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January 27, 2010

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-0609.

Attention: Elizabeth M. Murphy, Secretary

Re: Comments on Proposed Changes to Rule 163 – File No. S7-30-09

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Commission's proposal to amend Rule 163 under the Securities Act of 1933.[1] We believe that the central purpose of the proposal, to allow underwriters and dealers to make pre-filing offers on behalf of well known seasoned issuers ("WKSIs"), will greatly facilitate the capital-raising process for WKSIs with no loss of protection for investors. We therefore support the Commission's proposal in general, although we believe that some of the specific conditions included in the proposal would create practical impediments in the offering process that could be eliminated without weakening investor protection. Our comments are focused on these conditions and on two of the questions that the Commission posed for comment in the proposing release.

The Proposed Amendments

Rule 163 provides an exemption from the registration requirements of Section 5(c) of the Securities Act that permits a WKSI to make offers to potential investors in a possible registered public offering before the WKSI files a Securities Act registration statement covering the offering, subject to specified conditions. Paragraph (c) of the Rule currently limits the exemption to communications made by or on behalf of

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

the issuer and specifically excludes communications made by an offering participant that is an underwriter or dealer. The Commission proposes to amend paragraph (c) to permit these communications to be made by an underwriter or dealer, but only if the following three conditions, among others, are met:

- the underwriter or dealer receives written authorization from the issuer to act as its agent or representative before making any communication in reliance on the exemption;

- the issuer authorizes or approves any written or oral communication before it is made by an authorized underwriter or dealer; and

- any authorized underwriter or dealer that has made an authorized communication pursuant to the exemption is identified in the prospectus subsequently filed for the related offering.

In general, we believe that expanding the exemption in Rule 163 to permit underwriters and dealers to make pre-filing communications with investors on behalf of WKSIs is an important step in facilitating the capital-raising process for those issuers. As the Commission notes in the proposing release, WKSIs considering a possible offering may want to assess the level of market interest in the offering before filing a registration statement (or amending an existing one to cover the offering) but may be reluctant or unable to communicate directly with investors for two main reasons. First, the issuer may not have sufficient knowledge about potential investors to determine which ones to contact, or may not have the experience or resources necessary to engage in such communications effectively. Second, direct contacts with investors may effectively disclose material, non-public information about the issuer and its capital-raising plans, possibly contravening Regulation FD or the antifraud provisions of the federal securities laws, unless someone other than the issuer first contacts the investors (usually on a "no-names" basis) and obtains confidentiality agreements from them. Thus, the issuer may need to engage an underwriter or dealer to contact investors on its behalf in order to benefit from the broad client base and expertise of a market professional and to preserve confidentiality and avoid a possible securities law violation.

In our experience, these reasons for an issuer to engage an underwriter or dealer to contact investors before a registration statement is filed are real and significant, and at times they can cause an issuer to forego a registered offering and raise capital in a private transaction. This problem can be particularly serious in situations where an issuer must raise capital quickly and concerns about preserving confidentiality are especially sensitive, as was often the case during the recent period of financial market turmoil. Thus, we believe that expanding the exemption in Rule 163 to allow pre-filing communications by underwriters and dealers will remove a significant impediment in the capital-raising process for WKSIs, as well as a sometimes powerful disincentive for WKSIs to raise capital in registered public offerings rather than private transactions, and we applaud the Commission for proposing to expand the exemption. We also believe, however, that the three proposed conditions listed above will create significant practical problems for WKSIs, underwriters and dealers that wish to rely on the expanded exemption and thus will limit the effectiveness of the Commission's proposal. Moreover, any failure to comply with the proposed conditions as they relate to a particular underwriter or dealer could result in a loss of the exemption for the pre-filing communications made by that underwriter or dealer and we think this result is disproportionately severe, especially because the conditions are likely to create a significant risk of inadvertent non-compliance. Accordingly, we urge the Commission to eliminate or modify the proposed conditions as follows.

