restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. In computing the two-year period for purposes of this provision, reference should be made to paragraph (d) of this section.

* * * * *

Dated: June 27, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secreatary.

[FR Doc. 95–16390 Filed 7–7–95; 8:45 am]

BILLING CODE 8010–01–P

17 CFR Parts 230 and 232

[Release No. 33–7188; File No. S7–18–95]

RIN 3235–AG52

Solicitations of Interest Prior to an Initial Public Offering

AGENCY: Securities and Exchange Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for comment a proposed rule that would allow issuers contemplating initial public offerings to solicit indications of investor interest in their companies prior to the filing of a registration statement under the Securities Act of 1933. The proposed rule would allow an issuer to assess potential investor interest in the company before incurring possibly significant costs associated with the preparation of offering disclosure documents. The proposals are intended to reduce the regulatory impediments and cost of accessing public markets consistent with investor protection interests.

DATES: Comments must be submitted on or before September 8, 1995.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters should refer to File No. S7–18–95. All comments received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C., 20549.

FOR FURTHER INFORMATION CONTACT: Richard K. Wulff, Office of Small Business Policy, Division of Corporation Finance, at (202) 942–2950 or James R. Budge, Office of Disclosure Policy, Division of Corporation Finance, at (202) 942–2910.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment a rule [1] that would permit an issuer prior to its initial public offering (''IPO'') to solicit indications of interest in the company's securities before filing a registration statement under the Securities Act of 1933 (the ''Securities Act'').[2] The Commission also is proposing to amend the ''test the waters'' provision [3] under Regulation A [4] to permit issuers that ''test the waters'' under Regulation A and decide to have a registered offering instead to do so without a 30 day waiting period, as well as permitting issuers to use Regulation A if, after ''testing the waters'' under the proposed new rule, they determine to go forward with a Regulation A offering instead of a registered offering.[5] In addition, Securities Act Rule 100 [6] would be amended to add a definition of direct participation investment program for purposes of the new rule, and Regulation S–T [7] would be amended to provide that the ''test the waters'' document for registered offerings may be submitted to the Commission in electronic format via the EDGAR system, at the option of the issuer.

I. Background

In 1992, as part of its Small Business Initiatives, the Commission introduced new procedures into Regulation A that allow issuers considering whether to undertake a public offering to ''test the waters'' for potential investor interest before undertaking a full-scale offering that requires the preparation, Commission filing and delivery to investors of the mandated offering documentation.[8] The initiative was intended to provide a cost-effective means for an issuer, with no established market for its securities, to determine whether there is any investor interest in its securities before undertaking an offering and incurring the full costs of compliance with the applicable disclosure requirements. If, after the solicitation, the issuer concludes there is insufficient or no investor interest, it can avoid significant, unnecessary compliance costs. If the issuer determines to proceed with the offering, it is required to provide potential investors with the full mandated disclosure documents. Since adoption of the ''test the waters'' procedures, 61 issuers have submitted solicitations to the Commission, 26 of which have proceeded to file Regulation A or registered offerings.

In 1993, the North American Securities Administrators Association, Inc. (''NASAA'')[9] undertook a two-year pilot program to consider and evaluate ''test the waters'' approach under state securities laws.[10] Nine states [11] have been participating in the pilot. The NASAA pilot procedures differ from those adopted under Regulation A in several respects, the most significant of which are: (a) a pre-use filing requirement; (b) more mandated information in the solicitation document; [12] (c) a requirement that the written solicitation document be delivered to those directly contacted; and (d) delivery of the prospectus at least seven days prior to sale. Several classes of issuers are disqualified from using the NASAA pilot ''test the waters'' procedures.

Various commenters have suggested that the Commission explore extending the benefits of the ''test the waters'' process beyond Regulation A.[13] Most recently, the Subcouncil on Capital Allocation of the Competitiveness

[1] Proposed Rule 135d.

[2] 15 U.S.C. 77a *et seq.*

[3] Securities Act Rule 254 [17 CFR 230.254].

[4] 17 CFR 230.251–230.263.

[5] Proposed amendments to Rule 254(d) [17 CFR 230.254(d)] and Rule 254(b)(4) [17 CFR 230.254(b)(4)].

[6] 17 CFR 230.100.

[7] 17 CFR Part 232.

[8] Release No. 33–6949 (July 30, 1992) [57 FR 36442]; Release No. 33–6996 (April 28, 1993) [58 FR 26509].

[9] NASAA is an association of securities commissioners from each of the 50 states, the District of Columbia, Puerto Rico, Mexico and several of the Canadian provinces.

[10] *See* NASAA's Proposed Statement of Policy on Solicitation of Interest (Test the Waters)(''NASAA's Statement'') which is set forth in an Appendix to this release.

[11] Colorado, Kansas, Massachusetts, Oklahoma, Oregon, Pennsylvania, Vermont, Virginia, and Washington.

[12] The NASAA Statement requires, in addition to the information set forth in Rule 254, (1) the date of the issuer's organization as well as a statement of its stage of development; (2) a more specific description of the issuer's business, products and services and the manner in which the issuer intends to carry out its activities; (3) a general indication of the manner of using proposed proceeds from the offering; and (4) a complete listing of the issuer's officers and directors, their locations, employment history and educational background. *See* Solicitation of Interest Form in the NASAA Statement in the Appendix to this release.

[13] The comment letter prepared by members of the Committee on Federal Regulation of Securities, the Committee on State Regulation of Securities and the Small Business Committee of the Section of Business Law of the American Bar Association on the Small Business Initiatives suggested in 1992 that the Commission explore extending use of ''test the waters'' beyond the Regulation A context to other offerings. *See* letter dated July 8, 1992 in response to request for comment on the Small Business Initiatives (Release No. 33–6924 (March 12, 1992) [57 FR 9768]).

Policy Council [14] recommended that in the interest of facilitating small business capital raising, these issuers be permitted to ''test the waters'' in advance of undertaking a registered IPO.

Experience under Regulation A suggests that the ''test the waters'' initiative provides issuers of small offerings a useful and cost-effective means of assessing whether there is sufficient potential interest in the company as an investment to proceed with a Regulation A offering. To date, these solicitations do not appear to have raised significant investor protection concerns. Accordingly, the Commission today is soliciting comment on the appropriateness of providing a similar ''test the waters'' option for registered IPOs. [15]

In considering whether to provide a ''test the waters'' process for registered IPO's, the Commission is committed to assuring that the interests of investors are not compromised. The release solicits comment on a number of limitations or conditions that go beyond those currently required in connection with Regulation A offerings. These comments are intended to provide a basis for the Commission to assess the need for any or all of these provisions to assure that investors have the full opportunity to review and consider the information mandated by the Securities Act in making their investment decision, and that the solicitation of interest communications are not such as to cause investors to overlook the mandated disclosures. [16]

The IPO market is one of the great strengths of the U.S. capital markets, and its breadth and depth is unique. [17] In the first five years of the 1990's, $114.8 billion have been raised in the common equity IPO market. [18] Continued investor confidence is key to maintaining the strength and vitality of this market, and any ''test the waters'' process implemented by the Commission will have to be consistent with maintaining this confidence.

