

Proposed Amendment to Rule 163(c)

January 11, 2010

On December 18, 2009, the Securities and Exchange Commission proposed amendments to Rule 163(c) under the Securities Act of 1933, as amended (the “Securities Act”), that would allow a well-known seasoned issuer (“WKSI”) (as defined in Rule 405 under the Securities Act) 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] The purpose of the SEC’s adoption of Rule 163 in connection with Securities Act reform in 2005 was to make sure that WKSIs “would not be unnecessarily constrained in their capital formation activities while retaining important investor rights and remedies under the Securities Act.” The SEC’s proposed amendments to the Rule would expand the ability of a WKSI, and its representatives to communicate with investors and gauge their interest in purchasing securities before a registration statement is filed.

Pursuant to Rule 163 as currently in effect, WKSIs can engage in unrestricted oral and written offers for their securities before a registration statement is filed without violating the “gun-jumping” provisions of the Securities Act, provided the conditions to the Rule are satisfied.

One of the conditions to Rule 163 is that the offer to sell the WKSI’s securities be made “by or on behalf of” the WKSI. Rule 163(c) as currently in effect provides that “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” [emphasis added]. Following adoption of Rule 163, the SEC discovered, however, that many WKSIs have not filed automatic shelf registration statements.” The SEC also recognized that “WKSIs may want to assess the level of investor interest in their securities before filing a registration statement ... for the offered securities. The SEC further recognized that issuers may wish to be able to engage underwriters to approach their broader base of institutional clients on the issuer’s behalf to ascertain their clients’ interest in investing in the issuers’ securities before filing a registration statement. The ability to do so could have important benefits to issuers, including the ability to maintain confidentiality regarding the issuers’ plans to raise capital.

To address this concern and to maximize the benefits the SEC intended for WKSIs under its Securities Act reform, the SEC is now proposing to amend the “by or 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. The conditions to be satisfied are that:

- the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communications on its behalf;
- 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; and
- 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.

The SEC confirmed in its proposal that all other provisions of Rule 163 would continue to apply, including that (i) all communications made by or on behalf of the issuer and in reliance on Rule 163 would continue to be subject to Regulation FD; (ii) every written communication that is an offer made in reliance on the Rule 163 exemption would contain substantially the legend required by the rule; and (iii) 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 is filed.

The SEC proposed the expansion of Rule 163 to enable a WKSJ to utilize underwriters and dealers to communicate with a broader group of potential investors in a manner that would not adversely affect the market for the issuer's securities and also would benefit investors by allowing underwriters and dealers to communicate with them while still giving the investors the rights and remedies of a registered offering under the Securities Act.

If the SEC's proposed amendments to Rule 163(c) are adopted, then there are a few requirements that underwriters must be mindful of to make sure they are in full compliance with the Rule.

1. The underwriter must receive written authorization from the issuer to act as its representative before engaging in any communication on behalf of the issuer regarding a possible offering of securities. Accordingly, underwriters may want to enter into an engagement letter with the issuer that explicitly includes such authorization. In current practice, underwriters often do not obtain an engagement letter with an issuer before an underwriting agreement is executed at the timing of the pricing of an offering, so this would be a change from current common practice.
2. The SEC specifically warns against an underwriter, without authorization from the issuer, from gauging interest in the market for an issuer's securities and then presenting the issuer with an unsolicited proposal for an offering of securities. The SEC wants to make sure that the issuer is involved in any communications made by an underwriter in reliance on Rule 163.
3. Any written communication that is approved or authorized by the issuer would be a free writing prospectus and would be required to be filed when a registration statement for the offering is filed.
4. The amendments to Rule 163 would not affect the applicability of Regulation FD. If an authorized underwriter acting on behalf of an issuer desires to communicate material non-public information to persons enumerated in Regulation FD, then the issuer, or the underwriter acting on its behalf, would first need to obtain a confidentiality agreement from such persons or the issuer would need to publicly disclose the information in accordance with Regulation FD.

5. The Underwriting or Plan of Distribution section in the prospectus contained in the registration statement must identify any authorized underwriter or dealer who makes a communication on behalf of a WKSJ in reliance upon Rule 163.

The comment period for the SEC's proposed revisions to Rule 163 ends on January 27, 2010. We would expect the SEC to act quickly after such date to implement the proposals.

[\[1\]](#) See SEC Release No. 33-9098.