Communications to Investors

The Securities and Exchange Commission Proposes to Allow Underwriters to Contact Investors on Behalf of a Well-Known Seasoned Issuer Before a Registration Statement is Filed

SUMMARY

The Securities and Exchange Commission has proposed amendments to Rule 163(c) under the U.S. Securities Act of 1933 that would allow an underwriter or dealer to communicate with investors on behalf of a well-known seasoned issuer (commonly referred to as a “WKSI”) about an offering of the issuer’s securities before a registration statement is filed under the Securities Act, provided that the underwriter or dealer has been authorized in advance by the issuer to do so.

Rule 163 currently permits a WKSI to communicate with investors about a potential offering of its securities before filing a registration statement with the SEC, but does not permit an underwriter or dealer to do so on the issuer’s behalf until after a registration statement is filed. In the proposing release, the SEC notes that in certain capital-raising plans there may be a benefit in allowing dealers or underwriters to discuss the contemplated offering with investors before a registration statement is filed, as the issuer may not wish to engage directly in such preliminary communications. The SEC believes the current limitation in Rule 163 has reduced the potential benefits of its 2005 offering reforms, which were intended to encourage issuers to register offerings with the SEC, and could lead such issuers to conduct unregistered offerings instead, with the resultant loss of the rights and remedies available under the Securities Act to investors in registered offerings and diminished liquidity for the offered securities.
The SEC is soliciting comments on the proposed amendments. The deadline for comments is January 27, 2010.

BACKGROUND

In 2005, the SEC adopted various modifications to the registration, communications and offering requirements under the Securities Act. As part of those modifications, the SEC liberalized the communications rules for a new category of issuers, called “well-known seasoned issuers” (“WKSIs”). The new rules also permitted WKSIs to file registration statements that become effective automatically upon filing, without SEC review.

Pursuant to Rule 163, WKSIs can engage in unrestricted oral and written offers before a registration statement is filed without violating the “gun-jumping” provisions of the Securities Act (i.e., provisions restricting communications relating to public offerings in the absence of a filed registration statement). Rule 163 exempts an offer made “by or on behalf of” a WKSI from these restrictions as long as the conditions of the rule are met. Under the current rule, a communication is deemed to be “by or on behalf of” a WKSI if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made. At the time the SEC adopted the rule and permitted automatic shelf registration, it expected that a WKSI would usually have a shelf registration statement on file that it could use for any of its registered offerings, and that both the issuer as well as any underwriters would be able to communicate with investors without the need for an exemption such as Rule 163. In the release proposing the amendment, however, the SEC noted that, contrary to expectations, many WKSIs have not filed automatic shelf registration statements or have filed registration statements that do not register all of the types of securities they may want to offer. As a result, a WKSI that wants to contact investors about a potential offering may need to do so in accordance with Rule 163, and thus may not be permitted to have an underwriter or dealer make those contacts on its behalf.

The SEC notes that some methods used in recent capital-raising transactions have highlighted impediments in Rule 163 to the ability of a WKSI to communicate with broader groups of potential investors regarding a possible offering of the issuer's securities. Specifically, WKSIs may want to assess the level of investor interest in their securities before filing a registration statement (or a post-effective amendment to an existing registration statement) covering the offered securities. Although Rule 163

1 Release No. 33-9098 (December 18, 2009).

2 A WKSI is an issuer that meets the registrant requirements of Form S-3 or Form F-3; either (x) has at least $700 million in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates or (y) with regard to issuers that will only register non-convertible securities (other than common equity) or certain full and unconditional guarantees, has issued, for cash, within the last three years at least $1 billion aggregate principal amount of non-convertible securities (other than common equity) through primary offerings registered under the Securities Act; and is not an “ineligible issuer” as defined in Securities Act Rule 405.
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Currently allows these issuers to communicate directly with potential investors to determine their interest in purchasing securities without violating the “gun-jumping” provisions of the Securities Act, the SEC notes that many of these issuers either do not have sufficient knowledge about potential investors to contact them directly or may prefer not to contact investors directly out of concern that any such contact could itself constitute and reveal material, non-public information about the issuers’ capital-raising plans without the opportunity to first obtain a confidentiality agreement from the investors. Thus, the SEC acknowledges that a WKSI may wish to engage underwriters or dealers to contact investors on its behalf, in order to benefit from the latter’s broad client base and to preserve confidentiality, and thus to better ascertain the depth and extent of market interest in a potential offering without adversely affecting the market for the issuer’s securities (e.g., by filing a registration statement and revealing its capital-raising plans prematurely). In its current form, however, Rule 163 does not permit an offering participant who is an underwriter or dealer to make such communications.

