January 2, 2018

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Attention: Mr. Brent J. Fields, Secretary

Re: FAST Act Modernization and Simplification of Regulation S-K (File Number S7-08-17)

Dear Secretary Fields:

The Securities Industry and Financial Markets Association ("SIFMA") is writing to respond to the invitation of the Securities and Exchange Commission ("Commission") for public comment on the modernization of certain business and financial disclosure requirements in Regulation S-K as set forth in the Commission's Proposed Rule Release No. 33-10425, 34-81851 (the "Release"). We appreciate the opportunity to provide comments to the Commission on the Release.

In our comment letter to the Commission's earlier concept release on *Business and Financial Disclosure Required by Regulation S-K*[1], we suggested the Commission be guided by three overarching considerations when considering how to modernize disclosure requirements -- principles-based versus prescriptive disclosure requirements, materiality as the principal factor underlying disclosure requirements, and consideration for the undue risk of liability on registrants and other offering participants of adding or expanding requirements for forward-looking information. We believe many of the rule proposals in the Release reflect these considerations and we appreciate the Commission's taking steps both to eliminate information an investor may consider irrelevant and to take into account the burdens imposed on a registrant to comply with disclosure requirements, whether in terms of monetary cost, disclosure of

[1] Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064, 34-77599 (Apr. 13, 2016) (the "2016 Concept Release").

commercially sensitive matters or liability exposure. We hope the Commission will continue to consider other ways in which it can propose changes to the disclosure regime to achieve these goals.

Accordingly, we generally support the proposals in the Release. We respond below to several of the specific questions posed by the Commission in the Release.

Description of Property (Item 102)
Questions 1, 2 and 3:

> ***Question 1*. Should we revise Item 102 to clarify that a description of property is required only to the extent that physical properties are material to the registrant and may be provided on a collective basis, if appropriate, as proposed? Under what circumstances is the flexibility to provide property disclosure on a collective basis useful (e.g., information about the percentage of material properties within and outside the United States)?**

> ***Question 2*. Should we harmonize non-industry-specific disclosure thresholds by replacing them with a materiality threshold as proposed?**

We agree with the Commission's proposal to revise Item 102 to clarify that a description of property is required only to the extent that physical properties are material to the registrant. The prescriptive elements of the existing requirement to provide the location and general character of a company's principal plants, mines and other materially important physical properties including those of its subsidiaries often produces unnecessary and immaterial disclosure in response to this requirement. We also agree with the proposal to permit property disclosure to be provided on a collective basis, if appropriate. In particular, the ability to provide collective disclosure could result in meaningful disclosure based on types of properties, geography or age of properties, among other categories.

> ***Question 3*. The S-K Study recommended that, for businesses that have material properties, disclosure requirements could be refocused on material facts about those properties that would inform investors about the significance of the property to the business, including uncertainties in connection with these properties. Should Item 102 require additional disclosure about material properties, including uncertainties such as information about properties that are located near designated areas where natural disasters are more likely to occur? If so, what should be required and why? Would this elicit more meaningful disclosure or would this duplicate disclosure in MD&A?**

We do not believe Item 102 should require disclosure about uncertainties such as information about properties that are located near designated areas where natural disasters are more likely to occur. One of the stated goals of the Commission in the Release is to streamline the existing disclosure framework.[2] The MD&A requirement to disclose known trends and uncertainties in

[2] See Release at 9.

Regulation S-K Item 303(a)(3)(ii), combined with the Item 503(c) requirement to disclose material risks, captures disclosure about uncertainties with respect to material properties. Requiring such disclosure in the property discussion as well would be duplicative.

Management's Discussion and Analysis of Financial Condition and Results of Operations – Year-to-Year Comparisons (Instruction 1 to Item 303(a))
Questions 4, 5, 6, 7, 8 and 9:

Question 4. Should we revise Item 303 as proposed?

We believe Item 303 should be revised as proposed to permit a company to provide a year-to-year comparison only for the most two recent years if the discussion of the earliest year is immaterial and has been previously discussed in an annual report. The proposed revisions would benefit both companies and investors by eliminating unnecessary discussions of periods or matters that have previously been disclosed.

