

Easing the Prohibitions Against Gun-Jumping

Article

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Takeaways

- Proposed Rule 163B would permit oral or written communications by all issuers with prospective investors that are QIBs or IAs, prior to or after the filing of a registration statement to gauge interest in a contemplated offering.
- Communications made pursuant to the proposed rule would not be required to be filed with the SEC or bear any legend.
- The proposed rule is intended to provide cost-effective means for evaluating market interest before incurring the costs of an offering.

Introduction

On February 19, 2019, the Securities and Exchange Commission (SEC) proposed a rule that would generally permit all issuers to “jump the gun”—that is, to make offers to certain institutional investors prior to the filing of a registration statement. This rule would enable any issuer, as well as its proposed underwriters, to “test the waters” to see to what extent these institutions might be interested in investing in the company before a registration statement is filed.

The Current Landscape

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Under Section 5(c) of the Securities Act of 1933 (Act) it is generally unlawful to “jump the gun” by making an oral or written offer to sell a security before a registration statement is filed with the SEC.

Under Section 5(b)(1) of the Act it is generally unlawful to transmit a prospectus relating to a security with respect to which a registration statement has been filed with the SEC unless that prospectus meets the requirements of Section 10 of the Act.

Several existing rules under the Act, adopted from time to time over a period of decades, provide relief, subject to certain conditions and exceptions in each case, from the gun-jumping prohibitions of Sections 5(b)(1) and 5(c) of the Act, including:

- Rule 134, which permits limited information to be communicated after a registration statement has been filed, without such communication being deemed to constitute a “prospectus”;
- Rule 135, which permits very limited information (but not, notably, the identity of any underwriters) contained in a notice published by or on behalf of an issuer or selling security holder of a proposed offering to be disseminated before a registration statement has been filed, without such notice being deemed to constitute an “offer”;
- Rule 163, which exempts a well-known seasoned issuer (as defined in Rule 405 under the Act, a “WKSI”) from the gun-jumping prohibitions of Section 5(c) of the Act; provided that any written communication that is an offer (as defined in Section 2(a)(3) of the Act) will constitute a free writing prospectus (as defined in Rule 405 under the Act, a “FWP”) that must bear a specified legend and, subject to certain exceptions, be filed with the SEC;
- Rule 163A, which exempts from Section 5(c) of the Act certain communications made more than 30 days before the filing of a registration statement that do not refer to a securities offering that will be the subject of the registration statement;
- Rule 164, which provides that where the issuer is not an ineligible issuer (as defined in Rule 405 under the Act), an FWP used after the filing of a registration statement is deemed to be a Section 10(b) prospectus for purposes of Section 5(b)(1) of the Act;
- Rules 168 and 169, which permit the regular release of business information by specified issuers and/or to specified audiences, without such communications being deemed to constitute “offers”; and
- Rule 255, which permits testing-the-waters communications in offerings to be made under Regulation A under the Act.

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