

MEMO# 31738

April 29, 2019

ICI Files Comment Letter on SEC's Proposal Expanding Pre-Filing Communications with Certain Prospective Investors

[31738]

April 29, 2019 TO: ICI Members
Chief Compliance Officer Committee
Closed-End Investment Company Committee
SEC Rules Committee
Small Funds Committee SUBJECTS: Closed-End Funds
Compliance RE: ICI Files Comment Letter on SEC's Proposal Expanding Pre-Filing Communications with Certain Prospective Investors

ICI today filed the attached comment letter in response to the Securities and Exchange Commission's proposed new rule that would expand the ability of issuers, including investment company issuers, to gauge market interest in a contemplated securities offering by providing "test-the-waters" communications with certain sophisticated investors.[\[1\]](#)

The letter supports the proposed rulemaking, providing ICI members' views both as investors and as issuers. As investors, the proposed rule 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 many funds, such as 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 of 1940 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 proposed rule'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.

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, consistent with current rules for institutional communications.

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.

Dorothy M. Donohue
Deputy General Counsel - Securities Regulation

Kenneth Fang
Assistant General Counsel

[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.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.