Question 5. Should we expand the proposal, with similar conditions, to other forms such as Form S-1 and Form 8-K?

The proposal as written would amend Item 303 itself (and not the forms that require Item 303 disclosure). Accordingly, we believe the proposed rule would apply to a filing on any form that requires Item 303 information, so long as the discussion of the earliest year is immaterial and has been previously discussed in an annual report.

Question 6. Instead of allowing registrants to eliminate the earliest of the three years of MD&A in some situations, should we retain the earliest year requirement and instead amend Item 303 to allow registrants to hyperlink to the prior year's annual report for that disclosure in lieu of repeating the disclosure in the current year's report?

We believe the proposed revisions to Item 303 are beneficial because, ideally, they will incentivize registrants to improve MD&A disclosure. In eliminating the third year, registrants have the opportunity to craft disclosure that focuses on material trends without having to focus on immaterial issues from prior year periods. Retaining the earliest year requirement by permitting a hyperlink to the prior year's annual report is unlikely to promote these types of changes, and is instead likely to incentivize registrants to provide disclosure that simply tracks that of the prior period.

Question 7. Should we include additional conditions on allowing registrants to exclude the earliest of the three years or provide guidance on when a discussion of the earliest of the three years would be material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations? For example, should we not allow registrants to exclude discussion of the earliest year if there has been a material change to either of the two earlier years due to a restatement or a retrospective adoption of a new accounting principle?

The proposal emphasizes that omission of the earliest year in MD&A is permissible only if it is immaterial. As a result, revisions to the earliest year information as a result of a restatement or the retrospective adoption of a new accounting principle might be sufficiently material that a discussion of the earliest year would be warranted by the revised rule as proposed. Registrants should be permitted to evaluate whether and to what extent this discussion is necessary. The addition of guidance requiring a discussion of the earliest year in all or some cases where a restatement or retrospective adoption of a new accounting principle has occurred is likely to be interpreted as prescriptive and detract from the materiality-based focus of the proposal.

> ***<u>Question 8</u>. Should we revise Instruction 1 to Item 303(a) as proposed to eliminate the reference to year-to-year comparisons? Would eliminating that reference encourage registrants to use a different presentation? Alternatively, should we retain the references to year-to-year comparisons and revise the instruction to identify specific alternatives to year-to-year comparisons? If so, what alternatives should we include?***

We support the proposed elimination of the reference to year-to-year comparisons in Instruction 1 to Item 303(a). The instruction currently states that registrants “shall” use those comparisons and only references those comparisons without referencing any other type of presentation that could satisfy the requirements of the rule. As a result, year-to-year comparisons tracking income statement line items (and in some cases not distinguishing between material and immaterial line items) have become the norm. We believe the elimination of that reference will, as noted above, give companies the opportunity and perhaps even incentivize them to craft disclosure that better allows investors to understand the material trends driving their results.

> ***<u>Question 9</u>. Should we eliminate the reference to five-year selected financial data in Instruction 1 to Item 303(a) as proposed? Would there be a significant impact on the total mix of information available? Would eliminating this reference discourage registrants from providing trend disclosure in their MD&A?***

We believe the reference to five-year selected financial data in Instruction 1 to Item 303(a) should be eliminated as proposed. We believe the requirement to disclose known trends that have had or are expected to have a material impact on a company in Item 303(a)(3)(ii) appropriately does not specify how far back a company needs to look. Companies should be permitted to determine how many years of information are necessary to an investor’s understanding of known trends. The prescriptive suggestion to look back five years currently incorporated in the instruction frequently produces unnecessary and irrelevant disclosure.

<u>Risk Factors (Item 503(c))</u>
<u>Question 35:</u>

> ***<u>Question 35</u>. Should we eliminate the risk factor examples as proposed, or do they provide useful guidance to registrants? Instead of eliminating the examples, should we provide different or additional examples that would be more helpful to registrants? If so, what examples would be most helpful?***

We believe the risk factor examples should be eliminated as proposed. The list of examples of topics that may be addressed in the risk factors, many of which are only applicable in an offering context and particularly in an initial public offering, has become more prescriptive than suggestive because most companies include risk factors addressing each of the examples even if not material. We believe eliminating the list of examples of topics would provide for more useful principles-based disclosure rather than disclosure responsive to prescriptive topic lists. This is an area where principles-based disclosure is critical because one size certainly will not fit all registrants, or even the same registrant over time.

