Form 17

Procedures for Wall Crossing Investors

PROCEDURES FOR WALL CROSSING INVESTORS

[Issuer Name], (“Issuer”) has proposed to offer shares of common stock pursuant to an effective registration statement and intends to market confidentially to a limited number of investors with the assistance of Underwriter/Representative[[1]](#footnote-1) prior to the public announcement of the offering. Material non-public information to be shared on an “over-the-wall” basis will be limited to: (1) the timing, structure, and terms of the offering; and (2) certain other confidential information about Issuer that has not been publicly disclosed (the “Other Information”).[[2]](#footnote-2) The Other Information will be publicly disclosed by Issuer prior to the expiration of the agreed upon confidentiality period (no later than [time A.M./P.M. EDT] on [DATE]), irrespective of whether the public marketing commences.

Timing

* Confidential marketing is expected to commence before the markets open on [Date].
* Public announcement of the offering is expected by press release substantially in the form attached as Annex A after the markets close on [Date] (the “Deal Press Release”).
* The Other Information is contained in a press release substantially in the form attached as Annex B (the “Cleansing Press Release”) and the Cleansing Press Release will be disseminated by Issuer after markets close on [Date], irrespective of whether the public marketing commences.
* Pricing is expected to occur before the open of the [Exchange] on [Business Day after confidential marketing was initiated].

Public Disclosure

* All material non-public information disclosed in Over-the-Wall Calls will be publicly disclosed by Issuer prior to the expiration of the agreed upon confidentiality period (collectively, “Public Disclosure”).
* The confidentiality period is proposed to extend to [9:30 a.m. (EDT) on [specified date]]. Before bringing potential investors over-the-wall, Issuer and Underwriter must execute a side letter in which Issuer agrees to make the Public Disclosure prior to the expiration of the confidentiality period.

Documentation:

* Regardless of whether the Offering ultimately takes place, ECM of the Underwriter should maintain copies of: (i) the Approved Script and the Approved Content; (ii) the investor contact list (including date, Authorized Officer, and the employee of Underwriter handling each contact); (iii) Acknowledgments; (iv) a list of investors brought over-the-wall; and (v) the Public Disclosure (when made).

Required Approvals

* Issuer/Offering Agent Side. Senior management of Issuer and ECM of Underwriter,[[3]](#footnote-3) as well as internal ECM legal, Issuer’s counsel ([Name of Issuer’s Counsel]), and Underwriters’ counsel ([Name of Underwriters’ Counsel]) must approve the written script (the “Approved Scripts”) for the proposed Over-the-Wall Call. See Annex D for the form of Approved Script. In addition, senior management of Issuer will need to approve content of any material non-public information to be shared (“Approved Content”). Senior management of Issuer has approved the concept of wall crossing investors in accordance with these procedures.
* Buy-Side. Prior to communication of material non-public information, an authorized legal or compliance officer (or other authorized officer as approved by ECM Legal) (“Authorized Officer”) at each relevant potential investor must approve such investor being taken “over-the-wall” and acknowledge (electronically or by signed hardcopy) applicable confidentiality restrictions (the “Acknowledgment”).
* Issuer has approved disclosing the Approved Content (as defined above) to investors that have agreed to be wall-crossed.
* Issuer and Underwriter ECM management have approved the written scripts attached as Annex D (as defined above).
* Issuer’s counsel has signed off on these procedures, including use of the Approved Content, the Approved Scripts, and the Confirmatory E-mails (as defined below).

