

Memorandum

SEC Permits All Issuers to “Test the Waters”

September 27, 2019

On September 26, 2019, the Securities and Exchange Commission adopted a new rule under the Securities Act of 1933, as amended, that will allow all issuers, and not just emerging growth companies, to “test the waters” prior to the filing of a registration statement.¹ New Rule 163B is a welcome change that expands the availability of one of the most popular accommodations of The Jumpstart Our Business Startups Act of 2012, enabling all issuers to gauge investor interest in a potential registered securities offering before committing to one publicly or incurring associated costs.

Specifically, the final rule permits any issuer or person authorized to act on behalf of an issuer, including an underwriter, to engage in oral or written communications with potential investors, whether prior to or following the filing of a registration statement, so long as such communications are limited to potential investors that the issuer reasonably believes are qualified institutional buyers (QIBs) or institutional accredited investors (IAIs).² Qualifying communications would not need to be filed with the SEC or be required to include any specified legends.

Although exempt from the gun-jumping provisions of the Securities Act, these communications will be considered “offers” subject to the prospectus liability and anti-fraud provisions of the federal securities laws. Public company issuers will also need to evaluate whether information in these communications would trigger obligations under the selective disclosure rules of Regulation FD.

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

¹ See [Final Rule - Solicitations of Interest Prior to a Registered Public Offering](#), Release No. 33-10699, File No. S7-01-19 (September 26, 2019).

² In its proposing release, the SEC included a statement that a Rule 163B communication also must not conflict with material information in the related registration statement. The adopting release clarifies that this statement is intended as guidance for issuers on their obligations under the federal securities laws generally and is not itself a condition to the availability of Rule 163B.

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