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January 25, 2010

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

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Ms. Murphy:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission (the "Commission") of comments on the proposed amendments to Rule 163(c) (the "Proposed Amendments") set forth in release no. 33-9098 (the "Release").

We commend the Staff on its proposal. The ability of issuers to confidentially assess investor demand or "test the waters" has been critical for a substantial percentage of equity offerings since the fourth quarter of 2008 due to market volatility. Unfortunately, as a practical matter, not all issuers have the flexibility to do so. As noted by the Staff in the Release, a surprisingly large number of WKSIs either have no shelf registration statement on file or a shelf registration statement that does not cover equity securities. Why? Some issuers are concerned about the "overhang" effect on their share price from having a shelf registration statement on file. Some issuers have not issued equity in many years and did not anticipate the market's current volatility or the impact of such volatility on their liquidity needs.

While Rule 163 as currently drafted would appear to afford WKSIs without an appropriate registration statement on file the ability to test the waters, as a practical matter it does not. By excluding underwriters and dealers, Rule 163 is of very limited utility since most issuers need the assistance of a financial intermediary to identify

potential investors, obtain confidentiality agreements and accurately assess investor interest. As a result, it is rarely relied upon.

While we strongly support the Proposed Amendment, we have two comments regarding the new condition that "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."

Our first comment is that this condition, if interpreted narrowly, could significantly limit the flexibility intended to be provided by the Proposed Amendment, particularly with respect to oral communications. As a practical matter it is impossible to script or even anticipate the content of the appropriate responses to all potential questions an investor may ask. If prior authorization requires approving the content of the communication as opposed to merely authorizing an underwriter or dealer to engage in communications, the practical result is that there will be a number of questions asked by investors that underwriters will not be allowed to answer since a response may not have been pre-approved or pre-authorized. In addition, some responses may reflect an underwriter's views about the issuer's industry or market conditions, which should not require issuer involvement. Accordingly, we recommend that the requirement not apply to oral communications or alternatively that it be clarified that an issuer may authorize an underwriter or dealer to make oral communications on its behalf without necessarily approving the content of the communication.

Our second comment is a point of clarification. We assume that the written and oral communications that must be approved are any written or oral communications that are an offer – similar to the filing requirement. Communications that are not offers should not need to be pre-approved by the issuer.

We appreciate the opportunity to comment on the proposed rule. We would be happy to discuss our comments or any questions the Commission or its staff may have with respect thereto. Please do not hesitate to contact Richard D. Truesdell, Jr. at 212-450-4674 if you would like to discuss these matters.

Very truly yours,

Davis Polk & Wardwell LLP