JONES WALKER

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SEC PROPOSES RULE CHANGES TO FACILITATE PRE-MARKET EFFORTS BY UNDERWRITERS IN OFFERINGS BY WKSIs

The SEC recently proposed changes to Rule 163 under the Securities Act of 1933 to permit underwriters and dealers to communicate with investors on behalf of well-known seasoned issuers, or WKSIs, regarding securities offerings prior to the filing of a registration statement. Although current Rule 163 permits WKSIs and their authorized agents to make oral and written offers of securities before a registration statement is filed with the SEC, offering participants who are underwriters and dealers are prohibited from making such pre-filing communications. The proposed rule change is intended to enable WKSIs to better gauge market interest prior to filing a registration statement covering the securities, by allowing them better access to investors through their authorized underwriters or dealers.

The proposed rule change would not be relevant to WKSIs who already have a shelf registration statement on file with the SEC covering the securities proposed to be issued, because Rule 163 addresses pre-filing offers.

Under the proposed rule change, an underwriter or dealer could be a representative of a WKSI under Rule 163 if the following conditions are met:

- the WKSI must have authorized the underwriter or dealer in writing to act as its representative prior to its making the communication;
- oral and written communications by the underwriter or dealer must be approved in advance by the WKSI; and
- the underwriter or dealer making the communication must be identified in the prospectus, if a registration statement is ultimately filed.

As is the case with offers under current Rule 163, all communications made in reliance on the amended rule would be subject to Regulation FD. Additionally, every written communication that is an offer would be subject to Rule 163's legend requirements and, if a registration statement is filed, filing requirements.

As indicated above, the proposed rule changes only apply to WKSIs. A WKSI is an issuer that meets the registration requirements of Form S-3 or Form F-3; has at least $700 million in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates (or has issued, for cash, within the last three years at least $1 billion

aggregate principal amount of non-convertible securities through primary offerings registered under the Securities Act); and is not an "ineligible issuer" as defined in Rule 405 of the Securities Act.

Comments on the SEC's proposal, a copy of which may be assessed by clicking here, are due by January 27, 2010.

—*Dionne M. Rousseau* and *Allen E. Frederic, III*

NYSE ADOPTS AMENDMENTS TO CORPORATE GOVERNANCE LISTING REQUIREMENTS

The SEC recently approved amendments to the New York Stock Exchange's ("NYSE") corporate governance listing standards that became effective January 1, 2010. Some of the more relevant amendments include the following:

- *Incorporation of SEC's Director Independence Disclosure Requirements.* In an effort to minimize duplicative corporate governance requirements between the NYSE standards and SEC rules, the amendments replace references to categorical standards for director independence previously contained in Section 303A with the director independence disclosure requirements contained in Item 407 of Regulation S-K, which requires companies to describe, by specific category or type, any transactions, relationships or arrangements considered by the board in making director independence determinations.
- *Notice of Non-Compliance with Corporate Governance Requirements.* Under the prior listing standards, listed companies were required to notify the NYSE in writing after an executive officer became aware of any "material" non-compliance with the NYSE corporate governance standards. The amended rules now require listed companies to notify the NYSE in writing after an executive officer becomes aware of "any" non-compliance with the NYSE corporate governance standards.
- *Waiver of Code of Business Conduct and Ethics.* The amendments clarify that any waivers of a listed company's code of business conduct and ethics granted to executive officers and directors must be disclosed within four business days by means of a press release, disclosure on the company's corporate website or a filing on Form 8-K.
- *Website Disclosure.* The amendments permit listed companies to report certain corporate governance disclosures only required by NYSE rules on their websites as opposed to their proxies or annual reports, provided the proxy statement or annual report states that the disclosure is contained on the company's website and provides the website address. The amendments also eliminate the requirement that listed companies make hard copies of their corporate governance documents available upon request given the fact that the documents are available on company websites.
- *NYSE Certifications.* The amendments eliminate the requirement that a listed company disclose in its annual report to shareholders that it filed the previous year's CEO certification required by NYSE corporate governance standards and any certifications required by the SEC. Listed companies, however, are still required to furnish the annual CEO certification to the NYSE.

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- *Executive Sessions and Communications with Directors.* Prior to the amendments, NYSE rules required a listed company's non-management directors to meet in regularly scheduled executive sessions. Because non-management directors may include directors who do not meet the NYSE's independence standards, the amendments clarify that a company will satisfy this requirement by holding executive sessions of its independent directors. The amendments also clarify that the method provided for communicating with the presiding director or non-management or independent directors as a group must be for all interested parties and not just for shareholders.
- *Audit Committee Requirements.* The amendments require disclosure of a board's determination, if applicable, that a member of its audit committee's service on more than three public company audit committees would not impair that director's ability to serve on its audit committee, regardless of whether or not the company limits its audit committee members to serving on three or fewer public company audit committees.
- *Controlled Companies.* The NYSE provides an exemption from certain of its corporate governance listing standards for a "controlled company," which is defined as a company for which more than 50% of the voting power is controlled by an individual, a group, or another company. The amendments clarify that the 50% voting power threshold relates to voting power for the election of directors.

Listed companies should review their proxy disclosures and corporate governance documents (including committee charters and D&O questionnaires) to ensure compliance with the revised rules. For a copy of the full text of the SEC release adopting the new standards, click here.

—*Allen E. Frederic, III* and *Peter J. Rivas*

NASDAQ ADOPTS TEN MINUTE NOTIFICATION RULE PRIOR TO RELEASING MATERIAL INFORMATION

The SEC recently approved changes to NASDAQ Rule 5250(b)(1) and IM-5250-1 that now require, rather than recommend, NASDAQ-listed companies to notify NASDAQ's Market Watch Department at least ten minutes prior to publicly releasing material information. This notice must be made, except in emergency situations, through NASDAQ's electronic disclosure submission system. The changes are intended to better enable NASDAQ to consider whether trading in a security should be temporarily halted. A copy of the SEC's release approving the changes may be accessed by clicking here.

—*Allen E. Frederic, III* and *Peter J. Rivas*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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