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April 29, 2019

Via E-mail: rule-comments@sec.gov

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

Attention: Brent J. Fields, Secretary

Re: Solicitations of Interest Prior to a Registered Public Offering – File No. S7-01-19

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Securities and Exchange Commission's (the "Commission") proposed new Rule 163B (the "Proposed Rule") that would permit all issuers, as well as persons acting on their behalf, such as underwriters, to assess market interest for a proposed registered offering by engaging in oral and written communications with 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.[1]

We strongly endorse the Commission's efforts to expand the permitted use of such "test-the-waters" communications to all companies, regardless of size or reporting status. In our experience, we have seen the benefits of test-the-waters communications for the emerging growth companies ("EGCs") with whom we have worked on securities offerings. We believe that the Proposed Rule would significantly

[1] Release No. 33-10607; File No. S7-01-19 (February 19, 2019) (the "Release").

improve the capital-raising process for non-EGC issuers, allowing them to gauge institutional investor interest before a potential registered offering, saving time and costs as issuers would be able to focus on offerings that are more likely to attract investor demand, potentially resulting in additional registered offerings in the United States and more investment opportunities for U.S. investors, including retail investors.

I. Proposed Exemption

We strongly believe the Proposed Rule would represent a substantial improvement relative to the current rules governing pre-offering communications, which generally permit only EGCs and, in certain limited circumstances, well-known seasoned issuers ("WKSIs"), to engage in pre-offering communications with potential investors. Given the volatility of the capital markets, the costs of raising capital and the need, in some cases, to do so quickly, all issuers will benefit from being able to gauge market interest in a potential registered offering by soliciting preliminary interest from institutional investors.

Further, we believe that the Proposed Rule would be beneficial not only for companies determining whether to pursue an initial public offering, but also for already-public companies, because it would permit more issuers, and persons acting on their behalf, including underwriters, to engage in "wall crossings", or confidential pre-marketing activities, to a limited number of investors prior to making a final decision to launch a registered offering. In our experience, wall crossings have become a common and effective marketing tool for registered offerings in recent years, especially during periods of market volatility, because they allow issuers to gauge interest in a proposed offering on a confidential basis prior to public disclosure of the offering. Under the current rules, however, the ability of a non-EGC to engage in such communications for a registered offering is limited to WKSIs or issuers with a registration statement on file. Adopting the Proposed Rule would level the playing field by allowing every issuer,

whether or not it is an EGC or WKSI, to engage in wall-crossing activities even when it does not have a registration statement on file.

Our only suggestion for improving the Proposed Rule would be to eliminate Section (a)(2), which states that the rule would not be available in situations involving a plan or scheme to evade the requirements of Section 5 of the Securities Act of 1933 (the "Securities Act"). Given the "reasonable belief" standard embodied in Section (b)(1) of the Proposed Rule, we do not understand how the "scheme to evade" concept could ever apply, in practice, to covered test-the-waters communications, and so are concerned that Section (a)(2) may have a chilling effect or otherwise give rise to confusion, and should therefore be eliminated.

II. Benefits to Issuers

Historically, the staff of the Division of Corporation Finance (the "Staff") has taken the position that, once an offering is started privately, it may not be turned into a public offering. Although Rule 155 under the Securities Act provides an integration safe harbor that addresses this situation, it is limited and restrictive and, in our experience, has very little practical utility (and this would most certainly be the case during periods of market stress, when wall-crossing procedures would be most needed and useful). The upshot is that an issuer is effectively precluded from meeting with investors to gauge investor interest while preserving the flexibility to complete the offering either through a private placement or a public offering. We believe the Proposed Rule would resolve this issue by permitting any issuer, with or without having already filed a registration statement, to measure interest from potential investors regarding both public and private offerings. From our experience, such optionality would be beneficial to all issuers, not just EGCs, particularly during times of economic stress, when capital needs to be raised within very short time frames, and issuers may be reluctant to expend

resources preparing for a registered offering for which there may ultimately be insufficient investor demand.

III. Benefits to Investors and Investor Protection

In addition to expanding the options available to issuers by permitting them to freely explore both public and private offerings, the Proposed Rule should also benefit potential investors. With the ability to get better information as to potential investor demand for various offerings, issuers should be more likely to pursue offerings in the United States, and to do so on a registered basis. By increasing the attractiveness of the U.S. capital markets to issuers, the Proposed Rule should also increase U.S. investors' access to these potential investment opportunities.

We do not believe that requiring communications pursuant to the Proposed Rule to be filed or treated as a free writing prospectus would serve any useful purpose. Although EGCs were initially hesitant to use test-the-waters communications after Section 5(d) of the Securities Act was adopted in 2012, over time, we now see most, if not all, EGCs using the test-the-waters accommodation—along with the confidential submission process—to confidentially gauge market interest prior to pursuing registered public offerings. We have also seen market participants developing robust policies and procedures for test-the-waters communications in order to ensure that information communicated in test-the-waters materials does not conflict with the information ultimately presented in the registration statement. In light of this market practice, and given the sophistication of QIBs and IAIs, we see no reason to condition the Proposed Rule on a filing requirement. This is consistent with the approach taken by Rule 144A and Regulation D under the Securities Act, neither of which requires the filing of offering materials. Accordingly, we do not believe that there is any need for specific legends or filing requirements for test-the-waters communications. Rather, the Staff will have the ability to request test-the-waters materials in connection with its comment process.

IV. Eligibility

We agree that the Proposed Rule should extend to all issuers, including non-reporting issuers, EGCs, non-EGCs, WKSIs, and investment companies. In our experience, the size or reporting status of an issuer is not correlated with its desire to gauge investor interest prior to a registered public offering. We also believe that the scope of the Proposed Rule, in applying to both written and oral communications that occur either before or after a registration statement is filed, is correct. Limiting the Proposed Rule to cover only communications that occur after a registration statement is filed would be counter to the Commission's stated intent of providing issuers with a "cost-effective means for evaluating market interest before incurring the costs associated with [...] an offering", and would require issuers to incur potentially unnecessary costs in connection with the filing, if investor interest in a registered offering turns out to be limited. Also, there is always the concern of a potential adverse market reaction to a situation in which the issuer files for a registered offering, but then is unable to complete the offering.

V. Non-Exclusivity

We strongly endorse non-exclusivity of the Proposed Rule and believe that issuers should be able to continue to rely on any other available exemptions under the Securities Act when communicating with investors about a contemplated securities offering. Issuers who engage in pre-offering oral or written communications with QIBs or IAIs may determine that such communications are not adequate, or may determine to pursue a different approach, in which case such an issuer should not be precluded from relying on other available exemptions, such as Rule 144A, Rule 164 or Rule 506 under the Securities Act or Rule 255 of Regulation A.

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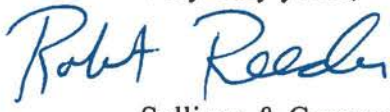
If you would like to discuss our letter, please feel free to contact Robert E. Buckholz, Robert W. Reeder III or Catherine M. Clarkin at (212) 558-4000, or John L. Savva or Sarah P. Payne at (650) 461-5600.

Very truly yours,



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