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Want to Test the Waters? Now All Issuers Can

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Earlier this year, we discussed how all issuers may soon get their chance to test the waters. This morning it became official, when the Securities and Exchange Commission (SEC) adopted a final rule permitting all issuers to take advantage of the “test-the-waters” accommodation that has been available to emerging growth companies under the Jumpstart Our Business Startups Act (JOBS Act) since 2012. According to SEC Chairman, Jay Clayton, “Investors and companies alike will benefit from test-the-waters communications, including increasing the likelihood of successful public securities offerings.” The SEC press release announcing the final rules is available [here](#).

Under the new rule, Securities Act Rule 163B, any issuer and any person authorized to act on its behalf (including the company’s underwriters) may engage in oral or written communications with certain potential investors either prior to or following the filing of a registration statement with the SEC, in order to gauge their interest in investing in the company pursuant to a proposed registered public offering.

To comply with the rule, issuers may only engage in test-the-water communications with potential investors that are, or are reasonably believed to be, qualified institutional buyers (QIBs) or institutional accredited investors (which are entities that qualify as accredited investors under Rule 501(a) of Regulation D). In the final rule release, the SEC did not require issuers or underwriters to take specific steps to verify investor status. The SEC did, however, provide that issuers could “continue to rely on methods they currently use to establish a reasonable belief regarding an investor’s status in other contexts.”

Issuers are not required to include any legends on test-the-waters communications under the new rule. However, issuers subject to Regulation FD will still 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.

Keep in mind that any test-the-waters communication made under the new rule will be deemed an “offer” and will therefore be subject to the anti-fraud and other applicable provisions of the federal securities laws. Also, an issuer that proceeds with the proposed public offering after testing-the-waters will still be required to file a registration statement with the SEC.



The final rule release is available [here](#). The new rule will become effective 60 days after publication in the Federal Register.

We invite you to contact us directly if you have any questions regarding the new rule.