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April 29, 2019

Re: Solicitations of Interest Prior to a Registered Public Offering
Release No. 33-10607
File No. S7-01-19

via e-mail: rule-comments@sec.gov

Ms. Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Countryman:

We are submitting this letter in response to the Commission's request for comment on the above-referenced rule proposal. We appreciate the Commission's willingness to solicit comments on its proposal to expand so-called "testing the waters" ("TTW") relief to all newly public companies, seasoned reporting companies, smaller reporting companies and pre-IPO companies generally, regardless of emerging growth company status, as well as to business development companies and other registered investment companies. This important proposal would allow companies to gauge investor interest in a registered offering prior to committing significant resources to prepare for one. We strongly support this proposal and believe it will greatly ease access to capital and contribute positively to our markets with no adverse impact on investor protection. Given that TTW communications under proposed rule 163B are limited to qualified institutional buyers and institutional accredited investors, we believe there is no reason to exclude any category of issuers from this expansion and that the Commission should adopt the rule as proposed.

Pre-marketing an offering on a confidential basis to a handful of investors prior to making a final decision to launch has become a common and useful marketing tool for registered offerings for EGCs, and we believe the clear ability to engage in these sorts of investor communications is one of the most beneficial innovations of the JOBS Act of 2012. Before launching an IPO, EGC issuers can gauge interest before publicly filing a registration statement, saving them money and embarrassment if there is no market appetite for their securities and helping position them for a more successful offering if there is. Post IPO, this helps them pre-market during times of market volatility.

Currently, non-EGCs cannot take advantage of this expanded TTW process unless they have publicly filed a registration statement or already have a shelf registration statement on file. We do not see any reason to treat non-EGCs differently. If an offering moves forward, investors will get a statutory prospectus in due course and the expanded TTW process will have been limited to QIBs and IAIs – sophisticated investors who are unlikely to ignore the statutory prospectus and rely exclusively on information provided to them during the TTW process. Proposed rule 163B will simply level the capital-raising playing field for all companies.

The release asks for comment, among other things, on whether solicitations of interest from QIBs and IAIs prior to and following the filing of a registration statement provide issuers with flexibility before launching a registered offering. Understanding the appetite for a company's offering is critical before committing significant managerial and financial resources to a registered offering. As a result the proposed rule would permit more companies to explore a potential public offering, and possibly adjust the structure of the financing and timing in order to maximize the likelihood of success, in a relatively cost-efficient manner. Depending on results of TTW for a specific offering, a company could abandon or postpone the offering without running a risk of impacting its stock price due to market concerns over the company's inability to complete an announced financing.

Addressing the release's request to comment on whether this expanded TTW process should be exempt from Regulation FD, we believe it should not. If the proposed offering or its abandonment were itself material to investors of an already-public company, the company could easily comply with Regulation FD the same way companies do today, benefitting all investors equally. The company would have to obtain confidentiality undertakings and restrict the contacted investors from trading in the company's securities for a day or two, until the contemplated offering is publicly launched or abandoned. This process ensures that investors are protected and the timing of material information disclosure remains fair for all investors.

We also address the release's request to comment on any impact on investor protection, liability and the antifraud provisions. As the expanded TTW standard would be limited to QIBs and IAIs, these sophisticated investors are able to give feedback to companies without needing additional protection at this stage, as noted above. Further, the limitation to QIBs and IAIs substantially reduces any concern over conditioning or hyping the markets. This process has become invaluable to EGCs, and we see no reason for not allowing all companies to benefit from this JOBS Act innovation. Investors remain protected, as following the decision to launch a public offering, a registration statement will be filed. We believe potential investors approached during the TTW process will be appropriately protected by the Commission's proposal to deem these communications "offers" that remain subject to Section 12(a)(2) liability and the anti-fraud provisions, such as rule 10b-5.

We do not recommend any requirement to file TTW materials. A filing requirement, which does not currently apply to EGCs, would substantially increase the time and expense of preparing TTW materials because of the need for legal review by outside securities counsel for both the company and the proposed underwriters. Additionally, much of the interaction in TTW meetings is oral in nature and so a filing requirement would not cover what is often the most substantive component of the meeting (unless the Commission were to take the further unprecedented step of requiring the filing of transcripts – a regulatory incursion into the marketing process that we are confident the Commission does not contemplate).

The release further requests comment on the sufficiency of the company's "reasonable belief" that an investor is a QIB or IAI. We think the reasonable-belief standard is sufficient, and that the standard for rule 163B needs to be no more burdensome for companies and their underwriters than current practice in rule 144A and Section 4(a)(2) private placements, in which companies and their underwriters refer to their own documentation as well as to industry-known reliable sources to check investor qualification. While it is possible that occasionally an institutional investor that does not meet the $5 million asset test for accredited status would be contacted for TTW purposes, designing a set of protocols that go beyond the reasonable-belief standard would risk interrupting the simplicity, rapidity and fluidity that today make the TTW process as effective as it is. And certainly nothing as burdensome as the procedures contemplated by rule 506(c) is appropriate here – after all, unlike with Regulation D offerings, no investors will purchase securities in an offering subject to proposed rule 163B until they have been furnished with a statutory prospectus. We also do not recommend that the Commission offer a non-exclusive list of methods for establishing a reasonable belief, as such non-exclusive lists often have a distinctly normative impact on the advice securities lawyers give their clients about what kinds of procedures are necessary for compliance.

We appreciate the opportunity to participate in the process, and would be pleased to discuss our comments or any questions that the Commission or its staff may have, which may be directed to Bruce K. Dallas, Joseph A. Hall, Michael Kaplan or Richard D. Truesdell, Jr., of this firm at 212-450-4000.

Very truly yours,

Davis Polk & Wardwell LLP