Mechanics of Wall Crossing

* Underwriter ECM will contact only a limited number of key institutional investors, a list of which has been agreed upon by Issuer and Underwriter, each of which has previously delivered to Underwriter a Master Confidentiality Agreement.
* Only to be conducted by [senior members of Syndicate and/or ECM management].
* No “public-side” participation in the calls by research, sales, or trading personnel.
* Underwriter will not begin contacting investors until it has received a signed copy of the side letter attached as Annex C.
* The appropriate Approved Script will be used by Underwriter for the call in which an investor is wall-crossed.
* Underwriter will send an e-mail substantially in the form of Annex E (the “Confirmatory E-mails”) confirming an investor’s oral agreement to be brought over-the-wall, which e-mail will be affirmed by reply e-mail (a copy of which will be delivered to Issuer).
* Once an investor is over-the-wall, only Approved Content may be conveyed to that investor.
* The only information that will be conveyed to investors by Underwriter or Issuer will be Approved Content (as defined above) consisting of: (i) information that is in the public domain; (ii) information contained in the Deal Press Release; and (iii) the Other Information contained in the Cleansing Press Release.
* Regardless of whether the offering ultimately takes place, Underwriter ECM will maintain copies of: (i) these procedures; (ii) the investor contact list (and the identity of the Underwriter ECM member handling each contact); (iii) the confirmatory e-mail from investors brought over-the-wall; (iv) the list of investors brought over-the-wall; and (v) the public disclosure made by Issuer.

ANNEX A

Deal Press Release for Offering

ANNEX B

Cleansing Press Release

ANNEX C

Side Letter

[Month] \_\_\_, 20\_

[Name of Representatives]

As Representatives of the several Underwriters

[Addresses]

Ladies and Gentlemen:

[Issuer], a \_\_\_\_\_\_\_\_\_\_\_\_\_\_ corporation (the “Company”), [anticipates entering] [has entered] into an Underwriting Agreement (the “Underwriting Agreement”), by and between the Company and the representatives of the Underwriters listed therein (the “Representatives”), pursuant to which the Company expects to publicly offer (the “Offering”) shares of the Issuer’s common stock (the “Shares”).

In order to facilitate the marketing and the sale of the Shares, the Company has asked the Representatives to contact, on a confidential basis, a select group of prospective institutional purchasers of the Shares and has agreed to allow the Representatives to disclose certain non-public information concerning the Company and/or its affiliates and subsidiaries (any such disclosed information, the “Confidential Information”) to those prospective purchasers who have agreed (each, a “Consenting Account”), until the public dissemination of the material Confidential Information, to maintain the confidentiality of such Confidential Information, to not trade in any of the Company’s securities and to fully comply with applicable securities laws.

The Company hereby covenants and agrees with the Representatives for the express benefit of the Consenting Accounts that it will file with, or furnish to, the U.S. Securities and Exchange Commission a Current Report on Form 8-K or other periodic report or widely disseminate a press release disclosing in full any material Confidential Information that at such date and time the Company deems to constitute “material non-public information” within the meaning of applicable securities laws no later than the earlier to occur of (i) [TIME] (New York time) on [Date] and (ii) if the Company decides not to pursue the Offering, the close of business on the business day after the date of such decision. For purposes of this letter agreement, “Confidential Information” shall be deemed to include, without limitation, the existence and, if applicable, abandonment, delay, postponement, suspension, cancellation, termination, or withdrawal of, or other similar act with respect to, the Offering.

Except as expressly set forth herein, this letter agreement shall not operate as a waiver or an amendment of any terms, conditions, rights, or privileges under the Underwriting Agreement.

Please acknowledge your agreement with the foregoing by signing where indicated below and returning an executed counterpart of this letter agreement to the undersigned.

|  |  |
| --- | --- |
|  | Very truly yours, |
|  | [ISSUER] |
|  | By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
|  |  | Name:Title: |
| Acknowledged and agreed as of the date first above written |  |
| [REPRESENTATIVE 1] as Representative |  |
| By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  |
|  | Name:Title: |  |
| [REPRESENTATIVE 2] as Representative |  |
| By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |  |
|  | Name:Title: |  |

ANNEX D

Approved Scripts

To be read to a Legal or Compliance Officer of an investor:

We have a potential transaction that we would like to discuss with others at your organization pending your approval. Before I can provide specific details, I must inform you that the information is non-public and highly confidential. Once you or others in your organization receive this information, including names and details of the potential transaction, you or others in your organization that receive this information may be considered “insiders.” Please recall that [firm name] has executed and delivered a Master Confidentiality Agreement to Underwriter. The information will be subject to that agreement. Before receiving this information, you must agree that you will, on behalf of yourself or anyone else, treat the information we provide confidentially and not communicate this information to anyone outside of your firm and to restrict trading by those in possession of the confidential information until a time no later than 9:00 a.m. (New York time) on [Date]. You also agree that you will not or cause anyone else to engage in any trading activities related to the issuer’s securities prior to any public announcement of the information and the transaction, and you will not use the information to give any type of advice, for your firm as principal or, if applicable, for any of your clients. You also agree that you will comply with all applicable laws, rules, and regulations in this regard. Do you agree to this?

