



ALERT

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"Test-the-Waters" Accommodations Could Be Coming to a Company Near You

A proposed rule change would provide increased flexibility to issuers seeking to communicate with institutional investors earlier in the offering process.

On February 19, 2019, the U.S. Securities and Exchange Commission ("SEC") announced a proposal to expand "test-the-waters" accommodations to all issuers.

Section 5(c) of the Securities Act of 1933 prohibits most written or oral communications about proposed securities offerings prior to the filing of a registration statement with the SEC. The "test-the-waters" accommodation, which was included in the 2012 Jumpstart Our Business Startups Act, currently allows only "emerging growth companies" to gauge institutional investor interest in a proposed registered securities offering, including an initial public offering, before filing a registration statement with the SEC. The proposed rule would allow all issuers to engage in "test-the-waters" communications with investors that are, or that the issuer reasonably believes are, either "qualified institutional buyers" or "institutional accredited investors."

Any "test-the-waters" communications made pursuant to the proposed new rules would not need to include legends or be filed with the SEC. However, the information included in the communications would not be allowed to conflict with material information in a related registration statement. Additionally, the communications would still be considered "offers" subject to liability under Section 12(a)(2) of the Securities Exchange Act of 1934 and the anti-fraud provisions of the federal securities laws.

If adopted, the proposed accommodation would provide increased flexibility to issuers seeking to communicate with institutional investors earlier in the offering process. This, in turn, should allow issuers to better understand the information and offering terms important to institutional investors before conducting an offering and, thereby, provide more cost-effective means for gauging institutional investor interest and raising capital. The SEC believes the proposed rule would not impair investor protection because qualified institutional buyers and institutional accredited investors are financially sophisticated and have the ability to adequately assess investment opportunities.

The proposed rule will undergo a 60-day public comment period following the date it is published in the Federal Register.



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