COMMITTEE ON SECURITIES REGULATION

ROBERT E. BUCKHOLZ, JR.
CHAIR
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-3876
Fax: (212) 291-9018
buckholzr@sullcrom.com

TREVOR OGLE
SECRETARY
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-7938
Fax: (212) 291-9429
oglet@sullcrom.com

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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, Securities and Exchange Commission

Re: Comments on Proposed Revisions to Rule 163 under the Securities Act of 1933, File No. S7-30-09

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Securities Regulation of the New York City Bar in response to the Securities and Exchange Commission's proposed amendments to Rule 163 under the Securities Act of 1933 to allow, subject to certain conditions, 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.[1]

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors, and academics. Please note that Mr. Jeffrey T. Kern, a member of the Staff of the Financial Industry Regulatory

[1] Revisions to Rule 163, Release No. 33-9098, File No. S7-30-09 (Dec. 18, 2009) (to be codified at 17 C.F.R. 230.163(c)).

Authority ("FINRA"), who is a member of our Committee, did not participate in the preparation of this letter or the decision by our Committee to submit this letter to the Commission.

The Committee heartily endorses this proposed change to Rule 163, and welcomes the opportunity to comment on the specific details of the proposed amendments. An important objective of the Commission's 2005 Securities Offering Reform (the "2005 Reform")[2] — and Rule 163 in particular — was to improve investor protection by encouraging well-known seasoned issuers ("WKSIs") to raise capital through the Securities Act registration process. Following the 2005 Reform, fewer WKSIs than expected filed automatic shelf registration statements (particularly with respect to common equity), and so the practical need for an exemption for pre-filing offers has been greater than anticipated. Amending Rule 163 to allow WKSIs to test the market via underwriters or dealers, by further facilitating registered offerings, will in our view advance that same investor protection objective underlying the 2005 Reform. By the same token, we respectfully submit that a number of the proposed conditions to this new use of Rule 163 are not needed from an investor protection perspective, will only serve to limit the beneficial impact of the amendments, and should therefore be reconsidered.

OVERVIEW OF THE PROPOSED AMENDMENTS

Rule 163 presently provides an exemption from Section 5(c) of the Securities Act for written offers by or on behalf of WKSIs in advance of the filing of a registration statement, provided that the appropriate legend is used and written offers made in reliance on the rule are filed with the Commission. Pursuant to Rule 163(c), a communication is "made by or on behalf of an issuer" if the issuer, or its agent or representative other than an offering participant that is an underwriter or dealer, authorizes or approves the communication before it is made.

The proposed amendments to Rule 163(c) would permit a WKSI to designate an underwriter or dealer as an agent or representative for the purposes of pre-filing communications on its behalf with potential investors. The amended rule would impose three conditions to such a designation: first, the underwriter or dealer must receive written authorization from the WKSI before making any communication on its behalf; second, the issuer must authorize or approve any written or oral communication by the underwriter or dealer before it is made; and third, any authorized dealer that makes a communication on behalf of the issuer in reliance on Rule 163 must be identified in the prospectus filed in connection with the corresponding securities offering. As is currently the case with issuer communications, any written offers by an underwriter or dealer on behalf of an issuer would be required to be filed as a free writing prospectus.

ANALYSIS OF THE PROPOSED AMENDMENTS

Allowing underwriters and dealers to make pre-filing communications on behalf of WKSIs will improve those issuers' access to the capital markets by allowing WKSIs to leverage an underwriter or dealer's existing network of investors, thus enabling WKSIs to make offering decisions on a more informed basis, especially with respect to terms and timing. As the proposing release notes, without engaging underwriters and dealers, many WKSIs have insufficient information regarding potential investors to be able to contact them directly. With

[2] Securities Offering Reform, Securities Act Release No. 8591 (Aug. 3, 2005).

respect to investor protection, oral and written communications pursuant to Rule 163 remain "offers" that are subject to liability under Sections 12(a)(2) and 17(a) of the Securities Act (as well as Section 10(b) of the Exchange Act). If the WKSI ultimately proceeds with an offering, investors participating in the offering would benefit from the same protections afforded in any other registered offering. We therefore agree with the Commission that expanding the Rule 163 exemption to encompass offering participants that are underwriters or dealers is a constructive amendment that will enhance issuer access to the capital markets while maintaining investor protection.

