807 - Managing the IPO Process

Gary Hirsch
General Counsel
IntraLinks, Inc.

August Moretti
Chief Financial Officer
Alexza Pharmecueticals

Ken Siegel
General Counsel
Verigy

Mark A. Stachiw
Senior Vice President, General Counsel and Secretary
MetroPCS Communications, Inc.

Faculty Biographies

Gary Hirsch

Gary Hirsch is the chief legal officer of IntraLinks in New York City, a leading software-as-a-service company. Throughout his career, Mr. Hirsch has advised corporations on acquisitions, financings, governance matters, and commercial transactions including technology licensing

Prior to joining IntraLinks, Mr. Hirsch was general counsel of Currenex, Inc., an institutional currency trading platform recently acquired by State Street Bank. Before that he served as assistant counsel in the corporate legal department of Marsh & McLennan Companies. He began his career as an associate at Willkie Farr & Gallagher in New York.

Mr. Hirsch is a graduate of Dartmouth College and the NYU School of Law.

August Moretti
Chief Financial Officer
Alexza Pharmecueticals

Ken Siegel
General Counsel
Verigy

Mark A. Stachiw

Mark A. Stachiw is senior vice president, general counsel, and secretary of MetroPCS Communications in Dallas.

Prior to joining MetroPCS Communications, Mr. Stachiw served as senior vice president and general counsel of Allegiance Telecom Company Worldwide for Allegiance Telecom, Inc., and as vice president and general counsel, Allegiance Telecom Company Worldwide when it initiated bankruptcy proceedings. Prior to joining Allegiance Telecom, Inc., Mr. Stachiw was of counsel at Paul, Hastings, Janofsky and Walker, LLP, and represented national and international telecommunications firms in regulatory and transactional matters. Before joining Paul Hastings, Mr. Stachiw was the chief legal officer for Verizon Wireless Messaging Services (formerly known as AirTouch Paging and PacTel Paging.)

ACC Annual Meeting 2007 - Session 807 : Managing the IPO Process

Materials

1. Program Outline

PART 1 – Planning and Process Overview
2. Going Public – Decisions and Process Overview (Heller Ehrman)
3. Responsibility Checklist
4. Org Meeting Binder including Timeline
5. Data Room (Due Diligence) Index

PART 2 – Managing Communications: Quiet Period, Analysts and Investor Relations
6. Forms: Quiet Period Guidelines for Employees
7. Summaries of Recent Rule Changes
8. Ten Tips on Disclosing Forecasts
9. Sample Public Company Communications Policy
10. Investor Relations White Paper

PART 3 – Drafting and Comments: S-1 specifics and accounting/SEC/auditor hot buttons
11. Prospectus Contents
12. Bulletin re: Executive Compensation Disclosure Rules (recent changes)

PART 4 – Dealing with certain Constituents
13. Notice to Registration Rights Holders
14. Form of Individual Lock Up Agreement
15. Form of D&O Questionnaire
16. Memorandum re EDGAR codes
17. Audit Committee Charter
18. Compensation Committee Charter

PART 5 - Public Company Governance (selected topics)
19. Memorandum regarding Public Company Corporate Governance (Heller Ehrman)
20. Detailed Compliance Checklist
21. Public Company Handbook (Heller Ehrman)
22. Guidance regarding Equity Compensation Plans
23. Sample Insider Trading Policy
24. Sample Whistleblower Policy
25. Public Company Guidance (Latham)

PART 6 – Roadshow, Pricing and Closing
26. Sample Roadshow schedule
27. Sample Underwriting Agreement with Issuer Counsel's Changes
28. Memo to Employees regarding Red Herring, Reverse Split and Pricing
29. "Pricing Outside the Range" (Latham)
30. Heller Ehrman Venture Group contacts

ACC Annual Meeting 2007 - Session 807 – Managing the IPO Process

Program Outline

INTRODUCTIONS and program summary

PART 1 – Planning and Process Overview (some of these topics are covered in more detail later)

A. Decision to go public – lead time, selection of outside counsel, selecting underwriters, organizational meeting, developing timeline, assignment of responsibilities, auditing legal and regulatory compliance

B. Due diligence, drafting S-1, auditor sign-off, filing, SEC comments

C. What goes on while S-1 is being done

1. Dealing with various constituencies: Board, management and employees, stockholders, analysts, regulators

2. Getting ready for public company governance

D. Roadshow, red herring, pricing, announcement, closing, listing

PART 2 – Managing Communications: Quiet Period, Analysts and Investor Relations

A. Rules, recent changes, prefinancing road show; dealing with underwriter firms' analysts, others

B. Authorized spokespersons, management training

C. Preparing for post closing communications and disclosure controls: Use of Investor Relations firms; analyst guidance and issues after closing, IR section of corporate website; disclosure committee

PART 3 – Drafting and Comments: S-1 specifics and accounting/SEC/auditor hot buttons

A. Risk factors, MD&A, executive compensation, beneficial ownership, regulatory environment

B. Cheap stock charges /123R

C. Option backdating or other red flags in history

D. Revenue recognition

E. Internal controls

F. Restatements and material weaknesses

PART 4 – Dealing with certain Constituents

A. Stockholders and optionholders – Lock-ups; shareholder agreements; registration rights, secondaries, reverse splits, directed share programs; option grants during registration process

B. Board – Composition, size and terms; director recruiting and remuneration; D&O questionnaires, NASD questionnaires; committees (Audit, Compensation, Nominating), charters, independence; EDGAR filings; short-swing profits

C. Management - Explaining what is disclosed; new policies, individual accountability, culture change

PART 5 - Public Company Governance (selected topics)

A. Review of stock option plans and the like, review of corporate records and necessary revisions to articles and bylaws and other corporate housekeeping, coordinating with other capital raising

B. Code of Ethics; Insider Trading and Whistleblower policies; Open Door policy; appointment of compliance officer

C. Exchange listings and rules

D. 10b5-1 plans

E. SOX budget & timetable

PART 6 – Roadshow, Pricing and Closing

A. Underwriting agreement – typical issues; fee structure; signing (after pricing)

B. Roadshow overview, mechanics (who participates, duration, operating while it's happening)

C. Electronic roadshows

PART 7 – Last Words

A. Don't Wait till the Last Minute – D&O insurance; customer references lined up for U/W due diligence; EDGAR codes for D&O; Form 3s & 4s; stock transfer agent & certificates

B. References: websites, Ipovitalsigns.com, management primer, other publications, acknowledgements

ATTORNEY-CLIENT PRIVILEGED
MEMORANDUM

To: Mighty Oak Corporation (the "Company")

From: Heller Ehrman LLP

Date: 2007

Re: Going Public

"Going public" refers to the initial public offering of a class of the Company's securities, typically the common stock, to the public through a registration statement prepared in compliance with the Securities Act of 1933 (the "Securities Act") and filed with the Securities and Exchange Commission (the "SEC"). The initial public offering ("IPO") process involves a series of steps culminating in the sale of shares and the establishment of a public market for the Company's common stock. Following the completion of the IPO, the Company will be subject to the periodic reporting and other obligations of the Securities Exchange Act of 1934 (the "Exchange Act").

This memorandum provides an overview of the IPO process, summarizes the advantages and disadvantages of going public, and surveys the key corporate governance decisions that the Company will need to make before proceeding with an IPO. Please note, however, that this memorandum is only an overview that briefly summarizes a number of complex legal issues. It is neither a comprehensive treatment of any of the issues described, nor a complete list of the legal issues faced by companies pursuing an IPO. Furthermore, it is not intended to provide specific legal advice to any individual.

Heller Ehrman has prepared several other memos dealing with related aspects of the IPO process, including:

- a "Publicity" memo, which covers restrictions on public disclosures during the offering period;
- a "Public Company Handbook," which summarizes the restrictions and reporting requirements applicable to public companies and their insiders;
- a "Pre-IPO Corporate Governance Checklist," which summarizes the specific SEC and stock exchange requirements with respect to Board and Committee composition; and
- a "Pre-IPO Stock Plan Memo," which summarizes various issues that should be considered concerning the Company's stock plans and equity compensation arrangements prior to the IPO.

WHY GO PUBLIC: ADVANTAGES AND DISADVANTAGES

The decision to become a public company can be a momentous one for the Company. Although the advantages of going public may seem obvious, the costs and risks of being a public company are less so. The Company should carefully consider the pluses and minuses of such a decision before going forward.

Advantages

The advantages of going public include:

Cash: The proceeds of an IPO can be substantial, and can have a significant positive impact on the financial position of the Company. A successful IPO can help the Company grow more quickly, hire more employees, and invest more in infrastructure, research and development, and business development.

Improved Access to Capital: The typical public offering will improve the Company's net worth, often making new capital or borrowing available from a broader range of sources and on more favorable terms. If the Company's stock performs well, and market conditions permit, the Company may have the ability to raise additional money through either public or private financings.

Use of Common Stock as Acquisition Currency: Since following the IPO there will be a public market for the Company's common stock, the Company may use the stock as a form of "currency" to pursue corporate acquisitions, paying for acquired companies or assets with stock instead of cash.

Increased Public Profile: Customers and suppliers of the Company will have the ability to invest in the Company and track the Company's performance. An increased public profile can boost product sales, facilitate the recruitment of personnel and lead to greater brand recognition and customer confidence.

Increased Ability to Attract Personnel: A public market for the Company's common stock may make stock options and other forms of equity compensation offered through incentive plans more attractive to potential employees and board members.

Stockholder Access to Liquidity: Following a successful IPO, there will be a public market for the Company's common stock that will provide a source of liquidity for the Company's stockholders. It is important to keep in mind, however, that not all of the Company's common stock will be freely tradable as soon as the Company goes public, and there will be significant constraints on the ability to sell Company securities for a significant period of time following the IPO (see "Constraints on Trading in the Company's Securities" below).

Disadvantages

The total cost of an IPO is substantial. The typical costs for an IPO, including legal and accounting fees, printing costs and filing fees, but not underwriters' commissions, can exceed $1,000,000, depending on the complexity of the disclosure, the size of the offering and the length of the process. The IPO will require members of senior management, usually including at least the Company's Chief Executive Officer, its Chief Financial Officer, and its in-house counsel, if it has one, to devote several hundred aggregate hours of time over the typical three to four-month IPO process. In addition, the underwriters' commission in an initial public offering is typically a minimum of 7% of the aggregate price to public, and may be more if a non-establishment investment bank is used. Most of these costs are not recoverable if the IPO does not go forward.

Once the Company is public, it will be subject to a number of reporting requirements and compliance costs, such as the following:

Mandatory Public Disclosure: After the Company completes its IPO, it will be required to file regular reports with the SEC. The Company will also be required to report the compensation of its top executives, describe and file its material business contracts (subject to limited exceptions for information that the SEC allows to remain confidential for competitive reasons) and report the stock ownership of its principal stockholders, as well as the status of its business operations.

Restrictions on Communications with the Investment Community: The Company will most likely want to have periodic conversations with the financial analysts that track the Company's stock, and to that end will probably issue regular press releases on its earnings and other major events. As a public company, the Company will have to monitor its disclosures to third parties (such as analysts) to avoid "selective disclosure." Management decisions and flexibility will likely be affected by the constant stockholder scrutiny and quarterly earnings announcements.

Constraints on Trading in the Company's Securities: Even after an IPO creates a public market for the Company's common stock, shares of the Company's stock acquired prior to the IPO or held by designated insiders will remain restricted. Underwriters will typically require that directors, officers, employees, investors and others who acquired shares of the Company prior to the IPO sign "lock-up" agreement that prevents such stockholders from selling their pre-IPO shares for a designated period, typically six months plus a potential additional few weeks, after the effective date of the IPO. Even after the lock-up expiration, however, sales of "restricted securities" (securities acquired prior to the IPO, and other securities acquired outside a public offering) and "control securities" (securities held by directors, officers and other persons in a position of control over the Company, however acquired) will remain subject to restrictions under Rules 144 and 701 of the Securities Act. In addition, Section 16 under the Exchange Act imposes restrictions and reporting requirements for directors, executive officers and 10% stockholders. Reports required to be publicly filed under these rules are tracked by the financial press and often published by newspapers. More information about these restrictions may be found in the Heller Ehrman "Public Company Handbook."

Increased Potential Liability: The Company and its officers and directors may also be subject to stockholder derivative lawsuits claiming that the Company made material misstatements or failed to disclose material information in its public statements and filings. Insiders of the Company will be subject to Section 16 under the Exchange Act, which imposes liability for buying and selling the Company's stock within any six month period, regardless of whether the transactions were based on the use of material non-public information.

Increased Corporate Governance Requirements: Following the passage of the Sarbanes-Oxley Act in 2002, public companies became subject to many more specific corporate governance requirements than had previously been the case. In particular, the Company will be required to:

- have a Board with a majority of independent directors within one year after the IPO effective date, with fully independent committees;
- have a system of internal control over financial reporting that meets rigorous public auditing standards;
- adopt a Code of Ethics that applies to all directors, officers and employees; and
- adopt a system for the Audit Committee to review complaints about auditing and financial matters from employees and stockholders.

The Company should be aware of these requirements and realistically assess the incremental compliance costs, which on average are $1-2 million a year according to some industry surveys.

THE IPO PROCESS

The steps to be completed for a successful initial public offering include the following:

- The Company must select an underwriting team to manage the public offering of securities; the underwriter will undertake a due diligence process and negotiate an underwriting agreement that is reviewed by the National Association of Securities Dealers (the "NASD");
- The Company, working with their underwriters, auditors and counsel, must prepare a registration statement and file it with the SEC;
- The Company, working with its underwriters, must market its securities to potential investors (the "road show"); and
- The Company must file an application and take other necessary steps for listing its common stock on a stock exchange, such as the New York Stock Exchange or the Nasdaq Stock Market.

Selecting the managing underwriter (also called the "book-runner") is the first phase of the process. The Company will typically interview several underwriters before selecting the one that will manage the offering; this process is sometimes called the "bake-off." In selecting the lead underwriter, the Company should consider the underwriter's expertise in the Company's industry, the underwriter's reputation and ranking, the underwriter's ability to commit appropriate resources to the IPO, the strength and commitment of the research team, and the underwriter's thoughts about the Company's valuation. Given the amount of time that an IPO requires, and the intensity of the effort, "chemistry" between Company management and the underwriter's banking team is also important.

A typical IPO takes three to four months after selecting the managing underwriter: five to eight weeks to prepare and file the registration statement; five to seven weeks after filing to clear the SEC review process, complete the road show, and become "effective"; and three or four business days thereafter to close. The actual amount of time required for any individual IPO depends upon a number of factors, including the complexity of disclosure, the availability and quality of the financial statements, the work load of the SEC staff, the status of the Company's business and the experience of the working group, as well as general market conditions. Many of these factors are outside the Company's control.

One of the most time consuming and important tasks of the IPO process is the preparation of the offering document for the Company's shares (the "Prospectus"), which is part of the registration statement filed with the SEC. The SEC will review the registration statement and issue comments; typically the filing will go through several rounds of comments before the SEC declares the registration statement effective. Because a preliminary Prospectus is used on the road show as well as being filed with the SEC, all participants in the process must cooperate to ensure that the Prospectus provides full disclosure. The officers and directors of the Company as well as the underwriters, accountants and attorneys involved in the offering are liable for material misstatements or omissions of material facts from the Prospectus.

The Organizational Meeting

Once the underwriters have been selected, the next step is the "organizational" or "all-hands" meeting. The purpose of the organizational meeting is to identify the principal issues that must be addressed in preparing the registration statement, as well as in structuring the offering. The meeting often provides the first opportunity for all parties to meet one another. While all parties present at the initial meeting will not attend all working group sessions, it is an opportunity for everyone at one time to address the principal issues to be raised in structuring the offering and preparing the registration statement.

The typical group involved in the IPO process, and their roles, include the following:

Management Team: The Company's Chief Executive Officer, its Chief Financial Officer and its in-house counsel, if it has one, will virtually always be involved in the IPO process. Other executive officers may participate based upon their availability, experience, and other factors.

Board of Directors: The Board has the principal decision-making authority regarding the timing and terms of the offering, based upon advice from management and the Company's counsel, accountants and investment bankers. The Board is generally not involved in the day-to-day activities of the working group, although it will be responsible for reviewing and signing the registration statement.

Company Counsel: Typically Company counsel is the principal coordinator of the working group. In connection with the IPO process itself, Company counsel will coordinate the Company's legal due diligence, prepare the various drafts of the registration statement, respond to SEC comments, negotiate the underwriting agreement, deliver a legal opinion, and, once all SEC comments have been responded to, request that the SEC declare the registration statement effective. In addition, Company counsel will advise the Company on Board independence issues, executive compensation and stock plans, and other corporate governance matters.

Managing Underwriters: The managing underwriter provides basic advice and strategy concerning marketing aspects of the offering, organizes the sales syndicate, leads the due diligence investigation and has substantial involvement in preparing the registration statement. The managing underwriter also has principal responsibility for the "road show" and all marketing activities.

Underwriters' Counsel: Underwriters' counsel assists the underwriters in conducting the due diligence investigation and drafting the registration statement. Underwriters' counsel also prepares the underwriting documents, files the underwriting terms and arrangements with the NASD and responds to NASD comments, and qualifies the securities as may be required under state securities laws ("blue sky" laws).

Independent Accountants: The Company's independent accountants are responsible for reviewing the financial statements to be included in the registration statement, and assisting with other financial data. The accountants are also typically responsible for verifying the accuracy of financial data in the Prospectus and compliance with SEC accounting rules, dealing with accounting issues such as revenue recognition and stock-based compensation, and helping to review the Management's Discussion & Analysis ("MD&A") section of the Prospectus. In addition, the independent accountants also provide a "comfort" letter to the underwriters regarding certain financial information contained in the Prospectus.

Additional Experts: Patent, litigation or regulatory counsel and other experts may be included depending upon circumstances.

Regulators: Regulatory agencies, including the SEC, the NASD, the stock exchange on which the Company plans to list, and state securities or "blue sky" commissions, will play a role in reviewing the offering documents. The SEC engages in a substantive review of the disclosure in the Prospectus, as well as accounting issues. The NASD reviews underwriter compensation arrangements. The stock exchange will review the Company's application for listing, including the Company's current or proposed compliance with their corporate governance requirements.

Structuring the Offering

Management and the underwriters must reach early agreement on a number of substantive and procedural issues concerning the IPO. In addition to the anticipated valuation of the Company and the size of the offering, they must determine whether stock splits or other recapitalizations will be required to keep the number of outstanding shares to a manageable size, whether there will be "directed share" programs allowing certain individuals to purchase shares in the IPO on a pre-selected basis, whether selling stockholders will be allowed to participate in the offering, and what the terms of the "lock-up" agreements will be.

Size of the Offering; Valuation: The size of the offering will be determined by the Company and the underwriters, taking into account the amount of money the Company is interested in raising, the level of dilution the Company is willing to accept, the number of shares necessary to ensure a liquid trading market, and general market conditions. Although valuation of the Company will be discussed early in the underwriting process, the actual price of the offering will usually not be set until after the road show has been completed and the underwriters have a proposed "book" of interested purchasers.

The underwriters generally receive an option to purchase up to an additional 15% of the number of shares in the initial offering. The option typically has an exercise period of up to 30 days after the effective date of the registration statement. This over-allotment option is often referred to as the "green shoe."

Directed Share Program: The underwriters and the Company must also determine whether the Company wishes to have a directed share program. Under such programs, often referred to as "friends and family" programs, a portion of the offering, usually not more than 5% of the shares proposed to be sold, will be reserved by the underwriters for sale directly to certain investors designated by the Company, such as customers, suppliers or employees.

Participation of Selling Stockholders: The IPO may include not only new shares issued by the Company, but also shares sold by existing stockholders of the Company. The underwriters will advise the Company whether market conditions will permit the sale of shares by existing stockholders in the IPO. Since investors in venture-backed companies often have contractual rights to register their shares in an IPO, these rights must be reviewed, and may need to be amended or waived if selling stockholders are not going to be part of the offering.

Lock-Up Agreements: In an IPO, the managing underwriter will typically request that all stockholders, as well as all officers and directors, enter into agreements with the underwriters whereby these persons agree not to sell their shares for a specified period of time after the effective date of the offering. As a practical matter, the managing underwriter may permit the Company to restrict the solicitation of lock-up agreements to stockholders owning a significant percentage of the outstanding shares, e.g., in excess of 1%. The purpose of these lock-up agreements is to allow the development of an orderly trading market in the Company's securities by reducing the "overhang" of shares that might be publicly sold but are not included in the registration statement.

The standard lock-up period is 180 days after IPO effectiveness. Due to recent changes to the NASD rules restricting the publication of research reports near a lock-up expiration date, the lock-up agreement may provide that the lock-up period may be extended by a short period of time (typically about two additional weeks) to allow the publication of such reports.

Due Diligence Process

An examination of the Company's records is essential in preparing the registration statement. Counsel for the Company and the underwriters will conduct a review of the Company's documents, in close consultation with the Company and the underwriters. The review is extensive and thorough. To assist in gathering information, counsel will usually send a questionnaire to the officers, directors and significant stockholders of the Company, and schedule interviews and meetings with management. The underwriters and their counsel will visit the Company's facilities and may interview divisional heads, as well as corporate partners, customers, commercial bankers and others having material relationships with the Company. In addition, the underwriters will conduct a thorough business review of the Company's records, financial statements and business practice.

PRE-IPO CORPORATE GOVERNANCE ISSUES

Prior to embarking on an IPO, the Company will want to review its corporate governance policies and procedures and determine whether it should reincorporate in Delaware and whether it should consider the adoption of one or more anti-takeover devices. The Company will need to review its Board and committee structure and determine if any additional directors will need to be recruited to the Board. The Company will need to review the systems it has in place for producing financial statements, with an eye towards the more rigorous public company requirements. Finally, the Company should review the corporate governance requirements for listing on the exchange of its choice.

Reincorporation in Delaware

Many companies not already incorporated in Delaware choose to reincorporate in that state just prior to an IPO. The Delaware General Corporation Law (the "DGCL") is a modern, current and internationally recognized and copied corporation statute which is updated annually to take into account new business and court developments. There is a well-developed body of caselaw interpreting the DGCL, which facilitates certainty in business planning. The Delaware Court of Chancery is considered by many to be the nation's leading business court, where judges expert in business law matters deal with business issues in an impartial setting. In addition, Delaware offers an efficient and user-friendly Secretary of State's office permitting, among other things, prompt certification of filings of corporate documents.

Consideration of Anti-Takeover Devices

As a public company, the Company will be more vulnerable to hostile takeovers than it was as a private company. The Board and management of the Company must decide whether

the additional risk is worth adopting certain anti-takeover strategies, including one or more of the following:

- Reincorporation in Delaware, to take advantage of that state's well-developed law on the subject of anti-takeover protections.
- Adoption of a "classified" or "staggered" Board, providing that directors are elected for 2- or 3-year terms instead of running for re-election every year; this provision makes it more difficult to acquire a company by taking over the Board.
- Elimination of the ability of stockholders to take action by written consent.
- A Shareholder Rights Agreement that provides that in the event of attempted hostile takeover pre-acquisition stockholders will receive a massive issuance of new shares; this type of agreement is commonly known as a "poison pill."

Board and Committee Independence

The rules of the SEC and the stock exchanges contain specific requirements with respect to Board composition and structure. Specifically, the rules require that a majority of the Board members be independent, that the Board conduct regular executive sessions of the independent directors, and that the Board establish certain committees composed entirely of independent directors, including an Audit Committee, a Compensation Committee, and usually a Nominating Committee as well. The determinations of which directors may be considered "independent" are complex and vary by the exchange and also by Committee assignment. In general, a director may not be considered independent with respect to Board or specified Committee service if he or she has been recently employed by the Company or its auditors, is or represents a significant stockholder of the Company, has material transactions with the Company, or is in a control position with respect to an entity that has a significant business relationship with the Company. In addition, the rules include separate financial literacy and sophistication requirements for Audit Committee members. See the Heller Ehrman "Pre-IPO Corporate Governance Checklist" for more details on Board and Committee independence and composition requirements.

Since many privately-held companies operate with a relatively informal Board structure, and many do not have a majority of independent directors on their Board, most companies considering an IPO will have to recruit one or more new directors that meet the regulatory independence and knowledge requirements. Recruiting new directors can require a significant amount of lead time. Although many exchanges allow newly-listed companies a phase-in period during which full compliance with the rules is not required, the Company should be in a position at the time of the IPO to know how it will meet the independence requirements once the phase-in period is complete. The Company will also need to develop a director compensation policy; director compensation typically includes an annual cash retainer, chair retainers and meeting fees, as well as equity awards.

Officer Certifications, Financial Reporting and Controls

Once the Company goes public, it will be subject to the periodic and other reporting requirements of the Exchange Act. The Company's Chief Executive Officer and Chief Financial Officer will need to make certifications regarding the completeness and accuracy of each quarterly and annual report. The Company's senior management will need to make quarterly evaluations of the Company's disclosure controls, i.e., the processes that help to ensure that the Company's disclosure documents are accurate, timely and complete). In addition, beginning with its second annual report as a public company, the Company's senior management will have to evaluate annually the effectiveness of the Company's internal control over financial reporting, i.e., the internal processes that help to ensure the accuracy of the Company's financial statements. The Company's auditors will do a separate annual evaluation and attestation of the internal controls and management's evaluation of them.

Although many privately-held companies have systems in place to provide regular quarterly and annual reports to investors, the amount of detail included in the reports will generally have to be increased to meet SEC standards. In addition, the Company will need to develop a workable system of disclosure controls and internal controls prior to the IPO.

The requirement to evaluate the Company's internal controls was added by Section 404 of the Sarbanes-Oxley Act of 2002, and compliance still being phased in for smaller public companies. The internal control evaluation is a particularly complex and expensive undertaking. Few privately-held companies have documented and tested their internal controls at a level rigorous enough to meet public company standards. Private companies considering an IPO should be cognizant of the requirement and build in substantial lead time to bring their financial reporting up to public company standards.

Other Governance Issues

The rules of the SEC and the individual stock exchange rules require that companies comply with certain governance standards. The Company should make a decision early in the process as to which stock exchange it would like to be listed on following the IPO. Most IPO companies choose to list with the Nasdaq Stock Market, either on the Nasdaq Global Market or the Nasdaq Capital Market (for smaller capitalization companies). Although the listing requirements and fees are different for the two Nasdaq markets, the corporate governance standards for listing are the same.

Nasdaq requires its listed companies adopt a Code of Ethics applicable to all directors, officers and employees, that covers company policy on honest and ethical conduct (including rules for restricting or handling conflicts of interest), corporate disclosure, compliance with applicable laws, and procedures for reporting violations of the Code. The rules also require that the Audit Committee adopt a policy for the receipt, retention and proper handling of complaints about financial or auditing matters. The policy must include procedures under which employees can submit such complaints anonymously. Nasdaq rules also require the Audit Committee (or another independent committee) regularly review "related party transactions" between the Company and its insiders.

Although not specifically required by the rules, most companies will want to review their executive compensation arrangements and stock plans prior to a IPO. The arrangements must be fully disclosed in the Prospectus; note that in 2006, the SEC significantly expanded the scope of executive compensation disclosures. See the Heller Ehrman "Pre-IPO Stock Plan Memorandum" for more information.

MIGHTY OAK CORPORATION

Initial Public Offering

on Form S-1

Responsibility Checklist

As of 2007

"CO"	= Company:	**Mighty Oak Corporation**
"UW"	= Underwriters:	**[Underwriter(s)]**
"CC"	= Company Counsel:	Heller Ehrman Venture Law Group[1]
"UC"	= Underwriters' Counsel:	**[Underwriters' Counsel]**
"CA"	= Company Accountants:	**[Company Accountants]**

	Responsible	[UC / CC] Internal Responsibility	Done
A. **Pre-Filing Period**			
1. **Select Printer, Banknote Company, Registrar and Transfer Agent**	CC **[PL/AT]**		☐
2. **Due diligence checklist**	CC **[PL/AT]**		☐
3. **D/O and 5% Holder Questionnaires**	CC **[PL/AT]**		☐
4. **Prepare going public memoranda**			
• Going Public (D, O & E)	CC **[AT]**		☐
• Public Company Handbook	CC **[AT]**		☐
• Publicity & Gun Jumping	CC **[AT]**		☐
• Pre-IPO Corporate Governance Memo	CC **[AT]**		☐
• Pre-IPO Stock Plan Memo	CC **[AT]**		☐
5. **Corporate Actions; Board of Directors**			
Schedule Board meeting prior to filing to approve	CO/CC **[SH]**		☐
• Public Offering resolutions (including power of attorney for S-1 signing and establishment of pricing committee)	CC **[AT]**		☐
• Stock Split (___:___)	CO/CC **[SH/PL]**		☐
• D/O Indemnification Agreements	CO/CC **[AT/PL]**		☐
• D/O Insurance	CO/CC **[SH/AT]**		☐
• Delaware reincorporation, If applicable (see Item 27)	CO/CC **[SH/AT]**		

[1] **Bracketed initials indicate suggested internal staffing:**
PL = Paralegal
AT = Attorney
SH = Shareholder

© 2007 Heller Ehrman LLP. All right reserved. Reprinted with permission for attendees of the 2007 annual meeting of the Association of Corporate Counsel. This sample memorandum is provided for information purposes and should not be construed as legal advice. For more information about Heller Ehrman, visit www.hellerehrman.com.

	Responsible	[UC / CC] Internal Responsibility	Done
• Compensation Committee Charter	CO/CC **[SH/AT]**		☐
• Audit Committee Charter	CO/CC **[SH/AT]**		☐
• Nominating Committee Charter	CO/CC **[SH/AT]**		☐
• Code of Ethics / Business Conduct	CO/CC **[SH/AT]**		☐
• Director compensation plans	CO/CC **[SH/AT]**		☐
• Corporate Governance Guidelines	CO/CC **[SH/AT]**		☐
• Insider Trading Policy	CO/CC **[SH/AT]**		☐
• Anti-takeover devices	CO/CC **[SH]**		☐
6. **Draft Registration Statement**	All		☐
• Cover page of S-1	CC **[AT]**		☐
• Cover page of prospectus	UW/CC/UC **[AT]**		☐
• Inside cover page of prospectus	CO/CC **[AT]**		☐
• Prospectus summary	CO/CC **[AT]**		☐
• Company section	CO/CC **[SH/AT]**		☐
• Risk Factors	CO/CC **[SH/AT]**		☐
• Use of Proceeds	CO/CC/CA **[AT]**		☐
• Dividend Policy	CO/CC/CA **[AT]**		☐
• Dilution	CO/CC/CA **[AT]**		☐
• Capitalization	CO/CC **[AT]**		☐
• Selected Financial Data	CO/CC/CA **[SH/AT]**		☐
• MD&A	All (CC) **[SH/AT]**		☐
• Business section	All (CC) **[AT]**		☐
• Management	CO/CC **[AT/PL]**		☐
• CD&A	All (CC) **[AT]**		☐
• Certain Transactions	CO/CC/UC **[AT/PL]**		☐
• Principal Stockholders	CO/CC **[AT/PL]**		☐
• Shares Eligible for Future Sale	CO/CC **[AT/PL]**		☐
• Description of Capital Stock	CC **[AT/PL]**		☐
• Underwriting	CC/UW/UC **[AT/PL]**		☐

	Responsible	[UC / CC] Internal Responsibility	Done
• Legal Matters/Experts/Additional Information	CC/UC/CA **[AT]**		☐
• Back cover page of prospectus	UW/CC/UC **[AT]**		☐
• Part II and Exhibits	CO/CC **[AT]**		☐
• Signature pages	CO/CC **[AT]**		☐
• Underwriter style compliance	UW/UC **[AT]**		☐
• Rule 430A undertakings, etc.	CO/CC **[AT]**		☐
• Photographs/Artwork and captions	CO/CC/UW **[AT]**		☐
• Edgarization of Registration Statement	CO/CC **[AT]**		☐
• Edgarization of Exhibits	CO/CC **[AT]**		☐
• Legends for international tranche (if applicable)	UCCC **[AT]**		☐
7. **Due diligence matters**	UC/CO/CC **[AT/PL]**		☐
• Coordinate getting documents to UC	CO/UC/CC **[AT/PL]**		☐
• Articles review/Bylaws review	CC/UC **[AT/PL]**		☐
• Minutes review	CC/UC **[AT/PL]**		☐
• Material contracts review	CC/UC **[AT/PL]**		☐
• Monitor pre-filing publicity issues, press releases, trade shows	All **[AT/PL]**		☐
• Due diligence on business, products, competitors, regulatory issues	All **[AT/PL]**		☐
• Environmental compliance review	CC/UC **[AT/PL]**		☐
• Consider risk factors	All **[AT/PL]**		☐
• Review D/O Questionnaires	CC/UC **[AT/PL]**		☐
• Review qualifications to do business	CC/UC **[AT/PL]**		☐
• Intellectual Property issues	CO **[AT/PL]**		☐
• Litigation issues	CO/CC **[AT/PL]**		☐
• Review Financial Statements and Management audit letters	CO/CA/UW/U C **[AT/PL]**		☐
• Prepare binders backing up factual statements; industry and market data; third-party sources	CO/CC **[AT/PL]**		☐
8. **Organize exhibits; compile exhibits and index**	CC **[AT/PL]**		☐
• Confidential treatment request (material contracts)	CC **[AT/PL]**		☐
9. **NASDAQ Listing**			
• Reserve Ticker Symbol	CC **[AT/PL]**		☐
• Listing Application	CC **[AT/PL]**		☐

	Responsible	[UC / CC] Internal Responsibility	Done
• CUSIP number	CC **[AT/PL]**		☐
10. **Cheap stock**			
• Prepare spreadsheet and initial analysis	CO/CA/CC **[AT/PL]**		☐
• Cheap stock arguments	CO/CA/CC **[AT/PL]**		☐
• Review cheap stock situation, options, loans to officers	CO/CA/CC **[AT]**		☐
11. **Experts' consent letters**			
• Accountant's Consent	CA/CC		☐
• Law Firm Consent	CO/CC **[SH]**		☐
12. **Underwriting arrangements**			
• Proposed list of underwriters	UW		☐
• Final size of offering? Secondary participation distribution? Over-allotment option?	UW		☐
• Underwriting Agreement and Agreement Among Underwriters	UC/UW		☐
• Underwriters' Questionnaire, Cover Letter and Power of Attorney	UC		☐
• Review underwriting documents	UC/CC **[AT]**		☐
13. **Regulation S-K/S-X compliance check for S-1**	CC/UC/CA		☐
14. **NASD Corporate Finance correspondence regarding reasonableness of UW terms**	UC/CC		☐
• Review application for Nasdaq listing	UC/CC		☐
• Coordinate UW acceleration requests, and distribution information required under 15c2-8	UC/CC		☐
15. **Blue Sky Matters**	UC/CC		☐
• Determine whether underwriters will require Blue Sky Memorandum; if yes, proceed with other items in this section	UC		☐
• Prepare/review blue sky problem memo with Company	UC		☐
• Preliminary Blue Sky Memorandum	UC		☐
• Final Blue Sky Memorandum	UC		☐
• Coordinate blue sky qualifications and discuss potential problems with UW counsel	CC		☐
16. **Accounting Considerations**	CA		☐
• Timing and availability of audited financials	CA		☐
• Check notes to financials against text in S-1	CA		☐
• Review audit committee activities and minutes	CA		☐
• Review internal accounting controls	CA		☐

	Responsible	[UC / CC] Internal Responsibility	Done
• Audit letters updates	CA		☐
• MIS status	CA		☐
	CA		
17. **Comfort Letter**	UC/CA		☐
18. **Securityholders**			
• Shareholders/optionholders lists	CC **[AT/PL]**		☐
• Registration Rights Analysis	CC **[AT/PL]**		☐
• Overhang Analysis	CC **[AT/PL]**		☐
• Lock up	UC/CC **[AT/PL]**		☐
• Registration Rights Notice	CC **[AT/PL]**		☐
• Warrantholder Notice	CC **[AT/PL]**		☐
• Selling Shareholder documents	CC **[AT/PL]**		☐
19. **Employee Stock Plan Matters; Securities Compliance**			
• New public company Stock Plan (increase number, 16b compliance)	CO/CC **[AT/PL]**		☐
• Compensation Committee Composition (16b compliance)	CO/CC **[AT/PL]**		☐
• ESPP (start with IPO)	CO/CC **[AT/PL]**		☐
• Employee resale memo and meeting	CO/CC **[AT/PL]**		☐
• Review and confirm 701 compliance	CC **[AT/PL]**		☐
20. **Stock Issuance Matters**			
• Legend removal application (including NASD listing approval letter)	CC **[AT/PL]**		☐
• Select form of public company Stock Certificate	CC **[AT/PL]**		☐
• Transfer Agent/Registrar	CC **[AT/PL]**		☐
21. **Form 8-A Registration Statement**	CC **[AT/PL]**		☐
22. **Anti-Takeover Devices**	CC **[AT/PL]**		☐
• Bylaw and Article Amendments	CC **[AT/PL]**		☐
• Board resolutions	CC **[AT/PL]**		☐
23. **File S-1**			
• Obtain EDGAR filing codes for company	CO/CC/UC **[AT/PL]**		☐
• SEC and NASD transmittal letters (review)	CC/(UC) **[AT/PL]**		☐
• Signature pages	CO/CC **[AT/PL]**		☐
• Prepare wire transfer for SEC and NASD	CO/CC **[AT]**		☐

	Responsible	[UC / CC] Internal Responsibility	Done
• Coordinate obtaining signed report/consent from CA	CC **[AT/PL]**		☐
• Obtain any other consents	All		☐
• Exhibits	CC **[AT/PL]**		☐
• WebCOBRA filing with NASD (within one day of Form S-1)	CO/CC **[AT]**		☐
B. **Period Between Filing and Effectiveness (Waiting Period)**			
1. **Press release on filing**	CO/CC/UC **[SH/AT]**		☐
2. **Call SEC**			
• Identify Staff examiner	CC **[AT]**		☐
• Send courtesy copies of filing, artwork	CC **[AT]**		☐
3. **Stock Split (___:___), if applicable**			
• Shareholder consent	CC **[SH/AT]**		☐
• File Amended and Restated Articles	CC **[SH/AT]**		☐
4. **Obtain EDGAR filing codes for Section 16 Officers and Directors**	CC **[AT/PL]**		☐
5. **Annual Shareholder Meeting (actual timing may be company specific)**			
• Record Date	CC **[SH/AT]**		☐
• Script	CC **[SH/AT]**		☐
• Minutes	CC **[SH/AT]**		☐
• Proxy Statement and Proxy	CC **[SH/AT]**		☐
• Directors	CC **[SH/AT]**		☐
• Auditors	CC **[SH/AT]**		☐
• Articles (blank check preferred stock)	CC **[SH/AT]**		☐
• Bylaws (no actions by written consent)	CC **[SH/AT]**		☐
• Stock plan (increase and 16b compliance)	CC **[SH/AT]**		☐
• ESPP (start with IPO)	CC **[SH/AT]**		☐
6. **Arrangements for Underwriter Syndicate Information Meeting, Road Show and Institutional Meetings**	UW		☐
7. **Syndicate list**	UW		☐
8. **Coordinate printing of stock certificates**	CO/CC		☐
9. **Coordinate with Nasdaq regarding listing of stock and provisions of S-1 amendments**	CC/CO		☐
10. **Respond to SEC comments (if any)**	All **[SH/AT]**		☐
• Registration statement amendment	All **[SH/AT]**		☐
• Inclusion of additional financials?	CA **[SH/AT]**		☐

	Responsible	[UC / CC] Internal Responsibility	Done
• SEC response letter	CC **[SH/AT]**		☐
• Signature pages	CC **[SH/AT]**		☐
• Additional check and wire transfer required if deal size increases	CO/CC **[SH/AT]**		☐
• Expert's Consent Letters	CA/CC **[SH/AT]**		☐
• Amendments to NASD	UC		☐
• Additional exhibits	CC **[SH/AT]**		☐
• Confidential Treatment Request comment response (if any)	CC **[SH/AT]**		☐
11. **Print Preliminary Prospectus (Red Herring)**	CC **[SH/AT]**		☐
12. **Prepare Company's S-1 acceleration request**	CC		☐
13. **Prepare UW's acceleration request**	UW/UC		☐
14. **NASD follow up**			
• NASD Questionnaire			☐
• Obtain clearance from NASD Corporate Finance Department regarding reasonableness of UW terms	UC		☐
• NASD to notify SEC of fairness of UW arrangements	UC		☐
• Confirm legal opinions are prepared for filing with Amendment, along with their exhibits	UC		☐
• Distribution information 15(c)2-8	UC		☐
• Arrange for other filing details including cover letters, signatures of attorneys-in-fact, additional fees if required	UC		☐
• Underwriter syndicate mailing	UW		☐
• Underwriter agreement executed	UW/CO		☐
• Final NASD mailing	UC		☐
15. **Nasdaq follow up**			
• Confirm Nasdaq listing application approved	UC		☐
16. **Pricing meeting**	UW/CO		☐
17. **Sign underwriting agreement**	UW/CO		☐
18. **Prepare final prospectus**	UW/CO		☐

	Responsible	[UC / CC] Internal Responsibility	Done
19. **Prepare closing documents**	CC/UC/CA **[PL]**		☐
• Closing memorandum	CC **[PL]**		☐
• CEO/Secretary Certificate regarding Articles/Bylaws/resolutions	CC **[PL]**		☐
• Officers' Certificate delivered pursuant to Underwriting Agreement	CC **[PL]**		☐
• Certificate of Transfer Agent and Custodian	CC **[PL]**		☐
• Cross Receipts	CC **[PL]**		☐
• Opinion of UC	UC **[PL]**		☐
• Opinion of CC	CC **[SH]**		☐
• Accountants' letters	CA		☐
20. **Review closing documents prepared by CC**	UC		☐
21. **Update and bring down due diligence**	UC		☐
22. **Qualifications to do business in other states**	CA		☐
23. **Blue sky memorandum, if applicable**	UC		☐
24. **Press release on pricing**	CO/CC/UW		☐
25. **Media schedule and tombstone advertisement**	UW		☐
26. **File Form 3 and Schedule 13G/D**	CC **[AT/PL]**		☐
27. **Delaware Reincorporation (if applicable)**			
Board Resolutions of California Company approving merger	CC **[AT/PL]**		☐
Incorporate Delaware Company	CC **[AT/PL]**		☐
Prepare Agreement and Plan of Merger	CC **[AT/PL]**		
File Amended Certificate to include Preferred Stock	CC **[AT/PL]**		☐
Board Resolutions of Delaware Company	CC **[AT/PL]**		☐
• Appoint Board	CC **[AT/PL]**		☐
• Approve Certificate of Incorporation, Bylaws and Amended Certificate	CC **[AT/PL]**		☐
• Approve Stock Certificate and Sell Stock to California corporation	CC **[AT/PL]**		☐
• Approve merger	CC **[AT/PL]**		☐
• Assume California corporation's stock option plans	CC **[AT/PL]**		☐
• Approve Indemnification Agreement	CC **[AT/PL]**		☐
Approval of Sole Shareholder of Delaware Company regarding Amended Certificate and Bylaws	CC **[AT/PL]**		☐
Issue Shares to California Company and 25102(f) compliance	CC **[AT/PL]**		☐
Permit Application (25121) for qualification of Delaware securities	CC **[AT/PL]**		☐
Amend Permit Application for change in outstanding/authorized shares	CC **[AT/PL]**		☐
Mail Shareholder Information Statement and NASD Questionnaire	CC **[AT/PL]**		☐
• Approve merger	CC **[AT/PL]**		☐
• Amend Stock Option Plan; Adopt ESPP	CC **[AT/PL]**		☐
Obtain Shareholder Consents	CC **[AT/PL]**		☐
Execute Agreement and Plan of Merger	CC **[AT/PL]**		☐

	Responsible	[UC / CC] Internal Responsibility	Done
File Certificate of Merger in Delaware	CC **[AT/PL]**		☐
Execute Indemnification Agreements	CC **[AT/PL]**		☐
Consent to use of name in California	CC **[AT/PL]**		☐
Foreign qualification in California	CC **[AT/PL]**		☐
Amend foreign qualifications to reflect amendment of company name (if applicable)	CC **[AT/PL]**		☐
Consider new permit for old ISO Plan for stock grants after merger	CC **[AT/PL]**		☐
Obtain California Tax Clearance Certificate and Assumption of Liability	CC **[AT/PL]**		☐
Prepare Annual Franchise Tax Report	CC **[AT/PL]**		☐
C. **Post-Effective Period**			
1. **Prepare 462(b) (if deal size increases after effectiveness)**	CO/CC **[AT/PL]**		☐
2. **File 424(b) Prospectus five days after effectiveness (2 days if Rule 430A is invoked)**	CC **[AT/PL]**		☐
3. **Confirm date, time & place for preclosing/closing**	CC/UC **[AT/PL]**		☐
4. **Coordinate method of payment and stock certificate delivery**	CC **[AT/PL]**		☐
5. **Blue sky compliance/Supplemental Blue Sky Memo**	UC **[AT/PL]**		☐
6. **Closing; Notification of Transfer Agent & Registrar**	CC/CO/UC **[AT/PL]**		☐
7. **File Restated Articles (or Certificate) of Incorporation**	CC **[AT/PL]**		☐
8. **Insider Trading Memoranda; Public Company Handbook and Employee Meetings**	CO/CC **[AT/PL]**		☐
9. **Deregister over-allotment shares if option not exercised**	CC **[AT/PL]**		☐
10. **Final underwriter syndicate mailing**	UW **[AT/PL]**		☐
11. **Coordinate exchange of stock certificates**	CC **[AT/PL]**		☐
12. **Prepare closing volumes**	CC **[AT/PL]**		☐
13. **File Form 4's for purchases/sales/stock or option grants in connection with IPO**	CC **[AT/PL]**		☐
14. **File Form S-8 Registration Statement**	CC **[AT/PL]**		☐

MARCH 14, 2004

PROJECT BROADWAY

Organizational meeting

CONFIDENTIAL

CONFIDENTIAL

1. Agenda

Discussion topic	Time
I. Introductions	3:00–3:15 pm
II. Rules of the road	3:15–3:30 pm
III. Key milestones ■ Target of May 1 filing ■ Timing of accounting-related matters (Audit, Q1 review, S-1 etc) ■ Any potential obstacles?	3:30–4:00 pm
IV. Company overview	4:00–5:00 pm
IV. S-1 draft discussion ■ Preliminary comments ■ Areas for further diligence/refinement (market size, statistics, others) ■ Accounting-related matters (revenue recognition, cheap stock/stock-based compensation) ■ Lawsuit ■ Assignment of responsibilities	5:00–6:00 pm
V. Next steps ■ Management due diligence sessions ■ Availability of due diligence on workspace ■ Next meeting	6:00–6:30 pm

PROJECT BROADWAY

CONFIDENTIAL

2. Transaction review

I. **Discussion of the offering**
- A. Size
- B. Primary and secondary components
- C. Stock split
- D. Distribution considerations
  - Institutional / retail allocation
  - Domestic / international allocation
  - Syndicate structure
  - Directed share program "Friends + Family"
- E. Over-allotment option (15%) "Green Shoe"
- F. Use of proceeds
- G. Lock-up (coverage, time period)
- H. Listing and proposed stock symbol

II. **Proposed time schedule**
- A. Business and legal due diligence calls
- B. Drafting sessions
- C. Management presentation
- D. Financial projections and financial due diligence call
- E. Audit completion and accounting due diligence call
- F. Targeted S-1 filing date
- G. Commitment committee timing
- H. Targeted printing date
- I. Timing of internal sales force presentations
- J. Roadshow schedule
- K. Targeted offering date
- L. Holidays/major corporate events/other potential timing conflicts

III. **Financial and accounting issues**
- A. Completion and review of recent year-end audit
- B. Review of past management letters
- C. Tax issues/accounting issues
- D. Timing of 2004 10K and March 2005 10Q
- E. Authorized and outstanding shares
- F. Option plans
- G. Comfort letter
- H. Financial projections

PROJECT BROADWAY

CONFIDENTIAL

3. Preliminary offering timeline summary

March 2005

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

April 2005

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

May 2005

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

June 2005

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

July 2005

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Participants

ILK	[redacted]
U	Underwriters
CC	Company Counsel
UC	Underwriters' Counsel
PWC	PriceWaterhouseCoopers

Holidays FOMC Meetings

Week of	Action	Responsibility
Mar 14	■ **Organizational meeting (Mar 14)**	All
	■ **Management presentation (Mar 18)**	All
	■ Begin due diligence - business (customers) and legal	All
	■ Begin drafting S-1	All
Mar 21	■ Continue drafting sessions and business & legal due diligence	All
	■ Distribute financial projections	ILK
	■ Begin financial due diligence	All
Mar 28	■ Continue drafting sessions and financial due diligence	All
Apr 04	■ Preliminary Research Analyst due diligence	ILK, Research Analyst
Apr 18	■ Continue drafting sessions and financial due diligence	All
Apr 25	■ **Audit finalized (Apr 25)**	PWC
	■ Accounting due diligence	U, UC, CC, PWC
	■ **Finalize S-1 (Apr 29)**	All
May 2	■ **File S-1 with SEC (May 2)**	CC, UC
May 9	■ Prepare roadshow presentation	ILK, U
Jun 06	■ **Receive SEC comments to S-1**	ILK, CC
Jun 13	■ File Amendment-1	ILK, CC
Jun 27	■ Receive SEC comments to Amendment-1	ILK, CC
Jul 04	■ File Amendment-2	ILK, CC
	■ **Print Red Herrings and distribute preliminary prospectus (Jul 6)**	ILK, CC, Printers
	■ **Management/analyst presentations to sales forces (Jul 7-8)**	ILK, U
Jul 11	■ **Commence roadshow (Jul 11)**	ILK, U
Jul 18	■ End roadshow (Jul 21)	ILK, U
	■ **Pricing (Jul 21)**	All

PROJECT BROADWAY

CONFIDENTIAL

4. Preliminary due diligence topics

I. **Business overview**
- A. Corporate history and background
- B. Business description by business/product line
- C. Growth strategy
- D. Core competencies
- E. New products/businesses/ventures/services
- F. Key milestones in the next several years–revenues, number of clients, etc.
- G. Review of key supplier relationships

II. **Industry overview**
- A. Overview of the market for secure online business collaboration
- B. Market opportunity by end market segment (size and growth)*
- C. Major trends in the industry/factors influencing growth
  - i. [redacted]-vertical ([redacted]deal volume; [redacted]volume)
  - ii. [redacted]t vertical ([redacted]volume)
  - iii. Others
- D. Key current and potential competitors
  - i. Major competitors in each market segment
  - ii. Discussion of key differentiators–current and long-term
- E. Barriers to entry
- F. Competitive advantages/weaknesses

III. **Customer information**
- A. Existing and target customer base
- B. Customer contracts*
  - i. Recent wins
  - ii. Renewal/maturity schedule
  - iii. Summary of key terms
- C. Revenue by customer for top 10 customers*
- D. Revenue by geography*
- E. Largest customers by product*
- F. Status and trends in customer relationships/opportunity for future growth and development
- G. Brief review of any significant relationships severed or customers lost since inception
- H. List of other strategic relationships

CONFIDENTIAL

IV. **Shareholder issues/communications**
- A. Review existing shareholder list (5% owner and insiders)
- B. Registration rights of existing shareholders
- C. Lock-up period and constituents

V. **Legal issues**
- A. Due diligence request from Underwriters' Counsel
- B. Outstanding claims and litigation
- C. Restrictions or other consents needed to offer shares
- D. Disclosure of confidential agreements/requests for confidential treatment
- E. Existing and proposed employment agreements
- F. Copyright and intellectual property issues
- G. Timing of Board approvals
- H. Sarbanes-Oxley compliance

VI. **Publicity policy**
- A. Quiet period
- B. Pending newspaper articles or other media interviews
- C. Press releases (filing and other)
- D. Communications with employees
- E. Financial conferences

VII. **Prospectus**
- A. Prospectus summary
- B. Use of proceeds
- C. Principal and selling shareholders
- D. Risk factors
- E. Financial statement presentation
- F. Recent developments
- G. Capitalization table
- H. Selection of printer
- I. Use of color, artwork, logos

VIII. **Miscellaneous**
- A. Transfer agent and registrar
- B. Preparation of roadshow presentation

C. Describe accounting changes
D. Quarterly financial statements and operating statistics (last three years)
E. Detailed discussion of historical results
F. Historical results versus original budget (if available)*
G. Operating expenses; major elements; economies of scale
H. Schedule of property and equipment, with cost and accumulated depreciation*
I. Historical capital expenditures
J. Aging of receivables and payables
K. Description of any off-balance sheet liabilities
L. Breakdown of selling, general, and administrative expense
M. Review of significant accounting policies (cash vs. accrual, tax vs. book, revenue recognition policies, etc.)
N. Discussion with auditors
O. Discussion of any tax issues
P. Current ownership structure*
Q. Review any related party transactions

VIII. Projected financial information*

A. Detailed projected income statements, balance sheets, and cash flow statements
B. Key assumptions
    i. Revenue mix
        a) By revenue-model type (transaction-based vs. subscription-based)
        b) By channel type (direct sales vs indirect sales vs viral marketing)
        c) By client type
        d) By product type
        e) By region
    ii. Customer/transaction count (revenue drivers)
    iii. Pricing
    iv. Deferred revenue
    v. Net bookings
C. Quarterly income statement projections for Q2, Q3 and Q4 2005 and FY 2006
    i. Fourth and First quarter (2004 and 2005 respectively) results vs. budget
D. Projected margins by line of business
E. R&D and capital expenditure projections
F. Discussion of factors affecting revenue growth and/or timing
G. Discussion of any major strategic initiatives

IX. Financing materials

A. Bank credit agreements and any other loan documents
B. Status of any new bank financing negotiations
C. Liens on real and personal property

X. Legal and regulatory

A. Discussion of pending and past litigation (both against and initiated by ILK)
B. Review regulatory requirements and any recent or potentially significant future changes
C. Summary of all tax audits, amounts in dispute, if any
D. List and description of trademarks, copyrights, patents, etc.*
E. Review of insurance policies and coverages; identify any material exposures
F. Insurance claims history and outstanding claims

XI. Miscellaneous

A. Description of all significant properties
B. Summary description of all leases--operating and capital, change of control provisions, etc.
C. Legal review of organizational documents, corporate records, and material agreements
D. Company press releases

* Indicates document request

IPO Data Room Index (Draft)

(All amendments and revised versions of the following documents as of the closing of the offering will continue to be uploaded.)

