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Ladies and Gentlemen:

We respectfully submit this letter in response to the request for comment by the Securities and Exchange Commission (the "Commission" or the "SEC") on its proposed new rule in Release No. 33-10607; File No. S7-01-19 (the "Release") that would permit issuers that are not "emerging growth companies" to engage in oral or written communications with potential investors that are, or are reasonably believed to be, qualified institutional buyers ("QIBs") or institutional accredited investors ("IAIs"), either prior to or following the filing of a registration statement, to determine whether such investors might have an interest in a contemplated securities offering. We thank the Commission for its efforts to propose this rule and the opportunity to provide our comments.

We broadly support the Commission's efforts to extend to all issuers an accommodation that is currently available only to emerging growth companies ("EGCs"). We agree with the observation that pre-filing solicitations by EGCs pursuant to Section 5(d) of the Securities Act of 1933 (the "Securities Act") have not raised any significant investor protection concerns. We see proposed Rule 163B as a commendable effort to level the playing field for EGCs and other issuers contemplating a registered securities offering. Permitting all issuers to "test the waters" will give them the same cost-effective means currently enjoyed by EGCs for evaluating market interest before incurring the costs associated with a potential public offering. We concur with the view that the ability to test the waters may also encourage a greater number of issuers to participate in the public markets, which would promote increased numbers of investment opportunities for more investors, including retail investors. In addition, existing investors in those issuers that ultimately take advantage of the proposed exemption should also benefit in the form of a potential increase in the enterprise value of such issuers by enabling them to pursue a more efficient capital raising strategy.

A. Proposed Exemption.

While it is true that many recent companies conducting registered initial public offerings in the United States have been EGCs, the potential benefits of testing-the-waters communications are not limited to companies with less than $1.07 billion of annual revenue. We believe that companies with greater than $1.07 billion of revenue may wish to communicate with investors before deciding to proceed with a registered offering for a variety of reasons: (1) to better gauge the demand for and valuation of their securities; (2) to settle on offering terms and size to align with market interest; (3) to reduce the risk of having to withdraw a publicly filed registration statement, thus mitigating potential reputational damage; (4) to decrease the risk of public disclosure of sensitive or proprietary information to competitors if the issuer decides not to proceed with a public filing of a registration statement due to insufficient investor interest or adverse market conditions; and (5) to save some or all of the cost of preparing and publicly filing a registration statement in the event of disappointing investor feedback. By gathering information from investors before publicly filing a registration statement, issuers should increase their likelihood of conducting successful public offerings, which in turn we believe should result in a greater number of registered offerings in the United States.

We do not believe that the proposed expansion of permissible test-the-water communications raises investor protection concerns. To begin with, we do not believe that the practice of testing the waters by EGCs has raised any such concerns, and in fact has aided investors in many cases by giving them additional time to evaluate particular investment opportunities. It is well established that QIBs and IAIs have the financial sophistication and resources to "fend for themselves," making the protections of the Securities Act's registration process unnecessary. We do not think that the proposed expansion of the use of these communications raise any concerns of misleading marketing or hyping for several reasons: (1) such communications will be deemed "offers" that are subject to Section 12(a)(2) liability (see below); (2) issuers will know that it is common Commission Staff practice in connection with its review of the registration statement to request supplemental submission of any written test-the-waters materials that the issuer used with investors; (3) prospective underwriters who assist the issuer in preparing test-the-waters materials and arrange investor meetings will be concerned about adverse reputational damage if materials contain misleading or over-hyped information; and (4) prior to making a binding investment decision, solicited investors will have the opportunity to compare the information that they reviewed in testing-the-waters meetings against the filed registration statement (which is subject to liability under Section 11 of the Securities Act) to obtain potentially more detailed information about the issuer and the offering and to confirm consistency with the earlier materials.

We agree that test-the-water communications under proposed Rule 163B should be deemed “offers” under Securities Act Section 2(a)(3) that are subject to Section 12(a)(2) liability. In our view they are clearly “offers” within the meaning of that term for purposes of the Federal securities laws. Since one of the primary goals of using test-the-waters communications is to provide prospective investors additional time to evaluate, understand, and ask questions about potential investment opportunities, the conclusion that they should be deemed “offers” is, in our view, inescapable.

We do not believe that the rule should require written test-the-waters communications to be legended and/or filed with the Commission and to become subject to Section 11 liability, as such a requirement would effectively make them available to prospective investors that are not QIBs or IAIs. As the Commission notes in the proposal, these types of investors (QIBs and IAIs) are generally considered to have the ability to assess investment opportunities, thereby reducing the need for the additional safeguards provided by a filing or legending requirement. We believe the remedies afforded by Section 12(a)(2) and Section 10(b) under the Exchange Act are sufficient protections for investors, and imposing potential Section 11 liability is unnecessary. Moreover, even if legends were to be required, we do not think the rule should prescribe their content: market practice has sufficiently developed with respect to test-the-waters communications used by EGCs and we expect that market practice for such communications in reliance on the new rule would likely be consistent.