The SEC believes that, if adopted, the proposed amendment to Rule 163 will enable WKSIs to better gauge the level of interest in the market for an offering and explore possible terms for such an offering before filing a registration statement or including the securities in the registration statement through a post-effective amendment.

THE PROPOSED AMENDMENTS TO SECURITIES ACT RULE 163(c)

Under the proposal to amend Rule 163(c), an underwriter or dealer could be an agent or representative of a WKSI, and thus communicate with investors on the issuer’s behalf, under Rule 163 if all the following conditions are satisfied:

- the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on its behalf;
- the issuer authorizes or approves any written or oral communication before it is made by an authorized underwriter or dealer as agent or representative of the issuer; and
- any authorized underwriter or dealer that has made any authorized communication on behalf of the issuer in reliance on Rule 163 is identified in any prospectus contained in the registration statement that is subsequently filed for the offering to which the communication relates.

“*We understand,*” the SEC further observes, “that underwriters or dealers generally do not reveal the identity of the issuer to potential investors before securing agreements to retain confidentiality of the information until it is publicly disclosed or is no longer material, non-public information.”
All other provisions of Rule 163 would continue to apply, including that:

- all communications made by or on behalf of the issuer and in reliance on Rule 163 would continue to be subject to Regulation FD;4
- every written communication that is an offer made in reliance on the Rule 163 exemption would contain substantially the legend required by the rule; and
- every written communication that is an offer made in reliance on the Rule 163 exemption would be filed with the SEC as a free-writing prospectus when the registration statement, or amendment to the registration statement, is filed5.

In the proposing release, the SEC states that it does not believe an underwriter or dealer should be able to rely on Rule 163, without prior authorization from the issuer, to gauge interest in the market for an issuer’s securities and then present the issuer with an unsolicited proposal for an offering of that class of securities. By requiring that the underwriter or dealer receive written authorization to act as the issuer’s agent or representative before making pre-filing offers in reliance on Rule 163, the proposed amendment requires that the issuer be involved with (and thus have some control over) any communication effort to be made by the underwriters or dealers from the outset.6

The second condition of the proposed amendment is that the issuer must authorize or approve any written or oral communication before it is made by an authorized underwriter or dealer. Any written or oral communication made by an authorized underwriter or dealer would be considered an issuer communication. Any written communication that is approved or authorized by the issuer and made pursuant to the proposed amendment on behalf of the issuer would need to be filed as a free-writing prospectus when a registration statement for the offering is filed. An oral communication made by an authorized underwriter or dealer pursuant to the proposed amendment would not be subject to a filing requirement.

In the proposing release, the SEC states that one way an issuer could satisfy the second condition with regard to approving oral communications is to approve the contents of the information that will be conveyed orally by the authorized underwriter or dealer to investors. The proposing release does not

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4 The SEC notes that, if an authorized underwriter or dealer acting on behalf of an issuer desires to communicate material, non-public information in reliance on the proposed amendment to persons enumerated in Regulation FD (e.g., broker-dealers, investment advisers and any security holders who it is reasonably foreseeable will trade on the information), then either the issuer, or the underwriter or dealer acting on its behalf, would first need to obtain a confidentiality agreement from those persons or the issuer would need to disclose the information publicly in the manner and at the time required by Regulation FD.

5 As is currently the case, the filing condition of Rule 163(d) would apply only if and when a registration statement, or an amendment to a registration statement, for the offering is filed. Accordingly, if no such registration statement (or amendment) is filed, a free-writing prospectus used pursuant to Rule 163 does not have to be filed.

6 The SEC notes that this requirement is not intended to limit the existing ability of an underwriter or dealer not acting on behalf of an issuer from making “reverse inquiry” offers after a registration statement is filed.
specify what form either the authorization to act as agent or the approval of any communication must take (although the initial authorization must be in writing and both it and any approval of a communication must be made in advance), nor does the release provide any guidance on the degree of specificity required for any such authorization or approval to be valid.

SEC COMMENT SOLICITATION ON RULE PROPOSALS
The SEC is soliciting comment from interested parties on all aspects of the proposed amendment. Among other things, the SEC asks whether the types of investors that an authorized underwriter or dealer could approach under the proposed amendment should be limited (e.g., to “qualified institutional buyers”, as defined in Securities Act Rule 144A) and whether the amendment would affect the timing of registered offerings and the ability of investors who are not approached in advance to evaluate the offerings. Comments are due by January 27, 2010.