1 Corporate Records

- 1.01 Certificate of Incorporation & Charter Documents
- 1.02 By-Laws
- 1.03 BOD Minutes and written consents
- 1.04 Committee Charters and Minutes
- 1.05 SH Minutes and written consent
- 1.06 Subsidiary Corporate Records
- 1.07 Form of stock certificates
- 1.08 Communications to SHs
- 1.09 Press clippings and releases
- 1.10 Stock ledger
- 1.11 D&O bios and payment arrangements
- 1.12 Corporate Organization Chart.
- 1.13 Foreign Qualifications/Juris. Doing Biz or Qualified
- 1.14 Good Standing Cert(s)
- 1.15 Financings (Funding Rounds)
- 1.15 D&O Questionnaires

2 Capitalization

- 2.01 Cap Table
- 2.02 Shareholders List
- 2.03 Warrants, options/option plans, and rights
- 2.04 Docs re contingent or other obligations (appraisal rts, etc)
- 2.05 Registration rights schedule

3 Finances

- 3.01 Audited Financial Statements
- 3.02 Borrowings and Lines of Credit
- 3.03 Bank Accounts
- 3.04 Unaudited Financials
- 3.05 Tax returns filed since inception
- 3.06 Correspondence with Accountants
- 3.07 Other Docs re financing arrangements
- 3.08 Mgmt. letters from auditors re control systems, etc.
- 3.09 All letters from Co's attorneys to auditors
- 3.10 Projections, budgets or biz plans since formation
- 3.11 Accounting & Audit Policies

4 Material Agreements

- 4.01 Leases of real property and/or personal property
- 4.02 All Ks with any affiliates
- 4.03 Mat. Ks with suppliers and contractors
- 4.04 Ks with any D, O or SH or any affiliate of such persons
- 4.05 Ks with Referral Partners
- 4.06 Material Ks for the purchase or use of any equipment, goods
- 4.07 Form of Company Services Agreements
- 4.08 Schedule of Top Customers
- 4.09 Top Customer Agreements
- 4.10 Material Software License and Maintenance Agreements

4.11 Acquisitions
4.12 Reserved
4.13 Other material Ks with independent contractors
4.14 All guarantees
4.15 All security agreements
4.16 All stock pledges, warrants and option agrmts
4.17 UCC Filings
4.18 Auditor & Professional Advisor Engagements
4.19 Law Firm Retention Agreements
4.20 Government Ks
4.21 Material consulting or management services Ks
4.22 Ks relating to investments
4.23 Ks relating to consolidated tax filings, refunds
4.24 Settlements, waivers with private parties
4.25 Confidentiality & Non-Compete Agreements of ee's
4.26 All indemnification agreements.
4.27 Jt. venture or partnership agrmts
4.28 Significant Ks involving sponsorship/donations
4.29 Other Ks not in ordinary course of business
4.30 Mat. Ks list which may be affected by change of control
4.31 Info re mat. existing or potential defaults under any Ks
4.32 Ks list where company has made or received advance payments
4.33 Repurchase agrmnts re to shares owned by ee's
4.34 Agrmts relating to material capital expenditures

4.35 Settlements with Govt Agencies
4.36 Loan agrmnts/docs re loans or advances
4.37 Ks of Ds, Os or SH relating to Co
4.38 Ks between any Co affiliates
4.39 Docs re any receivables from/payables to Ds, Os or SHs
4.40 Ks/commitments whose loss might have an adverse impact
4.41 Ks, orders, judgments, which materially adversely affect company
4.42 Mat. options, proposals, LOIs to sell or purchase services
4.43 Ks involving barter, offset, countertrade or similar obligs
4.44 Agrmt in favor of another to enter into any of the above
4.45 Summ. of 3rd party discussions re the acquis. of add'l servs
4.46 Summ. of ongoing/anticipated plans to out-license products

5 Employee Materials

5.01 Ee stock option plans, and other bonus plans
5.02 Retirement plans and actuarial eval rpts for each plan
5.03 Profit-sharing, savings, 401(k) and ESOP plans
5.04 Cash bonus and incentive compensation plans
5.05 Other ee insurance benefit plans (e.g. dental/medical)
5.06 Employment, consulting agrmnts
5.06.01 UK Employment Agreements
5.06.02 Consultant Agreements
5.07 6 figure D or key ee salary and compensation plans
5.08 List of all ee's
5.08.01 Ee org chart

5.08.02 Schedule (name, title, start date, salary, bonus)

5.09 List of temps: name, title, start date, salary, agency

5.10 All ee nondisc, noncompetition and similar agrmts

5.11 Employee handbooks

6 Intellectual Property

6.01 A list of US & foreign patents, trdmrks, & other IP

6.02 Summaries of each patent/patent application IDed above

6.03 All patent, trademark, service mark, or other license agrmt

6.04 List of all law firms/attys that have acted as IP counsel

6.05 All active joint development, R&D arrangements

6.06 Active, mat. transfer, confidentiality, or consulting agrmts

6.07 All IP licenses from/to company except ord. course service agmts

6.08 Agrmts where Co pays a royalty to a 3rd party

6.09 All Ks since ___ re the acquisition of any biz, tech, IP

6.10 Mat. Ks re purchase, use of research, data or equip

6.11 IP rights list material to Co's biz which Co does not own

6.12 Sched of all consultants working on Co's service/IP

6.13 ID where Co has rec'd a threat of action for IP infringmt

6.14 ID all patents which may conflict with Co IP

6.15 Copies of the file histories for issued & pending patents

6.16 Rpts/opinions from counsel re Co's owned/licensed patents

6.17 Docs of Co's public disclosures of its research or inventions

6.18 ID litigation re IP owned or licensed to Co

6.19 All corresp and litigation docs re potential IP infringement

6.20 ID where Co has put another on notice of its patent rights

6.21 ID breach by Co or other co.

6.22 Co's policies on confi info and Co IP

6.23 ID public disclosures or offers for sale of Co's tech

6.24 All ee agrmts (invention, non-disclosure, non-comp)

6.25 Funds from any propr technology owned or licensed to Co

6.26 K obligs/restrictions re Co IP incl licenses, escrow

6.27 ID all pending or threatened conflicts involving IP

7 Proceedings and Investigations

7.01 Schedule of litig, arbitr, & admin proceedings

7.02 Reserved

7.03 Agrmnts/corresp. with counsel re material IP

7.04 Corresp sent to/from counsel re annual audits, re litigation

7.05 Orders/jmts requiring or prohibiting future activities

7.06 Government Investigations

8 Miscellaneous

8.01 Principal competitors in each market segment

8.02 ERISA 5500 rpts, actuarial valuations for Co benefit plans

8.03 Compliance policies and programs

8.04 Schedule of Co outside counsel with brief description

8.05 Any Co affirm action plan, together with any related data

8.06 Insurance Schedule/Summary

8.07 All corresp. with Gov't agencies

8.08 Descr of service wrrties/assurncs for past, current sales

8.09 Analys of Co,its industry prep internally or by bankers

8.10 Most recent lien search on Co material property

8.11 System Diagram s

8.12 System Security Info

8.13 Memos/corresp. prep by Co, outside counsel re legis.

8.14 Any other docs or info which are significant to Co's biz

MEMORANDUM TO ALL
(PRE-S-1 FILING NOTICE REGARDING QUIET PERIOD)

To: All Employees of COMPANY — DRAFT – FOR INTERNAL USE ONLY

From: General Counsel

Date:

Subject: Proposed IPO and Restrictions on Company Publicity and Other Communications

---

COMPANY is contemplating an initial public offering (IPO) of its common stock. It is important that company personnel be aware of restrictions on the dissemination of information regarding the company during the IPO process. The federal securities laws prohibit COMPANY from engaging in various publicity efforts concerning COMOPANY during the IPO process and for a period time following the completion of the IPO. Any violation of these requirements could delay or stop our IPO efforts or materially harm the Company.

As a result, it is critical that all employees maintain the confidentiality of COMPANY IPO plans. No employee should discuss our IPO plans or any matters relating to the company's financial results, financial projections or future business prospects with any person outside of the company. In addition, all employees must adhere to the following publicity restrictions:

- All public statements made by anyone regarding the company should be cleared with me. Such "public statements" not only include press releases, but also include speeches to groups of any kind, interviews, product literature distributed to newspapers, magazines and trade groups, and announcements of new products and developments within the company.

- Inquiries from financial analysts, newspapers reporters and others who may relay information regarding the company and the proposed IPO to persons outside of the company or the public at large should be directed to me.

- Although SEC guidelines enable a company in the IPO process to continue to issue press release concerning factual business developments and to advertise products in most cases consistent with past practice, these guidelines are based upon subjective factors. As result, any changes in the frequency or type of product advertising or general publicity activities should be cleared with me.

Please do not hesitate to contact me if you have any questions regarding these matters.

COMPANY– CONFIDENTIAL

Frequently Asked Questions pending a possible IPO

Q: What exactly is the Quiet Period?

A: The term "Quiet Period" refers to the period leading up to an IPO when external communications about the company and its IPO are restricted by law and SEC regulations.

Q: When does the Quiet Period start, and how long does it last?

A: The Quiet Period runs from the time that a company engages underwriters in the pursuit of a potential IPO until a Registration Statement is filed with the SEC. After the Registration Statement is filed, restrictions on external communications continue to apply, but this second period is referred to as the "Waiting Period". Whenever we speak of the Quiet Period in conversation or in the press, we may be referring to the Quiet Period or the Waiting Period.

Q: What am I allowed or not allowed to say or write?

A: During the Quiet Period, no one is permitted to disclose that an IPO is pending, or that underwriters have been engaged. You cannot discuss the company's future business prospects ("we're looking to triple volume this year") and if you use any figures about our business, you need to take care to see that they are accurate ("we've handled over 50,000 transactions"). You are still free to talk about and sell COMPANY'S services, features, value proposition, team and track record – for most of us, this means business as usual.

Q: Am I allowed to speak to friends, family and personal contacts about the IPO in a non-official capacity? What, if any, information can I share? Can I tell my stockbroker? What about my mom?

A: Simply put, the answer is No. Although it is natural for your partner or spouse to be aware generally that the company is pursuing an IPO, you are prohibited from discussing the IPO, any details of the company's plans or any future business prospects of COMPANY with anyone. If mom asks, "How's work?" please tell her "Business is good. These potatoes are delicious."

Q: Do I need to watch what I say and/or write in e-mails?

A: Always! Restrictions on disclosure apply to all verbal and written communications, including – and in particular – email. Never send an email that you would not want to see reprinted with your name in The Wall Street Journal.

Q: What do I do if someone calls to ask about the IPO? Or asks me "how is the IPO going" during a meeting?

A: If a client or vendor says they heard something about an IPO and asks you for more information, you may respond by saying that, you are sorry, but you are not in a position to comment on the matter. Tell them you simply cannot talk about it and move on to the next subject. It is unlikely anyone would press beyond that.

It also is acceptable to say to someone with whom you have not spoken before about the company – for example, during a sales pitch or an interview with a candidate – "COMPANY has been around for 10 years, has had 16 consecutive quarters of revenue growth, is backed by top venture firms, and, as a privately held company, is always considering the possibility and right timing for an IPO, merger or sale." Please do not comment or provide "your own opinion" beyond that.

Note, during the "Quiet Period" before a registration statement is filed, you should NOT say, "Sorry we are in the Quiet Period." When you read an article about a company like Morningstar declining to discuss their business plans, citing the "quiet period," they really are referring to the "waiting period" -- their registration statement has been filed and they are waiting for it to become effective. During that period, the fact that the company is pursuing an IPO is public knowledge. Before the filing of a registration statement, COMPANY is not permitted to divulge anything about the IPO.

Finally, remember all inquiries by the press or any officials should be directed to the General Counsel.

Q: Can I (or must I?) exercise my stock options now?

A: You are free to purchase shares pursuant to a stock option during the IPO registration process. Note there can be no guarantee the IPO will occur, or, if it does, whether the stock of the company will be worth more than the price you pay for it at any given time. You also may be restricted from selling your stock into the public market for up to six months after the closing of an IPO. You are never required to exercise your options. Purchasing shares is a personal investment decision.

MEMORANDUM

To: Officers and Directors of Mighty Oak Corporation (the "Company")

From: Heller Ehrman Venture Law Group

Date: 2007

Subject: Restrictions on Company Publicity During an Initial Public Offering

---

In connection with the initial public offering ("IPO") of Common Stock contemplated by Mighty Oak Corporation (the "Company"), it is important that the Company's officers and employees, and its Board of Directors, be aware of restrictions on the dissemination of publicity or information regarding the Company during the offering process.

The IPO process is generally divided into three periods. The first period, known as the "pre-filing" or "quiet" period, is generally the four to six weeks before the filing with the SEC of a Registration Statement (the "Registration Statement") under the Securities Act of 1933 (the "Securities Act"). The second period, generally referred to as the "waiting" period, covers the period following the filing of the Registration Statement until the SEC declares the Registration Statement effective. The third period, referred to as the "post-effective" or "prospectus delivery" period, is generally the 25 days following the effective date.

The SEC adopted major reforms to the Securities Act offering rules in 2005. The new rules have significantly broadened the ways in which companies are permitted to communicate to the public during a public offering, depending on their reporting status and their market capitalization. However, many of these provisions are not applicable to newly public companies or during an IPO.

In addition to the legal restrictions outlined below, it is important to remember that state and federal anti-fraud laws apply to the Company's publicity activities at all times. There may also be compelling business, investment banking and other non-legal considerations beyond the scope of this memorandum, which would impact the Company's publicity activities during an IPO.

1. **RESTRICTIONS DURING THE QUIET PERIOD**

(a) **Statutory Environment.** It is illegal under the Securities Act to offer to sell any security unless a Registration Statement has been filed with respect to such security. The SEC has broadly construed "offer to sell" to include any publicity that has the effect of "conditioning the public mind or arousing public interest in the company." Consequently, certain activities or pieces of publicity (including information on the Company's website, or hyperlinked to it), may result in a violation of the Securities Act known as "gun jumping," even if that activity or piece of publicity is not expressly phrased in terms of an offer to sell.

(b) **The Beginning of the Quiet Period; Bright-Line Exclusion for Certain Pre-IPO Communications.** The "quiet period" begins when a company has definitively decided to embark on a public offering. The organizational meeting is often used as the de facto beginning of the quiet period, but based on facts and circumstances the quiet period could very likely begin earlier in a particular offering. Once the Company has begun actively considering an IPO, therefore, the Company should consult with counsel about its public communications.

Securities Act Rule 163A, adopted as part of the 2005 Securities Act reform noted above, resolves some of the uncertainty surrounding pre-IPO communications by providing a bright-line test for certain communications. The Rule stipulates that all communications made more than 30 days before the filing of a Registration Statement will not be considered prohibited "offers" as long as the communication is made by or on behalf of the Company, does not reference a securities offering that is or will be the subject of the Registration Statement, and the Company takes reasonable steps within its control to prevent further distribution of the information during the 30 day period immediately before a Registration Statement is filed.

The Company should pay particular attention to the "reasonable steps to prevent further distribution" requirement, as it can be a trap for the unwary. For example, an interview given to a newspaper reporter more than 30 days before the filing of the Registration Statement could still be determined to be a gun-jumping violation if it was published inside the 30-day window. Because a company cannot know in advance the exact date on which the Registration Statement will actually be filed, it cannot know with precision when the 30-day pre-filing quiet period will begin. As long as an IPO is under active consideration, therefore, the Company should proceed with caution in giving media interviews that may be published in the future.

(c) **The Effects of A Gun Jumping Violation**. The SEC may seek to cure any perceived gun-jumping violations by delaying the effectiveness of the Registration Statement until after a specified "cooling off" period. The length of the cooling-off period depends on the circumstances, and can be days, weeks, or even months. This is risky for the Company, since the market window for an offering may close during the SEC-enforced delay. The SEC might alternatively or additionally require that the offending information be disclosed in the prospectus, which means the Company and others may be held liable if such statements are misleading. Other remedies available to the SEC include the exclusion of any underwriter involved in the violation from the underwriting syndicate conducting the offering, or an injunction against the Company (and possibly other parties) to preclude further violations.

(d) **Common Scenarios and How to Avoid Gun Jumping.** Before the Registration Statement is filed, a number of gun jumping problems can be avoided by making sure that Company personnel are aware of and comply with the following general guidelines:

(1) **Contacting Holders of Registration Rights and Potential Selling Stockholders.** Practical considerations and contractual obligations often require the Company to contact holders of registration rights or potential selling stockholders before filing a Registration Statement. The SEC generally views such activities as permissible. However, for purposes of ensuring compliance with the Securities Act, these activities should only be conducted with the advice and assistance of Heller Ehrman Venture Law Group.

(2) **Public Announcements.** Securities Act Rule 135 provides that public notice of a proposed Registration Statement filing will not be deemed an "offer" if states that an offering will be made only by a prospectus and contains no more than certain limited information, including the name of the Company (but not the underwriters) and the title, amount and basic terms of the offered securities. There is no legal requirement that a company contemplating an IPO issue a pre-filing press release, and generally, such press releases are not done. Many companies will choose to issue a press release once the Registration Statement has been filed. However, this press release will also be limited in what it covers, and therefore is generally drafted by counsel.

(3) **Corporate Advertising and General Press Releases.** Under long-standing SEC guidelines, the Company may continue to issue press releases and advertisements regarding factual business and financial developments, product advertisements and stockholder communications, provided that they are in customary form, consistent with prior practice, do not contain any projections, forecasts or valuations, and do not suggest by content, timing or distribution that a selling effort is underway. Media interviews, analyst conference calls and speeches must also comply with these guidelines for communications; as a result, many companies refrain from such activities during the quiet period. In order to prevent inadvertent violations of the quiet period restrictions, all of these forms of communication should be pre-cleared by Heller Ehrman Venture Law Group.

New Securities Act Rule 169 provides a safe harbor for pre-IPO companies with respect to regularly-released factual business information. "Factual business information" includes information about the Company, its business or financial developments, or other aspects of its business, as well as advertisements or other information about the Company's products or services. The term "regularly released" is not defined, although SEC commentary indicates that a similar communication must have been delivered at least once before the offering. This safe harbor does not protect forward-looking information (e.g., projections).

To qualify for the Rule 169 safe harbor, the information must be regularly released to persons receiving the information other than as investors or potential investors, such as customers and suppliers. The fact that such customers and suppliers might also be potential investors does not affect the availability of the safe harbor if the conditions are otherwise satisfied. Since the Rule is fairly new, there is some uncertainty over certain modes of communication.

The safe harbor is nonexclusive, which means that communications that do not fall under the protection of Rule 169 may nevertheless be permissible under the long-standing SEC guidelines outlined above.

(4) **Other Public Communications**. Management should consult with Heller Ehrman Venture Law Group before planning major ad or promotional campaigns or responding to any outside inquiries from financial analysts, newspaper reporters or others who may relay information to the public, and before consenting to any public speaking engagements during the pre-filing period, to prevent inadvertent violation of the gun-jumping rules.

2. **RESTRICTIONS DURING THE WAITING PERIOD**

(a) **Statutory Environment.** Oral offers to sell securities may be made once the Registration Statement has been filed. Written offers may also be made, but any transmitted prospectus (broadly defined as any prospectus, notice, circular, advertisement, letter or communication, either written or transmitted by radio or television, which offers any security for sale or confirms the sale of any security) must meet the requirements of the Securities Act. Any corporate publicity, press release or advertising during the waiting period, as well as interviews and speeches, must continue to comply with the quiet period guidelines.

(b) **The Preliminary Prospectus.** A form of prospectus filed as part of the Registration Statement is a prospectus meeting the requirements of the Securities Act, and therefore may be used during the waiting period. This form of prospectus is called a "preliminary prospectus" or sometimes a "red herring" because of the required legend, printed in red, on the cover page. The preliminary prospectus for an IPO will generally be printed immediately before the road show, after the Company has resolved all major comments from the SEC and reached agreement with the underwriters on the number of shares to be offered and a preliminary offering price range. The preliminary prospectus contains most of the information contained in a final prospectus, with the exception of revisions made in response to last-minute SEC comments, late-breaking developments about the Company, certain information relating to and derived from the price at which the securities will be offered, and the composition of the underwriting syndicate.

(c) **Limited Written Offers.** Securities Act Rule 134 provides a safe harbor for public notices made after the filing of a Registration Statement that are limited to certain information about the Company and its business and certain information about the offering, including the names of the underwriters, the securities being offered and the underwriters' marketing activities (including road shows). Rule 134 notices may also include certain administrative information, such as how to open accounts or participate in directed share plans. A press release issued on filing or when the number of shares and proposed price range are available would fall under this Rule.

(d) **Free-writing Prospectuses.** Under new Securities Act Rules 164 and 433, a company engaged in an IPO may, as long as certain conditions are met, use a "free-writing prospectus," basically a written (or electronic) document that may be considered an offer but that does not satisfy the requirements for a preliminary prospectus. The free-writing prospectus must be accompanied by or preceded by a preliminary prospectus meeting certain requirements, including a price range, unless such a prospectus was previously provided and there has been no material change since it was provided. The concurrent delivery requirement may be satisfied by sending the free-writing prospectus electronically, in a communication that includes an active hyperlink to the eligible preliminary prospectus. The free writing prospectus must have a prescribed legend, and there are some restrictions on the use of disclaimers. Although not part of the registration statement, a free-writing prospectus must nevertheless be filed with the SEC, if it (i) is prepared by the Company, (ii) is prepared by an underwriter on behalf of the Company and contains material new information, (iii) is prepared by an underwriter and broadly disseminated or (iv) contains final terms of the offered securities. Generally, the obligation to file the free-writing prospectus rests with the Company, even if it is prepared by an underwriter, although in

certain limited circumstances the underwriter must make the filing. The Company must retain any free-writing prospectus, whether or not it has been filed with the SEC, for three years.

Note that in most cases a company filing for an IPO will not include a price range in its initial filing. Therefore, it is likely that the Company will not be able to use a free-writing prospectus until later in the offering period, once a preliminary prospectus with a price range has been filed.

The rules on free-writing prospectuses have implications in a number of areas.

(1) **Electronic Communications.** Information constituting an "offer" included in the Company's website or hyperlinked by the Company from its website is considered a free-writing prospectus. In addition, e-mails, facsimiles and electronic postings on websites are considered written communications subject to the free-writing prospectus requirements. Particular care should be taken with respect to any Company-wide e-mail updates about the IPO, or about related matters after the Company is publicly traded.

Historical information regarding the Company that is identified as such and is included in a separate section on the Company's website does not constitute a free-writing prospectus, unless such information is expressly incorporated by reference or otherwise included in a prospectus or identified in connection with a securities offering.

(2) **Media Communications and General Press Releases.** Media publications are considered free-writing prospectuses, but are subject to special rules. If a Company insider gives an interview to a reporter (including both print and electronic publications as well as TV and radio broadcasts), the entire resulting story is a free-writing prospectus. If a publication includes information that is not contained in documents already on file, the Company must file the publication within four business days after the Company becomes aware of it.

(3) **Telephone Communications.** Individual telephone calls are considered oral communications not subject to the free-writing prospectus rules. "Blast" voice messages, however, are considered written communications subject to the rules governing free-writing prospectuses.

(4) **Interviews and Speeches.** Interviews and speeches by a founder, director or member of management, if available in electronic form, are considered written communications and therefore subject to the rules governing free-writing prospectuses.

(5) **Liability Issues.** Since a free-writing prospectus does not become part of the Registration Statement, it is not subject to liability under Section 11 of the Securities Act (unless the company opts to file it as part of the Registration Statement). Nevertheless, companies are subject to liability for statements made in a free-writing prospectus under Section 12(a)(2) of the Securities Act and the other anti-fraud provisions of federal securities laws (including Rule 10b-5 under the Exchange Act).

(e) **The Road Show.**

(1) **Live Road Shows.** Oral offers to sell the Company's securities may be made during the waiting period. In fact, it is customary for underwriters and sometimes dealers to orally solicit indications of interest or offers to buy. In the latter part of the offering period, certain members of management will accompany the managing underwriters on a "road show," a series of informational meetings which members of the selling group or potential investors attend to listen to presentations from the Company. All marketing efforts should be conducted through and coordinated with the underwriters, and the Company should promptly refer any inquiries regarding the purchase of stock to the underwriters.

A road show that originates live and is delivered to a live audience is considered an oral communication. Such a live road show is not a free-writing prospectus, even if it is also transmitted electronically (e.g., by closed-circuit television to overflow audiences, live webcast or video conference). If the live road show is transmitted electronically, steps must be taken to ensure that the electronic version of the road show is not accessible after the presentation. Slides or other visual aides provided or transmitted as part of a live road show may also be deemed oral communications, provided steps are taken to make sure such information is available only during the live presentation. Failure to take these measures may convert the presentation into an electronic road show, subject to the rules discussed below.

Although oral and certain written offers are permitted during the waiting period, as discussed above, the anti-fraud provisions of the securities laws always apply. Accordingly, the Company must avoid making statements during the road show, or at any other time, that contain any untrue statement of material fact or omit to state a material fact necessary in order to make the statement, in light of the circumstances under which it was made, not misleading. One of the best methods for avoiding such statements is to limit the content of such statements to information contained in the preliminary prospectus.

(2) **Electronic Road Shows.** All electronic communications, other than live, real-time communications to a live audience, are considered written communications. If such communications purport to sell securities, then they are free-writing prospectuses. "Electronic road shows," which do not originate live in real time to a live audience and are electronically transmitted, are considered free-writing prospectuses. The Company will not be required to file an electronic road show presentation as a free-writing prospectus if it makes at least one "bona fide" version of the road show readily available electronically to any potential investor. A "bona fide" version is one that includes the same general areas of information regarding the Company, its management, and the securities being offered as other written or electronic road shows for the same offering. The bona fide version need not address all the same subjects or provide the same information as other versions of an electronic road show, and it need not provide an opportunity for questions and answers or other interaction.

(f) **Corporate Advertising and Press Releases.** The pre-filing guidelines regarding corporate publicity, press releases and advertising summarized above in continue to apply during the waiting period. Under the new rules, incorrect use of such materials during the waiting period is longer be an automatic violation of the Securities Act, but use of such materials must nevertheless comply with the new free-writing prospectus rules.

3. **RESTRICTIONS DURING THE POST-EFFECTIVE PERIOD**

Offers and sales of securities may take place after the effective date of the Registration Statement, provided that any offer, sale or delivery of the securities during the 25 days following the effective date must be accompanied or preceded by a final prospectus. Under Securities Act Rule 172(b), this prospectus delivery requirement may be satisfied by timely filing of the final prospectus with the SEC. Any investor may request a copy of the final prospectus, but it does not have to be provided before settlement.

4. **OTHER CONSIDERATIONS**

(a) **Negotiations with Underwriters.** Notwithstanding the broad definition of what an offer to sell is under the Securities Act, preliminary negotiations or agreements among the Company and its underwriters do not violate the Securities Act. Accordingly, preliminary negotiations with the managing underwriters, including the execution of a letter of intent, pose no practical gun jumping problems. However, the execution of definitive agreements pursuant to which the Company's securities are sold and purchased are prohibited until the Registration Statement is declared effective by the SEC.

(b) **Internet Websites.** As noted above, information on the Company's website or hyperlinked by the Company from its website may be considered an "offer." The Company should review its website well in advance of filing the Registration Statement, to remove potentially troublesome language and to make sure historical information concerning the Company is properly identified and segregated. Documents that are hyperlinked to the Company's website should also be reviewed, since the linked documents may be deemed to be "incorporated by reference" into the Company's website. In particular, the Company should remove any links to brokers' research reports on the issuer or its industry, or to news stories that go beyond factually reporting the issuer's business and financial developments. The Company should avoid making significant changes to its website (such as adding an investor relations site) prior to the offering, since such a change might also be perceived as gun jumping. **Since the rules concerning the "scrubbing" of an issuer's website prior to a public offering are complex, management should consult with Heller Ehrman Venture Law Group concerning the information currently on the Company's website.**

5. **SUMMARY**

In order to control the flow of information disseminated during the public offering process, and avoid potential securities laws violations, it is important that management be aware of and attempt to screen, to the extent practicable, each oral or written communication by the Company that may be construed as an offer to sell securities or a sale of securities. Heller Ehrman Venture Law Group suggests that the Company institute the following procedures in order to avoid problems in this area:

- No person, but especially no Company officer, should discuss the proposed public offering with outsiders either before or after the filing of the Registration Statement, unless such proposed discussion is first cleared with Heller Ehrman Venture Law Group.

- All public statements made by the Company (including those contained on a website or made via the Internet generally) from the pre-filing period through the post-effective period should be cleared with Heller Ehrman Venture Law Group. Such 'public statements' not only include press releases, but also speeches to groups of any kind, interviews, product literature distributed to newspapers, magazines and trade groups, announcements of new products and developments within the Company. In addition, the Company should be cautious about making changes in the frequency or type of product advertising or general publicity activities prior to or during the IPO. Heller Ehrman Venture Law Group will work with the Company to plan the most effective approach in each particular circumstance.

- Responses to inquiries from financial analysts, newspapers reports and others who may relay information regarding the Company and the proposed offering to persons outside of the Company or the public at large should be deferred until consultation with Heller Ehrman Venture Law Group.

- One or two persons at the Company should be designated as the official spokespersons to whom all proposed public statements, outside inquiries and other similar questions should be directed. They should be given an opportunity to review this memorandum and may want to consult Heller Ehrman Venture Law Group in the event that they have questions regarding it or situations that may arise during the public offering process.

_____

This memorandum is only a summary of relevant federal securities laws relating to publicity involving the Company during the initial public offering process. As always, if you have questions regarding the material contained in this memorandum, or questions regarding matters outside the scope of this memorandum, please contact Heller Ehrman Venture Law Group.

_____

LATHAM & WATKINS

Number 467 July 25, 2005

Client Alert

Latham & Watkins Corporate Department

Securities Act Reform Arrives

SEC Issues Final Rules Adopting Securities Act Reform Measures Effective December 2005

On July 19, 2005, the Securities and Exchange Commission released final rules for its securities offering reform initiative, which the SEC originally proposed on November 3, 2004 and unanimously approved in final form on June 29, 2005.[1] These new rules, estimated to take effect in early December 2005, will significantly change the registered offering process for all issuers and underwriters.

"These new rules will significantly change the registered offering process for all issuers and underwriters, and registration on demand without SEC review will be available for the largest 30 percent of public companies."

The new rules are designed to liberalize permitted communications, rationalize liability timing and improve offering procedures for all issuers. In addition, registration on demand without SEC review will be available for the largest 30 percent of public companies. We will provide you with a detailed analysis of all of these new rules in a comprehensive publication in the near future (as we did when the SEC proposed the new rules). The purpose of this Client Alert is to give you the headlines.

In the discussion that follows, you will find a brief summary of the key provisions of the final rules relating to:

- registered offerings generally;
- IPOs;
- shelf registration statements;
- a newly created special category of very large issuers known as "well-known seasoned issuers" (WKSIs); and
- additional reporting requirements under the Securities Exchange Act of 1934.

New Rules for All Registered Offerings

Overhaul of Gun-Jumping Restrictions

The new rules significantly relax restrictions on (1) communications made before the filing of a registration statement and (2) written communications during the period between a registration statement's initial filing and its effectiveness. Under the old rules, communications prior to filing were at risk of being treated as prohibited offers, and written communications after filing but prior to effectiveness were at risk of being treated as nonconforming prospectuses. Violations of these restrictions have historically been referred to as "gun jumping."

Under the new rules:

- communications by issuers more than 30 days before filing a registration statement will not be considered a prohibited offer, so long as the communications do not reference a securities offering and the issuer takes reasonable steps to prevent further distribution of the communication during the 30-day pre-filing period;
- all issuers will be able to publish regularly released factual business information at any time during the registration process and reporting companies (other than voluntary filers) will be able to publish regularly released forward-looking information while in registration;
- WKSIs will be able to make pre-filing offers at any time without violating gun-jumping restrictions; and
- communications about certain procedural matters after the filing of a registration statement will be expressly permitted, such as the anticipated schedule for an offering or instructions on how to open an account to purchase securities in the offering.

This new 30-day bright-line approach to gun-jumping questions, taken together with the other new permissive safe harbors, will make life much easier for all issuers.

Free Writing Prospectuses

Under the new rules, after the filing of the registration statement, all issuers and offering participants (other than certain ineligible issuers)[2] will be able to use written or electronic communications as part of the sale process even if the communications do not satisfy the strict rules for prospectuses. These communications are known as "free writing prospectuses."

All free writing prospectuses will be subject to liability under the antifraud provisions of the federal securities laws, including Section 12(a)(2) liability. Free writing prospectuses will not, however, be subject to Section 11 liability unless filed as part of the registration statement.

Cross-Liability

The rules as proposed raised significant questions regarding cross-liability issues that may arise where one member of the deal team uses a free writing prospectus that the other deal team members did not use. To address these concerns, the new rules provide that a member of the deal team (such as one member of an underwriting syndicate) will not be liable under Section 12(a)(2) for a free writing prospectus used by another deal team member unless the first deal team member:

- used or referred to the free writing prospectus in offering or selling the securities;
- offered or sold securities and participated in planning for the other deal team member's use of the free writing prospectus; or
- is required to file the free writing prospectus (which for underwriters is limited to free writing prospectuses that are "broadly disseminated" on an unrestricted basis).

It remains to be seen whether these cross-liability rules adequately address uncertainty over deal team members' potential liability for free writing prospectuses they did not use or prepare.

Filing Requirements

The use of free writing prospectuses requires:

- filing any free writing prospectus prepared by or on the behalf of the issuer;
- filing information provided by and about the issuer and contained in anyone else's free writing prospectus;
- filing any free writing prospectus that an underwriter or other third party broadly disseminates (which does not include distribution via restricted Web site or via email to customers, regardless of the number of customers receiving the email distribution); and
- retaining copies of each free writing prospectus used and not filed for three years.

In other words, issuers will be required to file (1) any written or electronic information distributed by them that

constitutes an offer outside the statutory prospectus and (2) similar materials distributed by other members of the deal team, subject to one important exception. The exception provides that information "prepared by" someone other than the issuer merely "on the basis of" issuer information need not be filed.[3]

This exception is likely to give rise to difficult interpretive issues. It is unclear how an issuer will distinguish between its own information and information prepared on the basis of its information. For example, it remains uncertain whether a rating agency report will necessarily be a free writing prospectus that would be subject to the filing requirements and the associated liability provisions.

Finally, because a free writing prospectus cannot "conflict with" the registration statement, we expect that deal teams will elect to include the information in a free writing prospectus in the registration statement in all marginal cases. As a result, the contents of any free writing prospectus will likely end up in the registration statement and therefore be subject to Section 11 liability in most cases.

Road Shows

Pre-recorded electronic road shows are considered free writing prospectuses but do not have to be filed (except in the IPO context under certain circumstances, discussed below). In contrast, a real-time communication to a live audience, including a road show presentation, is deemed to be an "oral" communication, whether via videoconference or otherwise, and is therefore not a free writing prospectus and is not required to be filed.

Term Sheets

With the introduction of free writing prospectuses, the new rules permit the use of term sheets in any securities offering (not just the Rule 434 term sheets used principally in asset-backed securities offerings). Although all term sheets will be considered free writing prospectuses, only final term sheets will need to be filed. An issuer using a term sheet would have to file the final term sheet within two days after the date the terms became final or two days after the date of first use, whichever is later.

Underwriters

It remains to be seen whether underwriters will embrace the use of free writing prospectuses. We expect that underwriters will seek to have a significant voice in the decision to release any free writing prospectus during the offering process.

We also expect that underwriters will apply normal due diligence procedures to any disclosure contained in a free writing prospectus. For example, underwriters will likely want to satisfy themselves that the information contained in free writing prospectuses is covered by comfort letters from auditors and negative assurance letters from counsel. As a result, it is unclear the extent to which free writing prospectuses will be used in a typical offering to communicate with potential investors.

Liability at Point of Sale

Under the new rules, information conveyed to a purchaser only after the time of the contract of sale will not be taken into account for purposes of determining liability for a materially misleading misstatement or omission under Section 12(a)(2) or Section 17(a)(2).[4] Liability under Section 12(a)(2) or Section 17(a)(2) will thus be assessed based *only* upon information conveyed to investors *at or before* the time of an investment decision.

As a result, it will not be sufficient to deliver an accurate and complete final prospectus after pricing but prior to closing. Deal teams will need to conclude that prospective purchasers have received all relevant information before pricing the offering and confirming orders.

This change in liability timing introduces one potential use for free writing prospectuses that may become commonplace. When material developments arise between circulation of the preliminary prospectus and pricing, the issuer will need to communicate the new information to the market before entering into a contract of sale for the securities. We would expect to see free writing prospectuses used during this period in IPOs, in conjunction with a pre-effective amendment to the registration statement, to correct or update the information previously provided.

For example, if an issuer's earnings become available during the road show, a free writing prospectus could be circulated to all prospective purchasers including a copy of the earnings release or the "recent results" paragraph that will appear in the final prospectus. This approach would allow a preliminary prospectus to be updated by distributing a few changed pages rather than recirculating a complete new preliminary prospectus (and, if the distribution occurred electronically, the update could include a hyperlink to the corresponding pre-effective amendment to the registration statement). As a result, underwriters may begin to collect email addresses as part of their normal road show procedures to facilitate the electronic circulation of free writing prospectuses where necessary.

Issuers using incorporation by reference can satisfy their updating obligation simply by filing a Form 8-K or submitting a Form 6-K including a press release relating to the material development. We would expect this practice to continue for issuers using Form S-3 or Form F-3.

Incorporation by Reference Into Form S-1 and Form F-1

The new rules will allow reporting companies (other than voluntary filers) that are current in their filings under the Exchange Act to incorporate previously filed Exchange Act reports into registration statements on Form S-1 and Form F-1. The SEC is accordingly eliminating Form S-2 and Form F-2 (which were seldom used).

Prospectus Delivery

The new rules no longer require physical delivery of a final prospectus. Filing a final prospectus will satisfy the delivery requirement, which means that issuers generally will no longer be required to print final prospectuses.

New Rules for IPOs

The new IPO rules provide that issuers:

- may continue to publish factual business information that is regularly released to persons other than in their capacity as actual or potential investors, consistent with past practice and with the same employees making the communications (which means that the CEO cannot suddenly start making statements that lower-level employees made previously);
- cannot use a free writing prospectus prepared or paid for by the issuer or any other offering participant unless a statutory prospectus accompanies or precedes the free writing prospectus (which means that free writing prospectuses cannot be used in an IPO until the issuer has filed a price range), although this requirement can be satisfied via hyperlink in a free writing prospectus distributed by email; and
- must, in any IPO of common equity or convertible securities, file a copy of any pre-recorded electronic road show used in the marketing process (live road shows are not covered by this rule) unless the issuer makes at least one version of a bona fide electronic road show readily available to an unrestricted audience (for example, on its Web site).

As a result, every pre-recorded IPO road show will have to be either posted to the issuer's Web site or filed with the SEC.

We would expect both issuers and underwriters to ask their counsel (and perhaps their accountants) to take an increasingly active role in the review and preparation of pre-recorded IPO road show presentations as road shows become a publicly accessible part of the liability landscape.

In addition, the new rules supersede a series of no-action letters, now withdrawn, that formerly provided the basis for proceeding with electronic road shows and contained many restrictions and conditions that will fall away under the new regulatory regime. For example, there will no longer be any reason to limit the audience of an electronic road show, to permit the retransmission of only live presentations before an audience, to limit viewers to seeing the road show presentation for a limited number of times or to prohibit the printing or copying of the road show.

New Rules for Shelf Registrations and Takedowns

The new rules contain a number of innovations designed to modernize the shelf registration process for all eligible issuers. These changes will eliminate previous barriers to the use of shelf programs and will make shelf registration significantly more attractive for all issuers. The shelf rules for WKSIs are discussed below under "Special Rules for WKSIs."

The shelf changes available to all issuers include the following improvements:

- one rule (Rule 430B) now codifies the information that an issuer may exclude from its base prospectus in a shelf registration statement and include in later filings;
- issuers eligible to use Form S-3 or Form F-3 may keep a shelf registration statement in place for three years and are no longer required to register only securities that the issuer intends to offer within two years or any given time period (although the two-year rule remains in place for shelf registration statements that are not on Form S-3 or Form F-3);
- restrictions on Rule 415(a)(4) "at-the-market" offerings will be eliminated (which means that issuers will be able to conduct these offerings without identifying the underwriters in the registration statement and without any volume limitation);
- immediate takedowns from shelf registration statements will now be permitted, eliminating the prior restriction against shelf takedowns at the time of effectiveness;
- issuers eligible for a primary offering on Form S-3 or Form F-3 may use a prospectus supplement to:
  - make material changes to the plan of distribution described in the base prospectus; and
  - identify new selling security holders, provided that the securities they wish to sell were outstanding when the registration statement was filed; and
- issuers may make "fundamental change" disclosures via prospectus supplement, which will eliminate the cumbersome post-effective amendment procedures previously required for such disclosures.

As a result of these changes, the shelf registration process will be more streamlined for all issuers and a number of procedural obstacles to accessing the public securities markets will be eliminated.

Special Rules for WKSIs

Some of the most dramatic changes in the new rules are available only to WKSIs. These are the select issuers that, in addition to being eligible for a primary offering on Form S-3 or Form F-3, have either:

- $700 million of unaffiliated common equity float (on a worldwide basis); or
- $1.0 billion in aggregate principal amount of debt securities registered and issued for cash, not exchange, in the preceding three years.[1]

Voluntary filers are excluded from the definition of WKSI since they are not subject to the full range of investor protection regulation.

The special benefits afforded to WKSIs (which represent approximately 30 percent of all listed issuers) include:

- automatic shelf registration (although issuers that qualify as WKSIs based on their registered debt will be limited to registrations of non-convertible debt unless they have an unaffiliated common equity float of $75 million or more); and
- the ability to use free writing prospectuses at any time (unlike other issuers, which can use free writing prospectuses only after filing of a registration statement).

In other words, WKSIs will be able to register securities offerings immediately without SEC review and will be free at any time to make offers to sell securities before filing a registration statement without regard to previously applicable gun-jumping restrictions.

Automatic Shelf Registration

The new rules will entitle WKSIs to a significantly more flexible version of shelf registration under which:

- the shelf registration statement will become effective automatically upon filing (without any SEC review of the registration statement);
- a WKSI may register an unspecified amount of securities on its automatically effective Form S-3 or Form F-3 registration statement;
- less information will be required in the base prospectus (for example, the base prospectus may omit the plan of distribution as well as a description of the securities, other than identifying the type or class);
- a WKSI may add new classes of securities and eligible majority-owned subsidiaries after effectiveness; and
- filing fees will be structured on a pay-as-you-go basis, where payment will be required only at the time of each shelf takedown.

In other words, WKSIs are being completely released from the traditional SEC review process for securities offerings. However, like all reporting issuers, WKSIs will continue to be subject to SEC review of their Exchange Act filings at least once every three years. The absence of prior SEC review in the offering context will be a particular advantage in structuring global offerings and should help eliminate the need to exclude US offerees from certain transactions.

New Exchange Act Reporting Requirements

The new rules also require additional disclosures in Exchange Act reports:

- risk factors will be required as part of the annual report on Form 10-K or Form 20-F (and will need to be updated in Form 10-Q filings);
- accelerated filers and WKSIs must disclose in their annual reports on Form 10-K or Form 20-F if, more than 180 days before the end of the fiscal year to which the Form 10-K or Form 20-F relates, the SEC staff issued material comments that remain unresolved at the time of the filing; and
- voluntary filers under the Exchange Act must disclose their status as such by checking a box on the cover page of their periodic reports "for informational purposes only," to indicate that they may cease to file Exchange Act reports "at any time and for any reason without notice."

Conclusion

The world as we know it will change dramatically this December. Gun-jumping issues will be more limited and problems that arise will be easier to address. Free writing prospectuses will give issuers an unprecedented ability to communicate with investors during the

offering process and, where necessary, will permit offerings to be updated in real time without recirculation. Road shows will likely become publicly accessible in IPOs. Offerings by WKSIs will not be subject to SEC review.

To some extent, it remains to be seen whether the underwriting community will embrace these new freedoms, not all of which come without a price. For example, free writing prospectuses are subject to liability under Section 12(a)(2) and Section 17(a)(2), and it is unclear whether the new rules adequately address cross-liability for members of the deal team who are not involved with a free writing prospectus used by another deal team member. Free writing prospectuses could become commonplace or may be used only in isolated circumstances.

Taken together, the new rules are designed to entice issuers back to the world of registered offerings by making the process more user-friendly. On the other hand, the *WorldCom* case gives underwriters strong cause to prefer Rule 144A offerings (since those offerings are subject only to the general antifraud provisions of the federal securities laws, and not Section 11, which was the basis for liability in *WorldCom*). It will be interesting to see which of these two competing influences will ultimately predominate.

In any case, the new rules will provide the most striking changes for the largest 30 percent of listed issuers that will qualify as WKSIs. They will be released on their own recognizance and will no longer be subject to advance supervision by the SEC. We are looking forward to an interesting fall and winter as we all adjust to these important regulatory changes.

Endnotes

[1] Release No. 33-8591, 34-52056 (July 19, 2005), available at <http://www.sec.gov/rules/final/33-8591.pdf>. For the proposing release, see Release No. 33-8501, 34-50624 (Nov. 3, 2004), available at <http://www.sec.gov/rules/proposed/33-8501.htm>. The final rules will take effect 120 days after publication in the Federal Register, which typically occurs approximately two weeks after the SEC release date. Based on this time frame, the effective date would be on or about December 1, 2005.

[2] The free writing prospectus provisions do not apply to "ineligible issuers," which include issuers that (1) are not current in their Exchange Act reports (other than enumerated Form 8-K filings), (2) filed for bankruptcy within the last three years; (3) were, in the last three years, blank check companies, shell companies (other than business combination shells) or penny stock issuers; and (4) fall into other enumerated categories.

[3] Where the rules require a free writing prospectus to be filed, the free writing prospectus does not have to be filed as part of the registration statement, although the filing must identify the registration statement to which the free writing prospectus relates.

[4] The new rules provide that Section 11 liability will continue to be measured, consistent with current practice, based upon information provided at the time of effectiveness or when the information becomes part of the registration statement.

[5] In addition to debt securities, the $1.0 billion threshold will cover any non-convertible securities other than common equity. Both of the thresholds for WKSI eligibility will be measured as of a date within a 60-day window period (similar to the window used for Form S-3 and Form F-3 eligibility) of the latest of the issuer's most recent (1) filing of a shelf registration statement; (2) amendment to a shelf for Section 10(a)(3) purposes; or (3) Form 10-K or Form 20-F, if in the last 16 months the issuer has filed neither a shelf nor a Section 10(a)(3) shelf amendment.

Office locations:

Boston
Brussels
Chicago
Frankfurt
Hamburg
Hong Kong
London
Los Angeles
Milan
Moscow
New Jersey
New York
Northern Virginia
Orange County
Paris
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorneys listed below or the attorney whom you normally consult. A complete list of our *Client Alerts* can be found on our Web site at www.lw.com.

If you wish to update your contact details or customize the information you receive from Latham & Watkins, please visit www.lw.com/resource/globalcontacts to subscribe to our global client mailings program.

If you have any questions about this *Client Alert*, please contact Brian G. Cartwright, Alexander F. Cohen, Kirk A. Davenport, John J. Huber, Ian D. Schuman, Joel H. Trotter, Loryn B. Zerner or any of the following attorneys.

Boston
David A. Gordon
+1-617-663-5700

Brussels
Andreas Weitbrecht
+32 (0)2 788 60 00

Chicago
Mark D. Gerstein
Christopher D. Lueking
+1-312-876-7700

Frankfurt
Hans-Jürgen Lütt
John D. Watson, Jr.
+49-69-60 62 60 00

Hamburg
Joachim von Falkenhausen
+49-40-41 40 30

Hong Kong
John A. Otoshi
David T. Zhang
+852-2522-7886

London
Alexander F. Cohen
Bryant Edwards
+44-20-7710-1000

Los Angeles
Brian G. Cartwright
Thomas W. Dobson
+1-213-485-1234

Milan
Michael S. Immordino
+39 02-85454-11

Moscow
Anya Goldin
+7-501-785-1234

New Jersey
David J. McLean
+1-973-639-1234

New York
Kirk A. Davenport II
Marc D. Jaffe
+1-212-906-1200

Northern Virginia
Eric L. Bernthal
+1-703-456-1000

Orange County
Patrick T. Seaver
+1-714-540-1235

Paris
Dominique Basdevant
John D. Watson, Jr.
+33 (0)1 40 62 20 00

San Diego
Scott N. Wolfe
+1-619-236-1234

San Francisco
Tracy K. Edmonson
+1-415-391-0600

Shanghai
Rowland Cheng
+86 21 6101 6000

Silicon Valley
Robert A. Koenig
+1-650-328-4600

Singapore
Michael W. Sturrock
+65-6536-1161

Tokyo
Michael J. Yoshii
+81-3-6212-7800

Washington, D.C.
John J. Huber
William P. O'Neill
Joel H. Trotter
+1-202-637-2200

Ten good rules

What every public company should know about disclosing future operating results

Every public company must decide whether and to what extent to give the market future operating results. Because public companies are not required by any stock exchange or the Securities and Exchange Commission (SEC) to provide investors with these projections, this is a subjective decision. Investors and analysts can be demanding. Their questions about future company performance will begin at the IPO road show and continue on every quarterly earnings call, and at investor meetings and conferences in between. Many companies will sort through the overlapping webs of safe harbours, case law and liability provisions, and conclude that earnings guidance is simply not worth the headache.

Other companies will conclude that the market needs help in setting earnings expectations and will take the guidance plunge. The decision to give guidance can spring from a desire to share good news with investors to help the market reach to a higher valuation for the company's stock or from a desire to correct analysts' overly optimistic earnings expectations. Whatever the motivation, management should understand the legal landscape before going forward. It is possible to give guidance in a deliberate and careful way without incurring undue liability. It is also possible to make mistakes that can have real financial consequences.

The decision whether to give guidance and how much guidance to give is an intensely individual one. Each company should have a policy on guidance that suits its individual personality, and there is no one-size-fits-all solution in this area. However, there are some issues that every chief executive officer, chief financial officer and audit committee member should consider before formulating a guidance policy.

1) Designate a single executive officer or a limited number of executive officers to communicate with analysts and investors about future plans and prospects. This is usually confined to the CEO and CFO, or can include the heads of business divisions.

2) Adopt an appropriate and consistent guidance policy and follow it. The most basic decisions are whether to give guidance on a quarter-by-quarter basis or on a year-by-year basis, and then how far forward to project results. Some businesses are stable and predictable. For them, predicting earnings on a quarter-by-quarter basis might be an option. Many energy companies, for example, have pre-sold most of their power output many years into the future. Conversely, businesses with lumpy revenue streams, or that experience seasonality or weather issues might not feel they can make quarterly projections prudently.

3) Do not rely on boilerplate. Explain the assumptions underlying forward-looking statements and disclose the risks that anticipated results might not be realized. The cautionary statements should match the guidance in dynamic, carefully tailored terms. These disclaimers must temper the predictions of a rosy future with a balanced discussion of what could go wrong. The risk disclosure should also be appropriately updated with each publication – don't just use the language from prior years.

4) Have prepared remarks reviewed by counsel and stick to the script. The best guidance and related cautionary disclosures are given in a controlled environment. The most popular forum is the year-end or quarter-end earnings call, which allows a high degree of internal control. Many companies prefer to give guidance orally on their earnings calls and do not produce a written version of their statements for the related earnings press release. For a company executive who is comfortable sticking tightly to a prepared script, this is a perfectly acceptable choice. For others, putting it down in writing in the earnings release might be a wise internal control. Viewed with hindsight, overly optimistic guidance can result in financial cost to the company, and its directors and officers. Legal counsel should be part of the quality control and risk/reward evaluation process. It is not always true that the investor relations department wants more projected information and lawyers want less. In practice, good guidance can only be achieved by balancing the benefits to the company and the associated risks, and counsel can assist in this balancing act.

5) Disclose guidance and other material information only in public forums. The SEC's Regulation FD prohibits "selective disclosure" of material non-public information and must also be taken into account in discussions about providing guidance. Regulation FD was enacted, in part, to eliminate the practice of providing insight into management's expectations of future operating results to the select and privileged few and not to the many. Regulation FD and subsequent enforcement actions have effectively eliminated the historical practice of privately walking analysts' earnings estimates up or down to avoid unpleasant surprises at quarter-end or year-end. Guiding analysts about future earnings is still permitted under Regulation FD, as long as the analysts and the general public learn the same thing at the same time. Updating or confirming prior guidance is treated the same way under Regulation FD – it's all fine provided the public gets the information at the same time as the analysts.

"It is possible to give guidance without incurring undue liability. It is also possible to make mistakes that can have real financial consequences"

The 10 rules for public companies' guidance

1 Put a small number of people in charge
2 Be consistent
3 Do not rely on boilerplate
4 Stick to the script
5 Only disclose in public forums
6 Be prepared for questions
7 Don't comment on analyst reports
8 Watch out for non-Gaap numbers
9 Continually evaluate disclosure
10 Be particularly careful when offering or selling securities

Those that ignore Regulation FD's prohibition on selective disclosure do so at their peril.

6) Be prepared for questions. There are at least three good reasons to anticipate analysts' questions about guidance. First, there are some questions you will want to answer and, if the answer has not been scripted, it might not come out with the appropriate nuance. Second, there are some questions you will not want to answer. It helps to have worked out in advance which questions you are prepared to answer and which questions merit only a "no comment" response. Do not be afraid to say "no comment" in response to questions or to deflect uncomfortable questions by restating your guidance policy. Lastly, Regulation FD frowns on answering follow-up questions in private calls or meetings where the public does not have access, so the earnings call script will effectively limit what can be talked about in private meetings in between earnings calls.

7) Do not comment on or redistribute analysts' reports, and only review advance copies of analysts' reports for factual errors. If you edit analysts' reports too extensively, they can be deemed your own.

8) Watch out for non-Gaap numbers. The SEC's Regulation G requires public companies that disclose or release non-Gaap financial measures to include in that disclosure, or release a presentation of, the most directly comparable Gaap financial measures and a reconciliation between those measures and Gaap. Don't forget Regulation G.

"Those that ignore Regulation FD's prohibition on selective disclosure do so at their peril"

9) Continually evaluate whether changed circumstances argue for an update of previous disclosures. Even if your policy is to comment on guidance only once a year, don't follow it blindly. Particularly in the context of securities offerings, sales by insiders and/or share repurchase programmes, be sure market expectations are managed to avoid unpleasant surprises. Circumstances that might cause an update can occur quickly and at inopportune times, and companies need to be able to act quickly in this era of immediate information flow. All of the main players should coordinate and communicate so informed judgments can be made as to what to say to the market and when.

10) Be particularly sensitive to these rules in the context of an offering of securities, share repurchase programme or acquisition transaction, or when insiders are selling stock. The pendancy of a securities offering creates special issues for guidance givers and involves a range of regulatory requirements. In share repurchase programmes, the key to avoiding liability is careful forethought to the timing of guidance and share repurchases. For example, consider limiting share repurchases to time periods that closely follow guidance announcements. The more closely in time the repurchases follow the guidance, the less likely that intervening events might have undermined the guidance. And, for companies with particularly active share repurchase programmes, consider delegating decision-making authority to a third party or to a corporate officer who is walled off from the company's internal financial and operational projections. Similar sensitivities arise when insiders are selling shares.

Ultimately, all decisions related to market guidance should be made in a deliberate manner and should be the subject of careful internal control, including discussion with counsel. Plan ahead, script statements carefully, and make sure the critical assumptions underlying projected results are explained so investors and analysts can evaluate projections fairly.

By Kirk Davenport and Steven Stokdyk of Latham & Watkins LLP

SAMPLE

POLICY ON PUBLIC DISCLOSURES OF MATERIAL INFORMATION

The goal of the _____ (the "Company") Disclosure Policy is to provide timely dissemination of Company information, in a consistent and orderly fashion and in accordance with legal and regulatory requirements. This disclosure policy confirms in writing our existing policy.

Many of these policies require careful judgment. Any questions regarding the policy or its interpretation in any particular instance should be directed to _____, our General Counsel, or _____, our outside legal counsel ("Outside Counsel").

General Procedures on Public Disclosures of Material Information

All speeches, written statements, presentations and other external communications of Company information with meaningful financial content, or with content likely to have a material impact on a stockholder's perception of the value of the Company (collectively, "Material Disclosures") will be coordinated through the Company's Chief Financial Officer and General Counsel. Examples of such communications include, but are not limited to, press releases on earnings, conference calls with analysts to discuss earnings releases, and presentations at industry conferences geared to securities analysts and institutional investors.

In general, all communications containing Material Disclosures will be reviewed by the Company's Chief Financial Officer and the General Counsel and to the extent that any such Material Disclosure may relate to or affect the Company's financial statements, the Audit Committee of the Company's Board of Directors, prior to their use. Material Disclosures which are part of SEC filings, or which pertain to potential acquisitions or other non-routine matters, will also be reviewed by the General Counsel and the Outside Counsel.

Press Releases and other Written Communications

Designated personnel, as appropriate, will (i) draft the press release or other written communication, (ii) circulate it for review to the General Counsel, the Chief Financial Officer and other officers as appropriate, (iii) alert Nasdaq, and (iv) disseminate the release through a national wire service and other distribution channels.

Financial Disclosures that will be part of documents to be filed with the Securities & Exchange Commission will be prepared by the Finance Department and reviewed by the Chief Financial Officer, the General Counsel, the Board of Directors (to the extent required by law), and other officers and the Outside Counsel as appropriate.

The Company shall endeavor to include in its press releases and other documents containing Disclosures, such as (i) appropriate cautionary statements, (ii) specific time references such as "as of (specific time and date rather than indefinite time references such as 'currently'), we see the following trend…" to minimize the duty to update, and (iii) information sufficient to answer likely questions to minimize further inquiry.

Oral Corporate Communications

The Company's Chief Executive Officer will designate the primary Company spokespersons (the "Spokespersons") for all Material Disclosures. Others within the Company or its operating units from time to time may be designated by the Chief Executive Officer to respond to specific inquiries as necessary or appropriate. It is essential that the Spokespersons as well as the Outside Counsel continue to be fully apprised of all company developments in order that they be in a position to evaluate and discuss those events that may impact the disclosure process, e.g. the status of any merger activities, material operational developments, extraordinary transactions, major management changes, etc. The Spokespersons shall continue to be integrally involved in scheduling and developing presentations for all meetings and other communications with analysts, stockholders, and the media, for arranging appropriate interviews with Company management, and for responding to all inquiries from the public for additional information about Financial Disclosures.

If the Chief Executive Officer, any Company Spokesperson, any executive officer of the Company, or any member of the Company's Board of Directors, inadvertently discloses material non-public information in any non-public forum, such person shall immediately notify the General Counsel and the Outside Counsel. The Company will promptly provide public disclosure of such inadvertently disclosed material information, either via press release, an SEC filing on Form 8-K, a public-access conference call or Webcast, or similar method, unless the Company secures an agreement from the recipient or recipients to hold such information in confidence.

Policy on Responding to Calls from the Financial Community, Stockholders and the Media

Employees who are not authorized Spokespersons, and members of the Company's Board of Directors, should refer all calls from the financial community, stockholders and the media to one of the Spokespersons designated above.

Policy on Reviewing Analyst Reports

With regard to responding to financial models or drafts of analysts' research reports or models, it is the Company's policy to review for factual content only. The Company may also comment on assumptions based on incorrect data. A statement will be provided with each review stating that the Company has reviewed the report or model for factual errors only and this review does not endorse the analysis, soft information or conclusions in the report. Control of this process, including the scheduling of analysts' meetings, is centralized through the Company's Chief Financial Officer.

Policy on Responding to Rumors

It is the policy of the Company to respond consistently to questions about rumors regarding the Company or its business with the following statement: "It is our policy not to comment about rumors or speculation." The Company may be required to make a more definitive statement when it is clear that the Company is the source for the rumors which are causing movement in the trading price of the Company's shares, if any. This determination shall

be the decision of the Chief Executive Officer, the Chief Financial Officer, the General Counsel and other officers of the Company as appropriate in consultation with the Outside Counsel.

Policy on Commenting on Analysts' Earnings Estimates

The Company will schedule a conference call with analysts once a quarter to discuss the Company's earnings results, projected earnings and its analysis of future trends. The conference call will be preceded by a broadly-disseminated press release, which will include the means of public access. The call will be accessible (in listen-only mode) by stockholders and others outside the analyst community via toll-free telephone call, Webcast, or other similar method. The Company will not make Financial Disclosures, other than in a broadly-disseminated press release or publicly-accessible analyst call.

Should the Company determine during the quarter that earnings will likely be out of the range of current analyst estimates (particularly if earnings will likely be below the range), the Company may consider issuing a broadly disseminated press release, following by a group call to analysts in accordance with the procedures outlined above. The Outside Counsel should be consulted as early as possible when it appears that such circumstances may exist.

Policy on Corporate Presentations

The Spokespersons, Chief Executive Officer, and others may, from time to time, give presentations at industry conferences geared to securities analysts and institutional investors. Such events may be sponsored by the Company or by third parties.

Any presentations to be given at such conferences should be reviewed in advance by the Spokespersons, the General Counsel, and if appropriate, by the Outside Counsel. In addition, in certain situations it may be appropriate to document a series of questions and answers to better prepare the presenter.

Policy on Forward-Looking Statements

It is the Company's policy to provide selective forward-looking information to enable the investment community to better evaluate the Company and its prospects. The Company will make statements and respond to inquiries with respect to, for example, significant new product developments, projected demand or market potential for products or services. Where possible, Company Spokespersons and the General Counsel (and the Outside Counsel, if necessary) will review the information ahead of time to verify that such information does not constitute a Financial Disclosure.