In addition, we agree with the Commission's decision not to propose that registrants summarize the most significant risk factors or present their risk factors in order of management's perception of the magnitude of the risk or by order of importance to management, as discussed in further detail in our comment letter in response to the 2016 Concept Release.

Description of Registrant's Securities (Item 601(b)(4))
Questions 41, 42, 43 and 44:

> ***Question 41*. Should the proposed amendments include a requirement to file Item 202 disclosure for each class of securities registered under Section 12 of the Exchange Act as an exhibit to the annual report? Why or why not? Should registrants also be required to include descriptions of securities that are not registered under Section 12 of the Exchange Act? For example, should issuers reporting only under Section 15(d) of the Exchange Act (e.g., asset-backed issuers) be required to file Item 202 disclosure as a Form 10-K exhibit?**
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> ***Question 42*. Do the requirements for Item 202, and our proposal to require that the Item 202 information be provided as an exhibit to the annual report, provide sufficient disclosure about debt securities or other classes of stock with different or preferential voting rights?**
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> ***Question 43*. Would the new requirements result in significantly higher compliance costs? Would the new requirements provide benefits to investors and facilitate informed investment decisions? Would the proposed amendments require disclosure that is adequately provided elsewhere in the annual report or on EDGAR?**
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> ***Question 44*. Would compliance with the proposed amendment be problematic for issuers with multiples classes of registered securities (e.g., well-known seasoned issuers or asset-backed issuers)? If so, how should we revise the proposed amendments to avoid unnecessary burdens that may be imposed on these issuers?**

We support the proposal to require all registrants to include Item 202 disclosure as an exhibit to the annual report. Currently, this information is not always easy to locate because it requires cross-referencing to the date of the original offering of each type of security. And for companies that have not issued new securities since Item 202 came into effect, the same level of detail with respect to their securities as required by Item 202 may not be available. This requirement would put all registrants on a level playing field in terms of the scope of information available about their securities and would make the information easy to find for all investors. That said, we do not believe the requirement should be extended to apply to registrants' securities that are only registered under Section 15(d). Securities registered only under Section 15(d) (which, for example, include debt securities initially offered under Rule 144A under the Securities Act pursuant to a registration rights agreement but that typically continue to trade only among Qualified Institutional Buyers) trade within and among an investor base that is relatively small, is sophisticated and does not need ready access to Item 202 details via an exhibit to the annual report.

We do believe the existing Item 202 requirements provide sufficient information to investors, including with respect to differential voting rights, and do not need to be expanded. Although there will be an initial burden (in drafting new disclosure or expanding old/existing disclosure) for issuers with securities that caused them to become subject to Section 12 before Item 202 came into effect, in those cases this burden will be a one-time event, and in all other cases registrants will only need to copy the Item 202 from the offering of each Section 12 registered security to the Item 202 annual report exhibit. In both cases we think the benefit to investors outweighs the one-time burden for registrants.

Information Omitted From Exhibits (Item 601)
Questions 45, 46 and 47:

> ***Question 45*. Should the proposed amendments permit registrants to omit entire schedules and attachments to exhibits unless the schedules or attachments contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document?**
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> ***Question 46*. Should Item 601(a)(5) require registrants to provide a list of the contents of the omitted schedules and attachments as proposed? Would a list of the titles of the schedules and attachments be sufficient to identify the contents of the omitted schedules and attachments? Should we provide guidance on the registrant's description of any omitted schedule or attachment?**
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> ***Question 47*. As proposed, Item 601(a)(5) would expand the existing Item 601(b)(2) accommodation to all exhibits. Should we require exhibits filed pursuant to certain subsections of Item 601(b) to include all schedules and attachments even if they are not material? If so, which exhibits and subsections?**

