

SEC Expands 'Testing-the-Waters' Provisions to All Issuers

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On December 3, 2019, Rule 163B which expands the “testing-the-waters” provisions afforded to emerging growth companies (EGCs), will become effective to all issuers. The new rule was adopted by the Securities and Exchange Commission (SEC) this fall and allows any issuer or authorized persons on behalf of the issuer, not limited by reporting status or size, to provide investors that are or are reasonably believed to be qualified institutional buyers (QIBs) or institutional accredited investors (IAIs), with written or oral communications, prior to or following filing a registration statement in order to ascertain market interest related to a potential offering.

The new rule has the goal of leveling the playing field for all issuers by allowing issuers to better understand demand for an offering. Chairman Jay Clayton stated: “Investors and companies alike will benefit from test-the-waters communications, including increasing the likelihood of successful public securities offerings.” Reliance on Rule 163B is non-exclusive and issuers may continue to rely on other rules and/or exemptions. Additionally, in connection with the adoption of the new Rule 163B, the SEC amended Rule 405 to make clear that written communications used in reliance on Rule 163B are not required to be filed because they are not considered to be a free writing prospectus.

Key Points of New Rule 163B

	Testing-the-Waters Provisions Rule 163B Applicable to All Issuers
Eligibility	<i>All issuers and authorized parties on behalf of the issuer</i>
Timing	<i>Any time before or after a registration statement is filed</i>
Audience	<i>Limited to QIBs or IAIs or those reasonably believed to meet the definition of a QIB or IAI (this differs from Section 5(d) of the Securities Act, which did not expressly include a reasonable belief standard)</i>
Communications	<i>Written or oral with no limits beyond considering liability for a material misstatement or omission and Regulation FD disclosure obligations</i>
Confidentiality	<i>Not required, however Regulation FD may be triggered without precautions</i>
Liability	<i>Liability for a material misstatement or omission applies</i>
Legend or Filing Requirements	<i>None, but subject to SEC review upon request</i>
Exclusivity	<i>Non-exclusive</i>
Constitute a Free Writing Prospectus	<i>No</i>

Despite clarification issued by the SEC regarding no legend or filing requirements, issuers who plan to take advantage of the new rule should be aware that the SEC may request review of any materials used or communications made in reliance on Rule 163B just as it has for EGCs. Issuers should also take careful consideration regarding communications and Regulation FD and how such communications may trigger disclosure obligations. Lastly, communications made in reliance on the rule are deemed to be offers and therefore liability for material misstatements and/or omissions applies and issuers should review communications carefully to ensure compliance. The full text of the final rule may be accessed [HERE](#).

For additional information please contact any member of Haynes Boone's [Capital Markets and Securities Practice Group](#).