II. Proposals

A. Description of proposed Rule 135d

Under the proposal, an eligible issuer considering a registered IPO would be permitted to solicit indications of interest prior to filing a registration statement under the Securities Act, subject to the conditions and limitations of proposed new Rule 135d. While assuring that investors receive information mandated by the Securities Act before making an investment, the proposed rule would allow companies to gauge investor interest before incurring the significant expense required in the preparation of IPO disclosure documents. If market interest is not reflected by the response to the solicitation, companies may turn to other capital-raising plans. [19]

Under the current system, this would only be determined after preparation of all required compliance materials, which may involve significant expense. The efficiency of the capital markets, and the fiscal health of developing enterprises, is not benefited by issuers' finding out later rather than sooner that the public markets are not the most appropriate forums for their capital raising. On the contrary, the efficiency of the capital raising process is enhanced when issuers that spend the large sums required for an IPO have some indication as to how an offering will be received. The proposal would allow issuers to structure their offerings with consideration for their particular needs as well as the needs of investors, since issuers would be able to receive indications from potential investors concerning what offering structure may be of interest, and could then use that information in structuring their offerings.

Communications meeting the requirements of the proposed rule would not be deemed to offer any security for sale [20] for purposes of Section 5 of the Securities Act. [21] As proposed, those eligible to use the new rule would include any issuer not reporting under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act''), [22] but not: [23]

(a) Issuers of asset-backed offerings; [24]

(b) Partnerships, limited liability companies and other direct participation investment programs; [25]

(c) Investment companies registered or required to be registered under the Investment Company Act of 1940; [26] or

(d) Blank check or penny stock issuers. [27]

The first three exclusions apply to those issuers that appear unsuited to a ''test the waters'' concept, given the complex and contractual nature of the issuer. Blank check and penny stock issuers are excluded because of the substantial abuses that have arisen in such offerings. Comment is requested as to the appropriateness of the proposed exclusions. Are there any issuers proposed to be excluded that should be provided the benefits of the ''test the waters'' process? Are there additional classes of issuers that should be excluded either because of the nature of the investment vehicle or potential for abuse? Should any of the exclusions in the NASAA draft policy statement be specifically incorporated into the proposal? [28] Should the rule be limited to small business issuers? [29]

As in the case of Regulation A, the proposed IPO ''test the waters'' solicitation may include both oral and written solicitations, provided that a written solicitation document is submitted to the Commission at or prior to the time the solicitation is first

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[14] See Forthcoming Report to be used by the Subcouncil on Capital Allocation of the Competitiveness Policy Council, March 31, 1995.

[15] The Commission has established the Advisory Committee on the Capital Formation and Regulatory Processes (the ''Advisory Committee''), chaired by Commissioner Steven M.H. Wallman. The Advisory Committee is considering fundamental issues relating to the regulatory framework governing the capital formation process, including whether the current system of registering securities offerings should be replaced with a company registration system. The recommendations of the Advisory Committee may result in rule proposals or legislative recommendations that, if implemented, may also address the matters discussed in this release. While some of the company registration models under consideration generally would not change the requirements by which a company that was not filing reports with the SEC conducts an IPO, certain company registration models could facilitate solicitations of interest by registered companies with respect to repeat offerings, by eliminating the requirement for registering each public offering of securities.

[16] A discussion of the legal basis for the proposed rule is in Section C of the release; comment is specifically solicited on this issue.

[17] *See, e.g. Foreign Firms Flock to U.S. for IPOs*, Wall Street Journal, June 23, 1995, at C1.

[18] Securities Data Company. This includes foreign companies' first common equity offerings in the U.S.; it does not include asset-backed securities.

[19] Limitations on general solicitation under Regulation D [17 CFR 230.501–230.508] and case law under Section 4(2) of the Securities Act [15 U.S.C.77d(2)] may limit companies' flexibility in pursuing such alternatives. Comment is requested in the discussion hereinafter as to what steps the Commission should take to address these issues. In a companion release published today, the Commission is soliciting comment on various possible approaches to allowing general solicitations in some form in Regulation D offerings. See Release No. 33–7185.

[20] Proposed Rule 135d(a). This provision would be similar to that contained in Rule 135 [17 CFR 230.135].

[21] 15 U.S.C. 77e.

[22] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

[23] Proposed Rule 135d(a)(1).

[24] ''Asset-backed securities'' is defined in General Instruction I.B.5 of Form S–3 [17 CFR 239.13].

[25] ''Direct participation investment program'' would be defined in a proposed amendment to Rule 100. Comment is requested as to whether the scope of the proposed definition is appropriate or whether an alternative definition would meet the goals of the exclusion.

[26] 15 U.S.C. 80a–1 *et seq.*

[27] A ''blank check'' company is defined at Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)]; and ''penny stock'' is defined at Exchange Act Rule 3a51–1 [17 CFR 240.3a51–1].

[28] *See* Section 1 of NASAA Statement in the Appendix to this release.

[29] ''Small business issuer'' is defined in Securities Act Rule 405 [17 CFR 230.405].

made.[30] Unlike Regulation A, however, the submission of the ''test the waters'' written materials would be a condition to reliance on the rule. Comment is requested as to whether the rule should require that the written ''test the waters'' solicitation material be submitted and subject to Commission staff review prior to use. Comment also is requested as to whether submission should be a condition to reliance upon the rule.

Any written solicitation or broadcast would be required to include the following:

- A statement that the solicitation is not an offering of securities for sale, and that any public offering to be made will be made by means of a prospectus that may be obtained from the issuer and that will contain detailed information about the company and management, as well as financial statements;
- A statement that no money is being solicited, or will be accepted;
- A statement that no sales will be made or commitments to purchase securities will be accepted until a registration statement is filed with the Commission and becomes effective or an appropriate exemption from registration is available and utilized;
- A statement that indications of interest involve no obligation or commitment of any kind; and
- An identification of the issuer's chief executive officer and a brief and general description of its business and products.[31]

Comment is solicited as to whether each of the specified disclosure items is needed in the IPO context. Should any additional information be required under the proposed rule? Comment is requested as to whether additional information should be required in the soliciting material, such as that required by the NASAA draft policy.[32] Should the rule limit the amount of information includable about financing plans such as the type and amounts of securities that might be offered for sale, as well as possible underwriting arrangements? Should the mandated information be required in any oral solicitation?

