

January 26, 2010

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Proposed Amendments to Securities Act Rule 163  
(File No. S7-30-09)

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Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> Capital Markets Committee appreciates this opportunity to comment on certain of the matters discussed in the Securities and Exchange Commission’s (the “Commission”) proposal (the “Proposing Release”) to amend Rule 163(c) under the Securities Act of 1933, as amended (the “Securities Act”).<sup>2</sup>

The Commission’s proposed amendments to Rule 163 would, subject to certain conditions, allow an underwriter or dealer to act as an authorized agent or representative for a well-known seasoned issuer (“WKSI”) in communicating offers of the issuer’s securities to investors prior to the filing of a registration statement (or the filing of a post-effective amendment to add classes of securities, such as common stock, to an automatic shelf registration statement) without violating Section 5(c) of the Securities Act.

The SIFMA Capital Markets Committee fully supports initiatives to improve the market at no cost to investor protection. We therefore strongly support the Commission’s proposed rule changes. Our members believe that this could be a significant positive change. Since 2008, and continuing today, large U.S. companies have substantial need for equity capital, and issuers and their bankers are operating in a difficult environment. Filings signaling a common stock or convertible or similar

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> SEC Release No. 33-9098 (December 18, 2009), 74 FR 68545.

issuance frequently lead to downward pressure on the issuer's stock price before a deal is launched. The market reaction to equity offerings that are publicly launched but are not able to be completed has been quite severe in many cases. The ability to gauge investor interest has therefore become extremely important. And because WKSIs are well followed in the market and because of the brief nature of WKSI registration statements, the proposal does not raise investor protection concerns.

Currently, Rule 163 permits a WKSI to authorize offering participants other than underwriters and dealers to make pre-filing offers on its behalf. At the time Rule 163 was adopted by the Commission as part of the Securities Offering Reforms of 2005<sup>3</sup>, the Commission stated that it expected a majority of WKSIs to file automatic shelf registration statements. We believe that one of the purposes of the reforms was to provide WKSIs with continuous market access, subject to investor interest. However, many WKSIs have not filed automatic shelf registration statements. Consequently, by prohibiting underwriters and dealers from gauging market interest on behalf of an issuer without filing a registration statement, Rule 163 may be hindering the launch and completion of public equity offerings, given issuers' reservations as noted above with filing a "signaling" registration statement that could potentially have an adverse effect on the market for their stock.

The proposed changes to Rule 163 would benefit both issuers and investors. They will allow WKSIs and their authorized underwriters and dealers an important opportunity to gauge market interest prior to launching an offering, and will provide investors more time to consider their investment decision in respect of such offerings. It is our members' experience that the proposed changes will also encourage registered offerings of convertible securities because they will permit the same pre-launch activities as are permitted in Rule 144A and other unregistered offerings.

We are commenting below on certain issues relating to the proposed second and third conditions to the use of amended Rule 163, which, if addressed, we believe could assist in more completely achieving the beneficial objectives of the proposed amendments.

**I. The Second Condition – Approval of any Written or Oral Communication Made by an Authorized Underwriter or Dealer**

We do not believe this condition to be necessary in light of the control issuers should be expected to exert, especially as a result of the authorization already required by the first condition that is proposed by the Commission (*i.e.*, "the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on its behalf"). We expect that because pre-filing communications made in reliance on Rule 163 are the issuer's, each authorizing issuer will endeavor to control the substance of these communications. Pre-

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<sup>3</sup> See Securities Act Release No. 8591 (August 3, 2005), 70 FR 44721.

filing communications made in reliance on Rule 163 by any agent or representative other than an underwriter or dealer do not now have and will not have the second condition, but we would not expect the agent or representative to have greater autonomy in what and how it can communicate on an issuer's behalf. Moreover, we believe that in satisfying the first condition an issuer should be expected to engage with its authorized underwriter or dealer on how it would like to determine and monitor the substance of the authorized underwriter or dealer's pre-filing market soundings. The Proposing Release, which notes a similar expectation when explaining the purpose of the first condition, states that "[b]y requiring that the underwriter or dealer receive written authorization before making pre-filing offers on behalf of the issuer in reliance on Rule 163, the proposed amendments require that the issuer be involved with any communications made by the underwriters or dealers in reliance on Rule 163."<sup>4</sup> We believe, therefore, that the control inherent in a WKSI-agent relationship, coupled with the WKSI's added involvement expected as a result of the first condition, renders the second condition unnecessary.

In addition, we are concerned that the second condition may create an unintended risk that reduces the use of amended Rule 163, which we believe could otherwise have a very positive effect on the market. Consistent with past practice, we expect that pre-filing communications made in reliance on amended Rule 163 will almost always be oral. There is inherent uncertainty in the contents of any conversation, depending in particular on an investor's interests, concerns and questions. By requiring that WSIs authorize or approve oral communications before they are made, a risk is created that an underwriter or dealer would not be able to rely on Rule 163 if it made a pre-filing oral communication that was not precisely in line with the text the issuer had approved. This would expose it to a possible violation of Section 5 of the Securities Act and the potential strict-liability rescission risk of Section 12(a)(1) of the Securities Act. We believe the existence of this risk could reduce underwriters' and dealers' willingness to rely on Rule 163.

If the Commission retains the second condition, an alternative to the pre-approval requirement is to mandate that only the scope of the pre-filing communication needs to be pre-approved. This could be accompanied by guidance from the Commission that approval of the exact contents of an oral offer is not required. This clarification would reduce the risk of a violation of Section 5 under the Securities Act, while preserving for the issuer sufficient control over the content of the discussion. We expect that regardless of how specific the pre-approval is required to be, issuers will not permit the use of non-public information in pre-filing communications without their specific authorization (and without ensuring that appropriate confidentiality arrangements are in place as required by Regulation FD).

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<sup>4</sup> See Proposing Release, *supra* note 1 at Section III.

II. The Third Condition – Disclosure Identifying Authorized Underwriters or Dealers that has Made Any Authorized Communication

We do not believe the required disclosure provides any apparent benefit to investors. In addition, the disclosure could be problematic if it applies to dealers and underwriters that engage in pre-filing communications but then do not participate in the offering. The negative consequences could diminish use of the amended rule. We would therefore suggest that, if this condition is not eliminated, it be revised to require only general disclosure that underwriters or dealers made pre-filing communications in reliance on Rule 163, or otherwise clarified to ensure that underwriters and dealers not participating in the offering need not be disclosed.

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The SIFMA Capital Markets Committee thanks the Commission for affording it the opportunity to comment on the Proposing Release. If you have any questions concerning these comments, or would like to discuss our comments further, please feel free to contact me at 212 648 0598 or by email at [leslie.k.gardner@jpmorgan.com](mailto:leslie.k.gardner@jpmorgan.com).

Sincerely,



Leslie K. Gardner  
Chair of the SIFMA Capital Markets Committee and  
Managing Director & Associate General  
Counsel – J.P. Morgan

cc: Securities and Exchange Commission  
Hon. Mary L. Shapiro, Chairman  
Hon. Kathleen L. Casey, Commissioner  
Hon. Elisse B. Walter, Commissioner  
Hon. Luis A. Aguilar, Commissioner  
Hon. Troy A. Paredes, Commissioner

Securities and Exchange Commission – Division of Corporation Finance  
Ms. Meredith Cross, Director