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SEC Proposes Rule Change to Allow Underwriters to Offer Securities of WKSIs Before a Registration Statement is on File With the SEC

On December 18, 2009, the U.S. Securities and Exchange Commission (SEC) proposed amendments to Rule 163 under the Securities Act of 1933, as amended (SEC Release No. 33-9098), to allow underwriters or dealers who have been authorized in writing by a “well known seasoned issuer” (WKSI) to offer securities to prospective investors prior to filing a registration statement, subject to certain conditions. Currently, Rule 163 exempts WKSIs and their authorized agents and representatives (*other than an offering participant who is an underwriter or dealer*) from the restrictions on making oral and written offers prior to filing a registration statement. The proposed amendments are a further liberalization of the communication rules for WKSIs and are intended to facilitate “wall crossings” or pre-marketed offerings by the largest issuers.

Background – Mum is the Word

Rule 163 was adopted as part of the SEC’s 2005 reforms that liberalized the offering and communication process. Pursuant to Rule 163 as currently in effect, WKSIs can communicate directly with prospective investors in order to gauge investor interest in a potential securities offering before they file a registration statement with the SEC without violating the “gun-jumping” restrictions of the Securities Act. The rule, however, does not allow underwriters or dealers to communicate with prospective investors on behalf of the issuer. As a practical matter, this limits the utility of the rule since issuers are generally reluctant to approach prospective investors about an unannounced securities offering because of concerns about disclosing material non-public information. As a result, public offerings marketed confidentially to investors on an overnight basis, known as “wall

crossings”, could only be conducted by issuers with a shelf-registration statement on file with the SEC. The proposed amendments to Rule 163 would allow WKSIs to conduct wall crossings without having a registration statement on file.

Proposed Amendments – Underwriters and Dealers Can Speak Up

The proposed rule change would allow an underwriter or dealer who is acting as an agent or representative of a WKSI to communicate with prospective investors, either orally or in writing, about a potential securities offering before a registration statement is filed if each of the following conditions is satisfied:

- the underwriter or dealer must receive written authorization from the WKSI to act as its agent or

representative before making any communication on its behalf;

- the WKSI must authorize or approve any oral or written communication before it is made; and
- the authorized underwriter or dealer that has made any communication in reliance on Rule 163 must be identified in any prospectus filed for the securities offering.

Regulation FD – It's Still a Secret: Don't Tell, Don't Trade

The proposed amendments would not change how Regulation FD, which prohibits selective disclosure, applies to a communication made in reliance on Rule 163. Rule 163 communications are not considered to be in connection with a registered public offering and are therefore *not* exempt from Regulation FD. Before approaching a prospective investor about an unannounced public offering on behalf of a WKSI, an underwriter or dealer would first need to obtain a

confidentiality agreement from the investor with respect to any material non public information. The proposing release makes it clear that, in the SEC's view, any person subject to a confidentiality agreement who trades on the information would be subject to insider trading liability.

Written Communications Must Be Filed

Every written communication made on behalf of a WKSI by its authorized underwriter or dealer must be filed by the WKSI as a free writing prospectus promptly upon the filing of the related registration statement or amendment. Oral communications are not subject to a filing requirement.

The proposed amendments to Rule 163 are subject to a public comment period. The deadline for comments is January 27, 2010.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

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