Subject to the prescribed disclosure, the proposed rule would permit other information to be included. This information specifically could include the type, amount, and price of the securities to be offered, financial information (including unaudited financial statements, and projections or other forward-looking statements). All such information, of course, would be subject to antifraud prohibitions. Comment is requested as to whether information with this level of specificity about the possible offering should be permitted, or, instead, whether the information should be more limited, such as to information about the company generally and its intention to conduct an initial public offering.

The issuer would be permitted to include a coupon that could be returned to the company indicating interest and requesting a prospectus in the event the company determines to undertake a public offering.[33] The coupon would be required to state clearly and separately that the indication of interest is not binding and that no money should be sent. Under the proposed rule, issuers would not be permitted to include questions in the coupon soliciting information about the investors' financial profile, such as income, assets and investment history. Comment is requested as to whether this limitation is appropriate.[34]

Under the rule as proposed, there is no restriction on the means of dissemination of the ''test the waters'' solicitation.[35] Thus, the issuer could send the solicitation material to prospective investors, or publish it in a newspaper or other print media. Use of broadcast media, whether radio or television, would be permitted, as would electronic dissemination through such media as the Internet or other data networks. To come within the protection of the proposed safe harbor, the mandated disclosure provisions would have to be met with respect to each publication or transmission. Comment is requested as to whether there should be restrictions on this type of solicitation. While unsolicited telephoning of investors could be conducted, should such telephoning be prohibited by the issuer, by broker/dealers, and other non-issuer personnel altogether? Should the rule require that any person directly contacted be given a copy of the written solicitation material required to be submitted to the Commission? Should the rule contain additional limitations on the statements allowed? Should the rule prescribe what information is permitted to be included?

Should oral solicitations be limited or precluded? For example, should oral solicitations be limited to certain statements, or limited to the information set forth in the written solicitation material? Should oral solicitations be limited to accredited investors[36] or qualified institutional buyers?[37]

The proposed rule also would require that the writing or script be submitted to the Commission. Unlike the current Regulation A ''test the waters'' provision, however, the submission would be made only at the Commission's Washington, D. C. headquarters.[38] Also, as noted above, unlike the current Regulation A ''test the waters'' provision, this submission would be a condition to reliance upon the rule.[39] Following the submission of the written document or script of the broadcast, oral communications with prospective investors and other broadcasts would be permitted. All communications would be subject to the antifraud provisions of the federal securities laws.[40] As is the case with Regulation A,[41] the proposed rule could not be relied upon after the filing of a registration statement.[42] Thus, under the proposal, all ''test the waters'' solicitations, written or oral, must terminate at the time a registration statement for the offering is filed. Also, the proposal would, like Regulation A,[43] require that 20 days elapse between the last publication or delivery of the solicitation document or broadcast and any sales of securities.[44] Should this apply to oral ''test the waters'' solicitations as well?

Finally, the proposed rule, like Regulation A,[45] would deem ''test the

[30] Proposed Rule 135d(a)(3) and (4).

[31] Proposed Rule 135d(a)(2).

[32] *See* Solicitation of Interest Form in the NASAA Statement in the Appendix to this release.

[33] Proposed Rule 135d(b).

[34] Rule 254 of Regulation A does not prohibit requests for such information in the coupon.

[35] If an issuer wants to maintain full flexibility to proceed with an offering under Regulation D and Section 4(2) of the Securities Act, the means of dissemination of the ''test the waters'' solicitation would have to be consistent with the limitations under the regulation and statute. *See* the companion release issued today, soliciting comment on the use of general solicitation in Regulation D offerings. Release No. 33–7185.

[36] *See* Rule 501(d) of Regulation D [17 CFR 230.501(d)].

[37] *See* Rule 144A(a)(1) [17 CFR 230.144A(a)(1)].

[38] Proposed Rule 135d(a)(3). Under the proposed rule, the document would be submitted to the Commission, but not officially filed, and, like Rule 254 material, would be available for public inspection. The ''test the waters'' submission could be submitted either in paper or via the Commission's EDGAR system. *See* proposed amendment to Rule 101(b) of Regulation S-T [17 CFR 232.101(b)].

The proposed rule would contain a note stating that only solicitation of interest material that contains substantive changes from or additions to previously submitted material need be submitted.

[39] Rule 254 of Regulation A provides that submission of the materials to the Commission is not a condition to the exemption.

[40] Proposed note to proposed Rule 135d(a)(4).

[41] Rule 254(b)(3) [17 CFR 230.254(b)(3)].

[42] Proposed Rule 135d(a)(5).

[43] Rule 254(b)(4) [17 CFR 230.254(b)(4)].

[44] Proposed Rule 135d(a)(6).

[45] The Commission amended Rule 254 to provide that a written ''test the waters'' solicitation document complying with Regulation A will not constitute a ''prospectus'' as defined in Section 2(10) of the Securities Act [15 U.S.C. 77b(10)]. *See*

waters'' material submitted to the Commission and otherwise in compliance with the rule not to be a ''prospectus'' as defined in Section 2(10) of the Securities Act,[46] and therefore not subject to Section 12(2) of the Securities Act.[47] Comment is requested as to the appropriateness of removing these materials from Section 12(2) liabilities. Should ''test the waters'' soliciting material be required to be filed as part of the registration statement for the IPO and subjected to Sections 11[48] and 12(2) liabilities if the registered offering is conducted within a specified time period of the solicitation, *e.g.* 2, 6 or 12 months?

In *Gustafson* v. *Alloyd Co., Inc.,*[49] the Supreme Court concluded that the written instruments there at issue did not constitute a ''prospectus'' as that term is used in Section 12(2) of the Securities Act, notwithstanding the broad coverage of the statutory definition of the term ''prospectus'' in Section 2(10) of the Securities Act. The Commission believes that its determination that written documents of the type referred to in proposed Rule 135d should *not* be deemed a prospectus, or part of a prospectus, is an appropriate use of its authority both under Sections 2(10) and 19(a). It also believes that its proposal to limit the breadth of the term ''prospectus'' is not inconsistent with the Supreme Court's decision in *Gustafson*.

As noted above, the proposed rule requires that no sales of securities occur until at least 20 days after the last publication or delivery of the solicitation document or broadcast.[50] Comment is requested as to whether or not pre-confirmation prospectus delivery requirements[51] should be revised to permit investors a longer period of time than they have currently, *e.g.*, seven days (instead of the current 48 hours) to consider prospectus information where the ''test the waters'' process has been used. Comment is requested as to the need for additional procedures to assure investors a sufficient opportunity following a ''test the waters'' solicitation to review and assess the full information about the issuer, its management, the securities and the offering provided by the registration statement and prospectus. Comment also is requested as to whether or not there is a need to require that all ''test the waters'' solicitations, written or oral, cease at some period of time prior to the filing of a registration statement for an IPO. Given the purpose of the proposed rule, allowing issuers to determine whether to undertake a registered IPO before incurring the costs of complying with the disclosure and other related requirements, would such a cooling-off period be consistent with financing schedules? Due diligence and preparation of documents typically takes 60 to 90 days.[52] Comment is requested as to the need for a cooling-off period prior to the commencement of a registered offering, and the period of time that would be appropriate, *e.g.* 30 days or 60 days.

Under Regulation A, failure to comply with the terms and conditions of the ''test the waters'' procedures can result in a Commission order suspending a Regulation A exemption. Under proposed Rule 135d, just as with Rule 135, full compliance with the terms and conditions of the rule is required to come within the safe harbor provisions of the rule. Comment is requested as to whether there should be a provision addressing failures to comply with the provisions that would provide adequate protection to investors, preclude undue conditioning of the market, allow timely oversight of the contents of the written solicitation material, and avoid loss of the safe harbor for technical, immaterial deviations from the specific requirements of the safe harbor.

With respect to investor protection, today's proposals would not alter the type and amount of information available to investors in connection with an IPO. Issuers making use of the proposed ''test the waters'' procedure would continue to be subject to all the current IPO disclosure requirements, and IPO registration statements would continue to be subject to Commission staff review if the issuer determined to proceed with a registered offering after soliciting investor interest.

Comment is requested generally on whether the proposed ''test the waters'' rule is appropriate and in investors' interest in the context of registered IPOs. Will the proposed process effectively accomplish the Commission's goal of allowing businesses to assess the capital market's potential interest in their businesses on a cost-effective basis, without causing investors to overlook the full disclosures mandated by the federal securities laws?

B. Relationship of Exempt Offerings to ''Test the Waters'' Activity

After an issuer has engaged in a ''test the waters'' procedure under the proposed rule, it might conclude that, rather than having a registered offering, it would be desirable to raise capital by means of a Regulation A, private[53] or Regulation D offering. In order to accommodate the issuer's flexibility to use Regulation A, that Regulation's ''test the waters'' rule would be amended to make it clear that ''testing the waters'' under the proposed new rule could be followed by a Regulation A offering,[54] just as an issuer that ''tests the waters'' under Regulation A could ultimately determine to have a registered offering instead.[55] Comment is solicited on whether proposed Rule 135d should be used for ''testing the waters'' with a view to either a registered or a Regulation A offering, thus replacing Rule 254.

With respect to offerings relying on an exemption other than Regulation A, it is noted that under Rule 502(c) of Regulation D,[56] any form of general solicitation or general advertising would preclude availability of the exemptions provided by Rules 505 and 506.[57] Thus, if the issuer's ''test the waters'' activity was done in a way that involved general advertising or other activities constituting general solicitation,[58] it could not proceed directly to an offering relying on an exemption that precluded general solicitation, even if the parties expected to purchase in the exempt

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Release No. 33–6996 (April 28, 1993) [58 FR 26509]. The antifraud provisions of the federal securities laws (Section 17(a) of the Securities Act [15 U.S.C. 77q(a)] and Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78j(b)]), however, continue to apply to any Regulation A ''test the waters'' material.

[46] 15 U.S.C. 77b(10).

[47] 15 U.S.C. 77*l*(2).

[48] 15 U.S.C. 77k.

[49] _____ U.S. _____, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995).

[50] Of course, if the issuer were to comply with both proposed Rule 135d and Rule 505 (or 506) of Regulation D, [17 CFR 230.505 and 230.506, respectively] and it were decided not to proceed with an IPO, it could sell immediately under Rule 505 (506). Similarly, if an issuer were to comply with both Rule 135d and Rule 504 [17 CFR 230.504] (which does permit general solicitation), sales could proceed immediately without waiting 20 days in the event the issuer determines not to go the IPO route.

[51] *See* Rule 15c2–8 [17 CFR 240.15c2–8].

[52] C. Schneider, J. Manko, and R. Kant, *Going Public: Practice, Procedure and Consequences,* 36 (1995).

[53] Section 4(2) of the Securities Act [15 U.S.C. 77d(2)].

[54] Proposed Rule 254(b)(4).

[55] *See* Rule 254(d). This provision would be amended to eliminate the 30 day waiting period currently required before filing a registration statement.

[56] 17 CFR 230.502(c).

[57] Because public offerings are permitted under Rule 504, the following discussion about ''general solicitation'' would not apply to transactions pursuant to that exemption.

[58] This would depend upon the manner and scope of the dissemination of the ''test the waters'' communication. The determination as to whether the activities constituted a general solicitation would hinge upon the particular facts and circumstances of individual situations.

offering were accredited investors.[59] Just as with any other party relying on such an exemption, the issuer would have to ensure that the exempt offering would not be integrated with the ''test the waters'' activity,[60] either by relying on the safe harbor afforded for transactions occurring more than six months before and after the Regulation D transaction,[61] or by otherwise ensuring that the transactions were distinct enough so that they would not be integrated under the five-factors test.[62] This is comparable to the treatment of Regulation A ''test the waters'' activity.[63]

The Commission recognizes that the possibility of integrating ''test the waters'' activity with private or Regulation D offerings could impair the usefulness of proposed Rule 135d. In a companion release that proposes a new exemption from registration for offerings made in compliance with a recently enacted California exemption,[64] the Commission is soliciting public comment on a variety of approaches to general solicitation, including whether the prohibition against general solicitation for Rules 505 and 506 offerings should be rescinded, whether it would be feasible to reduce restrictions but limit the information allowed to be disseminated or the manner of dissemination, and other approaches. Would another approach be to provide a special integration safe harbor for private placements following a Rule 135d ''test the waters'' solicitation?

For example, would the 20 day period proposed between the last ''test the waters'' document or broadcast and any sale be an appropriate safe harbor for non-integration of a sale to accredited investors following a ''test the waters'' solicitation?

C. Communications That Are Not ''Offers''

As noted, proposed Rule 135d would provide that any communication meeting the conditions of the rule, as described above, is not deemed to offer any securities for sale, for purposes only of Section 5 of the Securities Act. Thus, ''test the waters'' activity could take place without the filing of a Securities Act registration statement or an available exemption from registration.

The Commission is cognizant that rulemaking in this area is circumscribed by the statute's prohibition of conduct constituting an ''offer'' prior to the filing of a registration statement.[65] The application of this definition to differing forms of pre-filing communications will, of course, vary. In proposing Rule 135d for comment, it is the Commission's intention to examine further the elements of the types of pre-filing activity that would be most constructive for IPOs and investors, as well as the appropriate limitations or parameters of such activity.

The Commission has previously had occasion to consider the application of the statute to other types of public communications made prior to the filing of a registration statement, both in rules and in interpretive positions.[66] The Commission has also cautioned that certain publicity efforts in advance of a proposed public offering, although not couched in terms of an express offer, may raise questions under the statute if they contribute to conditioning the public market or arousing public interest in an issuer or its securities before a registration statement is filed.[67] In the context of exempt public offerings for small businesses under Section 3(b) and Regulation A, the Commission has indicated that ''test the waters'' activities pursuant to Rule 254 are considered offers for purposes of Section 2(3).[68] The Commission intends to examine these and other interpretations of the relevant statutory provisions in considering the historical scope of permissible ''test the waters'' activities and the appropriateness of the provisions of proposed Rule 135d.

Recognizing these statutory limitations, the Commission requests comment as to whether alternative means are available to permit issuers to gather data efficiently to assist them in assessing the likelihood that a contemplated offering will be successful. For example, could a simplified registration procedure be adopted in which ''test the waters'' practices are made pursuant to a filed, but extremely simplified, registration statement, with normal, extensive information to be filed by amendment if an offering proceeds? Would this approach be consistent with Sections 7 and 10 of the Securities Act,[69] which allow the Commission to define the contents of a registration statement and a prospectus, respectively? Would the modest additional burden of filing ''test the waters'' materials as a technical registration statement render the procedure substantially less useful for issuers? Would issuers use a process that requires the inclusion of the ''test the waters'' materials in a registration statement subject to Section 11 or a prospectus subject to Section 12(2) of the Securities Act?

III. Request for Comment

Any interested persons wishing to submit written comments on the proposed expansion of the ''test the waters'' procedure to IPOs, as well as on other matters that might have an impact on the proposals contained herein, are requested to do so. Comments are requested on the impact of the proposals on issuers, investors, and others. The Commission also requests comment on whether the proposed rules, if adopted, would have an adverse impact on competition that is neither necessary nor appropriate in furthering the purposes of the Securities Act.

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[59] 17 CFR 230.501(a).

[60] *See* Rule 502(a) of Regulation D [17 CFR 230.502(a)], which enumerates factors to be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D.

[61] Rule 502(a).

[62] The five-factors integration test is set forth in Securities Act Release No. 4552 (November 6, 1962)[27 FR 11316].

[63] *See* Release No. 33–6949, Part II.B.

[64] Release No. 33–7185.

[65] Section 2(3) [15 U.S.C. 77b(3)] provides, in pertinent part:

The term ''offer to sell'', ''offer for sale'', or ''offer'' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

[66] The Commission has indicated that the Securities Act allows the following public communications, among others, prior to the filing of a registration statement:

- Rule 135 [17 CFR 230.135] (notice given by an issuer that it proposes to make a registered public offering of securities, if the notice states that the offering will be made only by means of a prospectus and contains only specified information).
- Rule 135a [17 CFR 230.135a] (certain generic investment company advertising).
- Rule 135b [17 CFR 230.135b] (certain standardized options disclosure materials).
- Rule 135c [17 CFR 230.135c] (notice by an issuer that it proposes to make, is making, or has made an offering of securities not registered or required to be registered under the Securities Act, provided that the notice is not for the purposes of conditioning the U.S. securities market, the notice states that the securities may not be offered or sold in the U.S. absent registration or an exemption, and the notice contains only specified information).
- Rules 137 [17 CFR 230.137], 138 [17 CFR 230.138], and 139 [17 CFR 230.139] (certain broker-dealer research reports).
- Rule 145(b)(1) [17 CFR 230.145(b)(1)] (certain communications regarding Rule 145(a) transactions).
- Release 33–5927 (April 24, 1978) [42 FR 18163]; United Technologies Corporation (April 24, 1978) (interpretive release and letter, permitting disclosure by a bidder in a cash tender offer of information required by the Williams Act about previous negotiations or agreements with the subject company regarding a merger without a registration statement being on file).

[67] *See, e.g.*, Release No. 33–3844 (Oct. 8, 1957) [22 FR 8359] (discussing publication of information prior to and after the effective date).

[68] *See* Release No. 33–6996 (April 28, 1993) [58 FR 26509]. The Commission is considering the extent to which the rationale underlying Rule 254 should guide its present inquiry.

[69] 15 U.S.C. 77g and 77j, respectively.

Comments will be considered by the Commission in complying with its responsibilities under Section 23(a) of the Exchange Act.[70] Comment letters should refer to File No. S7–18–95. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

IV. Cost-Benefit Analysis

To assist the Commission in its evaluation of the costs and benefits that may result from the proposals, commenters are requested to provide views and data relating to any costs and benefits associated with these proposals. The proposals, which are intended to reduce complexity and potentially significant costs to an issuer in connection with the planning for an IPO, while not sacrificing investor protection, are expected to reduce the costs associated with IPOs. The Commission is not proposing to increase the burdens on any issuer that chooses to engage in an IPO. Use of the proposed ''test the waters'' procedure would be optional. Further, any cost associated with the preparation of the proposed ''test the waters'' document would be offset by the significant benefits that issuers would receive in the reduction of costs. Those benefits also include a higher degree of assurance that a particular offering will find a receptive market.

V. Summary of the Initial Regulatory Flexibility Analysis

An initial regulatory flexibility analysis has been prepared in accordance with 5 U.S.C. 603 concerning the proposed new rule and amendments. The analysis notes that the amendments are intended to reduce costs associated with IPOs.

As discussed more fully in the analysis, the proposals would affect persons that are small entities, as defined by the Commission's rules, but would affect small entities in the same manner as other registrants. The proposed rule and amendments, however, are designed to decrease potential costs to all issuers, including small businesses.

A copy of the analysis may be obtained by contacting James R. Budge, Office of Disclosure Policy, Division of Corporation Finance, Mail Stop 3–12, 450 Fifth Street, N.W., Washington, D.C. 20549.

[70] 15 U.S.C. 78w(a).

VI. Statutory Basis for Rules

The amendments to the Securities Act rules, Regulation A and Regulation S–T are being proposed pursuant to Sections 2, 3, 4, 5, and 19 of the Securities Act, as amended.[71]

The amendment to Regulation S–T also is being proposed pursuant to Sections 3, 12, 13, 14, 15(d), 23(a) and 35A of the Exchange Act, as amended,[72] Sections 3, 5, 6, 7, 10, 12, 13, 14, 17 and 20 of the Public Utility Holding Company Act of 1935, as amended,[73] Section 319 of the Trust Indenture Act of 1939, as amended,[74] and Sections 8, 30, 31 and 38 of the Investment Company Act of 1940, as amended.[75]

List of Subjects in 17 CFR Parts 230 and 232

Reporting and recordkeeping requirements, Securities

Text of Proposed Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

2. By adding a paragraph (a)(8) to § 230.100 to read as follows:

§ 230.100 Definition of terms used in the rules and regulations.

(a) * * *

(8) The term *direct participation investment program* means any program (other than an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*)) that provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution, including, but not limited to, partnerships, limited partnerships, real estate investment trusts as defined in I.R.C. § 856, and limited liability companies.

* * * * *

[71] 15 U.S.C. 77b, 77c, 77d, 77e, and 77s.

[72] 15 U.S.C. 78c, 78l, 78m, 78n, 78o(d), 78w(a) and 78*ll*.

[73] 15 U.S.C. 79c, 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q and 79t.

[74] 15 U.S.C. 77sss.

[75] 15 U.S.C. 80a-8, 80a-29, 80a-30 and 80a-37.

3. By adding § 230.135d to read as follows:

§ 230.135d Solicitation of interest document for use prior to an initial public offering.

(a) For purposes only of section 5 of the Act, a written or oral communication, or the making of scripted radio or television broadcasts, to determine whether there is any interest in the issuer's initial public offering of securities shall not be deemed to offer any securities for sale if:

(1) The issuer of the securities:

(i) Is not subject to section 13 or 15(d) of the Securities Exchange Act of 1934 (the ''Exchange Act'') (15 U.S.C. 78a *et seq.*) immediately before the submission of solicitation material pursuant to this section;

(ii) Is not a development stage company that either has no specific business plan or purpose, or has indicated that its business plan is to merge within an unidentified company or companies;

(iii) Is not an issuer of penny stock as defined in Section 3(a)(51) and Rule 3a51–1 under the Exchange Act;

(iv) Is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(v) Is not an issuer of asset-backed securities; and

(vi) Is not an issuer that after its initial public offering would be a direct participation investment program;

(2) The written document or script of the broadcast:

(i) States that the solicitation is not an offering of securities for sale, and that any public offering to be made will be made by means of a prospectus that may be obtained from the issuer and that will contain detailed information about the company and management, as well as financial statements;

(ii) States that no money or other consideration is being solicited, and if sent in response, will not be accepted;

(iii) States that no sales of the securities will be made or commitment to purchase accepted until a registration statement is filed with the Commission and becomes effective, or an appropriate exemption from registration is available and utilized;

(iv) States that an indication of interest made by a prospective investor involves no obligation or commitment of any kind; and

(v) Identifies the chief executive officer of the issuer and briefly and in general its business and products;

(3) On or before the date of its first use, the issuer shall submit a copy of

any written document or the script of any broadcast to be used in reliance upon this section to the Commission's main office in Washington, D.C. (Attention: Office of Small Business Policy). The document or broadcast script shall either contain or be accompanied by the name and telephone number of a person able to answer questions about the document or the broadcast.

Note: Only solicitation of interest material that contains substantive changes from or additions to previously submitted material need be submitted.

(4) Oral communications with prospective investors and other broadcasts are not made until after submission of the written document or script of the broadcast to the Commission as provided in subparagraph (a)(3) of this section; there is no solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any prospective investor in reliance upon this section; and no sale is made until a registration statement is effective pursuant to Section 8 of the Act with respect to the securities offering, or an appropriate exemption from registration is available and utilized;

Note: The written documents, broadcasts and oral communications are each subject to the antifraud provisions of the federal securities laws.

(5) Solicitations of interest in reliance upon the provisions of this section are not made after the filing of a registration statement under the Act; provided, however, that receipt by the issuer after the filing of a registration statement of a coupon from a potential investor provided to such potential investor pursuant to paragraph (b) of this section prior to the filing of a registration statement is consistent with this subparagraph; and

(6) Sales pursuant to a registration statement are not made until 20 calendar days after the last publication or delivery of the document or radio or television broadcast.

(b) Any written document used in reliance upon this section may include a coupon, returnable to the issuer, indicating interest in a potential registered offering, revealing the name, address and telephone number of the prospective investor, and stating clearly and separately that the indication of interest is not binding and that no money should be sent. Such coupon may not request information about the financial profile of the investor, such as income, assets or investment history.

(c) Written solicitation of interest materials used in reliance upon this section submitted to the Commission as provided in paragraph (a)(3) of this section, and otherwise in compliance with this section shall not be deemed to be a prospectus as defined in Section 2(10) of the Act.

4. By amending § 230.254 by revising paragraph (b)(4), to read as follows:

§ 230.254 Solicitation of interest document for use prior to an offered statement.

* * * * *

(b) * * *

(4) Sales pursuant to an offering circular or registration statement may not be made until 20 calendar days after the last publication or delivery of the document or radio or television broadcast pursuant to this rule or pursuant to § 230.135d.

* * * * *

5. By amending paragraph (d) of § 230.254 by removing the phrase: ‘‘, if at least 30 calendar days have elapsed between the last solicitation of interest and the filing of the registration statement with the Commission,’’.

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

6. The authority citation for Part 232 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79t(a), 80a–8, 80a–29, 8a–30 and 80a–37.

7. By amending § 232.101 by removing the word ‘‘and’’ following the semicolon in paragraph (b)(4), by removing the period at the end of (b)(5) and adding in its place ‘‘; and’’, and by adding paragraph (b)(6) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(b) * * *

(6) Solicitation of interest documents or broadcast scripts submitted to the Commission pursuant to Rule 135d (§ 230.135d of this chapter).

* * * * *

Dated: June 27, 1995.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix To Release

Title: Resolution of the North American Securities Administrators Association, Inc., Regarding the Testing-the-Waters Exemption

Whereas, NASAA recognizes the policy objectives underlying the testing-the-waters exemption drafted by its working group, but has substantial concerns as to whether it can adequately ensure that investors are protected,

Therefore, be it resolved that NASAA will take no formal action with regard to the proposal so that a two year pilot program may be undertaken by those jurisdictions electing to do so and the results of the program may be carefully considered.

Adopted by the membership of the North American Securities Administrators Association on April 25, 1993 at its Spring Meeting in Washington, D.C.

Proposed Statement of Policy on Solicitation of Interest (Test the Waters)

Note: This proposed rule has not been adopted by the NASAA membership by a resolution adopted April 25, 1993, the membership voted to take no action on the proposal pending a study of its effect in those jurisdictions that choose to adopt its use on an experimental basis. It is being published solely to provide a uniform basis for this pilot project that will attempt to determine if such an exemptive rule can be implemented without jeopardizing investor protection.

Solicitations of Interest prior to the Filing of the Registration Statement:

(1) An offer, but not a sale, of a security made by or on behalf of an issuer for the sole purpose of soliciting an indication of interest in receiving a prospectus (or its equivalent) for such security is exempt from section [301] of the Act if all of the following conditions are satisfied:

(a) The issuer is or will be a business entity organized under the laws of one of the states or possessions of the United States or one of the provinces or territories of Canada, is engaged in or proposes to engage in a business other than petroleum exploration or production or mining or other extractive industries and is not a ‘‘blind pool’’ offering or other offering for which the specific business or properties cannot now be described.

(b) The offerer intends to register the security in this state and conduct its offering pursuant to either Regulation A or Rule 504 of Regulation D, as promulgated by the Securities and Exchange Commission.

(c) Ten (10) business days prior to the initial solicitation of interest under this rule, the offerer files with the [Administrator] a Solicitation of Interest Form along with any other materials to be used to conduct solicitations of interest, including, but not limited to, the script of any broadcast to be made and a copy of any notice to be published.

(d) Five (5) business days prior to usage, the offerer files with the [Administrator] any amendments to the foregoing materials or additional materials to be used to conduct solicitations of interest, except for materials provided to a particular offeree pursuant to a request by that offeree.

(e) No Solicitation of Interest Form, script, advertisement or other material which the offerer has been notified by the [Administrator] not to distribute is used to solicit indications of interest.

(f) Except for scripted broadcasts and published notices, the offerer does not communicate with any offeree about the contemplated offering unless the offeree is

provided with the most current Solicitation of Interest Form at or before the time of the communication or within five (5) days from the communication.

(g) During the solicitation of interest period, the offerer does not solicit or accept money or a commitment to purchase securities.

(h) No sale is made until seven (7) days after delivery to the purchaser of a prospectus. [Alternative: No sale is made until seven (7) days after delivery to the purchaser of a final prospectus, or in those instances in which delivery of a preliminary prospectus is allowed hereunder, a preliminary prospectus.] [1]

(i) The offerer does not know, and in the exercise of reasonable care, could not know that the issuer or any of the issuer's officers, directors, ten percent shareholders or promoters:

1. Has filed a registration statement which is the subject of a currently effective registration stop order entered pursuant to any federal or state securities law within five years prior to the filing of the Solicitation of Interest Form.

2. Has been convicted within five years prior to the filing of the Solicitation of Interest Form of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including, but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud.

3. Is currently subject to any federal or state administrative enforcement order or judgment entered by any state securities administrator or the Securities and Exchange Commission within five years prior to the filing of the Solicitation of Interest Form or is subject to any federal or state administrative enforcement order or judgment entered within five years prior to the filing of the Solicitation of Interest Form in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found.

4. Is subject to any federal or state administrative enforcement order or judgement which prohibits, denies, or revokes the use of any exemption from registration connection with the offer, purchase or sale of securities.

5. Is currently subject of any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction permanently restraining or enjoining, such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the state entered within five years prior to the filing of the Solicitation of Interest Form.

The prohibitions listed above shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against such person or if the broker/dealer employing such party is licensed or registered in this state and the Form B–D filed with this state discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this subsection may act in a capacity other than that for which the person is licensed or registered. Any disqualification caused by this section is automatically waived if the agency which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

(2) A failure to comply with any condition of section (1) of this rule will not result in the loss of the exemption from the requirements of section [301] of this Act for any offer to a particular individual or entity if the offerer shows:

(a) The failure to comply did not pertain to a condition directly intended to protect that particular individual or entity; and

(b) The failure to comply was insignificant with respect to the offering as a whole; and

(c) A good faith and reasonable attempt was made to comply with all applicable conditions of section (1).

Where an exemption is established only through reliance upon this section (2), the failure to comply shall nonetheless be actionable as a violation of the Act by the [Administrator] under section [408] of the Act and constitute grounds for denying or revoking the exemption as to a specific security or transaction.

(3) The offerer shall comply with the requirements set forth below. Failure to comply will not result in the loss of the exemption from the requirements of section [301] of this Act, but shall be a violation of the Act, be actionable by the [Administrator] under section [408] of the Act, and constitute grounds for denying or revoking the exemption as to a specific security or transaction.

(a) Any published notice or script for broadcast must contain at least the identity of the chief executive officer of the issuer, a brief and general description of its business and products and the following legends:

1. No money or other consideration is being solicited and none will be accepted;

2. No sales of the securities will be made or commitment to purchase accepted until delivery of an offering circular that includes complete information about the issuer and the offering;

3. An indication of interest made by a prospective investor involves no obligation or commitment of any kind; and

4. This offer is being made pursuant to an exemption from registration under the federal and state securities laws. No sale may be made until the offering statement is qualified by the SEC and is registered in this state.

(b) All communications with prospective investors made in reliance on this rule must cease after a registration statement is filed in this state, and no sale may be made until at least twenty (20) calendar days after the last communication made in reliance on this rule.

[(c) A preliminary prospectus (or its equivalent) may only be used in connection with an offering for which indications of interest have been solicited under this rule if the offering is conducted by a registered broker-dealer.] [2]

(4) The [Administrator] may waive any condition of this exemption in writing, upon application by the offerer and cause having been shown. Neither compliance nor attempted compliance with this rule, nor the absence of any objection or order by the [Administrator] with respect to any offer of securities undertaken pursuant to this rule, shall be deemed to be a waiver of any condition of the rule or deemed to be a confirmation by the [Administrator] of the availability of this rule.

(5) Offers made in reliance on this rule will not result in a violation of Section 301 of the Act by virtue of being integrated with subsequent offers or sales of securities unless such subsequent offers and sales would be integrated under federal securities laws.

(6) Issuers on whose behalf indications of interest are solicited under this rule may not make offers or sales in reliance on section[s] [private placement exemption] [3] until [six (6)] [4] months after the last communication with a prospective investor made pursuant to this rule.

Comments

1. All communications made in reliance on this rule are subject to the anti-fraud provisions of this Act.

2. The [Administrator] may or may not review the materials filed pursuant to this rule. Materials filed, if reviewed, will be judged under anti-fraud principles. Any discussion in the offering documents of the potential rewards of the investment must be balanced by a discussion of possible risks.

