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## SEC Broadens Testing-The-Waters Relief

The Securities and Exchange Commission has expanded to all issuers “solicitations of interest” relief from registration statement filing requirements previously afforded only to “emerging growth companies” by the 2010 JOBS Act.

Under the new rule, adopted September 25, an issuer, or parties acting on behalf of an issuer (such as underwriters or placement agents), may engage in discussions with “qualified institutional buyers” or “institutional accredited investors” regarding their interest in a public offering of securities by the issuer. Previously, any issuer that was not an EGC had to file a registration statement before having these discussions, making it difficult for an issuer to assess market interest. In the case of “wall-crossed” offerings, this requirement was particularly onerous and obligated an issuer to have a shelf registration statement on file and effective in the case of non-EGCs, as the existing rule relating to “free writing prospectuses” of “well-known seasoned issuers” extended relief only to the issuer, not to underwriters.

The SEC amended its definition of “free writing prospectus” to exclude communications made in reliance on the new rule. While written communications under the new rule needn’t be filed with the SEC, the Commission noted the expectation of the Division of Corporation Finance that it will request copies of those communications when reviewing a registration statement, consistent with

current practice regarding TTW communications by EGCs.

The rule states expressly that TTW communications constitute “offers” for purposes of the anti-fraud provisions of the federal securities laws. The release proposing the rule noted that these communications must be consistent with material information in the filed registration statement, and, in the adopting release, the SEC clarified that this statement was a reminder that these communications are subject to the anti-fraud provisions, rather than a condition of the rule. The SEC also cautioned, in the adopting release, that communications must be made in compliance with “fair disclosure” regulations.

The rule becomes effective 60 days after its publication in the Federal Register.

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