SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

Release No. 33-9098; File No. S7-30-09

RIN 3235-AK29

REVISIONS TO RULE 163

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to Rule 163(c) under the Securities Act of 1933 that would allow a well-known seasoned issuer to authorize an underwriter or dealer to act as its agent or representative in communicating about offerings of the issuer's securities prior to the filing of a registration statement. We believe that the proposed amendments should further facilitate capital formation by well-known seasoned issuers by removing certain impediments to issuer communications with broader groups of potential investors regarding offerings of securities.

DATES: Comments must be received on or before January 27, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-30-09 on the subject line; or

- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-30-09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Ted Yu, Special Counsel, Office of Chief Counsel, at (202) 551-3500, in the Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-4561.

SUPPLEMENTARY INFORMATION: We are proposing amendments to Rule 163(c)[1] under the Securities Act.[2]

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[1] 17 CFR 230.163(c).

[2] 15 U.S.C. 77a et seq.

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I. Background

In 2005, we adopted various modifications to the registration, communications and offering processes under the Securities Act.[3] As part of those modifications, we liberalized the communications rules for a new category of issuers, called "well-known seasoned issuers" ("WKSIs"), so they would not be unnecessarily constrained in their capital formation activities while retaining important investor rights and remedies under the Securities Act. A WKSI is an issuer that meets the registrant requirements of Form S-3 or Form F-3; has at least $700 million in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates (or has issued, for cash, within the last three years at least $1 billion aggregate principal amount of non-convertible securities through primary offerings registered under the Securities Act); and is not an "ineligible issuer," as defined in our rules.[4] We permitted these issuers to benefit the most from the liberalization of our offering and communication rules because they have a reporting history under the Exchange Act[5] and are presumptively the most widely-followed issuers in the marketplace.[6]

We adopted Rule 163 under the Securities Act as part of our 2005 reforms.[7] Pursuant to Rule 163, WKSIs can engage in unrestricted oral and written offers[8] before a

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3 See Securities Offering Reform, Securities Act Release No. 8591 (Aug. 3, 2005) [70 FR 44721] ("Securities Offering Reform Adopting Release").

4 See Securities Act Rule 405 [17 CFR 230.405].

5 15 U.S.C. 78a et seq.

6 See Securities Offering Reform Adopting Release, supra note 3, at Section II.A.

7 17 CFR 230.163.

8 Securities Act Section 2(a)(3) [15 U.S.C. 77b(a)(3)] defines "offer" as any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The term

registration statement is filed without violating the "gun-jumping" provisions of the Securities Act.[9] Rule 163 exempts an offer made "by or on behalf of" a WKSI from the prohibition in Section 5(c) of the Securities Act[10] on offers to sell, offers for sale, or offers to buy an issuer's securities before the filing of a registration statement, so long as the conditions of the rule are met. Under the current rule, a communication is deemed to be "by or on behalf of" a WKSI if the issuer or 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.[11]

II. Purpose of the Proposed Amendments to Securities Act Rule 163(c)

Rule 163 was adopted with the purpose of liberalizing the communication rules for WKSIs so that they could engage in oral and written communications, subject to certain enumerated conditions, before the filing of a registration statement for the offered securities. We believed that this rule, along with other modifications to the registration and offering process under the Securities Act adopted at the same time, would encourage more issuers to conduct their offerings on a registered basis, thereby enhancing investor

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"offer" has been interpreted broadly and goes beyond the common law concept of an offer. See Diskin v. Lomasney & Co., 452 F.2d 871 (2d. Cir. 1971); SEC v. Cavanaugh, 1 F. Supp. 2d 337 (S.D.N.Y. 1998).

9 As we described in the Securities Offering Reform Adopting Release, the Securities Act restricts the types of offering communications that issuers or other parties subject to the Act's provisions (such as underwriters) may use during a registered public offering. The nature of the restrictions depends on the period during which the communications are to occur. Violations of these restrictions generally are referred to as "gun jumping." See Securities Offering Reform Adopting Release, supra note 3, at Section III.A.

10 15 U.S.C. 77e(c).

11 See Rule 163(c) [17 CFR 230.163(c)].

protection.[12] At the time we adopted the rule and the automatic shelf registration process,[13] we expected that a WKSI would usually have a shelf registration statement on file that it could use for any of its registered offerings – an expectation shared by some commenters.[14] Accordingly, we expected that it would be unusual for WKSIs to make offers prior to the filing of a registration statement in reliance on the Rule 163 exemption.[15] We have since learned, however, that many WKSIs have not filed automatic shelf registration statements or that the automatic shelf registration statements they have filed may not register all of the types of securities that they may want to offer.[16] If a WKSI wants to make offers before a registration statement is filed, it must rely on the

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12 See Securities Offering Reform Adopting Release, 70 FR at 44777 ("We hope that providing these automatic shelf issuers more flexibility for their registered offerings, coupled with the liberalized communications rules we are adopting, will encourage these issuers to raise their necessary capital through the registration process").

