



CENTER FOR CAPITAL MARKETS
COMPETITIVENESS

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April 29, 2019

Ms. Vanessa Countryman
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Solicitations of Interest Prior to a Registered Public Offering;
Release No. 33-10607; File No. S7-01-19;
17 CFR Part 230;
RIN 3235-AM23**

Dear Secretary Countryman:

The U.S. Chamber of Commerce (the “Chamber”) created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy. The CCMC appreciates the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the “SEC” or “Commission”), entitled Solicitations of Interest Prior to a Registered Public Offering (the “Proposing Release”).

Again, the Chamber commends the Commission for its ongoing commitment to review existing regulations that affect capital formation in the United States. As we have repeatedly noted, this issue is especially important in light of the declining number of public companies—in the past twenty years, the number of US public companies has been cut in half. We are confident that a careful reassessment of the SEC’s overall approach to issues affecting the burdens on companies to go public and stay public will, over time and in the aggregate, make an impact.

As the Proposing Release notes, the CCMC was proud to partner with Nasdaq and several leading business associations to produce a report (the “Report”) last year entitled *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay*

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*Public.*¹ The Report includes a number of policy recommendations on topics including corporate governance, financial reporting and disclosure, equity market structure and other regulatory requirements, each designed with the goal of improving the attractiveness of the public company business model.² Among our recommendations was the request to amend the Securities Act to permit all issuers to engage in oral or written communications (“test the waters”) with potential investors that are qualified institutional buyers (“QIBs”) or institutional accredited investors to determine interest in a securities offering. Proposed Rule 163B is entirely consistent with this approach, and we enthusiastically support its adoption.

Allowing all issuers to test the waters with potential qualified investors would allow issuers to take advantage of one of the more popular provisions of the JOBS Act, which by its terms is currently limited to emerging growth companies (“EGCs”). This approach is also endorsed by the Treasury Department, which in its own recent report on improving the U.S. financial system noted that testing the waters gives companies “a better gauge of investor interest prior to undertaking significant expense and, in the event the company elects not to proceed with an IPO, information has been disclosed only to potential investors and not to the company’s competitors.”³ Of course, even seasoned issuers can also benefit from testing the waters in secondary and follow-on offerings, and we also support the Proposing Release’s extension of the testing the waters exemption to those kinds of transactions as well.

We do not believe that adopting Rule 163B in the manner proposed would compromise investor protection. Rule 163B only authorizes communications to determine possible interest in a registered securities offering. It serves to mitigate older doctrines involving conditioning the market that have become less salient in the instantaneous information age of today. Moreover, an issuer or its agent may engage in testing-the-waters communications only with a limited subgroup of offerees.

¹ Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public (Spring 2018), available at https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/05/CCMC_IPO-Report_v17.pdf.

² Although many of these recommendations are beyond the scope of the Proposing Release, we hope the Commission will continue to give due consideration to them as other future rulemakings are contemplated.

³ U.S. Dep’t of the Treasury, A Financial System That Creates Economic Opportunities: Capital Markets (2017), available at <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>.

Proposed Rule 163B does not affect other provisions of the Securities Act pursuant to which investors will receive a statutory prospectus and any other information required to be provided to investors in a registered public offering. Finally, as formulated, Rule 163B communications will remain subject to Section 12(a)(2) liability and the other antifraud provisions of the federal securities laws.

