



test the waters, but don't make waves

MSK Client Alert

October 14, 2019

SEC Adopts New Rule Allowing All Issuers to Test the Waters in Registered Offerings

On September 26, 2019, the SEC announced that all issuers—including non-reporting issuers and investment companies (including registered investment companies and business development companies) will soon be able to “test-the-waters” in initial public offerings and other registered securities offerings. Under the newly adopted Rule 163B, any issuer will be able to engage in “test-the-waters” communications with qualified institutional buyers and institutional accredited investors.

Previously, under the Jumpstart Our Business Startups Act, only emerging growth companies were permitted to engage in “test-the-waters” communications. Rule 163B provides relief from the from restrictions imposed by Section 5 of the Securities Act on written and oral offers prior to, or after filing, a registration statement for issuers who do not qualify as emerging growth companies. This will give all issuers “flexibility in determining whether to proceed with a registered public offering while maintaining appropriate investor protections.”

Once in effect, communications made under Rule 163B will:

- Have no filing or legending requirements;
- Be deemed “offers”; and...

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