We will send you an e-mail confirming this conversation that will serve as an internal record of your acknowledgment that the information provided to you is subject to the Master Confidentiality Agreement and our agreement to share certain confidential information with you regarding the subject company and your agreement to treat any information that we have discussed today, as well as any information that you receive in the future, on a confidential basis.

If speaking to an authorized person other than Legal or Compliance (only with the prior approval of Underwriter ECM Legal):

We have a potential transaction that we would like to discuss with you. Before I can give you specific details, I must inform you that the information is non-public and highly confidential. Once you receive this information, including names and details of the transaction, you may be considered an “insider,” which would impose trading and other restrictions on you personally as well as your firm. Please recall that [firm name] has executed and delivered a Master Confidentiality Agreement to Underwriter. The information will be subject to that agreement. Before receiving this information, you must agree that you will, on behalf of yourself or anyone else, treat the information we provide confidentially and not communicate this information to anyone outside of your firm and to restrict trading by those in possession of the confidential information until a time no later than 9:00 a.m. (New York time) on [Date]. You should understand there may be legal and regulatory consequences, including potential sanctions and penalties relating to the misuse or improper circulation of inside information. If you have any questions about the definition of an “insider” and the implications of being brought over-the-wall, you should speak with your internal counsel or compliance officer.

Do you need to confirm with or inform your internal counsel or compliance officer?

[If the answer is yes, then do not continue. If the answer is no, then proceed with the following:]

To be read if the investor does not need to consult with their Legal or Compliance Officer:

Before receiving this information, you must acknowledge that the information provided to you is subject to the Master Confidentiality Agreement and agree that you will, on behalf of yourself or anyone else, treat the information we provide confidentially and not communicate this information to anyone outside of your firm and to restrict trading by those in possession of the confidential information until a time no later than 9:00 a.m. (New York time) on [Date]. You also agree that you will not or cause anyone else to engage in any trading activities related to the issuer’s securities prior to any public announcement of the information and the transaction, and you will not use the information to give any type of advice for your firm as principal or, if applicable, for any of your clients. You also agree that you will comply with all applicable laws, rules and regulations in this regard. Do you acknowledge and agree to the foregoing?

ANNEX E

Affirmation E-mail

Further to our recent telephone conversation, we are sending you this communication to confirm your agreement as a condition to receiving the non-public information regarding a company in the [Industry] sector (the “Issuer”). You have acknowledged that the non-public information provided to you is subject to the Master Confidentiality Agreement dated \_\_\_\_\_\_\_\_ \_\_\_\_, \_\_\_\_, by and between [firm name] and Underwriter. Until the expiration time (as defined below), you have agreed that: (a) you will not use any of the non-public information that you have received to purchase or sell, directly or indirectly, securities of the issuer (including entering into hedge transactions involving such securities); (b) you will not convey any of the non-public information that you have received to any other person outside of your firm, and that you will communicate it within your firm only on a need to know basis; and (c) you will fully comply with all applicable laws, rules, and regulations with regard to your receipt of the non-public information. We understand that you may take the position that, while complying with your obligations under applicable laws, including the U.S. federal securities laws and your internal policies, the trading restrictions will not (i) apply to personnel that are effectively walled off by appropriate “Chinese Wall” information barriers or (ii) restrict trading in broad-based indexes in which the securities of the issuer may be an immaterial component.

The term “expiration time” means the earliest to occur of (i) such time that we inform you in writing that you are no longer subject to the confidentiality arrangements described above, (ii) such time that the issuer files a Form 8-K with the Securities and Exchange Commission or widely disseminates a press release announcing the non-public information, and (iii) 9:00 a.m. (New York time) on [Date].