The Company will ensure that such statements are identified as "forward-looking" in accordance with the guidelines of the Private Securities Litigation Reform Act of 1995, as amended. Moreover, all statements will be accompanied by (or identify the public availability and location of) meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those projected in the statement.

Policy on Communications with Board of Directors

The Board of Directors will be kept aware of all material developments and significant information to be disseminated to the public. Moreover, Board members and other insiders will be apprised of material developments which the Company is not ready to announce publicly in order to avoid premature or selective disclosure or inadvertent insider trading.

Adopted on _____

IPO White Paper

The Importance of Beginning a Strategic IR Partnership Early in the IPO Process

Executive Summary

Embarking on an IPO is one of the most exciting events in a company's life cycle, and it is also one that typically creates many questions on how to best proceed. Which are the right set of bankers, should we do a "joint books" or "co-lead" deal, are we big enough to go public, how should the company be positioned, what financial model should we be presenting, what metrics do we want to present once we are public, should we provide guidance and how should we do so, what information can we share with the bankers, is that the same as what we can share with the analysts, and the list goes on.

Having an experienced IR advisor, with significant capital markets experience and an unbiased perspective, is a critical asset during the IPO phase. VC's are often biased based on their equity investments, the vast majority of Board members do not have experience interacting with investors and making decisions that occur throughout the IPO process, equity research analysts are no longer able to participate as "partners" the way they once could, and bankers can have conflicting agendas during the IPO (i.e., showing a higher growth rate may be necessary to make a company attractive or big enough, yet it can make it much more difficult for a company to create a solid track record as a public company).

In our experience, many of the most important decisions and evaluation criteria don't get the attention they deserve during the IPO process, while companies will spend days and weeks going back and forth on sentences in the S-1 registration statement that will ultimately make no difference on the success of the company's IPO or post-IPO performance. The bottom line is properly managing expectations, beating and raising guidance, and marketing and positioning the story to investors and analysts are all areas that IR can have a positive impact on (and they are areas that have a significant impact on long-term management credibility and valuation). Notably, the cost of engaging an IR advisor during the IPO process is relatively inconsequential compared to banker, accounting and legal fees, even though there is significant value added.

From start to finish, important areas strategic IR can assist in during the IPO process include:

- **Investment banker selection assistance**
- **Preparation for organizational meeting**
- **Preparation for analyst teach-in**
- **Financial model formulation and communication**
- **Metric and information disclosure**
- **Roadshow preparation and Q/A preparation**
- **Infrastructure preparation**
- **Presentation training**
- **Digital media**

Westport, CT Boston, MA New York, NY Los Angeles, CA

One of the most important decisions private companies will make is its **selection of underwriters**. Your IR advisor should be able to leverage its buy-side contacts to get up to date opinions on the banking firms being evaluated, and then drill down to conduct due diligence on the specific research analysts that would most likely cover companies once it became a public company.

Research analysts are not as active in the IPO process as they once were, but they can still make or break a deal and they are critical to aftermarket support. As such, it is very important that private companies carefully evaluate the research analysts from several perspectives. First, is the analyst enthusiastic about the story. We find it amazing when we hear about companies that have selected a given banking firm if they have either not met or come away with a luke warm feeling after meeting the research analyst. It is the analyst, not the banker, that performs the sales force teach-in to explain the story to the institutional sales force; the analyst is the one who creates a model on the company; the research analyst takes questions from the buyside/salesforce during the roadshow; and it is the research analyst that rolls out coverage post IPO.

We have seen emerging growth IPOs have a difficult time getting done, even with bulge bracket firms, when the senior analysts were luke warm on the story. We have seen other situations where research analysts have rolled out with "neutral" or "sell" ratings even though the stock was below the IPO price level – which is significant because the buy-side knows that sell-side analysts are privy to greater levels of information during the IPO due diligence process.

After courting research analysts, developing relationships over time, and having a good sense of which ones truly understand and appreciate a company's fundamental position, it is important to work with an IR advisor to conduct independent checks with the buyside. These will show which sell-side analysts the buyside use as their primary calls in a given sector. An analyst may love a company and understand its position, but if no-one on the buyside respects what the analyst has to say, it may influence whether to include the firm on the deal (or at a minimum how much economics the firm should receive to participate in the offering).

After conducting proper due diligence on all relevant factors in banker selection (bankers, distribution capabilities, specialty sales forces, research capabilities, etc.), it is important to realize that all banking firms are not going to accept a role in the IPO just because they have told you all along that they love the company. You will find certain firms that will not "go to the right" of other firms on the cover of the prospectus, some firms will not take anything less than a book runner role, others will not take less than co-lead position, some will not provide the top banker or research analyst on deals where they are not the lead manager, some will take a co-lead but they need at least 35% economics to do so, and some firms will provide high quality research and aftermarket support for as little as 1% economics or even free!

The bottom line is that companies need to keep their options open, start from the far left of the cover and work toward the right. It is also increasingly common to see 4 or even 5 banks on the cover, even for deals as small as $50 million. A strategic IR advisor that has participated in many IPOs and knows the banking firms well, can help private companies evaluate how to best construct the cover and obtain top notch research and after market support for a relatively small investment.

After the banking team is selected, companies need to **prepare for the organizational meeting**, followed shortly thereafter by the **analyst teach-in**. The organizational meeting will entail presentations from executives in areas such as sales, marketing, services, R&D, business development, legal, HR, finance and the CEO.

An independent strategic IR advisor with significant IPO experience should be leveraged to help in preparation for these very important meetings. The organizational meeting begins to set the tone for how companies will be positioned and this is the first major event where the quality of management is being evaluated. Related to this, the sales pipeline, forecasting process and financial model related to revenue, net income, cash flow and growth rates are evaluated in detail, and significant opinions are formed after these presentations.

One of the important considerations in organizational meetings (and analyst teach ins) is **what information will be disclosed**. Companies should be considering what kind of metrics do competitors frequently disclose, what metrics are important in running the business, and what metrics might be disclosed on a quarterly basis once public. A strategic IR

advisor can help the management team make these decisions, which are important during the IPO process and critical post-IPO.

It is important to keep in mind that investment banking firms are taking underwriting risk during the IPO, and as such, information will be shared during the IPO process that will not necessarily be disclosed as a public company. There may be some information that is shared with the bankers that is not shared with the research analysts, and some information may be shared with both that will never be shared again. A strategic IR advisor is a good independent third party to review this information before presenting it to bankers and analysts which are evaluating the company and management with every piece of disclosure.

Further to the high level of scrutiny during these meetings, it is extremely important that companies do not slap together presentations the day or two before the organizational and analyst meetings. Bankers and analysts still need to participate in the commitment committee calls before investment banking firms are given the green light by their firms to underwrite an IPO. During our investment banking and research careers, we have walked away from deals during mid-stream when companies have done a particularly poor job of presenting the company, rigor in sales process, adequate pipeline and comfort underlying the financial forecast, etc. While walking away from the IPO can be the most visible impact related to a poor performance by management during this stage of the IPO process, there are other less than optimal outcomes such as bankers persuading companies to potentially sell the company rather than push forward with an IPO; or, in a tough IPO environment bankers will push ahead with what they consider the highest quality companies while they will hold back companies that they do not believe will present as well.

While the organizational meeting can be a much friendlier environment (bankers are still largely in "sell mode"), companies need to take their level of preparation to the next level when it comes to the analyst teach-in, which comes several weeks after the organizational meeting. The level of detail and metrics shared related to pipeline management, quarterly projections, and business drivers is much greater in this meeting. It is the company's responsibility to both get the research analysts excited to sell the company's story to the rest of their firm's constituencies, in addition to feeling comfortable with the financial model that they must commit to.

A strategic IR advisor that has significant IPO experience as a banker, research and IR professional is an excellent advisor during this critical **financial model presentation and communication stage.** Management has a once in a lifetime opportunity to set expectations. It is critical that management clearly articulate the details as to what has driven historical results and what will drive revenue and expenses in the upcoming quarters/years.

A strategic IR advisor can work with management to help ensure that expectations are at the most desirable (and appropriately conservative) starting level. When presenting a financial model to bankers and analysts, companies often do not consider the appropriate level of cushion that is needed to raise estimates over time. For example, the "out year" is often the year off of which valuations are determined, and companies often do not want to discount their expected growth rate materially off of what they believe is achievable because of the associated valuation impact, bankers telling them they need to show a certain level of growth to be considered attractive to growth investors, pressure from VCs or simply a lack of experience in the IPO process.

This can turn out to be a short-cited decision, however, if companies do not consider that with the exception of the IPO bubble period, a primary factor that makes stocks perform over the long-term is meeting/beating/raising estimates. When getting ready to present a quarterly financial model to analysts, a management team should ask themselves if they are ready to have the "out year" estimate raised a minimum of 4 times and potentially 8 times before the year is completed.

Unless an investor is selling a significant majority of their stock on the IPO, it almost always pays off to go with more conservative estimates up front (and a lower valuation) because if the company delivers on its financial targets the stock is much more likely to be higher 12 months down the road if estimates are being raised over the course of the year. To this point, a company can end up delivering the same revenue and EPS over a 12 month time period, but the ending valuation can be materially different depending on how the expectations are managed over time.

When presenting forecasts to analysts during the pre-IPO phase, there is a significant divergence that we see in terms of what kind of projections management teams share with bankers and analysts. Some companies show ranges, other show point numbers – and those who do differ from showing the internal plan, the internal plan with a slight haircut that management makes investment decisions based off of, or the equivalent of a "Street Plan." A strategic IR advisor can work with management on how to best present the financial forecast to give analysts comfort that there are appropriate degrees of conservatism built into the model and management understands how to appropriately manage expectations as a public company.

In addition to doing a quality job in presenting the financial model, it is equally important that companies follow up with research analysts to see where they come out with their finished models. Did the analysts properly model the seasonality of revenue and expenses, is there a tight range or a wide dispersion in the analyst estimates – which could create different messages being sent to the market, and did any of the analysts discount the model more than management is comfortable with – which will impact valuation.

Management and IR must stay on top of analyst estimates before the deal is filed, and even more so after the initial filing as companies close in on putting a price range on the cover and research analysts conduct their sales force teach-in. In a worst case scenario, we are aware of a company that delayed their IPO by several months, completed a quarter in the meantime, did not provide an adequate review of the finished quarter's results and the related impact on forward estimates. The outcome was analysts rolling out with higher estimates than management were prepared to guide to in their first quarter out of the box. This led to a significant decline in the stock price and a hit to management's credibility.

Once a company has filed their S-1 statement, it is time to turn the attention toward the roadshow and infrastructure preparation. The strategic IR advisor can play an important role in **roadshow presentation and Q/A preparation** based on significant IPO experience and first hand knowledge of what investors are focused on, what questions analysts ask, and what kind of answers investors are looking to hear.

One of the frequent mistakes that we typically see is companies spending much too much time putting slides together. Slides are moved around, moved back to the original position, new slides are put in, and then they are taken out. The process continues for weeks, with less time being spent on what management is actually going to say as they are walking through the slides. Even more importantly, how is management going to answer the difficult questions throughout the presentation. As a result, many companies spend 70-80% of their time "working slides" and only 20-30% of the time working on their voice over and q/a.

We would advise companies to spend roughly 40% of their time on the slides, 30% on the voice over and 30% of Q/A prep. A company can have the best slide deck in the world, but if the voice over does not make the story easy to understand it will be lost on investors. In addition, great slides and a compelling voice over will be equally ineffective if management is not prepared to effectively answer the laundry list of CEO/CFO questions that will come up. Investors only have 30 minutes to decide whether they want to participate in the IPO, and they are evaluating everything management says under a microscope as a result.

While the strategic IR team can help management to prepare for the right things to say, a corporate communications team is also indispensable in helping management teams from a **presentation training** perspective. No matter how experienced or inexperienced management teams are, we have never seen a management team that did not feel as if they benefited from presentation training. While we recently participated on a pre-IPO panel ourselves, one of the other panelists that was previously an investment banker and currently a CFO of a public company stated that he took presentation training and would advise that every company do the same.

Another factor that companies should increasingly consider as part of their roadshow preparation is the use of **Digital Media**. Descriptions of a product or a customer reference in a prospectus is one thing, but to see a customer on video sharing their experience with a product and the business benefits that they have generated as a result can be extremely powerful. Starting a presentation with a high impact, thirty to sixty second overview of a company in digital media can be engaging and powerful, and a strategic IR advisor can help to focus the message for investors. .

At the same time management is preparing the roadshow, it is important that the **IR infrastructure** is being put in place to support the company once it is public, and this is another area where the strategic IR advisor is involved. From a systems perspective, the strategic IR advisor should have access to essential data services for tracking analyst estimates, obtaining equity research, competitor transcripts, shareholder information, and market making information among others.

In addition, the company must ready the IR portion of their web site, with the vast majority of companies deciding to outsource the management of the IR website to a third party such as Thompson or Shareholder.com. The strategic IR advisor should have special IPO package rates with vendors such as these, in addition to services such as BusinessWire and PRNewsWire for press release distribution. The cost for all of these services can range from a couple thousand dollars per month to over $10,000 per month, and a strategic IR advisor should help a company to minimize these costs while putting in place a best practices infrastructure.

Other process related areas that need to be determined before the management team hits the road is how phone calls are going to screened, who is authorized to speak to Wall Street professionals, will the company go with an all electronic investors kit or will physical materials be mailed. In addition, an IR plan should be put in place that determines how many days should the CEO/CFO be prepared to spend participating in investor conferences and non-deal roadshows, will there likely be a follow-on transaction or what is the expected activity around the time of the lock up, how will the company handle requests for company visits, and who will the company target from the sell-side for additional coverage.

Conclusion

The IPO is one of the most exciting events in a company's life cycle, and it is an event that must be prepared for properly in order to serve as a foundation for long-term success. An experienced strategic IR advisor can add value and a unique, independent perspective throughout the IPO process. It is for these reasons that wise clients engage an IR advisor at the same time they begin to think about banker selection.

Additional information from ICR

Appendix I: In-house or Outsource

One of the common questions many companies face as they prepare for an IPO is should we have an internal person focused on IR or should we outsource the function. At ICR, we work with clients as both an outsourced function, as well as a complement to internal resources. Our total client base is over 190, and approximately 25% of our clients have internal resources dedicated to investor relations. Most companies that have internal resources dedicated to IR are larger cap and more mature, but they still benefit from ICR's capital markets experience and independent perspective when it comes to strategic IR messaging and strategy. While we are happy to work with clients in any structure, more than 90% of our historical IPO client relationships prefer the outsourced model because the cost/value is extremely compelling.

It makes sense for a company to hire dedicated IR resources during the IPO stage if it anticipates having significant sell-side coverage and an overall high level of exposure (i.e., salesforce.com or Google). That said, ICR has IR clients that have expanded research coverage to 15 analysts in the years following an IPO and the outsourced model still works extremely well.

For a sensible fixed fee, ICR clients gain a team of former sell-side and buy-side analysts that have 24/7 availability on all important IR matters, and our services include all strategic and process related matters. In addition, ICR invests several hundred thousand dollars each year in data services to ensure that we are able to provide our clients with all of the tools necessary to run a top notch IR program. Comparable experience would be impossible to hire internally at such a price, and that does not consider the cost savings realized as result of ICR's preferred vendor relationships and investments in data services.

Appendix II: ICR's Technology Team

TIM DOLAN, TECHNOLOGY GROUP HEAD, SENIOR MANAGING DIRECTOR
Tim spent eight years with Deutsche Bank Alex. Brown, where he became a top rated analyst covering the enterprise software sector (both applications and infrastructure software). Tim's achievements included being named to the Institutional Investor (II) All-American Research team, Global II All-American Research team, #1 rated software analyst by the Wall Street Journal, and a top 5 analyst by both Reuters and the Greenwich poll.
GARO TOOMAJANIAN, SENIOR VICE PRESIDENT
Garo spent nearly two decades analyzing and working in the technology industry. Garo most recently spent 7 years as a senior technology research analyst with RBC Capital Markets, where he was recognized as a leading analyst in the electronic design space and covered companies in the software and semiconductor sector. Garo also spent over 10 years in sales, marketing and consulting roles in the electronic design automation (EDA) industry.
STACI STRAUSS MORTENSON, SENIOR VICE PRESIDENT
Staci spent 8 years as a portfolio manager/analyst at Camelot Capital, a technology fund with several hundred million dollars in assets. At Camelot, Staci was a Partner and invested in a broad range of software, services and Internet companies. Previously, Staci spent 6 years as a Senior Account Manager at Connors Communications, a PR and marketing firm specializing in the consumer technology, B2B companies and education markets.
KORI DOHERTY, VICE PRESIDENT
Kori was formerly an Equity Research Associate with First Albany, where she covered the Network Security and Network Management sectors. Prior to First Albany, Kori spent two years in Investor Relations and Corporate Finance with American Science and Engineering, a publicly-traded, high tech manufacturing company.
WENDY BURNS, VICE PRESIDENT
Wendy formerly held equity research positions on the sell-side for six years at RBC Capital Markets, Inc., First Albany Capital and Janney Montgomery Scott. During this time frame, she covered a range of sectors, including electronic design automation, semiconductor IP, telecommunications, as well as entertainment software.

Table of Contents
(Listed in order of appearance in a standard IPO prospectus)
(IPO Prospectus Disclosure Items have been added for all IPOs after 1/1/01)

LATHAM & WATKINS

Number 558 January 3, 2007

Client Alert

Latham & Watkins Tax Department

SEC Revises Executive and Director Compensation Disclosure Rules

"On December 22, 2006, the Securities and Exchange Commission (SEC) released interim final rules changing the reporting of stock and option awards. These changes will be effective for 2007 proxy statements and annual reports, as well as registration statements filed for companies with fiscal years ending after December 15, 2006."

On December 22, 2006, the Securities and Exchange Commission (SEC) released interim final rules changing the reporting of stock and option awards in the Summary Compensation Table (SCT), Director Compensation Table (DCT) and Grants of Plan-Based Awards Table as contained in proxy statements, annual reports and registration statements. In addition, the SEC changed how to report in the Summary Compensation Table the salary and bonus which an executive elects to forgo in favor of receiving non-cash compensation. ***These changes will be effective for 2007 proxy statements and annual reports, as well as registration statements filed for companies with fiscal years ending after December 15, 2006.*** The changes to the disclosure rules are summarized as follows:

Stock Awards and Option Awards Columns

A company must now report the annual compensation cost of stock and option awards over the requisite service period as described in FAS 123R in the Stock Awards and Option Awards columns of the SCT and the DCT. Accordingly these columns will now correlate to the dollar amount that a company will recognize for financial reporting purposes for that fiscal year. Under the rules released by the SEC in August, the total aggregate fair value of the stock and option grants were previously required to be reported in these columns. This amount is now required to be disclosed in the Grants of Plan-Based Awards Table, as described below.

Because the amounts in the Stock Awards and Option Awards columns of the SCT and DCT include the annual compensation cost for all awards over their vesting period, the compensation cost of grants made in years prior to 2006 will now also be included in the tables.

Forfeited awards are required to be footnoted, and the amount of compensation cost previously disclosed will be deducted from the amount otherwise disclosable in the period in which the award is forfeited. This could result in a negative amount being disclosed.

In addition, these changes may impact the determination of who will be a named executive officer, since such amounts are included in determining the three most highly compensated officers of a company.

Grants of Plan-Based Awards Table

The Grants of Plan-Based Awards Table has been revised to add a *new column*

(column (l)) disclosing the grant date fair value of each individual equity award, as computed under FAS 123R. This is the amount that was formerly required to be reported in the Stock Awards and Option Awards columns of the SCT and DCT. It should be noted that the fair value of each grant is required to be reported and not the aggregate of all grants, which was how such amounts were to be previously disclosed in the SCT and DCT.

In addition, if any option or stock appreciation right is repriced or otherwise materially modified during the last completed fiscal year, then the incremental fair value, computed as of the repricing or modification date in accordance with FAS 123R must also be disclosed in the Grants of Plan-Based Awards Table.

The DCT was also revised to require similar footnote disclosure of the fair value of each equity award grant, as well as incremental fair value of any repriced or otherwise materially modified option or stock appreciation right in the prior fiscal year.

Reporting of Salary and Bonus Received in the form of Non-Cash Compensation

The SEC also revised the instructions to the Salary and Bonus columns of the SCT regarding the disclosure of salary or bonus forgone at the election of a named executive officer in favor of receiving stock, equity-based or other form of non-cash compensation. Under the revised instruction, the forgone amount is reported in the Salary or Bonus column, as applicable, with a footnote disclosing the non-cash compensation received and referencing the Grants of Plan-Based Awards Table, where such stock, option or non-equity incentive plan award elected is reported.

The SEC's release describing these amendments can be found at http://www.sec.gov/rules/final/2006/33-8765.pdf

HellerEhrman LLP
Venture Law Group

CLIENT UPDATE

August 23, 2006

SEC Adopts New Rules on Executive Compensation Disclosure

On July 26, the SEC adopted rules that will significantly expand the current requirements for disclosure by public companies of executive and director compensation. This Client Update provides a brief summary of the new rules.

Although the rules as adopted were substantially similar to the rules proposed in January, there were some important changes. In particular, the new rules will require significant disclosure about stock option grant practices.

The new rules will generally be effective for annual reports and annual meeting proxy statements filed for fiscal years ending on or after December 15, 2006, and Securities Act registration statements that require compensation information filed on or after December 15, 2006. The changes to the Form 8-K rules will be effective in October 2006, 60 days after publication of the rules in the Federal Register (which as of this writing has not yet occurred).

Although the annual report and proxy statement rules will continue to require three years' compensation information for designated officers, companies will not be required to restate prior year's compensation information to comply with the new rules. As a result of special transition rules, in the first year of compliance with the new rules, each company will be required to provide information only for the most recent fiscal year. In the second year of compliance, the company will be required to provide information for the two most recent fiscal years. Beginning with the third compliance year and continuing thereafter, the company will be required to provide three years' information.

This Update consists of

- an Executive Summary, which list the issues and action items arising under the new rules that Board, Compensation Committees and senior management should focus on immediately;
- a Detailed Summary of the new rules; and
- an Appendix with forms of the new compensation disclosure tables that will be required in annual reports, proxy statements and other SEC filings.

GENERAL COUNSEL

CONFIDENTIAL

DATE

To the Holders of
Registration Rights of
COMPANY

RE: COMPANY - Notice of Registration Rights

Dear Sir or Madam:

COMPANY (the "Company") is considering an underwritten initial public offering (the "Proposed Offering") of its Common Stock (the "Common Stock") which would involve the registration of a certain number of shares of Common Stock with the Securities and Exchange Commission (the "SEC"). On June 30, 2005, the Company filed a Registration Statement on Form S-1 (the "Registration Statement") with the SEC in connection with the Proposed Offering. UNDERWRITER are acting as representatives (the "Representatives") of the underwriters (the "Underwriters") of the Proposed Offering. Neither the size nor the structure of the Proposed Offering has been finalized and the Company reserves the right to change the same and to terminate the Proposed Offering at any time.

Under the Registration Rights Agreement among the Company and certain holders of the Company's Series 1 Preferred Stock that are parties thereto dated as of June 9, 2004 (the "Rights Agreement"), you have the right to have your shares of Common Stock which would be issuable upon conversion of Series 1 Preferred Stock at the time of the Proposed Offering ("Registrable Securities"), included in the Registration Statement and Proposed Offering, subject to pro rata cutbacks by the Underwriters. Some of the shares to be sold in the Proposed Offering may be allocated to you and the shareholders who desire to register and sell their shares (the "Selling Shareholders"). Time constraints require that you indicate now the maximum number of Registrable Securities you are requesting to be registered and offered for sale. In the event there is a limitation placed by the Company's underwriters on the number of shares that Selling Shareholders can sell, the Company will be required to allocate the available number of shares among the Selling Shareholders on a pro rata basis according to each Selling Shareholder's proportion of the total number of Registrable Securities requested to be registered by the Selling Shareholders. The Representatives of the Underwriters have the

right pursuant to the Rights Agreement executed by you to exclude any or all shares of the Selling Shareholders from the Proposed Offering if and to the extent they are of the opinion that including such shares would adversely affect the marketing of the shares to be sold by the Company in the Proposed Offering.

The purpose of this letter is to (i) notify you of the Company's intent to register shares of its Common Stock, (ii) determine whether you wish to participate in the Proposed Offering, and (iii) in the event you do not wish to participate in the Proposed Offering, request that you provide the Company with a written waiver to that effect. Please be aware that the market for public offerings is highly volatile and there can be no assurance that the Proposed Offering will proceed on schedule or will be successfully completed.

Whether or not the Proposed Offering occurs as planned depends upon a number of factors, including market conditions at the time the SEC has completed its review of the Registration Statement. A final decision on whether to proceed with the Proposed Offering will be made by the Company and the Representatives of the Underwriters at that time. Please note that it is very important that there be no pre-offering publicity that might cause the SEC to raise questions with respect to the marketing of the Proposed Offering. **ACCORDINGLY, YOU ARE ADVISED TO EXERCISE DISCRETION IN DISCUSSING THE SUBJECT MATTER OF THIS LETTER WITH ANY PERSON. THE PROPOSED OFFERING COULD BE INDEFINITELY DELAYED OR EVEN TERMINATED AS A RESULT OF ANY DISCLOSURE OF INFORMATION THAT YOU CURRENTLY POSSESS REGARDING THE COMPANY THAT HAS NOT OTHERWISE BEEN PUBLICLY DISCLOSED. PLEASE KEEP CONFIDENTIAL ALL INFORMATION RELATING TO THE PROPOSED OFFERING, AND PLEASE LIMIT YOUR DISCUSSIONS TO YOUR FINANCIAL AND LEGAL ADVISORS AND IMMEDIATE FAMILY, IF NECESSARY.**

In deciding whether to include your shares in the Proposed Offering, you should consider, in addition to the opportunity for liquidity, other factors such as: the potential of the Company's Common Stock either to decline or appreciate in value in the future, the customary underwriting discounts and commissions (typically 7%) of the price at which such shares are sold to the Underwriters, as well as any applicable stock transfer costs. Please note that the Proposed Offering price per share will be determined by negotiations among the Pricing Committee of the Board of Directors and the Representatives. **NO PRICE RANGE WITH RESPECT TO THE COMMON STOCK HAS BEEN NOR IS EXPECTED TO BE ANNOUNCED PRIOR TO THE DEADLINE FOR SUBMITTING THE ENCLOSED ELECTION NOTICE.**

Each Selling Shareholder will be required to execute (through a duly authorized attorney-in-fact) an Underwriting Agreement which will govern the sale of shares to the Underwriters and certain other related documents. Each Selling Shareholder shall further be required to execute a Power of Attorney appointing certain of the Company's officers as their attorneys-in-fact ("Attorneys-in-Fact") for purposes of executing the Underwriting Agreement and related documents and taking certain other actions on their

behalf in connection with the Proposed Offering. The Attorneys-in-Fact shall also enter into a custody agreement on behalf of the Selling Shareholders with a transfer agent, pursuant to which such transfer agent will act as custodian of the certificates representing the shares of Common Stock each Selling Shareholder will be selling in the Proposed Offering. In addition, as a condition to your participation in the Proposed Offering, you will be required to execute the form of Lock-Up Agreement in the form previously delivered to you with respect to the Company shares that you own and do not sell in the Proposed Offering.

To enable the Company to determine which shareholders would like to participate in the Proposed Offering as described above, we have enclosed for execution and return an Election Notice of Participation or Waiver attached as Exhibit A (the "Election Notice").

Please complete and return the Election Notice as soon as possible if you wish to participate in the Proposed Offering, but in no case later than August 12, 2005. Please return the Election Notice whether or not you wish to participate in the Proposed Offering. **IF YOUR COMPLETED ELECTION NOTICE IS NOT RECEIVED BY AUGUST 12, 2005, YOU MAY NOT BE ABLE TO PARTICIPATE IN THE PROPOSED OFFERING.**

Please return the Election Notice via overnight courier to our counsel, ISSUER COUNSEL, at the following address:

ISSUER COUNSEL'S
NAME &
ADDRESS

A pre-paid Federal Express envelope is enclosed for your convenience.

Thank you in advance for your assistance. To facilitate the Proposed Offering, we would appreciate your response as soon as possible, but in any event by Friday, August 12, 2005. If you have any questions or comments, please do not hesitate to call me at the Company at, or ISSUER COUNSEL'S NAME & NUMBER

Sincerely,

EXHIBIT A

ELECTION NOTICE OF PARTICIPATION OR WAIVER

The undersigned hereby elects to have _____ shares of Common Stock registered under the Registration Statement and included in the proposed public offering (the "Proposed Offering") of Common Stock of COMPANY (the "Company") pursuant to the terms of the Registration Rights Agreement among the Company and certain holders of the Company's Series 1 Preferred Stock that are parties thereto dated as of June 9, 2004 (the "Rights Agreement"). **I acknowledge that this number of shares may be reduced in whole or in part subject to the terms of the Rights Agreement. I also acknowledge that any shares sold by the undersigned as part of the Proposed Offering will be sold through the underwriters for the Proposed Offering on the same terms and conditions as shares sold by the Company and other selling shareholders.**

The undersigned hereby elects not to exercise its registration rights under Section 4 of the Rights Agreement in connection with the Proposed Offering and hereby waives its right to participate in the Proposed Offering.

HOLDER:

_____

By: _____

Name: _____

Title: _____

LOCK-UP AGREEMENT

_____, 200_

UNDERWRITER
As Representatives of
the several Underwriters listed in
Schedule I to the Underwriting
Agreement referred to below
c/o UNDERWRITER
UNDERWRITER'S ADDRESS

Re: COMPANY – Initial Public Offering

Ladies and Gentlemen:

The undersigned understands that you**,** as Representatives of the several Underwriters, propose to enter into an Underwriting Agreement (the "Underwriting Agreement") with COMPANY, a STATE corporation (the "Company"), providing for the initial public offering (the "Initial Public Offering") by the several Underwriters named in Schedule I to the Underwriting Agreement (the "Underwriters"), of common stock, $0.01 per share par value, of the Company (the "Securities"). Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Underwriting Agreement.

In consideration of the Underwriters' agreement to purchase and make the Initial Public Offering of the Securities, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned hereby agrees that, without the prior written consent of UNDERWRITER on behalf of the Underwriters, the undersigned will not, during the period beginning on the date of the preliminary prospectus printed in connection with the marketing of the Securities (the "Preliminary Prospectus") and ending 180 days after the date of the final prospectus (the "Public Offering Date") relating to the Initial Public Offering (the "Prospectus"), (1) offer, pledge, announce the intention to sell, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase, or otherwise transfer or dispose of, directly or indirectly, any shares of Common Stock, $0.01 per share par value, of the Company (the "Common Stock") or any securities convertible into or exercisable or exchangeable for Common Stock (including without limitation, Common Stock which may be deemed to be beneficially owned by the undersigned in accordance with the rules and regulations of the Securities and Exchange Commission and securities which may be issued upon exercise of a stock option or warrant) or (2) enter into any swap or other agreement that transfers, in whole or in part, any of the economic consequences of ownership of the Common Stock, whether any such transaction described in clause (1) or (2) above is to be settled by delivery of Common Stock or such other securities, in cash or otherwise. In addition, the undersigned agrees that, without the prior written consent of UNDERWRITER on behalf of the Underwriters, the undersigned will not, during the period ending 180 days after the date of the Prospectus, make any demand for or exercise any right with respect to, the registration of any shares of Common Stock or any security convertible into or exercisable or exchangeable for Common Stock.

Notwithstanding the foregoing, if (1) during the last 17 days of the 180-day restricted period, the Company issues an earnings release or material news or a material event relating to the Company occurs;

or (2) prior to the expiration of the 180-day restricted period, the Company announces that it will release earnings results during the 16-day period beginning on the last day of the 180-day period, the restrictions imposed by this Letter Agreement shall continue to apply until the expiration of the 18-day period beginning on the issuance of the earnings release or the occurrence of the material news or material event.

The foregoing restrictions shall not apply to any transfer of Securities (a) to any underwriters in the Initial Public Offering pursuant to the underwriting agreement for the Initial Public Offering; (b) as a bona fide gift or gifts; (c) to any trust for the sole benefit of the undersigned or the undersigned's family; (d) by will or intestacy to the undersigned's legal representative, heir or legatee; (e) if the undersigned is a partnership, corporation, limited liability company or similar entity, (1) to another partnership, corporation, limited liability company or similar entity if the transferee and the undersigned are affiliates or (2) as a distribution to partners , stockholders or members of the undersigned; or (f) acquired in the public market on or after the date of the final prospectus filed by the Company with the Securities and Exchange Commission in connection with the Initial Public Offering, *provided* that, in the case of any transfer pursuant to clauses (b) through (f), (1) each donee, transferee or distributee shall execute and deliver to each UNDERWRITER a duplicate form of this letter; (2) no filing by any party under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, is required in connection with any such donation, transfer or distribution (other than a filing on a Form 5 made after the expiration of the lock-up period in connection with a donation or transfer pursuant to clauses (b) through (e)); and (3) no transfer includes a disposition for value.

The restrictions herein will commence on the later of (x) the date of this Letter Agreement and (y) the date of the Preliminary Prospectus. This Letter Agreement shall lapse and become null and void if the Public Offering Date shall not have occurred on or before _____ (or earlier if the Company or Underwriters terminate the Initial Public Offering by written notice to the other).

In furtherance of the foregoing, the Company, and any duly appointed transfer agent for the registration or transfer of the securities described herein, are hereby authorized to decline to make any transfer of securities if such transfer would constitute a violation or breach of this Letter Agreement.

The undersigned hereby represents and warrants that the undersigned has full power and authority to enter into this Letter Agreement. All authority herein conferred or agreed to be conferred and any obligations of the undersigned shall be binding upon the successors, assigns, heirs or personal representatives of the undersigned.

The undersigned understands that the Underwriters are entering into the Underwriting Agreement and proceeding with the Initial Public Offering in reliance upon this Letter Agreement.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of STATE, without regard to the conflict of laws principles thereof.

Very truly yours,

_____
Name:
Address:

MEMORANDUM

COMPANY

DIRECTORS, OFFICERS AND CERTAIN STOCKHOLDERS QUESTIONNAIRE

TO: **Directors, Officers and Certain Stockholders of COMPANY**
FROM: ISSUER COUNSEL
DATE:

WHAT IS THIS?

- Enclosed please find one copy of a "Directors, Officers and Certain Stockholders Questionnaire" (the "Questionnaire") relating to the proposed public offering of COMPANY (the "Company").

HOW DO I READ THIS?

- Certain terms used herein are italicized, and definitions of such italicized terms are provided in Annex A to the Questionnaire. References in the Questionnaire to the Company's "Current Fiscal Year" are to the Company's fiscal year ending December 31, 200_. Reference to the Company's "Last Fiscal Year" are to the Company's fiscal year ended December 31, 200_. Parenthetical references to "Items" used in the Questionnaire refer to items of Regulation S-K promulgated under the Securities Act of 1933, as amended.

WHY IS THIS NECESSARY?

- The following information is requested from you in connection with the preparation of a Registration Statement (the "Registration Statement") to be filed with the Securities and Exchange Commission (the "SEC") regarding the proposed public offering. The information requested in the Questionnaire is for your protection and that of the Company. The information supplied in response to the Questionnaire will be used to assure that the information included in the Registration Statement will be correct. Accordingly, great care should be exercised in completing the Questionnaire.

WHY AM I SIGNING THE QUESTIONNAIRE?

- Your signature at the end of the Questionnaire will constitute:
  - (i) your consent to the Company's use of the information in the Registration Statement;
  - (ii) your acknowledgment that *material* misstatements or the omission of *material* facts in the Registration Statement may give rise to civil and criminal liabilities to the Company, each officer and director of the Company signing the Registration Statement and other persons associated with the Registration Statement;
  - (iii) your agreement to notify the Company of any misstatement of a *material* fact in the Registration Statement, or any amendment thereto, and of the omission of any *material* facts necessary to make the statements contained therein not misleading, as soon as practicable after a copy of the Registration Statement or any such amendment has been provided to you and prior to the completion of the Company's proposed public offering; and
  - (iv) your confirmation that the following statements are correct, to the best of your knowledge and belief.

WHO MUST SIGN THE QUESTIONNAIRE?

- All directors, officers and stockholders that hold more than a 5% interest of the Company must complete and sign the Questionnaire. Please note that, in the event you qualify under more than one of the foregoing (e.g. you are an officer and a 5% stockholder), you must complete and sign the Questionnaire in (or on behalf of) each capacity that so qualifies.
- In the event you hold shares of the Company *beneficially* (see definition) it can be complicated to determine who or what entity is required to complete and sign the Questionnaire. If you have any questions or concerns regarding who should properly complete the Questionnaire, please call ISSUER COUNSEL

INSTRUCTIONS

- **It is very important that an answer be given for each question; if the answer to any question is "No," "None" or "Not Applicable," please so indicate**. Where necessary, you may wish to continue your responses on a separate sheet and attach it to the Questionnaire. Please type or print your answers.
- Please complete the Questionnaire and return it to **ISSUER COUNSEL**

THE EXISTENCE AND CONTENTS OF THE QUESTIONNAIRE AND YOUR ANSWERS IN RESPONSE TO THE QUESTIONS ARE CONSIDERED CONFIDENTIAL AND PROPRIETARY BY THE COMPANY AND SHOULD BE TREATED ACCORDINGLY.

1. BACKGROUND INFORMATION

1.1 **Biographical or Corporate Information**. Please provide the following biographical or corporate information (where applicable): (Item 401)

Full Name or Corporate Name:_____

Business Address:_____

Business Telephone:_____

Birth date and Age:_____

1.2 **Business Experience**.

(a) Positions and *Offices* with the Company. Please complete the table below by listing all positions and *offices* held with the Company and/or any *subsidiary* (including any present position).

Position/Office	**Term of Office** (Month and Year)	***Nature of Responsibilities***

(b) Membership in Committees of the Board of Directors. ***(Directors only)*** If you indicated above that you have served or currently are serving as a director of the Company, have you also served or are you currently serving on a committee of the Board of Directors?

ANSWER: YES NO

If "yes", please indicate below (i) the name of the committee, (ii) the time period during which you have been or were a member and (iii) whether you have served as chairman of the committee:

(c) *Compensation Committee Interlocks*. ***(Directors only)*** Are you involved in any *compensation committee interlock*? (Item 402(j)(3))

ANSWER: YES NO

If "yes", please describe:

(d) Past Business Experience. Please provide information regarding your principal occupation(s) or employment(s) during the last five (5) years, including the month and year of each shift of principal occupation or employment. Also, please describe the *nature of responsibilities* in your positions prior to employment with the Company (including, if relevant, information regarding the size of the operation supervised). Feel free to add any other information which you feel is relevant. (Item 401(a)(b) & (e)(1))

Time Period (Month/Year)	**Official Name of Employer**	**Principal Business of Employer**	**Position(s) Held**	***Nature of Responsibilities***

Are any of the above employers a parent, *subsidiary* or *affiliate* of the Company?

ANSWER: YES NO

If "yes", please describe:

1.3 **Financial Statement Expertise**.

(a) ***(Current Directors Only)***. Are you able to read and understand fundamental statements, including a company's balance sheet, income statement and cash flow statement?

ANSWER: YES NO

(b) ***(Current Directors Only)***.

Do you possess an understanding of generally accepted accounting principles and financial statements?

ANSWER: YES NO

Do you possess the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves?

ANSWER: YES NO

Do you have experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be

raised by the Company's financial statements, or experience actively supervising one or more persons engaged in such activities?

ANSWER: YES NO

Do you have an understanding of internal controls and procedures for financial reporting?

ANSWER: YES NO

Do you have an understanding of audit committee functions?

ANSWER: YES NO

If you circled "YES" regarding any of the above attributes, please indicate how you acquired such attributes:

	(Check Here If Description Applies)	**Brief Description of Your Experience**
Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions		
Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions		
Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements		
Other relevant experience		

1.4 **Arrangements for Selection**. Do you have any *arrangement* or understanding with any person and/or entity pursuant to which you were selected or nominated as a director or officer of the Company? (Items 401(a) and (b))

ANSWER: YES NO

If "yes," please describe:

1.5 **Education**. Please list all colleges and/or universities that you have attended, and all degrees received from such colleges or universities.

Name of College or University	Major	Degree Received	Year Degree Awarded

1.6 **Family Relationships**. Do you have any *family relationship* with any director, *executive officer* or person nominated or chosen to become a director or *executive officer* of the Company? (Item 401(d))

ANSWER: ***YES*** ***NO***

If "yes," please describe the family relationship:

1.7 **Directorships Held**. Are you a director or an *executive officer* of any public or private corporation or any registered investment company, or do you serve on the compensation committee or audit committee of **any** entity? (Item 401(e)(2))

Name of Company	Public	Private	Director	Compensation Committee Member	Audit Committee Member	*Executive Officer* (Please state title)

2. LEGAL PROCEEDINGS -- COMPANY

2.1 **Legal Proceedings: Investigations**. To the best of your knowledge, is any legal proceeding (including any administrative proceeding or investigation by any governmental authority) pending or contemplated to which the Company or any *subsidiary* is a party, or of which any of its or their property is or would be the subject? (Item 103).

ANSWER: ***YES*** ***NO***

If "yes," please describe the proceeding:

2.2 **Adverse Interest**. Are you, or any *associate* of yours, a party adverse to the Company or any *subsidiary*, or do you or any *associate* of yours have a *material* interest adverse to the Company or any *subsidiary* in any pending or contemplated legal proceeding (including administrative proceedings and investigations by governmental authorities)? (Schedule 14A, Item 7(a). Item 103, Instruction 4.)

ANSWER: ***YES*** ***NO***

If "yes," please describe the arrangement:

3. SECURITIES HOLDINGS

3.1 **5% Stockholders**. Do you know of any person (including corporations, partnerships, trusts, associations and other such groups) who *beneficially* owns more than 5% of any class of the Company's stock? (Item 403(a))

ANSWER: ***YES*** ***NO***

If "yes," please include the information in the table provided in Section 3.3 below.

3.2 **Voting Arrangements.** Do you know of any voting trust or similar agreement under which more than 5% of the Company's outstanding stock is held or is to be held? (Item 403(a), Instruction 7)

ANSWER: ***YES*** ***NO***

If "yes," please describe:

3.3 **Share Ownership**. Please identify the number of shares of the Company, or any of its parents or any *subsidiary*'s equity securities that you *beneficially* own as of the date of the Questionnaire. Include all shares of the Company's securities which are (i) registered in your name, including shares registered in your name as trustee, executor, custodian, pledgee, agent or nominee, either alone or with others, (ii) owned *beneficially* by you or any *associate* of yours, or (iii) registered in the name of a nominee or in street name, including any such shares held for the account of any of the above. (Item 403(b))

Name and Address of Record Owner	Type of Security	No. of Shares and % of Class	Type of Ownership (trust, partnership, direct, personal, etc.)

3.4 **Rights to Acquire Shares**. Please identify on the following table the number of shares of the Company's equity securities which you, or a 5% stockholder known to you (see Section 3.1), has the right to acquire (including *stock options*, warrants, conversion or otherwise) within (60) days of the *proposed effective date*. Include in this table all rights to acquire the Company's securities which are (i) registered in your name, including shares registered in your name as trustee, executor, custodian, pledgee, agent or nominee, either alone or with others, (ii) owned

beneficially by you or any *associate* of yours, or (iii) registered in the name of a nominee or in a street name, including any such shares held for the account of the above. (Item 403(b))

Name of Record Owner	Type of Security	Number of Shares	Type of Ownership (trust, partnership, direct, personal, etc.)

3.5 **Disclaimer of Beneficial Ownership**. Do you wish to disclaim shares *beneficially* owned and reported above for purposes other than for use in the Registration Statement?

ANSWER: ***YES*** ***NO***

NOTE: You may wish to consult with counsel regarding this disclaimer as it may be important not only in connection with securities laws, but also because, without it, your reporting the ownership of such shares might be construed as an admission of ownership for other purposes, such as short swing trading liabilities.

If "yes," please provide the information requested in the following table with respect to the person(s) who should be shown as the beneficial owner(s) of the shares in question:

Class of Stock	Number of Shares *Beneficially* Owned	Name of Actual Beneficial Owner	Relationship of Such Person to You

Please explain the nature of any indirect ownership (*i.e.*, "as trustee for children," "by wife," "by Trust," "through partnership," "through limited liability company," etc.):

3.6 **Change in Control**. Do you know of any *arrangements*, including any pledge of securities by any person, which could cause a change in *control* of the Company? (Item 403(c))

ANSWER: ***YES*** ***NO***

If "yes," please describe the arrangement.

4. LEGAL PROCEEDINGS -- INDIVIDUAL

4.1 **Types of Proceedings**. Please describe any of the following events that have occurred to you within the last five (5) years. For purposes of computing the five (5)-year period, use the date upon which the final order, judgment or decree was entered or upon which any right of appeal lapsed. For bankruptcy petitions, use the date of filing for uncontested petitions and the date of approval for contested petitions. (Item 40l(f))

(a) **Bankruptcies**.

(1) Was a petition under the federal bankruptcy laws or any state insolvency law filed by or against:

(i) you;

(ii) any partnership in which you were a general partner at the time of such filing or within two (2) years before the time of such filing; or

(iii) any corporation or business association of which you were an *executive officer* at the time of such filing or within two (2) years before the time of such filing? (Item 401(f)(1))

ANSWER: ***YES*** ***NO***

(2) Was a receiver, fiscal agent or similar officer appointed by a court for:

(i) you;

(ii) any partnership in which you were a general partner at the time of such filing or within two (2) years before the time of such filing; or

(iii) any corporation or business association of which you were an *executive officer* at the time of such filing or within two (2) years before the time of such filing? (Item 401(f)(1))

ANSWER: ***YES*** ***NO***

(b) **Criminal Convictions**. Have you been convicted in a criminal proceeding, or are you the named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)? (Item 401(f)(2))

ANSWER: ***YES*** ***NO***

(c) **Court Orders and Injunctions**.

(1) Have you been the subject of any order, judgment, decree or sanction, not subsequently reversed, suspended or vacated, issued in any court or proceeding, relating to an alleged violation of:

(i) any state or federal securities law or regulation; (Item 401(f)(5))

(ii) any federal commodities law? (Item 401(f)(6))

ANSWER: ***YES*** ***NO***

(2) Have you been the subject of any order, judgment or decree, not subsequently reversed, vacated or suspended by any court, permanently or temporarily enjoining you from or limiting the following activities: (Item 401(f)(3))

(i) engaging in any type of business practice;

(ii) acting as a merchant, broker, advisor, or any other person regulated by the Commodity Futures Trading Commission;

(iii) acting as an advisor, underwriter, broker or dealer in securities;

(iv) acting as a director or employee of an investment company, bank, savings and loan, or insurance company?

ANSWER: ***YES*** ***NO***

(d) **Orders By Other Authorities**. Have you been the subject of any order, judgment or decree, not subsequently reversed, suspended or vacated, issued by any federal or state authority enjoining, barring, suspending or otherwise limiting your right to engage in any type of business practice or to be associated with persons engaged in any such business practice? (Item 401(f)(4))

ANSWER: ***YES*** ***NO***

(e) **Regulatory Sanctions**. Has any sanction been imposed on you by a (i) **self regulatory organization**, (ii) **contract market**, (iii) **futures association** or any substantially equivalent foreign authority or organization?

ANSWER: ***YES*** ***NO***

(f) ***Promoters* and *Control Persons.*** To the best of your knowledge, has any *control person* or *promoter* of the Company been involved in any proceeding or subject to any order of any of the types described in this Section 4? (Item 401(g))

ANSWER: ***YES*** ***NO***

If "yes," please name the *control person*/*promoter* and describe the proceeding or order:

(g) **Regulatory Investigations**. Have you ever been the subject of any inquiry, investigation or lawsuit by the Securities and Exchange Commission, the National Association of Securities Dealers, or any other regulatory organization?

ANSWER: ***YES*** ***NO***

If you answered "yes" to any of the above questions, please describe the circumstances of the proceeding in detail and attach it to the Questionnaire.

5. ECONOMIC RELATIONSHIPS

5.1 **Certain Business Relationships**. Are you, or have you been during the Company's Current Fiscal Year or the Company's last three completed fiscal years, an *executive officer* of, or the record or *beneficial owner* of, in excess of a 10% equity interest in any firm, corporation or other business or professional entity: (Item 404(b)(1), (2), (3) and (6))

(a) which has made payments to the Company or any *subsidiary* for property or services, during the Company's Last Fiscal Year, or proposes to make during the Company's Current Fiscal Year, in excess of 5% of:

(1) the Company's consolidated gross revenues for its Last Fiscal Year; or

(2) the other entity's consolidated gross revenues for its last fiscal year;

(b) to which the Company or any *subsidiary* have made payments for property or services, during the Company's Last Fiscal Year, or proposes to make during the Company's Current Fiscal Year, in excess of 5% of:

(1) the Company's consolidated gross revenues for its Last Fiscal Year; or

(2) the other entity's consolidated gross revenues for its last fiscal year;

(c) to which the Company or any *subsidiary* were indebted at the end of the Company's Last Fiscal Year, in an aggregate amount of 5% of the Company's total consolidated assets at the end of the such fiscal year?*

*The Company's total consolidated assets as of 12/31/04 were $24.5 million.

ANSWER: ***YES*** ***NO***

If the answer is "yes" to any of paragraphs (a) - (c) above, please provide an attachment to the Questionnaire identifying (1) the entity with which the Company has such a relationship, (2) the nature of your affiliation with such entity and the relationship between such entity and the Company, and (3) the amount of the business done between the Company and such entity during the Company's Last Fiscal Year.

5.2 **Business Ownership**. Do you now own, or have you at any time owned of record or *beneficially*, in excess of a 10% equity interest in any firm, corporation or other business or professional entity specified in Questions 5.1 (a)-(c) above?

ANSWER: ***YES*** ***NO***

If "yes," identify and briefly describe the business of such firm, corporation, or other business or professional entity, and the nature of your relationship with such entity.

6. COMPENSATION OF EXECUTIVE OFFICERS (Executive Officers Only)

6.1 **Annual Compensation.** Please complete the table below for the Company's Last Fiscal Year. (Item 402(b)(2)(iii)).

Fiscal Year	Salary**	Bonus**
2004		

**Salary and bonus include cash and non-cash remuneration. Also include all amounts deferred by you, including amounts deferred pursuant to 401(k) plans. For stock and other forms of non-cash remuneration, please disclose the fair market value at the time the compensation was awarded.

6.2 **Other Annual Compensation.**

During the Company's Last Fiscal Year, have you, or any member of your *immediate family*, received any personal benefits or other compensation from the Company as a result of your employment (excluding benefits from group life, health, etc., or other similar *plans*)? (Item 402(b)(2)(iii)(C)(1) – (5))

(a) Examples of perquisites paid by the Company include, without limitation:

(1) Home repairs and improvements.

(2) Housing and other living expenses (including domestic service) provided at your principal and/or vacation residence.

(3) Personal use of the Company's property (such as housing, airplanes, cars, computers).

(4) Personal travel expenses.

(5) Personal entertainment and related expenses, including club memberships.

(6) Medical expenses.

(7) Payment of fees for legal, accounting and other professional service matters unrelated to the business of the Company.

(8) Relocation expenses.

(9) The use of personnel of the Company for personal purposes.

(10) Payments to financial institutions for loans with below commercial market interest rates.

(11) Loans from the Company at below commercial market interest rates (please use your interest savings as the value of this perquisite).

ANSWER: ***YES*** ***NO***

If "yes," please describe each perquisite and the dollar amount received during the Last Fiscal Year:

Fiscal Year	Perquisite	($) Value
2004		
2004		
2004		

(b) Have you received:

(1) above market or preferential earnings on *restricted stock*, *stock options*, or *SARs*;

(2) any deferred compensation;

(3) any earnings or interest on *long-term incentive plan* compensation;

(4) any amounts reimbursed for payment of taxes; or

(5) any discount on the purchase price of the Company's securities not generally available?

ANSWER: ***YES*** ***NO***

If "yes," please describe.

6.3 **Long-Term Compensation.** Please complete the table below for the Company's Last Fiscal Year. (Item 402(b)(2)(iv))

Fiscal Year	Dollar Value of *Restricted Stock* Awards*	Number of Securities Underlying *Stock Options*/*Stock Appreciation Rights (SAR)*	Dollar Value of *Long-Term Incentive Plan* Payouts (*LTIP*)
2004			

**Restricted stock* awards should be calculated by multiplying the market price of the Company's unrestricted stock on the date of the grant by the number of shares awarded.

Please complete the Tables below (if applicable)

***RESTRICTED STOCK* AWARDS TABLE**

If you have received any *restricted stock* awards during the Last Fiscal Year, please state: (Item 402(b)(iv)(Instructions))

(i) the date of the award or purchase: _____

(ii) the class of security awarded: _____

(iii) the number of shares: _____

(iv) the purchase price per share: _____

(v) the fair market value on date of award: _____

(vi) any conditions to vesting: _____

(vii) any dividends paid: _____

***LTIP* AWARDS TABLE**

If you have received any *LTIP* awards during the Last Fiscal Year please state: (Item 402(e))

(i) the dollar value of all payouts: _____

(ii) the number of shares, units or other rights awarded: _____

(iii) performance or time period before maturation: _____

(iv) for plans not based on stock price, the estimated range of payout amounts for:

(a) the threshold (minimum amount payable for a certain level of performance): _____

(b) the target (amount payable if specific performance targets are reached): _____

(c) the maximum (maximum possible payout): _____

(v) *material* terms of an award and the criteria for determining payouts: _____

***STOCK OPTIONS/SARs* TABLE**

If you have received any individual *stock options* or *SARs* during the Last Fiscal Year, please state: (Item 402(c))

(i) the number of securities underlying the *stock options* and *SARs* granted: _____

(ii) the percentage the grant represents of total *stock options* and *SARs* granted to employees: _____

(iii) the per share exercise or base price of the *stock options* or *SARs*: _____

(iv) the expiration date of the *stock options* or *SARs*: _____

(v) the potential realizable value of each grant or the present value of each grant: _____

6.4 **Other Compensation.** Have you received any other compensation from the Company that could not be properly reported in other areas? (Item 402(b)(2)(v))

ANSWER: ***YES*** ***NO***

Examples include, but are not limited to:

(i) amounts paid for resignation, retirement or change in *control* of the Company;

(ii) above market or preferential amounts earned on *restricted stock*, *stock options*, *SARs* or other deferred compensation;

(iii) annual Company contributions or other allocations to vested and unvested plans; and

(iv) any payments on insurance premiums.

If "yes," please describe.

6.5 ***Stock Options*/*SARs* Exercised.** Have you exercised any *stock options* or *SARs* during the Last Fiscal Year? (Item 402(d))

ANSWER: ***YES*** ***NO***

If "yes," please state:

(i) the number of shares received upon exercise: _____

(ii) amount realized upon exercise: _____

(iii) the number of underlying unexercised options and *SARs* held at end of the Last Fiscal Year (separately identifying the exercisable and unexercisable *stock options* and *SARs*): _____

(iv) the value of unexercised *stock options* at the end of the Last Fiscal Year: _____

6.6 **Pension Plan and Retirement.** Have you received any contributions, payments, accruals or allocations to your account by the Company under any retirement plan, annuity, employment contract deferral, deferred compensation plan or other similar *arrangement* during the Last Fiscal Year?

ANSWER: ***YES*** ***NO***

If "yes," please identify (i) the plan; and (ii) the amount.

6.7 **Defined Benefit or Actuarial Plan**.

(a) Please provide the following information with regard to any defined benefit or actuarial plan by which benefits are determined primarily by final compensation and years of service: (Item 402(f))

(i) the compensation covered by the plan: _____

(ii) estimated credited years of service: _____

(iii) estimated annual benefits payable upon retirement: _____

(b) If you have any defined benefit or actuarial plans under which benefits are not determined primarily by final compensation and years of service, please state:

(i) the formula for determining benefits: _____

(ii) estimated annual benefits payable upon retirement: _____

6.8 **Repricing of *Stock Options*/*SARs*.** Has the exercise price of any of your *stock options* or *SARs* been adjusted or amended at any time during the Last Fiscal Year? (Item 401(i))

ANSWER: ***YES*** ***NO***

If "yes," please describe the arrangement.

6.9 **Employment Contracts and Termination of Employment and Change-in-*Control* Arrangements. (Item 402(h))**

Are you a party to or beneficiary of either of the following:

(a) Any employment agreement between you and the Company; and/or

(b) Any *arrangement* providing for payments (including periodic payments and installments) exceeding $100,000 in the event of your resignation, retirement or any other termination of your employment with the Company, or a change in *control* of the Company or a change in your responsibilities following such a change in *control*?

ANSWER: ***YES*** ***NO***

If "yes," please identify and describe such agreement or arrangement.

6.10 **Third Party Transactions**. Have you received, or are you aware, of any transaction, current or planned, between the Company and a third party, the primary purpose of which is to furnish remuneration or benefits to you?

ANSWER: ***YES*** ***NO***

If "yes," please describe the terms and conditions of such *arrangement* and any benefits received for the past fiscal year.

7. COMPENSATION OF DIRECTORS (Directors only)

7.1 **Compensation Arrangements**.

(a) Please describe the standard arrangement, including amounts, by which you are compensated for your services as a director, including additional amounts payable for committee participation or special assignments. (Item 402(g)(1))

Item	Amount
Retainer	
Fee per board meeting	
Fee per committee meeting	
Other (please describe below)	

(b) During the Company's Last Fiscal Year, did you have any compensation *arrangement* in connection with services you provided to the Company other than the standard directors' fees payable by the Company? (Item 402(g)(2))

ANSWER: ***YES*** ***NO***

If "yes," please provide a description, including amounts paid or payable on your behalf of any such *arrangement*, including (without limitation) any consulting *arrangement.*

7.2 **Program Participation**. Do you participate in any "director legacy" or "charitable award" programs? (Item 402(g))

ANSWER: ***YES*** ***NO***

If "yes," please describe.

