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February 25, 2010

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File No. S7-30-09
Release No. 33-9098
Revisions to Rule 163

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its December 18, 2009 proposing release referenced above (the "Proposing Release").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section, nor does it necessarily reflect the views of all members of the Committee.

I. Overview

We support the Commission's efforts to improve access to the public capital markets, and believe that the Commission's proposed amendment to Rule 163 under the Securities Act of 1933 (the "Securities Act"), with certain revisions as suggested below, would help to facilitate capital raising while at the same time ensuring investor protection. The Commission's proposed amendment to Rule 163(c) would permit a well-known seasoned issuer ("WKSI") to authorize an underwriter or dealer to act as its representative

or agent in connection with communications about a public offering of the WKSI's securities prior to the filing of a registration statement relating to those securities. We believe this to be an important step in broadening the application of Rule 163, which was adopted as part of the Commission's securities offering reforms in 2005. Under Rule 163, WKSIs are permitted to engage in unrestricted oral and written offers before a registration statement is filed without violating the "gun-jumping" provisions of the Securities Act. The current rule precludes the involvement of underwriters and dealers in this process; as proposed, the Commission would extend the application of the rule to underwriters and dealers.

We believe the Commission's efforts to lessen the burdens imposed on raising capital by the largest and most well-followed companies have benefited our capital markets, and at the same time have preserved appropriate investor protections. We believe that the Commission's far-sighted efforts to eliminate "speed bumps" in the process by which WKSIs are able to access the public capital markets have played, and will continue to play, an important role in enabling companies to act expeditiously to raise capital.

II. Background of Pre-Marketed Transactions

Issuers that have sought to access to the public capital markets in the past few years have encountered significant difficulties as a result of the extraordinary volatility our capital markets have experienced. The recent financial crisis and the attendant market disruptions have created significant uncertainties in connection with traditionally-marketed underwritten public offerings, including significant execution risk. Companies considering accessing the public markets must now, perhaps more than in the past, consider the adverse effects a launched but not successfully completed offering can have on an issuer's stock price. Underwriters have also experienced increased market risk, particularly in situations where price volatility has created incentives for some market participants to engage in short selling the issuer's securities at the time a public offering is launched. While these considerations have been exacerbated by the financial crisis, they may also present continuing challenges after market conditions return to normal.

In order to address these concerns and achieve a level of comfort that the market will be receptive to a proposed public offering, underwriters and issuers have often determined to engage in confidential pre-marketing activities prior to the launch of a registered securities offering. Typically, during this pre-marketing phase, an underwriter will contact a select group of prospective investors in order to assess their interest in the offering. Because of the confidential nature of the proposed offering, prospective investors who are contacted during the pre-marketing phase are generally required to agree to keep all information about the proposed offering confidential and to not trade on the basis of the information. Following a successful pre-marketing phase, the issuer and underwriter may determine to proceed with the public offering.

Notwithstanding these pre-marketing procedures, in practice (and notwithstanding Rule 163) many WKSIs that have not filed a registration statement with the Commission have determined that they are unable to engage in effective pre-marketing efforts under the Commission's current rules without risk of violating Section 5 of the Securities Act. This is due, in part, because many issuers would expect their underwriters to be engaged in the pre-marketing communications, and under Rule 163, an offering participant who is an underwriter or dealer does not fall within the scope of the Rule 163 exemption.

Although a WKSI without an existing shelf registration statement could, of course, file an automatic shelf registration statement immediately prior to commencing its pre-marketing activities, WKSIs may be concerned that the filing of a shelf registration statement could signal to the market that an offering is imminent (or put pressures on issuers to respond to questions regarding the prospect of an imminent offering), and thereby create market and execution risk concerns that the pre-marketing effort the WKSI is seeking to avoid.

In our view, appropriate pre-marketing efforts in connection with proposed public offerings increase the likelihood that such offerings can be successfully completed, and may substantially reduce execution and market risk. Especially in the case of WKSIs, that have the ability to access the public capital markets at any time through the use of immediately effective registration statements, such pre-marketing efforts are a necessary adjunct to the efficiency of capital raising. Absent the ability to engage in a full pre-marketing effort prior to a public offering, WKSIs may determine to raise capital in private placement transactions or other exempt offerings. Although these alternatives are efficient, they exclude many retail investors from the offering process, and do not necessarily provide the same level of investor protection as public offerings. By expanding Rule 163 to permit underwriters and dealers to engage in pre-marketing activities, the Commission would be encouraging WKSIs to avail themselves of the public capital markets.

III. The Use of Rule 163 and Automatic Shelf Registration Statements

The current limitation in Rule 163 that a communication is made "by or on behalf of" an issuer 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, has significantly restricted the use of the rule. Although communications by WKSIs and their non-underwriter or dealer agents or representatives are permitted under the rule, communications by underwriters or dealers are not. As a result, the entities most qualified to engage in pre-marketing activities are excluded from the pre-marketing process. In light of the benefits WKSIs and investors derive from pre-marketing activities, we believe it would be appropriate for the Commission to amend

Rule 163 to permit underwriters and dealers to communicate on behalf of WKSIs prior to the filing of a registration statement relating to a public offering.

