

NEW YORK

1285 Avenue of the Americas
New York, NY 10019-6064
+1 212 373 3000

BEIJING

Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86 10 5828 6300

HONG KONG

12th FL, Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852 2846 0300

LONDON

Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44 20 7367 1600

TOKYO

Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81 3 3597 8101

WASHINGTON, D.C.

2001 K Street NW
Washington, DC 20006-1047
+1 202 223 7300

WILMINGTON

Brandywine Building
1000 N. West Street, Suite 1200
Wilmington, DE 19801
+1 302 655 4410

January 11, 2010

SEC Proposes Amendments to Facilitate Access by WKSIs to Investors in Advance of Filing a Registration Statement

The SEC has recently proposed amendments to Rule 163(c) under the Securities Act of 1933 (the "Securities Act"). Under the proposed amended rule, a well-known seasoned issuer ("WKSIs") would be able to authorize an underwriter or dealer to act on its behalf in communicating with prospective investors about potential offerings prior to the filing of a registration statement. This change is expected to facilitate wall-crossed offerings, as it would permit WKSIs to mandate underwriters to make pre-marketing inquiries on the WKSIs' behalf in advance of filing a registration statement.

Overview

Section 5(c) of the Securities Act makes it unlawful, subject to certain exceptions, for any person to offer to sell (or buy) a security unless a registration statement has been filed with the SEC. Rule 163 exempts from Section 5(c) certain communications made prior to the filing of a registration statement if the communication is made "by or on behalf of" a WKSIs, provided the conditions of the rule are met (e.g., written communications must contain a legend and be filed as free writing prospectuses upon filing of the registration statement). Under Rule 163(c), a communication is deemed to be made "by or on behalf of" a WKSIs 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.

Rule 163 was adopted as part of the 2005 Securities Offering Reform to facilitate communications by WKSIs prior to the filing of a registration statement. Also as part of the 2005 Reform package, the SEC adopted the automatic shelf registration rules, which provide that a WKSIs may register unspecified amounts of different types of securities by filing a registration statement that will become automatically effective without SEC review. In light of the automatic shelf registration process, the SEC expected WKSIs to typically have shelf registration statements on file, obviating the need to rely upon Rule 163. In the proposing release, the SEC noted, however, that many WKSIs have not in fact filed automatic shelf registration statements or that the automatic shelf registration statements that have been filed may not register all of the types of securities that WKSIs may want to offer.

Proposed Amendments to Rule 163(c)

A WKSI that has not yet filed a registration statement may rely upon Rule 163 to communicate directly with prospective investors to assess market interest in a potential offering of its securities. However, in practice, many WKSIs do not have the network of institutional investor contacts they can approach directly to assess market interest. Also, WKSIs making a direct approach may be concerned about selective disclosure given that, in certain cases, even the disclosure of a WKSI's identity may be considered material non-public information (in these cases, it is not possible for a WKSI acting without an underwriter to obtain a confidentiality undertaking prior to such disclosure).

Current Rule 163 does not permit an underwriter or dealer to make communications on behalf of a WKSI without a registration statement on file, so a WKSI that wishes to engage underwriters or dealers to take advantage of a wider base of institutional clients on its behalf to ascertain the level of market interest for a potential offering has two options:

- file an automatic shelf registration statement prior to a market check, which could create a “market overhang” for the WKSI's common stock, or
- proceed with an unregistered offering (in which issuers typically must offer liquidity discounts due to the resale restrictions on the securities).

To address the concerns raised by WKSIs and in an effort to promote registered offerings, the SEC has proposed amending the definition of “by or on behalf of an issuer” in Rule 163(c) so that underwriters or dealers can act as agents or representatives of WKSIs under the rule. This would permit underwriters or dealers to assess market interest on behalf of the WKSI prior to the filing of a registration statement. A WKSI could use an underwriter or dealer in this fashion provided:

- the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on the WKSI's behalf;
- the WKSI authorizes or approves any written or oral communication before such communications is made; and
- any authorized underwriter or dealer that has made any authorized communication in reliance on Rule 163 is identified in any prospectus contained in the relevant registration statement.

Practical Effects of the Proposed Amendments

If the change is adopted, as long as previously authorized by the WKSI, underwriters would be able to market the offering to a limited number of prospective investors prior to the public announcement of the sale without the WKSI having a registration statement on file (the underwriter or dealer would not, however, be permitted to authorize communications to be made by any other person). The proposed change would not permit an underwriter or dealer, without prior authorization, to assess market interest in a WKSI's securities and then present the WKSI with an unsolicited proposal for an offering of that class of securities.

If the communication is written, it must contain a legend and be filed as a free writing prospectus upon filing of the registration statement.

An underwriter or dealer that is not acting on behalf of a WKSI would continue to be permitted to make “reverse inquiry” offers in registered offerings (typically used in MTN programs), under which an investor may be allowed to purchase securities from a WKSI through an underwriter or dealer that is not designated in the prospectus as the WKSI’s agent by having such underwriter contact the WKSI with an interest from the investor.

Communications would still be subject to Regulation FD and, thus, if an authorized underwriter or dealer wishes to communicate material non-public information to persons covered by Regulation FD, the WKSI, or the authorized underwriter or dealer, would first need to obtain a confidentiality undertaking. Alternatively, the WKSI would need to publicly disclose such information on Form 8-K and within the time limits of set forth in Regulation FD.

Communications made under Rule 163, while exempt from the gun jumping provisions, would still be considered offers and, thus, subject to liability standards applicable to offers generally.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Any questions concerning the issues addressed in this memorandum may be directed to Mark S. Bergman (+44.207.367.1601), John C. Kennedy (+1.212.373.3025) and Tracey A. Zaccone (+1.212.373.3085).