As a brief overview of our comments on proposed Rule 163B:

- We believe test-the-waters communications aid issuers in assessing investor demand and structuring their offerings, and expect that expanding the use of this technique beyond EGCs would motivate more private companies to consider a public offering.
- We concur that QIBs and accredited investors are appropriate recipients of test-the-waters communications. To facilitate global offerings made on a fully registered basis, we recommend that the Commission permit Rule 163B communications also to be made to parties that are not “U.S. Persons” (as defined in Rule 902(k)) who may purchase in the non-U.S. tranche of the registered offering. Separately, in the case of a concurrent domestic registered offering and offshore Regulation S offering, the Commission should confirm that communications made under Rule 163B in connection with the domestic registered offering would not be deemed “Directed Selling Efforts” (as defined in Rule 902(c)) for purposes of the non-U.S. Regulation S offering.
- For those issuers that test the waters but do not complete a public offering, we believe the Commission should clarify that such issuers may immediately conduct a private placement or Regulation A offering after the proposed public offering is abandoned.
- We agree that Rule 163B should be non-exclusive in order to permit issuers to rely on other exemptions from registration when they test the waters. Many seasoned issuers already conduct confidentially marketed public offerings for their secondary and follow-on offerings, and we would not wish to see Rule 163B crowd out that market practice. But, at the same time, Rule 163B would expand the universe of issuers eligible to conduct wall-crossed offerings, which we support.

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- We believe that investment companies, including closed-end funds and business development companies would also benefit from the use of Rule 163B.

DISCUSSION

A. Proposed Exemption

We unequivocally support proposed Rule 163B. The ability to test the waters is frequently relied upon by EGCs, and that the practice has served to encourage many companies considering an IPO to continue along that that course. It is also widely utilized in Regulation A offerings. Among EGCs, use of test-the-waters communications during the IPO is not uniform, and varies considerably by industry. Industries that most frequently use the accommodation are those that desire to explain complex issues about their business models to investors. These include life sciences and biotechnology, telecommunications, and other technology-intensive businesses.

Though there are some exceptions, EGC test-the-waters communications most commonly occur after confidential submission but before public filing of the registration statement. By proceeding in this fashion, EGCs and their underwriters are indeed able to gauge market demand for a particular issue and make changes to the offering structure in response to feedback from potential investors, which in turn informs the decision as to whether the offering should proceed. We echo the Commission's sentiment that pre-filing solicitations pursuant to Section 5(d) have not been a significant cause for concern with respect to investor protection.

As the Commission is well aware, completing a public offering is a costly and time-consuming process, with many concomitant regulatory consequences, and many potential issuers are reluctant to proceed along that path if the outcome is uncertain. For example, few issuers will attempt to complete an IPO if they know with certainty that demand for the offering is soft or if the offering will price substantially below the expected range. Similarly, in weighing whether to conduct an IPO, many issuers balance the potential economic benefits against the potential competitive harm that results when financial and other proprietary information is disclosed to the public, which in addition to investors necessarily includes competitors and other third parties whose interests may not be aligned with those of the issuer. By mitigating these types

of uncertainties, we believe all issuers contemplating an IPO, regardless of size, would benefit from the ability to test the waters, and expect that it would likewise motivate more companies to consider the public offering route.

Rule 163B would be expected to have a synergistic effect with the Commission's policy of accepting draft registration statements from all issuers for non-public review. Indeed, these two provisions should be viewed as parallel policy changes, in which the Commission extends JOBS Act accommodations to a larger class of issuers. Taken together, these measures should encourage more issuers to pursue a registered public offering.

Because larger, more-diversified companies often have more complicated business models that require additional explanation relative to smaller ones, we believe non-EGCs would find testing the waters attractive. As further detailed below, many mature public companies test the waters during wall-crossed follow-on offerings, and investors are very receptive to this practice. Accordingly, we have every reason to believe that companies not qualifying for EGC status would make use of this technique at the IPO stage too.

As the Commission knows, EGCs are not currently required to file any written test-the-waters communications as exhibits to their registration statements. We do not believe that other issuers availing themselves of new Rule 163B should be required to do so either. Likewise, EGCs are not required to use any particular legends or disclaimers on written test-the-waters materials, and we do not believe that other issuers should be subject to such a requirement under Rule 163B. The Staff regularly requests copies of test-the-waters communications during the IPO comment letter process while the issuer is in registration, and the Staff can continue to follow that practice under Rule 163B to ensure consistency in messaging with the statutory prospectus and to monitor antifraud concerns.