8. TRANSACTIONS WITH THE COMPANY

PLEASE NOTE: For purposes of Questions 8.1 and 8.2 below, "Immediate Family" includes your spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, and brothers and sisters-in-law.

8.1 **Existence of Indebtedness**.

(a) Were you, any member of your *immediate family* or any of your *associates* indebted to the Company or any *subsidiary* in an amount in excess of $60,000 (excluding any indebtedness for purchases subject to usual trade terms and ordinary travel and expense payments) at any time during the Current Fiscal Year or the Company's last three completed fiscal years (*i.e.*, between January 1, 2001 and December 31, 2003)? (Item 404(c))

ANSWER: ***YES*** ***NO***

If "yes," please state:

(i) the largest total amount of indebtedness outstanding at any time during such period: _____

(ii) the nature of the indebtedness and the transaction in which it was incurred: _____

(iii) the amount outstanding as of the date of this Questionnaire: _____

(iv) the rate of interest paid or charged thereon: _____

(v) the name of such *immediate family member* or *associate*, if any, and the nature of your relationship with such *associate*: _____

(b) Has any such indebtedness arisen in a transaction involving the purchase and sale of the Company's stock within six (6) months that has not been discharged by payment? (Item 404(c), Instruction 4)

ANSWER: ***YES*** ***NO***

If "yes," state the amount of any "profit" realized and describe the transaction(s).

8.2 **Interest in Any Transaction**.

(a) Did you, any member of your *immediate family* or any of your *associates* have a direct or indirect *material* interest in any transaction or series of similar transactions in which the amount involved exceeded $60,000 (computed without regard to the amount of profit or loss involved in the transaction) during the Company's Current Fiscal Year or the Company's last three completed fiscal years to which the Company or any *subsidiary* was a party? (Item 404(a))

(b) Will you, any member of your *immediate family* or any of your *associates* have a direct or indirect *material* interest in any currently proposed transaction or series of transactions in which the amount involved exceeds $60,000 (computed without regard to the amount of profit or loss involved in the transaction), to which the Company or any *subsidiary* will be a party?

Examples of possible transactions contemplated by Questions 8.2(a) and (b) include, without limitation:

(i) periodic installments in the case of any lease or other agreement providing for periodic payments or installments (Instruction 3);

(ii) the purchase or sale of assets by or to the Company or any *subsidiary* (Instruction 5);

(iii) the purchase of the Company's stock from the Company;

(iv) indebtedness for money borrowed in which the Company is the borrower, lender or guarantor.

ANSWER: ***YES*** ***NO***

If "yes," please describe the transaction(s), naming each person who has an interest in the transaction and indicate such person's relationship to the Company, the nature of such person's interest in the transaction(s), the amount of such transaction(s) (including for such purposes all periodic installments provided for) and, where practicable, the amount of such person's interest in the transaction(s).

(c) If any such transaction involved, involves or is to involve the purchase or sale of assets by or to the Company or any *subsidiary*, other than in the ordinary course of business, did the seller acquire the asset within the two (2) years prior to such transaction?

ANSWER: ***YES*** ***NO***

If "yes," please state:

(i) cost of asset to purchaser: $_____

(ii) cost of asset to seller: $_____

Please indicate below the principle followed in determining the Company's (or its *subsidiary*'s) purchase or sale price and the name of the persons making such determinations.

8.3 **Contracts with the Company.** Are you or any of your *associates* a party to a contract with the Company or any *subsidiary*, or in which the Company or any *subsidiary* has succeeded to a party by assumption or assignment? (Item 601(b)(10))

ANSWER: ***YES*** ***NO***

If "yes," please describe (including the date and performance period of the agreement).

9. IDENTITY OF *ASSOCIATES*.

9.1 Please provide the full name, form (e.g., partnership, corporation, etc.), if applicable, nature of business done by, if applicable, each principal place of business of, if applicable, and the nature of your relationship to each *associate* of yours referred to in the answers to the Questionnaire.

Name of *Associate*	Form	Nature of Business	Principal Place of Business	Nature of Relationship

10. MATERIAL RELATIONSHIPS

10.1 **Affiliation with Accountants and Counsel.** Have you been *affiliated* or connected with a law firm (including ISSUER COUNSEL) or accounting firm that the Company has retained in the Last Fiscal Year or proposes to retain during the Current Fiscal Year? (Item 404(b)(4))?

ANSWER: ***YES*** ***NO***

If "yes," please name the firm(s), your relationship with the firm(s) and the dollar amount of fees or compensation paid by the Company to such firm(s) if that amount exceeds 5% of such firm's gross revenues from that firm's Last Fiscal Year.

10.2 **Affiliation with Investment Banking Firms.** Are you now, or have you been a partner or *executive officer* of any investment banking firm (including UNDERWRITER) that has performed services for the Company (other than as a participating underwriter in a syndicate) during the Company's last three completed fiscal years or that the Company proposes to have perform services during the Current Fiscal Year? (Item 404(b)(5))

ANSWER: ***YES*** ***NO***

If "yes," please name the firm(s), your relationship with the firm(s) and the dollar amount of fees or compensation paid to such firm(s) if that amount exceeds 5% of such firm's gross revenues for that firm's last fiscal year.

10.3 **Similar Relationships.** In addition to the transactions referred to in Questions 10.1 and 10.2, are there any other relationships between you and the Company that are substantially similar in nature and scope to the relationships described in those questions.

ANSWER: ***YES*** ***NO***

If "yes," please describe such relationships.

11. RELATIONSHIP WITH AUDITORS

11.1 Do you or does any *associate* of yours have any interest, direct or indirect, by security holdings or otherwise, in ACCOUNTING FIRM

ANSWER: ***YES*** ***NO***

If "yes," please describe.

11.2 To the best of your knowledge, was ACCOUNTING FIRM or any partner or professional employee of that firm during the Company's last three completed fiscal years (a) committed to acquire any direct *material* financial interest in the Company or (b) been connected with the Company as a *promoter, underwriter or related person*, voting trustee, director, officer or employee?

ANSWER: ***YES*** ***NO***

If "yes," please describe.

12. INDEMNIFICATION

12.1 Are there any indemnification or insurance provisions set up to protect you in any manner against any liability that you may incur as a result of your position with the Company? (Items 510 and 702)

ANSWER: ***YES*** ***NO***

If "yes," please describe the arrangement.

13. NASD MATTERS

13.1 State whether you or any of your affiliates are:

(a) a member of the National Association of Securities Dealers, Inc. (the "NASD")?

ANSWER: ***YES*** ***NO***

(b) a person associated with a member of the NASD?

ANSWER: ***YES*** ***NO***

(c) an affiliate of a member of the NASD?

ANSWER: ***YES*** ***NO***

(d) an underwriter or a related person with respect to the proposed offering of shares of Common Stock (the "Securities") of COMPANY (the "Company")?

ANSWER: ***YES*** ***NO***

NOTES:

(1) The NASD Bylaws define "member" to mean any broker or dealer admitted to membership in the NASD.

(2) The NASD Bylaws define "person associated with a member" to mean every sole proprietor, partner, officer, director or branch manager of any member, or any natural person occupying a similar status or performing similar functions, or any natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by such member (for example, any employee) whether or not any such person is registered or exempt from registration with the NASD.

(3) The NASD Bylaws define "affiliate" to mean a person who controls, is controlled by, or is under common control with, such other person.

(4) The NASD has interpreted "underwriter or a related person" with respect to a proposed offering to include an underwriter, underwriters' counsel, financial consultants and advisers, finders, members of the selling or distribution group, and any and all other persons "associated with" or "related to" and members of the immediate family of any of the foregoing persons.

If so, state the name of any such member and the nature of the affiliation or association and any particulars regarding the acquisition by you of securities of the Company or its affiliates if any, including the date of acquisition, consideration paid and number (in the case of equity securities) or face value (in the case of debt securities) of securities acquired.

If you answered "yes" to any of the Questions 13(a)-(d), please state the capacity in which you are participating in the initial public offering.

13.2 Except for the receipt of underwriting discounts and commissions, do you know if UNDERWRITER, as representatives for the other underwriters (the "Underwriters"), or any person related to the Underwriters, will receive any reimbursement for expenses or any other compensation in connection with the offering?

Do you know if the Underwriters or any person related to the Underwriters will receive any financial consulting or advisory fee in connection with the offering?

Do you know if a finder's fee will be paid in connection with the offering?

Do you know if the Underwriters or any person related to the Underwriters will receive any other type or amount of compensation (other than as set forth in the prior three questions) in connection with the offering?

Do you know if, during the preceding 12 months, the Underwriters or any person related to the Underwriters have received or acquired from the Company, any persons who are participating in the offering as selling stockholders or any director or officer of the Company any item of value or any warrants, options or other securities?

Do you know if any of the proceeds of the offering will be paid to or received by the Underwriters or any associated or affiliated person of the Underwriters or any member of the immediate family of such associated or affiliated person?

13.3 Do you own stock or other securities of any NASD member not purchased in the open market?

ANSWER: ***YES*** ***NO***

If you answered "yes" to the preceding question, please state the name of the NASD member or members and describe the securities.

NASD Member(s) whose securities you own	Description of securities

13.4 Have you entered into any arrangements within the last 12 months that provide for the receipt of any item of value and/or the transfer of any warrants, options or other securities from the Company or its subsidiaries or from the "issuer" (as defined in Appendix A) to any "member" of the NASD or any "person associated with a member" of the NASD or any "underwriter or related person" or do you propose or plan to enter into such an arrangement within the next 12 months?

ANSWER: ***YES*** ***NO***

If so, please identify the parties involved and provide the material terms of the arrangement.

13.5 Have you or any associate of yours had a material relationship with the Underwriters or any other underwriter or investment firm or underwriting organization which might participate in the underwriting of the Securities being registered?

ANSWER: ***YES*** ***NO***

If so, please describe such relationship and identify the party or parties involved.

14. TRANSACTIONS RELATED TO PROPOSED PUBLIC OFFERING

14.1 Except with respect to the proposed public offering of the Company's securities, do you know of any *plan*, agreement, *arrangement*, authorization or understanding made or to be made by any person, or any transaction already effected:

(a) To limit or restrict the sale of the securities during the period of the proposed public offering?

ANSWER: ***YES*** ***NO***

If "yes," please describe.

(b) To stabilize the market for the securities?

ANSWER: ***YES*** ***NO***

If "yes," please describe.

(c) To withhold commissions or otherwise to hold each underwriter or dealer responsible for the distribution of its participation in the proposed public offering?

ANSWER: ***YES*** ***NO***

If "yes," please describe.

15. FOREIGN CORRUPT PRACTICES ACT

In your response to this question, the following instruction apply:

a. Each question is to be read as relating to the activities or conduct of the Company and any affiliate of the Company, as well as to the conduct of any person who has acted or is acting on behalf of or for the benefit of any of them. Persons who have acted or are acting on behalf of or for the benefit of any entity include, but are not necessarily limited to, directors, officers, employees, agents, consultants and sales representatives.

b. Each question is to be read as relating not only to activities or conduct within the United States, but also outside the United States.

c. The terms "payments" and "contributions" include not only the giving of cash or hard goods but also the giving of anything else of value - for example, services or the use of property.

d. The term “indirectly” means an act done through an intermediary. Payments to sales agents or representatives which are passed on in whole or in party to purchasers, or compensation or reimbursement to persons in consideration for their acts, are examples of acts done through intermediaries.

e. Your answers include not only matters of which you have direct personal knowledge, but also any matters which you have reason to believe may have existed or occurred (for example, you may not “know” of your own personal knowledge that contributions were made by the Company to a political party in a foreign land, but, based upon information which has otherwise come to your attention, you may nonetheless have “reason to believe” that such a contribution was made. In such case, your response would be “YES.”)

Do you have knowledge or reason to believe that any of the activities or types of conduct enumerated below have been or may have been engaged in, either directly or indirectly, at any time since the founding of the Company?:

1. Any bribes or kickbacks to government officials or their relatives, or any other payments to such persons, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

2. Any bribes or kickbacks to persons other than government officials, or to relatives of such persons, or any other payments to such persons or their relatives, whether or not legal, to obtain or retain business or to receive favorable treatment with regard to business.

3. Any contributions, whether or not legal, made to any political party, political candidate or holder of governmental office.

4. Any bank accounts, funds or pools of funds created or maintained without being reflected on the corporate books of account, or as to which the receipts and disbursements therefrom have not been reflected on such books.

5. Any receipts or disbursements, the actual nature of which has been "disguised" or intentionally misrecorded on the corporate books of account.

6. Any fees paid to consultants or commercial agents which exceeded the reasonable value of the services purported to have been rendered.

7. Any payments or reimbursements made to personnel of the Company for the purposes of enabling them to expend time or to make contributions or payments of the kind or for the purpose referred to in subparts 1. through 6. above.

ANSWER: ***YES*** ***NO***

If “yes,” please describe the activity or type of conduct:

16. GENERAL

16.1 **Additional Information**. The regulations of the SEC require that, if otherwise disclosable, the information you have furnished in response to the questions above be included in the Registration Statement. If you know of any additional information necessary to make the answers you have given above not misleading in the light of the circumstances under which your answers were made, please disclose in additional sheets and attach to this Questionnaire.

ACKNOWLEDGEMENT

I hereby agree to notify the Company promptly of any changes in the foregoing information which should be made as a result of any developments, including the passage of time.

I understand and acknowledge that the Company will rely on the information set forth herein for purposes of preparing and filing the Registration Statement covering an underwritten public offering of the Company's securities.

I understand that material misstatements or the omission of material facts in the Registration Statement may give rise to civil and criminal liabilities to the Company, to each officer and director of the Company signing the Registration Statement and other persons signing the Registration Statement. I will notify the Company and its legal counsel (ISSUER COUNSEL) of any misstatement of a material fact in the Registration Statement or any amendment thereto, and of the omission of any material fact necessary to make the statements contained therein not misleading, as soon as practicable after a copy of the Registration Statement or any such amendment has been provided to me. I will promptly notify the Company and its legal counsel (ISSUER COUNSEL) of any change in the foregoing information which occurs prior to the effective date of this offering.

I CONFIRM THAT THE FOREGOING ANSWERS CONTAINED IN THIS QUESTIONNAIRE ARE CORRECTLY AND FULLY STATED TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Dated:_____, 200_ Signature: _____

Print Name: _____

ANNEX A

Definitions

The term **"affiliate"** means a person or entity that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, another person.

The term **"arrangement"** means any plan, contract, authorization or understanding, whether or not set forth in a formal document.

The term **"associate"** as used throughout the Questionnaire, means (a) any corporation or organization (other than the Company or any *subsidiary*) of which you are an officer, director, member or partner or of which you are, directly or indirectly, the beneficial owner of 5% or more of any class of equity securities, (b) any trust or other estate in which you have a substantial beneficial interest or as to which you serve as trustee or in a similar capacity, (c) your spouse, (d) any relative of your spouse or any relative of yours who has the same home as you or who is a director or officer or key executive of the Company or any *subsidiary*, (e) any partner, syndicate member or person with whom you have agreed to act in concert with respect to the acquisition, holding, voting or disposition of shares of the Company's securities.

The term **"beneficially,"** when used in connection with the ownership of securities, means (a) any interest in a security which entitles you to any of the rights or benefits of ownership even though you may not be the owner of record or (b) securities owned by you directly or indirectly, including those held by you for your own benefit (regardless of how registered) and securities held by others for your benefit (regardless of how registered), such as by custodians, brokers, nominees, pledges, etc., and including securities held by an estate or trust in which you have an interest as legatee or beneficiary, securities owned by a partnership of which you are a partner, securities held by a personal holding company of which you are a shareholder, shares held by a public company of which you are a director, officer or holder of more than a 5% interest, and securities held in the name of your spouse, minor children and any relative of yours (sharing the same home) or your spouse.

A "**beneficial owner**" of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares:

(1) voting power which includes the power to vote, or to direct the voting of, such security; and/or

(2) investment power which includes the power to dispose, or to direct the disposition, of such security.

The term "**compensation committee interlock**" exists if during the Last Fiscal Year either (1) a director of the Company also served as a member of the compensation committee (or other board committee performing equivalent functions, or, in the absence of such a committee, the entire board of directors) of some other entity and an *executive officer* of that other entity served as a director or member of the Company's Compensation Committee (or other Board committee performing equivalent functions, or, in the absence of such a committee, the entire Board of Directors); or (2) a director of the Company of also served as a director of some other entity and an executive officer of that other entity served as a member of the Company's Compensation Committee (or other Board committee performing equivalent functions, or, in the absence of such a committee, the entire Board of Directors).

The term **"control"** means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person specified, whether through the ownership of voting securities, by contract or otherwise.

A **"control person"** of a specified person is a person that directly, or indirectly through one or more intermediaries, controls the person specified.

The term **"executive officer(s)"** means the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any person who performs similar policy making functions for the Company (or other entity that may be indicated).

The term **"family relationship"** means any relationship by blood, marriage or adoption, not more remote than first cousin.

The term **"immediate family"** includes the spouse; parents; children; siblings; mothers and fathers-in-law; sons and daughters-in-law; and brothers and sisters-in-law of the person specified.

The term "**item of value**" includes the following items and all other items of value received or to be received by the underwriter and related persons in connection with or related to the distribution of the public offering: (i) discount or commission; (ii) reimbursement of expenses to or on behalf of the underwriter and related persons; (iii) fees and expenses of underwriter's counsel (except for reimbursement of "blue sky" fees); (iv) finder's fees, whether in the form of cash, securities or any other item of value; (v) wholesaler's fees; (vi) financial consulting and advisory fees, whether in the form of cash, securities, or any other item of value; (vii) common or preferred stock, options, warrants, and other equity securities, including debt securities convertible to or exchangeable for equity securities (received (a) for acting as private placement agent for the issuer; (b) for providing or arranging a loan; credit facility, merger or acquisition services, or any other service for the issuer; (c) as an investment in a private placement made by the issuer; or (d) at the time of the public offering); (viii) special sales incentive items; (ix) any right of first refusal provided to any participating member to underwrite or participate in future public offerings, private placements or other financings, which will have a compensation value of 1% of the offering proceeds or that dollar amount contractually agreed to by the issuer and underwriter to waive or terminate the right of first refusal; (x) compensation to be received by the underwriter and related persons or by any person nominated by the underwriter as an advisor to the issuer's board of directors; (xi) commissions, expense reimbursements, or other compensation to be received by the underwriter and related persons as a result of the exercise or conversion, within twelve months following the effective date of the offering of warrants, options, convertible securities, or similar securities distributed as part of the public offering; (xii) fees of a qualified independent writer; and (xiii) compensation, including expense reimbursements, previously paid to any member in connection with a proposed public offering that was not completed, unless the member does not participate in the revised public offering.

The term **"issuer"** includes the Company, any selling security holders offering securities to the public, any affiliate of the Company or selling security holder, and the officers or general partners, directors, employees and security holders thereof.

The term **"long-term incentive plan"** means any plan providing compensation intended to serve as incentive for performance to occur over a period longer than one fiscal year, whether such performance is measured by reference to financial performance of the Company or an affiliate, the Company's stock price, or any other measure, but excluding *restricted stock*, stock option and SAR plans.

The term **"material"** when used in the Questionnaire to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an

average prudent investor ought reasonably to be informed before purchasing the securities of the Company.

The term **"material relationship"** has not been defined by the SEC. However, the SEC has indicated that it will probably construe as a "material relationship" any relationship which tends to prevent arms-length bargaining in dealings with a company, whether arising from a close business connection or family relationship, a relationship of control or otherwise. It seems prudent, therefore, to consider that you would have such a relationship, for example, with any organization of which you are an officer, director, trustee or partner or in which you own, directly or indirectly, 5% or more of the outstanding voting stock, or in which you have some other substantial interest, and with any person or organization with whom you have, or with whom any relative or spouse (or any other person or organization as to which you have any of the foregoing other relationships) has, a contractual relationship.

The NASD defines a **"member"** as being any broker or dealer or individual, partnership, corporation or other legal entity admitted to membership in the NASD or any officer or partner of such a member, or the executive representative of such a member or the substitute for such a representative.

The term **"nature of responsibilities"** means any information relevant to a description of your level of professional competence and prior business experience, and may include, depending upon the circumstances (i.e., if your employment with or directorship of the Company has been for less than five years), such specific information as the size of operations supervised.

The term **"offices"** means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration or finance) and any other person who performs similar policy making functions for the Company. It may include persons such as production managers, sales managers or research scientists who are not *executive officers* but who make or are expected to make significant contributions to the business of the Company.

The NASD defines a **"person associated or affiliated with a member"** or **"associated or affiliated person of a member"** as being every sole proprietor, general or limited partner, officer, director, or branch manager of any member, or any natural person occupying a similar status or performing similar functions, or any natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by such member (for example, any employee), whether or not any such person is registered or exempt from registration with the NASD.

Thus, **"person associated or affiliated with a member"** or **"associated or affiliated person of a member"** includes a sole proprietor, general or limited partner, officer, director, or branch manager of an organization of any kind (whether a corporation, partnership or other business entity) which itself is either a *member* or a *person associated or affiliated with a member* or *associated or affiliated person of a member*. In addition, an organization of any kind is a *person associated or affiliated with a member* or *associated or affiliated person of a member* if its sole proprietor or any one of its general or limited partners, officers, directors, or branch managers is a *member, person associated or affiliated with a member* or *associated or affiliated person of a member*.

The term **"plan"** includes all plans, contracts, authorizations or assignments whether or not set forth in any formal document.

The term **"promoter"** includes:

(i) Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer; or

(ii) Any person who, in connection with the founding and organizing of the business or enterprise of an issuer, directly or indirectly receives in consideration of services or property, or both services and property, 10 percent or more of any class of securities of the issuer or 10 percent of more of the proceeds from the sale of any class of such securities. However, a person who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this paragraph if such person does not otherwise take part in founding and organizing the enterprise.

The term **"proposed effective date"** means the date on which the registration statement on Form S-1 for the proposed public offering of the Common Stock of the Company is declared effective by the United States Securities and Exchange Commission.

The term **"stock options"** includes all options, warrants, or rights to purchase securities of the Company or any *subsidiary*, other than those issued to security holders as such on a pro rata basis.

The term **"subsidiary"** means a corporation controlled by the Company, directly or indirectly, through one or more intermediaries.

The term **"restricted stock"** means any stock awarded by the Company which is subject to vesting based upon lapse of time, continued service with the Company or a subsidiary and/or attainment of performance-based conditions or milestones.

The term **"stock appreciation right"** ("SAR") means a right to receive upon exercise, in cash and/or stock, an amount equal to the excess of the fair market value of the shares to which the SAR relates over the exercise price of the SAR. SARs may be granted in tandem with Stock Options or independently of Stock Options. The term SARs includes (i) SARs payable only in cash, (ii) SARs payable only in stock, (iii) SARs payable in cash or stock at the election of the Company and (iv) SARs payable in cash or stock at the election of the holder.

The term **"underwriter or related person"** includes underwriters, underwriters' counsel, financial consultants and advisors, finders, members of the selling or distribution group, members participating in the offering, and any and all other persons associated with "affiliates" (defined above) of or "members of the immediate family" (defined above) of any of the persons described above.

Memorandum

To: Officers and Directors of COMPANY

From:

Date:

Re: EDGAR Codes

As you may know, all filings (i.e. Forms 3, 4 and 5 and Schedules 13D, 13G and 13F), evidencing ownership that are required to be filed with the SEC under the Williams Act and Section 16 of the Securities Exchange Act of 1934, as amended, are now filed electronically via the SEC's EDGAR system (Electronic Data Gathering Analysis Retrieval System). The SEC recently altered the method by which persons and companies making electronic filings via EDGAR are assigned filing codes. To be assigned EDGAR filing codes, individuals and corporate filers must access the SEC's secure Internet site and provide certain information to the SEC.

As you may know, the executive officers and directors up COMPANY will be obligated to file a Form 3 under Section 16 of the Exchange Act on or before the effectiveness of the IntraLinks registration statement. (and Forms 4 or 5 thereafter). In order to prepare and timely file these forms for each of you we will need to obtain from the SEC on your behalf your personal EDGAR filing codes.

IF YOU ALREADY HAVE EDGAR CODES ON ACCOUNT OF YOUR ASSOCIATION WITH OTHER PUBLIC COMPANIES, PLEASE COMPLETE THE FORM ATTACHED HERETO AS EXHIBIT A AND RETURN THE SAME TO:

ISSUER COUNSEL'S NAME & ADDRESS

If, you have never applied for, or received EDGAR Codes, we ask that you sign and return the limited power of attorney attached as Exhibit B. This power of attorney is limited in scope and empowers us to obtain EDGAR Codes on your behalf and eliminates the inconvenient and cumbersome process one would need to complete to obtain codes. This power of attorney does not authorize us to execute or file any forms reporting any holdings you may have in Intralinks or any other publicly traded company.

The power of attorney should be promptly returned in the self-addressed stamped envelope provided herewith to the attention of ISSUER COUNSEL'S NAME & ADDRESS so that we may begin the process of obtaining EDGAR Codes. Once your signed power of attorney has been returned to us, we will obtain your EDGAR filing codes. Once we receive your codes we will notify you by email or mail of all of your codes.

If you have any question please do not hesitate to contact ISSUER COUNSEL'S NAME & CONTACT INFORMATION

EXHIBIT A

EDGAR INFORMATION

Name:

Current CIK#:

Current CCC#:

The address you wish to have appear on any COMPANY Forms 3, 4 or 5 or Schedules 13D/13G made on your behalf:

_____
_____
_____
_____

Contact Person/Information (information to be used if we experience difficulties with your EDGAR Codes):

_____
_____
_____
_____

Please note that we will only contact you if we experience problems with your filing codes for the other codes assigned by the SEC, for example, the Password, Pass Phrase, or PMAC. We recommend that you annually update your records including your password which expires 12 months following its issue. This is not to say that for this purpose we will not be able to make filings on your behalf. Should you need assistance regarding EDGAR Codes assigned, please feel free to contact us.

EXHIBIT B

POWER OF ATTORNEY

The undersigned hereby constitutes and appoint ISSUER COUNSEL the undersigned's true and lawful attorneys-in-fact to:

(1) execute for and on behalf of the undersigned Form ID to effect the assignment of codes to the undersigned to be used in the transmission of information to the United States Securities & Exchange Commission using the EDGAR System , in accordance with the regulations of the Securities Act of 1933 and Securities Exchange Act of 1934, as amended, and the rules thereunder;

(2) take any other action of any type whatsoever in connection with the foregoing which, in the opinion of such attorneys-in-fact, may be of benefit to, in the best interest of, or legally required by, the undersigned, it being understood that the documents executed by such attorneys-in-fact on behalf of the undersigned pursuant to this Power of Attorney shall be in such form and shall contain such terms and conditions as such attorneys-in-fact may approve in such attorneys-in-fact's discretion.

The undersigned hereby grants to each such attorney-in-fact severally, full power and authority to do and perform any and every act and thing whatsoever requisite, necessary or proper to be done in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as the undersigned might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that such attorney-in-fact, or such attorney-in-fact's substitute or substitutes, shall lawfully do or cause to be done by virtue of this Power of Attorney and the rights and powers herein granted. The undersigned acknowledges that the foregoing attorneys-in-fact, in serving in such capacity at the request of the undersigned, is not assuming, any of the undersigned's responsibilities to comply with any provision, requirement or obligation under U.S. Securities Laws.

This Power of Attorney shall remain in full force and effect unless earlier revoked by the undersigned in a signed writing delivered to the foregoing attorneys-in-fact.

IN WITNESS WHEREOF, the undersigned has caused this Power of Attorney to be executed as of this ____ day of _____ 200_.

By: _____
Name:

SAMPLE AUDIT COMMITTEE CHARTER

Adopted by the Board of Directors of _____

Purpose

The purpose of the Audit Committee (the "Committee") of the board of directors (the "Board") of _____ (the "Company") is to oversee the accounting and financial reporting processes of the Company and audits of its financial statements and the effectiveness of the Company's internal control over financial reporting. Notwithstanding the foregoing, however, the Committee is not responsible for planning or conducting audits, or determining whether the Company's financial statements are complete and accurate or in accordance with generally accepted accounting principles.

Composition

The Committee shall be composed of three or more directors, as determined by the Board, each of whom shall be "independent", as that term is defined in Section 10A(m) of the Securities Exchange Act of 1934 (the "Exchange Act"), and the applicable rules and regulations ("Regulations") of the SEC, and, if and so long as the Company's securities are publicly traded, shall meet the independence and financial literacy requirements of Nasdaq or such other exchange on which the Company's shares are traded. At least one member of the Committee shall be an "audit committee financial expert", as that term is defined in the Regulations, and shall have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

Responsibilities

The Committee is charged by the Board with the responsibility to:

1. Appoint and provide for the compensation of a "registered public accounting firm" (as that term is defined in Section 2(a) of the Sarbanes-Oxley Act of 2002) to serve as the Company's independent auditor, oversee the work of the independent auditor (including resolution of any disagreements between management and the independent auditor regarding financial reporting), evaluate the performance of the independent auditor and, if so determined by the Committee, replace the independent auditor; it being acknowledged that the independent auditor is ultimately accountable to the Board and the Committee, as representatives of the stockholders.

2. Ensure the receipt of, and evaluate the written disclosures and the letter that the independent auditor submits to the Committee regarding the auditor's independence in accordance with Independence Standards Board Standard No. 1, discuss such reports with the auditor, oversee the independence of the independent auditor and, if so determined by the Committee in response to such reports, take appropriate action to address issues raised by such evaluation.

3. Discuss with the independent auditor the matters required to be discussed by SAS 61, as it may be modified or supplemented.

4. Instruct the independent auditor and the internal auditor, if any, to advise the Committee if there are any subjects that require special attention.

5. Instruct the independent auditor to report to the Committee on all critical accounting policies of the Company, all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management, ramifications of the use of such alternative disclosures and treatments and the treatment preferred by the independent auditor, and other material written communication between the independent auditor and management, and discuss these matters with the independent auditor and management.

6. Meet with management and the independent auditor, together and separately, to discuss the annual financial statements and the report of the independent auditor thereon, and to discuss significant issues encountered in the course of the audit work, including: restrictions on the scope of activities; access to required information; the adequacy of internal controls, including any special steps adopted in light of any significant deficiencies or material weaknesses in the design or operation of internal control over financial reporting identified during the course of the annual audit, and the adequacy of disclosures about changes in internal control over financial reporting; the adequacy of the disclosure of off-balance sheet transactions, arrangements, obligations and relationships in any reports filed with the SEC; and the appropriateness of the presentation of any non-GAAP financial measures (as defined in the Regulations) included in any report filed with the SEC or in any public disclosure or release.

7. Review and discuss with management and the independent auditor management's report on internal control over financial reporting, and the independent auditor's audit of the effectiveness of the Company's internal control over financial reporting and its attestation report, prior to the filing of any Form 10-K.

8. Review the management letter delivered by the independent auditor in connection with the audit.

9. If applicable, following such review and discussions, if so determined by the Committee, recommend to the Board that the annual financial statements be included in the Company's annual report on Form 10-K.

10. If applicable, meet quarterly with management and the independent auditor to discuss the quarterly financial statements prior to the filing of the Form 10-Q; provided that this responsibility may be delegated to the chairman of the Committee or a member of the Committee who is a financial expert.

11. Meet at least once each year in separate executive sessions with management, the internal auditor, if any, and the independent auditor to discuss matters that any of them or the

Committee believes could significantly affect the financial statements and should be discussed privately.

12. Have such direct and independent interaction with members of management, including the Company's chief financial officer and chief accounting officer, as the Committee believes appropriate.

13. Review significant changes to the Company's accounting principles and practices proposed by the independent auditor, the internal auditor, if any, or management.

14. Review the scope and results of internal audits, if any.

15. Evaluate the performance of the Company's Chief Financial Officer and internal auditor, if any, and, if so determined by the Committee, recommend replacement of the Company's Chief Financial Officer or internal auditor.

16. If there is an internal auditor, obtain and review periodic reports on the internal auditor's significant recommendations to management and management's responses.

17. Conduct or authorize such inquiries into matters within the Committee's scope of responsibility as the Committee deems appropriate.

18. Provide minutes of Committee meetings to the Board, and report to the Board on any significant matters arising from the Committee's work.

19. At least annually, review and reassess this Charter and, if appropriate, recommend changes to the Board.

20. Prepare the Committee report required by the Regulations to be included in the Company's annual proxy statement to the extent the Company's securities are publicly traded.

21. Establish a procedure for receipt, retention and treatment of any complaints received by the Company about its accounting, internal accounting controls or auditing matters and for the confidential and anonymous submission by employees of concerns regarding questionable accounting or auditing matters.

22. If applicable, approve, in accordance with Sections 10A(h) and (i) of the Exchange Act, the Regulations and the Auditing Standards of the Public Company Accounting Oversight Board, all professional services, to be provided to the Company by its independent auditor, provided that the Committee shall not approve any non-audit services proscribed by Section 10A(g) of the Exchange Act in the absence of an applicable exemption. The Committee may adopt policies and procedures for the approval of such services which may include delegation of authority to a designated member or members of the Committee to approve such services so long as any such approvals are disclosed to the full Committee at its next scheduled meeting.

23. Review and approve all related party transactions.

Authority

By adopting this Charter, the Board delegates to the Committee full authority in its discretion to:

1. Perform each of the responsibilities of the Committee described above.

2. Appoint a chair of the Committee, unless a chair is designated by the Board.

3. Engage and oversee independent counsel and other advisers as the Committee determines necessary to carry out its responsibilities.

4. Cause the officers of the Company to provide such funding as the Committee shall determine to be appropriate for payment of compensation to the Company's independent auditor and any legal counsel or other advisers engaged by the Committee, and payment of ordinary administrative expenses of the audit committee that are necessary or appropriate in carrying out its duties.

SAMPLE

COMPENSATION COMMITTEE CHARTER

Adopted by the Board of Directors
of

Purpose

The purposes of the Compensation Committee (the "Committee") established pursuant to this charter are to discharge the responsibilities of the Company's Board of Directors (the "Board") with respect to compensation matters for the Company's executive officers and other employees and consultants to the extent set forth herein, administer the Company's equity and other compensation plans, and take or cause to be taken such other actions and address such other matters as the Board may from time to time authorize the Committee to undertake or assume responsibility for.

Composition

The Compensation Committee will be comprised of at least two members of the Board of Directors. Such members will be elected by and serve at the discretion of the Board. Each Committee member will serve on the Committee during his or her respective term as a Board member, subject to earlier removal by a majority vote of the Board. Unless a chair is elected by the Board, the members of the Committee may designate a chair by vote of the Committee.

Unless the Company is subject, and subject to, and complies with, the NASDAQ phase-in-rules, each member of the Committee will be (1) "independent" as defined under applicable Nasdaq (or applicable stock exchange) rules (except as otherwise permitted under such rules), (2) a "non-employee director" under Rule 16b-3(b)(3)(i) promulgated under the Securities Exchange Act of 1934, and (3) an "outside director" under the rules promulgated under Section 162(m) of the Internal Revenue Code of 1986. These terms are more fully described on Exhibit A attached hereto.

In the event that the Committee has more than two members and one or more members of the Committee are absent from a meeting of the Committee or being present at a meeting recuse themselves from an action taken, the remaining members of the Committee (provided there are at least two such members), acting unanimously, shall have the power to take any necessary action. No action of the Committee shall be valid unless taken pursuant to a resolution adopted and approved by at least two members of the Committee. No member of the Committee shall participate in any discussions or deliberations relating to such person's own compensation or other matters in which such person has a material interest.

Responsibilities

The Committee is charged by the Board with the responsibility to:

1. Determine the amount and form of compensation paid to the Company's executive officers and to review the performance of such persons in order to determine appropriate compensation, as well as to establish the Company's general compensation policies and practices and to administer plans and arrangements established pursuant to such policies and practices, to take such action, and to direct the Company to take such action, as is necessary and advisable to compensate such persons and to implement such policies and practices in a manner consistent with its determinations.

2. Determine the amount and form of compensation paid to the Company's Chief Executive Officer ("CEO"), to take such action, and to direct the Company to take such action, as is necessary and advisable to compensate the CEO in a manner consistent with its determinations, and to review at least annually the CEO's performance, including in light of goals and objectives established for such performance, including the relationship of such compensation to corporate performance, and in light of such review determine his or her compensation, provided, however, that upon the appointment of a new CEO, the entire Board must determine the amount and form of compensation paid to such new CEO.

3. To select, engage, compensate and terminate compensation consultants, legal counsel and such other advisors as it deems necessary and advisable to assist the Committee in carrying out its responsibilities and functions as set forth herein.

4. Approve any employment agreements, severance arrangements, change-in-control arrangements or special or supplemental employee benefits, and any material amendments to any of the foregoing.

5. To administer the Company's equity compensation plans, including without limitation to approve the adoption of such plans, to reserve shares of Common Stock for issuance thereunder, to amend and interpret such plans and the awards and agreements issued pursuant thereto, and to make awards to eligible persons under the plans and determine the terms of such awards, provided, however, that upon the appointment of a new CEO, the entire Board must determine any awards granted to such new CEO under the Company's equity compensation plans.

6. Review and approve, subject to stockholder or Board approval as required, the creation or amendment of any incentive, equity-based and other compensatory plans of the Company (other than amendments to tax-qualified employee benefit plans and trusts, and any supplemental plans thereunder, that do not substantially alter the costs of such plans to the Company or are simply to conform such plans to applicable laws or regulations).

7. Review periodically the compensation and benefits offered to nonemployee directors and recommend changes to the Board as appropriate.

8. Produce an annual report on executive compensation for inclusion in the Company's proxy statement to the extent that the Company's securities are publicly traded.

9. Provide minutes of Committee meetings to the Board, and report to the Board on any significant matters arising from the Committee's work.

10. Make regular reports to the Board with respect to significant actions and determinations made by the Committee.

11. At least annually, review and reassess this Charter and, if appropriate, recommend changes to the Board.

12. Periodically review its own performance and report on its conclusions in this regard to the Board.

13. Perform such other duties and responsibilities as may be assigned to the Committee by the Board, as designated in plan documents, as are required by law, applicable Nasdaq (or stock exchange) rules, or as are otherwise necessary and advisable, in its or the Board's discretion, to the efficient discharge of its duties hereunder.

Authority

By adopting this Charter, the Board delegates to the Committee full authority in its discretion to:

1. Perform each of the responsibilities of the Committee described above; provided, however, to the extent permitted by applicable law, that the Board retains the authority to authorize one or more

officers of the Company to designate officers and employees to be recipients of rights or options created by the Company or to determine the number of such rights or options to be received by such officers or employees.

2. Delegate such of its authority and responsibilities as the Committee deems proper to members of the Committee or a subcommittee.

3. Appoint a chair of the Committee, unless a chair is designated by the Board.

4. Engage and terminate compensation consultants, independent counsel and such other advisers as the Committee determines necessary to carry out its responsibilities, and approve the fees and other terms of retention of any such consultants and other advisers.

5. Cause the officers of the Company to provide such funding as the Committee shall determine to be appropriate for payment of compensation to any compensation consultants, independent counsel or other advisers engaged by the Committee.

Exhibit A

1. Independent Director.

The Compensation Committee must be composed solely of " independent" directors, as defined in NASD Rule 4200(a)(15). If the Compensation Committee is composed of at least 3 members, one non-independent director who is not a current officer or employee or family member of such person may serve on the Compensation Committee for up to 2 years.

The following would not be independent under NASD Rule 4200(a)(15):

(a). An officer or employee of the company

(b). A director who has been employed by the company or any parent or subsidiary of the company within the past 3 years

(c). A director who received, or who had a family member who received, payments from the company of more than $60,000 during the current fiscal year or any of the past 3 years, other than compensation to the director for Board service or compensation to a family member who is an employee but not an executive officer of the company, its parent, or any subsidiary

(d). A director who is the immediate family member of any person who was an executive officer of the company or any parent or subsidiary of the company within the past 3 years

(e). A director who is a partner, executive officer, or controlling shareholder of any organization to which the company made, or from which the company received, payments that exceed 5% of the recipient's gross revenues for that year, or $200,000, whichever is more, during the current or any of the past 3 years, other than payments arising solely from investment

(f). A director who is an executive officer of another company where any of the company's executive officers has served on the compensation committee of the other company within the past 3 years

(g). A director who was a partner or employee of the company's outside auditor and worked on the company's audit during the past 3 years

(h). Any person who has a relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment

2. Non-Employee Director.

Rule 16b-3(b)(3)(i) of the Securities Exchange Act of 1934 defines a Non-Employee Director as a director who:

(a). Is not currently an officer (as defined in Rule 16a-1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer;

(b). Does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer, for services rendered a s a consultant or in any capacity other than a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to Rule 404(a) of this chapter;

(c). Does not possess an interest in any other transaction for which disclosure would be required pursuant to Rule 404(a) of this chapter; and

(d). Is not engaged in a business relationship for which disclosure would be required pursuant to Rule 404(b) of this chapter.

3. Outside Director.

Regulation 1.162-27(e)(3) promulgated under Section 162(m) of the Internal Revenue Code of 1986, as amended, defines an Outside Director as a director who:

(a) Is not a current employee of the publicly held corporation;

(b) Is not a former employee of the publicly held corporation who receives compensation for prior services (other than benefits under a tax-qualified retirement plan) during the taxable year;

(c) Has not been an officer of the publicly held corporation; and

(d) Does not receive remuneration from the publicly held corporation, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services.

Nasdaq

MEMORANDUM

To: Mighty Oak Corporation

From: Heller Ehrman LLP

Date: 2007

Subject: Corporate Governance Issues related to the Initial Public Offering of Mighty Oak Corporation (the "Company")

This memorandum summarizes the principal corporate governance issues the Company will need to consider in connection with its proposed initial public offering (the "IPO") and anticipated listing on the Nasdaq Global Market (formerly the Nasdaq National Market). Please note, however, that this memorandum is only an overview. It is neither a comprehensive treatment of any of the issues described, nor a complete list of the corporate governance issues faced by companies pursuing an IPO. Furthermore, it is not intended to provide specific legal advice to any individual.

Heller Ehrman has prepared several other memos dealing with related aspects of the IPO process, including:

- a "Going Public" memo, which provides an overview of the IPO process and summarizes the advantages and disadvantages of going public;
- a "Publicity" memo, which covers restrictions on public disclosures during the offering period;
- a "Public Company Handbook," which summarizes the restrictions and reporting requirements applicable to public companies and their insiders; and
- a "Pre-IPO Stock Plan Memo," which summarizes various issues that should be considered concerning the Company's equity compensation plans and arrangements prior to the IPO.

I. Overview of Corporate Governance Issues for Pre-IPO Companies

The Company must consider a number of corporate governance questions in connection with its planned IPO.

- Does the Board of Directors meet the independence, composition and structural requirements of the SEC and Nasdaq? Will the Board need to recruit additional directors?
- Will the Board of Directors need to create any new committees? What should the membership of Board committees be post-IPO?
- Will the Audit Committee pre-approve all audit and non-audit services, or will it delegate some of that authority to a subcommittee, or pursuant to written policies and procedures?
- What will be the parameters of the Company's financial "whistleblower" policy, and how will complaints be investigated?
- Does the Company have a Corporate Secretary who understands the more formal minute-taking responsibilities of public companies?
- Which officers will be required to file ownership and transaction reports under Section 16 of the Securities Exchange Act of 1934?
- What will be the parameters of the Company's Insider Trading Policy, and to whom will the Policy apply? Who will be required to pre-clear trades in the Company's stock?
- Are any loans to directors or executive officers outstanding? Such loans must be satisfied prior to the filing of the IPO registration statement.
- Will the Company adopt a Code of Ethics meeting SEC and Nasdaq requirements, or will it adopt a broader Code of Business Conduct?
- Will the Company adopt any anti-takeover defenses?
- Will the Board adopt Corporate Governance Guidelines?
- What kind of procedures will the Company put in place to manage public disclosures, both required disclosures in SEC filings and disclosures to the investment community?
- Does the Company have a document retention policy adequate for public company requirements?

- Has the Company named a crisis management team to deal with unanticipated events?

II. Board of Directors

For most companies considering an IPO, it is likely that bringing the Board of Directors up to public company standards will require significant advance planning. Many venture-backed companies have few directors that meet the required "independence" standards of the exchange listing standards or the SEC audit committee rules. In addition, relatively few privately-held companies have the formal committee structure required for public companies listing on an exchange. Obviously, the selection of directors who will sit on these key committees must be handled with care.

Board independence standards and composition requirements were significantly enhanced following passage of the Sarbanes-Oxley Act of 2002. Although there are specific SEC rules relating to certain aspects of corporate governance, most of the relevant rules are embodied in the Nasdaq listing standards.

A. Director Independence Requirements

Nasdaq requires that the Board of Directors of its listed companies be comprised of a majority of independent directors. The Board must affirmatively determine whether each non-management director is "independent," i.e., that the director has no relationship that would interfere with the independent exercise of the director's judgment in carrying out the director's responsibilities.

Nasdaq had identified a number of relationships that are considered significant impairments of independence. The rules provide that, if any of the following relationships exist with respect to a particular director, that director may not be considered independent.

- A director is, or during the past three years was, employed by the Company or by any parent or subsidiary of the Company;
- A director accepts, or has a family member who accepts, any payments from the Company or any parent or subsidiary of the Company in excess of $100,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than compensation for board or board committee service, payments arising solely from investments in the Company's securities, compensation paid to a family member who is a non-executive employee of the Company or a parent or subsidiary of the Company, benefits under a tax-qualified retirement plan, or non-discretionary compensation.[1]

[1] For purposes of determining a director's independence, Nasdaq rules define a "family member" to include a person's spouse, parents, children and siblings, whether by blood, marriage or adoption or who has the same residence as the director.

- A director is, or during the past three years was, employed by the Company or by any parent or subsidiary of the Company as an executive officer, or has a family member who was so employed.

- A director is, or has a family member who is, a partner in, or a controlling stockholder or an executive officer of, any organization to which the Company made, or from which the Company received, payments (other than those arising solely from investment in the Company's securities) that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, in the current fiscal year or any of the past three fiscal years, other than payments arising solely from interests in the Company's securities or payments under non-discretionary charitable contribution matching programs.

- A director is employed as an executive officer of another entity where any of the executive officers of the Company serve on the compensation committee of such other entity, or if such relationship existed during the past three years.

- A director is, or during the past three years was, a partner or employee of the Company's outside auditor who worked on the Company's audit during the past three years, or has a family member who was so employed.

It is important to note, however, that the absence of any of these specified relationships does not mean that a particular director is independent. Many other relationships (including business or social relationships between a director and a member of management outside the Company) may impact a particular director's independence and should be considered by the Board in the course of making an independence determination. In particular, relationships that are close to the prohibited relationships (e.g., a director whose family member is employed by the Company in a non-executive capacity) should be carefully scrutinized.

B. Board Committee Requirements

Nasdaq listing requirements (and, with respect to the Audit Committee, SEC rules) impose certain requirements on the Committee structure of a public company's Board. Each public company must have an independent Audit Committee. In addition, certain decisions regarding executive compensation and director nominations must be made either by independent Compensation and Nominating Committees, respectively, or by action of the independent directors.

Each of these Committees should have a written charter.

1. Audit Committee

Nasdaq and SEC rules require public companies to have an Audit Committee comprised of at least three independent directors. In addition, SEC rules impose an enhanced independence standard for Audit Committee members. A director is not eligible to serve on the Audit Committee in any year if the director receives any compensation from the Company other than for Board service in that year. In addition, none of the Audit Committee members can be an "affiliate" of the Company, defined as a person who controls, is controlled by, or is under

common control with the Company. Generally speaking, a director who owns less than 10% of the Company's outstanding common stock, without any other relationships, will not be considered an "affiliate" for this purpose. A director with a higher level of stock ownership may serve on the Audit Committee only if the Board affirmatively determines that the director is not an "affiliate."

Under Nasdaq rules, each of the members of the Audit Committee must be "financially literate," i.e., able to read and understand fundamental financial statements. At least one member of the Audit Committee must be "financially sophisticated," i.e., must have had past employment experience in finance or accounting, professional certification in accounting, or other comparable experience or background. In addition, SEC rules require the Company to disclose whether at least one member of the Audit Committee is a "financial expert," a defined term that is similar but not identical to Nasdaq's financial sophistication requirement.

The role of the Audit Committee has been dramatically enhanced in recent years, and the Audit Committee now has a broad list of specific responsibilities.

- The Audit Committee is responsible for the appointment, compensation, retention, oversight, and if necessary the replacement, of the Company's outside auditors.

- The Audit Committee must review the independence of the auditor, which will include a review of non-audit services being provided by the auditor. (Under SEC rules, auditors may not provide certain non-audit services to their audit clients without impairing their independence).

- The Audit Committee must pre-approve audit and non-audit services.

- The Audit Committee must review with the auditor the Company's critical accounting policies and practices; all alternative treatments of financial information within GAAP that have been discussed with management, together with the ramifications of the use of such alternative treatments; and other written communications between the auditor and management, including the management letter and schedule of unadjusted differences.

- The Company's CEO and CFO are required to disclose to the Audit Committee, on a quarterly basis, all significant deficiencies in the design or operation of internal control over financial reporting that would adversely affect the Company's financial statements, and any fraud, whether or not material, that involves management or other employees who have a significant role in such internal controls.

- The Audit Committee is required to establish procedures for receiving and handling complaints received by the Company regarding accounting, internal accounting controls or auditing matters, or the confidential, anonymous submission by Company employees of concerns regarding questionable accounting or auditing matters. These procedures are often referred to as the "whistleblower policy."

- The Audit Committee must prepare a report for the annual meeting proxy statement.

- The Audit Committee must have the authority to engage independent counsel and other advisors as it deems necessary to carry out its duties; the Company must provide adequate funding for such independent advisors.

- The Audit Committee, or another committee of independent directors, must review and approve all "related party" transactions, i.e., transactions between the Company and its insiders.[2]

The Audit Committee must make some additional decisions with respect to certain of its responsibilities.

Pre-Approval of Non-Audit Services: The Audit Committee may approve all such services on a case by case basis. It may delegate some or all of this pre-approval authority to a subcommittee of one or more of its members. Alternatively, the Audit Committee may approve some or a designated portion of the non-audit services pursuant to a pre-approval policy, provided that (i) the policy is detailed as to the particular service; (ii) the Audit Committee is informed on a timely basis of each service approved under such a policy; and (iii) the policy does not delegate Audit Committee responsibilities to management. The Audit Committees of many IPO companies choose to begin with the Committee approving each of these services. The Committee may choose to delegate or develop a pre-approval policy later, based on its particular needs.

Financial "Whistleblower" Policy: The Audit Committee must develop a procedure that allows for (i) the receipt, retention and treatment of complaints received by the Company regarding accounting, internal accounting controls or auditing matters and (ii) the confidential, anonymous submission by employees of the Company of concerns regarding questionable accounting or auditing maters. Principle decision points for the Audit Committee with respect to such policies include:

- How should anonymity of Company employees be protected? The Audit Committee may simply accept unsigned letters from employees, but many Committees find it difficult to follow up on such complaints. The Committee should consider investigating and evaluating third-party service providers, which offer anonymous telephone hotlines and e-mail services for whistleblower policies.

- How should complaints be reviewed? Some Audit Committees prefer to review each complaint. Other Committees designate a gatekeeper, who may either be a Committee member or a member of management, such as the General Counsel, to review complaints before they are presented to the full Committee. As with pre-approval procedures, the Audit Committees of many IPO companies choose to begin with reviewing each complaint. The Committee can adopt a pre-review procedure later based on its particular experience. If such a pre-review system is used, the Audit Committee must be kept informed on a timely basis about what complaints have been reviewed and processed.

[2] Given the enhanced responsibilities of the Audit Committee, some companies transfer the responsibility of approving related party transactions to another independent committee, such as the Governance Committee, if the Company has one. Note that the Board, the Audit Committee or the Committee designated to approve related party transactions should ratify all such transactions prior to the IPO.

2. Compensation Committee

Nasdaq rules require that the compensation of the Company's executive officers be determined either by a Compensation Committee comprised solely of at least two independent directors or by a majority of the Board's independent directors. Most companies prefer to set up a Compensation Committee, however, because of the favorable treatment under Section 16 of the Exchange Act and Section 162(m) of the Internal Revenue Code for companies with independent Compensation Committees.

In order to qualify for favorable treatment under Section 16 and IRC Section 162(m) members of the Compensation Committee should also qualify as "non-employee directors" under Section 16 of the Exchange Act, and "outside directors" under Section 162(m) of the Internal Revenue Code, terms whose definitions are similar but not identical to the definition of "independent director" for general Nasdaq purposes. To qualify under these additional standards, a director must not receive any compensation from the Company other than for Board service, must have no interest in a material transaction that would require disclosure as a "related party transaction" under SEC rules, must not be a current employee of the Company, and must never have been an officer of the Company.

The function of the Compensation Committee is to develop and periodically review compensation policies and practices applicable to executive officers, including the criteria upon which executive compensation is based, the specific relationship of corporate performance to executive compensation, and the components of executive compensation, including salary, cash bonus, deferred compensation, and incentive or equity-based compensation. The CEO may attend Compensation Committee meetings, but Nasdaq rules specifically prohibit the CEO from being present during deliberations regarding the CEO's compensation. The Compensation Committee must prepare a report for the annual meeting proxy statement.

The SEC recently adopted new rules with respect to executive compensation disclosure, which became effective for disclosures made for fiscal years ending on or after December 15, 2006. The new disclosure requirements are likely to enhance the attention paid to the Compensation Committee and its functions.

3. Nominating Committee

Nasdaq rules require that the nominees for the Company's Board of Directors must be selected, or recommended for the Board's selection, either by a Nominating Committee comprised solely of at least two independent directors or by a majority of the Board's independent directors. The Nominating Committee should determine whether it will develop standards for new directors, and whether those standards will differ for directors nominated by stockholders.

The Nominating Committee may also act as a Corporate Governance Committee. The specific functions of such a governance committee will vary by company, but they often include

setting Board policies (e.g., a policy limiting the number of public company Boards a director can serve on concurrently), or considering term limits and mandatory retirement ages for directors. Alternatively, the Company may decide to adopt Corporate Governance Guidelines (see discussion below). Many new public companies operate without a formal Corporate Governance Committee while their Boards are relatively small.

4. Phase-In for New Public Companies

Nasdaq currently permits companies listing in connection with an IPO to phase in compliance with the Board and committee independence rules. The Company must have at least one independent director on each Committee at the time of IPO effectiveness, a majority of independent directors on each Committee within 90 days, and fully independent Committees within one year.

There are also limited exemptions to the independence rules for all Nasdaq-listed companies, whether or not they are listing in connection with an IPO. A Committee with at least three members may include one non-employee director who is not independent under the Nasdaq standard. Directors sitting on a Committee under this limited Nasdaq exemption may not chair the Committee and may not sit on the Committee for more than two years. In addition, the Company must disclose the fact that it is relying on the Nasdaq exemption in its annual meeting proxy statement. Note, however, that all Audit Committee members must still meet the SEC independence standards. In addition, the Compensation Committee members must still meet the Section 16 and IRC 162(m) standards to retain favorable treatment under those rules.

Although Nasdaq permits companies to phase in compliance with the rules, we recommend that the Company nevertheless strive to be in compliance at the time of the IPO, or shortly thereafter. The Company should also consult with its lead investment banker for the IPO to see if the bankers have any concerns with marketing the IPO to potential investors if the Company plans to rely on the Nasdaq transition rules for directors. Finding directors that will be a good "fit" for a public company Board is often a challenging process which can take longer than anticipated. Similarly, the use of the Nasdaq exemptions is probably best restricted to an interim or emergency basis.

5. Board Size

Although there are no specific minimum Board size requirements for public companies, filling out the Committees with independent directors can present logistical difficulties. For example, if the Board has only five directors, even if four are independent, each director will sit on at least two committees. The Audit Committee, in particular, will have a greatly expanded role following the IPO, and many Audit Committee members are reluctant to sit on multiple committees. As a practical matter, therefore, many public companies will have at least six independent directors.

6. Board Compensation

Generally speaking, the directors of public companies have more specific responsibilities than the directors of private companies, and therefore tend to receive a higher level of compensation. There are no fixed standards for Board compensation, and the Company will

need to determine what level of compensation (and the mix of cash versus equity compensation) is appropriate. Many companies will pay certain key directors, such as the Audit Committee chairman, additional compensation in recognition of that director's additional responsibilities.

7. Board Minutes

Although Board minute-taking practices will not necessarily change following an IPO, the Board should recognize that Board and committee minutes are more likely to come under scrutiny once the Company is public. One example of this increased scrutiny occurred during the recent ***Disney*** case, where the Delaware court spent a considerable amount of time examining the minutes of Disney's Compensation Committee in order to determine whether the Board had met its fiduciary duties in approving the employment package and severance arrangements for former executive Michael Ovitz. In addition, the SEC and other regulatory bodies may ask to see Board or committee minutes during the course of an investigation.

In light of this potential for additional scrutiny, the Company should appoint a Corporate Secretary who is responsible for preparing Board meeting minutes on a timely basis. While the Secretary need not be an attorney, the Secretary should be cognizant of the legal and business environment in which the Company operates. The independent members of the Board should also determine how minutes should be taken for the executive sessions that Nasdaq requires its listed companies to have on a regular basis, which the corporate Secretary typically will not attend.

III. Section 16 Compliance

Section 16 under the Exchange Act imposes certain reporting requirements and trading restrictions on the Company's directors, 10% stockholders, and certain officers of the Company. One important pre-IPO task is the designation of the Company officers who will be subject to Section 16. The Section 16 rules limit the term "officer" to those officers generally considered "executive officers," including the Company's president, chief executive officer, chief financial officer, principal accounting officer and vice presidents in charge of a principal business unit, division or function. However, any other officer or other person who performs a policy-making function for the Company may also be considered an "officer" for Section 16 purposes, regardless of title.

In addition to identifying the Section 16 officers, the Company will need to decide whether it will ask a company employee to act as a Section 16 filing agent for those officers. Although Section 16 filings are the responsibility of each individual, many companies find it convenient to designated such an agent on behalf of their own officers, particularly since the turnaround time for the required transaction reports is short (two business days). The Section 16 rules permit an officer or director to designate a filing agent via a power of attorney. If an agent is designated, and the power of attorney is properly filed with the SEC, the agent can make the Section 16 filings without having to track down the officer for signatures each time a report is due.