First Condition – Initial Authorization in Writing

This condition requires that an underwriter or dealer receive a written authorization from the issuer before making any communication in reliance on the expanded exemption. While this condition may help ensure that the issuer retains control over the timing and nature of communications relating to a possible offering of its securities, we question the need for requiring that the authorization be in writing. Written authorizations are not consistent with customary market practice, in which issuers often provide underwriters with oral "mandates" to launch an offering of their securities. Given the often tight time frames in which offerings may be conducted, requiring an issuer and an underwriter or dealer to negotiate and prepare a written authorization could serve as a "speed bump" in the offering. Moreover, as initial discussions between an issuer and an underwriter often occur at a business level, between members of the issuer's management and the underwriter's banking professionals, the need to prepare a written authorization before any communications with investors occur can be easily overlooked, especially when time is of the essence. Because the proposed condition would require that the writing be made before any such communications occur, oversights could not be corrected after the fact and would result in a loss of the exemption.

We believe that, in this context, an oral authorization would be just as effective as a written one and should suffice for purposes of the first condition. If an issuer is concerned that an oral authorization may not provide sufficient guidance to an underwriter or dealer, or if an underwriter or dealer is concerned that the existence or scope of the authorization may later be disputed, it can require that the authorization be memorialized in writing before agreeing to move forward. The parties are best situated to weigh the costs and benefits of having a writing under the particular circumstances of an offering, and if they conclude that an oral authorization is acceptable and are willing to proceed without a writing, we see little purpose served in requiring them to have one.

We urge the Commission to eliminate the requirement that the initial authorization be in writing. If the requirement is retained, we urge that it at least be modified so that the initial authorization required to be given in advance of the first communication with investors may be given orally as long as it is later confirmed in writing, and so that a failure to reduce an otherwise effective authorization to writing at the outset will not result in a loss of the exemption and compel the issuer to raise capital in a private transaction.

Second Condition – Content Approval by the Issuer

This condition requires that the issuer authorize or approve any pre-filing communication by an underwriter or dealer, whether made orally or in writing, and that the issuer do so in advance. While this may be feasible for substantive written communications, we do not think it will be feasible for oral communications. While the proposing release suggests that the issuer need only approve the content, as opposed to the precise form, of an oral communication, we believe it will be difficult as a practical matter for an underwriter or dealer to ensure that its subsequent oral communications with investors remain within the bounds of the issuer's approval. In order to provide an issuer with useful feedback about the level of investor interest in an offering, an underwriter or dealer must have the ability to engage investors in meaningful conversations and thus to respond to their questions. Unless the underwriter or dealer adheres to a pre-approved script, there will necessarily be uncertainty about whether the "content" of every conversation was approved by the issuer. Even if the issuer and the underwriter or dealer believe that the content was approved, their assessment of events may be challenged after the fact by third parties asserting rescission claims under Section 5. Moreover, because the issuer's approval must be given in advance, the parties will have no way to clear up any uncertainty about the scope of the approval that may arise after it is given as a result of actual discussions with investors. Because getting this wrong can result in a violation of Section 5 of the Securities Act, the parties may well conclude they have no practical choice but to rely on pre-approved scripts and forego opportunities to engage investors on meaningful matters that do not fit neatly within the confines of the scripts. We believe this condition will drive underwriters and dealers to limit their oral communications with investors to an extent not found in private offerings or in registered offerings post-filing. This will significantly limit the usefulness of pre-filing communications for both WKSIs and investors and will undermine the effectiveness of the Commission's proposal.

If the purpose of the second condition is to ensure than an issuer may control the content of pre-filing communications made on its behalf, we do not believe the second condition is necessary to achieve this purpose. An issuer has the ability to control the content whether or not the exemption requires issuer approval. For example, if an issuer wished to do so, it could decline to retain a dealer unless the dealer was willing to submit substantive written communications to the issuer for review, or to brief the issuer on the general content of oral communications. On the other hand, if the issuer is not concerned about approving the content, why should it be required to do so? The second condition appropriately places no limits on the content of pre-filing communications or on the scope of the issuer's approval. Yet if the issuer may exercise discretion in deciding how broad or narrow its approval will be, why should it be required to grant approval at all?