At the same time, for the reasons set forth below, we think that the conditions the proposed rule imposes on the underwriter or dealer's use of the rule are generally at odds with the Commission's stated goals in amending the rule, while serving no clear investor protection function. A key consideration, in our view, is the severe consequences that could flow from a loss of the Section 5 exemption due to a failure to meet any of these conditions. Most of the conditions (with the notable exception of the condition relating to advance issuer approval of specific communications) are generally consistent with current offering practices, and we would expect most issuers to impose these or similar restrictions by contract. Imposing these measures as conditions to the Section 5 exemption is therefore unnecessary, and on the margin will tend to discourage beneficial reliance on the amended rule. We also believe that the amended rule should not be limited to communications made to "qualified institutional buyers" ("QIBs").

Requiring Advance Issuer Approval of Specific Communications Will Limit WKSIs' Ability to Test the Market in Reliance on the Rule

Under the proposed amendments, communications by underwriters or dealers that are not specifically authorized or approved by the issuer will not fall within the Rule 163 exemption. Although the proposing release notes that an issuer could satisfy this condition by giving oral approval of the content of the communication, in practice, we believe this condition will require underwriters and dealers to follow an issuer-approved script or risk loss of the exemption. At the very least, we are concerned that this condition would seriously inhibit meaningful dialogue with prospective investors. This would undercut the Commission's stated goal of allowing WKSIs to ascertain investors' interest in the securities before filing a registration statement, and prevent WKSIs from obtaining the full measure of benefit the exemption would otherwise provide. Because the communications at issue would be subject to the anti-fraud provisions of both the Securities Act and the Exchange Act, we do not see how removing this condition would jeopardize the Commission's investor protection objectives. We are also not aware that unauthorized (by the issuer) dealer communications have presented any particular problems in shelf registered offerings, and do not expect that such communications would be more problematic in the pre-filing context.

Required Disclosure of Underwriters or Dealers that Make Communications in Reliance on Rule 163 Will Inhibit Use of the Rule

The proposed amendments also condition availability of the exemption on the identification of underwriters or dealers that make pre-filing communications on behalf of an issuer in the prospectus filed in connection with the corresponding offering of securities. Although we are less concerned about this condition than we are about the condition for approval of

communications, we still do not see how this condition advances any investor protection interest. Since we also believe this condition would tend to inhibit reliance on the amended rule, we recommend that it not be included.

The disclosure contemplated by this condition will, as suggested in the proposing release, supplement the plan of distribution disclosure in the subsequent registered offering, but not in a way that would be material to investors in that offering. In our view, little purpose is served by naming underwriters or dealers that an issuer engages to test the waters for an offering, especially when those conversations do not lead to a transaction. A dealer that makes Rule 163 communications and then participates as an underwriter in an offering will of course be named in the prospectus as an underwriter, but we do not see how the fact that Rule 163 communications took place would, in and of itself, be material to investors in the context of that registered offering. In effect, the details of the Rule 163 activities are superseded by the registered offering itself. On the other hand, a dealer that makes Rule 163 communications but for whatever reason does not participate in the subsequent offering should not have to be named in the prospectus, because its role in respect of the offering is simply not material to investors. While such a dealer may have Section 12(a)(2) liability in respect of communications actually made by it (the recipients of which will know its identity), it should not have Section 11 liability in the subsequent offering in which it does not participate, and so we do not think investors in that offering have any real need for disclosure of the dealer's identity or Rule 163 activities.