We believe registrants should be permitted to omit entire schedules and attachments to exhibits unless the schedules or attachments contain material information and unless that information is not otherwise disclosed in the exhibit or the disclosure document as proposed. This proposed amendment would represent a return to what we believe used to be relatively common market practice even in the absence of explicit guidance in the rules, and would be a welcome reduction for companies in cost and effort relating to required exhibits. Companies will need to review any schedules and other attachments to be omitted for any information that would be material. We also agree with the Commission's proposal to require registrants to provide a list of the omitted schedules and exhibits (unless confidential and not material, in which case they should be permitted to be redacted, per the proposal below). We do not believe any guidance is necessary other than for the description to accurately describe the contents of the schedule or exhibit. Lastly, we believe the proposed accommodation should be extended to include agreements filed pursuant to Rule 601(b)(1) (Underwriting Agreements), but not to other exhibits filed pursuant to Item 601(b).

Redaction of Confidential Information in Material Contract Exhibits
Questions 49, 50 and 52:

> ***Question 49*. Should registrants be permitted to omit confidential information from exhibits filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed without submitting a confidential treatment request as proposed? Similarly, should we amend our investment company forms to permit investment companies to omit confidential information from exhibits?**
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> ***Question 50*. Would the disclosure provided in exhibits change under the proposed amendments? Why or why not?**
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> ***Question 52*. Should we allow registrants to omit confidential information from exhibits other than those filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed? For instance, should registrants be allowed to omit similar information from exhibits filed pursuant to Item 601(b)(2)? Should they be allowed to omit similar information from exhibits filed pursuant to other subsections of Item 601? If so, which subsections and why?**

We believe a registrant should be permitted to omit confidential information from exhibits filed pursuant to Item 601(b)(10) that is both (i) not material and (ii) competitively harmful if publicly disclosed without submitting a confidential treatment request as proposed. The proposal would be a welcome change for registrants. Confidential treatment requests have become quite lengthy and are time-consuming for companies to prepare. The requests also frequently need to be produced in a tight time frame (for example, within four business days after signing if a company chooses to file a material agreement as an exhibit to an Item 1.01 Form 8-K). Registrants would still have to analyze prior to filing the requirements for redacting confidential information, so they would be in a position to provide that analysis to the SEC subsequently upon request. We also encourage the Commission to extend this accommodation to exhibits filed pursuant to Item 601(b)(1) (Underwriting Agreements) and (2) (Plans of Acquisition, etc.). If confidential treatment is necessary, these agreements should not be treated any differently than other types of material contracts. In fact, these are the types of agreements that do put time pressure on companies because they are almost always filed concurrently with the Item 1.01 Form 8-K where they are first disclosed. In addition, with respect to Item 601(b)(2) agreements, given that the Commission previously granted the accommodation to exclude schedules and exhibits to these agreements and is only now considering extending the accommodation to other material contracts, we can think of no reason to exclude these agreements from the confidential treatment accommodation.

Material Contracts (two-year look back test) (Item 601(b)(10)(i))
Question 54:

> ***Question 54*. Should we revise Item 601(b)(10)(i) to limit the two-year look back test to newly reporting registrants as proposed?**

We believe Item 601(b)(10)(i) should be revised to limit the two-year look back test to newly reporting registrants as proposed. The proposal would limit the (frequently long) list of material agreements to those that remain to be performed at the time of the filing. The proposal would leave in place for newly reporting registrants the requirement to provide material contracts that were entered into within the two years prior to the filing, thereby providing investors with important information about how a new registrant runs its business and that registrant's practices with respect to its contractual arrangements.

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We understand that the Commission is continuing to consider improvements to Regulation S-K. In considering our comments on the Release, we revisited our earlier suggestions in response to the 2016 Concept Release. As the Commission considers further improvements, we would request that it consider the suggestions in our earlier letter, and in particular the items below, which we consider to be of the highest importance (because the burden on issuers versus value to investors is the highest) or easy to implement and consistent with a shift toward a more principles-based versus a prescriptive disclosure regime.