13 Under the automatic shelf registration process, eligible WKSIs can register unspecified amounts of different specified types of securities using Form S-3 or Form F-3 registration statements that are effective upon filing.

14 See letter from the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law. http://www.sec.gov/rules/proposed/s73804/dljohnson021105.pdf.

15 See Securities Offering Reform Adopting Release, supra note 3, at Section III.D.2.b.ii.

16 According to the data analyzed by the staff in our Office of Economic Analysis, 50% of the 2,273 registrants that indicated that they were WKSIs as of the end of their 2006 or 2007 fiscal years have filed an automatic shelf registration statement on either Form S-3 or F-3. At the time we proposed the modifications to the registration, communication, and offering processes under the Securities Act, we recognized that some issuers may have concerns regarding possible market overhang effect and solicited comments on whether the automatic shelf registration procedure should be made mandatory in order to eliminate concerns over any such effect. See Securities Offering Reform, Release No. 33-8501 (Nov. 14, 2004) [69 FR 67392] ("Securities Offering Reform Proposing Release") at Section V.B.2. Commenters believed that use of the automatic shelf registration process should be optional. See, e.g., letter from the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law. As we noted in the Securities Offering Reform Adopting Release, we did not mandate the use of the automatic shelf registration process by WKSIs so that issuers would have the flexibility to file a registration statement on any form for which they are eligible and, if they wished, delay the effective date of their registration statements. See Securities Offering Reform Adopting Release, supra note 3, at Section V.B.2.a.ii.

Rule 163 exemption, and many WKSIs do not have registration statements on file.[17] As noted above, the Rule 163 exemption is not available for communications made by an offering participant that is an underwriter or dealer.

Some methods used in capital raising transactions have highlighted certain impediments in Rule 163 to a WKSI's communications with broader groups of potential investors regarding offerings of the issuer's securities.[18] Specifically, WKSIs may want to assess the level of investor interest in their securities before filing a registration statement (or a post-effective amendment to an already-filed automatic shelf registration statement)[19] for the offered securities. Although Rule 163 currently allows these issuers to communicate directly with potential investors to determine their interest in purchasing securities without violating the "gun-jumping" provisions of the Securities Act, we understand that many of these issuers either do not have sufficient knowledge about

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17 If a WKSI had filed a registration statement covering the securities being offered, then it would not need the exemption because Securities Act Section 5(c)'s prohibitions on offers being made before a registration statement has been filed would no longer apply to the securities included in the registration statement.

18 See, e.g., Lynn Cowan, Follow-On Deals Take a Night Shift – Increasing Number of Companies Work After-Hours to Line Up Orders, Wall St. J., Apr. 27, 2009 ("In a trading environment that can still be volatile, bankers and companies don't want to follow the traditional practice of marketing a deal over several days and then gauging investor interest. Instead, they are reaching out to large institutional investors such as mutual funds to make sure there's sizable interest, swiftly building a book of orders after the closing bell, and pricing before the market reopens the next day."); Lynn Cowan, "Wall Crossings" Provide Fund-Raising Edge, Wall St. J., Dec. 29, 2008 ("In a wall crossing, institutional investors are lined up to buy substantial chunks of new stock ahead of a public sale. In order to participate in what is essentially a private placement, those investors sign a confidentiality agreement that lets them cross the wall and become insiders. In exchange for gaining access to inside information, they are barred from trading in the stock until the public end of the deal is done. They gain no price advantage for signing on early.").

19 Under Securities Act Rule 413(b), a WKSI can add new classes of securities or securities of an eligible subsidiary to an automatic shelf registration statement at any time before the sale of those securities. In order to add new classes of securities, an issuer must file a post-effective amendment, which will be immediately effective, to register an unspecified amount of the new class of securities.

potential investors to contact them directly or prefer not to contact investors directly out of concern that any such contact could itself constitute and reveal material, non-public information about the issuers' capital-raising plans without the opportunity to first obtain a confidentiality agreement. Consequently, these issuers wish to be able to engage underwriters or dealers to approach their broader base of institutional clients on the issuers' behalf to ascertain their clients' interest in investing in the issuers' securities before filing a registration statement.[20] Because Rule 163 does not 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 a WKSI, a WKSI without a registration statement on file or without having particular classes of securities included in the registration statement cannot engage underwriters or dealers to have discussions with potential investors on its behalf. This reduces the benefits of our earlier reforms for issuers considering registered offerings and could lead such issuers to conduct unregistered offerings, with the resultant loss of the rights and remedies available under the Securities Act to investors in registered offerings.

To address this concern, we are proposing to amend the "by and on behalf of an issuer" definition in Rule 163(c) so that, under certain circumstances, underwriters or dealers can be agents or representatives of WKSIs under the rule.[21] By preventing underwriters or dealers from acting on behalf of issuers, the current definition may be

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[20] We understand that underwriters or dealers generally do not reveal the identity of the issuer to potential investors before securing agreements to retain the confidentiality of the information until it is publicly disclosed or is no longer material, non-public information. See, e.g., Cowan, "Wall Crossings" Provide Fund-Raising Edge, supra note 18. See also the discussion in Section III below on the applicability of Regulation FD to communications made in reliance on Rule 163.

