

Gavel to Gavel: Test-the-waters now available to all issuers

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On Dec. 3, new Rule 163B of the Securities Act of 1933, as amended, went into effect, thereby permitting all issuers to gauge market interest in potential registered securities offerings by engaging in oral or written, or test-the-waters, communications with certain contemplated investors prior to, or following, the filing of a registration statement.

In 2012, the Jumpstart Our Business Startups Act (JOBS Act) created a new Section 5(d) of the Securities Act, known as the test-the-waters accommodation. Under Section 5(d), emerging growth companies and persons acting on their behalf could engage in oral or written communications with potential investors that are qualified institutional investors or institutional accredited investors, before or after filing a registration statement, to gauge such investors' interest in potential securities offerings. The SEC's new Rule 163B expands the test-the-waters accommodation to include non-

emerging growth companies as well, allowing any issuer, or person authorized to act on its behalf, to engage in such communications with potential investors that are, or are reasonably believed to be, qualified institutional investors or institutional accredited investors.

The new Rule 163B will effectively provide all issuers with flexibility in determining whether to proceed with a registered public offering while maintaining appropriate investor protections. The rule is non-exclusive and an issuer may rely on other Securities Act communications rules or exemptions when determining how, when, and what to communicate about a contemplated offering. The communications will be deemed offers, subject to liability under Section 12 of the Securities Act as well as the anti-fraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act of 1934, as amended.

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