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solicitation, including whether the prohibition against general solicitation for Rules 505 and 506 offerings should be rescinded, whether it would be feasible to reduce restrictions but limit the information allowed to be disseminated or the manner of dissemination, and other approaches.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.