[21] We are proposing to amend the "by or on behalf of" definition solely for purposes of Rule 163, which, by its terms, is available only to WKSIs.

causing unnecessary impediments to the ability of WKSIs to communicate with a broader group of potential investors regarding the possibility and terms of securities offerings by the issuers. If adopted, the proposed amendments will enable WKSIs to better gauge the level of interest in the market for an offering and explore possible terms for such an offering before filing a registration statement or including the securities in the registration statement through a post-effective amendment. Allowing authorized underwriters or dealers to be agents or representatives of a WKSI will provide these issuers with access to the underwriters' or dealers' existing networks of investors to assess market interest in the issuer's securities.

The proposed amendments would remove impediments from the ability of WKSIs to raise capital through registered offerings rather than through private offerings which, as we previously recognized, often require issuers to offer liquidity discounts to potential investors due to the corresponding resale restrictions imposed on the securities sold.[22] We also believe that investors would benefit from our existing regulatory framework of specific disclosure requirements that apply to registered offerings,[23] from greater liquidity for the acquired securities because they will not be acquired in private transactions with corresponding resale restrictions,[24] and from important rights and remedies under the Securities Act.[25] We believe the proposed amendments are consistent

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22 See Securities Offering Reform Proposing Release, supra note 16, at Section XI.C.3.

23 See, e.g., Regulation S-K [17 CFR 229.10 et seq.].

24 We have previously recognized that securities sold pursuant to registration statements generally enjoy more liquid markets than unregistered securities. See, e.g., Securities Offering Reform Proposing Release, supra note 16, at Section XI.C.3.

25 While communications made pursuant to Rule 163 are exempt from the prohibitions of Securities

with our traditional recognition of the "broad remedial purposes" of the Securities Act and the underlying "public policy which strongly supports registration."[26]

III. Proposed Amendments to Securities Act Rule 163(c)

We are proposing to amend Rule 163(c) to provide that an underwriter or dealer could be an agent or representative of a WKSI under Rule 163 if the following conditions are satisfied:

- the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on its behalf;[27]
- 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;[28] and

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Act Section 5(c), they are still considered offers and, therefore, subject to liability provisions applicable to such offers. These provisions include Securities Act Section 12(a)(2) [15 U.S.C. 77l(a)(2)], Securities Act Section 17(a) [15 U.S.C. 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)], and Exchange Act Rule 10b-5. In addition, written communications made in reliance on Rule 163 must be filed as free writing prospectuses when the related registration statement is filed, and will be subject to liability as such.

[26] See Notice of Adoption of Rules 145 and 153A, Prospective Rescission of Rule 133, Amendment of Form S-14 under the Securities Act of 1933, and Amendment of Rules 14a-2 and 14c-5 under the Securities Act of 1934, Securities Act Release No. 5316 (Oct. 6, 1972) [37 FR 23631]; Notice of Adoption of Rule 144 Relating to the Definition of the Terms "Underwriter" in Sections 4(1) and 2(11) and "Brokers' Transactions" in Section 4(4) of the Securities Act of 1933, Adoption of Form 144, and Rescission of Rules 154 and 155 under that Act, Securities Act Release No. 5223 (Jan. 11, 1972) [37 FR 591].

[27] See proposed Rule 163(c)(1).

[28] See proposed Rule 163(c)(2). One way that an issuer could satisfy this condition is to approve the contents of the information that will be conveyed by the authorized underwriter or dealer to potential investors through oral communications.

- 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.[29]

All other provisions of Rule 163 would continue to apply, including that:

- all communications made by or on behalf of the issuer and in reliance on Rule 163 would continue to be subject to Regulation FD;[30]
- every written communication that is an offer made in reliance on the Rule 163 exemption would contain substantially the legend required by the rule;[31] and
- every written communication that is an offer made in reliance on the Rule 163 exemption would be filed with the Commission as a free writing prospectus when the registration statement, or amendment to the registration statement, is filed.[32]

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29 See proposed Rule 163(c)(3).

30 Rule 163(e) [17 CFR 230.163(e)]; Regulation FD [17 CFR 243.100 et seq.]. We note that the amendments we are proposing today do not affect any other provision of existing Rule 163, including the continued applicability of Regulation FD to communications made in reliance on the exemption. As discussed below, communications made in reliance on Rule 163 are not considered to be in connection with a registered securities offering for purposes of the exclusion from Regulation FD.

31 Rule 163(b)(1) [17 CFR 230.163(b)(1)]. Under the proposed amendments, issuers or their agents or representatives would continue to have the ability under Rule 163(b)(1) to "cure" a failure to include the required legend in any written communication made in reliance on the exemption.

