

SEC Adopts New Rule to Allow All Issuers to “Test-the-Waters”

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Washington D.C., Sept. 26, 2019 —The Securities and Exchange Commission today announced that it has voted to adopt a new rule that extends a “test-the-waters” accommodation—currently a tool available to emerging growth companies or “EGCs”—to all issuers. Under the new rule, all issuers will be allowed to gauge market interest in a possible initial public offering or other registered securities offering through discussions with certain institutional investors prior to, or following, the filing of a registration statement.

“The final rule benefits from the staff’s experience with the test-the-waters accommodation that has been available to EGCs since the Jumpstart Our Business Startups Act (JOBS Act),” said SEC Chairman Jay Clayton. “Investors and companies alike will benefit from test-the-waters communications, including increasing the likelihood of successful public securities offerings.”

The new rule is one of several SEC initiatives that build on JOBS Act provisions intended to encourage companies to access our public markets.

The rule will become effective 60 days after publication in the Federal Register.

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FACT SHEET

Solicitations of Interest Prior to a Registered Public Offering

Action

The Securities and Exchange Commission announced that it has voted to expand a popular modernization reform that will enable all issuers to engage in test-the-waters communications with qualified institutional buyers (“QIBs”) and institutional accredited investors (“IAIs”) regarding a contemplated registered securities offering prior to, or following, the filing of a registration statement related to such offering. These communications will be exempt from restrictions imposed by Section 5 of the Securities Act on written and oral offers prior to or after filing a registration statement. The expanded test-the-waters provision will provide all issuers with flexibility in determining whether to proceed with a registered public offering while maintaining appropriate investor protections.

Background

In 2012, Congress passed the Jumpstart Our Business Startups Act (the “JOBS Act”), which created Section 5(d) of the Securities Act. Section 5(d) permits an emerging growth company (“EGC”) and any person acting on its behalf to engage in oral or written communications with potential investors that are QIBs and IAIs before or after filing a registration statement to gauge such investors’ interest in a contemplated securities offering. The new rule extends this “test-the-waters” accommodation to non-EGCs, thereby encouraging more issuers to consider entering our public equity markets.

Highlights

Securities Act Rule 163B

Securities Act Rule 163B will permit any issuer, or any person authorized to act on its behalf, to engage in oral or written communications with potential investors that are, or are reasonably believed to be, QIBs or IAs, either prior to or following the filing of a registration statement, to determine whether such investors might have an interest in a contemplated registered securities offering. The rule is non-exclusive and an issuer may rely on other Securities Act communications rules or exemptions when determining how, when, and what to communicate about a contemplated securities offering.

Under the rule:

- there are no filing or legending requirements;
- the communications are deemed “offers”; and
- issuers subject to Regulation FD will need to consider whether any information in a test-the-waters communication would trigger disclosure obligations under Regulation FD or whether an exemption under Regulation FD would apply.

What’s Next?

The rule will become effective 60 days after publication in the Federal Register.

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