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File Number S7-30-09

Dear Ms. Murphy:

I am submitting this letter in response to the request by the Securities and Exchange Commission (the "Commission") for public comment on the proposed amendments to Rule 163 under the Securities Act of 1933 (the "Securities Act"), which would allow, subject to certain conditions, a well-known seasoned issuer ("WKSI") to authorize an underwriter or dealer to act as its agent or representative in communicating certain information related to potential offerings of the issuer's securities prior to the filing of a registration statement.<sup>1</sup> When enacted as part of the Commission's 2005 Securities Offering Reform,<sup>2</sup> Rule 163 was intended to substantially liberalize the process by which WKSIs could offer their securities to the public and, as noted in the Proposing Release, to improve investor protection by encouraging WKSIs to raise capital by conducting offerings on a registered basis. However, inherent restrictions in the current rule—namely, that it is unavailable to offering participants that are underwriters or dealers—have limited the benefits the rule intended to provide. The practical effect of these shortcomings was particularly acute during the depths of the recent financial crisis when WKSIs were forced to raise capital in extremely volatile markets, and the ability to "test the waters" prior to announcing a proposed offering through the filing of a registration statement was of significant value but limited as a practical matter for those WKSIs that did not have an effective equity shelf by Rule 163's current formulation.

<sup>1</sup> Revisions to Rule 163, Release No. 33-9098, File No. S7-30-09 (Dec. 18, 2009) (to be codified at 17 C.F.R. 230.163(c)) (the "Proposing Release").

<sup>2</sup> Securities Offering Reform, Securities Act Release No. 8591 (Aug. 3, 2005).

## **I. Introduction**

I believe that the Commission's proposed amendments to Rule 163 are a welcome and practical extension of the existing rule that would further facilitate capital formation for WKSIs by allowing underwriters and dealers to gauge broader market interest in the issuer's securities prior to filing a registration statement. I believe that expanding the scope of the rule's exemption to include underwriter and dealer communications will considerably benefit investors as issuers will be more likely to utilize the registered offering process, thereby potentially expanding investor participation while providing all investors the full panoply of protection of the Federal securities laws. While I strongly support and endorse the Commission's proposed amendments to Rule 163 expanding the exemption to underwriters and dealers, for the reasons described below, I respectfully submit that the conditions to exemption in the proposed rule as currently formulated are not necessary to protect investors, are likely to prove excessively complicated from an administrative perspective and may ultimately limit the benefits the proposed amendments are intended to provide.

## **II. Analysis of the Proposed Amendments**

As noted in the Proposing Release, WKSIs typically are not well-positioned to adequately gauge the interest for their securities in the market. They may not know who to contact and it is extremely difficult for them to contact prospective investors on a confidential or "no-names" basis. As a result, WKSIs without registration statements on file with the Commission who wish to "test the waters" by ascertaining potential interest in a potential offering before announcing the offering may prefer to conduct unregistered offerings. The current benefit of unregistered offerings is that they can be conducted on a confidential basis and financial intermediaries—the organizations best suited to identifying prospective investors and gauging potential interest—can participate on behalf of the issuer. In a private offering, the investors, of course, receive more limited protection under the Federal securities laws. In addition, the WKSI itself may be disadvantaged by an unregistered offering because of the discount it may be required to offer investors to account for the resale restrictions applicable to privately placed securities. If the proposed amendments are adopted, by allowing underwriters or dealers to communicate with their existing network of prospective investors on behalf of WKSIs in advance of filing a registration statement, WKSIs will have the opportunity to make more informed decisions about whether and when to access the capital markets, and will be more likely to undertake such offerings on a registered basis, which will further the Commission's investor protection goals.

However, I believe that the conditions to exemption under the proposed amendments should not be implemented as proposed as they are likely in my view to impede reliance on the additional flexibility contemplated by the amendments. My principal concern with these requirements is that failure to explicitly comply with these conditions—which are primarily ministerial—would render any pre-filing offer made by an underwriter or dealer on behalf of a WKSI a violation of Section 5(c) of the Securities Act. In my view, such an outcome would be an unreasonably severe penalty as measured against the magnitude of reasonably foreseeable ways in which one could fail to comply with the proposed conditions despite best efforts to comply, and thus may discourage reliance on the proposed amendments.

**a. Requiring *written* authorization from the issuer is inconsistent with other Commission regulations and may deter reliance on the rule.**

While I do not oppose a requirement obligating an underwriter or dealer to have authorization from an issuer before communicating with investors in reliance on the exemption provided by Rule 163, I do not believe it is necessary for that authorization to be reduced to *writing*. To my knowledge, there are no other Securities Act rules whereby communications “by or on behalf of the issuer” is defined to require prior approval of such communications in writing. Imposing the writing requirement as a condition to reliance on the proposed amendments may seem to impose a very modest burden. However, I think is important to note that in registered securities offerings—be they initial public offerings undertaken over many months or shelf take-downs conducted on an interday basis—the first writing between the issuer and the underwriters typically is the underwriting agreement signed at pricing. Custom in the industry is for substantial efforts to be undertaken by underwriters on behalf of issuers based on an oral mandate that is only reduced to writing if a transaction is successfully priced. I believe that requiring a mandate to be reduced to writing in the narrow context of pre-filing offerings on behalf of WKSIs will be confusing to issuers and underwriters alike, create the risk of inadvertent rule violations and not contribute to investor protection.

