



April 26, 2019

Ms. Vanessa Countryman
Acting Director
Office of the 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. S7-01-09)

Dear Ms. Countryman:

The American Securities Association¹, representing our nation's Main Street and regional financial services companies, appreciates this opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposal to allow more issuers to communicate directly with potential investors prior to an initial public offering (IPO) ("Proposal"). The ASA strongly supports the reforms outlined in the Proposal and appreciates the ongoing work of the SEC to facilitate capital formation for growing businesses.

Background

The 2012 Jumpstart our Business Startups ("JOBS") Act included provisions that allowed emerging growth companies ("EGCs") to engage in communications with institutional investors prior to completing a public offering (known as "testing the waters"). As the Proposal notes, the vast majority of public companies (nearly 90%) that have gone public since the JOBS Act was passed have filed as EGCs, and the ability to test the waters prior to an IPO has proven to be one of the more popular JOBS Act provisions.

As a general matter, effective communication between investors and companies is a bedrock principle of our capital markets. Effective communication allows for more efficient allocation of capital by helping investors better understand the long-term opportunities and risks associated

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.



with businesses. The period leading up to an IPO is a critical time for businesses to “tell their story” to potential investors, which is a key component to a successful public offering.

As noted in the Proposal, the Commission has in the recent past relaxed some restrictions that had been placed on communications between pre-filing companies and institutional investors. In 2005 – as part of the Securities Offering Reform rulemaking package – the SEC allowed well-known seasoned issuers (WKSIs) to engage in oral or written communications with potential investors without violating the “gun jumping” provisions of the Securities Act. And in 2015, the SEC also allowed companies planning a Regulation A offering to test the waters prior to raising capital under the newly adopted “Reg A+” provisions of the JOBS Act.

These actions reflect the opinion of both Congress and the SEC that pre-offering communications can enhance the long-term performance of businesses and keep investors better informed. In November 2017, the U.S. House of Representatives passed legislation to allow all issuers to take advantage of the JOBS Act test the waters provision by a vote of 419-0.² This legislation was later included as part of the JOBS and Investor Confidence Act – a package of capital markets reform bills intended to help companies raise more capital, and which also passed the House of Representatives by a wide bipartisan margin.³

The Proposal Will Facilitate Public Offerings Without Undermining Investor Protection

The ASA does not believe that the Proposal will harm investors in any manner or lead to any increase in fraud or manipulation of the public markets. If anything, the Proposal will enhance investors’ understanding of businesses looking to enter the public markets, and it will hold issuers more accountable in the way that they tell their story to potential shareholders.

As with previous efforts by the Commission to increase issuer/investor engagement, the Proposal clearly states that that any “information provided in a test-the-waters communication under the proposed rule must not conflict with material information in the related registration statement.”⁴ The Proposal also reminds companies that they must consider whether information disclosed in test the water discussions triggers any obligations under Regulation FD. Put simply, the Proposal does not interfere with any existing investor protection requirements and would not result in one group of investors receiving “selective disclosure” over others.

Other Capital Formation Initiatives

The ASA continues to be concerned about the decline in the number of U.S. public companies over the last two decades. When fewer companies go public, long-term economic growth is inhibited and Main Street investors have fewer opportunities to invest their hard-earned money

² H.R. 3903 Encouraging Public Offerings Act of 2017 (115th Congress)

³ House Amendment to S. 488, JOBS and Investor Confidence Act (115th Congress) Passed House July 2018 406-4.

⁴ Proposal at 12



in growing businesses. For too long, the SEC abdicated its statutory mandate to facilitate capital formation, so we appreciate this latest effort to re-focus the SEC on improving the attractiveness of our public capital markets.

While the ASA worked closely with the House and Senate to develop the JOBS and Investor Confidence Act, the SEC need not wait for Congress to act in order to pursue a capital formation agenda. Indeed, there are a host of initiatives the SEC can undertake on its own without need Congressional authorization, and we encourage the SEC to continue to advance this agenda.

In 2018, the ASA – along with seven other organization – released a report entitled “Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public” that laid out 22 recommendations for how to make out public markets more robust for the 21st Century.⁵ This report contains a number of ideas that would garner the support of a broad group of market participants and make it easier for companies to complete a public offering.

As the SEC considers its next steps on capital formation, the ASA is particularly supportive of the following ideas:

- 1) Promote research coverage for small companies by allowing investment banking and research analysts the ability to jointly attend “pitch” meetings to have direct dialogue with EGCs. The SEC should also codify by rulemaking the ability of broker-dealers to receive hard dollars for research payments in order to mitigate the harmful effects of the research provisions of the EU Markets Financial Instruments Directive (MiFID) II.**
- 2) EGCs should be afforded the option of listing their securities on a single exchange and to work with that exchange to determine an optimal tick size for their stock. This would facilitate the secondary market trading of small public companies.**
- 3) The SEC should broaden the definition of an “accredited investor” in order to increase the flow of capital to early stage companies and provide more Main Street investors the ability to invest in private companies before they go public.**
- 4) The SEC should institute a reasonable oversight regime for proxy advisory firms and take steps to ensure that asset managers vote their shares in a manner consistent with the economic best interest of their shareholders.**

Conclusion

⁵ Report available at <https://www.uschamber.com/report/expanding-the-ramp-recommendations-help-more-companies-go-and-stay-public>



The ASA strongly supports the Proposal allowing all issuers to engage in written or oral communications with potential investors before an IPO. We believe this will ultimately help more companies complete a successful IPO and we appreciate the SEC again advancing a positive initiative. The ASA stands ready to assist the Commission on its important capital formation agenda in any way we can.

Sincerely,

Christopher A. Iacovella
Chief Executive Officer
American Securities Association