At the same time, the prospect of needing to disclose "unsuccessful" Rule 163 activities by a dealer may inhibit issuers from relying on the amended rule. A failure to meet this condition would appear to render the exemption unavailable for any pre-filing offer made by dealers, so we believe issuers may take a conservative position on what prior offers must be treated as "related" to the subsequent offering. As discussed above, we believe that use of the amended rule will promote investor protection, by encouraging use of the registration process. Since we believe that use of the amended rule would be discouraged by a condition requiring that dealers relying on Rule 163, particularly dealers that are not participating as underwriters, be named in the subsequent prospectus, we would not impose such a condition. Even if the Commission determined that disclosure with respect to Rule 163 activities should be required in the subsequent registered offering, we submit that the disclosure requirement should not be made a condition to availability of the Rule 163 exemption.

The Rule Should Not Require that the Issuer Authorization Be in Writing

The Committee does not object to a requirement that a dealer must have the issuer's authorization before making Rule 163 communications. However, we submit that the amended rule should not require *written* authorization. Obliging issuers to provide an underwriter or dealer with written authorization would be unprecedented and, on the margin, likely to inhibit beneficial reliance on the amended rule. In other rules promulgated under the Securities Act that define "by or on behalf of the Issuer", in no instance does there appear a requirement that the authorization or approval be in writing.[3]

[3] See, e.g., Rule 146(a) ("An offering document is 'prepared by or on behalf of the issuer' for purposes of Section 18 of the Act, if the issuer or an agent or representative: (1) Authorizes the document's production, and (2) Approves the document before its use."); Rule 159A, Notes to paragraph (a) of Rule 159A ("[I]nformation is

The Amended Rule Should Not Be Limited to Communications by Dealers to Qualified Institutional Buyers

We agree with the decision, implicit in the proposed amendments, not to limit the amended rule to communications by dealers to certain types of investors, such as QIBs. Limiting the universe of potential investors that underwriters or dealers may communicate with on behalf of WKSIs would reduce the utility of the amended rule. But since any *purchases* of securities following such communications will be effected in a registered offering, we do not see any investor protection rationale for such a limitation on offers. We therefore urge you not to impose one.

The Amended Rule Will Not Unfairly Disadvantage Investors that Are Not Approached Prior to Filing

The proposing release requests comment as to the effect the proposed amendments would have on the timing of the subsequent registered offering, and the effect such timing would have on the ability of investors who are not approached prior to filing to evaluate the offering. The proposed amendments are intended to (and we believe will) facilitate the registered offering process. We believe that the biggest effect will be an increase in the certainty the issuer will have that an offering, once commenced, can in fact be completed; any impact on the timing of offerings is likely to be less significant. But even if the amended rule permitted an acceleration of some offering timelines, we believe the effect would simply be to permit a WKSI that does not have a shelf registration in place (and would therefore use Rule 163) to approach the timeline available to a WKSI with a shelf registration already on file. We therefore feel the proposed amendments do not raise any serious investor protection issue relating to the timing of offerings.

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Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully Submitted,

/s/Robert E. Buckholz, Jr.

Committee on Securities Regulation

Drafting Subcommittee

Bruce C. Bennett
Robert E. Buckholz, Jr.
Bernd Bohr
Deanna Kirkpatrick

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provided or a communication is made by or on behalf of an issuer if an issuer or an agent or representative of the issuer authorizes or approves the information or communication before its provision or use."); Rule 163(c) ("[A] communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer . . . authorizes or approves the communication before it is made."); Rule 163A(c) (same); Rule 168(b)(3) (same); Rule 169(b)(2) (same).

Richard M. Kosnik
Matthew D. Leavitt
Andrew J. Pitts
Richard Smith
Robert C. Vincent, III

Securities Regulation Committee

Julie M. Allen
Bernd Bohr
Martin M. Cohen
Caroline Gentile
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