

of this chapter in disseminating information about the material change to security holders, and including the minimum periods during which the offer must remain open (with withdrawal rights) after notice of the change is provided to security holders.

(b) Notwithstanding Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer that commences before the effectiveness of a registration statement in accordance with the provisions of § 230.162(a) of this section, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e-4(e)(2) or § 240.14d-4(b) of this chapter. This applies not only to exchange offers subject to those provisions, but also to exchange offers not subject to those provisions that meet the conditions in § 230.162(a)(2) of this section.

*Instruction to § 230.162 of this section:* Notwithstanding the provisions of § 230.162 of this section above, for going-private transactions (as defined by § 240.13e-3) and roll-up transactions (as described by Item 901 of Regulation S-K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

[73 FR 60087, Oct. 9, 2008]

**§ 230.163 Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.**

PRELIMINARY NOTE TO § 230.163. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In an offering by or on behalf of a well-known seasoned issuer, as defined in Rule 405 (§ 230.405), that will be or is at the time intended to be registered under the Act, an offer by or on behalf of such issuer is exempt from the prohibitions in section 5(c) of the Act on offers to sell, offers for sale, or offers to

buy its securities before a registration statement has been filed, provided that:

(1) Any written communication that is an offer made in reliance on this exemption will be a free writing prospectus as defined in Rule 405 and a prospectus under section 2(a)(10) of the Act relating to a public offering of securities to be covered by the registration statement to be filed; and

(2) The exemption from section 5(c) of the Act provided in this section for such written communication that is an offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.

(b) *Conditions*—(1) *Legend.* (i) Every written communication that is an offer made in reliance on this exemption shall contain substantially the following legend:

The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at [www.sec.gov](http://www.sec.gov). Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1-8[xx-xxx-xxxx].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site, and provide the Internet address and the particular location of the documents on the Web site.

(iii) An immaterial or unintentional failure to include the specified legend in a free writing prospectus required by this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the specified legend condition;

(B) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and

(C) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus is retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

(2) *Filing condition.* (i) Subject to paragraph (b)(2)(ii) of this section, every written communication that is an offer made in reliance on this exemption shall be filed by the issuer with the Commission promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption.

(ii) The condition that an issuer shall file a free writing prospectus with the Commission under this section shall not apply in respect of any communication that has previously been filed with, or furnished to, the Commission or that the issuer would not be required to file with the Commission pursuant to the conditions of Rule 433 (§230.433) if the communication was a free writing prospectus used after the filing of the registration statement. The condition that the issuer shall file a free writing prospectus with the Commission under this section shall be satisfied if the issuer satisfies the filing conditions (other than timing of filing which is provided in this section) that would apply under Rule 433 if the communication was a free writing prospectus used after the filing of the registration statement.

(iii) An immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent provided in this section will not result in a violation of section 5(c) of the Act or the loss of the ability to rely on this section so long as:

(A) A good faith and reasonable effort was made to comply with the filing condition; and

(B) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(3) *Ineligible offerings.* The exemption in paragraph (a) of this section shall not be available to:

(i) Communications relating to business combination transactions that are subject to Rule 165 (§230.165) or Rule 166 (§230.166);

(ii) Communications by an issuer that is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or

(iii) Communications by an issuer that is a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

(d) For purposes of this section, a communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer is deemed to be an offer by the issuer and, if a written communication, is deemed to be a free writing prospectus of the issuer.

(e) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§243.100(b)(2)(iv) of this chapter).

[70 FR 44805, Aug. 3, 2005]

**§ 230.163A Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.**

PRELIMINARY NOTE TO §230.163A. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) Except as excluded pursuant to paragraph (b) of this section, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the