Section 5(d) does not currently distinguish between pre-filing and post-filing communications, and we concur that Rule 163B should similarly make no distinction. Although most test-the-waters communication occurs after confidential submission but before public filing, some issuers do so before the confidential filing and others do so during the 15-day period under Section 6(e)(1) of the Securities Act before the road show. Again, these differences are due to the varying needs of each issuer and

the fact that no two offerings are identical. Thus, we urge the Commission to preserve equivalent flexibility under proposed Rule 163B.

B. Eligibility and Investor Status

As highlighted above, we believe Rule 163B should be available to all issuers as proposed. We concur with the Commission that expanding the universe of issuers eligible to test the waters before a public offering would yield a number of benefits, including permitting a greater number of issuers to assess more accurately the demand for and valuation of their securities and allowing them to complete offerings at a lower cost. Investors would likewise benefit from increased disclosure by issuers, increased transparency in the marketplace, and a wider pool of potential issuers in which to invest. Because many public offerings are nowadays conducted in multiple international jurisdictions simultaneously, permitting all issuers to test the waters would also harmonize U.S. practice with the many jurisdictions outside the U.S. that already permit similar kinds of communications.

We concur that QIBs and institutional accredited investors are suitable recipients of test-the-waters communications. Some global public offerings are made on a fully registered basis for all securities worldwide whereas others are conducted in a process by which the domestic tranche is registered with the Commission and the offshore tranche is made on an unregistered basis in reliance on Regulation S. In the case of a global public offering that would be made on a fully registered basis, we recommend that the Commission permit Rule 163B communications to be made also to parties who are not “U.S. Persons” under Rule 902(k) who may purchase outside the United States in the non-U.S. portion of the registered offering. Separately, in the case of an offshore tranche effected under Regulation S in tandem with a domestic registered offering, the Commission should further confirm that communications made under Rule 163B would not be deemed “Directed Selling Efforts” under Rule 902(c) for purposes of the non-U.S. offering under Regulation S.

Under proposed Rule 163B, issuers would not be required to verify investor status, and an issuer could reasonably believe that a potential investor is a QIB or an institutional accredited investor even if that investor has provided false information to the issuer. We concur with the Commission that, in such circumstances, the issuer should not be deemed to violate Section 5 so long as it established a reasonable belief with respect to the potential investor’s status based on the particular facts and

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circumstances. We also concur that the Commission need not specify the procedures an issuer must follow to establish such a reasonable belief, and that issuers should continue to rely on the methods they currently use to establish a reasonable belief regarding an investor's status as a QIB pursuant to Rules 144A and as an accredited investor under Rule 501(a). Relatedly, our members have found that the verification procedures required under Rule 506(c) can often be cumbersome and that compliance with those procedures often serves as a disincentive to using the exemption. In order to be most effective, we would not want Rule 163B to suffer a similar fate.

Although we believe the adoption of Rule 163B is likely to increase public offering activity, the possibility remains that some issuers will test the waters and, after receiving investor feedback, determine that a public offering is not optimal at that time. In those situations, there remains a theoretical argument that the act of testing the waters constitutes a general solicitation that disqualifies the issuer from immediately completing a subsequent private placement. To be sure, we believe it should be possible to conduct such a private placement under existing law. But to foreclose the possibility of an inadvertent Section 5 violation for an issuer that engages in testing the waters but does not complete a public offering, we recommend that the Commission provide interpretive guidance or amend Rule 155 to make clear that an issuer may test the waters under Rule 163B, decide not to pursue a public offering and then proceed with an immediate private placement or Regulation A offering after abandoning its public offering, irrespective of whether it has filed a registration statement with the Commission.

