

(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

date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

(b) The exemption in paragraph (a) of this section shall not be available with respect to the following communications:

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

(2) Communications made in connection with offerings registered on Form S-8 (§ 239.16b of this chapter), other than by well-known seasoned issuers;

(3) Communications in offerings of securities of an issuer that is, or during the past three years was (or any of whose predecessors during the last three years was):

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter); or

(4) Communications made by an issuer that is:

(i) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); or

(ii) 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) 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 44806, Aug. 3, 2005]

§ 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.

PRELIMINARY NOTES TO § 230.164. 1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. Attempted compliance with this section does not act as an exclusive election and the person relying on this section 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 connection with a registered offering of an issuer meeting the requirements of this section, a free writing prospectus, as defined in Rule 405 (§ 230.405), of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§ 230.433) are satisfied.

(b) An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing conditions contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

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

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

(c) An immaterial or unintentional failure to include the specified legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act