

April 29, 2019

VIA EMAIL

Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Securities Act Release No. 10607 (File No. S7-01-19): Solicitations of Interest Prior to a Registered Public Offering (“Proposed Rule”)

Dear Ms. Countryman:

Dechert respectfully submits this comment to the Securities and Exchange Commission (“SEC” or “Commission”) in connection with the Proposed Rule to exempt from Sections 5(b)(1) and 5(c) of the Securities Act of 1933, as amended (“Securities Act”), certain “test-the-waters” communications by issuers that are contemplating a registered securities offering.¹ We intend for this comment to respond, in particular, to the Commission’s request for comment on the possible applicability of the Proposed Rule to funds that rely on the private fund exceptions from the definition of “investment company” set forth in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940, as amended (“Investment Company Act”).

Specifically, comment request number 21 of the Proposed Rule inquires: (1) whether private funds would benefit from the exemptions from Sections 5(b)(1) and 5(c) of the Securities Act under the Proposed Rule; and (2) whether other legal restrictions, including the restrictions on public offerings in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act, would limit private funds from engaging in the types of communications covered by the Proposed Rule.²

¹ Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and worldwide. Our clients include, among others, a wide variety of registered and unregistered investment companies (including mutual funds, closed-end funds and business development companies), private funds, investment advisers, broker-dealers and institutional investors. An extensive part of our services for these clients involves assistance with the federal securities laws in the organization, distribution and operation of investment funds. The comments herein reflect our own views and not necessarily the views of our clients.

² See *Solicitations of Interest Prior to a Registered Public Offering*, Rel. No. 33-10607 (Feb. 19, 2019) (“Proposed Rule”), at pp. 27–28.

Because private funds generally offer their securities pursuant to Section 4(a)(2) of the Securities Act (including Rule 506 thereunder), which separately provides for an exemption from Section 5, we do not believe that the specific exemptions from Sections 5(b)(1) and 5(c) under the Proposed Rule would currently benefit private funds. In particular, Section 4(a)(2) excludes non-public offerings from all of the requirements of Section 5, including the gun-jumping restrictions in Sections 5(b)(1) and 5(c). A fund relying on Section 4(a)(2) would thus not have a direct use for the specific exemptions provided for by the Proposed Rule. Consistent with this view, guidance from the Commission and the Staff has previously recognized that an issuer may rely on Section 4(a)(2) for exclusion from Section 5, including up to the filing of its registration statement, provided that its offering remains non-public through such period.³

In this context, if it is the Commission's intent to allow private funds to benefit from the test-the-waters communications contemplated by the Proposed Rule, the Commission would need to take further action to provide that these communications generally would not jeopardize a private fund's reliance on Section 4(a)(2) (including Rule 506) prior to its registered offering.

Relatedly, with respect to whether other legal restrictions would limit a private fund from engaging in test-the-waters communications, we note that guidance has consistently expressed the view that an offering pursuant to Section 4(a)(2) of the Securities Act generally would qualify as non-public for purposes of Sections 3(c)(1) and 3(c)(7) of the Investment Company Act.⁴

³ See *Revisions of Limited Offering Exemptions in Regulation D*, Rel. No. 33-8828 (Aug. 3, 2007), at pp. 53–55 (stating that “a company’s contemplation of filing a Securities Act registration statement for a public offering at the same time that it is conducting a Section 4(2)-exempt private placement would not cause the Section 4(2) exemption to be unavailable for that private placement” and also that “the filing of a registration statement has been viewed as a general solicitation” ceasing a non-public offering).

Moreover, Rule 152 under the Securities Act provides that Section 4(a)(2) will exclude from Section 5 an offering “not involving any public offering at the time of said [offering] although subsequently thereto the issuer decides to make a public offering and/or files a registration statement.”

⁴ See, e.g., *Santa Barbara Securities*, SEC No-Action Letter (pub. avail. April 8, 1983) (“[W]e generally interpret the nonpublic offering requirement of section 3(c)(1) consistently with the nonpublic offering exemption under section 4(2) of the Securities Act and rule 506.”); *Capital Supervisors, Inc.*, SEC No-Action Letter (pub. avail. June 16, 1983) (“Generally, the term ‘public offering’ in section 3(c)(1) of the 1940 Act has the same meaning it has under section 4(2) of the 1933 Act which exempts from the registration requirements of section 5 of the 1933 Act ‘transactions by an issuer not involving any public offering.’”); SEC Division of Investment Management, *Protecting Investors: A Half Century of Investment Company Regulation*, 103, n. 4 (1992) (“An offering that qualifies as a non-public offering under section 4(2) of the [Securities Act] and rule 506 of Regulation D . . . also generally qualifies as non-public for purposes of section 3(c)(1).”); “Investment Company Registration and Regulation Package,” SEC Division of Investment Management (Feb. 19, 2013) (“The term ‘public offering,’ as used in Section 3(c)(1) and Section 3(c)(7) of the Investment Company Act, has the same meaning that it has in Section 4(2) of the Securities Act.”).

Consistent with this guidance, we would not understand the public offering restrictions in Sections 3(c)(1) and 3(c)(7)—including the restrictions relating to “propose[d]” public offerings⁵—as creating additional concerns to those discussed above with respect to Section 4(a)(2) of the Securities Act. In alignment with Section 4(a)(2), a fund may generally rely on Sections 3(c)(1) or 3(c)(7) of the Investment Company Act, including up to the filing of its registration statement, provided that its offering remains non-public pursuant to Section 4(a)(2) of the Securities Act through such period.

We note that the Proposed Rule, in posing the above questions, appears to overstate the concern with the public offering restrictions in Sections 3(c)(1) and 3(c)(7) of the Investment Company Act as a factual matter. Specifically, the Proposed Rule suggests that, “in practice, funds currently do not typically rely on [Sections 3(c)(1) and Sections 3(c)(7)] during [a] seeding period” and instead elect to “typically register as investment companies during a seeding period.”⁶ Contrary to this factual statement, it is our experience that funds often do rely on Sections 3(c)(1) and 3(c)(7) prior to a registered offering, including through seeding periods, initial performance periods and up to the filing of a registration statement, based on their compliance with Section 4(a)(2) of the Securities Act during these periods.⁷

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We appreciate the opportunity to comment on the Proposed Rule. If the Commission or its Staff have any questions or wish to discuss the matters discussed in this letter, please contact: David Vaughan at [REDACTED] or [REDACTED]; Jonathan Gaines at [REDACTED] or [REDACTED]; or Neema Nassiri at [REDACTED] or [REDACTED].

⁵ The restriction that an issuer is “not presently proposing to make a public offering” appears in Section 3(c)(1) of the Investment Company Act, and Section 3(c)(7) requires that an issuer “does not at that time propose to make a public offering.” We do not believe that Congress intended to create different standards between these sections, notwithstanding the slightly different language between them. Accordingly, this letter jointly addresses the restrictions on public offerings in Sections 3(c)(1) and 3(c)(7).

⁶ See Proposed Rule, *supra* note 2, at n. 55 and accompanying text.

⁷ In the context of the Volcker Rule, the Commission similarly “recognize[d] that an entity that becomes a registered investment company or business development company might, during its seeding period, rely on section 3(c)(1) or 3(c)(7).” *Prohibitions and Restrictions on Proprietary Trading and Certain Interests In, and Relationships with, Hedge Funds and Private Equity Funds*, SEC Rel. No. BHCA-1 (Dec. 10, 2013), at p. 534.

Very Truly Yours,

/s/ Dechert LLP

Dechert LLP