Responses to Questions from 2016 Concept Release No. 33-10064, 34-77599 (SIFMA Comment Letter dated July 21, 2016)

Questions 24 and 28: General Development of Business

> ***Question 24*. Does the current requirement in Item 101(a)(1) to describe the general development of a registrant's business during the past five years provide useful disclosure that is not available either elsewhere in the current filing (e.g., MD&A or the notes to the financial statements) or in any prior filing, including current reports on Form 8-K? Should we require additional or more specific information under Item 101(a)(1) and, if so, what type of information and why?**

> ***Question 28*. Should we permit a summary disclosure of the general development of a registrant's business in all filings except the initial filing?**

Consistent with the Commission's proposal in the current Release to amend Item 102 Description of Property to remove prescriptive elements, we believe there should be no requirement to look back five years or any other prescriptive requirements applicable to the description of business in Item 101. We believe the requirement under Item 101(a)(1) to describe the general development of a registrant's business during the past five years is unnecessary. Current investors generally are familiar with the historical development of a registrant's business, and new investors can easily find the information in the filing where the information was initially disclosed (to which a registrant should cross-reference in each subsequent filing). Instead, registrants should be required to disclose in subsequent filings only any material developments in the registrant's business, which will sharpen investor focus on those developments. Where this type of information is required to be disclosed elsewhere (e.g., by Item 1.03 (Bankruptcy or Receivership) or 2.01 (Completion of Acquisition or Disposition of Assets) of Form 8-K), a cross-reference to that filing should be sufficient.[3]

Questions 100 and 101: Disclosure of Known Trends

> ***Question 100*. Should we revise the two-step test to apply a different standard in the first prong and if so, how? For example, should we require disclosure when a trend, event or uncertainty is more likely than not, probable, or reasonably possible to occur, rather than "reasonably likely" to occur?**
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> ***Question 101*. Should we eliminate the two-step test in favor of a different standard for identifying required and optional forward-looking disclosure and, if so, what test would be appropriate? For example, should we revise Item 303 to incorporate the probability/magnitude standard from Basic v. Levinson? Which standard – the two-part test, Basic's probability/magnitude standard, or some other standard – should we require, and why? Would any particular formulation be more or less burdensome for registrants?**

We propose eliminating the two-step test in favor of the probability/magnitude standard set forth in Basic v. Levinson. Although the two-step test represents a commendable effort by the Commission to mitigate the risk of Section 11 liability to offering participants of requiring forward-looking information by predicating that disclosure requirement on some cognizable measure of likelihood (as further discussed below), that risk continues to be a deterrent to companies deciding whether or not to go public. Modifying Item 303 to incorporate the probability/magnitude standard from Basic v. Levinson would strike a balance for disclosure of contingencies that is consistent with the considerations recognized by the Supreme Court.

If the Commission decides not to eliminate the two-step test in favor of the Basic v. Levinson test, the first prong of the two-step test should remain "reasonably likely" and not be changed to "reasonably possible." A "reasonably possible" threshold (which the Commission has made clear is a lower probability threshold than "reasonably likely") will result in registrants

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[3] We note in this regard that the Commission acknowledged in its recent Disclosure Update and Simplification Release (No. 33-10110; 34-78310) that certain information (e.g., fixed charge coverage ratios, stock price data and exchange rate data), if readily available to or calculable by investors, need not be included in registrants' periodic reports. The crux of the same release – namely, to eliminate redundant, duplicative and overlapping rules – also supports our suggestions here and elsewhere that, unless and until those rules are eliminated, cross-references rather than repetitive disclosure would be preferable.

overdisclosing the potential impact of currently known trends, events and uncertainties in order to avoid potential liability. We note the Commission previously considered a similar question when it adopted a "reasonably likely" standard with respect to Item 303(a)(4) of Regulation S-K in lieu of a "more than remote" standard. The Commission noted in its adopting release that the "reasonably likely" standard would reduce the possibility that investors will be "overwhelmed by voluminous disclosure of insignificant and possibly unnecessarily speculative information" under a lower disclosure threshold.[4] We believe the "reasonably likely" threshold will produce more meaningful disclosure of contingencies that really do keep senior management up at night and would avoid overwhelming investors with almost hypothetical "what if" scenarios.