You understand there may be legal and regulatory consequences, including potential sanctions and penalties relating to the misuse or improper circulation of inside information. We recommend that you notify your legal and/or compliance department about our recent telephone conversation and this e-mail communication.

Please confirm your understanding and agreement of these terms by return e-mail in the form below.

[Form of response: I hereby affirm, on behalf of [firm name] and for the benefit of each of the issuer, its directors and officers, and the Representatives and their respective affiliates, [firm name]’s agreement to the restrictions stated above and acknowledge that the non-public information is subject to the Master Confidentiality Agreement dated \_\_\_\_\_\_\_\_\_ \_\_\_\_, \_\_\_\_\_, by and between [firm name] and Underwriter.]

ATTACHMENT A

Over-the-Wall Script

(1) INITIAL CONTACT—to be held with Investor’s Legal/Compliance Officer (or other officer approved by ECM Legal) only:

“We would like to discuss with you and certain other individuals at your firm some highly confidential information relating to a potential offering of [equity [or equity-related] securities] by a U.S. public company. in the [ ] sector. The Issuer has a market cap of [ ] and its equity securities are primarily listed in [Americas/EMEA/ASIA/JAPAN]. The deal is expected to launch on [DATE/TIME] and is expected to price on [DATE/TIME]. Our discussing this opportunity with you would be subject to your agreement to treat the information we provide confidentially, not to use such information to render any type of advice to your firm as principal or, if applicable, your clients or those of your firm, and to restrict trading by those in possession of the confidential information until a time no later than [day and date], at [time A.M./P.M. (EDT)]. by which time all material non-public information provided to you hereunder will either have been made public or will have been determined by the issuer to no longer be material information.

Please note that if the company elects not to proceed with the potential business combination, then no “cleaning disclosure” will be made.

[INSERT IF THE ISSUER HAS AGREED TO MAKE AN AFFIRMATIVE CLEANING DISCLOSURE:

The company has agreed that it will, no later than [day and date], at [time A.M./P.M. EDT], publicly disclose any confidential information provided to you that as of that date and time constitutes “material non-public information” within the meaning of applicable securities laws, including, if necessary, the fact that the company was evaluating this potential offering.]

Do you agree to receive the confidential information on that basis? If so, we will send you an email confirming this conversation.”

[INSERT IF THE INITIAL CONTACT IS WITH A PERSON AT THE INVESTOR WHO IS NOT THE INVESTOR’S LEGAL/COMPLIANCE OFFICER BUT WHO IS APPROVED BY ECM LEGAL AND AGREES TO RECEIVE THE CONFIDENTIAL INFORMATION ON THE BASIS PROPOSED ABOVE: “Will you please confirm that you either have spoken, or have declined the opportunity to speak, to a member of your legal or compliance department concerning this request?”]

Note: If Investor asks what sector the issuer is in, you can answer “The \_\_\_\_\_\_\_\_\_\_\_\_ sector.”

(2) ORAL DISCLOSURE OF PARTIES:

If Investor orally confirms their agreement to the terms set forth above and indicates that they want to be taken over-the-wall, provide Investor’s representative with Issuer’s name and ticker symbol using the following script:

“The name of the issuer is [ ] and its ticker is [ ]. The name and ticker of the issuer and the potential offering itself should be treated as confidential information, subject to the terms you have just orally agreed to. We will now send you an email with additional details on this process and the applicable restrictions, which will require an affirmative email responsefrom you. Upon our receipt of your email response, you will receive a call from [Underwriter] who will give you additional details about the transaction and the potential parties.

Please do not contact any other person at [Underwriter], including your salesperson or any research analysts, regarding the confidential information of the potential offering, as these individuals are not aware of the potential offering or of any of the material non-public information.”

(3) INITIAL CONTACT EMAIL TO BRING ACCOUNTS OVER THE WALL:[[4]](#footnote-4)

We would like to discuss with you and certain other individuals at your firm some highly confidential information, which may include material non-public information, relating to a potential offering of securities by a U.S. public company in the [ ] sector. Certain details of the proposed transaction are highlighted below.