All Section 16 reports must be filed electronically. Insiders may not use the Company's EDGAR codes for these filings, but must each obtain an individual EDGAR filing code.

EDGAR codes may be obtained by filling out an online application form on Form ID, which can be found at: http://www.edgarfiling.sec.gov/).

Note that a Company officer or director who is an insider at another public company may already have an individual EDGAR code. Those individuals should not apply for a new EDGAR code, but should use the same EDGAR codes for all individual filings.

IV. Insider Trading Policy

A. General Considerations

Rule 10b-5 under the Exchange Act provides that anyone who possesses "material nonpublic information" regarding the Company must abstain from trading in, or recommending on the basis of such information the securities concerned, for as long as such inside information remains undisclosed. Determining what information is "material" is often difficult, but the basic test is whether it is information a reasonable investor would consider important in determining whether to purchase or sell securities.

Most public companies adopt an Insider Trading Policy that provides that trading by insiders take place during certain pre-established "window periods," and such trading is prohibited during pre-established "blackout periods." The Company will need to consider a number of questions in connection with designing its Insider Trading Policy, including the following:

- Who will be subject to the policy? At a minimum, the policy should cover all officers and directors of the Company, as well as any individuals below the executive level who may have access to sensitive financial information prior to its public release (e.g., finance and accounting staff). For new public companies with a relatively small number of employees, it may be appropriate for the policy to cover all employees. The policy should also extend to trades made by close family members and others sharing the household of covered persons. The Company may also want to consider whether its consultants should be covered by the policy.

- Who will be subject to pre-clearance rules? Many companies require that certain senior executive "pre-clear" trades with a designated compliance officer. This protects the senior executive from executing a trade during a period in which there is a material undisclosed transaction; the market (and regulators) may impute knowledge of such transactions to all senior executives.

- What blackout period is appropriate? The extent of the blackout period varies by industry, but is generally tied to the period in which insiders might be expected to know the quarterly financial results. A typical blackout period might extend from the first day of the last month of the quarter until two trading days after the public release of the earnings information.

B. Rule 10b5-1(c)

Rule 10b5-1(c) under the Exchange Act provides for a safe harbor defense against Rule 10b-5 liability for a person who trades in Company securities if such trades occur:

- Pursuant to a written plan, or a binding contract or instruction, entered into at a time when the insider was not aware of material nonpublic information; if properly done, purchases and sales may continue under the plan, contract or instruction even in periods during which the insider is aware of material nonpublic information; or

- Pursuant to a "blind trust" where the insider has delegated all investment control to another party.

Although Rule 10b5-1(c) plans are generally adopted by individuals working with their own brokers, the Company will need to decide whether it will develop policies with respect to Rule 10b5-1(c) plans adopted by its directors, officers or employees. In particular, although the SEC rules permit sales to occur any time as long as the sales are otherwise in accordance with the rule, many companies prefer to limit sales under such plans to regularly-scheduled window periods. Many companies also require executives to suspend such plans in certain limited circumstances (e.g., if the company is considering a major merger or acquisition transaction).

V. Other Governance Issues for the Board of Directors

A. Loans to Insiders

Under Section 13(k) of the Exchange Act, it is unlawful for any public reporting company (including for this purpose any company that has filed a registration statement for its IPO) to extend or maintain credit, or arrange for the extension or maintenance of credit, to any director or executive officer of the Company. Therefore, the Board should determine if there are any such outstanding loans (e.g., relocation loans, loans to purchase stock options, other personal loans) to directors or executive officers, and ensure that they are satisfied before the filing of the IPO registration statement.

Loans that were in effect prior to July 30, 2002, may remain outstanding, provided that they have not been materially modified since that date. The definition of "material modification," is very broad, however. If the Company has pre-July 2002 loans that have been modified in any way since July 2002, please consult with us to determine if such modifications were "material."

B. Code of Ethics

Under applicable SEC and Nasdaq rules, a company must have a publicly-available code of ethics applicable to all directors, officers and employees. At a minimum, the Code must promote: (1) honest and ethical conduct; (2) full, fair, accurate, timely and understandable corporate disclosure; compliance with applicable laws, rules and regulations; (3) prompt internal reporting to appropriate persons of violations of the Code, and (4) accountability for adherence to the Code.

The principal decision for the Board on this issue is whether to go beyond the minimum standards of the SEC and Nasdaq rules and adopt a broader code of business conduct for the Company.

C. Anti-Takeover Defenses

A full discussion of anti-takeover defenses is beyond the scope of this memorandum. However, it is typical for the Board to consider whether the Company will adopt some relatively straightforward anti-takeover defenses in connection with its IPO.

The most common forms of anti-takeover defenses include:

- Reincorporating into Delaware. If the Company is not already incorporated in Delaware, reincorporating into that state is frequently advisable in connection with an IPO. Delaware law allows companies to eliminate stockholder actions by written consent, to issue blank-check preferred stock, and to limit business combination transactions with interested stockholders, all of which are intended to reduce the probability of a hostile takeover. In addition, Delaware has a well-developed body of corporate law that helps to clarify the Board's fiduciary obligations in the event of a takeover attempt.

- Dividing the Board into two or three classes. Such "classified Boards" are more difficult to take over through a proxy contest, since only a portion of the directors are elected at any given meeting. In addition, under Delaware law directors on classified Boards can be removed by stockholders only for cause. Classified Boards have become less popular with institutional stockholders in recent years, and the adoption of a classified Board in connection with an IPO is less common now than in the past. Still, many companies adopt such Boards, both as a anti-takeover defense and as a way to maintain continuity on the Board.

- Adopting a "poison pill" stockholder rights plan. Although the validity of such plans has been repeatedly upheld by the Delaware courts, they have become unpopular with institutional investors in recent years. It is now relatively uncommon for companies to adopt such plans in connection with an IPO, although these plans remain something that companies should consider if an actual threat materializes.

D. Corporate Governance Guidelines

Although Corporate Governance Guidelines are not required for Nasdaq-listed companies, they are commonly used by larger public companies and required for NYSE-listed companies. The Board should therefore consider whether the Company should voluntarily adopt them. Guidelines typically cover such issues as Board membership or independence criteria (if the Company wants to adopt rules more stringent than the SEC rules or Nasdaq rules require), Board evaluation procedures, minimum stock ownership requirements for directors and executive officers, policies on how many public company Boards a director may concurrently serve on and still remain on the Board of the Company, mandatory retirement ages or term limits for directors, or CEO succession plans.

VI. Other Governance Issues for Management

A. Internal Control Over Financial Reporting; Disclosure Controls

Once it is public, management will have to include, in its Annual Report on Form 10-K, an evaluation of the Company's internal control over financial reporting, and a determination as to whether such controls are effective. The auditors will separately audit such internal controls, and issue a report on whether it agrees with management's evaluation of the internal controls' effectiveness. This requirement will not apply to new public companies until their second Annual Report on Form 10-K. For example, if a calendar-year company completes a public offering in 2007, it would not have to include the report in its 2007 Form 10-K, due in early 2008, but it would have to include the report in its 2007 Form 10-K, due in early 2009.

In preparation for going public, the Company will need to upgrade its internal controls to public company standards. Internal control requirements are extensive, and a full discussion of these requirements is beyond the scope of this memorandum.

From a governance standpoint, the Company will need to develop "disclosure controls." Although there is overlap between the procedures designated "disclosure controls" and those designated "internal control over financial reporting," "disclosure controls" specifically refers to procedures for drafting and reviewing periodic and other disclosures that public companies are required to make. The CEO and the CFO are responsible for developing controls to ensure that information required by the Company to be disclosed to the SEC is recorded, processed, summarized and reported accurately and on a timely basis and that information is accumulated and communicated to management as appropriate to allow timely decisions regarding such required disclosure. The CEO and CFO officer certifications required with each periodic (quarterly or annual report) will need to include specific certifications on the effectiveness of the disclosure controls, beginning with the first periodic report filed after IPO effectiveness.

Many public companies create a Disclosure Committee, a management committee that will typically include the CFO, the general counsel, senior operational officers, and an investor relations officer. The function of the Disclosure Committee is to monitor the operation of the disclosure controls to make sure they are operating effectively, and to review draft disclosures.

B. Press Releases and Other Disclosures to the Investment Community

As a public company, the Company will be communicating to financial analysts, institutional investors, and other members of the investment community on a regular basis. Many companies embarking on an IPO will therefore engage the services of a outside public relations firm and hire an experienced investor relations officer to handle such public disclosures.

The Company must follow the restrictions of SEC Regulation FD and avoid "selective disclosure" of non-public information. Many public companies adopt a Corporate Communications Policy, which designates certain officers (typically the CEO, the CFO and the senior investor relations officer) to act as spokespersons for the Company's disclosures.

C. Document Retention Policy

Once the Company has filed a registration statement for its IPO, it will become subject to the provisions of the Sarbanes-Oxley Act of 2002. Although Sarbanes-Oxley contains no specific document retention requirements, many of the disclosure rules have implicit requirements for good document retention policies. For example, the certifications on disclosure controls and internal controls that the CEO and CFO will be required to make with respect to periodic reports are required to be supported by "appropriate documentation." Many companies embarking on an IPO use the opportunity to review and formalize their document retention program and policies.

D. Crisis Management and Emergency Response

Many companies embarking on an IPO expect to undergo substantial growth once they become public. Informal methods of dealing with emergencies – including both operational emergencies such as power failures and natural disasters as well as legal and compliance ones, such as shareholder lawsuits or regulatory investigations – may no longer suffice. In making the decision to go public, the Company should also consider setting up a formal "crisis management" or "emergency response" team, so that it will be able to respond more quickly to such events.

E. Website Cleanup

The Company should review its website well in advance of filing its IPO registration statement to make sure historical information concerning the Company is properly identified and segregated. Management should ensure that the Company's website is "scrubbed" to either remove links to third party sources about the Company's products or prospects, or segregate them from the section of the Website in which the IPO documents will be posted. In particular, the Company should remove any links to brokers' research reports on the Company or its industry, or to news stories that go beyond factually reporting the Company's business and financial developments. Inappropriately-placed links might cause the information to be considered "incorporated by reference" into the Company's IPO registration statement, which would effectively make the Company a guarantor of the statements in those third-party sources.

Once the Company is public, it will be required to post or link periodic reports and insider trading reports filed with the SEC to the Company's website. Management should ensure that any needed enhancements to the website are completed before the IPO effective date.

VII. Conclusion

The suggestions provided above attempt to briefly detail the primary corporate governance decisions points to be made in connection with an IPO. They are intended only as general guidelines and the Company may have special issues or considerations.

May 2007

MIGHTY OAK CORPORATION
CORPORATE GOVERNANCE COMPLIANCE CHECKLIST
PRE-IPO COMPANIES[1]

Requirement	Comment on Applicability of Rules to New Public Companies
I. BOARD OF DIRECTORS COMPLIANCE CHECKLIST	
1. ***Independent Directors:*** The board must be comprised of a majority of independent directors.[2] *[Nasdaq Rule 4350(c)(1)]*	There is a 12-month phase-in for this requirement for new public companies. *[Nasdaq Rule 4350(a)(5)]*.
2. ***Executive Sessions:*** The board must have regularly convened (at least twice a year) executive sessions of the independent directors. *[Nasdaq Rule 4350(c)(2)]*	
3. ***Code of Ethics:*** Board must adopt a Code of Ethics meeting specified requirements applicable to all directors, officers and employees. *[Item 406 of Reg. S-K, Nasdaq Rule 4350(n)].*[3]	Company must disclose whether it has a code of ethics in its annual meeting proxy statement. Can file Code of Ethics with IPO registration statement or post to website.
4. ***Section 16 Compliance.*** Board must determine which officers are required to file ownership and transaction reports under Section 16 of the Securities Exchange Act.[4] Directors should apply for individual EDGAR filing codes, unless they already have them.	Form 3s for each director and executive officer must be on file prior to the IPO effective date. The Company may wish to obtain powers of attorney from Section 16 filers to facilitate future filings.
5. ***Insider Trading Policy.*** Board should adopt Insider Trading Policy regulating trading in company securities by company directors, officers and employees.	

Requirement	Comment on Applicability of Rules to New Public Companies
6. ***Loan Restrictions.*** It is unlawful for any issuer, as defined in the Sarbanes-Oxley Act of 2002, to extend or maintain credit, or to arrange for the extension or maintenance of credit, to any director or executive officer of the Company. *[Exchange Act Section 13(k)]*	Any outstanding loans to directors or executive officers should be repaid prior to the **filing** of the IPO registration statement.
II. AUDIT COMMITTEE COMPLIANCE CHECKLIST	
1. ***Membership*:** The audit committee must have three or more members, all of whom must be independent directors. *[Exchange Act Section 10A(m), Nasdaq Rule 4350(d)(2)(A)]* *Note: There is a higher standard of "independence" on the audit committee than the standard applicable to the board as described in Item I.1. above.*	Companies must have at least one independent director on the Audit Committee at the time of IPO effectiveness, a majority of independent members within 90 days and all independent members within one year of IPO effectiveness.
2. ***Audit Committee Financial Expert:*** • Determine whether any member of the Audit Committee meets the definition of "audit committee financial expert."[5] *[Item 407(d)(5) of Reg. S-K]* • All audit committee members must be able to read and understand financial statements at the time of their appointment. *[Nasdaq Rule 4350(d)(2)(A)]* • Nasdaq requires that at least one member of the audit committee have "past employment experience in finance or accounting, requisite professional certification in accounting or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities." *[Nasdaq Rule 4350(d)(2)(A)]*	Companies must disclose, in Form 10-K or annual meeting proxy statement, whether they have at least one audit committee financial expert, or if not, why not; if Audit Committee has one or more financial experts, at least one must be identified. Some companies voluntarily add this information to their IPO registration statement.

Requirement	Comment on Applicability of Rules to New Public Companies
3. ***Appointment and Oversight of Auditor:*** • The audit committee is directly responsible for the appointment, compensation, retention and oversight of the work of any accounting firm engaged to prepare or issue an audit report or other audit, review or attest services for the Company. *[Exchange Act Section 10A(m)(2)]* • The accounting firm must report directly to the audit committee. *[Exchange Act Section 10A(m)(2)]* • The audit committee is responsible for the resolution of disagreements between management and the auditor regarding financial reporting. *[Exchange Act Section 10A(m)(2)]*	
4. ***Authority to Engage Advisors:*** The audit committee has authority to engage independent counsel and other advisers as it determines is necessary to carry out its duties. *[Exchange Act Section 10A(m)(5)]*	
5. ***Pre-Approve Audit and Non-Audit Services:*** The audit committee must pre-approve[6] audit and nonaudit services provided by the independent auditors. *[Rule 2-01(c)(7) of Regulation S-X; Exchange Act Section 10A(i)]*	
6. ***Prohibited Non-Audit Services:*** Review non-audit services currently provided by the independent auditor to determine whether any of these services are prohibited under Section 201 of Sarbanes and the SEC implementing rules.[7] *[Exchange Act Section 10A(g)]*	

Requirement	Comment on Applicability of Rules to New Public Companies
7. ***Reports from Auditors:*** The Company's auditors must provide the audit committee with timely reports regarding: • All critical accounting policies and practices; • All alternative treatments of financial information within GAAP that have been discussed with management, ramifications of the use of such alternative disclosure and treatments and the treatment preferred by the independent auditor; and • Other material written communications between the independent auditor and management, including the management letter and schedule of unadjusted difference. *[Rule 2-07 of Reg. S-X; Sarbanes § 204]*	Applies to any audit completed on or after Company files its IPO registration statement.
8. ***Report from CEO and CFO:*** The CEO and CFO are required to disclose to the audit committee on a quarterly basis (1) all significant deficiencies in the design or operation of internal controls that could adversely affect the Company's ability to record, process, summarize and report financial data; and (2) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal controls. *[Exchange Act Rule 13a-14]*	Officer certification requirements will begin with first periodic report filed after IPO effectiveness.
9. ***Whistleblower Procedures:*** Establish procedures for: (1) the receipt, retention and treatment of complaints received by the Company regarding accounting, internal accounting controls or auditing matters; and (2) the confidential, anonymous submission by employees of the Company of concerns regarding questionable accounting or auditing matters. *[Exchange Act Section 10A(m)(4)]*	
10. ***Related-Party Transactions:*** Review and approve all related-party transactions.[5] *[Nasdaq Rule 4350(h)]*	Audit Committee should ratify existing related party transactions prior to filing of IPO registration statement.

Requirement	Comment on Applicability of Rules to New Public Companies
11. ***Audit Committee Charter:*** • Revise the audit committee charter to state the audit committee's purpose of overseeing the Company's accounting and financial reporting processes, and the audits of its financial statements, and to include the following specific audit committee responsibilities and authority: • the pre-approval of all audit services and permissible non-audit services; • the sole authority to appoint, determine funding for and oversee the independent auditors; • the responsibility to establish procedures for complaints; and • the authority to engage and determine funding for independent counsel and other advisors. *[Nasdaq Rule 4350(d)(1)]* • Recommend to the board the adoption of the amended audit committee charter. *[Nasdaq Rule 4350(d)(1)]*	Should be adopted before the IPO effective date. Charter must be filed with proxy statement at least once every three years. Many companies voluntarily post Audit Committee Charter on their websites.
III.NOMINATING COMMITTEE COMPLIANCE CHECKLIST	
1. ***Director Nominations:*** The nomination of directors must be selected or recommended for the Board's selection by (a) a majority of independent directors on the board or (b) by a nominating committee comprised solely of independent directors. *[Nasdaq Rule 4350(c)(4)(A)]*	Company must disclose in its annual meeting proxy statement whether it has an independent nominating committee, or if not, why not.

Requirement	Comment on Applicability of Rules to New Public Companies
2. ***Membership:*** The Nominating committee must have at least two members, and all members must be independent directors. If the nominating committee has at least three members, one non-independent, non-employee member may serve under a special and limited exception.[9] *[Nasdaq Rule 4350(c)(4)(A)(ii)]*	Must have one independent member at time of IPO, majority of independent members within 90 days, and all independent members within 12 months of IPO effective date (subject to applicable Nasdaq exemptions). If the company has no nominating committee, the Board must adopt a resolution that the independent directors will select director nominees, or recommend them for the Board's selection, consistent with Nasdaq Rule 4350(c)(4), by the IPO closing date.
3. ***Director Standards:*** The Nominating Committee should determine whether it will develop standards for new directors, and whether standards will differ for directors nominated by stockholders. *[Item 7(d)(2)(ii) of Schedule 14A]*	Company must disclose its policies in annual meeting proxy statement.
4. ***Corporate Governance:*** Determine whether Nominating Committee will also act as Corporate Governance Committee, and/or whether Company will adopt Corporate Governance guidelines.	Governance committees and governance guidelines not specifically required by Nasdaq; some companies adopting voluntarily.
5. ***Nominating Committee Charter.*** Adopt or revise Nominating Committee Charter consistent with post-IPO functions.	Should be adopted prior to IPO effective date.
IV. COMPENSATION COMMITTEE COMPLIANCE CHECKLIST	
1. ***Officers' Compensation:*** The compensation of the Company's officers[10] must be determined by (a) a majority of the independent directors on the board or (b) a compensation committee consisting solely of independent directors. The CEO may be present during deliberations regarding other officers' compensation, but may not vote. The CEO must not be present during the deliberations regarding his compensation. *[Nasdaq Rule 4350(c)(3)(A)-(B)]*	

Requirement	Comment on Applicability of Rules to New Public Companies
2. ***Membership:*** The Compensation Committee must have at least two members, and all members must be independent directors. If the compensation committee has at least three members, one non-independent, non-employee member may serve under a special and limited exception.[11] *[Nasdaq Rules 4350(c)(3)(A)(ii), 4350(c)(3)(B)(ii)]*	New public companies should have fully independent Compensation Committee at time of IPO effectiveness to comply with IRS and SEC Section 16 requirements.
3. ***Non-Employee Directors:*** All members of the compensation committee must qualify as "non-employee directors."[12] *[Rule 16b-3 of the Securities Exchange Act of 1934]*	
4. ***Outside Directors:*** All members of the compensation committee must qualify as "outside directors."[13] *[Section 162(m) of the Internal Revenue Code of 1986]*	
5. ***Compensation Policies and Practices:*** Develop and periodically review compensation policies and practices applicable to executive officers, including the criteria upon which executive compensation is based, the specific relationship of corporate performance to executive compensation and the composition in terms of base salary, deferred compensation and incentive or equity-based compensation and other benefits. *[Item 8 of Schedule 14A; Item 402(k)(1) of Reg. S-K]*	
6. ***Compensation Committee Charter.*** Adopt or revise Compensation Committee charter consistent with post-IPO functions	Should be adopted prior to IPO effective date.

Requirement	Comment on Applicability of Rules to New Public Companies
V. MANAGEMENT COMPLIANCE CHECKLIST	
1. ***Loan restrictions.*** It is unlawful for any issuer, as defined in the Sarbanes-Oxley Act of 2002, to extend or maintain credit, or to arrange for the extension or maintenance of credit, to any director or executive officer of the Company. *[Exchange Act Section 13(k)].*	Any outstanding loans to directors or executive officers should be repaid prior to the **filing** of the IPO registration statement.
2. ***Section 16 compliance.*** Section 16 officers should obtain individual EDGAR filing codes, unless they already have them.	Form 3s for Section 16 insiders must be on file prior to the IPO effective date. The Company may wish to obtain powers of attorney from individual filers to facilitate future filings.
3. ***Understand and observe SEC "Quiet Period" restrictions for companies preparing for an IPO.*** Senior management should approach public appearances with caution. Keep the issuance of press releases to a minimum. Regularly released factual business information OK, but review with counsel.	"Quiet Period" begins once decision to file IPO registration statement has been made. There is a safe harbor for communications made more than 30 days prior to the filing of a Registration Statement that do not refer to the offering.
4. ***Website cleanup.*** Scrub website to remove links to third party sources, to avoid inadvertent incorporation into IPO prospectus.	Should be done prior to the filing of the IPO registration statement.
5. ***Website enhancement.*** Arrange to have Company's periodic reports and insiders' Section 16 reports posted or linked to Company website. Consider posting Code of Ethics and Audit, Compensation and Nominating Committee charters as well.	Should be done prior to the IPO effective date.
6. ***Stock Plan Review.*** Review existing equity compensation plans and determine if new plans need to be adopted, or existing plans amended. Board and stockholder approval required.	All pre-IPO grants should be approved by independent Compensation Committee or full Board prior to IPO effective date.

Requirement	Comment on Applicability of Rules to New Public Companies
7. ***Hold Annual Stockholder Meeting.*** This will allow the Company to defer its first public company stockholder meeting until the following year. At the meeting, obtain stockholder approval for any option plans and other compensatory arrangements, including Section 280G parachute arrangements, that haven't previously gotten stockholder approval. It is much easier to get stockholder approval while the Company is still private and doesn't have to comply with the federal proxy rules.	Nasdaq requires its listed companies to have a stockholder meeting once each calendar year.
8. ***Upgrade Financial Reporting Procedures.*** Determine whether company will form Disclosure Committee for preparing periodic filings, and who will be on it. Establish disclosure controls to permit timely filing of reports required by the SEC. Upgrade internal controls over financial reporting to public company standards.	For new public companies, management will need to include report on effectiveness of internal controls, and related auditor attestation, with annual report for first fiscal year ending on or after July 15, 2007.
9. ***Securities/Corporate Law due diligence.*** Review corporate minute book. Review securities issuances and option plan issuances to make sure necessary steps have been taken to perfect state and federal exemptions.	

[1] This chart has been prepared for companies planning to list their securities on the Nasdaq National Market.

[2] Nasdaq Rule 4200(a)(15) defines an "independent director" as a person other than an officer or employee of the Company or its subsidiaries or any other individual having a relationship, which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director; provided that the following persons are not considered independent:

- A director who is employed by the Company or by any parent or subsidiary of the Company, or who was so employed during the past three years (not including service of up to 12 months as an interim executive officer)or who has a Family Member who is or was employed by the Company or any parent or subsidiary of the Company during the past three years as an executive officer ;
- A director who accepts or who has a Family Member who accepts any payments from the Company or any parent or subsidiary of the Company in excess of $100,000 during any twelve-month period during the past three fiscal years, other than compensation for board service, payments arising solely from investments in the Company's securities, compensation paid to a Family Member who is a non-executive employee of the Company or a parent or subsidiary of the Company, benefits under a tax-qualified retirement plan, or non-discretionary compensation.

- A director who is, or has a Family Member who is, a partner in, or a controlling stockholder or an executive officer of, any organization to which the Company made, or from which the Company received, payments (other than those arising solely from investment in the Company's securities) that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, in the current fiscal year or any of the past three fiscal years other than payments arising solely from interests in the Company's Securities or payments under non-discretionary Charitable Contributions monthly programs;
- A director who is employed as an executive officer of another entity where any of the executive officers of the Company serve on the compensation committee of such other entity, or if such relationship existed during the past three years; or
- A director who is, or has a Family Member who is, or was a partner or employee of the Company's outside auditor who worked on the Company's audit during the past three years.

For purposes of determining a director's independence, Nasdaq Rule 4200(a)(14) defines a "Family Member" to include a person's spouse, parents, children and siblings, whether by blood, marriage or adoption or who has the same residence as the director.

[3] Under the SEC rules, a "code of ethics" must be reasonably designed to deter wrongdoing and promote:

- Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
- Full, fair, accurate, timely and understandable disclosure in reports and documents that a Company files with, or submits to, the SEC and in other public communications made by the Company;
- Compliance with applicable governmental laws, rules and regulations;
- The prompt internal reporting to an appropriate person or persons identified in the code of violations of the code; and
- Accountability for adherence to the code.

Nasdaq requires a code of conduct that complies with the SEC definition of "code of ethics." The code must be publicly available. In addition, the code must contain an enforcement mechanism that provides for prompt and consistent enforcement, protection for persons reporting questionable conduct, clear and objective compliance standards and a fair process by which to determine violations.

[4] The term "officer" for purposes of Section 16 reporting includes a company's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions. *SEC Rule 16a-1(f).*

[5] See definition of "independent" set forth in endnote (2) above.

[6] The SEC rules implementing Sarbanes § 202 provide that services may be pre-approved either:

- On an engagement-by-engagement basis; or
- Pursuant to pre-approval policies and procedures established by the audit committee, provided that: (1) the policies and procedures are detailed as to the particular services; (2) the audit committee is informed on a timely basis of each such service; and (3) the policies and procedures do not include the delegation of audit committee responsibilities to management.

The audit committee may also delegate authority to grant pre-approvals to one or more of its independent members, provided that the pre-approvals are reported to the full committee at each of its scheduled meetings.

[7] The SEC rules prohibit the Company's auditors from providing any of the following non-audit services to an "audit client" at any point during the "audit and professional engagement period":

- Bookkeeping and other services related to the Company's accounting records or financial statements;
- Financial information systems design and implementation;
- Appraisal or valuation services, fairness opinions and contribution-in-kind reports;

- Internal audit outsourcing services;
- Management functions;
- Human resources;
- Broker-dealer, investment adviser or investment banking services; and
- Legal services; and
- Expert services unrelated to the audit performed for the purpose of advocating an audit client's interest in litigation or in a regulatory or administrative proceeding or investigation.

The rules contain limited exceptions with respect to some of these restrictions for non-audit services.

[8] "Related party transaction" refers to transactions required to be disclosed under Item 404 of Regulation S-K.

[9] See the definition of "independent director" set forth in endnote (1) above. In addition to that definition, the Nasdaq rules permit a single non-independent director, who is not an officer, employee or family member, to serve for up to two years on a nominating committee comprised of at least three directors under an "exceptional and limited circumstances" exception. *[Nasdaq Rules 4350(c)(4)]*

[10] The Nasdaq rules use the term "officers" as defined in Section 16 of the Securities Exchange Act of 1934 and Rule 16a-1 thereunder.

[11] See the definition of "independent director" set forth in endnote (1) above. In addition to that definition, the Nasdaq rules permit a single non-independent director, who is not an officer, employee or family member, to serve for up to two years on a compensation committee comprised of at least three directors under an "exceptional and limited circumstances" exception. Note, however, that the Section 16 and Section 162(m) exemptions may be lost unless all members meet the "non-employee" director and "outside director" requirements outlined below. *[Nasdaq Rule 4350(c)(3)(C)]*

[12] Under Rule 16b-3 of the Securities Exchange Act of 1934, the receipt by an officer or director of the Company of an option grant or other grant, award or other acquisition from the Company will be exempt from the short-swing profit provisions of Section 16(b) if the transaction is approved by a committee comprised solely of two or more non-employee directors. A "non-employee director" is defined as a director who:

- Is not currently an officer of the Company or a parent or subsidiary of the Company, or otherwise currently employed by the Company or a parent or subsidiary of the Company;
- Does not receive compensation, either directly or indirectly, from the Company or a parent or subsidiary of the Company, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the $120,000 threshold for which disclosure would be required pursuant to Rule 404(a) of Reg. S-K; and
- Does not possess an interest in any other transaction for which disclosure would be required pursuant to Rule 404(a) of Reg. S-K.

[13] A compensation committee comprised entirely of "outside directors" is required for reliance on the exemption in Section 162(m) of the Internal Revenue Code for remuneration payable solely on account of attainment of performance goals. An "outside director" is defined as a director who:

- Is not a current employee of the Company;
- Is not a former employee of the Company who receives compensation for prior services (other than benefits under a qualified retirement plan) during the taxable year;
- Has never been an officer of the Company; and
- Does not receive remuneration from the Company, either directly or indirectly, in any capacity other than as a director. For this purpose, remuneration includes any payment in exchange for goods or services.

[Nasdaq]

MEMORANDUM

To: Mighty Oak Corporation (the "Company")

From: HellerEhrman LLP

Date: 2007

Re: Public Company Handbook

This memorandum is intended to be a useful guide to some of the more important legal issues and requirements facing companies and their insiders. It is divided into four sections.

- Part I covers the rules applicable to transactions in Company securities by Company insiders (officers, directors and certain significant stockholders);
- Part II covers the Company's periodic and current disclosure requirements;
- Part III covers significant corporate governance requirements for public companies; and
- Part IV covers restrictions on how disclosure by public companies must be disseminated (Regulation FD).

Please note, however, that this memorandum is only an overview that briefly summarizes a number of complex legal issues. It is neither a comprehensive treatment of the issues described, nor a complete list of legal obligations of public companies or their insiders. Furthermore, it is not intended to provide specific legal advice to any individual.

This Public Company Handbook may be used either by public companies or by privately-held companies considering an IPO. For companies considering an IPO, Heller Ehrman has prepared several other memos dealing with the IPO process, including:

- a "Going Public" memo, which provides an overview of the IPO process, summarizes the advantages and disadvantages of going public, and surveys the key corporate governance decisions the Company will have to make before deciding to go public;
- a "Publicity" memo, which covers restrictions on public disclosures during the offering period;
- a "Pre-IPO Corporate Governance Checklist," which summarizes the specific SEC and stock exchange requirements with respect to Board and Committee composition; and
- a "Pre-IPO Stock Plan Memo," which summarizes various issues that should be considered concerning the Company's stock plans and equity compensation arrangements prior to the IPO.

TABLE OF CONTENTS

I. TRANSACTIONS IN COMPANY SECURITIES BY COMPANY INSIDERS

A. GENERALLY

Officers, directors, significant stockholders and other individuals affiliated with or in a control relationship with a public company ("insiders") are subject to a number of statutes, regulations and legal principles that govern their obligations regarding, and in many circumstances limit their ability to trade in, securities of the Company. Most of these rules derive from two federal securities statutes and related regulations. The Securities Act of 1933 (the "Securities Act"), requires that any sale of securities provide full disclosure about the transaction in a registration statement filed with the Securities and Exchange Commission (the "SEC") unless the sale is exempt from such registration under the Securities Act itself or under a rule adopted by the SEC. Rule 144 promulgated under the Securities Act imposes restrictions and reporting requirements on sales of certain securities acquired outside of a public offering, or held by designated insiders. Certain rules and regulations promulgated under Sections 10(b), 13 and 16 of the Securities Exchange Act of 1934 (the "Exchange Act") impose restrictions on trading by designated insiders and require reporting of securities transactions by those insiders.

Section I focuses on the following federal securities laws affecting transactions in securities of the Company by Company insiders:

- The general anti-fraud prohibitions in connection with the sale of securities and restrictions on insider trading found in Rule 10b-5 of the Exchange Act;
- The restrictions on and reporting requirements applicable to public sales of Company securities by certain insiders under Rule 144 of the Securities Act;
- The restrictions on and reporting requirements applicable to securities transactions by certain insiders under the "short-swing" trading rules of Section 16 of the Exchange Act; and
- The reporting requirements imposed on certain significant stockholders by Section 13 of the Exchange Act.

This Section also provides a brief overview of the application process for EDGAR ID codes for individual filers.

Although the term "insider" is used generically to mean officers, directors and significant stockholders of the company, each of the securities laws discussed in this Section covers a slightly different group of insiders, as well as slightly different types of transactions. It is important for each insider to review this Section carefully to understand which of the following restrictions he or she is subject to.

B. INSIDER TRADING POLICY

Federal securities laws make it unlawful for any person to trade in a security on the basis of "material nonpublic information" regarding the security or the issuer of the security. The primary rule reflecting this principle is Exchange Act Rule 10b-5. Accordingly, if an insider has knowledge of any material nonpublic information relating to the financial condition or business of the Company, or concerning any important developments in which the Company is involved, then, until a reasonable time after all such information has been appropriately disclosed to the public, the insider should not buy, sell or otherwise engage in any transaction with a third party involving any of the Company's securities.

There is no precise definition of material information, but information should be regarded as material if it is likely that it would be considered important to an investor in making an investment decision regarding purchase or sale of the Company's stock. Some types of information likely to be considered material include: financial results and projections (especially to the extent the Company's own expectations regarding its future financial results differ from analysts' expectations), news of a merger or acquisition, gain or loss of a major customer or supplier, major product announcements, changes in senior management, a change in the Company's accountants or accounting policies, or any major problems or successes of the business. Either positive or negative information may be material.

1. Company Responsibility Regarding Insider Trading Matters

Various provisions of the federal securities laws impose liability or potential liability upon the Company in the event an employee or insider of the Company engages in illegal insider trading involving the Company's securities. An employer or other person or entity that, directly or indirectly, controls or has control over a person who participates in illegal insider trading may incur civil liability. A "controlling person" includes not only employer companies, but any person with influence or control over another person, and could include those with managerial or supervisory responsibilities, such as officers and directors of the Company. A controlling person may be liable if the controlling person knew or recklessly disregarded facts that would lead a reasonable person to believe that a person within its control (i.e., an employee) was likely to commit a violation, and the controlling person failed to take appropriate steps to prevent the violation. Other provisions of federal law may also impose civil and even criminal liability on parties involved in illegal insider trading.

2. Insider Trading Policy

Potential penalties to the Company may be mitigated if the Company can establish that it had in place appropriate policies and procedures to prevent the occurrence of such illegal insider trading. For this reason, the majority of public companies adopt an insider trading policy.

The typical insider trading policy will apply to directors, officers, and specified employees and consultants of the Company, as well as certain family members and others sharing the household of such persons. The policy will explicitly prohibit anyone subject to it from trading in Company securities at any time he or she possesses material nonpublic information about the Company or its business.

Most insider trading policies will identify periods of time during which trading in the Company's securities may be permissible ("trading windows"), as well as periods of time during which trading or other specified transactions in the Company's securities are generally not permissible ("blackout periods"). The beginning of the blackout period will vary for each Company, and is often based on a determination about when information about the Company's financial position for that fiscal quarter or year is likely to be internally available. The blackout period usually extends for a brief period of time (typically two business days) following the date of public disclosure of the Company's financial results for the applicable fiscal quarter or year, to give the public markets time to react to the new disclosures.

In addition to blackout periods, the policy will typically require insiders and other designated individuals to "pre-clear" proposed transactions involving Company securities with the Company's Compliance Officer. If the Compliance Officer is unable to "clear" a proposed transaction, then the insider must refrain from entering into the transaction at that time. Note that although exercises of stock options under the Company's stock option plans are not typically restricted, these exercises are reportable by individuals subject to Section 16 reporting requirements (see Section I.D below).

Most insider trading policies will also provide that the Company may impose a "special" blackout period during what would otherwise be a trading window, usually because of potentially material developments not yet disclosed to the public. Special blackouts may be applicable to everyone, or only to directors, officers and selected employees who have, or are presumed to have, access to the information. In the event of a special blackout period, those affected must refrain from engaging in transactions involving the purchase or sale of the Company's securities and must not disclose to others the fact of the trading suspension.

Note that the establishment of trading windows under an insider trading policy is not a safe harbor against insider trading liability. An insider may be subject to civil and criminal liability, even for trades during a trading window, if the insider trades while in possession of material nonpublic information about the Company or its business. It is each insider's responsibility to comply with the laws prohibiting insider trading.

3. Transactions by Family Members and Affiliated Entities

The typical insider trading policy will apply not only to officers, directors and specified employees and consultants of the Company, but also to family members sharing a household with such persons, as well as to certain entities such as family trusts and partnerships or corporations in which such persons may have an ownership interest or control relationship. It is each insider's responsibility to make sure that these persons and entities abide by the policy, including the pre-clearance procedures described above. This may mean that an insider's family members or affiliated entities will be required to refrain from trading in Company securities at a time when they might otherwise desire to do so.

4. Rule 10b5-1(c) Affirmative Defense for Prearranged Trading Programs

Rule 10b5-1(c) of the Exchange Act provides an affirmative defense against insider trading liability under federal securities laws for a transaction done pursuant to "blind trusts" (generally, trusts or other arrangements in which investment control has been completely delegated to a third party, such as an institutional or professional trustee) or pursuant to a written plan, or a binding contract or instruction, when such program was entered into by the insider in good faith at a time when the insider was not aware of material nonpublic information, even though the transaction in question may occur at a time when the insider is aware of material nonpublic information.

Brokers offer a variety of structures that facilitate an insider's fitting sales of their company's securities within this affirmative defense. The most common type of "10b5-1(c) program" is a pre-arranged trading program that provides for periodic sales of Company stock under a specified formula. The arrangement may include a limit order, may specify the dates on which sales are to occur or alternatively may delegate authority to a third party to determine such dates, and may permit the arrangement to be terminated under certain circumstances. These arrangements are generally structured as contracts between the individual insider and his or her broker. Some insider trading policies may set additional limits on such programs.

C. RULE 144: SALES OF RESTRICTED AND CONTROL SECURITIES

1. Background

Under the Securities Act, all sales of securities must be made either pursuant to a registration statement filed with the SEC or an exemption from registration. Rule 144 under the Securities Act provides a safe harbor exemption for public resales of "restricted securities" by any person and for sales of any securities held by an "affiliate" of the issuer of the securities. Rule 144 is a complex rule and involves a number of technical definitions. Company insiders will need to comply with all applicable requirements of the Rule, as summarized below, before making any public sale of Company securities.

2. Definitions

Rule 144 governs two types of securities: "restricted securities" and so-called "control securities." "Restricted securities" are defined as securities acquired from the Company, or from

an affiliate of the Company, in a transaction or chain of transactions "not involving any public offering." Most Company securities acquired prior to the Company's initial public offering will be restricted securities. Securities acquired in certain types of transactions after the initial public offering – e.g., in a private transaction with the Company or another insider, or pursuant to certain merger-type transactions – will also be restricted securities. "Control securities" are any securities, other than restricted securities, held by an affiliate of the issuer. It is important to note that even securities purchased in the open market through a broker will be subject to certain of the requirements of Rule 144 if such shares are held by an affiliate of the Company.

An "affiliate" is defined as a person directly or indirectly controlling, controlled by or under common control with the Company. All directors and executive officers of the Company are affiliates of the Company. In addition, it is possible that persons performing functions similar to executive officers also may be deemed to be affiliates. Furthermore, holders of a significant amount of the Company's stock (in some cases, as little as 5% of the outstanding stock) could, under certain circumstances, be deemed to be affiliates. Insiders who are uncertain about their status as a Rule 144 affiliate should contact the Compliance Officer prior to making any transfers of Company securities.

3. Requirements for Sale of Securities under Rule 144

There are five basic requirements that must be met in order to sell securities under Rule 144:

(a) Current Public Information

Rule 144 is available only if the Company has been public at least 90 days and is current in its filings under the Exchange Act.

(b) One-Year Holding Period

There is a one-year holding period requirement for the sale of restricted securities (but not control securities). Generally, the holding period commences at the time at which consideration is paid for the security, unless the securities are purchased using a promissory note that is full recourse and secured by collateral other than the purchased shares. Rule 144 provides for the "tacking" of holding periods in specified circumstances (such as gifts). Thus, a recipient or donee of gifted stock may benefit from the holding period commencement date of the donor of such stock, "tacking" the amount of time the stock was held by the donor to the amount of time the stock is held by the donee, resulting in one aggregated holding period. However, if the donee pays some consideration for the shares and is purchasing shares from an affiliate of the Company, then such stock will likely be subject to a new holding period commencing on the date of such payment of consideration.

(c) Limitations on Amount of Sales

Total sales of restricted or control securities made under Rule 144 during any three-month period are limited to the greater of: (i) 1% of the Common Stock outstanding as shown by the most recent report or statement published by the Company; or (ii) the average weekly reported volume of trading in the outstanding Common Stock reported on all securities

exchanges and/or reported through an automated quotation system during the four calendar weeks preceding the filing of the required notice of the sale under Rule 144 with the SEC.

Under certain circumstances, persons selling securities under Rule 144 will be required to aggregate sales made by them directly with sales by other persons for purposes of these volume limitations. For example, when two or more persons agree to act in concert for the purpose of selling securities of the Company, sales by or for the account of such persons during any three-month period will be aggregated for the purpose of applying these limitations. In determining the number of shares that may be sold under Rule 144, sales by an affiliate's spouse, by any of relatives and any relative of the spouse (in the event they live in the same home as the affiliate), by trusts or certain estates in which the affiliate or certain of his or her relatives have at least a 10% beneficial interest or act as executor or trustee, and by corporations or partnerships in which the affiliate or certain of his or her relatives have a 10% beneficial interest, must be aggregated and included as sales by the affiliate. There are also special aggregation rules covering pledges and gifts of stock which provide that sales by the pledgee and donee will, in certain circumstances, be aggregated with sales by the pledgor or donor.

(d) Manner of Sale

The sale of securities under Rule 144 may only be made through a broker or directly with a market maker. A broker may do no more than execute the order to sell the securities as an agent and may receive no more than the usual and customary broker's commission. Neither the seller nor the broker may solicit or arrange for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction. A "market maker" includes a specialist permitted to act as a dealer, a dealer acting in the position of a block positioner, and a dealer who holds himself out as being willing to buy and sell the Company's shares for his own account on a regular and continuous basis.

(e) Notice of Proposed Sale to the SEC

To be entitled to the safe harbor protection of Rule 144, the seller must mail to the SEC, before or concurrently with either the placing of the sell order with the broker or the execution of the sale with the market maker, three copies of a Notice of Proposed Sale (Form 144), at least one of which must be manually signed. No Form 144 filing is required, however, if the amount of securities to be sold during any three-month period is *de minimis*, i.e., the total sold does not exceed 500 shares and the aggregate sale price does not exceed $10,000. Rule 144 requires that the seller have a bona fide intention to sell the securities within a reasonable time after filing the notice. If the seller does not in fact sell all securities covered by the Form 144 within three months and still wants to sell the securities, he or she must file a new Form 144 with the SEC. The media, including newspapers and websites covering financial and business news, routinely report on which insiders of which companies are selling company stock by obtaining copies of Form 144 filings.

D. SECTION 16 AND "SHORT-SWING PROFITS"

1. Applicability of Section 16

Section 16 under the Exchange Act imposes certain public reporting requirements and trading restrictions on the Company's directors, officers and 10% stockholders ("Section 16 Insiders"). The Section 16 rules limit the term "officer" to those officers generally considered "executive officers," including the Company's president, chief executive officer, chief financial officer, principal accounting officer and vice presidents in charge of a principal business unit, division or function. However, any other officer or other person who performs a significant policy-making function for the Company may also be considered an "officer" for Section 16 purposes. In addition, officers of subsidiaries of the Company can also under certain circumstances be considered Section 16 officers of the Company.

2. Trading Restrictions of Section 16(b)

Section 16(b) is intended to prevent the unfair use of corporate information by Section 16 Insiders. The restrictions and consequences of Section 16(b), however, apply whether or not material nonpublic information is in fact used. Section 16(b) provides generally that if an insider can be shown to have earned a profit from any purchase and sale, or any sale and purchase, of any equity security of the Company occurring within any period of less than 6 months, this profit is recoverable by the Company. Thus, a Section 16 Insider who purchases and sells, or sells and then purchases, Company shares within any period of less than 6 months will be required to forfeit any profits realized from these transactions. For example, a sale of common stock, followed by a purchase of common stock at a lower price within 6 months, would result in a profit recoverable by the Company. When multiple transactions are involved, the "profit realized" is generally calculated in a manner that results in the greatest amount of profit recoverable. Certain plaintiffs' law firms systematically review the reports required by Section 16 described below and may bring lawsuits on behalf of the Company to recover such profits, whether or not such actions are pursued by the Company.

As that the Company obtains the prior approval of the Board of Directors (or, if the Committee meets certain independence standards, of its Compensation Committee; see Section III.A.3 below) of options granted under the Company's applicable stock plans, then neither the option grant nor the later exercise of the option granted under those plans will result in a purchase transaction that could be matched with a sale of Company securities under Section 16(b). In addition, the acquisition of shares of common stock under such stock plans will also be exempt under Rule 16b-3. Purchases or sales by certain family members or related entities also may be imputed to a Section 16 Insider for purposes of Section 16. See the discussion of "beneficial ownership" below.

Section 16 Insiders of the Company should avoid entering into transactions that might result in their being liable for Section 16(b) "short-swing" trading profits. Avoiding this liability is one of the important reasons for the "pre-clearance procedures" required under the Company's Insider Trading Policy.

3. Prohibition on "Short Sales"

Section 16(c) prohibits officers and directors from engaging in certain types of "short sales." Specifically, Section 16(c) makes it unlawful for any officer or director, directly or indirectly, to sell any equity security of the Company, subject to some very limited exceptions, if the officer or director (1) does not own the security sold or (2) does own the security, but does not deliver it against such sale within 20 days thereafter, or does not, within five days after such sale, deposit it for delivery.

4. Reporting Requirements of Section 16(a)

Section 16 is enforced through the reporting requirements of Section 16(a). Section 16(a) requires every director, officer and 10% stockholder of the Company to report to the SEC, any stock exchange on which the Company's stock is traded and the Company itself each acquisition and disposition of shares of the Company's common stock. Transactions by Section 16 Insiders that are required to be reported on Form 4 are required to be reported by the end of the second business day following the date the transaction is executed. Most transactions by insiders involving equity securities of the Company are required to be reported on this two-day basis.

(a) Beneficial Ownership

The SEC has adopted two separate definitions of beneficial ownership. The first definition, the "voting or investment power" test, is used to determine whether a person's holdings may characterize that person as a greater than 10% stockholder. This test is the same as that used to calculate beneficial ownership for purposes of Section 13 of the Exchange Act, and is described more fully in Section I.E.2. of this memorandum.

However, a second definition of beneficial ownership is applicable for reporting and liability purposes under Section 16. According to this second definition, Section 16 Insiders are only required to report transactions in securities that are beneficially owned by them. For these purposes, officers, directors and stockholders are deemed beneficial owners of securities if they have a direct or indirect "pecuniary interest" in the securities, which is generally defined as the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the Company's securities. Section 16 Insiders are presumed to have a pecuniary interest in certain specified securities, including: (1) any "derivative securities," such as options, warrants or convertible securities, which provide a right to acquire the Company's securities through their exercise or conversion, whether the derivative securities are presently exercisable or not; (2) Company securities held by the Section 16 Insider's immediate family members who share the same household; (3) under certain circumstances, Company securities held by a trust of which the Section 16 Insider is the trustee or settlor, or of which the Section 16 Insider or his or her family members are beneficiaries; and (4) Company securities held by a general partnership or limited partnership in which the Section 16 Insider is a general partner, or by a corporation in which the Section 16 Insider has an ownership interest, but in each case only to the extent of his or her proportionate interest in the securities held by the entity.

(b) Report Forms

Section 16 provides specific forms for reporting holdings and transactions in securities.

Each Section 16 Insider is responsible for the preparation and filing of his or her required reports (although the Company may provide officers and directors with assistance in preparing and filing these reports). There are three types of reporting forms: (i) the initial Form 3 reporting holdings of Company securities, to be filed within 10 days of becoming a Section 16 Insider; (ii) the periodic Form 4 reporting of most transactions in Company securities, to be filed within two business days of the date the transaction is executed; and (iii) the annual Form 5 filing for reporting any holdings or transactions that either were exempt from Form 4 reporting, or which should have been reported earlier on a Form 3 or Form 4, to be filed within 45 days of the final day of the Company's fiscal year. All Section 16 filings must be made electronically via EDGAR (see Section I.F below).

(c) General Reporting Requirements

Almost all transactions involving Company securities (including derivative securities) in which a Section 16 Insider engages (including option grants, grants of restricted or bonus stock, option exercises, open market and private purchases and sales, dispositions of stock or options to the Company (including in option repricings), or dispositions or acquisitions of Company stock in a merger or similar transaction involving the Company) will be required to be reported on a Form 4 within two business days of the date the transaction is executed. There are two main exceptions to this rule: (1) *bona fide* gifts (which may be reported on Form 5 within 45 days after the last day of the Company's fiscal year end), and (2) purchases of Company stock under its stock plans (which need not be reported at all, but affect end-of-period holdings reflected in later-filed reports).

E. SECTION 13 INDIVIDUAL REPORTING REQUIREMENTS

Any person who acquires beneficial ownership of greater than 5% of an outstanding class of equity securities of the Company is obligated under Section 13 of the Exchange Act to report such beneficial ownership on one of two different schedules to the SEC and the Company.

1. Reporting Requirements

A person who becomes the holder of more than 5% of a class of the Company's equity securities must generally file an initial report on Schedule 13D within 10 days after acquiring such beneficial ownership. A person who is a 5% stockholder by virtue of shares acquired prior to the Company's IPO is not required to file a Schedule 13D, but instead must file an initial report on Schedule 13G within 45 days after the end of the calendar year in which the IPO became effective.

A person must report subsequent changes in the facts set forth in the initial report by filing an amended report. For the purposes of a report on Schedule 13D, an amendment must be filed within 10 days after any material change occurs in the facts disclosed in the initial report until that person no longer beneficially owns more than 5% of the outstanding common stock. Under Rule 13d-2, the increase or decrease in beneficial ownership of 1% or more of the outstanding common stock is deemed to be material.

For the purposes of a report on Schedule 13G, an amendment must be filed within 45 days after the end of any calendar year in which any changes in information reported in the previous year have occurred. A final amendment to the report on Schedule 13G is filed within 45 days after the end of the year during which that person ceases to own beneficially more than 5% of the class of securities. If a person filing on Schedule 13G acquires additional shares subsequent to the IPO totaling more than 2% of the total outstanding shares of class of such securities in any 12-month period, the person must file an amendment on Schedule 13D within 10 days of the triggering acquisition, and must report any subsequent changes on Schedule 13D, subject to the rules and filing deadlines of Schedule 13D.

Certain 5% stockholders may be able to file a report on Schedule 13G in lieu of a 13D if they qualify as "institutional investors" or "passive investors" under the relevant rules, and have no intent to change or influence the control of the Company. Note that the "passive investor" category is not available to 5% stockholders who are directors or executive officers of the Company.

Schedule 13D and 13G reports must be filed electronically via EDGAR (see Section I.F below) with a copy to the Company. No fee is required in connection with the filing of a report on Schedule 13D or 13G.

2. Beneficial Ownership

The reporting requirements of Sections 13(d) and 13(g) relate to the beneficial ownership of common stock of the Company. For the purposes of Sections 13(d) and 13(g), a person is the beneficial owner of shares of common stock if that person, directly or indirectly, has or shares the power to vote, or direct the voting of, or the power to dispose, or direct the disposition of, the shares. In addition, such person is the beneficial owner of shares in respect of which such power can be obtained within 60 days, including through (1) the exercise of any option, warrant or right, (2) the conversion of a security, (3) the revocation of a trust, discretionary account or similar arrangement, or (4) the automatic termination of a trust, discretionary account or similar arrangement. Moreover, a person is the beneficial owner of shares if the rights described in the preceding sentence are acquired for the purpose of changing the control of the Company, irrespective of whether that right can be utilized within 60 days.

Beneficial ownership may be acquired either individually or as a group. If two or more persons agree to act together in acquiring or voting shares, a group is considered to have acquired the shares of each member thereof as of the date of that agreement. If the group satisfies the ownership conditions referred to above, the group must file a report.

F. EDGAR FILING

All Section 16 and Section 13 reports must be filed electronically. Individuals requires to file these reports must obtain their own EDGAR filing codes; they cannot use Company EDGAR codes for these filings. If an individual is an insider at more than one public company, however (e.g., if a Company director is an executive officer at another public company), the insider may use the same EDGAR code for all these individual filings.

EDGAR codes may only be obtained online. The application for an EDGAR code, known as Form ID, can be found on the SEC's website at: http://www.edgarfiling.sec.gov/.

II. COMPANY DISCLOSURE REQUIREMENTS

A. PERIODIC DISCLOSURE: FORMS 10-K AND 10-Q[1]

1. Generally

The Annual Report on Form 10-K and the Quarterly Report on Form 10-Q are detailed disclosure documents that public companies are required to file regularly under the Exchange Act. These reports are a public company's principal disclosure documents, and are widely read by investors. In addition to financial statements, these reports must include details of the business, its capitalization and recent transactions; a "Management's Discussion and Analysis" (MD&A) of the Company's operating results; and information about executive compensation. A description of the key filing and disclosure requirements follows.

2. Filing and Accelerated Deadlines

The filing deadline for Form 10-K and Form 10-Q depends on whether the Company is considered an accelerated filer, a large accelerated filer, or a non-accelerated filer.

The Form 10-K filing deadline is 60 days after fiscal year end for large accelerated filers, 75 days after fiscal year end for accelerated filers, and 90 days after fiscal year end for non-accelerated filers.

The Form 10-Q filing deadline is 40 days after fiscal year end for accelerated filers and larger accelerated filers, and 45 days after fiscal year end for non-accelerated filers.

An "accelerated filer" is a company that meets all of the following requirements

- its public float is $75 million or more, measured as of the last business day of its most recently completed second fiscal quarter;
- it has been subject to Exchange Act reporting requirements for at least 12 months;
- it has filed at least one Annual Report under the Exchange Act; and

[1] This memorandum assumes that the Company is a U.S. issuer filing periodic reports on Form 10-K and Form 10-Q. The requirements for small business filers using Form 10-KSB and Form 10-QSB, and for foreign private issuers and Canadian issuers using Form 20-F or Form 40-K, are similar, but not identical, to the requirements outlined below.

- it is not eligible to use Forms 10-KSB and 10-QSB (the "small business filer" forms).

"Public float" is the aggregate market value of a company's outstanding common equity, i.e., market capitalization, minus the value of common equity held by "affiliates" (generally, officers, directors, and certain large stockholders) of the Company.

A "large accelerated filer" is an accelerated filer that has a public float of $700 million or more, measured as of the last business day of its most recently completed second fiscal quarter.

The Company must test whether it will become subject to the new deadlines once each year, based on the public float at the end of the company's second fiscal quarter. A company whose public float is $75 million or more at the end of its second quarter, and which meets the other requirements for being an accelerated filer, must file its Annual Report for that year, and all subsequent reports, on the accelerated filer schedule. Similarly, a company whose public float is $700 million or more must file using the large accelerated filer deadline.

Generally speaking, once a company becomes an accelerated filer or a large accelerated filer, they retain those designations unless their public float falls below specified levels. A large accelerated filer whose public float as of the end of its second fiscal quarter is below $500 million becomes an accelerated filer beginning with that year's annual report, and an accelerated filer whose public float as of the end of its second fiscal quarter is below $50 million becomes a non-accelerated filer beginning with that year's annual report.

3. GAAP Compliance

Generally, all reporting of financial information in Annual and Quarterly Reports must be in compliance with Generally Accepted Accounting Principles (GAAP). Many companies use non-GAAP financial measures in evaluating and reporting their financial information. A commonly used non-GAAP financial measure is called EBITDA (earnings before income taxes, depreciation and amortization), but many other such measures are in use.

Under SEC Regulation G, any public disclosure of material information that includes a non-GAAP financial measure must comply with certain specific requirements. In general, the disclosure must be identified as non-GAAP, must be accompanied by a presentation of the most directly comparable GAAP measure, and must include a reconciliation of the difference between the measure used and the most directly comparable GAAP measure.

Companies using non-GAAP financial measures in a document filed with the SEC or an earning release provided on Form 8-K (see Section II.B. below) must also explain why management believes the non-GAAP financial measure is useful to investors, and any additional purposes for which management uses the non-GAAP financial measure.

There are additional restrictions on the use of non-GAAP financial measures in SEC filings other than earnings releases in Form 8-K. In such filings, companies may not: (1) use non-GAAP liquidity measures that exclude charges or liabilities that require, or will require, cash

settlement, other than EBIT and EBITDA; (2) adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within two years; (3) present non-GAAP financial measures on the face of the financial statements; (4) present non-GAAP financial measures on the face of any SEC-required filing of "pro forma" statements; or (5) use titles or descriptions for non-GAAP financial measures that are confusingly similar to GAAP titles or descriptions.

4. Officer Certifications

The chief executive officer and chief financial officer are each required to make several very specific certifications with respect to the accuracy and completeness of all annual and quarterly reports. Certifications, which are qualified by the officer's knowledge, must follow the exact form specified. Separate certifications must be signed by each certifying officer.

