

## **SEC Proposes Amendment to Rule 163 - Pre-Registration Communications by WKSIs**

On December 18, 2009 the Securities and Exchange Commission (“SEC”) proposed to amend its rule permitting certain communications concerning offers to sell and offers to buy securities prior to the filing of a registration statement registering such securities.<sup>1</sup> The proposal, if enacted, would amend Rule 163 under the Securities Act of 1933 (the “Act”) in an effort to facilitate communications between well-known seasoned issuers (“WKSIs”) and potential investors.

### **I. Rule 163**

Currently, Rule 163, titled “Exemption from Section 5(c) of the Act for Certain Communications By or On Behalf of Well-Known Seasoned Issuers”, provides a safe harbor from the registration requirements of Section 5(c) of the Act, whereby WKSIs can make offers to buy and sell securities prior to the filing of an effective registration statement registering such securities, provided that if the offer is a written offer (a “free writing prospectus”), it contains a specified legend and is filed with the SEC promptly upon the filing of a registration statement covering such securities.<sup>2</sup>

At present, the exemption afforded by Rule 163 is not available to offering participants that are underwriters or dealers, as agents or representatives of a WKSI for purposes of these communications prior to registration.<sup>3</sup>

### **II. Proposed Amendments**

The proposed changes extend the Rule 163 exemption to underwriters or dealers, subject to three conditions: (1) the underwriter or dealer has written authorization from the WKSI to act as an agent, (2) the issuer has authorized the written or oral communication prior to making any communication and (3) any authorized underwriter or dealer that has made any authorized communication in reliance upon Rule 163 is identified in any prospectus contained in a registration statement filed for the offering to which the communication relates.

The SEC explains that the proposed amendments are “for the limited purpose of enabling issuers to authorize underwriters or dealers to approach potential investors on their behalf regarding a possible offering of the issuer’s securities”<sup>4</sup> and that this “should allow greater access to capital through the use of the underwriters’ or dealers’ existing networks of investors and the increased flexibility in evaluating the possible terms of offerings.”<sup>5</sup> The SEC notes that one effect of the amendments would be to encourage issuers to register securities offerings and as a result “investors should benefit from our existing regulatory framework of specific disclosure

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<sup>1</sup> See SEC Release No. 33-9098 (December 22, 2009) available at <http://www.sec.gov/rules/proposed/2009/33-9098.pdf> (the “Proposing Release”).

<sup>2</sup> Rule 163 is not applicable if the issuer has an automatic shelf registration statement on file registering the securities that such issuer is offering to buy or sell. According to footnote 16 of the Proposing Release, 50% of the 2,273 WKSI registrants that indicated that they were WKSIs as of the end of their 2006 or 2007 fiscal years, have filed automatic shelf registration statements on Form S-3 or F-3.

<sup>3</sup> See Rule 163(c).

<sup>4</sup> See Proposing Release at 12.

<sup>5</sup> *Id.* at 24.

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requirements and remedies that apply in registered offerings and greater liquidity for the acquired securities because they will not be acquired in private transactions with corresponding resale restrictions.”<sup>6</sup>

Further, the SEC states that Regulation FD would continue to be applicable to these communications in advance of the filing of a registration statement and if material non-public information is communicated, persons receiving the material non-public information would be required to enter into a confidentiality agreement.<sup>7</sup>

The SEC requests that comments on the proposals be submitted on or before January 27, 2010.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com); or Charlotte Zukowski at 212.701.3625 or [czukowski@cahill.com](mailto:czukowski@cahill.com).

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 14-15.