

**SEC PROPOSES AMENDMENT TO PERMIT PRE-FILING OFFERINGS
BY UNDERWRITERS ACTING ON BEHALF OF WELL-KNOWN
SEASONED ISSUERS**

The SEC recently proposed an amendment to Rule 163 under the Securities Act that would allow an underwriter or dealer, acting pursuant to written authorization from a well-known seasoned issuer (“WKSI”),¹ to act as its agent in communicating with potential investors regarding proposed offerings of the issuer’s securities even prior to the filing of a registration statement for such offerings. The amendment is designed to facilitate the ability of WKSI’s to gauge the level of market interest in contemplated securities offerings prior to any public disclosure. Comments on the proposal must be submitted by January 27, 2010.

Under the Securities Act, an issuer may not offer to sell its securities to investors unless it has an effective registration statement on file covering such offering, or unless such offering is otherwise exempt from registration. Current Rule 163 provides an exemption for offers made “by or on behalf of” a WKSI that occur prior to the filing of a registration statement, provided that certain conditions are met. However, Rule 163 currently does not permit underwriters and dealers to act as a WKSI’s agent for purposes of the pre-filing offer. Since many issuers either do not have the ability to seek out and contact prospective investors directly, or prefer not to contact investors directly out of concern that such contact would risk divulging material non-public information about their capital-raising plans, the benefits of Rule 163 have been significantly limited.

The proposed amendment would expand the existing exemption provided by Rule 163 by permitting an underwriter or dealer to act as the agent of a WKSI in communicating with investors about such WKSI’s potential securities offering, provided that each of the following conditions is met:

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

As is currently the case under Rule 163, (i) all communications made by or on behalf of the issuer would be subject to Regulation FD, and thus either recipients of material non-public information would need to agree to keep such information confidential or such information would need to be

¹ A WKSI is an issuer that meets the registrant requirements of Form S-3 or Form F-3, is not an “ineligible issuer” and has either \$700 million in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates or has issued, for cash, within the last three years at least \$1 billion aggregate principal amount of non-convertible securities through primary offerings registered under the Securities Act.

publicly disclosed in accordance with Regulation FD, (ii) all written communications that constitute offers must contain a legend indicating that the issuer may file a registration statement for the offering and that the investor should read the prospectus accompanying such registration statement and (iii) any written communication that constitutes an offer must be filed with the SEC as a free writing prospectus when the registration statement or amendment is filed (unless otherwise exempt).

Commentary:

- The proposed amendment would be a welcome revision to the current Rule 163 for WKSIs seeking to test the market for a contemplated securities offering before incurring the expenses and making the public disclosure associated with filing a registration statement. As noted above, a written communication made by an underwriter on behalf of a WKSI would need to be filed as a free writing prospectus if and when a registration statement is filed, as with any other written communication made in reliance upon Rule 163. Oral communications would not need to be filed, and thus would not need to be transcribed.
- The proposed amendment would require underwriters or dealers that make exempted communications on behalf of a WKSI to receive both a written authorization from the WKSI permitting the underwriter or dealer to serve as the WKSI's agent, as well as authorization or approval (not necessarily written) from the WKSI for each written or oral communication before it is made by the underwriter or dealer. Precisely what will be needed to establish valid WKSI approval of each underwriter or dealer communication is currently unclear, but this approval system would likely require substantial supervision by WKSIs of such underwriter or dealer communications.

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If you have any questions regarding Rule 163 or the proposed amendment, please contact Gregory B. Astrachan (212-728-8608, gastrachan@willkie.com), David K. Boston (212-728-8625, dboston@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com) or the Willkie attorney with whom you regularly work.

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December 31, 2009

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