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CONTACTING SULLIVAN & CROMWELL LLP
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CONTACTS

New York
Robert E. Buckholz, Jr. +1-212-558-3876 buckholzr@sullcrom.com
Catherine M. Clarkin +1-212-558-4175 clarkinc@sullcrom.com
Jay Clayton +1-212-558-3445 claytonwj@sullcrom.com
Robert W. Downes +1 212 558 4312 downesr@sullcrom.com
William G. Farrar +1-212-558-4940 farrarw@sullcrom.com
David B. Harms +1-212-558-3882 harmsd@sullcrom.com
Robert W. Reeder III +1-212-558-3755 reederr@sullcrom.com
Glen T. Schleyer +1-212-558-7284 schleyerg@sullcrom.com
Rebecca J. Simmons +1-212-558-3175 simmonsre@sullcrom.com
Andrew D. Soussloff +1-212-558-3681 soussloffa@sullcrom.com
Donald C. Walkovik +1-212-558-3911 walkovikd@sullcrom.com

Washington, D.C.
Eric J. Kadel, Jr. +1-202-956-7640 kadelej@sullcrom.com
Robert S. Risoleo +1-202-956-7510 risoleor@sullcrom.com
Dennis C. Sullivan +1-202-956-7554 sullivand@sullcrom.com

Los Angeles
Patrick S. Brown +1-310-712-6603 brownp@sullcrom.com
Alison S. Ressler +1-310-712-6630 resslera@sullcrom.com

Palo Alto
Scott D. Miller +1-650-461-5620 millersc@sullcrom.com
John L. Savva +1-650-461-5610 savvaj@sullcrom.com

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December 23, 2009
<table>
<thead>
<tr>
<th>City</th>
<th>Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>London</td>
<td>Nikolaos G. Andronikos</td>
<td>+44-20-7959-8470</td>
<td><a href="mailto:andronikosn@sullcrom.com">andronikosn@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>Kathryn A. Campbell</td>
<td>+44-20-7959-8580</td>
<td><a href="mailto:campbellk@sullcrom.com">campbellk@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>Richard C. Morrissey</td>
<td>+44-20-7959-8520</td>
<td><a href="mailto:morrisseyr@sullcrom.com">morrisseyr@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>John O’Connor</td>
<td>+44-20-7959-8515</td>
<td><a href="mailto:oconnorj@sullcrom.com">oconnorj@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>William A. Plapinger</td>
<td>+44-20-7959-8525</td>
<td><a href="mailto:plapingerw@sullcrom.com">plapingerw@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>David B. Rockwell</td>
<td>+44-20-7959-8575</td>
<td><a href="mailto:rockwelld@sullcrom.com">rockwelld@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>George H. White III</td>
<td>+44-20-7959-8570</td>
<td><a href="mailto:whiteg@sullcrom.com">whiteg@sullcrom.com</a></td>
</tr>
<tr>
<td>Paris</td>
<td>Krystian Czerniecki</td>
<td>+33-1-7304-5880</td>
<td><a href="mailto:czernieckik@sullcrom.com">czernieckik@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>William D. Torchiana</td>
<td>+33-1-7304-5890</td>
<td><a href="mailto:torchianaw@sullcrom.com">torchianaw@sullcrom.com</a></td>
</tr>
<tr>
<td>Melbourne</td>
<td>Robert Chu</td>
<td>+61-3-9635-1506</td>
<td><a href="mailto:chur@sullcrom.com">chur@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>John E. Estes</td>
<td>+61-3-9635-1503</td>
<td><a href="mailto:estesj@sullcrom.com">estesj@sullcrom.com</a></td>
</tr>
<tr>
<td>Sydney</td>
<td>Waldo D. Jones, Jr.</td>
<td>+61-2-8227-6702</td>
<td><a href="mailto:jonesw@sullcrom.com">jonesw@sullcrom.com</a></td>
</tr>
<tr>
<td>Tokyo</td>
<td>Izumi Akai</td>
<td>+81-3-3213-6145</td>
<td><a href="mailto:akaii@sullcrom.com">akaii@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>Garth Bray</td>
<td>+81-3-3213-6172</td>
<td><a href="mailto:brayg@sullcrom.com">brayg@sullcrom.com</a></td>
</tr>
<tr>
<td>Hong Kong</td>
<td>William Y. Chua</td>
<td>+852-2826-8632</td>
<td><a href="mailto:chuaw@sullcrom.com">chuaw@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>Chun Wei</td>
<td>+852-2826-8666</td>
<td><a href="mailto:weic@sullcrom.com">weic@sullcrom.com</a></td>
</tr>
<tr>
<td></td>
<td>John D. Young, Jr.</td>
<td>+852-2826-8668</td>
<td><a href="mailto:youngj@sullcrom.com">youngj@sullcrom.com</a></td>
</tr>
<tr>
<td>Beijing</td>
<td>William Y. Chua</td>
<td>+852-2826-8632</td>
<td><a href="mailto:chuaw@sullcrom.com">chuaw@sullcrom.com</a></td>
</tr>
</tbody>
</table>