

CORPORATE AND SECURITIES LAW

ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

SEC Seeks to Facilitate Pre-Marketing Efforts by Underwriters in Connection With Offerings by WKSIs

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The SEC has issued proposed amendments to Rule 163(c) under the Securities Act of 1933. These amendments would allow an underwriter or dealer to communicate with investors on behalf of a well-known seasoned issuer, or WKSIs,¹ regarding an offering of the WKSIs securities before it has filed a registration statement with the SEC. Rule 163 currently permits a WKSIs, subject to certain conditions, to engage in unrestricted oral and written offers and communications before the filing of a registration statement, but does not permit an offering participant who is an underwriter or dealer to make such pre-filing communications.

The SEC's proposed amendments to Rule 163(c) are designed to further facilitate the capital formation activities of WKSIs by enabling them to pre-market their securities more effectively by tapping into an underwriter or dealer's existing network of contacts to gauge the market's interest in their securities without having to publicly signal an intention to conduct a public offering through the filing of a registration statement.

The full text of the proposed amendments can be found in SEC Release 33-9098, available at <http://www.sec.gov/rules/proposed/2009/33-9098.pdf>. The deadline for providing comments to the SEC is January 27, 2010.

Pre-Marketed "Wall Crossing" Transactions and the Need for Changes to Rule 163

Pre-marketing frequently occurs in connection with "wall-crossed" deals which utilize swift, confidential marketing efforts by underwriters or dealers to assess investor interest prior to formally launching a deal. Due to the recent volatility in the capital markets, the popularity of this financing technique has grown significantly as it affords issuers the opportunity to raise large amounts of equity while concurrently being able to mitigate downward pressures on their

¹ A WKSIs is an issuer that meets the registrant requirements of Form S-3 or Form F-3; either (i) has at least \$700 million in worldwide market value of outstanding voting and non-voting common equity held by non-affiliates or (ii) with regard to issuers that will only register non-convertible securities (other than common equity) or certain full and unconditional guarantees, has issued, for cash, within the last three years at least \$1 billion in aggregate principal amount of non-convertible securities (other than common equity) through primary offerings registered under the Securities Act; and is not an "ineligible issuer" as defined in Rule 405 of the Securities Act.

stock price (such as through shorting activity) that may result from a fully-marketed offering announced days in advance.

Generally, “wall-crossing” transactions are marketed on a confidential “no-name” basis by an underwriter or dealer to a limited number of institutional investors throughout a trading day. If interested, potential investors are brought “over-the-wall,” or informed of the identity of the issuer and the specifics of the offering, but only after they have signed a confidentiality agreement and agreed to refrain from trading in the issuer’s securities until the offering is complete. If sufficient institutional investor interest exists, the deal is announced after the close of the market and is typically opened to the public for a limited period of time in order to increase the size or price of the deal or to complete the offering book. Upon completion of the broader marketing efforts, the offering is priced, settled and closed similar to traditional underwritten offerings. If sufficient interest does not exist, the issuer could opt not to proceed with the offering and, unless it has disclosed material, nonpublic information to potential investors, would not need to make any disclosures to the market.

Limitations on Pre-Marketing by Underwriters and Dealers under Current Rule 163

In order for an underwriter or dealer to assist in a wall-crossed deal, a WKSIs must have an effective registration statement on file with the SEC as Rule 163 currently only allows WKSIs, but not underwriters or dealers, to communicate directly with potential investors prior to filing. Because of this limitation, the value of Rule 163 to WKSIs is limited in that, without the assistance of an underwriter or dealer, many WKSIs either do not have sufficient knowledge regarding potential investors to contact them directly or may prefer not to contact investors directly out of concern that any such contact could itself constitute and reveal material, non-public information about the WKSIs’ capital formation activities without the opportunity to initially obtain a confidentiality agreement from the investors. As the SEC noted in the release, “underwriters or dealers generally do not reveal the identity of the issuer to potential investors before securing agreements to retain the confidentiality of the information until it is publicly disclosed or is no longer material, non-public information.”

Proposed Amendments to Rule 163(c)

The proposed amendments would expand the Rule 163 exemption to allow underwriters and dealers to communicate with and make offers to investors in connection with a WKSIs’ potential securities offering provided that each of the following conditions is met:

- **Written Authorization to Act as Agent.** The WKSIs must have authorized the underwriter or dealer in writing to act as its agent.
- **Underwriter Identification in Prospectus.** The underwriter or dealer must be identified in any prospectus filed in connection with the offer to which the communication relates.
- **WKSIs Authorization of Communication.** The WKSIs must authorize or approve any written or oral communication before it is made by the underwriter or dealer as an agent or representative of the WKSIs.

In addition, as with WKSJ pre-filing communications under Rule 163, all written underwriter pre-filing communications must:

- **Contain a Legend.** The legend would indicate that the WKSJ may file a registration statement for the offering and the investor should read the offering prospectus and the instructions about how to obtain a copy of the prospectus.
- **Be Filed As Free Writing Prospectuses.** Written pre-filing communications made by an underwriter or dealer would be required to be filed as free writing prospectuses at the time the related registration statement or amendment was filed.

Further, underwriter pre-filing communications of material, nonpublic information would be subject to the restrictions of Regulation FD regarding selective disclosure. Therefore, the necessity to have a potential investor agree to keep material, non-public information confidential remains in the underwriter or dealer context. To this end, the SEC reemphasized that "any misuse of the information [disclosed in confidence] for trading by any person subject to a confidentiality agreement would be covered under either the 'temporary insider' or the misappropriation theory of insider trading."

Bass, Berry & Sims PLC's Corporate Finance – 1933 Act Subgroup monitors and advises on developments in the area of initial public offerings, follow-on public offerings of equity and debt securities and Rule 144A offerings. If you have any questions regarding the issues addressed in this Corporate and Securities Law Advisory or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroup listed below.

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