As stated in the Proposing Release, it was the Commission's hope that Rule 163, along with other reforms, would encourage more issuers to conduct their offerings on a registered basis, which would ultimately serve to enhance investor protection.[1]

IV. The Proposed Amendments

In order to better enable WKSIs to assess investor interest in the securities in advance of filing a registration statement, the Commission proposes to amend Rule 163 to expand its scope to permit an offering participant who is an underwriter or dealer to make communications, or to authorize or approve communications, as an agent or representative of the WKSI (as used in this letter, an "Authorized Representative"), without a registration statement with respect to such securities being on file. We strongly support the proposed amendment of Rule 163, subject to the comments below.

Our principal concern with the proposed amendment is that by imposing specific conditions to the ability of underwriters and dealers to engage in pre-marketing activities, WKSIs will be less inclined to use underwriters and dealers for this purpose in a public offering context. We believe that with appropriate revisions to these conditions, the Commission's goals with respect to Rule 163 will be better achieved.

[1] In the Release, the Commission notes that many WKSIs have not filed automatic shelf registrations or that that automatic shelf registrations statements they have filed may not register all of the types of securities they may want to offer. We do not believe that failure of some WKSIs to file shelf registration statements should represent a cause for concern, or should suggest any infirmity generally with the securities offering reforms adopted in 2005. Many factors that go into an issuer's decision to file, or not to file, a shelf registration statement. In this regard, issuers continue to have concerns that filing of a shelf registration statement when there is no imminent need for capital may cause "overhang" concerns for the market that could potentially depress the price for the company's securities. In addition, the filing of a shelf registration statement that includes debt securities may signal to the market a company's willingness to become further leveraged, and many companies are unwilling to send such a message. Further, as noted above, in situations where an offering is in fact contemplated, the filing of an automatic shelf registration statement could potentially signal to the market that an offering is imminent, causing market pressure from short sellers and others who are trading in anticipation of an offering. Moreover, some WKSIs may not have any need for accessing the public markets, given their financial condition and access to capital through cash from operations or financing from lenders or through private capital markets. Lastly, the financial markets over the past three years have experienced significant disruption and volatility, such that a number of issuers who were WKSIs in 2005 may have lost their WKSI status (at least temporarily), or those WKSIs who were eligible to file automatic shelf registration statements were not in a position to access the public capital markets at appropriate prices or rates even if the need for capital arose during this period. For all of these reasons, we believe that the Commission should continue to monitor the use of automatic shelf registration statements and should not conclude that the flexibility afforded by the 2005 reforms are not widely embraced by the issuer community.

A. The requirement for advance *written* authorization

As proposed, Rule 163(c) would provide that the Authorized Representative must receive written authorization from the WKSI to act as the WKSI's agent or representative before any communications are made on the WKSI's behalf. We recognize that the Commission has proposed the advance written authorization condition, at least in part, as means to prevent underwriters or dealers from engaging in communications to gauge market interest in a prospective public offering without first obtaining an issuer's authorization, and then presenting the issuer with an unsolicited proposal for an offering. We agree that the prospect of one or more underwriters or dealers discussing a proposed public offering with potential investors prior to the filing of a registration statement creates issues affecting both the issuer and potential investors.

We believe that the Commission's concerns that the Authorized Representative be pre-approved by the WKSI can be appropriately addressed without requiring that any the pre-approval be in writing. We are concerned that the negotiation and execution of written documentation regarding the authorization could potentially delay pre-marketing activities. Instead, we believe the Commission's concerns with inappropriate "shopping" of offerings could be satisfied by the requiring either oral or written authorization the Authorized Representative by the WKSI prior to the pre-marketing. Under this approach, an Authorized Representative could proceed with pre-marketing communications upon receiving an oral mandate from the WKSI. To the extent that the issuer and the Authorized Representative determine to reflect the oral authorization in writing, the parties could do so prior to, during or following the pre-marketing effort, without necessarily delaying the pre-marketing process. We believe that any such written authorization, should be at the discretion of the parties, rather than imposed by the Commission as a condition to the pre-marketing.

B. The requirement for advance approval of Authorized Representative communications

We are concerned that requiring a WKSI to authorize or approve each and every written or oral communication before it is made by an Authorized Representative may impose inappropriate "speed bumps" to the pre-marketing effort, and could unnaturally restrict or interfere with the dialogue between an Authorized Representative and a potential investor.