We believe both oral and written solicitations of interest from QIBs and IAIs should be permitted both before and after a registration statement is filed, particularly since all issuers are now eligible to submit drafts of their registration statement on a confidential basis. We also support the view that such communications should not be treated as free writing prospectuses -- to do so would thwart the usefulness of proposed Rule 163B in the initial public offering context, since free writing prospectuses cannot be used by the issuer until the very end of the registration process after a price range has been included on the cover page of the prospectus. If the Commission were to limit the new exemption to communications made only after the public filing of a registration statement, that would defeat many of the potential benefits to issuers of the exemption as proposed. Issuers will have incurred significant costs in preparing and filing the registration statement (which may include competitively sensitive information), only to discover afterwards that investors were not prepared to meet the issuer’s expectations for the offering or that market conditions have changed. Such an issuer would also suffer some adverse reputational consequences associated with withdrawing a registration statement because of a perceived market failure. These risks, we think, would continue to deter some issuers from exploring public market alternatives, exactly the opposite result of one of the stated goals of the Commission.

We do not believe there should be any exemption from Regulation FD for some or all of the communications made in compliance with the proposed rule. Testing-the-water activities should only be conducted in full compliance with Regulation FD, including if necessary obtaining express confidentiality agreements from solicited investors if material non-public information will be conveyed. We note also that, as a general matter, testing-the waters communications are likely to be used more frequently by companies that are not subject to Regulation FD.

B. Eligibility.

We agree with the proposal that the rule should be available to all issuers, and there should be no exclusions. We believe that QIBs and IAIs have the sophistication to evaluate investment opportunities regardless of the type of issuer. Already today, accredited investors routinely evaluate investment opportunities presented to them by all types of issuers in connection with private placements, in which such investors receive substantially less disclosure than that required in public offerings. If, as a result of the adoption of the proposed exemption, more issuers (both in number and by type) offer their securities in the public marketplace, investors should benefit from greater liquidity of their investments compared to what they would have had if such securities were instead acquired in a private placement. We support initiatives of the Commission that are designed, as we think the current proposal is, to increase the number of registered offerings, which among other things will lead to a more diverse pool of issuers in which any investor (including retail investors) may invest and increased transparency in the marketplace.

C. Investor Status

We agree with the proposal that issuers should be required to establish a reasonable belief that the potential investors involved in test-the-waters communications are QIBs and IAIs. We do not believe that any higher standard is necessary. Unlike in the context of Rule 506(d), all investors who are targeted with Rule 163B communications and who in turn proceed to make an investment in the issuer will ultimately have the benefit of a registration statement that has been declared effective and would presumably be in compliance with the Securities Act and the rules and regulations thereunder. We do not believe that specific guidance on establishing reasonable belief is necessary. Issuers currently rely on various indicia (publicly available financial statements of prospective investors, documents filed by them with the Commission or other government agencies, or a certification by the chief financial officer of such prospective purchaser, among others) to establish a reasonable belief regarding an investor's status as a QIB or accredited investor, and we think such system works reasonably well to ensure appropriate status. Issuers and their advisors should be allowed to follow reasonable steps based on the particular facts and circumstances of a prospective investor without having to abide by inflexible prescribed methods that may be unduly costly or time consuming.

Although as a general proposition we support the Commission's initiatives over the years to liberalize communications during the registration process, we think a gradual approach in this regard is advisable. Accordingly, we agree with the approach in proposed Rule 163B that test-the-waters communications should be limited to investors that are QIBs and IAIs. We think the current testing-the-waters activities by EGCs do not suffer in any appreciable respect as a result of the limitation in Section 5(d) to investors that are QIBs or IAIs. We believe that QIBs or IAIs are in the better position, compared to other investors, due to access to greater resources and expertise, to evaluate testing-the-waters communications as part of the total mix of information, including the disclosures in the subsequent filed registration statement, provided in the context of an offering.

D. Non-exclusivity of proposed Rule 163B

We see no benefit in eliminating other exemptions that may be available to issuers for similar communications in various circumstances. Issuers may conclude that pre-offering communications with only QIBs and IAIs may not be sufficient for their purposes, and we think in such cases they should be permitted to look to other exemptions to expand the nature and targets of their communications (as long as they comply with the specific requirements of such other exemptions). It would, we believe, be counter to the Commission's approach in liberalizing communications to eliminate other permissible communications exemptions at the time of adopting Rule 163B. We do not foresee, in the adoption of Rule 163B, any impacts on the other exemptions that are available to various types of issuers or in connection with certain types of offerings (e.g., Section 5(d), Rule 163, Rule 255), so accordingly we would urge the Commission to retain those exemptions and adopt Rule 163B as a non-exclusive exemption.

E. Text of Proposed Rule 163B

We strongly encourage the Commission to omit proposed Section (a)(2) of proposed Rule 163B. Unlike in Rule 144 or certain other "safe harbors" from Securities Act registration, we believe that "anti-evasion" language is inappropriate in a rule with respect to permissible communications. It is very difficult to hypothesize how any testing-the-waters communication itself could constitute part of a scheme to evade Section 5 or, frankly, how an issuer or its advisors would make such a determination. We believe that including Section (a)(2) would create uncertainty and thereby limit the utility of proposed Rule 163B. In this regard, we note that neither Section 5(d) of the Securities Act nor Rule 163 or Rule 163A contain similar "anti-evasion" language.

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In this comment letter we are not commenting on any of the provisions of the Release relating to investment companies.

We thank the Commission for the opportunity to provide our feedback on the above matters. To discuss further, you may direct questions or comments to William J. Whelan, III, Stephen L. Burns, William V. Fogg, Andrew J. Pitts or Craig F. Arcella at (212) 474-1000.

Respectfully submitted,

/s/ Cravath, Swaine & Moore LLP

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