Neither the Securities Act nor any related Commission rules require an issuer to approve the content of oral communications by underwriters and dealers with investors after a registration statement is filed, and we see no reason to impose such a requirement in the pre-filing context. Pre-filing communications, of course, would be subject to liability under Section 12(a)(2) of the Securities Act. To our knowledge, the absence of an issuer approval requirement in the post-filing context has not been a cause of significant problems with regard to investor protection or compliance generally, and we do not think it would be in the pre-filing context. On the contrary, we think imposing such a requirement in the pre-filing context would cause significant problems for WKSIs, underwriters and dealers, and may adversely affect investor interests, as described above.

We urge the Commission to eliminate the second condition, either entirely or at least with regard to oral communications. If the condition is retained for oral communications, however, then we recommend that it be modified so as not to require issuer approval of oral communications *before* they are made. Permitting an issuer to approve the content of these communications after the fact will at least enable WKSIs, underwriters and dealers to avoid losing the Rule 163 exemption in situations where the communications with investors may have exceeded the scope of the issuer's prior approval but the parties agree that the communications were nevertheless appropriate and should be approved. We think situations like these are likely to occur, and that penalizing non-compliance with a loss of the exemption would be disproportionately – and unnecessarily – harsh.[2] This should help eliminate some of the compliance

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2 As currently proposed, amended paragraph (c) of Rule 163 could be read to mean that *any* non-compliance with *any* aspect of the proposed conditions as they relate to a particular underwriter or other dealer would result in the loss of the exemption for *all* pre-filing communications by the dealer, potentially exposing the dealer, as well as the issuer, to Section 5 rescission claims. Since neither the issuer nor the dealer would be able to correct the non-compliance, the issuer could have no choice but to postpone or cancel the offering or conduct it as a private transaction. We think such a draconian approach to compliance is unnecessary in this context. Accordingly, if the proposed conditions are not eliminated or modified as we discuss above, we urge the Commission at least to moderate the penalty for non-compliance by clarifying that the conditions apply on a

uncertainty that may otherwise cause underwriters and dealers to avoid responding to meaningful questions from investors.

Third Condition – Identification of Dealers in Prospectus

This condition requires that any underwriter or other dealer that makes a pre-filing communication in reliance on the expanded exemption must be named in the prospectus for the offering related to the communication. However, if such a dealer continues to participate in the offering as a principal underwriter at the time the prospectus is filed, the issuer will already be required under existing Commission rules to name the dealer as an underwriter in the prospectus.[3] As a practical matter, therefore, the third condition serves mainly to require prospectus identification of dealers that are *no longer* participating in the offering as underwriters when the prospectus is filed. Identifying these dealers in the prospectus, however, may highlight the fact that the issuer made pre-filing attempts to test the market through dealers other than the named underwriters, which in turn could raise questions among investors about whether the prior attempts failed. This sort of disclosure could prompt market speculation that damages the prospects for the offering. Requiring this disclosure may also discourage dealers from engaging in pre-filing communications since they may have to be identified in a later prospectus as a former participant, which may suggest to the market (rightly or wrongly) that their participation was terminated by the issuer for performance reasons. Because of these potentially harmful effects, the third condition could undermine the effectiveness of the expanded exemption, particularly in situations where WKSIs are having difficulty raising capital and the exemption is needed most.

Identification of formerly participating dealers in a prospectus is not required in other contexts. For example, after a shelf registration statement is filed, a dealer may have extensive communications with investors before an offering occurs and then not be selected by the issuer to participate in the offering as an underwriter. The issuer would generally not be required to identify the dealer in the prospectus for the offering, and we see no reason why a different rule should apply when a dealer makes pre-filing offers in reliance on Rule 163. If the third condition is intended to ensure that dealers making pre-filing offers can more easily be identified and thus held accountable for their statements, this would not be consistent with the Commission's long-standing

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communication-by-communication basis rather than on a blanket basis. This is particularly important for the second condition, which creates the greatest risk of inadvertent non-compliance.

