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SEC Adopts “Test-the-Waters” Accommodation for All Issuers

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On September 26, 2019, the Securities and Exchange Commission (SEC) announced the adoption of Securities Act Rule 163B, which expands to all issuers the “test-the-waters” accommodation, which had previously only been available to issuers that qualified as emerging growth companies.

The Jumpstart Our Business Startups Act (JOBS Act) was enacted in 2012 with the intent to encourage capital formation of small businesses by easing many of the burdensome requirements under federal securities laws. As one of the many ways the JOBS Act encouraged capital formation for small businesses, it permitted those issuers meeting the definition of an emerging growth company (and persons authorized to act on behalf of an emerging growth company) to communicate with qualified institutional buyers and institutional accredited investors regarding a proposed offering before filing a registration statement. This “test-the-waters” accommodation allowed emerging growth companies to gauge market interest before committing to the costly process associated with initial public offerings and other registered securities offerings.

With the adoption of Rule 163B, all issuers—including nonreporting issuers, emerging growth companies, non-emerging growth companies, well-known seasoned issuers, and investment companies— and their authorized representatives, including underwriters, will be able to take advantage of the test-the-waters accommodation. The SEC Press Release notes several technical considerations under Rule 163B, including: (i) that there are no filing or legending requirements; (ii) that communications are deemed “offers” as defined under the Securities Act; and (iii) that issuers must consider whether any information in a test-the-waters communication would trigger disclosure obligations under Regulation FD. In commenting on Rule 163B, SEC Chairman Jay Clayton stated, “[i]nvestors and companies alike will benefit from test-the-waters communications, including increasing the likelihood of successful public securities offerings.” The adoption of Rule 163B is one of many

initiatives intended to encourage companies to access U.S. public markets, which has recently been an area of focus for the SEC.

Rule 163B will become effective 60 days after publication in the Federal Register. Contact the experts at Michael Best's Securities and Capital Markets team for more information on conducting an offering with a test-the-waters component.

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