

Alerts & Publications



SEC Expands “Test-the-Waters” Communications Accommodation to All Issuers

October 3, 2019

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On September 26, 2019, the Securities and Exchange Commission (SEC) announced that it adopted Rule 163B under the Securities Act of 1933, a new rule extending the accommodation for “test-the-waters” communications to all issuers. The accommodation was previously only available to issuers that qualified as an “emerging growth company” (as defined in Section 2(a)(19) of the Securities Act). Rule 163B permits all issuers to gauge market interest in a potential initial public offering (or any other securities offering registered with the SEC) through discussions with certain specified institutional investors prior to or following the filing of a registration statement with the SEC. According to SEC Chairman Jay Clayton, “[i]nvestors and companies alike will benefit from test-the-waters communications, including increasing the likelihood of successful public securities offerings.” The adopting release for Rule 163B is available [here](#), and the Rule becomes effective 60 days after publication in the Federal Register.

The extension of the test-the-waters accommodation is consistent with previous extensions of accommodations available to emerging growth companies under the JOBS Act of 2012, as explained in our prior client alert, available [here](#).

Rule 163B extends an accommodation available to emerging growth companies pursuant to Section 5(d) of the Securities Act, originally implemented as part of the JOBS Act amendments to the Securities Act in 2012. Section 5(d) provides emerging growth companies an exemption from the Section 5 “gun-jumping” prohibitions, including (i) Section 5(c), which generally prohibits any written or oral offers prior to the filing of a registration statement, and (ii) and Section 5(b) (1), which requires that written offers registered with the SEC satisfy the definition of a prospectus as defined in Section 10 of the Securities Act.

Pursuant to Section 5(d) of the Securities Act, emerging growth companies (and any persons authorized to act on their behalf, including management and statutory underwriters) may engage in oral or written communications with potential investors that are (or are reasonably believed to be) “qualified institutional buyers” or “institutional accredited investors” either prior to or after filing a registration statement with the SEC to determine whether those investors might have an interest in that registered securities offering. Rule 163B extends the Section 5(d) accommodation to all issuers, regardless of size or reporting status, including business development companies and investment companies registered under the Investment Company Act of 1940. Neither Section 5(d) nor Rule 163B require an issuer to take specific actions to establish a “reasonable

belief” regarding an investor’s status as a qualified institutional buyer or institutional accredited investor; the adopting release for Rule 163B does make clear that issuers should continue to employ methods currently used in the context of Section 5(d).

Moreover, like test-the-waters communications made by emerging growth companies pursuant to Section 5(d), communications pursuant to Rule 163B are not required to be filed with the SEC and will not constitute a “free writing prospectus,” but may still be deemed an “offer” to sell the subject securities. Accordingly, test-the-waters communications will not require any specific legends. The SEC staff, however, may (and, in practice, generally do) request that issuers that engage in test-the-waters communications provide copies of such materials to the staff for review as part of the staff’s review of the registration statement.

Also like Section 5(d), the Rule 163B accommodation is limited to Section 5 of the Securities Act and, accordingly, the anti-fraud provisions of the federal securities laws and Regulation FD under the Securities Exchange Act of 1934 still apply to test-the-waters communications. Issuers and underwriters engaging in any test-the-waters communications should therefore ensure that such communications do not conflict with any disclosures made in connection with the registered offering or otherwise implicate any anti-fraud considerations under federal securities laws (including, for example, unlawful use of material, non-public information by recipients of the test-the-waters communications).

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Shelly Heyduk, an O’Melveny partner licensed to practice law in California, John-Paul Motley, an O’Melveny partner licensed to practice law in California, Robert Plesnarski, an O’Melveny partner licensed to practice law in the District of Columbia and Pennsylvania, and James M. Harrigan, an O’Melveny counsel licensed to practice law in the District of Columbia and Maryland, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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