

SEC Announces Expansion of Use of “Test-the-Waters” Communications to All Issuers

Insights

October 2, 2019

On September 26, 2019, the Securities and Exchange Commission (the “SEC”) announced that it had adopted a new rule that will allow all issuers to take advantage of the “test-the-waters” accommodation. 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. Prior to the new rule, only emerging growth companies or “EGCs” were permitted to “test-the waters” and these discussions could only occur prior to an initial public offering.

Summary of Rule

The new rule:

- Enables all issuers to engage in “test-the-waters” communications with qualified institutional buyers and institutional accredited investors regarding a contemplated registered securities offering prior to, or following, the filing of a registration statement related to such offering.
- Exempts “test-the-waters” communications from restrictions imposed by Section 5 of the Securities Act of 1933, as amended, however, issuers still would face liability for material misstatements or omissions in such communications.
- Requires no filing or legending of the communications, although the SEC may still request copies of written communications.

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.

However, issuers who are already public and are considering a registered offering 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.

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

The full text of the SEC Final Release can be found here:

<https://www.sec.gov/rules/final/2019/33-10699.pdf>

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