32 As is currently the case, the filing condition of Rule 163(d) would apply only if and when a registration statement, or an amendment to the registration statement, is filed. Accordingly, if no such registration statement is filed, a free writing prospectus used pursuant to Rule 163 does not have to be filed. Issuers or their agents or representatives would continue to have the ability under Rule 163(b)(2) to "cure" a failure to meet the filing condition when making any written communication in reliance on the Rule 163 exemption.

We believe that the proposed expansion of Rule 163 to permit authorized underwriters and dealers to communicate on behalf of a WKSI would enable the issuer to communicate with a broader group of potential investors in a manner that would not adversely affect the market for the issuer's securities. This proposed expansion also would be in the interest of investors as it would allow underwriters or dealers acting on behalf of an issuer to communicate directly with investors. If an issuer decides to sell securities pursuant to a registration statement after its authorized underwriter or dealer determines that there is sufficient interest, investors would have the same rights and remedies as any other investor in a registered offering under the Securities Act.

Under the proposed amendments to Rule 163, the first condition is that the underwriter or dealer must receive written authorization from the issuer to act as its agent or representative before engaging in any communication on behalf of the issuer in reliance on the proposed amended rule.[33] The proposed amendments are for the limited purpose of enabling issuers to authorize underwriters or dealers to approach potential investors on their behalf regarding a possible offering of the issuers' securities.[34] We are not proposing to amend the rule to permit unrestricted communications by any market participant. We do not believe an underwriter or dealer should be able to rely upon Rule 163, without prior authorization from the issuer, to gauge interest in the market for an issuer's securities and then present the issuer with an unsolicited proposal for an offering

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33 See proposed Rule 163(c)(1).

34 As we noted at the time we liberalized the communication regime for WKSIs, we believe that communications made by WKSIs have less potential for conditioning the market for the securities to be sold in a registered offering because of the market's familiarity with such large, more seasoned issuers and the ongoing market following of their activities. See Securities Offering Reform Adopting Release, supra note 3, at Section III.C.

of that class of securities. Such activities would go beyond the limited purpose of the proposed amendments to Rule 163. By requiring that the underwriter or dealer receive written 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.[35]

The second condition of the proposed amended rule is that the issuer must authorize or approve any written or oral communication before it is made by an authorized underwriter or dealer.[36] Any written or oral communication made by an authorized underwriter or dealer under the proposed amended Rule 163(c) would be considered an issuer communication. Any written communication that is approved or authorized by the issuer and made pursuant to the proposed amended rule on behalf of the issuer would need to be filed as a free writing prospectus when a registration statement for the offering is filed.[37] An oral communication made by an authorized underwriter or dealer pursuant to the proposed amended rule would not be subject to a filing requirement.

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35 We note that the requirement for prior written authorization in proposed amended Rule 163(c) is not intended to limit or otherwise affect the existing ability of an underwriter or dealer that is not acting on behalf of an issuer from making "reverse inquiry" offers in registered offerings. Under the "reverse inquiry" process, which is commonly used in medium-term note programs, an investor may be allowed to purchase securities from the issuer through an underwriter or dealer that is not designated in the prospectus as the issuer's agent by having such underwriter approach the issuer with an interest from the investor. See Joseph McLaughlin and Charles J. Johnson, Jr., Corporate Finance and the Securities Laws (4th ed. 2006). If the reverse inquiry process is used in offerings for which the issuer has already filed a registration statement, the requirement in proposed Rule 163(c)(1) for prior written authorization should not affect reverse inquiry offers since Section 5(c) of the Securities Act permits offers to be made after the filing of a registration statement.

36 See proposed Rule 163(c)(2).

37 Rule 163(b)(2) [17 CFR 230.163(b)(2)].

The proposed rule amendment is not intended to permit communications authorized by persons other than the WKSI. Thus, while the proposed amended Rule 163(c) would permit underwriters and dealers to act as the issuer's agents or representatives for purposes of making a communication, they would not be permitted, in turn, to authorize or approve a communication to be made by another person.

We emphasize that the amendments that we are proposing today do not change the applicability of Regulation FD to communications made in reliance on Rule 163. As is the case today, communications made in reliance on the proposed amended rule would not be considered to be in connection with a registered securities offering for purposes of the exclusion from Regulation FD.[38] Therefore, WKSIs would need to continue to comply with the provisions of Regulation FD with regard to any communications made pursuant to proposed amended Rule 163 to which Regulation FD would apply (including pre-filing communications made on behalf of the issuer by an authorized underwriter or dealer). If an authorized underwriter or dealer acting on behalf of an issuer desires to communicate material non-public information[39] in reliance on proposed amended Rule 163 to persons enumerated in Regulation FD,[40] the issuer, or the underwriter or dealer acting on its behalf, would first need to obtain a confidentiality agreement from the

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38 Rule 163(e); Exchange Act Rule 100(b)(2)(iv) [17 CFR 243.100(b)(2)(iv)].