Question 233: Amendments to Exhibits

> ***Question 233*. Should we continue to require registrants to file all amendments or modifications to previously filed exhibits as required under Item 601(a)(4)? Should we instead amend Item 601(a)(4) to exclude immaterial amendments? If so, should we provide guidance to registrants about how to determine whether an amendment is immaterial? Instead of materiality, should we permit registrants to exclude amendments based on a different standard? If so, what standard would be appropriate?**

Item 601(a)(4) should be amended to exclude immaterial amendments to previously filed exhibits. As discussed elsewhere, we urge the Commission to continue to focus on materiality as the cornerstone of disclosure requirements, including with respect to exhibits. This change would be consistent with the proposals in the current Release to eliminate the requirement to submit a confidential treatment request with each redaction and with the accommodation to permit issuers to omit schedules and exhibits from filed exhibits. Eliminating the requirement to file immaterial amendments will make it easier for investors to focus on the information that is most relevant to their decision-making, particularly since the current rule does not require any form of disclosure differentiating between material and immaterial amendments, often requiring investors to sift through the immaterial amendments to find those that are material.

Question 266: Financial Disclosure Accommodations

> ***Question 266*. Should we allow one or more categories of larger companies, such as companies with a longer reporting history or more readily available public information to benefit from scaled disclosure requirements as a means of reducing compliance costs?**

All IPO companies, regardless of size, should be able to take advantage of the rules that permit EGCs to present only two years of audited financials where providing three years of audited financials would be burdensome. While we recognize that providing a third year of financial statements may allow investors to better identify trends, creating three years of audited financials can be extremely burdensome for certain companies, such as when they have changed auditors or

[4] See SEC Release No. 33-8182 (January 28, 2003) ("we are mindful of the potential difficulty that registrants would have faced in attempting to comply with the "remote" disclosure threshold").

are required to apply the different accounting principles applicable to a public company. Moreover, the Commission's known trend disclosure requirement should result in the disclosure of any trend the third year of financial statements might have demonstrated. Allowing all registrants to present only two years of audited financials in an IPO registration statement where presenting three years of audited financial would be burdensome thus appropriately balances this compliance burden with the disclosure needs of investors.

Question 90: MD&A Guidance

> ***Question 90. There are various sources of Commission and Division guidance on MD&A. These include Commission releases, sections of the Division's Financial Reporting Manual and staff Compliance and Disclosure Interpretations. Given the amount of Commission and staff guidance on MD&A, should we consolidate guidance in a single source? If so, which guidance remains helpful, and is there guidance that we should not include in a consolidation? Would consolidation of this guidance facilitate registrants' compliance with the item's requirements, or is the existing form of this guidance sufficient?***

We believe Commission and staff guidance on MD&A should be consolidated into a single source. First, doing so would reduce the burden on registrants (and their counsel) of needing to look to multiple sources when drafting MD&A. Second, maintaining a single source would likely increase compliance with all MD&A disclosure requirements. In connection with consolidating MD&A guidance, we suggest that in creating a single source, the Commission consider which portions of existing MD&A guidance should be expressly restated (or reiterated), generally favoring principles-based guidance with illustrative examples to highlight the intended application of those principles. Third, we believe more organized guidance will result in more streamlined and effective disclosure and as a result benefit investors.

A consolidated framework for MD&A guidance should emphasize that the purpose of the critical accounting estimates section of the MD&A is to highlight those accounting policies that necessarily involve subjective judgments by management that have a material impact on the financial condition or results of operations of the registrant in the periods covered by the MD&A. The consolidated guidance should highlight that registrants should supplement, and not merely repeat, the significant accounting policies described in the financial statement footnotes, with a view to guiding an investor's reading of MD&A.

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If you have any questions regarding SIFMA's views or require additional information, please do not hesitate to contact the undersigned at (212) 313-1118, or our counsel on this matter, Jeffrey D. Karpf or Andrea M. Basham of Cleary Gottlieb Steen & Hamilton LLP, at (212) 225-2000.

Very truly yours,

Sean Davy, Managing Director, Capital Markets Division
Securities Industry and Financial Markets Association