Furthermore, we believe the Commission should clarify its statement from the Proposing Release that "information provided in a test-the waters-communication under the proposed rule must not conflict with material information in the related registration statement." While we generally agree with this sentiment in the case of communications made after a registration statement has been filed, it could create compliance difficulties in the case of test-the-waters communications made before the filing of a registration statement. In those cases, an issuer may not have even begun drafting any formal offering documents, and it is conceivable that an issuer would change its messaging after receiving investor feedback. At bottom, this is the fundamental point of testing the waters. But if an issuer does in fact change its messaging in response to investor demand, it may not be entirely true that the

information provided while testing the waters does “not conflict with material information in the related registration statement.”⁴

C. Non-exclusivity of the Proposed Rule

We agree that the proposed rule should be non-exclusive, permitting issuers to rely on other exemptions from registration as well. We believe non-exclusivity is particularly important to preserve the viability of various market practices that have developed in the absence of a comprehensive rule such as proposed Rule 163B. Similarly, new offering techniques may emerge if Rule 163B is adopted, and we do not believe that Commission rules should necessarily favor one procedure over another.

For example, seasoned issuers already rely on the confidentially marketed public offering, also known as a wall-crossed offering, for equity follow-on offerings, particularly during periods of market volatility. As part of such an offering, underwriters contact select institutional investors and, after securing a confidentiality and standstill agreement from interested parties, provide those investors with limited non-public information about the issuer and the offering in an effort to gauge market demand for a new issuance. In order to comply with Section 5, this technique is usually limited to issuers with effective shelf registration statements.⁵ Thus, such an offering is typically marketed off a base prospectus and pre-existing investor presentations, obviating the need to produce additional written disclosure documents or any free writing prospectuses. Proceeding in this fashion permits issuers to access the market in a matter of hours once investors are preliminarily contacted, and mitigates the price volatility and exposure to speculative trading that often accompany a generally marketed offering.

The wall-crossed offering has become an integral part of many book-building efforts and already functions without the effectiveness of proposed Rule 163B. While some issuers and their underwriters may elect to begin reliance on the proposed rule were it to be adopted, others may prefer not to do so and continue with the historical

⁴ Of course, under these circumstances the issuer would be subject to the liability and antifraud provisions of the federal securities laws if there are any material representations or omissions in the testing the waters materials or registration statement.

⁵ Because of the way this technique is structured, current Rule 163 and Rule 164 are often not available.

practice. Thus, we believe it is important not to interfere with the current market practice by requiring strict compliance with Rule 163B to the exclusion of all other alternatives.

On the other hand, proposed Rule 163B would expand the potential use of wall-crossed offerings to all issuers. In these situations, we expect issuers and their underwriters to observe many of the procedures currently utilized in the market for wall-crossed offerings. Reiterating our earlier support for this proposal, we believe it would be beneficial for a broader class of issuers to have the ability to test the waters.

As the Proposing Release notes, current Rule 163 permits WKSIs to engage in test the water communications before a registration statement is filed. But, Rule 163 imposes certain conditions, such as legending and filing requirements, that limit Rule 163's use. Further, underwriters are not permitted to rely on Rule 163, which also makes it unattractive to many issuers. Proposed Rule 163B would provide greater flexibility to WKSIs to engage in pre-offering communications, which we support. It would be helpful if the Commission were to clarify that any QIB or institutional accredited investor that passes test-the-waters information on to nonqualified parties in violation of a confidentiality agreement or otherwise in a manner inconsistent with the reasonable steps undertaken by the issuer to prevent such redistribution would not create Section 5 liability for the issuer or the need for any cooling-off period.

The Commission in 2009 proposed (but did not ultimately adopt) amendments to Rule 163(c) that would have permitted a WSKI to authorize an underwriter or dealer to act as its agent or representative in communicating information about offerings of the issuer's securities prior to the filing of a registration statement.⁶ At the time, the Commission asserted that the proposed amendments would further facilitate capital formation by WKSIs by removing many impediments to issuer communications with broader groups of potential investors regarding offerings of securities. The Chamber supported those proposed amendments, and in our comment letter we noted that permitting an underwriter or dealer to communicate about an offering prior to the filing of a registration statement would help WKSIs better gauge investor interest before having to expend the time and resources to file a formal registration statement. Then, as now, we believed such increased flexibility would enhance the ability of issuers and underwriters to assess whether market

⁶ See Release No. 33-9098, *Revisions to Rule 163* (Dec. 18, 2009).

conditions are favorable for a successful offering without compromising investor protection.