**b. Requiring issuer approval of any communications made by underwriters or dealers will be administratively complex in practice and inhibit meaningful dialogue with investors.**

Similarly, I believe that requiring issuer approval of each specific communication made by an underwriter or dealer potentially would be quite complex from an administrative perspective and, as a practical matter, could meaningfully inhibit an underwriter or dealer’s ability to ascertain interest in a potential offering from prospective investors. In order to be certain that the proposed amendments are complied with, I believe that outside counsel and internal risk management officers at financial intermediaries will require that any communication to be made in reliance on amended Rule 163 by an underwriter or dealer be limited to the word-for-word recitation of a script. Requiring such a script to be prepared will delay the offering process and, in my view, compromise the back and forth dialogue that often characterizes discussions with prospective investors, particularly those “anchor” investors who may wish to make a significant commitment to a proposed offering. As communications by underwriters or dealers would still be subject to the anti-fraud provisions of both the Securities Act and the Securities Exchange Act of 1934, including Rule 10b-5, I do not believe that investor protection would be jeopardized if the issuer approval condition were eliminated.<sup>3</sup>

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<sup>3</sup> Oral and written communications pursuant to Rule 163 remain “offers” that are subject to liability under Sections 12(a)(2) and 17(a) of the Securities Act as well as Section 10(b) of the Exchange Act.

**c. Requiring identification of underwriters or dealers that make communications in reliance on Rule 163 will not advance the Commission’s stated goal of investor protection.**

In my view, the proposed condition requiring disclosure of all underwriters and dealers who communicated with investors in reliance on Rule 163 in a prospectus related to the corresponding securities offering is not necessary. An underwriter or dealer that communicates with investors in reliance on Rule 163 and then subsequently participates in the offering as an underwriter will, of course, be named in the prospectus as an underwriter and be subject to liability under Section 11 and 12(a)(2) of the Securities Act. As discussed above, investors to whom pre-filing communications were made will have potential remedies if such communications were materially misleading. These investors will know the identity of the person from whom they received such communications. As drafted, the proposed disclosure requirement appears to have the further consequence that an underwriter or dealer who made pre-filing offers on behalf of the issuer but did not participate in a subsequent offering would have liability in respect of the registration statement related to that offering. This proposed requirement also is troubling because an underwriter or dealer who does not participate in the subsequent registered offering may have no practical ability to make sure that the required disclosure is made. If the issuer were to fail to make the required disclosure, the underwriter or dealer would retroactively fail to meet the requirements of the exemption and be subject to exposure for a Section 5 violation. I do not believe that any additional investor protection function would be achieved by this potential incremental liability and, accordingly, would recommend that this proposed condition be excluded from the rule amendments.

**d. Communications by underwriters or dealers in reliance on Rule 163 should not be limited to qualified institutional buyers (“QIBs”).**

The Proposing Release requests comment on whether communications by underwriters or dealers in reliance on the amended rule should be limited to QIBs. One of the Commission’s stated goals in proposing the amendments to Rule 163 was to enable WKSIs to make more informed decisions about their capital-raising plans by allowing underwriters or dealers to communicate with a broad network of investors before the WKSI has filed a registration statement. I believe that limiting communications by underwriters or dealers to QIBs or another subset of “qualified” investors would diminish the benefits of the proposed amendments. I note also that there is no such limitation applicable to issuers under existing Rule 163, and believe that creating different categories of eligible prospective investors for offers made by the issuer and offers made by financial intermediaries could result in confusion and unintentional rule violations, again with the extreme result of strict liability for an illegal offer under Section 5.

**e. The proposed amendments effects on the timing of an offering would not materially disadvantage investors approached after filing the registration statement.**

The Proposing Release also requests comment on what effect, if any, the proposed amendments would have on the timing of a registered offering and the effect such timing would have on investors not approached until after the registration statement is filed. One of the intended benefits of the amendments is to increase the certainty that an offering by

a WKSI, once commenced, will be completed. I believe that this potential for additional certainty will encourage WKSIs without an effective registration statement to utilize the registered offering process, thereby providing all investors—those approached in advance of filing and those subsequently approached—the full protections of the Federal securities laws. Before Rule 163 was adopted, issuers and underwriters could market transactions utilizing effective shelf registration statements prior to public announcement of a proposed offering. Rule 163 simply permits WKSIs the additional flexibility (with potential Federal securities law liability) to make such offers prior to filing its registration statement. I do not believe that permitting issuers to employ underwriters or dealers as part of these offers introduces any incremental disadvantage to prospective investors contacted after the proposed offering is made public. I do think it is certain, however, that if an issuer elects to conduct an unregistered offering because it has greater flexibility to “test the waters” before announcing a transaction, entire classes of potential investors—potentially including many of an issuer’s existing securityholders—will not have an opportunity to participate in transactions that could be available to them if conducted on a registered basis.

### **III. Conclusion**

I commend and appreciate the Commission’s thoughtful and pragmatic proposal to expand the availability of Rule 163, and strongly support adopting an expanded rule. I think extending the availability of Rule 163 to underwriters and dealers will provide additional flexibility to issuers and improve the efficiency and operations of our capital markets while promoting investor protection. As stated above, however, I believe these two goals can be met by significantly limiting the additional requirements—and additional risk of noncompliance without a corresponding investor protection benefit—included in the proposed amendments. Please contact me if I can provide any additional information on this important rule-making initiative.

Respectfully submitted,

Andrew J. Pitts

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