39 When we adopted Regulation FD, we recognized that, while not necessarily per se material, "events regarding the issuer's securities," such as "public or private sales of additional securities," were one of the types of information or events that should be reviewed carefully to determine whether they are material. See Selective Disclosure and Insider Trading, Release No. 33-7881 (Aug. 15, 2000) [65 FR 51716] ("Regulation FD Adopting Release") at Section II.B.2.

40 Rule 100(b)(1) [17 CFR 243.100(b)(1)]. Regulation FD provides that when an issuer, or person acting on its behalf, discloses material non-public information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may trade on the basis of the information), it must make public disclosure of that information. See Regulation FD Adopting Release, supra note 39, at Section I.

enumerated persons or the issuer would need to publicly disclose the information in the manner[41] and within the timeframe set forth in Regulation FD.[42] Moreover, any misuse of the information for trading by any person subject to a confidentiality agreement would be covered under either the "temporary insider" or the misappropriation theory of insider trading.[43]

The third condition in proposed amended Rule 163(c) is that an authorized underwriter or dealer who makes a communication on behalf of a WKSI in reliance on Rule 163 must be identified in the prospectus contained in the registration statement for the offering of the issuer's securities related to the communication.[44] This identification would provide investors with information to supplement disclosure about the plan of distribution of the WKSI's securities.[45]

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41 Under Regulation FD, the required public disclosure may be made by filing or furnishing a Form 8-K, or by another method or combination of methods that is reasonably designed to effect broad non-exclusionary distribution of the information to the public. See Exchange Act Rule 101(e) [17 CFR 243.101(e)].

42 The timing of the required public disclosure depends on whether the selective disclosure of material non-public information was intentional or non-intentional. For an intentional selective disclosure, the issuer must make public disclosure simultaneously; for a non-intentional disclosure, the issuer must make public disclosure promptly. See Exchange Act Rule 100(a) [17 CFR 243.100(a)].

43 See Regulation FD Adopting Release, supra note 39, at Section II.B.1.a.

44 See proposed Rule 163(c)(3).

45 See Item 508 of Regulation S-K [17 CFR 229.508] and Securities Act Rule 430B [17 CFR 230.430B]. Item 508 of Regulation S-K requires the identification of the underwriters through which the securities are offered and certain disclosures regarding the identified underwriters, such as the nature of any material relationships between the underwriters and the issuer as well as the nature and amount of underwriter compensation. Underwriters for securities offered pursuant to a registration statement are subject to Section 11 liability for untrue statements of material facts or omissions of material facts required to be included in a registration statement or necessary to make the statements in the registration statement not misleading at the time the registration statement became effective.

Request for Comment

- We are soliciting comment on all conditions of the proposed amendments to Rule 163(c).
- Should an underwriter or dealer be required to obtain written authorization from the issuer to act as its agent in order to make offers pursuant to proposed amended Rule 163(c)? If not, why?
- Should the issuer be required to authorize or approve any written or oral communications before it is made by an underwriter or dealer acting as its agent?
- Should any written communications made by such authorized underwriters or dealers be required to be filed as any other issuer free writing prospectus under Rule 163? If not, why?
- What effect, if any, would the proposed amendments to Rule 163 have on the timing of the subsequent registered offering and what effect would such timing have on the ability of other investors in the registered offering, such as those investors who may not be approached until after the registration statement has been filed, to evaluate the offering?
- To what extent would the proposed amendments to Rule 163 enable WKSIs to reach a broader group of investors and affect their ability to raise capital through registered offerings? Are there any other modifications that should be made to the conditions of Rule 163 that may facilitate the ability of WKSIs to raise capital with appropriate protections? What other effects, if any, would the proposed amendments

have on the ability of WKSIs to raise capital? Would the proposed amendments have any effect on the ability of issuers other than WKSIs to raise capital? Please explain in detail and provide supporting empirical data.

- What are the reasons that WKSIs may not have filed automatic shelf registration statements or included certain classes of securities on filed automatic shelf registration statements? How would the proposed amendments to Rule 163 affect an issuer's decision to file an automatic shelf registration statement? Please provide empirical data to the extent available.
- Should we limit the types of investors that an authorized underwriter or dealer could approach under proposed amended Rule 163, such as to qualified institutional buyers, as defined in Securities Act Rule 144A(a)(1),[46] or to other types of investors who may not need the protections afforded by the Securities Act's registration provisions?[47] If so, why?
- Should an underwriter or dealer that made any authorized communications on behalf of an issuer in reliance on the proposed amended Rule 163 be required to be identified in the prospectus contained in the registration statement that is filed for the offering related to the communications?

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[46] 17 CFR 230.144A(a)(1).

[47] See The Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, Securities Act Release No. 6806 (Oct. 25, 1988) [53 FR 33147].

IV. General Request for Comments

We request and encourage any interested person to submit comments regarding:

- the proposed rule changes that are the subject of this release;
- additional or different changes; or
- other matters that may have an effect on the proposal contained in this release.