There is a separate certification requirement under the federal criminal code for the same two offers that applies to all SEC filings that contain financial statement. The designated officers must certify that the report "fully complies" with the requirements of Section 13(a) or 15(d) of the Exchange Act, and that the information contained in the report "fairly presents, in all material respects, the financial condition and results of operations of the issuer." It is a crime punishable by up to $1 million and up to 10 years in prison to give the certification knowing that it is false, and a crime punishable by up to $5 million and up to 20 years in prison to willfully give the certification knowing that it is false.

The officer certifications must be filed as exhibits to the SEC filings to which they related. These certifications may not be signed under a power of attorney.

5. Specific Disclosure Requirements

(a) Quarterly Evaluations of Disclosure Controls

The Company must set up a system of controls and procedures to ensure that the Company's disclosure documents are accurate, timely and complete. Management must evaluate, in each quarterly and annual report, whether its disclosure controls are operating effectively. Failure to maintain adequate disclosure controls is an independent violation of the Exchange Act.

(b) Internal Control Reports

The Company is required to include, in its annual report, a report on and assessment of the effectiveness of its "internal control over financial reporting." The term "internal control over financial reporting" is defined as a process designed by or under the supervision of management to provide reasonable assurance regarding the reliability of financial reporting, and includes those policies and procedures that: (1) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the Company's transactions and asset dispositions; (2) provide reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in accordance with generally

accepted accounting principles, and that the Company's receipts and expenditures are made only in accordance with appropriate management or board authorization; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the Company's assets.

Management's assessment must include a conclusion as to whether its internal control over financial reporting is effective, using an established control framework, such as the one developed by the Committee of Sponsoring Organizations of the Treadway Commission, commonly known as the "COSO framework." To assert that the internal control over financial reporting is "effective," management must conclude that such internal control provides reasonable assurance that misstatements (either individually or collectively) caused by error or fraud in amounts that would be material to the financial statements would be prevented or detected and corrected by employees in the normal course. The annual report that includes management's assessment of the effectiveness of internal control over financial reporting must also include an auditor "attestation," which will both assess management's evaluation and provide the auditor's own assessment of the effectiveness of such controls.

During the course of evaluating internal control over financial reporting, management or the auditors may identify deficiencies in such control, some of which may be considered "significant deficiencies" or "material weaknesses." Applicable auditing standards categorize such deficiencies as follows: (1) a control deficiency exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or correct misstatements on a timely basis; (2) a significant deficiency is a control deficiency, or a combination of control deficiencies, that results in a more than remote likelihood (i.e., a reasonable probability) that a misstatement in the Company's annual or interim financial statements that is more than inconsequential will not be prevented or detected; and (3) a material weakness is a significant deficiency, or a combination of significant deficiencies, that results in a more than remote likelihood that a material misstatement in the Company's annual or interim financial statements will not be prevented or detected. A finding of a "material weakness" in internal control over financial reporting precludes a conclusion by that such internal control is effective.

Internal control reports are required currently for all domestic companies that are accelerated filers and large accelerated filers. Non-accelerated filers will not have to provide a management evaluation until their first annual report filed for a fiscal year ending on or after December 15, 2007, and will not have to provide the related auditor attestation until their first annual report filed for a fiscal year ending on or after December 15, 2008. In addition, IPO companies will not have to provide either the management report or the auditor attestation until their second annual report as a public company.

(c) Off-Balance Sheet Arrangements and Contractual Liabilities

The Company must disclose information about the off-balance sheet arrangements that are reasonably likely to have a current or future effect on the Company's financial condition or results. The company must also provide specific tabular disclosure of its contractual obligations, based on type of contracts and the due date for the obligations.

(d) Company Repurchases of Own Stock Including Certain Employee Benefit Plan Repurchases

The Company must provide detailed disclosure regarding repurchases of their own securities, including the total number of shares repurchased by the Company or certain affiliated purchasers and the average price paid per share repurchased. Although disclosure of repurchases required whether or not the repurchases are part of a publicly-announced repurchase program, the Company must disclose the principal terms of such a program, the total number of shares purchased as part of such a program, and the maximum number (or approximate dollar amount) of shares that may yet be repurchased under such program. The rules also require disclosure of certain repurchases made under employee stock plans.

(e) Risk Factor Disclosure; Disclosure of Unresolved SEC Staff Comments

The Company must include a discussion of Risk Factors in its annual report and provide any updates to the Risk Factors in its quarterly reports. Accelerated filers and large accelerated filers must also disclose in their annual reports whether they had material unresolved Staff comments on prior Exchange Act reports which were issued more than 180 days prior to the end of the fiscal year. Staff comments that have been resolved, including those that the Staff and the issuer have agreed will be addressed in future Exchange Act reports, do not need to be disclosed.

B. CURRENT REPORTS ON FORM 8-K

Form 8-K is the standard form for reporting certain events on a current basis. The following is a summary of the events that require the filing of a Form 8-K. Unless otherwise noted, all mandatory filings are due within 4 business days of the triggering event.

1. Mandatory Filings

(a) Item 1.01: Entry Into a Material Definitive Agreement requires disclosure of entry into, or the material amendment of, an agreement that is material to the Company and is not entered into in the ordinary course of business. The material agreement is required to be filed as an exhibit, although the exhibit filing may be delayed until the quarterly or annual report for the period during which the agreement was entered into.

Material agreements with directors and certain executive officers (the CEO, the CFO and the next three most highly compensated executive officers), as well as material amendments to agreements with those executive officers, are filed under Item 5.02 instead of Item 1.01 of Form 8-K.

(b) Item 1.02: Termination of a Material Definitive Agreement requires disclosure of a termination of a material definitive agreement other than by its terms.

(c) Item 1.03: Bankruptcy or Receivership requires disclosure if a receiver, fiscal agent or similar officer has been appointed for the Company in a proceeding under the Bankruptcy Act or any other similar state or federal proceeding in which a court has assumed jurisdiction or supervision over substantially all the assets or the business of the Company.

(d) **Item 2.01: Completion of Acquisition or Disposition of Assets** requires disclosure if the Company or a majority-owned subsidiary completes the acquisition or disposition of a significant amount of assets. An acquisition or disposition is "significant" if it meets the requirements of Rule 1-02(w) of Regulation S-X. Note that Regulation S-X is a technical accounting rule and the determination of whether an acquisition or disposition transaction is "significant" is not the same as determining whether the transaction is "material." If a transaction is "significant," pro forma financial statements will be required within 75 days of the transaction, unless the transaction involves a "shell" company; see the discussion in Item 9 below. If an acquisition is "material" but not "significant," the agreement (but not pro forma financial statements) will likely have to be disclosed as a material contract under Item 1.01.

(e) **Item 2.02: Results of Operations and Financial Condition** requires disclosure if the Company releases information about earnings or other financial results for a completed annual or quarterly period. Although there is no regulatory requirement to provide regular earnings releases, many companies provide them for market reasons.

(f) **Item 2.03: Creation of a Direct Financial Obligation or Obligation under an Off-Balance Sheet Arrangement** requires disclosure of the creation of a material financial obligation that the Company is directly liable for, or that the Company is directly or contingently liable for under an off-balance-sheet arrangement. A "direct financial obligation" is a long-term debt obligation, a capital lease obligation, or an operating lease obligation, or a short-term debt obligation (less than one year) arising other than in the ordinary course of business.

(g) **Item 2.04: Triggering Events that Accelerate or Increase a Direct Financial Obligation or Obligation under an Off-Balance Sheet Arrangement** requires disclosure of an event causing the increase or acceleration of a direct financial obligation, or an event causing the Company's contingent obligation under an off-balance-sheet arrangement to become direct.

(h) **Item 2.05: Costs Associated with Exit or Disposal Activities** requires disclosure when the Board of Directors, a Board committee, or an authorized company officer commits the Company to an exit or disposal plan or otherwise disposes of a long-lived asset, or terminates employees under a plan of termination.

(i) **Item 2.06: Material Impairments** requires disclosure when the Board of Directors, a Board committee, or an authorized company officer concludes that a material charge for impairment to one of more of the Company's assets, including an impairment of securities or goodwill, is required under GAAP. If the conclusion is reached in connection with the preparation, review or audit of financial statements to be filed in a periodic report, the disclosure may be made in the periodic report. Note that since many impairment decisions are made in connection with the preparation of periodic reports, in practice the number of Form 8-Ks filed under this item is limited.

(j) **Item 3.01: Notice of Delisting of Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing** requires any company that is listed on a national securities exchange such as Nasdaq to report when: (1) it receives a notice from the exchange

that maintains its principal listing that the Company or a class of its listed securities does not satisfy a rule or standard for continued listing; or that the exchange has taken all steps necessary to delist such securities; (2) it has notified its exchange that it is aware of any material noncompliance with a rule or standard for continued listing; (3) it receives a public reprimand letter from its exchange or association in lieu of delisting; and (4) the Board, a Board committee, or an authorized company officer has taken definitive action to delist the securities (including a delisting caused by a transfer a listing to another exchange).

(k) **Item 3.02: Recent Sales of Unregistered Securities** requires disclosure if the amount of unregistered securities sold since the last periodic report exceeded, in the aggregate, 1% of the Company's outstanding securities of that class. Sales of unregistered securities below this threshold must be reported in the next periodic report.

(l) **Item 3.03: Material Modification to Rights of Security Holders** requires disclosure of material modifications to the rights of stockholders or any class of the Company's securities.

(m) **Item 4.01: Changes in Certifying Accountant** requires disclosure of the resignation, dismissal or engagement of an independent accountant.

(n) **Item 4.02: Non-Reliance on Previously-Issued Financial Statements or a Related Audit Report or Interim Review** requires disclosure when: (1) the Company's Board of Directors, a Board committee, or an authorized officer concludes that any previously-issued financial statements should no longer be relied upon because of an error in the financial statements; or (2) the Company is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review. In addition, if the Company is making the disclosure based on notice from its independent accountant, the Company must provide a copy of the Form 8-K disclosure to the independent accountant no later than the day the Form 8-K is filed, and must subsequently amend its Form 8-K to include the accountant's response, within two business days of receiving the letter.

(o) **Item 5.01: Changes in Control** requires disclosure when, to the knowledge of the Board, a change in control of the Company has occurred.

(p) **Item 5.02: Departure of Directors, Principal Officers or Named Executive Officers; Election of Directors; Appointment of Principal Officers** requires disclosure whenever: (1) a director resigns, retires or refuses to stand for re-election, whether or not such action is connected with a dispute between the director and the Company; (2) a director is removed, whether or not for cause; (3) a director is appointed to the Board, other than by a stockholder vote at a stockholder meeting convened for that purpose; (4) a principal officer (CEO, president, CFO, principal accounting officer or principal operating officer) is appointed; or (5) a principal officer or named executive officer retires, resigns or is terminated from that position. The filing date for an officer appointment may be deferred until the date the appointment is first publicly announced. In addition, if a director resigns or refuses to stand for re-election due to a disagreement with the Company, or is removed for cause, disclosure must

include the date of the triggering event, any positions held by the director on any committee, and a brief description of the circumstances surrounding the resignation, refusal to stand for re-election, or removal. If the director furnishes the Company with any written correspondence concerning such circumstances, the Company must file the correspondence as an exhibit to the Form 8-K. The Company must provide a copy of the Form 8-K disclosure to the director no later than the day the Form 8-K is filed, and must subsequently amend its Form 8-K to include the director's response, if any, within two business days of receiving the letter.

Material agreements with directors and certain executive officers (the CEO, the CFO and the next three most highly compensated executive officers), as well as material amendments to agreements with those executive officers, are filed under Item 5.02 instead of Item 1.01 of Form 8-K.

(q) Item 5.03: Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year requires disclosure if: (1) the Company has made any amendment to its Articles of Incorporation or Bylaws, if the Company did not propose the amendment in a previously filed proxy statement or information statement; or (2) the Company decides to change its fiscal year by means other than a submission to a vote of the stockholders.

(r) Item 5.04: Temporary Suspension of Trading under Employee Benefit Plans requires disclosure of an impending pension plan blackout period under Regulation BTR (See Section III.B.8 below) on the same day the issuer notifies its insiders of the blackout period.

(s) Item 5.05: Amendments to Code of Ethics, or Waiver of Provision of Code of Ethics requires disclosure of waivers or substantive amendments to the Code of Ethics affecting the principal executive officer, principal financial officer, principal accounting officer or controllers. Alternatively, a company may post notifications of such waivers or amendments on its website, as long as it has disclosed its intention to do so in a previously-filed Form 10-K and posts the information within 4 business days. Note that, for Nasdaq listed companies, waivers of the code of ethics granted to directors or executive officers must be reported on Form 8-K (i.e., there is no website posting alternative for this item for Nasdaq companies).

(t) Item 5.06: Change in Shell Company Status requires a shell company that completes a transaction in which it ceases to be a shell company to report the material terms of that transaction.

2. Voluntary Filings

(a) Item 7.01: Regulation FD Disclosure covers information that the Company elects to disclose for Regulation FD purposes; see Section IV below for a more complete discussion of Regulation FD. The timing of the Form 8-K must conform with Regulation FD guidelines (generally, no later than disclosure of the information by management for intentional disclosures, or within 24 hours for inadvertent disclosures).

(b) Item 8.01: Other Events covers information on events with respect to which information is not otherwise called for by the rules, but that the Company elects to disclose. Since this is a voluntary filing, there is no specific time deadline.

3. Financial Statements and Exhibits

Item 9.01 covers financial statements, pro forma financial information and exhibits, if any, filed as part of the Form 8-K. Financial statement required to be filed in connection with certain business combinations must be filed not later than 71 calendar days after the date that the initial report was filed on Form 8-K announcing the transaction. If company files a Form 8-K on Item 2.01 (acquisitions) or Item 5.01 (change of control) and the transaction involves a shell company merger, the Company must include Form 10 level information with the original Form 8-K, due 4 business days after the transaction.

C. WEBSITE POSTING REQUIREMENTS

1. Periodic Reports

Companies classified as accelerated filers or large accelerated filers must disclose in their Form 10-K whether they are making their periodic reports available free of charge on their websites "as soon as reasonably practicable" (i.e., on the same day, if possible). Companies may make their reports available by providing a link to their reports on the SEC's EDGAR site or a third-party free site, or by actually posting the reports (e.g., in PDF format). A company that chooses to comply by posting a link to the SEC's EDGAR site or a third-party site should provide a link directly to that company's filings, not just a link to the EDGAR or third-party home page. A company that posts actual reports should ensure that the filings are available on its website for at least 12 months.

2. Section 16 Reports

The Company must post the Section 16 reports (Forms 3, 4 and 5) filed by its insiders on its website by the end of the business day after the filing date. The Company may comply with this requirement by providing a link to the list of the Company's filings on the SEC's website, by posting the Section 16 reports individually, or by linking to a third-party site (as long as it provides a link to the entire report, including Part II). Note that the Company must post the Section 16 reports using a separate link from the one used for the SEC periodic reports discussed in Section II.C.1 above.

3. Other Posting Requirements

SEC and Nasdaq rules require each public reporting company to make its Code of Ethics, if it has one, publicly available. SEC rules provide that a company may comply with this requirement by filing its Code of Ethics with its Annual Report, posting it on its website, or including an undertaking in the Annual Report to provide a copy of the Code of Ethics without charge to any stockholder upon request. Nasdaq rules do not specify the manner in which a company must make its Code publicly available, but presumably any method that satisfies the SEC rules would also comply with the Nasdaq requirement.

SEC rules require the Company to make the charters of its Audit, Compensation and Nominating Committees publicly available, either by posting these charters on its website (noting the website location in its annual report or annual meeting proxy statement) or by filing

these charters with its annual meeting proxy statement at least once every three years, or in any year in which a charter has been materially amended.

The federal proxy rules require the Company to either to disclose in its proxy statement its procedures for stockholder communications with directors, and any policy with respect to director attendance at annual meetings, or provide the website address where stockholder communication procedures and director attendance policies appear.

D. ANNUAL MEETING / PROXY STATEMENT REQUIREMENTS

The corporate laws of most states, and the listing standards of the Nasdaq Stock Market, require companies to hold annual meetings of stockholders. The federal proxy rules require certain very specific disclosures with respect to proposals concerning the election of directors, the amendment or adoption of stock option plans and other equity compensation plans, and the ratification of auditors. In addition, the proxy rules require detailed disclosures about the composition and functioning of the Company's Board, a discussion of its director nomination process, its procedures for stockholder communications with directors, and any policy with respect to director attendance at annual meetings.

The annual meeting proxy statement is also the document which provides the most detailed disclosure about executive compensation. The SEC recently adopted new disclosure rules which will significantly increase the amount of information the Company will have to provide about executive compensation, beginning with fiscal years ending on or after December 15, 2006.

III. CORPORATE GOVERNANCE REQUIREMENTS

A. BOARD AND BOARD COMMITTEE REQUIREMENTS

1. SEC Rules Regarding Audit Committee Standards

SEC rules set forth certain minimum standards for Audit Committees, which are embodied in the Nasdaq listing standards:

- Each member of the Audit Committee must be independent, according to specified criteria.
- The Audit Committee must be directly responsible for the appointment, compensation, retention and oversight of the Company's auditors.
- The Audit Committee must establish procedures for the receipt, retention and treatment of complaints regarding accounting, accounting controls or auditing matters, including procedures for the confidential anonymous submission by employees of concerns regarding questionable auditing matters.

- The Audit Committee must have the authority to engage independent counsel and other advisors, as it deems necessary.
- The Company must provide appropriate funding for the Audit Committee.

There are two basic criteria for determining independence:

- *No outside payments*: Audit Committee members are barred from accepting any consulting, advisory or other compensatory fees, either directly or indirectly (e.g., via payments to relatives), other than in the member's capacity as Board or committee member. Payments to an organization in which a director was a partner, manager or principal would be prohibited compensatory payments under this standard. As a result, lawyers, accountants or investment bankers whose firms are engaged by the Company will generally not be eligible for Audit Committee service.
- *Stock ownership*: Audit Committee members may not be "affiliates" of the Company, other than via their Board membership. SEC rules establish a safe harbor at 10% ownership (i.e., a director will not be deemed an affiliate by virtue of stock ownership if he or she owns less than 10% of the outstanding shares). Companies must determine, on a case by case basis, whether a director who owns 10% or more of the Company's outstanding shares is an "affiliate" of the Company.

2. Audit Committee Financial Expert Disclosure

In addition to establishing minimum standards for Audit Committee members, SEC rules require that each company disclose in its Annual Report whether the Company has at least one "audit committee financial expert" serving on the Audit Committee, along with the name of that person and whether that person is independent of management; if the Company's Board has no audit committee financial expert, the Company must disclose why it does not. An "audit committee financial expert" is a person who has all of the following attributes: (1) an understanding of GAAP and financial statements; (2) the ability to assess the general application of GAAP in connection with accounting for estimates, accruals and reserves; (3) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity that are generally comparable to the Company's, or experience actively supervising one or more persons engaged in such activities; (4) an understanding of internal controls and procedures for financial reporting; and (5) an understanding of audit committee functions.

3. Nasdaq Rules Affecting Boards

(a) Audit Committees

Each listed company must have an Audit Committee of at least three members, all of whom must be independent directors, subject to certain limited exceptions. Audit Committee members must satisfy the Nasdaq director independence rules as well as the Audit Committee independence standard set forth in the SEC rules. In addition to the Audit Committee functions

mandated by the SEC rules, the Audit Committee, or another independent committee of the Board, must approve all related-party transactions.

All Audit Committee members must be financially "literate" at the time of appointment to the Audit Committee, and at least one member must be financially "sophisticated" under existing Nasdaq-defined criteria. There is no requirement that any member of the Audit Committee meets the SEC definition of "audit committee financial expert," although as noted above SEC rules require companies to disclose whether or not their Audit Committees have a member who meets that definition. One director who is not independent under the Nasdaq standards but who meets the SEC independence standards may serve on the Audit Committee pursuant to a special exception. A director serving on the Audit Committee under this exception may serve for a maximum of two years, and may not chair the Audit Committee.

(b) Director Independence

The Board must affirmatively determine if a director is "independent." Under the Nasdaq corporate governance rules, a director may not be considered "independent" if:

- the director is employed by the Company or any parent or subsidiary of the Company or who was so employed during the past three years (not including service of up to 12 months as an interim executive officer);
- the director has accepted, or has a family member (generally, spouse, parents, children and siblings, whether by blood, marriage or adoption, or sharing residence) who has accepted, any payments from the Company or any parent past or subsidiary of the Company in excess of $100,000 in any 12-month period during the three years, other than certain permitted payments (compensation for Board or committee service, payments arising solely from investments in the Company's securities, benefits under a tax-qualified retirement plan, or non-discretionary compensation, or permissible loans);
- the director has a family member who is, or during the past three years was, employed by the Company or a parent or subsidiary of the Company as an executive officer;
- the director is, or has a family member who is, a partner in, or controlling stockholder or executive officer of, any organization to which the Company made, or from which the Company received, payments for property or services that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, in the current fiscal year or any of the prior three fiscal years;
- the director is, or has a family member who is, employed as an executive officer of another entity at any time during the past three years where any of the Company's executive officers serve on the compensation committee of the other entity; or

- the director is, or has a family member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor and worked on the Company's audit during the past three years.

Audit Committee members are also subject to the heightened independence standards set forth in the SEC rules described above.

(c) Other Nasdaq Rules Affecting Boards

Companies listed on Nasdaq are also required to have: (1) a majority of independent directors on the Board; (2) regularly-convened executive sessions of the independent directors (at least twice a year); and (3) a Compensation Committee and a Nominating Committee composed entirely of independent directors, subject to certain limited exceptions. Alternatively, compensation and nominating decisions may be approved by a majority of the independent directors.

Special phase-in rules apply to companies listing on Nasdaq for the first time following an IPO. Such companies must have at least one independent director on each committee at the time of IPO effectiveness, a majority of independent directors on each committee within 90 days of effectiveness, and completely independent committees (subject to limited exceptions available to all Nasdaq companies) within 12 months of effectiveness. Furthermore, a company listing in connection with its IPO will have 12 months from effectiveness to comply with the majority independent board requirement.

4. Other Rules Affecting Compensation Committees

In addition to the independence standards established by Nasdaq, certain provisions of Internal Revenue Code Section 162(m) and Section 16 of the Exchange Act are also relevant to the composition of the Compensation Committee.

Internal Revenue Code Section 162(m) (the $1 million cap on executive compensation) requires that, to ensure the deductibility of certain compensation paid to executive officers, the compensation must be approved by a compensation committee composed of at least two directors who: (1) are not current employees of the Company; (2) are not former employees of the Company receiving compensation during the tax year for prior services; (3) have never been officers of the Company; and (4) do not receive any remuneration in exchange for goods or services from the Company in any capacity other than as director.

The Section 16 rules provide that certain transactions between an insider and the Company will be exempt from Section 16(b) short-swing trading liability if the transaction is pre-approved by a compensation committee composed of at least two "non-employee directors," which means directors who: (1) are not officers or employees of the Company; (2) do not receive compensation from the Company in any capacity other than as director in excess of $120,000; and (3) do not possess an interest in any transaction, or are not engaged in any business relationship, that would require disclosure in the Company's proxy statement as a related-party transaction.

B. OTHER CORPORATE GOVERNANCE REQUIREMENTS

1. Auditor Independence Rules

Public reporting companies are required to have audited financial statements prepared by an "independent" auditor. Auditors must comply with certain rules to be considered "independent" with respect to a particular audit client.

(a) Prohibited Services

Auditors are prohibited from providing certain non-audit services to their audit clients, namely the following: (1) bookkeeping services; (2) financial information systems design and implementation; (3) appraisal or valuation services; (4) actuarial services; (5) internal audit outsourcing; (6) management functions; (7) human resources functions; (8) broker-dealer, investment adviser or investment banking services; (9) legal services; (10) certain expert services in connection with legal, administrative or regulatory proceedings; and (11) tax services that would require an auditor to act as an advocate for the audit client or otherwise impair auditor independence (e.g., representing an audit client in Tax Court).

(b) Audit Committee Pre-Approval

A company's Audit Committee must pre-approve all audit and permitted non-audit services provided by the auditor to the Company. Pre-approval of permitted non-audit services may be delegated in certain circumstances and subject to certain conditions.

(c) Auditor Rotation Requirements

The lead partner and the concurring partner at the audit firm cannot provide audit services to the same company for more than five consecutive years, and cannot return to audit services for that company for an additional five years. Certain other partners on the audit engagement team may not serve for more than seven consecutive years, and cannot return to audit services for an additional two years.

(d) Fees; Restrictions on Audit Partner Compensation

Each company must disclose, in its annual proxy statement, fees paid to the principal accountant in certain defined categories. Audit partners are prohibited from receiving compensation from their firms during the audit engagement period that is based on the performance or, or procurement of, non-audit services.

(e) Restrictions on Prior Employment

An accounting firm is prohibited from auditing a company's financial statements if certain members of management of that company had been members of the accounting firm's audit team within one year of the commencement of the audit.

(f) Auditor Reports to Audit Committee

The auditors must report on critical accounting policies and alternative accounting treatments to the Audit Committee.

2. "Improper Influence" on Conduct of Audits

Rule 13b2-2 of the Exchange Act specifically prohibits officers and directors, and persons acting under their direction, from coercing, manipulating, misleading or fraudulently influencing an auditor engaged in the performance of an audit if the person knew or should have known that such action, if successful, would render the Company's financial statements materially misleading. Note that the definition of "officer" for purposes of these rules is likely to apply to more than the "executive officers" required to file Section 16 reports, and includes some corporate officers (such as the corporate secretary and certain vice presidents) who may not have any real management responsibility.

SEC rules also extend to anyone acting "under the direction" of an officer or director, whether or not they are directly supervised by that officer or director. Such persons might include not only the Company's employees, but also customers, vendors or creditors who, under the direction of an officer or director, provide false or misleading information to an auditor, or who enter into undisclosed "side agreements" that enable the Company to mislead the auditor. Under appropriate circumstances, the scope of the rule might also include other partners or employees of the accounting firm, attorneys, securities professionals or other advisers who, for example, pressure an auditor to limit the scope of an audit.

The rule prohibits conduct designed to improperly influence an auditor "engaged in the performance of an audit." The SEC has given this term a broad reading, encompassing not only the professional engagement period, including any negotiations for retention of the auditor, but also actions subsequent to the engagement period, if the auditor is called upon to make decisions regarding a previously-released audit report. For example, the rules prohibit attempts to coerce a prior auditor to release a consent to the use of a prior-year audit. The rules also prohibit attempts to influence an auditor's review of interim financial statements as well as audits.

The rule prohibits attempts to influence an auditor to take an action, or fail to take an action, that might render the financial statements misleading. Examples of such inappropriate auditor actions or inactions including issuing or reissuing a report on the financial statements when the auditor knows there has been a material violation of GAAP; not performing audit, review or other procedures required by generally accepted auditing standards; not withdrawing a previously issued audit report when circumstances warrant such withdrawal; or not communicating appropriate matters to the Company's Audit Committee.

3. Code of Ethics

The Company must disclose in its Annual Report whether it has a Code of Ethics that applies to its principal executive officer, its principal financial officer, its principal accounting officer or controller, or persons performing similar functions, that met certain minimum standards, or if not, why not. A "Code of Ethics" means a set of standards reasonably designed

to deter wrong-doing and to promote: (1) honest and ethical conduct; (2) full, fair, accurate, timely and understandable corporate disclosure; compliance with applicable laws, rules and regulations; (3) prompt internal reporting to appropriate persons of violations of the Code, and (4) accountability for adherence to the Code.

The Company must make its Code of Ethics publicly available, by either (1) filing the Code of Ethics with its Annual Report, (2) posting it on its website (disclosing that fact in its Annual Report), or (3) making it available without charge to any stockholder upon request (by undertaking in its Annual Report). If the Code of Ethics required by the rules is part of a larger code, only the sections required by the rules needs to be made publicly available.

Nasdaq requires each listed company to adopt a code of conduct applicable to all officers, directors and employees. Although the Nasdaq rules refers to a "code of conduct," the definition tracks the SEC definition of "code of ethics" outlined above.

Waivers or substantive amendments to the Code of Ethics must be approved by the Board and reported on Form 8-K within four business days.

4. "Whistle-Blower" Protections For Employees Who Provide Evidence Of Fraud

It is unlawful for a public company, or any officer, employee or other agent of the company, to discharge, demote, suspend, threaten, harass or in any other manner discriminate, in any term or condition of employment, against an employee who lawfully provides information or assists in a fraud-related investigation or proceeding involving violations of: (1) federal criminal law involving securities fraud, mail fraud, bank fraud, or wire, radio and television fraud; (2) SEC rules or regulations; or (3) federal law relating to fraud against stockholders.

To be protected, the employee must provide the fraud-related information or investigative assistance to a federal regulatory agency, a member of Congress, or a person at the Company with supervisory or similar authority over the employee. It is important to note that it is not only unlawful for the employer company to take the prohibited actions against the whistle-blowing employee, but also makes it unlawful for *individual officers, employees or other agents* of the Company supervising the employee or otherwise involved in handling the matter within the Company to take such action. This means that a non-officer employee with some supervisory or administrative authority over another employee could be liable for mishandling a complaint voiced by the other employee.

Remedies for violating these whistle-blower provisions include compensatory damages, such as reinstatement of the employee to his or her former position at the seniority level the employee would have had in the absence of the unlawful retaliation, back pay plus interest, and special damages such as litigation costs, attorney fees and expert witness costs.

Whether the claim is resolved by the Secretary of Labor or by a federal district court, the employee need only demonstrate that the whistle-blowing activities were a contributing factor to the unfavorable employment action taken and that the whistle-blower "reasonably believes" that a violation of federal law has occurred. To rebut the claim, the employer must show clear and

convincing evidence (a higher evidentiary hurdle) that the unfavorable employment action would have occurred in the absence of the employee's protected behavior.

In addition to creating liability for retaliation against employee informants in securities fraud cases, federal law also creates liability for both public and private employers who retaliate or otherwise interfere with the lawful employment or livelihood of any person who provides truthful information to a law enforcement officer with regard to the commission or possible commission of any federal offense.

In addition to being able to secure relief under federal law, an employee who believes he or she has been discriminated against as a result of whistle-blowing activities also has the right to seek relief under other applicable laws or regulations.

5. Attorney Conduct Rules

The attorney conduct rules affect most corporate attorneys practicing in the U.S., whether practicing in law firms or in-house, with a few limited exceptions outlined below. Under these rules, an attorney who receives evidence of a "material violation" of the federal securities laws or certain corporate laws will generally be required to report this evidence to a company's chief legal officer, who must investigate the report and take remedial action if necessary. The rules also require the attorney to follow up on the complaint, and report "up the ladder" to the Board if the original report to a company's chief legal officer is not adequately responded to. Alternatively, the Board can designate a special committee, the Qualified Legal Compliance Committee, to receive attorney reports of material violations and conduct investigations.

6. Stockholder Approval of Equity Compensation Plans

Nasdaq rules require stockholder approval for the adoption and material amendments of equity compensation plans, subject to a few limited exceptions. In addition, the NYSE broker voting rules (which apply to most brokers, and therefore impact companies listed on Nasdaq as well as the NYSE) require that brokers receive instruction from beneficial owners before voting on proxy statement proposals concerning equity compensation plans.

Nasdaq-listed companies are required to obtain stockholder approval for all stock option plans, stock purchase plans, or other equity compensation arrangements (including individual compensation arrangements) established or materially amended after June 30, 2003, under which shares may be acquired by officers, directors, employees or consultants, except for certain direct purchase stock plans or dividend reinvestment plans, plans that meet the requirements of Section 401(k) or 423 of the Internal Revenue Code, or plans assumed in connection with a merger or acquisition meeting certain conditions. Stockholder approval is not required for "inducement grants" to new employees or directors of the company, as long as the Company issues a press release disclosing the material terms of the award.

7. Prohibition of Loans to Executive Officers and Directors

It is unlawful for a public company or a company which has filed a registration statement for an IPO to loan or otherwise arrange for the extension of credit in the form of a personal loan

to or for any executive officer or director of that issuer. This means that public companies are prohibited from making loans to their executive officers and directors, including loans to purchase company stock, to purchase real estate or assist with relocation expenses, to assist with personal tax liabilities, or otherwise. Loans and other arrangements of credit in existence as of July 30, 2002 may remain outstanding, as long as they are not materially modified or their terms extended on or after that date.

8. Regulation BTR

Under Regulation BTR, it is unlawful for officers subject to Section 16 of the Exchange Act and directors of public companies to purchase, sell or otherwise acquire or transfer any compensatory equity security of the Company during a "pension plan blackout period." An insider who engages in a prohibited transaction during a pension plan blackout period will be required to forfeit to the Company any profit on the transaction and may face SEC enforcement actions, other civil penalties and potentially even criminal penalties. Companies and plan administrators are required to notify insiders of plan blackouts within four business days after the issuer receives notice from the plan administrator as required under Department of Labor regulations, provided that in any event the insiders receive notice at least 15 calendar days before the beginning of the blackout period.

IV. REGULATION FD

Regulation FD ("Fair Disclosure") restricts the selective disclosure of information that is material and that has not previously been publicly disclosed. Regulation FD provides that, if a "senior official" of a public company intentionally discloses material nonpublic information to securities market professionals or holders of the company's securities who might trade on the information, it must provide simultaneous public disclosure of that information. The definition of "senior official" includes the company's executive officers and directors, investor relations officers, public relations officers and other employees who regularly interact with the investment community, and individuals acting at the direction of those persons.

Regulation FD does not provide a bright-line test for what is material. As noted above in Section I.B, material information is any information that a reasonable investor would consider important in deciding to buy, hold or sell Company securities.

Disclosures of material nonpublic information may not be made to securities industry professionals, such as brokers, investment advisers, sell-side analysts, buy-side analysts, investment companies and hedge funds, and to certain persons associated with such entities. In addition, a company may not make selective disclosure to any security holder of the company where it is reasonably foreseeable that the security holder would buy or sell the company's securities based on the information.

Regulation FD does not restrict ordinary-course business communications with customers, suppliers, strategic partners and government regulators. Nor does Regulation FD apply to disclosures made to the media.

In addition, Regulation FD specifically exempts the following types of disclosures from its restrictions:

- Disclosures to "temporary insiders" who owe the company a duty of trust and confidence (*e.g.*, an attorney, investment banker or accountant)
- Disclosures to recipients who expressly agree, either orally or in writing, to keep the information confidential (*e.g.*, in the context of a private financing or business combination)
- Disclosures to rating agencies for the purpose of developing a publicly available credit rating
- Most disclosures in connection with publicly-registered stock offerings (since these disclosures are already regulated under the Securities Act of 1933)

An agreement to keep material nonpublic information confidential may be made after the information is disclosed. This means that a company that mistakenly discloses material nonpublic information to a person covered by Regulation FD may avoid the required public disclosure if the recipient agrees not to disclose or trade on the basis of the information.

Intentional vs. Unintentional Disclosures: Disclosures that violate Regulation FD may be made intentionally or unintentionally. A disclosure is "intentional" for purposes of Regulation FD if the company or person acting on behalf of the company either knows or is reckless in not knowing that the information he or she discloses is both material and nonpublic. If a company intentionally discloses material nonpublic information to a person or group covered by Regulation FD, it must provide simultaneous public disclosure of that information. If material nonpublic information is unintentionally disclosed to such a group, the company must publicly disclose the information promptly after the unintentional disclosure. "Promptly" means within 24 hours or, if later, the beginning of the next day's trading on the New York Stock Exchange.

Public Disclosure Requirement: The company can meet the public disclosure obligation of Regulation FD by reporting the Item on Form 8-K, or by any other method (or combination of methods) that is "reasonably designed to provide broad, non-exclusionary distribution of information to the public." A company may use these methods in addition to, or in lieu of, a Form 8-K. For example, a company may publicly disclose information by issuing a press release, and posting that press release on its website. Note, however, that posting information on a website alone, not in conjunction with another method of public dissemination, is not sufficient to meet the public disclosure requirement of Regulation FD.

Communications with Analysts: Regulation FD does not prevent companies from disclosing non-material information to analysts. However, given the difficulty of determining what information is "material," companies that communicate information to analysts or investors in non-public settings, or in one-on-one meetings, take on a high degree of risk of violating Regulation FD. Company executives in such situations must be knowledgeable about what information has been publicly disclosed, and what undisclosed information is likely to be considered material. In order to avoid inadvertent selective disclosure of material nonpublic information, it is good practice to designate a limited number of persons to make disclosures or field inquires from individuals covered by Regulation FD.

Interaction of Regulation FD with Form 8-K Rules: As the result of changes to the Form 8-K rules implemented after the adoption of Regulation FD, some items that would be considered "material" for purposes of Regulation FD (e.g., earnings information) are now independently required to be disclosed on Form 8-K. The same Form 8-K may be used to fulfill multiple requirements. For example, a Form 8-K for the signing of a material contract may be used to fulfill both the Form 8-K filing requirement and the Regulation FD public disclosure requirement. Filers should indicate on the form whether the Form 8-K is being used for multiple filing requirements. It is important to remember, however, that the time deadlines for compliance with Regulation FD are not changed by the Form 8-K rules. This means, for example, that if a company wants to discuss a material contract with its analysts immediately after signing, and the company wants to use Form 8-K as its means of public disclosure for Regulation FD, it must file the Form 8-K prior to its analyst discussion, even though the SEC Form 8-K filing rules would otherwise allow four business days for the filing.

LATHAM & WATKINS

Number 565 February 5, 2007

Client Alert

Latham & Watkins
Tax Department

Welcome to 2007: Equity Plan and Executive Compensation Matters For Your Immediate Consideration

This *Client Alert* address three important topics worthy of your consideration as you head into your Spring Compensation Committee meetings and work on your 2007 proxies and stockholder meetings:

- Adopting an Equity Award Grant Policy;
- Reviewing 162(m) Plans and Compliance; and
- Reviewing the Impact of Related Persons Disclosure Rules

The Beat Goes On

As we all know, executive compensation was a very hot topic in 2006:

- The Securities and Exchange Commission (SEC) released the most comprehensive changes to executive and director compensation disclosure rules in its history;
- Options backdating and timing questions plagued many public companies and led to officer resignations, restatements of financial results and shareholder litigation;
- Clients wrestled with the implementation of accounting requirements under Statement of Financial Accounting Standards No. 123 (revised 2004) Share Based Payments (FAS 123R) as well as the nonqualified deferred compensation rules under Section 409A of the Internal Revenue Code (Code); and
- The press provided us with an endless stream of salacious stories on perquisites, severance packages and various other alleged compensation excesses on a daily basis.

Continuing that theme, 2007 is off to a very fast and busy start, with more of the same, plus:

- The focus that executive compensation will receive as companies file their 2007 proxies;
- The possibility of new Section 162(m) and Section 409A legislation;
- The anticipated arrival of final Section 409A regulations and the likely need finally to amend plans to comply in form with Section 409A and to fix discounted options by December 31, 2007;
- The SEC's issuance of favorable guidance on Zions Bancorporation's market-based approach to valuing options and equity for FAS 123R purposes and, of course;
- The inevitable surprises that every year seems to bring.

The purpose of this *Client Alert* is not to reprise the developments of 2006 or to address 2007 emerging issues in depth. We have already given you our thoughts on the SEC's new proxy disclosure rules in our 2006 *Client Alerts* and in our two sets of General Counsel Forums on the rules and issues, and we now are working with many of you as you prepare your CD&As and new compensation tables. We intend to focus on other 2007 issues as they emerge in future *Client Alerts* and Benefit Updates. (For a detailed discussion and analysis of the new SEC disclosure rules see Latham & Watkins *Client Alerts* No. 538 and 558.)' The purpose of this *Client Alert* is to call your attention to three important topics that are worthy

of your consideration as you head into your Spring Compensation Committee meetings and work on your 2007 proxies and stockholder meetings.

Consider Adopting an Equity Award Grant Policy

The new Compensation Discussion and Analysis (CD&A) mandated by the SEC executive compensation disclosure rules requires a discussion of various equity grant practices. Furthermore, the recent and still ongoing stock option timing investigations have focused attention on grant practices at hundreds of public companies. In addition to the accounting, income tax and disclosure consequences related to grant date determinations, these investigations have highlighted the importance of following applicable state laws, company organizational documents and plan documents when making equity compensation awards and setting the terms of such awards. It is clear that companies cannot afford to overlook any of these matters when granting options, restricted stock, RSUs, SARs and other equity awards.

Improper delegations of authority, failure to properly date actions by unanimous written consent and delayed recipient notification of awards are some examples of lax plan administration that can have unintended consequences, especially under the accounting measurement date rules of FAS 123R, which are now in effect and which are much more rigorous than the prior rules under APB 25. In this regard, FASB Staff Position 123R-2 and recent speeches by SEC accounting staff members make it clear that administrative delays and inattention to corporate formalities, which ultimately have largely been forgiven under APB 25 if not associated with backdated options, will not be overlooked in the future and that a date of grant will only be accepted as the accounting measurement date if the grant has been approved in accordance with all corporate governance requirements and if the grant is communicated to recipients within a relatively short time period after the approval. It is clear that many companies will need to change their equity grant practices to meet these new requirements and in order to avoid future accounting problems, even if they were spared restatements or other changes with respect to grants made under APB 25.

Accordingly, in order for companies to avoid the many painful consequences that can arise from improper or unclear grant procedures, we strongly recommend that all clients review their current equity grant practices and consider adopting written policies that can be reviewed, audited and updated periodically. Although the contents of grant policies will vary among companies, the following are some key guidelines:

- Compensation Committees should review and assert control over equity programs;
- Companies should never backdate equity grants;
- Companies should not grant "discounted options" except in extraordinary circumstances and only after thorough analysis of all issues, especially with respect to Sections 409A and 162(m) of the Code;
- Companies should regularize and consider limiting the number of equity grant dates, especially for new hire grants;
- Companies should establish a regular grant schedule well in advance of anticipated grants;
- Companies should consider making grants only during open trading windows;
- If grants are made during closed windows or blackout periods, companies should fully consider the impact that any material non-public information could have on the value of the grants, SEC disclosure requirements and optics considerations; and
- Companies should only make unscheduled grants in unusual circumstances, and with special care.

Consideration should also be given to adopting the following practices and procedures in order to implement grant policies:

- To the maximum extent possible, grants should be made only at in-person or telephonic meetings;
- The use of Actions by Unanimous Written Consent should be minimized;
- Delegations of grant authority to non-Board committees should be minimized to the extent practical;
- If delegations are used, they must conform to state law, by-law and plan requirements, and sub-delegations should be prohibited;
- Two-member committees are much preferable to one-member committees when it comes to establishing grant meeting and actions;
- A list of grantees and terms of proposed grants should be reviewed and finalized in advance of meetings;
- All paper, including minutes, Form 4s, Form 8-Ks, and grant agreements, should be prepared and processed promptly following meetings;
- Human resources and other administrative personnel should be trained on the applicable legal and regulatory requirements;
- It may be appropriate to designate someone to oversee equity award compliance, and have that individual report directly to the Compensation Committee;
- Internal controls and reviews should be established with the involvement of legal and accounting personnel; and
- Equity grants should be audited periodically to insure compliance with policies and procedures.

Companies should also review their equity plan provisions that specify how "fair market value" is determined for purposes of setting the exercise price of options, the purchase price of stock and the strike or base price of other awards. Many plans provide that fair market value will be determined as of the close of business on the day prior to the grant date, or based on average prices on the date of grant or the prior date. In order to avoid additional proxy statement disclosure under the new SEC rules, companies should consider amending their plans to provide that fair market value will be determined as of the close of business on the date of grant.

Review Section 162(m) Plans and Compliance

Section 162(m) of the Code generally limits a publicly held corporation's deductions for compensation paid to its chief executive officer and its next four most highly compensated officers to $1 million per year for each individual. "Qualified performance-based compensation" (QPBC) which is paid pursuant to plans which have been approved by shareholders and pay compensation only upon the achievement of objective performance targets set by a committee of two or more "outside directors" is exempt from this $1 million limit. However, QPBC plan treatment can be lost if the company does not adhere to the rigorous statutory requirements.

In recent years, the IRS has increased its focus on Section 162(m) compliance during audits and has indicated that its agents are discovering numerous instances of non-compliance with these requirements. The following is a list of the most important Section 162(m) issues companies should review when determining award payments for 2006 (and prior years) and establishing performance targets for 2007 and future years.

Latham & Watkins | **Client Alert**

Check Shareholder Re-Approval Requirements
In general, shareholders must approve QPBC performance goals at least every five years. Although this requirement is not applicable to stock options and SARs with an exercise price at least equal to 100 percent of grant date fair market value, other forms of intended QPBC such as cash bonuses, long-term incentive compensation and restricted stock or other equity awards will generally not qualify as QPBC unless the plan's performance goals are re-approved. If a plan's goals were last approved in 2002, it is likely that they need to be submitted to shareholders for re-approval in 2007.

Check for Expiring Transition Periods
Compensation plans that are in effect before a corporation becomes publicly held may be subject to special transition rules that defer the application of Section 162(m) for a period of time after the public company goes public. The length of the transition period depends on how the corporation becomes publicly held, and the adoption of material plan amendments can shorten the transition period. For corporations that become publicly held through an IPO, the transition period expires at the first meeting of the corporation's shareholders at which directors are to be elected that occurs after the close of the third calendar year following the year of the IPO. This means that companies that went public by way of an IPO in 2003 need to submit their plans for shareholder approval and otherwise comply with Section 162(m) in 2007 if they want QPBC treatment.

Review "Outside Director" Status Qualifications
To qualify as QPBC, compensation must be awarded and administered by a committee of two or more "outside directors" who are not employees or current or former officers and, generally, who do not receive remuneration other than director compensation from the corporation, unless it qualifies as "de minimis"(that is, insignificant) remuneration. Public companies should carefully review the status of the directors who administer these plans every year to make certain all committee members either qualify as "outside directors" or that any non-qualifying directors recuse themselves or abstain from voting on QPBC awards.

Review Plan Administration and Document Compliance
To qualify as QPBC, compensation must be paid based solely on the attainment of one or more pre-established, objective performance targets based upon goals approved by the company's shareholders. Such targets are only "objective" if a third party having knowledge of the relevant facts could determine at the end of the performance period whether the goals have been met. The terms of QPBC awards must also preclude discretion to increase the amount of the compensation that would otherwise be payable (although discretion to decrease is permissible). Failure to satisfy any of these requirements is fatal to QPBC treatment. Compliance with each of these requirements should be reviewed and carefully documented when Compensation Committees determine the amount of 2006 awards and set their 2007 award targets.

Don't Forget the Impact of the Related Persons Disclosure Rules

In addition to director and executive compensation disclosure requirements, the new SEC rules include changes to "related persons" proxy disclosures and expand the scope of transactions covered by these rules. The new rules require disclosure of a company's applicable policies and procedures for the review and approval (or ratification) of transactions involving related persons. Companies must also describe: (i) transactions that were not subject to review and approval (or ratification) under company policies and (ii) any circumstances in which such policies and procedures were not followed. Public companies should carefully review current policies and practices and consider adopting written policies for related person transactions if none is currently in place.

Most important to note is that under the amended rules, compensation arising solely from an employment relationship is not required to be reported as a related person transaction if the related person is not an immediate family member and the compensation is reported under Item 402 of Regulation S-K Executive Compensation (which covers Named Executive Officers (NEOs) and directors).

In addition, if the person in question is an executive officer who is not an NEO, such employment-related compensation is not required to be reported if (i) the compensation would have been reported under Item 402 if the executive officer were an NEO and (ii) such compensation was approved, or recommended to the company's Board of Directors for approval, by the Compensation Committee. Accordingly, we strongly recommend that our clients seek Compensation Committee approval of compensatory arrangements (including employment agreements) with all executive officers–not just NEOs–(and ratification of existing arrangements) if it has not already been done. Clients should also consider amending the Compensation Committee's charter to include a requirement for such review and approval as a matter course. Failure to approve such compensation can result in incomplete proxy related persons disclosure and the possibility of a company's later having to disclose all compensation payable to an executive officer as if that person were an NEO–not a happy prospect for most companies.

Endnote

[i] The *Client Alerts* can be found at http://www.lw.com/resource/Publications/_pdf/pub1747_1.pdf and http://www.lw.com/resource/Publications/_pdf/pub1643_1.pdf. The SEC rules can be found at http://www.sec.gov/rules/final/2006/33-8732a.pdf and http://www.sec.gov/rules/final/2006/33-8765.pdf.

Office locations:

Barcelona
Brussels
Chicago
Frankfurt
Hamburg
Hong Kong
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Northern Virginia
Orange County
Paris
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

MEMORANDUM[1]

To: Mighty Oak Corporation

From: Heller Ehrman LLP

Date: 2007

Subject: Stock Plan Issues related to the Initial Public Offering of Mighty Oak Corporation (the "Company")

In connection with the Company's proposed initial public offering (the "IPO"), the following is a summary of certain decisions that will need to be made with respect to the structuring of the Company's employee and director equity compensation plans as it transitions to being a public company.

As background, in addition to approval by its Board of Directors (or a Board committee), a public company is required in almost all circumstances to obtain shareholder approval of new or materially amended equity compensation plans. In addition, public company equity plans are subject to a different set of legal and tax requirements than are private company plans.

The material terms of the Company's equity compensation plans are required to be disclosed in the Form S-1 Registration Statement filed in connection with the IPO. Accordingly, review and finalization of plan structure, as well as Board and shareholder approval, should be completed as early in the IPO process as possible.

This memorandum summarizes the primary compensation plan structuring points that the Company should consider. Reaching decisions on the issues listed below will enable the Company, its accountants and its outside counsel to finalize the plan documentation process.

[1] This form is intended to illustrate the kinds of stock plan issues a company will need to address in connection with going public. For specific advice concerning plan design and compensation strategies, please consult with a member of our Compensation & Benefits Group.

I. Primary Equity Compensation Plan Matters

The Company currently has the following equity compensation plans in place, with the corresponding share numbers applicable to each:

Plan	Total Shares Reserved	Shares Available for Issuance as of __/__/__

The Company proposes to **[adopt a new equity compensation plan that will be] [amend the _____ Plan] described above and use that plan as]** its primary plan following the IPO (such plan, the "IPO Plan").

The following are a series of questions related to structuring the IPO Plan:

1. **Types of Awards.** The Company's IPO Plan **[is] [will be]** structured to permit the issuance of most common types of equity awards (including stock options, restricted stock awards, restricted stock units, stock appreciation rights, phantom stock, performance units and other similar types of awards.

The IPO Plan might also authorize payment of performance-based cash bonuses where the performance criteria and certain other aspects of the bonus arrangement require shareholder approval.

Should the plan also provide for cash bonuses? Yes No

2. **Number of Shares Reserved for Issuance.** Specify the number of shares of Common Stock that the Company wants to have available for issuance to employees under its IPO Plan: (Generally, this number should be enough to operate the plan without having to go back to its shareholders for approval of more shares for two to three years.)

_____

3. **Evergreen Provision.** In addition to a set number of shares initially reserved under the plan, specify whether the Company wants to include in the IPO Plan an evergreen provision that will annually replenish the number of shares available for issuance under the plan. (Generally, an evergreen provision is structured so that each year the pool of shares in the plan increases by the lesser of (a) a set number or (b) some percentage (e.g., 3-4%) of the Company's total outstanding shares of stock as of a

particular date each year (e.g., the last day of the prior fiscal year or the day prior to the Company's annual stockholders' meeting). Also, the evergreen provision often will continue for some number of years less than the entire life of the plan (e.g., 3-5 years).

Indicate whether the Company wants to include an evergreen in the IPO Plan:

Yes No

If Yes, please specify: the set number (as described above) _____

_____

percentage of outstanding stock _____

number of years of life of evergreen _____

4. **Section 162(m) Share Limit.** Applicable tax rules require that a plan specify the maximum number of shares subject to equity awards that may be issued to any one employee during a specified period of time. Generally, companies set this maximum number on a calendar year basis (although the Company could choose a different period). The annual maximum is an arbitrary number; it should be at least large enough to allow the Company to replace its CEO/President if necessary and might include a larger number that is permissible in connection with a person's hiring than would apply to the person in any year after they are hired.

Please specify the annual maximum number of shares desired (including whether multiple maximums will apply): _____

_____

If the plan also provides for cash bonuses, specify the maximum annual dollar amount that may be paid to a participant: $_____

5. **Performance Criteria.** To ensure full deductibility of certain equity awards (e.g., restricted stock awards) paid to top Company executives, the Company would need to grant such awards subject to satisfaction of pre-specified performance goals, which goals need to be disclosed to the shareholders in connection with their approval of the plan under which the awards are granted. The Company following is a list of performance goals that the Company might include in the IPO Plan in order to obtain shareholder approval thereof:

- cash flow;
- earnings (including gross margin, earnings before interest and taxes, earnings before taxes, and net earnings);
- earnings per share;
- growth in earnings or earnings per share;
- stock price;
- return on equity or average shareholders' equity;

- total shareholder return;
- return on capital;
- return on assets or net assets;
- return on investment;
- revenue;
- income or net income;
- operating income or net operating income;
- operating profit or net operating profit;
- operating margin;
- return on operating revenue;
- market share;
- contract awards or backlog;
- overhead or other expense reduction;
- growth in shareholder value relative to the moving average of the S&P 500 Index or a peer group index;
- credit rating;
- strategic plan development and implementation (including individual performance objectives that relate to achievement of the Company's or any business unit's strategic plan);
- improvement in workforce diversity, and
- any other similar criteria

6. **Change of Control Provisions.** The Company will need to decide what will happen to outstanding options and other awards in the event the Company is acquired by a third-party acquiror following the IPO. The starting point for this determination is the change of control provision in the Company's existing stock plan. The Company's _____ Plan provides that upon a change of control of the Company,

_____
_____.

Indicate whether any amendment to the change of control provisions is desired: _
_____
_____
_____

7. **Repricing.** Does the Company want the IPO Plan to permit repricing of options without the need for obtaining shareholder approval? Yes No

II. Employee Stock Purchase Plan

An Employee Stock Purchase Plan ("ESPP") program allows employees to purchase shares of the Company's stock on a periodic basis at a discount to fair market value on a tax-favorable basis. In recent years, a typical ESPP allowed employees to

purchase shares through payroll deductions at a discount to the market stock value equal to 15% of the lesser of the purchase date value or the grant date value (with the grant date typically preceding the purchase date by six to 24 months and the period between the two dates referred to as the program's "lookback" period).

Under FAS 123R, rights granted under ESPPs will result in the Company's recognizing compensation expense for financial statement purposes unless the program has no lookback period and provides for a discount of no more than 5% on the purchase date.

If the Company will have an ESPP commencing at the time of the IPO, then the following are structural points that should be considered:

1. **Separate Plan.** The ESPP program may be a stand-alone stock plan (for which separate shareholder approval is obtained) or it could be part of the Company's primary equity compensation plan. In the latter case, the shares used to fund ESPP share issuances would be drawn from the pool of shares in the primary plan, whereas with a stand-alone ESPP a separate pool of shares would be segregated solely for issuance under the ESPP.

Will the ESPP be: Separate Plan or Combined with Primary Plan

If the ESPP will be a separate plan, specify number of shares reserved for issuance under ESPP: _____

If the ESPP will have an evergreen provision, please specify:

Fixed number in evergreen formula: _____

Percentage of outstanding in evergreen formula: _____

2. **Structure of ESPP.**

Discount applicable to ESPP (not greater than 15%): _____

Lookback Period (not greater than 27 months): _____

3. **Definition of Compensation.** The ESPP must define "compensation" for purposes of specifying the source of plan contributions. Many plans define compensation narrowly to include regular straight time gross earnings and exclude payments for overtime, shift premium, incentive compensation, bonuses and other payments. Commissions can be either included or excluded from the definition of compensation. Some plans structure the definition more broadly (e.g., to include all W-2 cash compensation). Please specify the desired definition of "compensation" under the Company's ESPP: _____
_____

4. **Maximum Percentage for Deductions.** Each participant must decide what percentage of his or her compensation to have withheld each payroll period through the ESPP. Plans typically set an upper limit of 10-20% of compensation. The primary consideration for the Company in setting this limit is to manage the plan so as not to run out of shares during an offering period.

Specify the maximum percentage the Company's employees may have deducted: _____

5. **Purchase Period Share Maximum.** Applicable tax rules require that the ESPP specify the maximum number of shares that may be purchased during each period. This limit could be specified either as a set number of shares or a dollar value that in any event cannot exceed $25,000 per year. We generally recommend that the ESPP provide for a maximum number of shares that may be purchased in any one offering period as a way of avoiding depletion of plan shares in the event the Company's stock price drops. Typically, this maximum number of shares is set at 2,000-3,000 shares per six-month period.

Specify the maximum number of shares that may be purchased during any one six-month offering/purchase period: _____

6. **Limitations on Deduction Changes.** An ESPP generally limits the number of changes that a participant can make to his or her rate of contributions to the plan in order to minimize the Company's administrative burden (a participant can always withdraw from the plan and can change contribution rates with respect to future offering periods). ESPPs most commonly allow a participant to make only one decrease to the plan during an offering period, although some will allow one decrease and one increase.

Specify the structure that the Company's ESPP should have with respect to changes to contribution rates: _____
_____

III. Directors' Compensation Program

Directors compensation programs have undergone significant changes in recent years. A variety of compensation arrangements exist for independent public company directors, including:

Formula Stock Option or Restricted Stock Grant Programs
Annual Fees, including in connection with Committee participation, payable in cash or restricted stock
Meeting Fees, payable in cash or restricted stock
Reimbursement of Expenses incurred in connection with Board duties

If the Company will grant annual equity awards, please specify:

Type of Award (option, restricted stock, stock unit): _____

Number of Shares subject to Awards:

Award upon Board Appointment: _____

Annual Award: _____

Other Grant Triggers (e.g., committee appointment or membership, special award to non-executive Chairperson): _____
_____
_____

Vesting Schedule applicable to Award(s): _____
_____
_____

Will the shares subject to awards described above be drawn from the IPO Plan or from stand-alone directors plan? _____

If from a stand-alone directors plan, how many shares will be reserved for issuance under such plan? _____

If from the IPO Plan, should the above award structure be reflected in the IPO Plan document, or done on an ad-hoc basis outside the written IPO Plan document? _____

If the Company will pay an annual retainer, specify amount: $_____

Will the retainer be paid in cash or shares, and at the choice of the Company or the individual director? _____
_____

If the Company will pay meeting fees, specify:

Board Meeting Attendance Amount: $_____

Committee Meeting Attendance Amount: $_____

Telephone Board or Committee Meeting Amount: $_____

Additional Amounts for Board or Committee Chair: $_____
_____

Will fees be paid in cash or stock, and at whose choice? _____

_____

IV. Compensation Committee

Applicable securities and tax laws, as well as exchange rules, require that public company Boards have independent compensation committees to oversee and make decisions regarding compensation matters affecting executive officers. If the Board does not already have a compensation committee, it should designate one prior to the IPO.