* Approximate Deal Size: [ ]
* Type of Security: [ ]
* Primary Listing: [ ]
* Expected Deal Launch Date/Time: [ ]
* Latest Cleansing Date/Time: [ ]

Our discussing this opportunity with you would be subject to your agreement to treat all of the information we provide confidentially, not to use such information to render any type of advice to your firm as principal or, if applicable, your clients or those of your firm, and to restrict trading in the securities and any derivative instruments of the Company by those in possession of the confidential information until a time no later than [day and date], at [time A.M./P.M. EDT], by which time all material non-public information provided to you hereunder will either have been made public or will have been determined by the issuer to no longer be material information.

[INSERT IF THE ISSUER HAS AGREED NOT TO MAKE AN AFFIRMATIVE CLEANING DISCLOSURE:

Please note that if the company elects not to proceed with the potential offering, then no “cleansing disclosure” will be made.]

[INSERT IF THE ISSUER HAS AGREED TO MAKE AN AFFIRMATIVE CLEANING DISCLOSURE:

The company has agreed that it will, no later than [day and date], at [time A.M./P.M. EDT], publicly disclose any confidential information provided to you that as of that date and time constitutes “material non-public information” within the meaning of applicable securities laws, including, if necessary, the fact that the company was evaluating this potential offering.]

Do you agree to receive the confidential information on this basis? If so, please reply by phone, or by email with the text under “Accept Response Text” below, to confirm this conversation and your agreement and we will provide you with the name and ticker symbol of the issuer and additional details on this process and the applicable restrictions, which will require an affirmative email response from you. If you do not respond, we will assume you do not accept.

Accept Response Text:

I agree to receive the confidential information on the basis set forth in your e-mail and I confirm that I have either spoken, or have declined the opportunity to speak, to a member of my legal or compliance department concerning this request.

(4) CONFIRMATORY EMAIL PROCESS FOR ALL ACCOUNTS BROUGHT OVER THE WALL:

“We [have discussed and] will discuss with you certain highly confidential information relating to Issuer, ticker symbol [ ], and a potential upcoming offering of securities, which information would be material/price sensitive and which you have previously agreed to keep confidential. Except as provided immediately below, neither you nor your firm will: (i) disclose any of the confidential information regarding Issuer or the potential offering we have provided or will provide (the “Confidential Information”) to anyone within or outside your firm (other than, subject to these restrictions, to those people at your firm actively involved in the investment decision with respect to the potential offering) other than in response to a request by any regulatory authority, court or tribunal, or as required under any law or regulation; (ii) use such information to render any type of advice to your firm as principal or, if applicable, your clients or those of your firm other than in connection with your participation in the proposed offering (it being understood that this clause is not intended to limit your ability, subject to your compliance with applicable securities laws, to trade in securities of issuers who may be in the same sector or otherwise but are not affiliated with Issuer or the offering which is the subject of the Confidential Information); or (iii) engage in or cause anyone else to engage in any trading or market transactions relating to the securities or other financial instruments of the Issuer or effect any other transaction in such securities (or financial instruments (including, without limitation, transactions in derivative instruments that reference such securities) until a time no later than [day and date], at [time A.M./P.M. EDT)] (by which time such material Confidential Information that, as of such date and time, the Issuer deems to constitutes “material non-public information” within the meaning of applicable securities laws shall have been publicly disclosed or will have been determined by Issuer to no longer be material information) or such earlier date as Issuer shall have publicly disclosed all of such Confidential Information.

[INSERT IF THE ISSUER HAS AGREED NOT TO MAKE AN AFFIRMATIVE CLEANING DISCLOSURE:

Please note that if the company elects not to proceed with the potential offering, then no “cleansing disclosure” will be made.]

[INSERT IF THE ISSUER HAS AGREED TO MAKE AN AFFIRMATIVE CLEANING DISCLOSURE:

The company has agreed that it will, no later than [day and date], at [time A.M./P.M. EDT], publicly disclose any confidential information provided to you that as of that date and time constitutes “material non-public information” within the meaning of applicable securities laws, including, if necessary, the fact that the company was evaluating this potential offering.]