We request comment from the point of view of registrants, investors and other users of information who may be affected by the proposed rule changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

V. Paperwork Reduction Act

A. Background

Our proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[48] We are submitting these to the Office of Management and Budget (OMB) for review in accordance with the PRA.[49] The title for the information collection is "Rule 163 (17 CFR 230.163)(OMB Control No. 3235-0619)." An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid control number. The information collection requirements related to proposed amendments to Rule 163(c) would apply only to WKSIs and authorized offering participants choosing to rely on the proposed amended rule. Specifically, any free writing prospectus used by a WKSI or by an authorized offering participant would have

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48 44 U.S.C. 3501 et seq.

49 See 44 U.S.C. 3507 and 5 CFR 1320.11.

to be filed and be publicly available on the EDGAR system if and when the WKSI files a registration statement (or a post-effective amendment to an automatic shelf registration statement) to cover the securities offered pursuant to the proposed amended rule. Although WKSIs would not be required to engage offering participants to make authorized communications, if they did, the information collection requirement would be mandatory.

The estimates of reporting and cost burdens provided in this PRA analysis address the time, effort and financial resources necessary to provide the proposed collections of information and are not intended to represent the full economic cost of complying with the proposal.

B. Summary of Information Collections

The proposed amendments to Rule 163(c), if adopted, would revise the "by and on behalf of an issuer" definition used in the rule so that, under certain circumstances, underwriters or dealers could be agents or representatives of WKSIs and communicate on behalf of the issuers before a registration statement (or a post-effective amendment to an automatic shelf registration statement) covering the offered securities has been filed. The proposal could increase the number of free writing prospectuses filed pursuant to Rule 163 as a result of the WKSIs' new ability to engage underwriters or dealers to make communications, which, if written, would be free writing prospectuses, on their behalf.

One of the conditions of the proposed amendments to Rule 163(c) is the identification of any authorized underwriters or dealers that made communications in reliance on the rule in the prospectus contained in the registration statement (or post-effective amendment to an automatic shelf registration statement) filed for the offered

securities. This proposed condition does not impose a new disclosure requirement because an authorized underwriter or dealer that made a communication on behalf of a WKSI in reliance on the proposed amended rule would generally be an underwriter or dealer for the offering related to that communication and would, therefore, already be required to be identified under Item 508 of Regulation S-K, regardless of the proposed condition.

C. Paperwork Reduction Act Burden Estimates

At the time we adopted Rule 163, we estimated that most WKSIs would have an automatic shelf registration statement on file and would therefore not rely on the exemption provided in the rule. Accordingly, we estimated that 53 free writing prospectuses would be filed under Rule 163 per year and that issuers would spend 13.25 hours per year on such filings.[50] We have since learned that many WKSIs have not filed automatic shelf registration statements; the staff estimates that only 50% of the 2,273 registrants that were WKSIs as of the end of their 2006 or 2007 fiscal years have filed an automatic shelf registration statement on either Form S-3 or F-3. Therefore, we believe it is appropriate to update our PRA estimates of the costs and burdens imposed by the collection of information requirements of the proposed amended Rule 163. For the free writing prospectus rules, as was the case when we proposed Rule 163,[51] we estimate that 25% of the burden of preparation is carried by the issuer internally and 75% of the burden is carried by outside professionals retained by the issuer at an average cost of $400 per

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50 See Securities Offering Reform Proposing Release, supra note 16, at Section X.C.2. The calculation for the incremental burden hours issuers would spend under Rule 163 was 13.25 hours (53 free writing prospectuses filed, multiplied by 0.25 hours per filing).

51 See Securities Offering Reform Proposing Release, supra note 16, at Section X.C.

hour. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

The fact that many WKSIs do not have automatic shelf registration statements on file (or do not have the securities they propose to offer already included in their filed registration statements), along with our proposal to permit underwriters or dealers to make communications pursuant to Rule 163, may result in greater use of the Rule 163 exemption by issuers and potentially greater numbers of free writing prospectuses filed pursuant to the rule. However, since some communications made by underwriters or dealers in reliance on Rule 163 would be oral rather than written, and since an oral communication that is an offer need not be filed with the Commission as a free writing prospectus, the potential increase might be small. As a result of these two counteracting effects, we estimate for this analysis that the number of free writing prospectuses will double from our estimate at the time that Rule 163 was proposed. More specifically, we estimate that the incremental increase in the number of free writing prospectuses that may be filed pursuant to the proposed amended rule and number of incremental burden hours will be 53 free writing prospectuses and 13.25 hours per year, resulting in issuer personnel time of 3.3 hours and a cost of approximately $3,980 for the services of outside professionals. The following table illustrates the incremental annual compliance burden of the collection of information in hours and in cost for the proposed amendments to Rule 163:

