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April 30, 2019

VIA E-MAIL: rule-comments@sec.gov

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

Re: Request for Comments on Proposed New Rule 163B – File No. S7-01-19 (the "Release")

Dear Ms. Countryman:

We are writing to respond to the Commission's request for comments on its proposed new rule regarding solicitations of interest prior to a registered public offering, as set forth in the Release. New Rule 163B would permit any issuer 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 registered securities offering. In essence, the proposed rule would extend to all issuers the "test-the-waters" accommodation currently available to emerging growth companies ("EGCs") under Section 5(d) of the Securities Act. We are grateful for the opportunity to comment.

We strongly support the proposed rule. Experience with EGC issuers has proven the Section 5(d) accommodation to be a valuable tool in securities offerings, particularly in the IPO context, and that experience does not suggest any reason to hesitate in extending the same accommodation to other issuers.

Investor status

Under the proposed rule, the issuer may rely on its reasonable belief as to the status of potential investors as QIBs or IAIs. We think this is appropriate. We do not believe the Commission should specify steps that an issuer should take to establish such a belief; rather, we agree with the view expressed in the Release that a facts-and-circumstances approach is sufficient and that an issuer should continue to rely on its current methods for developing a reasonable belief regarding investor status under Rule 144A and Rule 501(a). We would suggest that the Commission consider specifying that such an approach is also sufficient under Section 5(d).

No limitations on content

Like Section 5(d), the proposed rule does not include specific limitations on the content of oral or written communications under the rule. We agree with this approach. In our experience with test-the-waters practices involving EGC issuers, they and their prospective underwriters have been cautious about the content of permitted communications, likely due to liability risk and the Commission staff practice of requesting copies of any written test-the-waters communications used to engage with potential investors. The Release notes that test-the-waters communications under the proposed rule must not conflict with material information in the related registration statement, which is consistent with the Rule 433 requirement for free writing prospectuses. We would suggest that the Commission specify that this is guidance, but not an additional condition for the availability of the exemption.

Amendment of Rule 405

The Release proposes to amend Rule 405 to exclude a written communication used in reliance on the proposed rule from the definition of free writing prospectus. We agree that the filing and legending contemplated in Rule 433 should not be required for written communications under proposed Rule 163B. The amendment to Rule 405 is arguably unnecessary, since an issuer relying on new Rule 163B would not rely on Rule 164 and consequently would not be subject to Rule 433, but it is a helpful clarification. We suggest that the Commission also exclude from the definition of free writing prospectus a written communication made in reliance on Section 5(d), to avoid any implication that the two forms of test-the-water communication should be treated differently. Similarly, we agree that – as specified in paragraph (b)(3) of the proposed rule – no filing under Rule 424(b) should be required, and suggest that the Commission consider confirming in the adopting release that no Rule 424(b) filing is required for test-the-waters communications under Section 5(d). Since the proposed rule is not intended to be exclusive, and an EGC issuer could rely on either the proposed rule or Section 5(d) for its test-the-waters communications, we believe a parallel approach to the exemptions would be appropriate.

Private placements following test-the-waters communications

The Release expresses the Commission's view that the availability of test-the-waters communications may facilitate capital formation by potentially lowering the costs and risks of the registered offering process for issuers, and may thus encourage issuers to conduct registered offerings. Our experience supports that view.

However, the Release acknowledges that after testing the waters an issuer could decide not to proceed with a registered offering and instead pursue a private placement. In some cases, the purposes of test-the-waters communications could include evaluating the relative merits of a registered offering and a private placement. Non-U.S. issuers, for example, often compare the advantages of offering equity securities on an SEC-registered basis or under Regulation S with a concurrent private placement to some U.S. investors.

An issuer choosing to test the waters will be well advised to consider whether doing so could constitute general solicitation that would be problematic if the issuer were ultimately to decide to raise capital in a private placement rather than a public offering. In this connection, Note 105 of the Release states that the Commission's 2007 guidance on how an issuer can conduct simultaneous registered and private offerings "would continue to apply." That guidance contemplates essentially a facts-and-circumstances analysis of whether a prospective investor became interested in the private placement by means of the registration statement or whether, for example, it had a substantive, pre-existing relationship with the issuer or its agents.

We do not agree that the same analysis should apply in the context of testing the waters under either Section 5(d) or proposed Rule 163B. The 2007 guidance addresses the consequences for a contemporaneous private placement of a truly "general" solicitation resulting from filing a registration statement for a public offering. By contrast, Congress in Section 5(d), and the Commission in proposed Rule 163B, have limited permissible solicitation to sophisticated institutional investors. Just as those investors have been judged to be able to fend for themselves in handling the potential for market conditioning otherwise prohibited by Section 5, so too should they be able to evaluate a possible private placement even if that is the first time the prospective investor was solicited by this issuer or its agents. Accordingly, to avoid unnecessarily constraining the test-the-waters process insofar as it may prejudice an issuer's decision ultimately to raise capital privately, we suggest that the Commission take the position that conducting test-the-waters communications in reliance on Rule 163B or Section 5(d) would not itself constitute general solicitation, whether or not there is a substantive, pre-existing relationship with the prospective investor.

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We thank you for the opportunity to submit this comment letter. Please do not hesitate to contact Nicolas Grabar or Elena Vespoli (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

Cleary Gottlieb Steen & Hamilton LLP