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January 27, 2010

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

Re: Comments on the Proposed Amendments to Securities Act Rule 163 that
Would Allow a Well-Known Seasoned Issuer to Authorize an Underwriter
or Dealer to Make Pre-Filing Offers on its Behalf
(File No. S7-30-09)

Dear Ms. Murphy:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposal (the "Proposing Release") to amend Rule 163(c) under the Securities Act of 1933, as amended (the "Securities Act").¹ We appreciate the opportunity to comment on the matters discussed in the Proposing Release.

The Commission's proposed amendments to Rule 163 would, subject to certain conditions, allow a well-known seasoned issuer ("WKSI") to authorize an underwriter or dealer to act as agent or representative for the authorizing WKSI in communicating with investors about offerings of the issuer's securities prior to the filing of a registration statement (or filing of a post-effective amendment to add classes of securities, such as common stock, to an automatic shelf registration statement) without violating the "gun-jumping" prohibitions of Section 5 of the Securities Act.

¹ SEC Release No. 33-9098 (December 18, 2009), 74 FR 68545.

Currently, Rule 163(a) permits pre-filing offers by or, with authorization, on behalf of a WKSI, but Rule 163(c) specifically prohibits underwriters and dealers from acting on behalf of a WKSI in this regard. At the time Rule 163 was adopted by the Commission as part of the Securities Offering Reforms of 2005², it was expected that a majority of WKSIs would file automatic shelf registration statements and thus pre-filing offers would be unusual. One of the purposes of the reforms was to provide essentially continuous access to markets for WKSIs, subject of course to investor interest and market conditions. However, many WKSIs have not filed automatic shelf registration statements. As a result, Rule 163, in its current form, may make public offerings, especially equity offerings, more difficult to launch or complete where a registration statement is not already on file or does not register common stock (or securities convertible into common stock or similar securities). Under these circumstances, underwriters and dealers are prohibited from gauging investor interest for equity offerings without the issuer filing a “signaling” registration statement (or post-effective amendment) that could potentially have an adverse effect on the market for the issuer’s stock. It may also discourage registered offerings and encourage unregistered offerings of convertible securities, where underwriters can gauge market interest before launch.

We strongly support the Commission’s proposed rule changes and believe they would significantly facilitate offerings of common stock (and securities convertible into common stock and similar securities), especially in large size transactions and in difficult market conditions, where it is most important to gauge investor interest prior to launching an offering. We also believe that, given market following of WKSIs and the brief nature of WKSI registration statements, the proposal raises no investor information or protection concerns.

We would note two issues that we believe, if addressed, could assist in more successfully achieving the objectives of the proposed amendments.

1. The second condition to the use of amended Rule 163 by an authorized underwriter or dealer is 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.”

The purpose of this condition is uncertain in light of the authorization already required by the first condition proposed by the Commission (*i.e.*, “the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on its behalf”). We understand that under Rule 163 pre-filing communications are the issuer’s, and the issuer would be expected to control the substance of these communications. However, under Rule 163 other authorized persons are not subject to a condition similar to the second condition. Indeed, a WKSI, in satisfying the first condition, should be expected to engage with its representative on how it would like to determine and monitor the substance of the underwriter or dealer’s pre-filing communication with potential investors. In that regard, we note the Commission’s expectation, stated when explaining the purpose of the first condition, that “[b]y requiring that the underwriter or dealer receive written

² See Securities Act Release No. 8591 (August 3, 2005), 70 FR 44721.

authorization before making pre-filing offers on behalf of the issuer in reliance on Rule 163, the proposed amendments require that the issuer be involved with any communications made by the underwriters or dealers in reliance on Rule 163.”³ We believe, therefore, that by satisfying the first condition, a WKSI will be able to exercise sufficient control over the content of any pre-filing oral or written communication made on its behalf by an underwriter or dealer, rendering the second condition unnecessary.

Importantly, we further are concerned that the second condition is not only unnecessary but also risks lessening the utility of what has the potential to be a very constructive change to Rule 163. Market practice where registration statements are filed strongly suggests that the substantial majority of communications under the amended rule would be oral. There is unavoidable uncertainty as to the exact contents of any oral communication with an investor, depending in particular on an investor’s interests, concerns and questions. Requiring the pre-approval of oral communications would create a risk that an underwriter or dealer that made a pre-filing oral communication that was not conducted precisely in accordance with an issuer-approved script could not rely on Rule 163. This would expose it to a potential violation of Section 5 of the Securities Act and the attendant potential strict-liability rescission risk of Section 12(a)(1) of the Securities Act. We believe the existence of this risk could well have a chilling effect on transaction participants’ willingness to rely on Rule 163 in this regard.

If the second condition is not eliminated, a possible alternative to requiring issuers to pre-approve the contents of pre-filing oral communications would be to require the issuer to pre-approve only the substance or scope of the subject matter of the pre-filing communication. The underwriter or dealer could conduct the conversation with potential investors within the approved parameters. We believe this clarification would reduce the concern regarding a possible inadvertent violation of Section 5. Guidance in connection with adoption that approval of the exact contents of an oral offer is not required would also be helpful.

2. The third condition to the use of the amended provisions is that “any authorized underwriter or dealer that has made any authorized communication on behalf of the issuer in reliance on Rule 163 is identified in any prospectus contained in the registration statement that is filed for the offering to which the communication relates.”

We believe such disclosure is of limited benefit at best to investors. In addition, the disclosure could be problematic if it applies to dealers and underwriters that engage in pre-filing communications but then do not participate in the offering. The negative consequences could lessen the use and utility of the amended rule. We would therefore suggest that, if this condition is maintained, it be modified either to provide for disclosure that underwriters or dealers, without being named, participated in pre-filing communications or to clarify that underwriters and dealers not participating in the offering need not be disclosed.

³ See Proposing Release, *supra* note 1 at Section III.

* * *

We very much appreciate this opportunity to provide you with our thoughts on the Proposing Release. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Proposing Release more generally. Please contact Leslie N. Silverman or Alan L. Beller at (212) 225-2000.

Very truly yours,



CLEARY GOTTLIB STEEN & HAMILTON LLP

cc: Securities and Exchange Commission
Hon. Mary L. Shapiro, Chairman
Hon. Kathleen L. Casey, Commissioner
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner

Securities and Exchange Commission – Division of Corporation Finance
Ms. Meredith Cross, Director