3 See Item 508 of Regulation S-K.

position that only dealers acting as principal underwriters in an offering must be named in the prospectus.[4] Accordingly, we urge the Commission to eliminate the third condition.

Two Questions Posed by the Commission

In the proposing release, the Commission asked for comment on two questions, among others. First, it asked whether the investors that an authorized underwriter or dealer could approach under the proposed amendments should be limited to specified types, such as qualified institutional buyers as defined in Rule 144A under the Securities Act ("QIBs"). Post-filing communications with investors are not limited in this manner and we see no reason to treat pre-filing communications any differently. Limiting these communications to QIBs may impose a substantial constraint on the ability of an issuer to assess investor demand before filing. The QIB category may exclude a significant group of large and sophisticated institutional investors[5] as well as substantial individual investors. Imposing such constraints may limit the usefulness of the expanded exemption as a means to assess demand in the *public* market, and thus may leave issuers that need to asses demand among a wider range of investors little choice but to pursue an offering in the private market. We believe that the proposed amendments are desirable in part because they would encourage WKSIs to raise more capital in registered public offerings. In this regard, limiting the types of investors that may be contacted under the expanded exemption could be counter-productive.

4 Even brokers and dealers that are actively engaged in selling efforts at the time the prospectus is filed – and thus may have had extensive post-filing communications with investors – need not be identified in the prospectus unless they serve as principal underwriters. See Item 508 of Reg. S-K.

Naming formerly participating dealers in the prospectus also suggests to investors that these dealers are underwriters for purposes of Section 11 of the Securities Act, which in turn could expose them to claims under Section 11 with regard to the prospectus disclosure. As these dealers are not participating in the offering when the prospectus is filed, it would be misleading (and unfair) to suggest that they may be held accountable for the contents of the prospectus.

5 Even institutional investors with more than $100 million of investment securities may not meet the technical criteria for qualifying as a QIB. For example, sovereign wealth funds and private equity investors – two types of investors that were active participants in the capital-raising efforts made by public companies in the difficult conditions of 2008-2009 – may hold very large investment portfolios, but because of the size of the portfolio ownership stakes, the issuers of the portfolio securities may be deemed to be "affiliates" of the investors.

Second, the Commission asked whether the proposed amendments would affect the timing of registered offerings and the ability of investors who are not approached in advance to evaluate the offerings. We do not think so. The fact that some investors may be approached earlier than others is not peculiar to offerings involving pre-filing communications; the same may be the case when all the communications occur after a registration statement is filed. Whether some investors have more or less time to consider an offering than others is not determined by whether the registration statement is filed before or after the first offer is made; rather, it is driven by market conditions and how quickly and broadly the issuer and underwriters decide the offering process must proceed. Timing can be just as tight for investors in an offering under a shelf registration statement that was filed and became effective long before any investors were contacted. Moreover, the Securities Act and related Commission rules wisely do not mandate the amount of time that investors must be given to consider an offering; rather, they mandate that adequate disclosure must be made available to investors at the time of sale. In this context, the focus of investor protection is on disclosure, not timing, and the proposed amendments will not interfere with this approach.

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In sum, we applaud the Commission for proposing to expand the exemption provided by Rule 163 so that WKSIs may engage underwriters and dealers to make pre-filing communications with investors. This change will remove a significant impediment to the capital-raising process for WKSIs, particularly in difficult markets. We urge the Commission, however, to modify or eliminate the three proposed conditions as discussed above. We think these conditions as currently proposed are unnecessary to protect issuers or investors and, on the contrary, are likely to create practical problems that will make the expanded exemption less useful and could discourage WKSIs from raising capital in the public markets.

If you would like to discuss our letter, please feel free to contact the undersigned at 212-558-3882.

Very truly yours,

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP
(by David B. Harms)