	Incremental Annual Responses	Hours/Form	Incremental Burden	25% Issuer	75% Professional	$400 Prof. Cost
	(A)	(B)	(C)=(A)*(B)	(D)=(C)*0.25	(E)=(C)*0.75	(F)=(E)*$400
Rule 163 filing	53	0.25	13.25	3.3	9.95	$3,980

D. Request for Comment

Pursuant to 44 U.S.C. § 3506(c)(2)(B), we request comments to (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) evaluate the accuracy of our estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-30-09. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-30-09, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE, Washington, DC 20549. Because the OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, your

comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

VI. Cost Benefit Analysis

A. Background

We believe that the definition of "by or on behalf of an issuer" currently in Rule 163(c) may be causing unnecessary impediments to the ability of WKSIs to communicate with a broader group of potential investors about offerings of the issuers' securities by preventing underwriters or dealers from acting on behalf of such issuers. Further, the current definition may also be impeding potentially useful discourse with prospective investors regarding the possibility and terms of securities offerings by the issuers. Accordingly, we believe that it is appropriate to propose to amend the definition in Rule 163(c) so that, under certain circumstances, underwriters or dealers could be agents or representatives of WKSIs under Rule 163. We believe that the proposed amendments would enable WKSIs to better gauge the level of interest in the market for an offering and explore possible terms for such an offering before filing a registration statement (or a post-effective amendment to an already filed automatic shelf registration statement) covering the offered securities while retaining for investors important rights and remedies under the Securities Act.

B. Benefits

The purpose of the proposed amendments to Rule 163(c) is to allow authorized underwriters or dealers to communicate on behalf of WKSIs before a registration statement (or a post-effective amendment to an already filed automatic shelf registration statement) covering the offered securities has been filed. By removing impediments to

the ability of WKSIs to communicate with a broader group of potential investors and access the capital markets through registered offerings, we believe that investors should benefit from our existing regulatory framework of specific disclosure requirements and remedies that apply in registered offerings and greater liquidity for the acquired securities because they will not be acquired in private transactions with corresponding resale restrictions. For WKSIs, the ability to engage offering participants who are underwriters or dealers for the purpose of communicating with a broader group of potential investors should allow greater access to capital through the use of the underwriters' or dealers' existing networks of investors and the increased flexibility in evaluating the possible terms of offerings.

The proposed amendments to Rule 163(c) would maintain the existing Securities Act liability scheme for communications made in reliance on the proposed amended rule and, because all communications made in reliance on proposed amended Rule 163 would be considered issuer communications regardless of whether they are made by an issuer or an authorized underwriter or dealer, the existing filing conditions in the rule would continue to apply to any written communications made in reliance on the rule. We believe that investor protection is further enhanced by removing certain impediments that WKSIs face in reaching a broader group of prospective investors in their capital raising activities through registered offerings rather than private offerings, while retaining for such investors important rights and remedies under the Securities Act, including available remedies under Securities Act Sections 11 and Section 12(a)(2).[52]

C. Costs

[52] 15 U.S.C. 77k and 77l(a)(2).

The proposed amendments to Rule 163(c) may involve certain costs. To the extent that a communication made on behalf of a WKSI pursuant to the proposed amended rule is a written communication, it would be a free writing prospectus that the issuer would have to file as with any other written communication made in reliance on Rule 163. For purposes of the PRA, we estimate the incremental costs to be issuer personnel time of 3.3 hours and approximately $3,980 for the services of outside professionals. If the communications are made orally, however, there would be no significant incremental costs because such communications would not have to be transcribed and filed in written form.

Another cost that may arise from the proposed amendments to Rule 163(c) is a possible decrease in the number of automatic shelf registration statements filed by WKSIs prior to an offering. In adopting the rules for automatic shelf registration statements for WKSIs, we hoped to provide sufficient flexibility for WKSIs to encourage capital formation through the registration process. Expanding Rule 163(c) to allow WKSIs to engage underwriters and dealers to act as their agent or representative in communicating with a broader group of investors may result in WKSIs waiting to file automatic shelf registration statements until after they have gauged the market's interest in an immediate offering. This decision not to file a registration statement in advance of identifying the classes of securities to be sold may delay the dissemination to the market of certain information regarding the issuer and its plans, such as the possibility that the issuer is contemplating an immediate offering of those types of securities. We believe, however, that many WKSIs will still file automatic shelf registration statements, even if they have no plans for an immediate offering, to have the capacity to sell their registered

securities on an immediate basis without having to wait for an automatic shelf registration statement to be filed.

To the extent that the proposed amended rule would encourage more WKSIs to file automatic shelf registration statements, these filings, as is the case today, would not be subject to review by the staff of the Division of Corporation Finance because they become effective automatically upon filing. Investors may lose the benefit of better disclosure prompted by staff review. These filers, however, would continue to be obligated to disclose, on an annual basis, written, unresolved staff comments on their periodic report disclosures that were issued more than 180 days prior to the fiscal year end covered by the report and that the issuer believes are material.

