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January 27, 2010

Via e-mail: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 33-9098 (File Number S7-30-09): Revisions to Rule 163

Dear Ms. Murphy:

We respectfully submit this comment letter in response to Release No. 33-9098, dated December 18, 2009 (the "Proposing Release"), in which the Securities and Exchange Commission (the "Commission") has requested comments on proposed amendments to Rule 163(c) of the Securities Act of 1933, as amended (the "Securities Act").

We commend the Commission and its staff for its efforts in re-examining current Rule 163 of the Securities Act and appreciate the opportunity to comment on the proposed amendments. We support the Commission's efforts to facilitate capital formation by well-known seasoned issuers ("WKSIs"), and as a general matter, we support the proposed rule amendments as welcome changes that we believe will help to further the Commission's stated objectives for Securities Offering Reform (2005). As noted in the Proposing Release, Rule 163 was adopted to help liberalize the communications rules for WKSIs so that they could engage in pre-filing oral and written communications in the belief that the freedom to engage in such activities would encourage more issuers to conduct registered offerings. We agree that allowing underwriters and dealers to conduct authorized pre-filing marketing activities on behalf of WKSIs should further encourage WKSIs to conduct registered offerings by removing impediments to their ability to effectively gauge investor interest through pre-filing marketing activities.

Responses to certain of the Commission's requests for comments regarding the Rule 163 Proposals

- **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?**

  - *An underwriter or dealer should be required to obtain express authorization (either written or oral) from the issuer to act as its agent in order to make offers pursuant to proposed amended Rule 163(c).*

The Proposing Release indicates that the requirement for written authorization would ensure that the issuer would be involved with any pre-filing communication made by the underwriters or dealers in reliance on Rule 163. We believe that requiring express authorization (either written or oral) would: (i) achieve the same result, (ii) increase the possibility that WKSIs will utilize amended Rule 163, (iii) give WKSIs the flexibility to reduce the possibility that a pre-filing marketing process fails or is rendered ineffective due to a speed-bump imposed by paper processing, (iv) be consistent with the Commission's acknowledgment in other contexts (*e.g.*, Regulation FD) that an express oral agreement is sufficient to evidence a party's expression and (v) by permitting the use of oral authorization, eliminate any potential confusion as to the sufficiency of a "writing" for purposes of satisfying the rule requirements. With respect to the point set forth in clause (iii) above, we note that speed may be essential to the success of any pre-filing marketing exercise. Specifically, the "wall-crossing" exercise, in which underwriters typically pre-market an offering on a confidential basis to a select number of large institutional investors on behalf of an issuer, has become (and continues to be) an important tool for certain issuers as the increased market volatility and uncertainty that has accompanied the credit crisis has highlighted the importance of being able to access the public markets quickly.

- **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?**

  - *We do not believe that an issuer should be required to authorize or approve each written communication before it is made by an underwriter or dealer acting as its agent but should, instead, be able to approve the contents of the information that will be conveyed to investors.*

Requiring an issuer to approve each written communication made by an underwriter or dealer in reliance on Rule 163 would introduce unnecessary speed-bumps to the pre-filing marketing process. We suggest that footnote 28 to the Proposing Release be revised to make clear that an issuer may satisfy the requirements of Rule 163(c)(2) by approving the contents of the information that will be conveyed by the authorized

underwriter or dealer to potential investors through written as well as oral communications. Further, we suggest that the footnote be revised to make clear that an issuer is not required to specifically approve the intended recipients of any Rule 163 oral or written communication by an underwriter or dealer.

- **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?**

  - *Written communications made by authorized underwriters or dealers should be required to be filed as any other issuer free writing prospectus under Rule 163.*

- **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), or to other types of investors who may not need the protections afforded by the Securities Act's registration provisions? If so, why?**

  - *Rule 163 should not limit the types of investors that an authorized underwriter or dealer could approach.*

We believe that it is reasonable to assume that the types of investors that underwriters or dealers acting as an issuer's agent would approach in connection with pre-filing marketing efforts (particularly in the case of wall-crossing exercises) will be the same types of investors that they currently approach in connection with such efforts for issuers with registration statements on file. Investors that are typically asked to participate in these types of exercises include primarily institutional investors with procedures in place to appropriately manage the conveyance of non-public information and whose participation in the offering would prove indicative of potential investor receptivity. Further, whether it is appropriate or desirable to reach beyond institutional investors in connection with such pre-marketing activities will depend to some extent upon the relevant facts and circumstances. If, for example, a WKSI has a large shareholder who is sophisticated and whose participation in a proposed offering would help support a marketing effort, it should have the ability to pre-market to that investor either on its own or through its underwriters without having to file a registration statement. Furthermore, it may be necessary for a WKSI to gauge retail investor interest in determining whether a particular type of offering will ultimately be successful. Finally, we note the Commission's belief as expressed in the Proposing Release that, to the extent that a WKSI (or its agents) utilizes Rule 163 and offers and sells the securities pursuant to a registration statement, investor protection will already be greatly enhanced by virtue of the fact that the offering is registered.

- **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?**

  - *Underwriters or dealers that make such authorized communications prior to the filing of a registration statement and that cease to be part of the offering process prior to such filing should not be required to be identified in the prospectus contained in the registration statement filed for the offering related to the communications.*

An underwriter or dealer that makes authorized pre-filing communications on behalf of an issuer under amended Rule 163 and ceases to participate in the offering process prior to the filing of a registration statement (a "non-participating underwriter") should not be required to be identified in the prospectus contained in the registration statement filed for the offering related to the communications. This requirement as currently proposed could lead to the perverse result that a non-participating underwriter with no economic stake in the offering and that has not offered securities pursuant to a registration statement could nevertheless be potentially subject to Section 11 liability as an "underwriter" as defined under the Securities Act. We do not believe that such a requirement is necessary for the protection of investors as they will have received disclosure that is, taken together, either (i) materially true and correct at the time of sale and, as such, no Section 11 (or Section 12) liability will accrue or (ii) materially deficient at the time of sale, in which case such investors will be able to bring claims against all parties specified in Section 11 (and potential defendants under Section 12), including participating underwriters. In addition, any written offers made by any underwriter or dealer in reliance on amended Rule 163 would have to be filed with the SEC. As such, investors who purchase securities will have the benefit of any information conveyed by non-participating potential investors prior to the filing of the registration statement. Finally, we believe that the required disclosure regarding non-participating underwriters could create investor confusion as to the identity of the underwriters/dealers responsible for the distribution of the subject securities and may raise irrelevant questions regarding the reasons for such non-participating underwriters' failure to participate in the distribution.

To the extent that the Commission decides to retain this requirement, we respectfully request that it clarify that a non-participating underwriter is not an "underwriter" for purposes of Section 11 liability.

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We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact Matthew E. Kaplan at (212) 909-7334, Peter J. Loughran (212) 909-6375,

Alan H. Paley (212) 909-6694 or Steven J. Slutzky (212) 909-6036 with any questions about this letter.

Very truly yours,

/s/ Debevoise & Plimpton LLP

Debevoise & Plimpton LLP