

SEC Proposes To Expand “Test-the-Waters” Reforms to All Issuers

Article By:

Mark D. Wood

Jonathan D. Weiner

Zachary J. McCullough

On February 19, the Securities and Exchange Commission proposed Rule 163B under the Securities Act of 1933, which would permit any issuer, and any underwriter or other person acting on an issuer’s behalf, to communicate with qualified institutional buyers (QIBs) and institutional accredited investors (IAIs) regarding a potential public offering prior to or following the filing of a registration statement for the offering. These so-called “test-the-waters” communications are intended to help issuers gauge interest in possible public offerings before issuers incur the costs of filing a registration statement with the SEC.

Proposed Rule 163B (and related rule amendments) would complement Section 5(d) of the Securities Act, which was enacted in 2012 as part of the Jumpstart Our Business Startups Act (JOBS Act) and permits only emerging growth companies (EGCs), which are issuers with less than \$1.07 billion in annual revenues, to engage in test-the-waters communications with qualified prospective investors in a contemplated securities offering. The proposal follows the extension of another JOBS Act reform—allowing confidential submission of certain filings with the SEC by non-EGCs—and is consistent with the SEC’s apparent desire to encourage more companies to go public in the United States.

If adopted, Rule 163B would exempt written and oral communications by or on behalf of any issuer with QIBs and IAIs from the “gun-jumping” restrictions of Section 5 of the Securities Act. In addition, compliant test-the-waters communications would be excluded from the definition of “free writing prospectus,” would not need to be filed with the SEC and would not need to bear any specific legends. Nevertheless, the communication would still be subject to certain existing rules:

1. A test-the-waters communication would be considered an “offer,” and would be subject to anti-fraud laws under the Securities Act;
2. Information in a test-the-waters communication could not conflict with material information in

the related registration statement; and

3. Test-the-waters communications could trigger disclosure under Regulation FD (though an issuer could have the recipient enter into a non-disclosure agreement to mitigate the need for public disclosure).

SEC chairman Jay Clayton noted in the SEC's press release announcing the proposed rule that "[e]xtending the test-the-waters reform to a broader range of issuers is designed to enhance [the issuer's] ability to conduct successful public securities offerings and lower their cost of capital, and ultimately to provide investors with more opportunities to invest in public companies."

The SEC is soliciting public comment on the proposed rule, and the comments period expires 60 days after publication the *Federal Register*.

The SEC's proposed rule is available [here](#).

The SEC's press release is available [here](#).

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