We understand that you may take the position that, while complying with your obligations under applicable laws, including the U.S. federal securities laws, and your internal policies, the trading restrictions will not: (i) apply to personnel that are effectively walled off by appropriate “Chinese Wall” information barriers; or (ii) restrict trading in broad-based indices in which the securities of Issuer may be an immaterial component”

[INSERT FOR MONEY/INVESTMENT MANAGERS OR HEDGE FUNDS WITH THIRD PARTY CUSTOMERS:

The trading restrictions will also not (a) restrict your ability to liquidate positions in Issuer’s securities held in accounts of customers who terminate your services; or (b) restrict your ability to sell Issuer’s securities held in accounts of customers who instruct you to sell Issuer’s securities (not upon the recommendation of anyone at your firm who has received any of the Confidential Information) and to whom you have not provided any of the Confidential Information].

“We remind you of your obligations under applicable securities laws, including the obligation not to trade on the basis of material non-public information. Neither we nor Issuer, nor any of our or its representatives make any representations or undertake any liability as to any information that may be provided to you, other than by the Issuer with respect to any such information that is included in the subscription agreement, prospectus or prospectus supplement relating to the potential offering, at the time of any sale.

The obligation in this email will terminate upon the earlier of (i) [DATE], at [TIME] EDT, (ii) such date that Confidential Information that constitutes “material non-public information” within the meaning of applicable securities laws being publicly disclosed or will have been determined by the Issuer to no longer be material information or price sensitive[, or] (iii) such date as the Issuer shall have publicly disclosed all of such Confidential Information[, or (iv) such time that we inform you in writing that the potential transaction has been abandoned by the parties].

You may not contact any other person at [ ], including your salesperson or any research analysts, regarding this information or the potential offering, as these individuals are not aware of the potential offering or of any of the material non-public information.

Obligations under this agreement are not qualified, modified, or amended in any way by any prior agreements, whether oral or written, related to such subject matter between the parties involved or any of their affiliates. This is the entire agreement between the parties and their affiliates and embodies all obligations regarding the proposed transaction.

[INSERT THE FOLLOWING IN CONNECTION WITH RULE 144A OFFERINGS (INCLUDING OFFERINGS WITH A REGULATION S TRANCHE):

You also represent, warrant and affirm that you are either (i) a “qualified institutional buyer” as defined in Rule 144A under the U.S. Securities Act of 1933, as amended (the “Securities Act”) or (ii) not a “U.S. person”, as such term is defined in Rule 902(k) of Regulation S under the Securities Act, and would be participating in any transaction in accordance with Regulation S.]

[INSERT THE FOLLOWING IN CONNECTION WITH REGULATION S ONLY OFFERINGS:

You also represent, warrant and affirm that you are not a “U.S. person”, as such term is defined in Rule 902(k) of Regulation S under the U.S. Securities Act of 1933, as amended, and would be participating in any transaction in accordance with Regulation S.]

[INSERT THE FOLLOWING IN CONNECTION WITH PRIVATE PLACEMENTS RELYING ON SECTION 4(a)(2):

You also represent, warrant and affirm that you are an “institutional accredited investor” within the meaning of Rule 501(a)(1), (2), (3) (7), (12) or (13) under the U.S. Securities Act of 1933, as amended.]

Please confirm your understanding and agreement of these terms by return email in the form below.

I hereby affirm, on behalf of [firm name] and for the benefit of each of Issuer and Underwriter/Representative [firm name]’s agreement to the restrictions stated above.” and the representations contained in the email to which this email replies.

(5) AWAIT RECEIPT OF EMAIL OR SIGNED FAX CONFIRMATION FROM INVESTOR.

(6) ORALLY DISCLOSE APPROVED CONTENT.

1. If the offering involves a syndicate, the representative of the syndicate should be referenced in this document.

 [↑](#footnote-ref-1)
2. Identify specific information.

 [↑](#footnote-ref-2)
3. If the offering involves a syndicate, the representative of the syndicate should be referenced in this document.

 [↑](#footnote-ref-3)
4. Please note that, if possible, emails should be sent by individual client. If the email is being sent to more than one client for any reason, email addresses should only be included in the BCC line. [↑](#footnote-ref-4)