

## **SEC PROPOSES RULE AMENDMENTS TO PERMIT PRE-FILING COMMUNICATIONS BY UNDERWRITERS ON BEHALF OF WKSI**

January 21, 2010

To Our Clients and Friends:

The Securities and Exchange Commission recently proposed changes to Rule 163 of the Securities Act that would – if adopted – allow underwriters to test market interest in a proposed offering by a well-known seasoned issuer (WKSI) prior to the filing of a registration statement. Under current Rule 163, only WKSI or their authorized agents or representatives (excluding underwriters or dealers) are permitted to communicate directly with potential investors prior to the filing of a registration statement.

The proposed amendments would revise Rule 163(c) to provide that an underwriter or dealer could act as an agent or representative of a WKSI for purposes of Rule 163 if the conditions of current Rule 163 are satisfied and:

- the underwriter or dealer receives written authorization from the WKSI to act as its agent or representative before making any communication on its behalf;
- the issuer authorizes or approves any written or oral communication before it is made by the underwriter or dealer; and
- any authorized underwriter or dealer that has made any such authorized communication is identified in the prospectus contained in the registration statement that is filed for the offering to which the communication relates.

Regulation FD's restrictions on selective disclosure would apply to any Rule 163 underwriter pre-filing communications (as they currently do to Rule 163 issuer pre-filing communications), and recipients would need to agree to keep any such information that is material confidential.

Practically, and most significantly, the proposed amendments would permit underwriters or dealers to help a WKSI that does not have a registration statement on file test the market and gauge investor interest in a contemplated but as yet unannounced public offering of securities, including through a "wall-crossing" exercise. This type of 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, became (and continues to be) a critical tool for certain issuers as market volatility brought on by the credit crisis highlighted the importance of being able to access the public markets quickly and with little prior notice. Under current SEC rules, underwriters may only engage in such pre-

marketing activities if the issuer already has a registration statement on file covering the securities subject to the proposed offering.

Finally, and of note, in our Client Alert “What’s Cookin’ In Dallas? Court Dismisses Insider Trading Charges Against Mark Cuban,” dated August 04, 2009 (available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=fadff3dc-2664-44a9-8cfd-3db04fde9535>), we suggested that the SEC could view the issues at stake in the Cuban case (i.e., whether a duty of confidentiality itself was enough to support the misappropriation theory of insider trading liability) as so important that the SEC might accept a loss at the District Court level and (as it later did) directly appeal the decision. The SEC’s restatement in the proposing release of its view that “any misuse of [material non-public information] 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” serves to emphasize the SEC’s position on the issue and its commitment to this aspect of its enforcement program. Investors that receive material non-public information in connection with a wall-crossing exercise should therefore take care to ensure that they have appropriate controls in place regarding the receipt and use of any such information.

The proposed amendments are subject to a public comment period ending on January 27, 2010. The SEC release may be found at [www.sec.gov/rules/proposed/2009/33-9098.pdf](http://www.sec.gov/rules/proposed/2009/33-9098.pdf).

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Please do not hesitate to call us to discuss the proposed rule amendments or this memorandum generally.

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