Although conducted outside the context of an offering, a non-deal roadshow allows issuers and their investment bankers to meet and present to existing and potential investors. At these meetings, only prior investor communications (such as SEC periodic reports and slide decks that do not discuss a new offering) are discussed. While such meetings are contemplated under Rule 168 so long as no offering is discussed, it would also be possible to expand their subject matter by combining them with Rule 163B communications. Accordingly, in this case, the flexibility to rely on the combination of SEC rules would be important to issuers as well.

D. Considerations for Use by Investment Companies

We believe various investment funds would make use of Rule 163B, and do not believe the Commission should limit or condition its use to particular classes of funds. In particular, we are optimistic that closed-end funds would benefit from adoption of the proposed rule. Test-the-waters communications would help such funds better assess market demand for particular fee structures or investment strategies before they incur the time and expense of preparing a registration statement. These communications would also facilitate a dialogue with qualifying investors after the filing of a registration statement.

We also believe the proposed rule would be beneficial for business development companies (each, a “BDC”). Congress established BDCs in 1980 to make capital available to small, developing and financially troubled companies that do not have ready access to the public capital markets or other forms of conventional financing. BDCs’ primary role in the economy to date has been to provide debt financing to companies, primarily in the small and middle markets, that may find it difficult to obtain traditional bank financing.

While there is a wide variation among BDCs in the size of their investments, the companies they invest in, and the industries in which they concentrate, they all share a common investment objective of making it easier for small and medium-sized companies to obtain access to capital. Small and medium-sized businesses are vital to promoting job formation and growth of the U.S. economy. This role has only

increased in recent years as many banks have limited their middle-market lending activity in response to stricter post-financial crisis capital requirements.

Access to the capital markets is especially important for BDCs because they are limited in their ability to retain capital in light of the requirement under federal tax law to distribute at least 90% of their taxable earnings annually. Accordingly, when BDCs are unable to access the capital markets efficiently they are in turn less able to satisfy their statutory mission of providing funding to small businesses and other companies that do not have ready access to more traditional sources of capital. As with other types of issuers, BDCs that are not EGCs would likewise benefit in their ability to raise public capital by having the ability to gauge investor demand to a particular offering both before and after filing a registration statement.

Congress has already expressed its clear support for the types of reforms Rule 163B would bring. As the Proposing Release notes, Congress has clearly instructed the Commission to extend the benefits of various SEC offering rules available to other issuers to BDCs⁷ and certain registered closed-end funds.⁸ Although adoption of Rule 163B would not completely satisfy the Commission's congressional mandate, it would certainly be in the spirit of facilitating capital formation for BDCs and closed-end funds—objectives we wholeheartedly support.

CONCLUSION

Again, we are supportive of the Commission's proposal to adopt Rule 163B. We are confident it will be well received by the issuer community without impairing the protection of investors. More importantly, we believe it will provide a much-needed boost to the attractiveness of the public markets. Thank you for your consideration, and we are available to discuss our comments further with the Commissioners or Staff at your convenience.

⁷ See Section 803(b) of the Small Business Credit Availability Act, Pub L. No. 115-141.

⁸ See Section 509(a) of the Economic Growth, Regulatory Relief and Consumer Protection Act, Pub. L. No. 115-174.

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Sincerely,

A handwritten signature in black ink, appearing to read 'T. Quaadman', with a long, sweeping horizontal stroke extending to the right.

Tom Quaadman

cc: The Honorable Jay Clayton
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman