

MEMO# 31715

April 15, 2019

Draft ICI Comment Letter on SEC's Proposal Expanding Pre-Filing Communications with Certain Prospective Investors; Member Comments Requested by Monday, April 22

[31715]

April 15, 2019 TO: Closed-End Investment Company Committee

ICI Securities Regulation Advisory Group

SEC Rules Committee

Small Funds Committee RE: Draft ICI Comment Letter on SEC's Proposal Expanding Pre-Filing Communications with Certain Prospective Investors; Member Comments Requested by Monday, April 22

In February, the Securities and Exchange Commission proposed a new rule that would expand the ability of issuers, including investment company issuers, to gauge market interest in potential securities offerings through communications with certain investors prior to the filing of a registration statement.[\[1\]](#)

ICI's draft comment letter on the proposal is attached for your review. **Please provide any written comments to Ken Fang at kenneth.fang@ici.org by close of business on Monday, April 22. Comments on the consultation are due to the SEC by April 29, 2019.**

The draft letter supports the proposed "test-the-waters" rulemaking, providing ICI members' views both as investors and as issuers with their own shareholders. As investors, the proposed rule, among other things, would enable funds to assess the nature and quality of potential future investment opportunities and provide funds with more lead time to evaluate an offering before investing. As issuers, the proposed rule would give business development companies that do not need to register as investment companies under the Investment Company Act of 1940, and closed-end funds that have already registered, more flexibility to gauge market interest in their proposed offerings. The letter notes, however, that open-end funds will see little or no benefit if, as proposed, they are required to register

as investment companies under the Investment Company Act before being eligible to use the test-the-waters communications.

The letter supports several aspects of the rulemaking. It supports extending the test-the-waters relief to all issuers. It also supports the Commission's determination that test-the-waters communications do not need specified legends or need to be filed with the SEC. In addition, the letter supports the determination that the rule is non-exclusive, meaning that issuers could rely on other communications safe harbors or exemptions in addition to the test-the-waters relief. Further, it generally supports the determination not to impose content restrictions on the communications provided.

The letter, however, makes two comments to improve the rule for funds. Specifically, it asks the Commission to:

- Permit funds to rely on the rule prior to registering as investment companies under the Investment Company Act. Enabling funds to rely on the rule prior to registration would encourage funds to utilize the relief without incurring the time and expense of preparing and filing a registration statement.
- Permit funds to use the test-the waters communications with all SEC-registered investment advisers, in addition to Qualified Institutional Buyers and Institutional Accredited Investors. Enabling funds to communicate with all SEC-registered advisers prior to an offering would provide funds with a better sense of the expected viability of the fund.

In addition, the letter recommends that the Commission require fund performance information used in test-the-waters communications to be presented in a standardized manner to compare fund performance on an "apples-to-apples" basis and to level the playing field for funds.

Our draft letter discusses these items in greater detail.

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[Attachment](#)

endnotes

[1] See Solicitations of Interest Prior to a Registered Public Offering, Securities Act Release No. 10607 (Feb. 19, 2019), *available at* <https://www.sec.gov/rules/proposed/2019/33-10607.pdf>. For a summary of the proposed rule, *please see* ICI Memorandum No. 31627 (Feb. 21, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo31627.

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