3. Any offer effected in violation of this rule may constitute an unlawful offer of an unregistered security for which civil liability attaches under Section [410] of the Act. Likewise any misrepresentation or omission may give rise to civil liability. Under the Uniform Securities Act a subsequent registration of the security for the sale of the security does not ''cure'' the previous unlawful offer. Only a rescission offer made in accordance with the provisions of the Act can accomplish such a ''cure.'' See commentary under Section 410.

Note to Users: The following form sets forth the minimum informational requirement for soliciting indications of interest under federal and state securities laws. You may include additional information if you think it necessary or desirable. Remember that any discussion in this document is subject to the anti-fraud provisions of the federal and state securities laws and must thereby be complete. Also, any discussion of potential rewards of the proposed investment must be balanced by a

[1] The bracketed subsection should only be used in those jurisdictions that have or intend to adopt an applicable ''red herring'' exemption. The ''red herring'' exemption should cross-reference this rule to avoid confusion.

[2] See footnote 1.

[3] Each jurisdiction should review its exemptions to determine which ones should be denied if contaminated by public solicitation.

[4] Some jurisdictions may choose a twelve month period because the private placement exemptions already in their statutes use this time frame.

discussion of possible risks. You may alter the graphic presentation of the form in any way as long as the minimum information is clearly presented.

Solicitation of Interest Form

_____

Name of Company

Street Address of Principal Office:
Company Telephone Number:
Date of Organization:

Amount of the Proposed Offering: _____

Name of Chief Executive Officer: _____

This is a solicitation of interest only. No money or other consideration is being solicited and none will be accepted.

No sales of the securities will be made or commitment to purchase accepted until the delivery of a final offering circular that includes complete information about the issuer and the offering.

An indication of interest made by a prospective investor involves no obligation or commitment of any kind.

This offer is being made pursuant to an exemption from registration under the federal and state securities laws. No sale may be made until the offering statement is qualified by the SEC and is registered in this state.

This Company

( ) Has never conducted business operations.
( ) Is in the development stage.
( ) Is currently conducting operations.
( ) Has shown a profit for the last fiscal year.
( ) Other (specify) _____

Business

1. Describe in general what business the company does or proposes to do, including what products or goods are or will be produced or services that are or will be rendered.

2. Describe in general how these products or services are to be produced or rendered and how and when the company intends to carry out its activities.

Offering Proceeds

3. Describe in general how the company intends to use the proceeds of the proposed offering.

Key Personnel of the Company

4. Provide the following information for all officers and directors or persons occupying similar positions:

Name, Title, Office Street Address, Telephone Number, Employment History (Employers, titles and dates of positions held during the past five years), and Education (degrees, schools and dates).

(end of form)

[FR Doc. 95–16391 Filed 7–7–95; 8:45 am]

BILLING CODE 8010–01–P

17 CFR Parts 210, 228, 239 and 249

[Release Nos. 33–7189; 34–35897; International Series No. 820; File No. S7–19–95]

RIN 3235–AG47

Streamlining Disclosure Requirements Relating to Significant Business Acquisitions and Requiring Quarterly Reporting of Unregistered Equity Sales

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules and forms.

SUMMARY: In connection with its review of problematic practices relating to Regulation S, the Commission is publishing for comment rule revisions that reduce the need for reliance on Regulation S by eliminating certain impediments to registered offerings of securities under the Securities Act of 1933 by streamlining requirements with respect to financial statements of significant acquisitions. Also, rule revisions are proposed that would require registrants to report on a quarterly basis recent sales of equity securities that have not been registered under the Securities Act of 1933.

DATES: Comments should be received on or before September 8, 1995.

ADDRESSES: Comment letters should refer to File number S7–19–95 and should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. The Commission will make all comments available for public inspection and copying in its Public Reference Room at the same address.

FOR FURTHER INFORMATION CONTACT: Annemarie Tierney, (202) 942–2990, Office of International Corporate Finance, or Douglas Tanner, (202) 942–2960, Office of Chief Accountant, Division of Corporation Finance, U.S. Securities and Exchange Commission, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment proposed amendments to the following rules and forms under the Securities Act of 1933 (the ''Securities Act'')[1] and the Securities Exchange Act of 1934 (the ''Exchange Act'')[2] concerning financial statements of acquired (or to be acquired) businesses and quarterly reporting of unregistered equity offerings: Rule 3–05 of Regulation S–X,[3] Rule 310 of Regulation S–B,[4] Item 17 of Form S–4,[5] Item 17 of Form F–4,[6] Item 7 of Form 8–K,[7] Item 2 of Form 10–Q,[8] Item 2 of Form 10–QSB,[9] Item 5 of Form 10–K,[10] and Item 5 of Form 10–KSB.[11]

I. Introduction

The Commission adopted Regulation S[12] in April 1990 in order to clarify the extraterritorial application of the registration requirements of the Securities Act.[13] Since adoption, a number of problematic practices have developed involving unregistered sales of equity securities of domestic reporting companies purportedly in reliance upon Regulation S. In a companion release,[14] the Commission is publishing its views concerning problematic practices under Regulation S and is requesting comment as to whether Regulation S also should be amended to impose additional restrictions on its use.

Commenters have suggested that companies may be compelled to sell securities offshore, rather than in registered transactions, because of registration disclosure requirements relating to significant acquisitions. The Commission is proposing to streamline these requirements to reduce regulatory impediments to the use of registered offerings. Also, in response to commenters' suggestions that investors need information about private or offshore placements of equity securities that is not currently disclosed, the Commission is proposing to require quarterly reporting of unregistered equity offerings. Commenters have suggested this public reporting may also have the ancillary benefit of deterring abuses of Regulation S.

II. Proposed Simplification of Registration Disclosure of Significant Acquisitions

Domestic companies subject to the reporting requirements of the Exchange Act are required to report significant acquisitions on Form 8–K within 15 days after consummation of the transaction; a grace period of up to 60 days from the filing due date is given for filing the required audited financial statements.[15] On the other hand, a

[1] 15 U.S.C. 77a *et seq.*
[2] 15 U.S.C. 78a *et seq.*
[3] 17 CFR 210.3–05.
[4] 17 CFR 228.310.
[5] 17 CFR 239.25.
[6] 17 CFR 239.34.
[7] 17 CFR 249.308.
[8] 17 CFR 249.308a.
[9] 17 CFR 249.308b.
[10] 17 CFR 249.310.
[11] 17 CFR 249.310b.
[12] 17 CFR 230.901–904.
[13] Release No. 33–6863 (Apr. 24, 1990) [55 FR 18306] (the ''Adopting Release'').
[14] Release No. 33–7190.
[15] *See* Item 2 and Item 7 of Form 8–K [17 CFR 249.308].