Specify the members of the compensation committee (all of whom should be "independent" under all applicable rules):

_____

_____

_____

What Board entity will determine directors' compensation (the full Board, the nominating/governance committee or the compensation committee)?

_____

Will the compensation committee delegate to a lower-level committee responsibilities for making periodic equity awards to non-officer employees? If so, specify the committee name and its membership:

_____

_____

What is the annual maximum number of shares that such committee may grant to employees? _____

_____

What is the per-employee maximum number of shares during any one-year period that such committee may grant? _____

V. Conclusion

The suggestions provided above attempt to briefly detail the primary decisions points to be made in connection with structuring the Company's equity compensation programs in connection with an IPO. They are intended only as general guidelines and the Company may have special issues or considerations that dictate different structures for its stock plans. As with all matters relating to equity compensation, the Company should have its accountants involved in all aspects of the plan structuring.

SAMPLE

INSIDER TRADING AND DISCLOSURE POLICY

This document sets forth the Policy regarding trading in the stock and other securities of _____ (the "Company") and, where applicable, the disclosure of such transactions. All references to the "Company" in the document include any subsidiaries of _____.

Applicability

This Policy applies to all officers and employees of the Company, all members of the Company's Board of Directors, and any consultants, advisors and contractors to the Company that the Company designates, as well as members of the immediate families and households of these persons. The Policy also applies to family trusts (or similar entities) controlled by or benefiting individuals subject to the Policy.

General Statement

Nonpublic information relating to the Company or its business is the property of the Company. The Company prohibits the unauthorized disclosure of any such nonpublic information acquired in the work-place or otherwise as a result of an individual's employment or other relationship with the Company, as well as the misuse of any material nonpublic information about the Company or its business in securities trading.

Insider Trading Compliance Officer

The Company has designated the Company's General Counsel, currently Gary Hirsch, as its current Insider Trading Compliance Officer. Please direct your questions as to any of the matters discussed in this Policy to Mr. Hirsch, who can be reached at (212) 543-7735 or via email at _____@_____.com.

General Policies

The following are the general rules of the Company's Insider Trading Policy that apply to **all Company officers, employees, directors and consultants**. It is very important that you understand and follow these rules. If you violate them, you may be subject to disciplinary action by the Company (including termination of your employment for cause). You could also be in violation of applicable securities laws (and subject to civil and criminal penalties, including fines and imprisonment). Note that it is

your individual responsibility to comply with the laws against insider trading. This Policy is intended to assist you in complying with these laws, but you must always exercise appropriate judgment in connection with any trade in the Company's stock.

The terms "immediate family," "material information" and "nonpublic information" are defined below.

Officers, directors and other personnel designated by the Company from time to time are subject to certain additional policies and restrictions. See "Additional Policies and Restrictions Applicable to Officers, Directors and Others Specified by the Company" on page 6. The terms "black-out period" and "trading window" are defined in the Additional Policies section.

1. **Don't trade while in possession of material nonpublic information.** From time to time you may come into possession of material nonpublic information as a result of your relationship with the Company. You **may not** buy, sell or trade in any stock of the Company or other securities involving the Company's stock **at any time** while you possess material nonpublic information concerning the Company (whether during a "black-out period," if applicable, or at any other time). You must wait to trade until newly released material information has been public for at least one full trading day (a trading day is a day on which the stock market is open).

2. **Pre-clear trades involving Company stock.** If you are unsure about whether information you possess would qualify as material nonpublic information and whether you therefore should refrain from trading in the Company's stock, you should pre-clear any transactions involving Company stock that you intend to engage in with the General Counsel.

3. **Don't give nonpublic information to others.** Don't give nonpublic information concerning the Company (commonly referred to as "tipping") to any other person, including family members, and don't make recommendations or express opinions about trading in the Company's stock under any circumstances.

4. **Don't discuss Company information with the press, analysts or other persons outside of the Company.** Announcements of Company information are regulated by Company policy (separate from this Policy) and may only be made by persons specifically authorized by the Company to make such announcements. Laws and regulations govern the nature and timing of such announcements to outsiders or the public and unauthorized disclosure could result in substantial liability for you, the Company and its management. If you receive inquiries by any third party about the Company's financial information, you should notify the Chief Financial Officer immediately. If you receive inquiries about other Company nnformation, you should notify the General Counsel immediately.

5. **Don't participate in Internet "chat rooms" in which the Company is discussed.** You may not participate in on-line dialogues (or similar activities) involving the Company, its business or its stock.

6. **Don't use nonpublic information to trade in other companies' stock.** Don't trade in the stock of the Company's customers, vendors, suppliers, users of the Company's services or other business partners (collectively, "Business Partners") when you have nonpublic information concerning these entities that you obtained in the course of your relationship with the Company and that would give you an advantage in trading. The basis of the Company's business is "trust" and "confidentiality." All prohibitions relating to trading of the Company's stock have equal applicability to trading in stock of the Company's Business Partners and companies that they may be dealing with.

7. **Don't engage in speculative transactions involving the Company's stock.** Don't engage in any transactions that suggest you are speculating in the Company's stock (that is, that you are trying to profit in short-term movements, either increases or decreases, in the stock price). You **may not** engage in any short sale, "sale against the box" or any equivalent transaction involving the Company's stock (or the stock of any of the Company's Business Partners in any of the situations described above). A short sale involves selling shares that you do not own at a specified price with the expectation that the price will go down so you can buy the shares at a lower price before you have to deliver them. A sale against the box is a hedging device in which the seller owns the shares in question but can cover his sale with other shares bought during the price decline while holding shares already owned "in the box" for long-term gain. Either of these transactions puts you in a position of conflict against your interests as a Company employee.

Note that many hedging transactions, such as "cashless" collars, forward sales, equity swaps and other similar or related arrangements may indirectly involve a short sale. The Company discourages you from engaging in such transactions and requires that any such transaction be carefully reviewed by the General Counsel prior to the time you enter into it. The General Counsel will assess the proposed transaction and, in light of the facts and circumstances, make a determination as to whether the proposed transaction may be completed or would violate this Policy. In addition, if you are trading in Company stock pursuant to a "blind trust" or a Rule 10b5-1(c) trading program (see "Exceptions for Blind Trusts and Pre-Arranged Trading Programs" below), there may be additional restrictions on your ability to engage in a hedging transaction.

In addition, the Company recommends that you not margin or pledge your Company stock to secure a loan to you and that you not purchase Company stock "on margin" (that is, borrow funds to purchase stock, including in connection with exercising any Company stock options).

8. **Make sure your family members and persons controlling family trusts (and similar entities) do not violate this Policy.** For purposes of this Policy, any transactions involving Company stock in which members of **your immediate family** engage, or **by family trusts**, partnerships, foundations and similar entities over which you or members of your immediate family have control, or whose assets are held for the benefit of you or your immediate family, **are the same as transactions by you**. You are responsible for making sure that such persons and entities do not engage in any transaction that would violate this Policy if you engaged in the transaction directly.

(Certain family trusts and other entities of this type having an independent, professional trustee who makes investment decisions on behalf of the entity, and with whom you do not share Company information, may be eligible for an exemption from this rule. Please contact the General Counsel if you have questions regarding this exception. You should assume that this exception is not available unless you have first obtained the approval of the General Counsel.)

Exceptions to the General Policies

The following exceptions to the general insider trading policies apply:

1. **Exceptions for Purchases Under Employee Stock Option and Stock Purchase Plans**

The **exercise** (without a sale) of stock options under the Company's stock option plans and the purchase of shares under the Company's employee stock purchase plan are exempt from this Policy, since the other party to the transaction is the Company itself and the price does not vary with the market but is fixed by the terms of the option agreement or the plan.

But, any subsequent **sale** of shares acquired under a Company stock plan **is subject** to this Policy.

2. **Exceptions for Blind Trusts and Pre-Arranged Trading Programs**

Rule 10b5-1(c) of the Securities Exchange Act of 1934 provides an affirmative defense against insider trading liability under federal securities laws for a transaction done pursuant to "blind trusts" (generally, trusts or other arrangements in which investment control has been completely delegated to a third party, such as an institutional or professional trustee) or pursuant to a written plan, or a binding contract or instruction, entered into in good faith at a time when the insider was not aware of material nonpublic information, even though the transaction in question may occur at a time when the person is aware of material nonpublic information. The Company may, in appropriate circumstances, permit transactions pursuant to a blind trust or a pre-arranged trading program that complies with Rule 10b5-1 to take place during periods in which the

individual entering into the transaction may have material nonpublic information or during black-out periods.

The trading prohibitions described in this Policy will not apply to transactions in the Company's securities made by an employee, officer or director of the Company under a blind trust or other arrangement or plan to trade securities under Rule 10b5-1 of the Securities Exchange Act of 1934 (a "Plan") that has been submitted to the Company's General Counsel and acknowledged by the Company in accordance with this policy.

Employees, officers and directors of the Company who are interested in adopting such a Plan should refer to the guidelines (the "Plan Guidelines") as adopted from time to time by Company's Board of Directors or a committee of the Board, which describe the substantive provisions recommended for Plans related to the Company's securities.

No Plan may become effective until the participant (i) has delivered a complete copy to the General Counsel and (ii) received the General Counsel's written acknowledgement of the Plan. In the case of a Plan entered into by an executive officer or director, the General Counsel is required to secure the approval of at least one non-employee member of the Company's Board of Directors before delivering the acknowledgment.

Application of Policy After Employment Terminates

If your employment terminates at a time when you have or think you may have material nonpublic information about the Company or its Business Partners, the prohibition on trading on such information continues until such information is absorbed by the market following public announcement of it by the Company or another authorized party, or until such time as the information is no longer material. If you have questions as to whether you possess material nonpublic information after you have left the employ of the Company, you should direct questions to the General Counsel at (212) 543-7735 or via email at _____@_____.com.

Potential Criminal and Civil Liability and/or Disciplinary Action

The penalties for "insider trading" include civil fines of up to three times the profit gained or loss avoided, and criminal fines of up to $1,000,000 and up to ten years in jail for each violation. You can also be liable for improper transactions by any person to whom you have disclosed nonpublic information or made recommendations on the basis of such information as to trading in the Company's securities ("tippee liability"). You may be liable for improper transactions by any person to whom you have inadvertently disclosed nonpublic information as well. The SEC has imposed large penalties even when the disclosing person did not profit from the trading. The SEC, the stock exchanges and the National Association of Securities Dealers ("NASD") use sophisticated electronic surveillance techniques to uncover insider trading. Employees of

the Company who violate this Policy shall also be subject to disciplinary action by the Company, which may include ineligibility for future participation in the Company's equity incentive plans or termination of employment for cause.

Definitions used in this Policy

1. **Immediate Family.** The following persons are considered members of your "immediate family": your spouse, parents, grandparents, children, grandchildren and siblings, including any such relationship that arises through marriage or by adoption. It also includes members of your household, whether or not they are related to you.

2. **Material Information.** It is not possible to define all categories of "material" information, but information should be regarded as material if it is likely that it would be considered important to an investor in making an investment decision regarding a purchase or a sale of the Company's stock.

While it may be difficult to determine whether particular information is material or not, there are some categories of information that are particularly sensitive and that should almost always be considered material. Examples include: sales figures, financial results and projections (especially to the extent the Company's own expectations regarding its future financial results differ from analysts' expectations), news of a merger or acquisition, gain or loss of a major customer or supplier, major product or service announcements, changes in senior management, a change in the Company's accountants or accounting policies, or any major problems or successes of the business. Either positive or negative information may be material. If you have any questions regarding whether information you possess is material or not, you should contact the General Counsel.

3. **Nonpublic Information.** Information about the Company is considered to be "nonpublic" if it is known within the Company but not yet disclosed to the general public. The Company generally discloses information to the public either via press release or in the regular quarterly and annual reports that the Company is required to file with the SEC. Information is considered "public" only after it has been publicly available, through press release or otherwise, for at least twenty-four hours. If you have any questions regarding whether any information you possess is nonpublic or has been publicly disclosed, you should contact the General Counsel.

Questions

Please direct questions you have regarding this Policy and any transactions in Company securities to the General Counsel at (212) 543-7735 or via email at _____@_____.com.

Additional Policies and Restrictions Applicable to Officers, Directors and Others Specified by the Company

The following additional policies and restrictions (the "Additional Policies") apply to executive officers, directors and certain other officers, employees and consultants of the Company, as designated from time to time by the General Counsel or the Company's Board of Directors. If you violate these rules, you may be subject to disciplinary action by the Company (including termination of your employment for cause). In addition, you could be in violation of applicable securities laws (and subject to civil and criminal penalties, including fines and imprisonment). Note that it is your individual responsibility to comply with the laws against insider trading. This Policy is intended to assist you in complying with these laws, but you must always exercise appropriate judgment in connection with any trade in the Company's stock.

Persons subject to these Additional Policies are also subject to the general policies described in the preceding section (with the more restrictive policy applying in any case where there is a conflict).

The terms "immediate family," "material information" and "nonpublic information" were defined above. The terms "black-out period" and "trading window" are defined at the end of this Additional Policies section.

1. **Don't trade during black-out periods.** The Company **prohibits** all executive officers, members of the Board of Directors, and certain other officers, employees and consultants designated by the Company from **trading during black-out periods** (whether regularly scheduled black-out periods, or special black-out periods implemented from time to time). It is your responsibility to know when the Company's quarterly black-out periods begin (you will be notified when they end). If you are informed that the Company has implemented a special black-out period, you **may not** disclose the fact that trading has been suspended to anyone, including other Company employees (who may themselves not be subject to the black-out), family members (other than those subject to this Policy who would be prohibited from trading because you are), friends or brokers. You should treat the imposition of a special black-out period as material nonpublic information.

Remember to cancel any "limit" orders or other pending trading orders you have in place during a black-out period (unless the orders were made pursuant to an approved Rule 10b5-1(c) trading program).

You are subject to the black-out periods if you are listed on Attachment A to this Policy. This list may be changed from time to time to add or remove persons as appropriate. If you are added to the list of persons subject to the Company's black-out periods, you will be notified by the General Counsel.

2. **You must pre-clear all trades involving the Company's stock.** All executive officers, members of the Board of Directors, and certain other officers, employees and consultants designated by the Company, **must refrain from trading** in the Company's stock, **even during an open trading window, unless** they first comply with the Company's pre-clearance procedures. For the purposes of this paragraph, trading in the Company's stock includes all pledges and encumbrances, all short sales, all gifts, and all transfers to affiliates of stockholder. To pre-clear a transaction, you must get the approval of the General Counsel before you enter into the transaction. In pre-clearing a trade, and in addition to reviewing the substance of the proposed trade, the General Counsel may consider whether it will be possible for both the individual and the Company to comply with any applicable public reporting requirements. You should contact the General Counsel **at least 3 days** before you intend to engage in any transaction to allow enough time for pre-clearance procedures.

You are required to pre-clear all transactions involving Company stock if you are listed on Attachment B to this Policy. If you are added to the list of persons subject to the Company's mandatory pre-clearance policy, you will be notified by the General Counsel.

3. **You must pre-clear any margin transactions involving Company stock.** If you are listed on Attachment B**,** you may not enter into any margin transaction involving Company stock unless you have first pre-cleared it with the General Counsel. The General Counsel will review proposed margin transactions in light of guidelines (including public reporting guidelines) that he or she from time to time establishes with input from the Board of Directors, if appropriate.

4. **You must pre-clear hedging or derivatives transactions involving Company stock.** The Company discourages persons listed on Attachment B from engaging in hedging or derivative transactions, such as "cashless" collars, forward contracts, equity swaps or other similar or related transactions. If you wish to engage in such a transaction, you must pre-clear it with the General Counsel, who will review the proposed transaction in light of guidelines (including public reporting guidelines) that he or she from time to time establishes, with input as appropriate from the Board of Directors and outside legal counsel.

5. **Observe the Section 16 liability rules applicable to officers and Board members and 10% stockholders.** Certain officers of the Company, members of the Company's Board of Directors and 10% stockholders must also conduct their transactions in Company stock in a manner designed to comply with the "short-swing" trading rules of Section 16(b) of the Securities Exchange Act of 1934. The practical effect of these provisions is that officers and directors who purchase and sell, or sell and purchase, Company securities within a six-month period must disgorge all profits to the

Company whether or not they had any nonpublic information at the time of the transactions.

If you are subject to Section 16, you are listed on Attachment C to this Policy.

6. **Comply with public securities law reporting requirements.** Federal securities laws require that officers, directors, large stockholders and affiliates of the Company publicly report transactions in Company stock (on Forms 3, 4 and 5 under Section 16, Form 144 with respect to restricted and control securities, and, in certain cases, Schedules 13D and 13G). The Company takes these reporting requirements very seriously and requires that all persons subject to public reporting of Company stock transactions adhere to the rules applicable to these forms. Where issues arise as to whether reporting is technically required (particularly issues that turn on facts specific to the transaction and the individuals involved, or on unsettled issues of law), the Company encourages its insiders to choose to comply with the spirit and not the letter of the law – in other words, to err on the side of fully and promptly reporting the transaction even if not technically required to do so.

7. **Comply with trading restrictions imposed in connection with pension plan blackout periods.** Federal securities laws prohibit Section 16 officers and directors of public companies from trading in company securities during a "pension plan blackout period." The Company is required to provide you with advance notice of a pension plan blackout period. If you receive such a notice, you must refrain from engaging in most transactions involving Company securities (**including exercising stock options**, notwithstanding the provisions contained in "Exemptions for Purchases Under Employee Stock Option and Stock Purchase Plans" above) until the pension plan blackout period has terminated. If you engage in a prohibited transaction during a pension plan blackout period, you will be required to turn over profits on the transaction (which may include amounts in excess of actual economic profits you realize on the transaction) to the Company.

In addition, where the Company is required to report transactions by individuals, the Company expects full and timely cooperation by the individual.

Exceptions for Emergency, Hardship or Other Special Circumstances.

In order to respond to emergency, hardship or other special circumstances, exceptions to the prohibition against trading during black-out periods will require the approval of the General Counsel and the Chief Executive Officer.

Application of Policy After Employment Terminates

If you are subject to the black-out periods imposed by this Policy and your employment terminates during a black-out period (or if you otherwise leave while in

possession of material nonpublic information), you will continue to be subject to the Policy, and specifically to the ongoing prohibition against trading, until the black-out period ends (or otherwise until the close of the first full trading day following public announcement of the material nonpublic information).

Definitions

1. **Black-Out Period.** During the end of each fiscal quarter and until public disclosure of the financial results for that quarter, persons subject to this Policy may possess material nonpublic information about the expected financial results for the quarter. Even if you don't actually possess any such information, any trades by you during that period may give the appearance that you are trading on inside information. Accordingly, the Company has designated a regularly scheduled quarterly "black-out period" on trading beginning with the fifteenth day of the last month of each quarter and ending at the close of the first full trading day (day on which the stock market is open) after disclosure of the quarter's financial results.

In addition to the regularly-scheduled black-out periods, the Company may from time to time designate other periods of time as a special black-out period (for example, if there is some development with the Company's business that merits a suspension of trading by Company personnel). The Company may not widely announce the commencement of a special black-out period, as that information can itself be sensitive information. For this reason, it is extremely important that you adhere to the pre-clearance procedures outlined in this Policy to ensure that you do not trade during any special black-out period.

2. **Trading Window.** The period outside a black-out period is referred to as the "trading window." Trading windows that occur between the regularly-scheduled quarterly black-out periods can be "closed" by the imposition of a special black-out period if there are developments meriting a suspension of trading by Company personnel.

INSIDER TRADING POLICY
ACKNOWLEDGMENT

I certify that I have read, understand and agree to comply with the _____ Insider Trading and Disclosure Policy. I agree that I will be subject to sanctions imposed by the Company, in its discretion, for violation of the Policy, and that the Company may give stop-transfer and other instructions to the Company's transfer agent against the transfer of Company securities as necessary to ensure compliance with the Policy. I acknowledge that one of the sanctions to which I may be subject as a result of violating the Company's policy is termination of my employment including termination for cause.

Date: _____ Signature: _____

Printed Name: _____

ATTACHMENT A

**PERSONS SUBJECT TO BLACK-OUT PERIODS
OF INSIDER TRADING POLICY
AS OF _____ ____, 200__**

See Section 1 under Additional Policies and Restrictions Applicable to Officers, Directors and Others Specified by the Company

(note that a person may be listed on multiple attachments)

ATTACHMENT B

**OTHERS DESIGNATED BY THE COMPANY
AS SUBJECT TO THE PRE-CLEARANCE PROCEDURES
OF THE INSIDER TRADING POLICY
AS OF _____ ____, 200__**

**See Sections 2, 3 and 4 under Additional Policies and Restrictions Applicable to Officers,
Directors and Others Specified by the Company**

(note that a person may be listed on multiple attachments)

ATTACHMENT C

PERSONS SUBJECT TO SECTION 16
AS OF _____ ____, 2004

See Section 5 under Additional Policies and Restrictions Applicable to Officers, Directors and Others Specified by the Company

(note that a person may be listed on multiple attachments)

INSIDER TRADING AND DISCLOSURE COMPLIANCE PROGRAM

In order to take an active role in the prevention of insider trading and reporting violations by its officers, directors, employees, consultants and other related individuals, _____ (the "Company") has adopted the policies and procedures described in this Compliance Program.

I. **Adoption of Insider Trading Policy.**

The Company has adopted the _____ Insider Trading and Disclosure Policy (the "Policy").

II. **Designation of Certain Persons.**

A. **Section 16 Individuals.** The Board of Directors has determined those persons who are "executive officers" and who are thus, along with the members of the Board of Directors (collectively, the "Section 16 Individuals"), subject to the reporting and liability provisions of Section 16 of the Securities Exchange Act of 1934, as amended (the "1934 Act") and the related rules and regulations. As of _____, the persons subject to Section 16 are those listed on Attachment C to the Policy. The Board of Directors will from time to time as appropriate amend such determination to reflect the election of new officers or directors, any change in function of current officers, and the resignation or departure of current officers or directors.

B. **Other Persons.** The Company has determined that those persons listed on Attachment A to the Policy are subject to the black-out periods imposed by the Policy. In addition, the Company has also determined that those persons listed on Attachment B (note that a person may be listed on multiple attachments) are subject to the pre-clearance requirements of the Policy (and further described in Section V.A. below), in that the Company believes that, in the normal course of their duties, such persons have, or are likely to have, regular access to material nonpublic information. Attachment A and Attachment B may each be amended from time to time. Under special circumstances, certain persons not listed on these Attachments may come to have access to material nonpublic information for a period of time. During such period, such persons will also be subject to the pre-clearance procedures, or may be added to the list of persons subject to the black-out periods.

III. **Oversight of Policy.** The Company's Board of Directors or a committee of the Board of Directors shall oversee the implementation and enforcement of the Policy.

IV. **Appointment of Compliance Officer.**

The Company has appointed the Company's General Counsel, currently as the Company's Insider Trading Compliance Officer (the "Compliance Officer"). In order to

ensure compliance with the Policy and in particular Section V.E. below, the Compliance Officer is authorized to designate one or more persons to assist in administering this Policy.

V. **Duties of Compliance Officer.**

The duties of the Compliance Officer include, but are not be limited to, the following:

A. Pre-clearing all transactions involving the Company's stock by the persons listed on Attachment B to the Policy, in order to determine compliance with the Policy, insider trading laws, Section 16 of the Exchange Act, Rule 144 promulgated under the Securities Act of 1933 and other applicable securities laws, as adopted and amended from time to time.

B. Assisting in the preparation and filing of Section 16 reports (Forms 3, 4 and 5) for all Section 16 Individuals, and other applicable reports (whether filed by the Company or the individual), including providing memoranda and other appropriate materials to its officers and directors regarding compliance with Section 16, its related rules and other applicable disclosure rules.

C. Serving as the designated recipient at the Company of copies of reports filed with the SEC by Section 16 Individuals under Section 16 of the Exchange Act and other reports required by applicable disclosure rules.

D. Mailing monthly, or if appropriate more frequent, reminders to all Section 16 Individuals and other individuals subject to disclosure rules regarding their obligations to report or to assist the Company in complying with its reporting obligations.

E. Establishing procedures designed to ensure that the Company will be in a position to comply with any securities law disclosure rules, either currently in force or that may be adopted in the future, that apply to the Company and relate to insider transactions involving Company stock. The procedures may include requiring an insider to notify the Compliance Officer sufficiently in advance of engaging in a transaction both to allow pre-clearance of the transaction for purposes of the Policy and to prepare any reports the Company is required to file, and requiring an insider to make available to the Company all information necessary for the Company to comply with applicable disclosure rules.

F. Performing periodic cross-checks of available materials, which may include Forms 3, 4 and 5, Form 144, officers and directors questionnaires and reports received from the Company's stock administrator and transfer agent, to determine trading activity by officers, directors and others who have, or may have, access to material nonpublic information.

G. Circulating the Policy (or a summary of the Policy) to all employees and consultants of the Company, on an appropriate periodic basis, and providing the Policy and other appropriate materials to new employees and consultants, and otherwise ensuring that appropriate education of affected individuals is accomplished.

H. Obtaining a signed acknowledgment of receipt of the Policy from individuals subject to it on an annual basis.

I. Providing periodic reports on ongoing compliance matters, including any disciplinary actions, regarding the Policy to the Audit Committee, or the full Board of Directors if requested, on a quarterly basis and otherwise assisting the Company's Audit Committee and Board of Directors in implementation of the Policy and this Compliance Program.

SAMPLE

Whistleblower Policy

Purpose

The purpose of the Company's whistleblower policy is to establish procedures for the submission of complaints or concerns regarding financial statement disclosures, accounting, internal accounting controls, auditing matters or violations of the Company's Code of Ethics.

Sarbanes-Oxley Requirements

Section 301 of the Sarbanes-Oxley Act requires the Audit Committee to establish procedures for: (a) the receipt, retention, and treatment of complaints received by the Company regarding accounting, internal accounting controls, or auditing matters; and (b) confidential, anonymous employee submissions of concerns regarding questionable accounting or auditing matters.

Procedures

In order to comply with Section 301, the Audit Committee has adopted the following procedures:

1. The Company will promptly forward to the Audit Committee any complaints that it has received regarding financial statement disclosures, accounting, internal accounting controls or auditing matters.

2. Any employee of the Company may submit, on a confidential and anonymous basis if the employee so desires, any concerns regarding financial statement disclosures, accounting, internal accounting controls, auditing matters or violations of the Company's Code of Ethics. All such concerns will be set forth in writing in a sealed envelope labeled with a legend such as "Submitted pursuant to the _____ Whistleblower Policy" and sent to the Company's Audit Committee at the addresses set forth below. In addition, any person with such concerns may report their concerns on a confidential or anonymous basis to the Audit Committee of the Company by calling the independent, toll-free Ethics Line established by the Company for that purpose at (800) _____. If an employee would like to discuss any matter with the Audit Committee, the employee should indicate this in the submission and include a telephone number at which he or she can be reached, should the Audit Committee deem such communication is appropriate.

3. Following the receipt of any complaints submitted hereunder, the Company's Audit Committee will investigate each matter so reported and take corrective and disciplinary actions, if appropriate, which may include, alone or in combination: a warning or letter of reprimand; demotion, loss of a merit increase, bonus or stock options; suspension without pay; or termination of employment.

4. The Company's Audit Committee may enlist employees of the company and/or outside legal, accounting or other advisors, as appropriate, to conduct any investigation of complaints regarding financial statement disclosures, accounting, internal accounting controls, auditing matters or violations of the Code of Ethics. In conducting any investigation, the Audit Committee shall use reasonable efforts to protect the confidentiality and anonymity of the complainant.

5. The Company does not permit retaliation of any kind against employees for complaints submitted hereunder that are made in good faith.

6. The Audit Committee will retain as a part of its records any such complaints or concerns for a period of at least 7 years.

Audit Committee Member Contact Information:

LATHAM & WATKINS

Number 575 March 2, 2007

Client Alert

Latham & Watkins
Corporate Department

Giving Good Guidance – What Every Public Company Should Know

Every public company must decide whether and to what extent to give the market guidance about future operating results. Questions from the buy side will begin at the IPO "road show" and will likely continue on every quarterly earnings call and at investor meetings and conferences between earnings calls. The decision whether to give guidance and how much guidance to give is an intensely individual one. Each company should have a policy on guidance that suits its individual personality, and there is no one-size-fits-all solution in this area. The only universal truths are that (1) every public company should have a policy on guidance and (2) that policy should be the subject of careful thought.

> "The decision whether to give guidance and how much to give is an intensely individual one. The only universal truths are (1) every public company should have a policy on guidance and (2) that policy should be the subject of careful thought."

The purpose of this *Client Alert* is to explore the issues that every CEO, CFO and audit committee member should consider before formulating a guidance policy. We will also offer some practical guidelines to consider in formulating an appropriate guidance policy.

A Review of the Basics

Public companies are not required by any stock exchange or SEC regulation to provide investors with projections of future operating results.[1] However, investors and analysts can be demanding, and many public companies elect to provide the market with guidance about their expectations for the future. The decision to give guidance can spring from a desire to share good news with investors to help the market get to a higher valuation for the company's stock or it can spring from a desire to correct analysts' overly optimistic earnings expectations. Whatever the motivation, the legal landscape should be carefully understood before management takes the plunge. It is possible to give guidance in a deliberate and careful way without incurring undue liability. It is also possible to make important mistakes that can have real financial consequences.

Primary Liability Provisions

There are a number of provisions in the federal securities laws that can create liability for forward-looking statements. In the context of a public offering, Section 11 and Section 12 of the Securities Act of 1933 impose liability on issuers, their officers and directors, and underwriters for misstatements of material fact or omissions of material facts necessary to make the statements made not misleading. In addition, Rule 10b-5 under the Securities Exchange Act of 1934 imposes liability in a similar manner, although the burden of proof on a plaintiff suing under Rule 10b-5 is higher.[2] Rule 10b-5 applies to statements made in the context of securities offerings as well as to periodic reports and day-to-day communications with analysts and investors. Because of the potential for liability, it behooves those giving guidance to speak carefully, completely and deliberately to mitigate the risk of unpleasant litigation.

SEC Safe Harbors

The Private Securities Litigation Reform Act of 1995 (PSLRA) enacted safe harbor provisions in both the Securities and the Exchange Acts for forward-looking statements[3] that are (1) identified as such and are (2) accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward looking statement." These safe harbors also provide protection where the plaintiff fails to prove that the statement was made with actual knowledge that the statement was false or misleading.[4] Even before the PSLRA, the SEC rules provided safe harbors for forward-looking statements relating to financial statement projections and plans and objectives for future operations made in documents filed with the SEC unless it was shown that the statements were made or reaffirmed without a reasonable basis or were disclosed other than in good faith.[5]

The Case Law

The federal courts, applying the safe harbor provisions of the PSLRA and, even before that, the more restrictive, judicially-created "bespeaks caution" doctrine, have held that forward-looking statements accompanied by appropriate cautionary language do not give rise to liability under the federal securities laws because the predictive statement read in context with the risk disclosure is not misleading as a matter of law.[6] However, despite the broad protections of the PSLRA's safe harbor, the cases suggest that boilerplate cautionary language may not be sufficient and that risk disclosure that is carefully tailored to fit the circumstances will maximize the protections the statute provides.[7] Thus, some courts have declined to allow the protections of the safe harbor where risk disclosures did not change over time and/or did not identify the risks that ultimately caused the prediction not to come to pass.[8] The essential importance of the safe harbor and the bespeaks caution doctrine, then, is that well crafted disclosure can serve as a shield against future challenges, even where good faith predictions of future results do not materialize.

Duty to Update

Although the PSLRA explicitly states that "nothing in this section shall impose upon any person a duty to update a forward-looking statement," some courts have suggested that a duty to update may apply if events transpire that cause a company's prior disclosure to be materially inaccurate, even though that prior disclosure was accurate when made.[9] There is no requirement that a public company immediately make public all material facts that come into its possession on a real-time basis,[10] but where a public company's affirmative and definitive prior statement becomes clearly and materially false, that company should consider issuing a clarifying/correcting/updating statement.

What does all this mean in real life? For one example, it means you can answer the question "Are you in merger negotiations with XYZ, Inc.?" with a "no comment" and not be obligated to later update that statement if you enter into merger negotiations.[11] However, if your answer to the first question was "This company will never enter into merger negotiations with XYZ, Inc.," then you may want to consider an updating disclosure once merger negotiations begin in earnest. In other words, once you make the decision to speak on a particular topic – expected earnings for the year, for example – you may not be able to stop talking about it as the facts change.

Considering whether to update earnings guidance is particularly complicated and depends very much on the facts and circumstances at hand. The first fact to consider is what was said in the first place. Let's take, for example, a company that issues guidance only once per year, in the first quarter, projecting earnings for the full year then in progress. In order to answer the question whether it needs to update its guidance every quarter as more facts become available and its thinking about the likely outcome for the full year moves around, we must first ask what was said when the guidance was first issued. Did the company specifically say that it would not be updating the full-year guidance every quarter? Did the company say it would only update guidance if a material corporate transaction occurs?

The next series of questions focuses on the facts that have transpired since the original guidance was issued. Is it obvious that the original guidance no longer holds because of well-understood changes in industry trends or an intervening acquisition or disposition? Did the original guidance include a clear explanation of the assumptions on which it was based? Is it clear that those assumptions have not come to pass? Has the Wall Street analyst community revised its estimate of full-year earnings down to a level that the company believes it can deliver?

Still other questions focus on the unique facts of the company's circumstances. Is the company's business such that it is difficult to know how the year will turn out until the last bottle of New Year's champagne has been poured? Will the company realistically be able to avoid questions from analysts about whether they still believe in the earlier guidance? All these considerations will come into play in analyzing the legal landscape and deciding whether to confirm or update prior guidance. Also very relevant to the decision is the investor relations department's desire to avoid unpleasant surprises among corporate constituents. An important further complication, which we will discuss below, is whether the company is selling or purchasing its own securities.

Regulation FD

Regulation FD's prohibition on "selective disclosure" of material nonpublic information must also be taken into account in any discussion of whether to give or update guidance.[12] Regulation FD was enacted, in part, to eliminate the practice of providing insight into management's expectations of future operating results to the select and privileged few and not to the many. Regulation FD and subsequent enforcement actions have effectively eliminated the historical practice of privately "walking" analysts' earnings estimates up or down to avoid unpleasant surprises at quarter-end or year-end. Guiding analysts about future earnings is still permissible under Regulation FD, so long as the analysts and the general public learn the same thing at the same time.

Updating or confirming prior guidance is treated the same way under Regulation FD – it's all fine so long as the public gets the information at the same time as the analysts do. In other words, the "Are you still comfortable with your guidance for this year?" question is right in the center of FD's bull's eye. That is not a question that can be answered in anything other than a Regulation FD-qualified form. In adopting Regulation FD, the SEC stated that an officer who provides direct or indirect guidance to an analyst regarding earnings forecasts "takes on a high degree of risk under Regulation FD." Those who have ignored or tried to skirt Regulation FD's prohibition on "selective disclosure" have paid a high price.[13]

Putting it all Together–Some Basic Decisions

Many companies will sort through the overlapping webs of safe harbors, case law and liability provisions and conclude that earnings guidance is simply not worth the headaches. Other companies will conclude that the market needs help in setting earnings expectations and will take the guidance plunge. The remainder of this *Client Alert* is aimed at providing some practical suggestions on how to survive as a giver of guidance.

How Far to Go

The most basic decision is whether to give guidance on a quarter-by-quarter basis or on a year-by-year basis. The next question is how far forward to project results. There is no one-size-fits-all answer here. Some businesses are stable and predictable. For them, predicting earnings on a quarter-by-quarter basis may be an option. Many energy companies, for example, have presold the majority of their output multiple years into the future. A company with a predictable earnings stream is in a very different position than a company with unpredictable operating results.

Businesses with lumpy revenue streams or that experience seasonality or weather issues may not feel they can make quarterly projections prudently. In a March 2006 survey, the percentage of guidance-giving companies furnishing only annual earnings guidance increased to 43 percent from 28 percent in a similar study conducted in 2005, and the percentage providing only quarterly guidance decreased to 13 percent from 28 percent over the same time period.[14] Even the most stable businesses typically elect not to provide earnings guidance beyond the year in progress, although there are some businesses that project future results for longer periods.

What to Say

Directly related to the decision how far forward to look when guiding investors is the decision what to say about the periods in question. Guidance takes many forms, not just earnings per share for the year. Some companies will guide investor expectations by giving a range of anticipated earnings per share or simply by saying that they are "comfortable with the Wall Street analysts' consensus" regarding earnings per share for the year.[15] Many companies provide the market with forecasts of an Adjusted Net Income or Adjusted EBITDA metric that excludes non-recurring, non-cash and/or unusual items.

These adjusted measures of operating performance are easier to predict accurately since they are unaffected by many of the income statement items that impact earnings per share. Of course, these non-GAAP financial measures will need to comply with Regulation G.[16] Other companies stop their numerical guidance at the revenue line, projecting only a targeted revenue growth in percentage terms. Revenue-only guidance may be supplemented with a comment about profit margins – "We expect to see an improvement in profit margins as we do not expect anticipated revenue increases to be accompanied by a corresponding increase in our fixed costs" – or not. Still another form of guidance involves non-financial measures – "We expect to open 25 new company-owned stores this year" or "We currently expect to complete construction of the facility in the fourth quarter of 2008." There is no limit to the forms that guidance can take. What is appropriate for one company in one industry may be totally inappropriate for another company, even another company in the same industry.

Latham & Watkins | **Client Alert**

Some Helpful Guidelines

Scope

Each company's decision on what to say and how far to go needs to be made in light of the nature of its industry and the circumstances of its business. Careful thought should be given to the trade off that going further down the income statement entails – more precise information will please analysts in the short run but it can create sharper liability issues in the long run. Much more agility is needed to predict earnings successfully per share rather than revenues, Adjusted Net Income or Adjusted EBITDA or another "normalized" measure of performance that is less likely to be impacted by surprises on the business front or in the accounting literature. We recommend that you only give guidance on a metric that you feel comfortable you can accurately predict.

Bespeaking Caution

All good guidance should be accompanied by dynamic, carefully tailored cautionary statements. These "disclaimers" must temper the predictions of a rosy future with a balanced discussion of what could go wrong. The risk disclosure should also be appropriately updated with each publication – don't just use the same old boilerplate from prior years. "Risk factor" disclosure can be very helpful in this regard. It is also very helpful to supplement the risk factors with disclosure about the basic assumptions that underly the projections. A 10 percent increase in earnings that is premised on cutting redundant overhead costs is not the same as a 10 percent increase that is premised on a substantial increase in market share. The point of the cautionary language is to explain what goes into the sausage so investors can make their own intelligent decisions about the likelihood of the projected outcome actually being realized. Good cautionary disclosure can be an effective insurance policy against future liability if the guidance turns out to be incorrect.

The Delivery

It is best if guidance (and the related cautionary disclosures) are given in a controlled environment. The most popular forum is the year-end or quarter-end earnings call. The script for these events is usually the subject of a greater degree of internal control than any casual encounter, and earnings calls are always Regulation FD-qualified events since the public is invited to dial in and listen and the audiotape is typically available on the company's Web site for a period of time after the call. Many companies prefer to give guidance orally on their earnings calls and do not produce a written version of their statements for the related earnings press release. For a CFO who is comfortable sticking tightly to a prepared script, this is a perfectly acceptable choice. For others, putting it down in writing in the earnings release may be a wise internal control.[17]

In any event, the earnings release or call should include carefully tailored "disclaimer" language and the actual guidance statements should be carefully vetted and scripted.[18]

Anticipating Questions

There are at least three good reasons to anticipate analysts questions about guidance. First, there are some questions you will want to answer and if the answer has not been scripted, it may not come out with all of the nuance that is appropriate. Second, there are some questions you will not want to answer. It helps to have worked out in advance which questions you are prepared to answer and which questions merit only a "no comment" response. Finally, Regulation FD frowns on answering follow-up questions in private calls or meetings where the public does not have access, so the earnings call script will effectively limit what can be talked about in private meetings in between earnings calls. Answering questions that were asked on the earnings call or providing additional detail on topics that have been covered at an appropriate level of materiality on the earnings call will generally be acceptable. Venturing into territories that were not covered on the public-access earnings call in subsequent private meetings can raise selective disclosure issues under Regulation FD.[19]

Updating or Confirming Prior Guidance

Given the many variables and events that affect businesses today, it can sometimes be more of a surprise when a company meets the guidance it provided at an earlier time than when it does not. However, when management begins to lose confidence in the company's ability to produce results that will be in-line with prior guidance, the decision whether to make a public statement to that effect is entirely dependent on context – all facts and circumstances must be considered. Did you say you would confirm your annual guidance every quarter? Did you say that you would not? Is it obvious from the facts that the prior guidance is no longer reliable (due to an important acquisition, disposition or industry development)? If you expect that you are going to exceed modestly your prior guidance, it is probably safe to keep that to yourself and pleasantly surprise the investment community.[20] If you are reasonably sure that you are going to miss the mark by a material amount, the pressure to manage expectations may force an out-of-sequence guidance update so as to avoid a steep drop in the stock when the disappointing results are announced. Managing expectations to maintain credibility and avoid unpleasant surprises is the goal here.

Special Considerations

Securities Offerings

As discussed above, the pendancy of a securities offering creates special issues for guidance givers. It is rare to find written guidance in a prospectus or offering memorandum and most earnings releases are "furnished" on Form 8-K rather than "filed" and hence are not incorporated by reference into the offering documents. So guidance is rarely part of the landscape for purposes of Section 11 of the Securities Act.[21] However, there remains an important question whether the prior guidance can be considered part of the offering for Section 12 and Rule 10b-5 purposes. The answer depends on the facts and circumstances. Where the prior guidance was given only orally at an earnings call many months previously, it may be possible to argue successfully that it is not part of the liability file for Section 12 purposes if no reference is made to the prior guidance in the selling process. That fact pattern could occur, for example, in a block trade context where there is no road show. However, where actual results are expected to be materially lower than the prior guidance, most companies elect to stay out of the market until they can properly adjust investor expectations by amending or updating their prior guidance.[22] Even where they are able to conclude that there is no legal duty to do so, investor relations considerations usually prevail. It is easy to see how a new investor who purchased securities at a time when the prior guidance indicated earnings per share for the year in the $1.05 to $1.10 range might feel wronged if shortly after his or her purchase the company reports earnings per share of $0.90. In the context of a securities offering, managing expectations becomes even more important. Investors who get what they expected generally don't sue issuers. Disappointed investors sometimes do.

Latham & Watkins | **Client Alert**

Share Repurchase Programs
Like pending offerings or strategic transactions, share repurchases require careful attention to guidance practices since the potential for liability under Rule 10b-5 exists equally in both contexts.[23] However, there are some important differences. Few purchasers in an offering will be disappointed if the company's guidance turns out to have been unduly conservative and earnings come in higher than projected. Shareholders who sold stock back to the company following gloomy projections, on the other hand, may feel aggrieved if subsequent actual earnings are strong. Thus, overly conservative guidance could be just as problematic as overly optimistic guidance, especially when the guidance is given during, or before commencing, a share repurchase program.

The key to avoiding liability is careful forethought to the timing of guidance and share repurchases. For example, consider limiting share repurchases to time periods that closely follow guidance announcements. The more closely in time the repurchases follow the guidance, the less likely that intervening events may have undermined the guidance. And, for companies with particularly active share repurchase programs, consider delegating decision-making authority to a third party or to a corporate officer who is walled off from the company's internal financial and operational projections.[24]

Insider Sales
It is also important to note that a decision not to update guidance may restrict the ability of executives and other insiders to sell shares. If the company learns facts causing management to conclude that prior guidance may no longer be accurate, both the underlying facts and management's conclusion could later be found to be material information. And, at least until those facts are made public or new guidance is given, that potentially material information will be non-public. Consequently, if insiders sold shares before new guidance was issued, regulators and plaintiffs could take the position that the transactions constituted improper insider trading.[25] Accordingly, if events undermine the accuracy of earlier public guidance, it may be wise to suspend executive purchases and sales of stock in order to avoid allegations of improper insider trading.

Mergers, Acquisitions and Tender Offers
Companies often provide guidance about the effects of significant corporate transactions – "We expect this transaction to be accretive to our earnings next year." These statements are subject to all of the concerns in this *Client Alert* generally, including Rule 10b-5 and, if there is a registration statement to be filed for the transaction or to issue securities to finance the transaction, Section 11 as well. In addition, they need to be considered in the context of the incremental statutory liability imposed by the proxy and tender offer rules. Finally, Regulation M-A may require documents containing these statements to be filed with the SEC. In business combination transactions, companies must also closely monitor public statements of their financial advisors, information agents and proxy solicitors that might be attributed to the company for compliance with Regulation FD and the other issues discussed in this *Client Alert*. Statements made during these transactions may influence voting decisions, tender decisions and purchase and sale decisions by both the company's and the target's shareholders, which increases the number of potential claimants. The many additional variables to be taken into account in giving guidance in these circumstances, including the combined results of two companies and synergies, make giving guidance in the context of merger transactions very complex.

Some Conclusions

Be Deliberate
The decision whether and to what extent to give guidance should be made in a deliberate manner and should be the subject of careful internal control, including discussion with counsel. Each company's situation is unique – there is no one-size-fits-all solution in this area. Plan ahead about how and when guidance will be given and script the statements carefully. Make sure to explain the critical assumptions underlying projected results so investors can evaluate your projections fairly.

Get a Policy and Stick to it
Consistency can be very helpful, both from an investor relations perspective and from a liability perspective.[26] Tell investors how and when you will be giving them guidance so they know what to expect. For example, tell investors that your policy is to give guidance once a year in March concurrently with your year-end earnings release, covering expectations for the year in process and don't update your guidance during the course of the year except in extraordinary circumstances, such as an offering or an acquisition or disposition. In between planned updates, you can deflect investor questions by explaining that it is your policy not to comment on prior guidance out of cycle.

Be Vigilant With Respect to Updates
Even if your policy is not to comment on your guidance except once per year, don't follow it blindly. Particularly in the context of securities offerings, sales by insiders and/or share repurchase programs, be sure that you are managing market expectations to avoid unpleasant surprises. Circumstances that might cause you to want to update can occur very quickly and at inopportune times, and companies need to be able to act quickly in this era of immediate information flow. All of the key players should coordinate and communicate so informed judgments can be made as to what to say to the market and when.

Involve Your Counsel
Viewed with hindsight, overly optimistic guidance can result in financial cost to the company and its directors and officers. Legal counsel should be part of the quality control and risk/reward evaluation process. It is not always true that the investor relations department wants more projected information and lawyers want less. In practice, giving good guidance can only be done by balancing the benefits to the company and the associated risks and counsel can assist in this balancing act.

Set forth below are 10 "rules of thumb" that will help you give good guidance without taking on inordinate liability. If you have any further questions about this *Client Alert*, feel free to contact Steven B. Stokdyk at +1 (213) 891-7421, Kirk A. Davenport at +1 (212) 906-1284, Richard Owens at +1 (212) 906-1396 or Jared Delgin at +1 (213) 891-7423.

10 Rules for Giving Good Guidance

1. Designate a single executive officer or a limited number of executive officers to communicate with analysts and investors about future plans and prospects.
2. Adopt an appropriate and consistent guidance policy and follow it.
3. Do not rely on boilerplate. Explain the assumptions underlying forward-looking statements and disclose the risks that anticipated results may not be realized – the cautionary statements should match the guidance.

Latham & Watkins | **Client Alert**

4. Have prepared remarks reviewed by counsel and stick to the script.
5. Remember Regulation FD: Disclose guidance and other material information only in public forums.
6. Do not be afraid to say "no comment" in response to questions or to deflect uncomfortable questions by restating your guidance policy.
7. Do not comment on or redistribute analysts' reports, and only review advance copies of analysts' reports for factual errors.
8. Remember Regulation G: Include appropriate disclosure for non-GAAP financial information where required.
9. Continually evaluate whether changed circumstances argue for an update of prior disclosures.
10. Be particularly sensitive to Rules 1 through 9 in the context of an offering of securities, share repurchase program or acquisition transaction, or when insiders are selling stock.

Endnotes

[1] This *Client Alert* does not address the SEC's encouragement to include forward-looking information in the Management's Discussion and Analysis sections of filings under the Securities Exchange Act. In our experience, this information rarely includes earnings guidance. See Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations, Release Nos. 33-8056, 34-45321, 67 Fed. Reg. 3,746 (Jan. 22, 2002).

[2] Rule 10b-5 generally requires a plaintiff to prove that the defendant made a false statement or an omission of a material fact, with "scienter," in connection with the purchase or sale of a security, upon which the plaintiff justifiably relied, and which proximately caused the plaintiff's economic loss. The courts have generally defined "scienter" in this context as an intent to defraud or a reckless disregard for the truth.

[3] These statements include, among other things, projections of revenues, income, earnings, capital expenditures, dividends, capital structure or other financial items, plans and objectives for future operations, products or services and related assumptions. 15 U.S.C. § 772-2(i)(1).

[4] Sections 27A of the Securities Act and 21E of the Exchange Act. These provisions do not apply in the context of an initial public offering, a tender offer or going private transaction, and are available only in a private action for damages and not in a proceeding initiated by the SEC.

[5] Rule 175 under the Securities Act and Rule 3b-6 under the Exchange Act. These provisions apply to SEC filings, including in the context of an initial public offering, a tender offer or a going private transaction.

[6] See, e.g., Harris v. Ivax, 182 F.2d 799, 803 (11th Cir. 1999); see also Rombach v. Chang, 555 F.3d 164, 173 (2d Cir. 2004); Miller v. Champion Enterprises, 346 F.3d 660 (6th Cir. 2003). The "bespeaks caution" doctrine was adopted in some fashion by almost every circuit court that addressed the issue prior to the PSLRA and remains a viable doctrine in cases where the Safe Harbor does not apply. See, e.g., Grossman v. Novell, 120 F.3d 1112, 1120 (10th Cir. 1997); In re Worlds of Wonder Sec. Litig., 35 F.3d 1407 (9th Cir. 1994); Polin v. Conductron Corp., 552 F.2d 797, 806 n.28 (8th Cir.), cert. denied, 434 U.S. 857 (1977); Sinay v. Lamson & Sessions Co., 948 F.2d 1037, 1040 (6th Cir. 1991); Rubinstein v. Collins, 20 F.3d 160, 166-68 (5th Cir. 1994); Kaufman v. Trump's Castle Funding (In re Donald J. Trump Casino Sec. Litig.), 7 F.3d 357, 371-73 (3d Cir. 1993), cert. denied, 510 U.S. 1178 (1994); I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759, 763 (2d Cir. 1991); and Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 (1st Cir. 1991).

[7] Under the safe harbor, there is no liability absent proof that the speaker had "actual knowledge" that the projection or forecast in question could not come to pass, and even then, state of mind is irrelevant unless the requisite cautionary disclosures are missing or inadequate. Under the bespeaks caution doctrine, or in circumstances where the safe harbor does not apply, however, cautionary language may not provide protection against statements that are not genuinely believed when made or for which there is no reasonable basis for belief or where the speaker is aware of undisclosed facts that undermine the accuracy of the statements when made.

[8] Asher v. Baxter International, Inc., 377 F.3d 727 (7th Cir. 2004), cert. denied, 544 U.S. 920 (2005).

[9] A duty to update must be distinguished from the duty to correct. The duty to correct applies when a statement that was believed to be correct when made turns out to have been incorrect when made. Some courts have suggested that a duty to update may exist when a statement that was correct and believed to be correct when made later turns out to be materially incorrect due to subsequent events. See, e.g., In re Time Warner Sec. Litig.), 9 F.3d 259, 267 (2d Cir. 1993), superseded by statute on other grounds, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4.

[10] The NYSE and Nasdaq rules for listed companies contain requirements for prompt disclosure of material information, but these requirements have not been interpreted to apply to internal projections or forecasts of future operating results.

[11] Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (U.S. 1988).

[12] Selective Disclosure and Insider Trading, SEC Release Nos. 33-7881, 34-43154, IC-24599 (Aug. 15, 2000).

[13] In the Matter of Schering-Plough Corporation and Richard J. Kogan, Admin. Proc. No. 3-11249, Exchange Act Rel. No. 34-48461 (September 9, 2003) (Administrative Order holding company's CEO responsible for Regulation FD violations occurring at private meetings with analysts during which the CEO used "a combination of spoken language, tone, emphasis, and demeanor" to convey negative, non-public material information. The company was fined a $1,000,000 civil fine. The CEO paid $50,000 personally.) Note, however, that a subsequent enforcement action against Siebel calls into question the applicability of Regulation FD to vague general comments and indicates that individual statements will be evaluated in the context of the total mix of information provided. SEC v. Siebel Systems, Inc., 384 F. Supp.2d 694 (S.D.N.Y. 2005).

[14] National Investor Relations Institute (NIRI) News Release dated April 6, 2006 (survey of 654 corporate members).

[15] It is worth noting that blessing an analyst's estimate or the street consensus can be viewed as "adopting" it under the case law, which can have the same legal consequences as if the company had issued the guidance itself. This casual approach to guidance usually does not offer an opportunity to include appropriate cautionary disclosure and should generally be avoided. Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 163 (2d Cir. 1980) (company may be exposed to liability if it placed its "imprimatur, expressly or impliedly, on the analysts' projections" contributing to the dissemination of material representations in the marketplace); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) ("We see no reason why adopting an analyst's forecast by reference should insulate an officer from liability where making the same forecast would not.").

[16] Regulation G requires public companies that disclose or release non-GAAP financial measures to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure.

[17] The Sarbanes-Oxley Act requires companies to maintain disclosure controls and procedures, and this requirement applies to all information disclosed, including guidance. We also note that the NYSE rules require Audit Committees of listed companies to review and discuss earnings press releases, and financial information and earnings guidance provided to analysts. As a result, companies should also carefully evaluate their internal processes for preparing and providing guidance.

[18] Oral forward-looking statements should be accompanied by an oral statement that the

cautionary disclosures are contained in a readily available written document. Similarly, statements regarding non-GAAP financial measures should identify where the required disclosures can be found.

[19] Courts have recognized that information disclosed by a company may not be material, even though a skilled analyst may be able to piece such information together with other information into a "mosaic" which reveals material nonpublic information.

[20] Remember that context is everything. If you are repurchasing your own shares or are involved in a going private transaction, the fact that your current guidance is materially low may be problematic. In the context of a securities offering, the opposite is true: materially high guidance is the worry there.

[21] Section 11 only applies to guidance if it is included in, or incorporated in, the prospectus for a public offering, which is highly unusual. In the rare circumstances where it is included, companies should consider the SEC rules applicable to projections (Item 10(b) of Regulation S-K and Item 10(d) of Regulation S-B).

[22] Companies should also carefully consider the consequences of providing or updating guidance in road show meetings that is not also made publicly, and the impact on the offering of saying "no comment" in response to questions about previous guidance.

[23] Compliance with Rule 10b-18 creates a limited "safe harbor" for share repurchase programs. However, that safe harbor only protects issuers from liability for market manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act. It does not shield against liability for materially false statements and omissions or insider trading.

[24] Rule 10b5-1(c)(2) allows companies to avoid insider trading liability for share repurchase programs when the decision-making authority is delegated subject to "reasonable policies and procedures" designed to prevent the decision-maker from becoming aware of material, non-public information. Pursuant to this provision, some companies have adopted Rule 10b5-1 plans for such purchases and insiders have adopted them for sales.

[25] Indeed, this theory underpins the insider trading charges filed in December 2005 by the United States Attorney's Office in Denver against Joseph Nacchio, the former CEO of Qwest Communications. The indictment against Nacchio alleges, among other things, that Nacchio sold approximately $100 million in Qwest stock during the first six months of 2001 after learning that Qwest was unlikely to meet its guidance. For now, the government's theory remains untested, but the case against Nacchio is scheduled to go to trial in March 2007.

[26] The adopting release to Regulation FD states that the "existence of an appropriate policy, and the issuer's general adherence to it, may often be relevant to determining the issuer's intent with regard to a selective disclosure." 65 Fed. Reg. at 51726, fn n. 90.

