BDCs") also do not benefit from many of the accommodations afforded to smaller reporting companies (and in many cases other reporting companies more generally). Because BDCs generally facilitate capital formation for smaller companies, eliminating the many restrictions applicable to them would in turn benefit smaller companies by increasing the investment dollars available to them. BDCs also create accessible investment opportunities for retail investors. Lastly, only S-3/F-3 eligible issuers currently benefit from other accommodations not applicable to all reporting*

*companies, including insulating securities analysts from liability for research coverage that might otherwise be deemed an offering of securities. Issuers and investors benefit from increased research, which provides greater access to information to facilitate more informed, and therefore more effective, capital raising and investment decisions.*

- Smaller reporting company definition: Revise definition to increase the number of companies benefitting from “small reporting company” scaled disclosure accommodations and SOX 404 exemptions
  - Proposal: Amend the definition of smaller reporting company to raise the public float threshold under which a company qualifies as a smaller reporting company from \$75 million to \$250 million
    - Background: [SEC proposed rule](#), June 2016
  - Proposal: Exempt all smaller reporting companies and give all first-time registrants a two-year annual report grace period from SOX 404 requirements
- Ability to use Form S-3/F-3: Permit for all issuers after one year of reporting
  - Proposal: Amend Forms S-3 and F-3 to permit all issuers to use Form S-3 or F-3 after their first post-IPO 10-K or 20-F (and eliminate all other S-3/F-3 eligibility requirements except being up to date with all Exchange Act filings)
- Elimination of restrictions on BDCs: Eliminate existing restrictions that currently prohibit BDCs from taking advantage of the majority of registration and offering-related accommodations afforded to issuers generally
  - Proposal: (a) Permit BDCs to take advantage of the following accommodations on the same basis as the other issuers to which they apply: WKSI status and automatic shelf registration; Rule 415 and shelf registration; incorporation by reference; the research and communications safe harbors provided by Rules 134, 138, 139, 163, 163A, 164, 168, 169, 433; access equals delivery (Rules 172 and 173); and the prospectus and prospectus supplement provisions of Rule 424(b); and (b) revise Rule 418(a)(3) to provide that BDCs meeting the Form S-3 eligibility requirements are exempt from the requirement to provide the SEC with reports or memoranda relating to their business, operations or products for the past 12 months upon request
- Research: Expand Rule 139 safe harbor to apply to all issuers
  - Proposal: Amend Rule 139 to provide that continuing coverage by research analysts of any issuer (as opposed to only those that qualify for Form S-3/F-3) would not be deemed to constitute an offer for sale of a security of such issuer before, during or after an

offering by such issuer

## **II. Promoting private investment and secondary market trading in restricted securities**

*Rationale: While there is significant room to ease the burdens on companies seeking to raise money in the U.S. public capital markets (as described above), private companies equally should be able to more easily access capital from willing investors. Promoting capital formation at each stage of a company's life cycle creates the much needed on-ramp to facilitate growth and job creation. Eliminating unnecessary roadblocks such as certain elements of the bad actor prohibition in Regulation D and expanding the potential universe of investors that can contribute capital to private companies in the U.S. These changes would directly increase investment in the U.S. economy and would also allow companies to grow more quickly, in some cases thereby putting them in a position earlier in time where (combined with the reform suggestions above) they may consider raising capital publicly in the U.S. Promoting investment in private companies also fosters the development of technology and other productivity enhancing innovations that so many private companies deliver to the U.S. economy.*

### **a. "Accredited investor" definition amendments**

- Proposal: Amend the definition of "accredited investor" in Rule 501 under the Securities Act to include the following criteria (which, if met, would qualify an investor as "accredited" as an alternative to the existing income/net worth tests)
  - Any investor currently licensed or registered as a broker or investment adviser by the SEC, FINRA (or an equivalent self-regulatory organization), or a state division responsible for licensing or registration of individuals in connection with securities activities; or
  - Require the SEC to develop additional objective standards based on education, job experience and professional knowledge or certifications, or alternatively develop such standards with the industry for draft legislation
  - Background: SEC Commissioner Piwowar suggested alternative tests would be beneficial in [February 2017 speech](#)

### **b. Revision of "bad actor" prohibition in Regulation D**

- Proposal: Revise substance and scope of bad actor disqualification
  - Limit types of actions that cause disqualification to material violations of the securities laws and;
  - Eliminate disqualifications based on actions of affiliates (other than subsidiaries), directors, officers and beneficial owners.

## **III. Promoting greater liquidity in secondary market public resales**

#### **a. Rule 144 amendments**

*Rationale: Facilitating secondary market public resales provides a more liquid exit for investors in U.S. public companies. Secondary market liquidity also creates a positive feedback loop to help reduce an issuer's cost of capital. Amending Rule 144 to eliminate complex and unnecessary resale requirements would both encourage more investment in U.S. public companies (and early stage companies that wish to go public) and in turn encourage more companies to consider going public.*

- Proposal: Amend Rule 144 under the Securities Act as follows
  - Establish 20% ownership as the presumptive dividing line between nonaffiliate and affiliate status for shareholders that may be deemed to be affiliates by virtue of their share ownership alone
  - Eliminate 3-month lag post-exiting affiliate status
  - Reduce holding period for restricted securities of reporting issuers from 6 to 3 months
  - Shorten period that must lapse after an issuer's IPO before Rule 144 becomes available to 30 or 60 days

#### **IV. Promoting greater liquidity in municipal securities**

##### **a. S. 828**

*Rationale: Municipal securities are a critical mechanism for state and local governments to finance their infrastructure needs and other obligations. Overhauling the nation's aging infrastructure is a priority of the current administration, and infrastructure investment will create new jobs both directly through construction and development and indirectly through its follow-on effects on economic output. S. 828 would amend the Federal Deposit Insurance Act and require federal banking regulators to treat certain municipal obligations as level 2B liquid assets under their liquidity coverage ratio rules. By allowing these obligations to be treated as high quality, liquid assets (HQLA) increased bank investment in municipal securities can be encouraged.*

- Bill: Amends the Federal Deposit Insurance Act to require the Appropriate Federal banking agencies to treat certain municipal obligations as level 2B liquid assets.
  - The treatment would apply to certain municipal bonds that are "investment grade", "liquid and readily marketable."
  - Defines certain municipal obligations as level 2B HQLA for purposes of the final rule entitled "Liquidity Coverage Ratio: Liquidity risk Measurement Standards"
  - Requires the amendment to the Liquidity Coverage Ratio Regulations within 90 days after the date of enactment of the legislation.