

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, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79t, 80a-8, 80a-29, 80a-30 and 80a-37, unless otherwise noted.

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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.

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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 78ll.

⁷³ 15 U.S.C. 79c, 79e, 79f, 79g, 79j, 79l, 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