The proposed amendments to Rule 163 would enhance access to the capital markets for only WKSIs. As a result, it is possible that other issuers, smaller than WKSIs or ineligible to be WKSIs, may encounter a more competitive capital-raising environment if they attempt to solicit investments from the same class of potential investors as those targeted by the WKSIs.

As proposed, an issuer must authorize an underwriter or dealer in writing before the underwriter or dealer can make any communications pursuant to the proposed amended rule. Arranging for this authorization may result in additional costs for issuers and underwriters or dealers.

D. Request for Comment

We request comments on this cost-benefit analysis and any of the costs and benefits associated with the proposed amendments to Rule 163(c). We solicit

quantitative data to assist with our assessment of the costs and benefits of the proposed rule amendments.

VII. Consideration of Promotion of Efficiency, Competition and Capital Formation

Securities Act Section 2(b)[53] requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The proposed amendments to Rule 163(c) are intended to remove certain impediments to communications by or on behalf of WKSIs with a broader group of potential investors before filing a registration statement (or a post-effective amendment to an already-filed automatic shelf registration statement) covering the securities being offered. We anticipate the proposed rule amendments will enhance a WKSI's ability to identify and communicate with investors regarding potential investments with the issuer and, as a result, make the capital formation process more efficient for these issuers. WKSIs will benefit from their authorized underwriter's or dealer's existing networks of investors when assessing market interest in their securities offerings, thereby potentially increasing their access to capital and improving their ability to issue securities on favorable terms to the issuer.

The proposed amendments to Rule 163 would enhance access to the capital markets for only WKSIs. As a result, it is possible that other issuers may not have the same capital-raising efficiencies if they attempt to solicit investments from the same class of potential investors as those targeted by the WKSIs, potentially creating a competitive

[53] 15 U.S.C. 77b(b).

advantage for some WKSIs. As we discussed in the Securities Offering Reform Adopting Release, these potential effects are justified in order to ensure that investors have appropriate access to information about issuers of different sizes.[54]

We request comment on whether the proposed rule amendments, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views, if possible.

VIII. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act[55] requires the Commission to undertake a Regulatory Flexibility Analysis of the effect of its rules on small entities unless the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities. Securities Act Rule 157[56] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year.

Pursuant to Section 605(b) of the Regulatory Flexibility Act,[57] the Commission hereby certifies that the proposed amendments to Rule 163(c), if adopted, will not have a significant economic impact on a substantial number of small entities. Rule 163 is, by its terms, available only to WKSIs. We believe that few, if any, small entities will be able to meet the $700 million non-affiliate equity market capitalization threshold[58] or the $1

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54 See Securities Offering Reform Adopting Release, supra note 3, at Section X.

55 5 U.S.C. 603(a).

56 17 CFR 240.0-10(a).

57 5 U.S.C. 605(b).

58 To satisfy this threshold, the worldwide market value of the issuer's outstanding voting and non-voting common equity held by non-affiliates must be $700 million or more as of a date within 60

billion non-convertible securities issuance threshold[59] to be considered WKSIs. For this reason, the proposed rule amendments, if adopted, should not have a significant economic impact on a substantial number of small entities.

We solicit written comments regarding this certification. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[60] a rule is "major" if it has resulted, or is likely to result, in:

- an annual effect on the U.S. economy of $100 million or more;
- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment, or innovation.

We request comment on whether the proposed amendments to Rule 163(c) would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on: (1) the potential effect on the U.S. economy on an annual basis; (2) any potential increase in costs or prices for consumers or individual industries; and (3) any potential effect on competition, investment, or innovation.

X. Statutory Authority – Text of the Proposed Amendments

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days of the determination date. See Securities Act Rule 405 [17 CFR 230.405]

59 To satisfy this threshold, the issuer must have issued for cash more than an aggregate of $1 billion in non-convertible securities, other than common equity, through registered primary offerings over the prior three years. See Securities Act Rule 405 [17 CFR 230.405].

60 5 U.S.C. 801 et seq.

We are proposing the amendments pursuant to Sections 7, 10, 19, and 28 of the Securities Act, as amended.

List of Subjects

17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, we are proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Amend §230.163 by revising paragraph (c) to read as follows:

§230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.

* * * * *

(c) 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, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made. Provided, however, an offering participant who is an underwriter or dealer may be an agent or representative of the issuer for purposes of this section if:

(1) the underwriter or dealer receives written authorization from the issuer to act as its agent or representative prior to making any communication in reliance on this exemption;

(2) the issuer authorizes or approves any written or oral communication before it is made by an underwriter or dealer authorized pursuant to the provision of this section to act as agent or representative of the issuer; and

(3) any underwriter or dealer authorized pursuant to the provision of this section that has made any communication authorized pursuant to the provision of this section is identified in the prospectus contained in the registration statement or amendment that may be filed for the offering of the issuer's securities related to the communication.

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By the Commission.

Elizabeth M. Murphy
Secretary

Dated: December 18, 2009