

SEC Proposes to Expand “Test-the-Waters” Modernization Reform to All Issuers

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by Gary L. Tygesson

The SEC proposed a new rule and related amendments that would expand the “test-the-waters” accommodation—currently available to emerging growth companies—to all issuers, including investment company issuers. Proposed Securities Act Rule 163B, if adopted, would significantly enhance an issuer’s ability to cost-effectively assess the demand for and valuation of its securities, and also provide insights into the structural components for the offering that are important to investors. The proposed Rule 163B would 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, qualified institutional buyers (QIBs) or institutional accredited investors (IAIs), 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 proposed rule would be non-exclusive and an issuer could rely on other Securities Act communications rules or exemptions when determining what to communicate regarding a contemplated securities offering.

Under the proposed rule:

- there would be no filing or legending requirements for test-the-waters communications;
- test-the-waters communications may not conflict with material information in the related registration statement;
- issuers subject to Regulation FD would 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; and
- although the new rule would exempt test-the-waters communications from the gun-jumping provisions of Section 5, such communications would still be considered “offers” under the Securities Act subject to Section 12(a)(2) liability and the anti-fraud provisions of the federal securities laws.

The proposal is subject to a 60-day public comment period. Additional information is available in the SEC’s press release regarding the proposed new rule here: [sec.gov/news/press-release/2019-14](https://www.sec.gov/news/press-release/2019-14).

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