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Small Business Notes

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U.S. Security and Exchange Commission (SEC) Adopts New Rule Allowing "Test the Waters" Communication by Securities Issuers to Institutional Buyers and Accredited Investors

On September 25, the SEC adopted its new Rule 163B expanding the use of "test the waters" communications – to sound out potential investor interest in a securities offering of a *registered* security.

Section 5 of the Securities Act is intended to prevent "gun jumping" by offerors in the form of communications about a securities offering before a registration of the securities takes place.

Until the SEC action on September 25, only Emerging Growth Companies were permitted, under an exemption in Section 5(d), to engage in oral or written communications with potential investors that are qualified institutional buyers or institutional investors. Under the new rule, all issuers, not just Emerging Growth Companies, are permitted to have oral or written communications before or after the filing of a registration statement with qualified institutional buyers or institutional accredited investor to sound out their potential interest in a contemplated securities offering.

The major elements of the new rule are:

- Eligible Issuers. The new rule is available to all issuers (including business development companies).
- Eligible Investors. Test the waters communications are limited to potential investors who are, or are reasonably believed to be, qualified institutional buyers or institutional accredited investors.
- Legend Requirement. Rule 163B communications will not be required to carry any legends.

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- Filing Requirement. Issuers will not be required to file Rule 163B communications with the SEC.
- Status as an Offer. Communications under Rule 163B will be considered to be offers under federal securities laws and thus subject to antifraud provisions of federal securities law.
- Non-Exclusivity. Rule 163B is non-exclusive, allowing issuers to rely on other securities exemptions at the same time as Rule 163B.

U.S. Supreme Court Hears Oral Arguments on Discrimination "Because of Sex" in Cases Involving Sexual Orientation and Transgender Status.

On October 8, 2019, the U.S. Supreme Court heard oral arguments in two consolidated cases in which the Court agreed to answer the question: Whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination ' because…of sex' within the meaning of Title VII of the Civil Rights Act of 1964.

In *Altitude Express, Inc. v. Zarda,* the estate of deceased Donald Zarda pursued a Title VII discrimination suit against Zarda's former employer alleging that he was discharged after disclosing his gay sexual orientation. In that case the Second Circuit Court of Appeals held that "…the statutory prohibition extends to all discrimination 'because…of sex' and sexual orientation discrimination is an actionable subset of sex discrimination."

In the second case, *Bostock v. Clayton County, Georgia,* Bostock alleged that his former employer—Clayton County –on learning of his sexual orientation falsely accused him mismanaging county funds and used that accusation as a pretext for firing him because of his sexual orientation. In that case the Eleventh Circuit Court of Appeals held that Title VII did not apply to Bostock's circumstances.

In a third case, *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC,* an employee who was born biologically male but planned to transition to female filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the employer fired her when she informed the employer of her transition plan. The Sixth Circuit Court of Appeals held that Title VII protects employees from discrimination based on gender identity. In this case the Supreme Court agreed to address the question "Whether Title VII prohibits discrimination against transgender people based on their status as transgender or on sex stereotyping.

Decisions in these cases can be expected in early Spring 2020.

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U.S. House of Representatives Passes New Regulatory Requirement for Start-Ups and Small Businesses. Senate Action Still Uncertain

On October 22, 2019, the U.S. House of Representatives passed HR 2513, the Corporate Transparency Act of 2019. Directed toward assisting law enforcement "…in detecting, preventing, and punishing terrorism, money laundering, and other misconduct," the bill would require covered entities (generally corporations and limited liability companies) to register all their "beneficial owners" with the Financial Crimes Enforcement Network (FinCEN).

Every covered entity, starting with new business formations and expanding to cover the two plus million existing corporations and limited liability companies in the U.S., would be required to provide the following information on each beneficial owner (defined as a natural person who exercises substantial control over the covered entity or who owns twenty five percent of more of the entity's equity, or receives substantial economic benefits from the assets of the entity):

- The beneficial owner's full legal name;
- The beneficial owner's date of birth;
- The beneficial owner's current residential or business address;
- The beneficial owner's unique identifying number from a state driver's license or state ID card.

Larger businesses or those regulated in some way would be exempt, for example, businesses issuing registered securities, banks and credit unions, SEC registered investment companies, public accounting firms, utilities, churches, charities and non-profit entities, and any business employing more than twenty full time employees that files U.S. tax returns and has a physical presence in the U.S.

The bill has been widely opposed and criticized by small business advocacy organizations which have stressed both privacy concerns and costs to small businesses in their opposition.

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