Although in many instances the information an Authorized Representative may communicate to a prospective investor as part of its pre-marketing activities may be based on scripts intended to assure that the information communicated to such investors is uniform, accurate and appropriate, it would be burdensome for WKSIs to be required, as a condition of having their underwriters and dealers engage in pre-marketing, to approve in advance all of these communications. More specifically, it would be reasonable to believe that potential investors may ask questions, either in oral form or in the form of e-mails or

other written communications. If an Authorized Representative would be required, in each instance, to determine whether a response to the question was within the express scope of the prior authorization, or would require the Authorized Representative to obtain additional authorization, the communications between the Authorized Representative and the potential investor may be unnaturally stilted and time consuming, and what could reasonably be discussed in a single phone call or e-mail response could be subject to delay and multiple communications.

We therefore propose that instead of requiring that "any" oral or written communication by the Authorized Representative be subject to prior authorization, the requirement relate only to the principal aspects of the proposed securities offering, including the nature and principal features of the security to be offered, the amount (or range of amount) to be raised, the anticipated timing of the offering, and any material non-standard terms of the proposed offering. By adding this flexibility, the issuer and the Authorized Representative would be better able to determine the scope of the Authorized Representative's authority to engage in written or oral communications not explicitly pre-approved by the issuer. Because any communication by the Authorized Representative would be deemed an issuer communication and may be subject to filing as a free writing prospectus, the Authorized Representative would likely be required by the issuer to keep and maintain, and to provide to the issuer, complete records of any such communications. By such process, all necessary disclosures would be made and the Commission's concerns should, in our view, be addressed.

C. The requirement for identification of underwriters and dealers in the prospectus

The Commission is also proposing that any Authorized Representative that has made any authorized communications on behalf of the issuer in reliance on Rule 163 be identified in any prospectus contained in the registration statement that is filed for the offering to which the communication relates. We consider this condition to be unnecessary for a number of reasons.

First, we do not believe that the identification in a prospectus of an Authorized Representative who has made "any" communication relating to the securities being registered would be material in any way to investors. Potential investors who have communicated with the Authorized Representative would already be aware of the involvement of the Authorized Representative, and potential investors who have not communicated with the Authorized Representative would find the information to be of little or no meaning.

Second, it is possible that an issuer that has designated an Authorized Representative may select another underwriter or dealer to conduct the offering instead of the original Authorized Representative. If this is the case, it is not clear in what capacity

the Authorized Representative would be identified in the prospectus, and in fact it may be necessary to make clear that the Authorized Representative was not acting as an underwriter or dealer in connection with the offering for liability purposes. If, by using an Authorized Representative, a WKSI may have a perceived obligation, however slight, to retain the Authorized Representative as underwriter for the transaction, the range of choices available to the WKSI as to underwriter selection may be significantly affected. Against the backdrop of the proposed disclosure not, in our view, serving any meaningful investor protection goal, while potentially having adverse effects, we suggest that the Commission not adopt this third condition.

D. The language of Rule 163(c)

In order to clarify the operation of the rule, we suggest that the Commission consider revising the text of the first clause of proposed Rule 163(c) to state as follows:

> "For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, including an authorized offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made. An offering participant who is an underwriter or dealer is authorized for purposes of this section if:"

E. Other considerations

The Commission requests comment on whether it should limit the types of investors that an Authorized Representative could approach under the proposed amendments to Rule 163. We do not believe that it would be appropriate for the Commission to limit the types of investors that could be approached, including limiting communications to Qualified Institutional Buyers as defined in Securities Act Rule 144A(a)(1). As discussed above, pre-marketing activities by underwriters and dealers have provided a very important method by which offerings can be completed in unfavorable market conditions, and limiting the types of investors who could be approached in a public offering pre-marketing effort could significantly undermine the utility of the proposed amendment to Rule 163. Among other things, by limiting communications to a class of prospective investors, Authorized Representatives would be required to verify the status of the investors to be solicited in advance of filing the registration statement, which could hinder pre-marketing activities. Moreover, an issuer may unintentionally violate Section 5 in the event that its judgment regarding the status of a potential investor proves to be incorrect.

The Commission has also solicited comments concerning whether the proposed amendment to Rule 163 would affect the timing of an offering or whether the timing

would impact the ability of investors approached after filing of the registration statement to evaluate the offering. We do not believe the proposed amendment would significantly alter the timing or in any way disadvantage prospective investors. We believe that both the first phase of confidential pre-marketing and the second phase of a post-announcement offering to a wider group of investors can be carried out in a manner that fully complies with the requirements of the Securities Act, and that all investors will have the opportunity to obtain the information necessary to adequately evaluate an investment in the WKSI. In this regard, we believe that the proposed amendment to Rule 163 balance the need for WKSIs to engage in pre-marketing activities through Authorized Representatives in advance of filing a registration statement, while at the same time preserving the investor protections afforded by the Securities Act. The Committee appreciates the opportunity to comment on the Release. Members of the Committee are available to discuss our comments should the Commission or the staff so desire.

Very truly yours,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin, Chair of the
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