Office locations:

Barcelona
Brussels
Chicago
Frankfurt
Hamburg
Hong Kong
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Northern Virginia
Orange County
Paris
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

Barcelona
José Luis Blanco
+34-902-882-222

Brussels
Andreas Weitbrecht
+32 (0)2 788 60 00

Chicago
Christopher D. Lueking
Richard S. Meller
+1-312-876-7700

Frankfurt
Marcus Herrmann
John D. Watson
+49-69-60 62 60 00

Hamburg
Joachim von Falkenhausen
+49-40-41 40 30

Hong Kong
John A. Otoshi
+852-2522-7886

London
Bryant B. Edwards
+44-20-7710-1000

Los Angeles
J. Scott Hodgkins
Steven B. Stokdyk
Jared A. Delgin
+1-213-485-1234

Madrid
José Luis Blanco
+34-902-882-222

Milan
David Miles
+39 02-3046-2000

Moscow
Anya Goldin
+7-495-785-1234

Munich
Jörg Kirchner
+49 89 20 80 3 8000

New Jersey
David J. McLean
+1-973-639-1234

New York
Kirk A. Davenport
Marc D. Jaffe
Richard D. Owens
Erica H. Steinberger
+1-212-906-1200

Northern Virginia
Eric L. Bernthal
+1-703-456-1000

Orange County
Patrick T. Seaver
R. Scott Shean
+1-714-540-1235

Paris
Olivier du Mottay
Thomas Forschbach
John D. Watson
+33 (0)1 40 62 20 00

San Diego
Robert E. Burwell
Scott N. Wolfe
+1-619-236-1234

San Francisco
John M. Newell
Kimberly L. Wilkinson
+1-415-391-0600

Shanghai
Rowland Cheng
+86 21 6101-6000

Silicon Valley
Robert A. Koenig
Anthony J. Richmond
+1-650-328-4600

Singapore
Michael W. Sturrock
+65-6536-1161

Tokyo
Michael J. Yoshii
+81-3-6212-7800

Washington, D.C.
Scott C. Herlihy
William P. O'Neill
+1-202-637-2200

IPO Road Show Schedule

Dates	Cities	Meetings
Feb.16th	Minneapolis	1
Feb.17th	New York	1
Feb.20th	London	6
Feb.21st	Frankfurt	2
	Basel	1
Feb.22nd	Zurich	3
Feb.22nd-23rd	Geneva	2
Feb.24th-26th	San Francisco	7
Feb.27th	Boston	9
Feb.28th-March 1st	New York	17
March 2nd	Baltimore	3
	Philadelphia	3
March 3rd	Kansas City	5
	Denver	3
	Salt Lake City	1
March 6th	Minneapolis	3
	Milwaukee	2
March 7th	San Diego	3
	Los Angeles	2

UNDERWRITING AGREEMENT
[Redlined comments from Issuer's Counsel]

COMPANY

[_____] Shares of Common Stock

Underwriting Agreement

[_____], 200_

UNDERWRITER
As Representatives of the
several Underwriters listed
in Schedule 1 hereto
c/o UNDERWRITER
UNDERWRITER'S ADDRESS

Ladies and Gentlemen:

COMPANY a STATE corporation (the "Company"), proposes to issue and sell to the several Underwriters listed in Schedule 1 hereto (the "Underwriters"), for whom you are acting as representatives (the "Representatives"), an aggregate of [_____] shares of common stock, par value $0.01 per share ("Common Stock"), of the Company and, at the option of the Underwriters, up to an additional [_____] shares of Common Stock of the Company, and the stockholders named in Schedule II hereto (the "Selling Stockholders") propose to sell to the Underwriters an aggregate of [_____] shares of Common Stock. The aggregate of [_____] shares to be sold by the Company and the Selling Stockholders is called the "Underwritten Shares" and the aggregate of [_____] additional shares to be sold by the Company is herein called the "Option Shares". The Underwritten Shares and the Option Shares are herein referred to as the "Shares". The shares of Common Stock of the Company to be outstanding after giving effect to the sale of the Shares are herein referred to as the "Stock".

The Company hereby confirms its agreement with the several Underwriters concerning the purchase and sale of the Shares, as follows:

1. Registration Statement. The Company has prepared and filed with the Securities and Exchange Commission (the "Commission") under the Securities Act of 1933, as amended, and the rules and regulations of the Commission thereunder (collectively, the "Securities Act"), a registration statement (File No. [_____]) including a prospectus, relating to the Shares. Such registration statement, as amended at the time it becomes effective, including the information, if any, deemed pursuant to Rule 430A under the Securities Act to be part of the registration statement at the time of its effectiveness ("Rule 430 Information"), is referred to herein as the "Registration Statement"; and as used herein, the term "Preliminary Prospectus" means each prospectus included in such registration statement (and any amendments thereto) before it becomes effective, any prospectus filed with the Commission pursuant to Rule 424(a) under the Securities Act and the prospectus included in the Registration Statement at the time of its effectiveness that omits Rule 430A Information, and the term "Prospectus" means the prospectus in the form first used to confirm sales of the Shares. If the Company has filed an abbreviated registration statement pursuant to Rule 462(b) under the Securities Act (the "Rule 462 Registration Statement"), then any reference herein to the term "Registration Statement" shall be deemed to include such Rule 462 Registration Statement. Capitalized terms used but not defined herein shall have the meanings given to such terms in the Registration Statement and the Prospectus.

2. Purchase of the Shares by the Underwriters. (a) The Company and each of the Selling Stockholders agree, severally and not jointly, to issue and sell the Shares to the several Underwriters as provided in this Agreement, and each Underwriter, on the basis of the representations, warranties and agreements set forth herein and subject to the conditions set forth herein, agrees, severally and not jointly, to purchase from the Company

NY\1013570.8

and each of the Selling Stockholders the respective number of Underwritten Shares set forth opposite such Underwriter's name in Schedule 1 hereto at a price per share of $[____] (the "Purchase Price").

In addition, the Company agrees to issue and sell the Option Shares to the several Underwriters as provided in this Agreement, and the Underwriters, on the basis of the representations, warranties and agreements set forth herein and subject to the conditions set forth herein, shall have the option to purchase, severally and not jointly, from the Company the Option Shares at the Purchase Price.

If any Option Shares are to be purchased, the number of Option Shares to be purchased by each Underwriter shall be the number of Option Shares which bears the same ratio to the aggregate number of Option Shares being purchased as the number of Underwritten Shares set forth opposite the name of such Underwriter in Schedule 1 hereto (or such number increased as set forth in Section 11 hereof) bears to the aggregate number of Underwritten Shares being purchased from the Company by the several Underwriters, subject, however, to such adjustments to eliminate any fractional Shares as the Representatives in their sole discretion shall make.

The Underwriters may exercise the option to purchase the Option Shares at any time in whole, or from time to time in part, on or before the thirtieth day following the date of this Agreement, by written notice from the Representatives to the Company. Such notice shall set forth the aggregate number of Option Shares as to which the option is being exercised and the date and time when the Option Shares are to be delivered and paid for which may be the same date and time as the Closing Date (as hereinafter defined) but shall not be earlier than the Closing Date nor later than the tenth full business day (as hereinafter defined) after the date of such notice (unless such time and date are postponed in accordance with the provisions of Section 11 hereof). Any such notice shall be given at least two Business Days prior to the date and time of delivery specified therein.

(b) The Company and the Selling Stockholders understand that the Underwriters intend to make a public offering of the Shares as soon after the effectiveness of this Agreement as in the judgment of the Representatives is advisable, and initially to offer the Shares on the terms set forth in the Prospectus. The Company and the Selling Stockholders acknowledge and agree that the Underwriters may offer and sell Shares to or through any affiliate of an Underwriter and that any such affiliate may offer and sell Shares purchased by it to or through any Underwriter.

(c) Payment for the Shares shall be made by wire transfer in immediately available funds to the account specified by the Company to the Representatives and by the Attorney-in-Fact (as defined below), with regard to payment to the Selling Stockholders, in the case of the Underwritten Shares, at the offices of UW COUNSEL time, on [____], 2005, or at such other time or place on the same or such other date, not later than the fifth business day thereafter, as the Representatives and the Company and the Attorney-in-Fact may agree upon in writing, or, in the case of the Option Shares, on the date and at the time and place specified by the Representatives in the written notice of the Underwriters' election to purchase such Option Shares. The time and date of such payment for the Underwritten Shares is referred to herein as the "Closing Date" and the time and date for such payment for the Option Shares, if other than the Closing Date, are herein referred to as the "Additional Closing Date".

Payment for the Shares to be purchased on the Closing Date or the Additional Closing Date, as the case may be, shall be made against delivery to the Representatives for the respective accounts of the several Underwriters of the Shares to be purchased on such date in definitive form registered in such names and in such denominations as the Representatives shall request in writing not later than two full business days prior to the Closing Date or the Additional Closing Date, as the case may be, with any transfer taxes payable in connection with the sale of the Shares duly paid by the Company or the Selling Stockholders, as the case may be. The certificates for the Shares will be made available for inspection and packaging by the Representatives at the office of UNDERWRITER set forth above not later than 1:00 P.M., New York City time, on the business day prior to the Closing Date or the Additional Closing Date, as the case may be.

3. Representations and Warranties of the Company. The Company represents and warrants to each Underwriter and the Selling Stockholders that:

(a) *Preliminary Prospectus.* No order preventing or suspending the use of any Preliminary Prospectus has been issued by the Commission, and each Preliminary Prospectus, at the time of filing thereof,

complied in all material respects with the Securities Act and did not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that the Company makes no representation and warranty with respect to any statements or omissions made in reliance upon and in conformity with information relating to any Underwriter furnished to the Company in writing by such Underwriter through the Representatives expressly for use in any Preliminary Prospectus.

(b) *Registration Statement and Prospectus.* The Registration Statement has been declared effective by the Commission. No order suspending the effectiveness of the Registration Statement has been issued by the Commission and no proceeding for that purpose has been initiated or, to the knowledge of the Company, threatened by the Commission; as of the applicable effective date of the Registration Statement and any amendment thereto, the Registration Statement complied and will comply in all material respects with the Securities Act, and did not and will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading; and as of the applicable filing date of the Prospectus and any amendment or supplement thereto and as of the Closing Date and, to the extent it occurs, as of the Additional Closing Date, the Prospectus will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that the Company makes no representation and warranty with respect to any statements or omissions made in reliance upon and in conformity with information relating to any Underwriter furnished to the Company in writing by such Underwriter through the Representatives expressly for use in the Registration Statement and the Prospectus and any amendment or supplement thereto.

(c) *Financial Statements.* The financial statements and the related notes thereto of the Company and its consolidated subsidiaries included in the Registration Statement and the Prospectus comply in all material respects with the applicable requirements of the Securities Act and the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Commission thereunder (collectively, the "Exchange Act"), as applicable, and present fairly the financial position of the Company and its subsidiaries as of the dates indicated and the results of their operations and the changes in their cash flows for the periods specified; such financial statements have been prepared in conformity with generally accepted accounting principles applied on a consistent basis throughout the periods covered thereby, and the supporting schedules included in the Registration Statement present fairly the information required to be stated therein; the other financial information included in the Registration Statement and the Prospectus has been derived from the accounting records of the Company and its subsidiaries and presents fairly the information shown thereby; and the pro forma financial information and the related notes thereto included in the Registration Statement and the Prospectus has been prepared in accordance with the applicable requirements of the Securities Act and the Exchange Act, as applicable, and the assumptions underlying such pro forma financial information are reasonable and are set forth in the Registration Statement and the Prospectus.

(d) *No Material Adverse Change.* Since the date of the most recent financial statements of the Company included in the Registration Statement and the Prospectus, (i) there has not been any change in the capital stock or long-term debt of the Company or any of its subsidiaries, or any dividend or distribution of any kind declared, set aside for payment, paid or made by the Company on any class of capital stock, or any material adverse change, or any development which could reasonably be expected to result in a material adverse change, in or affecting the business, properties, management, financial position, stockholders' equity, results of operations or prospects of the Company and its subsidiaries taken as a whole; (ii) neither the Company nor any of its subsidiaries has entered into any transaction or agreement that is material to the Company and its subsidiaries taken as a whole or incurred any liability or obligation, direct or contingent, that is material to the Company and its subsidiaries taken as a whole; and (iii) neither the Company nor any of its subsidiaries has sustained any loss or interference with its business which is material to the Company and its subsidiaries taken as a whole from fire, explosion, flood or other calamity, whether or not covered by insurance, or from any labor disturbance or dispute or any action, order or decree of any court or arbitrator or governmental or regulatory authority, except in each case as otherwise disclosed in the Registration Statement and the Prospectus.

(e) *Organization and Good Standing.* The Company and each of its subsidiaries have been duly organized and are validly existing and in good standing under the laws of their respective jurisdictions of organization, are duly qualified to do business and are in good standing in each jurisdiction in which their respective ownership or lease of property or the conduct of their respective businesses requires such qualification, and have all

power and authority necessary to own or hold their respective properties and to conduct the businesses in which they are engaged, except where the failure to be so qualified or have such power or authority would not, individually or in the aggregate, have a material adverse effect on the business, properties, management, financial position, stockholders' equity, results of operations or prospects of the Company and its subsidiaries taken as a whole (a "Material Adverse Effect"). The Company does not own or control, directly or indirectly, any corporation, association or other entity other than the subsidiaries listed in Exhibit 21 to the Registration Statement.

(f) *Capitalization.* The Company has an authorized capitalization as set forth in the Prospectus under the heading "Capitalization;" all the outstanding shares of capital stock of the Company (including the Shares to be sold by the Selling Stockholders) have been duly and validly authorized and issued and are fully paid and non-assessable and are not subject to any pre-emptive or similar rights; except as described in or expressly contemplated by the Prospectus, there are no outstanding rights (including, without limitation, pre-emptive rights), warrants or options to acquire, or instruments convertible into or exchangeable for, any shares of capital stock or other equity interest in the Company or any of its subsidiaries, or any contract, commitment, agreement, understanding or arrangement of any kind relating to the issuance of any capital stock of the Company or any such subsidiary, any such convertible or exchangeable securities or any such rights, warrants or options; the capital stock of the Company conforms in all material respects to the description thereof contained in the Registration Statement and the Prospectus; and all the outstanding shares of capital stock or other equity interests of each subsidiary of the Company have been duly and validly authorized and issued, are fully paid and non-assessable and are owned directly or indirectly by the Company, free and clear of any lien, charge, encumbrance, security interest, restriction on voting or transfer or any other claim of any third party.

(g) *Conversion of Preferred Stock.* The shares of Common Stock of the Company to be issued upon the conversion of the Series 1 convertible preferred stock, par value $0.01 per share, have been duly authorized and, when issued, will be validly issued, fully-paid and non-assessable, and the issuance of such shares will not be subject to any pre-emptive or similar rights.

(h) *Due Authorization.* The Company has full corporate right, power and authority to execute and deliver this Agreement and to perform its obligations hereunder; and all corporate action required to be taken for the due and proper authorization, execution and delivery by it of this Agreement and the consummation by it of the transactions contemplated hereby has been duly and validly taken.

(i) *Underwriting Agreement.* This Agreement has been duly authorized, executed and delivered by the Company.

(j) *The Shares.* The Shares to be issued and sold by the Company hereunder have been duly authorized by the Company and, when issued and delivered and paid for as provided herein, will be duly and validly issued and will be fully paid and nonassessable and will conform to the descriptions thereof in the Prospectus; and the issuance of the Shares is not subject to any preemptive or similar rights.

(k) *No Violation or Default.* Neither the Company nor any of its subsidiaries is (i) in violation of its charter or by-laws or similar organizational documents; (ii) in default, and no event has occurred that, with notice or lapse of time or both, would constitute such a default, in the due performance or observance of any term, covenant or condition contained in any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Company or any of its subsidiaries is a party or by which the Company or any of its subsidiaries is bound or to which any of the property or assets of the Company or any of its subsidiaries is subject; or (iii) in violation of any law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority, except, in the case of clauses (ii) and (iii) above, for any such default or violation that would not, individually or in the aggregate, have a Material Adverse Effect.

(l) *No Conflicts.* The execution, delivery and performance by the Company of this Agreement, the issuance and sale of the Shares and the consummation of the transactions contemplated herein will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Company or any of its subsidiaries pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which the Company or any of its subsidiaries is a party or by which the Company or any of its subsidiaries is bound or to which any of the property or assets of the Company or any of its subsidiaries is subject, (ii) result in any

violation of the provisions of the charter or by-laws or similar organizational documents of the Company or any of its subsidiaries or (iii) result in the violation of any law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority having jurisdiction over the Company or any of its subsidiaries or any of their operations, property or assets, except, in the case of clauses (i) and (iii) above, for any such conflict, breach or violation that would not, individually or in the aggregate, have a Material Adverse Effect.

(m) *No Consents Required.* No consent, approval, authorization, order, registration or qualification of or with any court or arbitrator or governmental or regulatory authority is required for the execution, delivery and performance by the Company of this Agreement, the issuance and sale of the Shares to be sold by the Company hereunder and the consummation of the transactions contemplated by this Agreement, except for (i) the registration of the Shares under the Securities Act and the Securities Exchange Act of 1934, as amended, (ii) such consents, approvals, authorizations, orders and registrations or qualifications as may be required under applicable state securities laws and the National Association of Securities Dealers, Inc. ("NASD") in connection with the purchase and distribution of the Shares by the Underwriters or (iii) such as have been obtained from the Nasdaq National Market.

(n) *Legal Proceedings.* Except as described in the Prospectus, there are no legal, governmental or regulatory investigations, actions, suits or proceedings pending to which the Company or any of its subsidiaries is or may be reasonably be expected to be a party or to which any property of the Company or any of its subsidiaries is or may reasonably be expected to be the subject that, individually or in the aggregate, if determined adversely to the Company or any of its subsidiaries, could reasonably be expected to have a Material Adverse Effect or materially and adversely affect the ability of the Company to perform its obligations under this Agreement; no such investigations, actions, suits or proceedings are threatened or, to the knowledge of the Company, threatened or contemplated by any governmental or regulatory authority or other third parties; and (i) there are no current or pending legal, governmental or regulatory actions, suits or proceedings against the Company, its subsidiaries or any of their affiliates that are required under the Securities Act to be described in the Prospectus that are not so described and (ii) there are no statutes, regulations or contracts or other documents that are required under the Securities Act to be filed as exhibits to the Registration Statement or described in the Registration Statement or the Prospectus that are not so filed or described.

(o) *Independent Accountants.* ACCOUNTING FIRM, who have certified certain financial statements of the Company and its subsidiaries are independent public accountants with respect to the Company and its subsidiaries as required by the Securities Act.

(p) *Title to Real and Personal Property.* The Company and its subsidiaries have good and marketable title in fee simple to, or have valid rights to lease or otherwise use, all items of real and personal property that are material to the respective businesses of the Company and its subsidiaries, in each case free and clear of all liens, encumbrances, claims and defects and imperfections of title except those that (i) do not materially interfere with the use made and proposed to be made of such property by the Company and its subsidiaries or (ii) could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect.

(q) *Title to Intellectual Property.* The Company and its subsidiaries own, are licensed or possess adequate rights to use all material patents, patent applications, trademarks, service marks, trade names, trademark registrations, service mark registrations, copyrights, licenses and know-how (including trade secrets and other unpatented and/or unpatentable proprietary or confidential information, systems or procedures) (collectively, "Intellectual Property") necessary for the conduct of their respective businesses; and the conduct of their respective businesses does not conflict in any material respect with any such rights of others, except where the failure to own, license or have such rights would not, individually, or in the aggregate, have a Material Adverse Effect, and the Company and its subsidiaries have not received any notice of any claim of infringement or conflict with any such rights of others, except those claims or conflicts that (i) do not materially interfere with the use made or proposed to be made of such Intellectual Property by the Company and its subsidiaries and (ii) could not reasonably be expected, individually or in the aggregate, to have a Material Adverse Effect.

(r) *No Undisclosed Relationships.* No relationship, direct or indirect, exists between or among the Company or any of its subsidiaries, on the one hand, and the directors, officers, stockholders, customers or suppliers

of the Company or any of its subsidiaries, on the other, that is required by the Securities Act to be described in the Registration Statement and the Prospectus and that is not so described.

(s) *Investment Company Act.* The Company is not and, after giving effect to the offering and sale of the Shares and the application of the proceeds thereof as described in the Prospectus, will not be required to register as an "investment company" or an entity "controlled" by an "investment company" within the meaning of the Investment Company Act of 1940, as amended, and the rules and regulations of the Commission thereunder (collectively, "Investment Company Act").

(t) *Taxes.* The Company and its subsidiaries have paid all material federal, state, local and foreign taxes and filed all tax returns required to be paid or filed through the date hereof; and except as otherwise disclosed in the Prospectus, there is no material tax deficiency that has been, or could reasonably be expected to be, asserted against the Company or any of its subsidiaries or any of their respective properties or assets.

(u) *Licenses and Permits.* The Company and its subsidiaries possess all licenses, certificates, permits and other authorizations issued by, and have made all declarations and filings with, the appropriate federal, state, local or foreign governmental or regulatory authorities that are necessary for the ownership or lease of their respective properties or the conduct of their respective businesses as described in the Registration Statement and the Prospectus, except where the failure to possess or make the same would not, individually or in the aggregate, have a Material Adverse Effect; and except as described in the Prospectus, neither the Company nor any of its subsidiaries has received notice of any revocation or modification of any such license, certificate, permit or authorization or has any reason to believe that any such license, certificate, permit or authorization will not be renewed in the ordinary course.

(v) *No Labor Disputes.* No material labor disturbance by or dispute with employees of the Company or any of its subsidiaries exists or, to the knowledge of the Company, is contemplated or threatened.

(w) *Compliance With Environmental Laws.* The Company and its subsidiaries (i) are in compliance with any and all applicable federal, state, local and foreign laws, rules, regulations, decisions and orders relating to the protection of human health and safety, the environment or hazardous or toxic substances or wastes, pollutants or contaminants (collectively, "Environmental Laws"); (ii) have received and are in compliance with all permits, licenses or other approvals required of them under applicable Environmental Laws to conduct their respective businesses; and (iii) have not received notice of any actual or potential liability for the investigation or remediation of any disposal or release of hazardous or toxic substances or wastes, pollutants or contaminants, except in any such case for any such failure to comply, or failure to receive required permits, licenses or approvals, or liability as would not, individually or in the aggregate, have a Material Adverse Effect.

(x) *Compliance With ERISA.* Each employee benefit plan, within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that is maintained, administered or contributed to by the Company or any of its affiliates for employees or former employees of the Company and its affiliates has been maintained in compliance with its terms and the requirements of any applicable statutes, orders, rules and regulations, including but not limited to ERISA and the Internal Revenue Code of 1986, as amended (the "Code"); no prohibited transaction, within the meaning of Section 406 of ERISA or Section 4975 of the Code, has occurred with respect to any such plan excluding transactions effected pursuant to a statutory or administrative exemption; and for each such plan that is subject to the funding rules of Section 412 of the Code or Section 302 of ERISA, no "accumulated funding deficiency" as defined in Section 412 of the Code has been incurred, whether or not waived, and the fair market value of the assets of each such plan (excluding for these purposes accrued but unpaid contributions) exceeds the present value of all benefits accrued under such plan determined using reasonable actuarial assumptions.

(y) *Accounting Controls.* Except as disclosed in the Prospectus, the Company and its subsidiaries maintain systems of internal accounting controls sufficient to provide reasonable assurance that (i) transactions are executed in accordance with management's general or specific authorizations; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain asset accountability; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(z) *Insurance.* The Company and its subsidiaries are insured by nationally recognized insurers and have insurance covering their respective properties, operations, personnel and businesses which insurance is in amounts and insures against such losses and risks as are adequate to protect the Company and its subsidiaries and their respective businesses; and neither the Company nor any of its subsidiaries has (i) received notice from any insurer or agent of such insurer that capital improvements or other expenditures are required or necessary to be made in order to continue such insurance or (ii) any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage at reasonable cost from similar insurers as may be necessary to continue its business.

(aa) *No Unlawful Payments.* Neither the Company nor any of its subsidiaries nor, to the best knowledge of the Company, any director, officer, agent, employee or other person associated with or acting on behalf of the Company or any of its subsidiaries has (i) used any corporate funds for any unlawful contribution, gift, entertainment or other unlawful expense relating to political activity; (ii) made any direct or indirect unlawful payment to any foreign or domestic government official or employee from corporate funds; (iii) violated or is in violation of any provision of the Foreign Corrupt Practices Act of 1977; or (iv) made any bribe, rebate, payoff, influence payment, kickback or other unlawful payment.

(bb) *No Restrictions on Subsidiaries.* No subsidiary of the Company is currently prohibited, directly or indirectly, under any agreement or other instrument to which it is a party or is subject, from paying any dividends to the Company, from making any other distribution on such subsidiary's capital stock, from repaying to the Company any loans or advances to such subsidiary from the Company or from transferring any of such subsidiary's properties or assets to the Company or any other subsidiary of the Company.

(cc) *No Broker's Fees.* Neither the Company nor any of its subsidiaries is a party to any contract, agreement or understanding with any person (other than this Agreement) that would give rise to a valid claim against the Company or any of its subsidiaries or any Underwriter for a brokerage commission, finder's fee or like payment in connection with the offering and sale of the Shares.

(dd) *No Registration Rights.* No person has the right to require the Company or any of its subsidiaries to register any securities for sale under the Securities Act by reason of the filing of the Registration Statement with the Commission or the issuance and sale of the Shares, except as otherwise described in the Registration Statement and the Prospectus.

(ee) *No Stabilization.* The Company has not taken, directly or indirectly, any action designed to or that could reasonably be expected to cause or result in any stabilization or manipulation of the price of the Shares.

(ff) *Business With Cuba.* The Company has complied with all provisions of Section 517.075, Florida Statutes (Chapter 92-198, Laws of Florida) relating to doing business with the Government of Cuba or with any person or affiliate located in Cuba.

(gg) *Margin Rules.* Neither the issuance, sale and delivery of the Shares nor the application of the proceeds thereof by the Company as described in the Registration Statement and the Prospectus will violate Regulation T, U or X of the Board of Governors of the Federal Reserve System or any other regulation of such Board of Governors.

(hh) *Forward-Looking Statements.* No forward-looking statement (within the meaning of Section 27A of the Securities Act and Section 21E of the Exchange Act) contained in the Registration Statement and the Prospectus has been made or reaffirmed without a reasonable basis or has been disclosed other than in good faith.

(ii) *Statistical and Market Data.* Nothing has come to the attention of the Company that has caused the Company to believe that the statistical and market-related data included in the Registration Statement and the Prospectus is not based on or derived from sources that are reliable and accurate in all material respects.

4. Representations and Warranties of the Selling Stockholders. Each of the Selling Stockholders severally represents and warrants to each Underwriter and the Company that:

(a) *Required Consents; Authority.* Except for the registration of the sale of the Shares under the Securities Act, and except for such consents, approvals and authorizations as may be required under the Exchange Act and applicable state securities laws in connection with the purchase and distribution of the Shares by the Underwriters, all consents, approvals, authorizations and orders necessary for the execution and delivery by such Selling Stockholder of this Agreement and the Power of Attorney (the "Power of Attorney") and the Custody Agreement (the "Custody Agreement") hereinafter referred to, and for the sale and delivery of the Shares to be sold by such Selling Stockholder hereunder, have been obtained; and such Selling Stockholder has full right, power and authority to enter into this Agreement, the Power of Attorney and the Custody Agreement and to sell, assign, transfer and deliver the Shares to be sold by such Selling Stockholder hereunder; this Agreement, the Power of Attorney and the Custody Agreement have each been duly authorized, executed and delivered by such Selling Stockholder.

Deleted: A

(b) *No Conflicts.* The execution, delivery and performance by such Selling Stockholder of this Agreement, the Power of Attorney and the Custody Agreement, the sale of the Shares to be sold by such Selling Stockholder and the consummation by such Selling Stockholder of the transactions herein and therein contemplated will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of such Selling Stockholder pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which such Selling Stockholder is a party or by which such Selling Stockholder is bound or to which any of the property or assets of such Selling Stockholder is subject, (ii) result in any violation of the provisions of the charter or by-laws or similar organizational documents of such Selling Stockholder or (iii) result in the violation of any law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory agency having jurisdiction over such Selling Shareholder, except, in the case of clause (i) and (iii) above, for any such conflict, breach or violation that would not individually, or in the aggregate, have a Material Adverse Effect.

(c) *Title to Shares.* Such Selling Stockholder has good and valid title to the Shares to be sold at the Closing Date by such Selling Stockholder hereunder (other than the Shares to be issued upon conversion of any shares of preferred stock, par value $0.01 per share ("Preferred Stock"), free and clear of all liens, encumbrances, equities or adverse claims; such Selling Stockholder will have, immediately prior to the Closing Date, assuming due issuance of any Shares to be issued upon conversion of Preferred Stock, good and valid title to the Shares to be sold at the Closing Date by such Selling Stockholder, free and clear of all liens, encumbrances, equities or adverse claims; and, upon delivery of the certificates representing such Shares and payment therefor pursuant hereto, each Underwriter who has purchased such Shares will acquire all of the Selling Stockholders' rights in such Shares, free of any adverse claim within the meaning of Section 8-102 of the New York Uniform Commercial Code, assuming each Underwriter has purchased such Shares without notice of an adverse claim.

Deleted: good and valid title to such Shares, free and clear of all liens, encumbrances, equities or adverse claims, will pass to the several Underwriters.

(d) *No Stabilization.* Such Selling Stockholder has not taken and will not take, directly or indirectly, any action designed to or that could reasonably be expected to cause or result in any stabilization or manipulation of the price of the Shares.

(e) *Registration Statement and Prospectus.* As of the applicable effective date of the Registration Statement and any amendment thereto, the Registration Statement did not and will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading; and as of the applicable filing date of the Prospectus and any amendment or supplement thereto and as of the Closing Date the Prospectus will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; provided that such Selling Stockholder makes no representation and warranty with respect to any statements or omissions other than with respect to the written information furnished to the Company by such Selling Shareholder specifically for inclusion in the Registration Statement or the Prospectus.

Deleted: complied and will comply in all material respects with the Securities Act, and

Deleted: made in reliance upon and in conformity with information relating to any Underwriter furnished to the Company in writing by such Underwriter through the Representative expressly for use in the Registration Statement and the Prospectus and any amendment or supplement thereto

Each of the Selling Stockholders represents and warrants that certificates in negotiable form representing all of the Shares to be sold by such Selling Stockholders hereunder other than any such Shares to be issued upon the conversion of any Preferred Stock, have been placed in custody under a Custody Agreement relating to such Shares, in the form heretofore furnished to you, duly executed and delivered by such Selling Stockholder to the Company, as custodian (the "Custodian"), and that such Selling Stockholder has duly executed and delivered a Power of Attorney, in the form heretofore furnished to you, appointing the person indicated in Schedule II hereto as such Selling Stockholder's Attorney-in-fact (the "Attorney-in-Fact") with authority to execute and deliver this Agreement on behalf of such Selling Stockholder, to determine the purchase price to be paid by the Underwriters to the Selling Stockholders as provided herein, to authorize the delivery of the Shares to be sold by such Selling Stockholder hereunder, to authorize (if applicable) the conversion of Preferred Stock to be converted with respect to the Preferred Stock to be sold by such Selling Stockholder hereunder and otherwise to act on behalf of such Selling Stockholder in connection with the transactions contemplated by this Agreement and the Custody Agreement.

Deleted: , and each of the Selling Stockholders who is selling Shares upon conversion of Preferred Stock represents and warrants that duly completed and executed irrevocable Preferred Stock conversion notices ("Conversion Notices"), in the forms specified by the relevant Certificate of Designation granting the Preferred Stock, with respect to all of the Shares to be sold by such Selling Stockholders hereunder have been,

Deleted: s

Deleted: or persons

Deleted: , and each of them,

Deleted: s

Deleted: s

Deleted: or any one of them the "Attorney-in-Fact"

Deleted: s

Each of the Selling Stockholders specifically agrees that the Shares represented by the certificates or the irrevocable Conversion Notice, in either case held in custody for such Selling Stockholder under the Custody Agreement, are subject to the interests of the Underwriters hereunder, and that the arrangements made by such Selling Stockholder for such custody, and the appointment by such Selling Stockholder of the Attorney-in-Fact by the Power of Attorney, are to that extent irrevocable. Each of the Selling Stockholders specifically agrees that the obligations of such Selling Stockholder hereunder shall not be terminated by operation of law, whether by the death or incapacity of any individual Selling Stockholder, or, in the case of an estate or trust, by the death or incapacity of any executor or trustee or the termination of such estate or trust, or in the case of a partnership, corporation or similar organization, by the dissolution of such partnership, corporation or organization, or by the occurrence of any other event. If any individual Selling Stockholder or any such executor or trustee should die or become incapacitated, or if any such estate or trust should be terminated, or if any such partnership, corporation or similar organization should be dissolved, or if any other such event should occur, before the delivery of the Shares hereunder, certificates representing such Shares shall be delivered by or on behalf of such Selling Stockholder in accordance with the terms and conditions of this Agreement and the Custody Agreement, and actions taken by the Attorney-in-Fact pursuant to the Powers of Attorney shall be as valid as if such death, incapacity, termination, dissolution or other event had not occurred, regardless of whether or not the Custodian, the Attorney-in-Fact, or any of them, shall have received notice of such death, incapacity, termination, dissolution or other event.

Deleted: s

Deleted: s

5. Further Agreements of the Company. The Company covenants and agrees with each Underwriter that:

(a) *Effectiveness of the Registration Statement.* The Company will use its reasonable best efforts to cause the Registration Statement to become effective at the earliest possible time and, if required, will file the final Prospectus with the Commission within the time periods specified by Rule 424(b) and Rule 430A under the Securities Act and the Company will furnish copies of the Prospectus to the Underwriters in New York City prior to 10:00 A.M., New York City time, on the business day next succeeding the date of this Agreement in such quantities as the Representatives may reasonably request.

(b) *Delivery of Copies.* The Company will deliver, without charge, (i) to the Representatives, three signed copies of the Registration Statement as originally filed and each amendment thereto, in each case including all exhibits and consents filed therewith; and (ii) to each Underwriter (A) a conformed copy of the Registration Statement as originally filed and each amendment thereto (without exhibits) and (B) during the Prospectus Delivery Period, as many copies of the Prospectus (including all amendments and supplements thereto) as the Representatives may reasonably request. As used herein, the term "Prospectus Delivery Period" means such period of time after the first date of the public offering of the Shares as in the opinion of counsel for the Underwriters a prospectus relating to the Shares is required by law to be delivered in connection with sales of the Shares by any Underwriter or dealer.

(c) *Amendments or Supplements.* Before filing any amendment or supplement to the Registration Statement or the Prospectus, whether before or after the time that the Registration Statement becomes effective, the Company will furnish to the Representatives and counsel for the Underwriters a copy of the proposed amendment or supplement for review and will not file any such proposed amendment or supplement to which the Representatives reasonably object.

(d) *Notice to the Representatives.* The Company will advise the Representatives promptly, and confirm such advice in writing, (i) when the Registration Statement has become effective; (ii) when any amendment to the Registration Statement has been filed or becomes effective; (iii) when any supplement to the Prospectus or any amendment to the Prospectus has been filed; (iv) of any request by the Commission for any amendment to the Registration Statement or any amendment or supplement to the Prospectus or the receipt of any comments from the Commission relating to the Registration Statement or any other request by the Commission for any additional information; (v) of the issuance by the Commission of any order suspending the effectiveness of the Registration Statement or preventing or suspending the use of any Preliminary Prospectus or the Prospectus or the initiation or threatening of any proceeding for that purpose; (vi) of the occurrence of any event within the Prospectus Delivery Period as a result of which the Prospectus as then amended or supplemented would include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances existing when the Prospectus is delivered to a purchaser, not misleading; and (vii) of the receipt by the Company of any notice with respect to any suspension of the qualification of the Shares for offer and sale in any jurisdiction or the initiation or threatening of any proceeding for such purpose; and the Company will use its best efforts to prevent the issuance of any such order suspending the effectiveness of the Registration Statement, preventing or suspending the use of any Preliminary Prospectus or the Prospectus or suspending any such qualification of the Shares and, if any such order is issued, will obtain as soon as possible the withdrawal thereof.

(e) *Ongoing Compliance of the Prospectus.* If during the Prospectus Delivery Period (i) any event shall occur or condition shall exist as a result of which the Prospectus as then amended or supplemented would include an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances existing when the Prospectus is delivered to a purchaser, not misleading or (ii) it is necessary to amend or supplement the Prospectus to comply with law, the Company will immediately notify the Underwriters thereof and forthwith prepare and, subject to paragraph (c) above, file with the Commission and furnish to the Underwriters and to such dealers as the Representatives may designate, such amendments or supplements to the Prospectus as may be necessary so that the statements in the Prospectus as so amended or supplemented will not, in the light of the circumstances existing when the Prospectus is delivered to a purchaser, be misleading or so that the Prospectus will comply with law.

(f) *Blue Sky Compliance.* The Company will qualify the Shares for offer and sale under the securities or Blue Sky laws of such jurisdictions as the Representatives shall reasonably request and will continue such qualifications in effect so long as required for distribution of the Shares; provided that the Company shall not be required to (i) qualify as a foreign corporation or other entity or as a dealer in securities in any such jurisdiction where it would not otherwise be required to so qualify, (ii) file any general consent to service of process in any such jurisdiction or (iii) subject itself to taxation in any such jurisdiction if it is not otherwise so subject.

(g) *Earning Statement.* The Company will make generally available to its security holders and the Representatives as soon as practicable an earning statement that satisfies the provisions of Section 11(a) of the Securities Act and Rule 158 of the Commission promulgated thereunder covering a period of at least twelve months beginning with the first fiscal quarter of the Company occurring after the "effective date" (as defined in Rule 158) of the Registration Statement.

(h) *Clear Market.* For a period of 180 days after the date of the initial public offering of the Shares, the Company will not (i) offer, pledge, announce the intention to sell, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase or otherwise transfer or dispose of, directly or indirectly, any shares of Stock or any securities convertible into or exercisable or exchangeable for Stock or (ii) enter into any swap or other agreement that transfers, in whole or in part, any of the economic consequences of ownership of the Stock, whether any such transaction described in clause (i) or (ii) above is to be settled by delivery of Stock or such other securities, in cash or otherwise, without the prior written consent of the Representatives, other than the Shares to be sold hereunder, options and restricted stock grants under existing employee stock option plans and any shares of Stock of the Company issued upon the exercise of options granted under existing employee stock option plans. In addition, the Company shall be permitted to file a Form S-8 filing with respect to its existing stock option plans. Notwithstanding the foregoing, if (1) during the last 17 days of the 180-day restricted period, the Company issues an earnings release or material news or a material event relating to the Company occurs; or (2) prior to the expiration of the 180-day restricted period, the Company announces that it will release earnings results during the 16-day period beginning on the last day of the 180-day period, the

restrictions imposed by this Agreement shall continue to apply until the expiration of the 18-day period beginning on the issuance of the earnings release or the occurrence of the material news or material event.

(i) *Use of Proceeds.* The Company will apply the net proceeds from the sale of the Shares as described in the Prospectus under the heading "Use of Proceeds".

(j) *No Stabilization.* The Company will not take, directly or indirectly, any action designed to or that could reasonably be expected to cause or result in any stabilization or manipulation of the price of the Shares.

(k) *Exchange Listing.* The Company will use its best efforts to list for quotation the Shares on the National Association of Securities Dealers Automated Quotations National Market (the "Nasdaq National Market").

(l) *Reports.* For a period of three years from the date hereof, the Company will furnish to the Representatives, upon request, copies of all reports or other communications (financial or other) furnished to holders of the Shares, and copies of any reports and financial statements furnished to or filed with the Commission or any national securities exchange or automatic quotation system.

(m) *Filings.* The Company will file with the Commission such reports as may be required by Rule 463 under the Securities Act.

6. Further Agreements of the Selling Stockholders. Each of the Selling Stockholders covenants and agrees with each Underwriter that:

(a) *Clear Market.* For a period of 180 days after the date of the initial public offering of the Shares, such Selling Stockholder will not (i) offer, pledge, announce the intention to sell, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase or otherwise transfer or dispose of, directly or indirectly, any shares of Stock or any securities convertible into or exercisable or exchangeable for Stock or (ii) enter into any swap or other agreement that transfers, in whole or in part, any of the economic consequences of ownership of the Stock, whether any such transaction described in clause (i) or (ii) above is to be settled by delivery of Stock or such other securities, in cash or otherwise without the prior written consent of the Representative, in each case other than the Shares to be sold by such Selling Stockholder hereunder, options and restricted stock grants under existing employee stock option plans and any shares of Stock of the Company issued upon the exercise of options granted under existing employee stock option plans. In addition, the Company shall be permitted to file a Form S-8 filing with respect to its existing stock option plans. Notwithstanding the foregoing, if (1) during the last 17 days of the 180-day restricted period, the Company issues an earnings release or material news or a material event relating to the Company occurs; or (2) prior to the expiration of the 180-day restricted period, the Company announces that it will release earnings results during the 16-day period beginning on the last day of the 180-day period, the restrictions imposed by this Agreement shall continue to apply until the expiration of the 18-day period beginning on the issuance of the earnings release or the occurrence of the material news or material event. The foregoing restrictions in this Section 6(a) shall not apply to any transfer of shares of Stock (a) to any Underwriters pursuant to this Agreement; (b) as a bona fide gift or gifts; (c) to any trust for the sole benefit of the undersigned or the undersigned's family; (d) by will or intestacy to the undersigned's legal representative, heir or legatee; (e) if the Selling Stockholder is a partnership, corporation, limited liability company or similar entity, (1) to another partnership, corporation, limited liability company or similar entity if the transferee and such Selling Stockholder are affiliates or (2) as a distribution to partners , stockholders or members of such Selling Stockholder; or (f) acquired in the public market on or after the date of the final prospectus filed by the Company with the Commission in connection with the Company's initial public offering pursuant to this Agreement, *provided* that, in the case of any transfer pursuant to clauses (b) through (f), (1) each donee, transferee or distributee shall execute and deliver to UNDERWRITER a duplicate form of the "lock-up" agreement substantially in the form of Exhibit A hereto; (2) no filing by any party under the Securities Act or the Exchange Act is required in connection with any such donation, transfer or distribution (other than a filing on a Form 5 made after the expiration of the restricted period specified above in connection with a donation or transfer pursuant to clause (b)); and (3) no transfer includes a disposition for value.

(b) *Tax Form.* It will deliver to the Representative prior to or at the Closing Date a properly completed and executed United States Treasury Department Form W-9 (or other applicable form or statement specified by the Treasury Department regulations in lieu thereof) in order to facilitate the Underwriters' documentation of their compliance with the reporting and withholding provisions of the Tax Equity and Fiscal Responsibility Act of 1982 with respect to the transactions herein contemplated.

7. Conditions of Underwriters' Obligations. The obligation of each Underwriter to purchase the Underwritten Shares on the Closing Date or the Option Shares on the Additional Closing Date, as the case may be, as provided herein is subject to the performance by the Company and each of the Selling Stockholders of their respective covenants and other obligations hereunder and to the following additional conditions:

(a) *Registration Compliance; No Stop Order.* The Registration Statement (or if a post-effective amendment thereto is required to be filed under the Securities Act, such post-effective amendment) shall have become effective, and the Representatives shall have received notice thereof, not later than 5:00 P.M., New York City time, on the date hereof; no order suspending the effectiveness of the Registration Statement shall be in effect, and no proceeding for such purpose shall be pending before or to the Company's or Representative's knowledge, threatened by the Commission; the Prospectus shall have been timely filed with the Commission under the Securities Act and in accordance with Section 5(a) hereof; and all requests by the Commission for additional information shall have been complied with to the reasonable satisfaction of the Representatives.

Deleted: 4

(b) *Representations and Warranties.* The respective representations and warranties of the Company and the Selling Stockholders contained herein shall be true and correct on the date hereof and on and as of the Closing Date or the Additional Closing Date, as the case may be; and the statements of the Company and its officers and each of the Selling Stockholders made in any certificates delivered pursuant to this Agreement shall be true and correct on and as of the Closing Date or the Additional Closing Date, as the case may be.

(c) *No Material Adverse Change.* Subsequent to the execution and delivery of this Agreement, no event or condition of a type described in Section 3(d) hereof shall have occurred or shall exist, which event or condition is not described in the Prospectus (excluding any amendment or supplement thereto) and the effect of which in the judgment of the Representatives makes it impracticable or inadvisable to proceed with the offering, sale or delivery of the Shares on the Closing Date or the Additional Closing Date, as the case may be, on the terms and in the manner contemplated by this Agreement and the Prospectus.

(d) *Officer's Certificate.* The Representatives shall have received on and as of the Closing Date or the Additional Closing Date, as the case may be, a certificate (i) of the chief financial officer or chief accounting officer of the Company and one additional senior executive officer of the Company who is satisfactory to the Representatives (A) confirming that such officers have carefully reviewed the Registration Statement and the Prospectus and, to the best knowledge of such officers, the representation set forth in Section 3(b) hereof is true and correct, (B) confirming that the other representations and warranties of the Company in this Agreement are true and correct and that the Company has complied with all agreements and satisfied all conditions on its part to be performed or satisfied hereunder at or prior to such Closing Date, (C) to the effect set forth in paragraphs (a) and (c) above and (ii) of the Selling Stockholders, in form and substance reasonably satisfactory to the Representative, confirming that (A) the representations and warranties of such Selling Stockholders in Section 4 of this agreement are true and correct and (B) the such Selling Stockholders have complied with all agreements and satisfied all conditions on their part to be performed or satisfied hereunder at or prior to such Closing Date.

Deleted: (A)

Deleted: the representation of such Selling Stockholders set forth in Section 4(e) hereof is true and correct and (B) confirming that

Deleted: other

Deleted: that

(e) *Chief Financial Officer's Certificate.* On or prior to the date of this Agreement, the Representatives shall have received a certificate, dated the date hereof, of CHIEF FINANCIAL OFFICER of the Company, stating to the effect that, with respect to the Company's fiscal year ended December 31, 200 , he has compared specified dollar amounts (or percentages derived from such dollar amounts) and other financial information contained in the Registration Statement and Prospectus (in each case to the extent that such dollar amounts, percentages and other financial information are derived from the general accounting records of the Company and its subsidiaries subject to the internal controls of the Company's accounting system or are derived directly from such records by analysis or computation) with the results obtained from inquiries, a reading of such general accounting records and other procedures specified in such certificate and has found such dollar amounts,

percentages and other financial information to be in agreement with such results, except as otherwise specified in such certificate.

(f) *Comfort Letters.* On the date of this Agreement and on the Closing Date or the Additional Closing Date, as the case may be, ACCOUNTING FIRM shall have furnished to the Representatives, at the request of the Company, letters, dated the respective dates of delivery thereof and addressed to the Underwriters, in form and substance reasonably satisfactory to the Representatives, containing statements and information of the type customarily included in accountants' "comfort letters" to underwriters with respect to the financial statements and certain financial information contained in the Registration Statement and the Prospectus; provided, that the letter delivered on the Closing Date or the Additional Closing Date, as the case may be, shall use a "cut-off" date no more than three business days prior to such Closing Date or such Additional Closing Date, as the case may be.

(g) *Opinion of Counsel for the Company.* ISSUER COUNSEL, counsel for the Company, shall have furnished to the Representatives, at the request of the Company, their written opinion, dated the Closing Date or the Additional Closing Date, as the case may be, and addressed to the Underwriters, in form and substance reasonably satisfactory to the Representatives, to the effect set forth in Annex A hereto.

(h) *Opinion of Counsel for the Selling Stockholders.* ISSUER COUNSEL, counsel for the Selling Stockholders, shall have furnished to the Representative, at the request of the Selling Stockholders, their written opinion, dated the Closing Date and addressed to the Underwriters, in form and substance reasonably satisfactory to the Representative, to the effect set forth in Annex B hereto.

(i) *Opinion of General Counsel for the Company.* GENERAL COUNSEL, Esq., general counsel for the Company, shall have furnished to the Representatives, at the request of the Company, his written opinion, dated the Closing Date or the Additional Closing Date, as the case may be, and addressed to the Underwriters, in form and substance reasonably satisfactory to the Representatives, to the effect set forth in Annex C hereto.

(j) *Opinion of Counsel for the Underwriters.* The Representatives shall have received on and as of the Closing Date or the Additional Closing Date, as the case may be, an opinion of UW COUNSEL, counsel for the Underwriters, with respect to such matters as the Representatives may reasonably request, and such counsel shall have received such documents and information as they may reasonably request to enable them to pass upon such matters.

(k) *No Legal Impediment to Issuance.* No action shall have been taken and no statute, rule, regulation or order shall have been enacted, adopted or issued by any federal, state or foreign governmental or regulatory authority that would, as of the Closing Date or the Additional Closing Date, as the case may be, prevent the issuance or sale of the Shares; and no injunction or order of any federal, state or foreign court shall have been issued that would, as of the Closing Date or the Additional Closing Date, as the case may be, prevent the issuance or sale of the Shares.

(l) *Good Standing.* The Representatives shall have received on and as of the Closing Date or the Additional Closing Date, as the case may be, satisfactory evidence of the good standing of the Company and its subsidiaries in their respective jurisdictions of organization and their good standing as foreign entities in such other jurisdictions as the Representatives may reasonably request, in each case in writing or any standard form of telecommunication from the appropriate Governmental Authorities of such jurisdictions.

(m) *Exchange Listing.* The Shares to be delivered on the Closing Date or Additional Closing Date, as the case may be, shall have been approved for listing on the Nasdaq National Market, subject to official notice of issuance.

(n) *Lock-up Agreements.* The "lock-up" agreements, each substantially in the form of Exhibit A hereto, between you and certain shareholders, officers and directors of the Company relating to sales and certain other dispositions of shares of Stock or certain other securities, delivered to you on or before the date hereof, shall be full force and effect on the Closing Date or Additional Closing Date, as the case may be.

(o) *Additional Documents.* On or prior to the Closing Date or the Additional Closing Date, as the case may be, the Company and the Selling Stockholders shall have furnished to the Representatives such further certificates and documents as the Representatives may reasonably request.

All opinions, letters, certificates and evidence mentioned above or elsewhere in this Agreement shall be deemed to be in compliance with the provisions hereof only if they are in form and substance reasonably satisfactory to counsel for the Underwriters.

8. Indemnification and Contribution.

(a) *Indemnification of the Underwriters.* The Company agrees to indemnify and hold harmless each Underwriter, its affiliates, directors and officers and each person, if any, who controls such Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages and liabilities (including, without limitation, reasonable legal fees and other expenses incurred in connection with any suit, action or proceeding or any claim asserted, as such fees and expenses are incurred), joint or several, that arise out of, or are based upon, any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or the Prospectus (or any amendment or supplement thereto) or any Preliminary Prospectus, or caused by any omission or alleged omission to state therein a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, except insofar as such losses, claims, damages or liabilities arise out of, or are based upon, any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with any information relating to any Underwriter furnished to the Company in writing by such Underwriter through the Representatives expressly for use therein, it being understood and agreed that the only such information furnished by any Underwriter consists of the information described as such in subsection (c) below.

Deleted: b

(b) *Indemnification of the Underwriters by the Selling Stockholders.* Each of the Selling Stockholders severally in proportion to the number of Shares to be sold by such Selling Stockholder, and not jointly, hereunder agrees to indemnify and hold harmless each Underwriter, its affiliates, directors and officers and each person, if any, who controls such Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages and liabilities (including, without limitation, the reasonable legal fees and other expenses incurred in connection with any suit, action or proceeding or any claim asserted, as such fees and expenses are incurred), joint or several, that arise out of, or are based upon, any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement or the Prospectus (or any amendment or supplement thereto) or any Preliminary Prospectus, or caused by any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, except insofar as such losses, claims, damages or liabilities arise out of, or are based upon, any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with information relating to any Underwriter furnished to the Company in writing by such Underwriter through the Representative expressly for use therein, it being understood and agreed that the only such information furnished by any Underwriter consists of the information described as such in subsection (c) below; provided, however, that (i) the indemnity provided by any Selling Shareholder hereunder shall apply only to written information furnished to the Company by such Selling Shareholder specifically for inclusion in the Registration Statement or the Prospectus and (ii) in no case shall any Selling Stockholder be liable or responsible for any amount in excess of the product of (x) the number of shares sold by such Selling Stockholder, and (y) the initial public offering price of the shares as set forth in the Prospectus, net of underwriting discount and commissions. Each of the Underwriters acknowledges that (x) the name and address of the Selling Shareholders in the Prospectus, (y) the number of shares of Stock being offered by the Selling Shareholders in the Prospectus and (z) the information relating to the Selling Shareholders appearing on page [___] of the Prospectus constitute the only information furnished to the Company by the Selling Shareholders specifically for inclusion in the Registration Statement or the Prospectus.

Deleted: i

Deleted: ii

(c) *Indemnification of the Company and the Selling Stockholders.* Each Underwriter agrees, severally and not jointly, to indemnify and hold harmless the Company, its directors, its officers who signed the Registration Statement, each of the Selling Stockholders and each person, if any, who controls the Company or any of the Selling Stockholders within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act to the same extent as the indemnity set forth in paragraph (a) above, but only with respect to any losses, claims, damages or

liabilities that arise out of, or are based upon, any untrue statement or omission or alleged untrue statement or omission made in reliance upon and in conformity with any information relating to such Underwriter furnished to the Company in writing by such Underwriter through the Representatives expressly for use in the Registration Statement and the Prospectus (or any amendment or supplement thereto) or any Preliminary Prospectus, it being understood and agreed upon that the only such information furnished by any Underwriter consists of the following information in the Prospectus furnished on behalf of each Underwriter: the concession and reallowance figures appearing in the third paragraph under the caption "Underwriting" and the information contained in the eleventh paragraph under the caption "Underwriting."

(d) *Notice and Procedures.* If any suit, action, proceeding (including any governmental or regulatory investigation), claim or demand shall be brought or asserted against any person in respect of which indemnification may be sought pursuant to either paragraph (a), (b) or (c) above, such person (the "Indemnified Person") shall promptly notify the person against whom such indemnification may be sought (the "Indemnifying Person") in writing; provided that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have under this Section 8 except to the extent that it has been materially prejudiced (through the forfeiture of substantive rights or defenses) by such failure; and provided, further, that the failure to notify the Indemnifying Person shall not relieve it from any liability that it may have to an Indemnified Person otherwise than under this Section 8. If any such proceeding shall be brought or asserted against an Indemnified Person and it shall have notified the Indemnifying Person thereof, the Indemnifying Person shall retain counsel reasonably satisfactory to the Indemnified Person to represent the Indemnified Person and any others entitled to indemnification pursuant to this Section 8 that the Indemnifying Person may designate in such proceeding and shall pay the fees and expenses of such counsel related to such proceeding, as incurred. In any such proceeding, any Indemnified Person shall have the right to retain its own counsel, but the fees and expenses of such counsel shall be at the expense of such Indemnified Person unless (i) the Indemnifying Person and the Indemnified Person shall have mutually agreed to the contrary; (ii) the Indemnifying Person has failed within a reasonable time to retain counsel reasonably satisfactory to the Indemnified Person; (iii) the Indemnified Person shall have reasonably concluded that there may be legal defenses available to it that are different from or in addition to those available to the Indemnifying Person; or (iv) the named parties in any such proceeding (including any impleaded parties) include both the Indemnifying Person and the Indemnified Person and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them. It is understood and agreed that the Indemnifying Person shall not, in connection with any proceeding or related proceeding in the same jurisdiction, be liable for the fees and expenses of more than one separate firm (in addition to any local counsel) for all Indemnified Persons, and that all such fees and expenses shall be paid or reimbursed as they are incurred. Any such separate firm for any Underwriter, its affiliates, directors and officers and any control persons of such Underwriter shall be designated in writing by UNDERWRITER, any such separate firm for the Company, its directors, its officers who signed the Registration Statement and any control persons of the Company shall be designated in writing by the Company and any such separate firm for the Selling Shareholders shall be designated in writing by the Attorney-in-Fact. The Indemnifying Person shall not be liable for any settlement of any proceeding effected without its written consent, but if settled with such consent or if there be a final judgment for the plaintiff, the Indemnifying Person agrees to indemnify each Indemnified Person from and against any loss or liability by reason of such settlement or judgment. Notwithstanding the foregoing sentence, if at any time an Indemnified Person shall have requested that an Indemnifying Person reimburse the Indemnified Person for fees and expenses of counsel as contemplated by this paragraph, the Indemnifying Person shall be liable for any settlement of any proceeding effected without its written consent if (i) such settlement is entered into more than 30 days after receipt by the Indemnifying Person of such request and (ii) the Indemnifying Person shall not have reimbursed the Indemnified Person in accordance with such request prior to the date of such settlement. No Indemnifying Person shall, without the written consent of the Indemnified Person, effect any settlement of any pending or threatened proceeding in respect of which any Indemnified Person is or could have been a party and indemnification could have been sought hereunder by such Indemnified Person, unless such settlement (x) includes an unconditional release of such Indemnified Person, in form and substance reasonably satisfactory to such Indemnified Person, from all liability on claims that are the subject matter of such proceeding and (y) does not include any statement as to or any admission of fault, culpability or a failure to act by or on behalf of any Indemnified Person.

Deleted: and

(e) *Contribution.* If the indemnification provided for in paragraphs (a), (b) and (c) above is unavailable to an Indemnified Person or insufficient in respect of any losses, claims, damages or liabilities referred to therein, then each Indemnifying Person under such paragraph, in lieu of indemnifying such Indemnified Person

thereunder, shall contribute to the amount paid or payable by such Indemnified Person as a result of such losses, claims, damages or liabilities (i) in such proportion as is appropriate to reflect the relative benefits received by the Company and the Selling Stockholders on the one hand and the Underwriters on the other from the offering of the Shares or (ii) if the allocation provided by clause (i) is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) but also the relative fault of the Company and the Selling Stockholders on the one hand and the Underwriters on the other in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative benefits received by the Company and the Selling Stockholders on the one hand and the Underwriters on the other shall be deemed to be in the same respective proportions as the net proceeds (before deducting expenses) received by the Company and the Selling Stockholders from the sale of the Shares and the total underwriting discounts and commissions received by the Underwriters in connection therewith, in each case as set forth in the table on the cover of the Prospectus, bear to the aggregate offering price of the Shares. The relative fault of the Company and the Selling Stockholders on the one hand and the Underwriters on the other shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by the Company and the Selling Stockholders or by the Underwriters and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

(f) *Limitation on Liability.* The Company, the Selling Stockholders and the Underwriters agree that it would not be just and equitable if contribution pursuant to this Section 8 were determined by pro rata allocation (even if the Selling Stockholders or Underwriters were treated as one entity for such purpose) or by any other method of allocation that does not take account of the equitable considerations referred to in paragraph (e) above. The amount paid or payable by an Indemnified Person as a result of the losses, claims, damages and liabilities referred to in paragraph (e) above shall be deemed to include, subject to the limitations set forth above, any legal or other expenses incurred by such Indemnified Person in connection with any such action or claim. Notwithstanding the provisions of this Section 8, in no event shall an Underwriter be required to contribute any amount in excess of the amount by which the total underwriting discounts and commissions received by such Underwriter with respect to the offering of the Shares exceeds the amount of any damages that such Underwriter has otherwise been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The Underwriters' obligations to contribute pursuant to this Section 8 are several in proportion to their respective purchase obligations hereunder and not joint.

(g) *Non-Exclusive Remedies.* The remedies provided for in this Section 8 are not exclusive and shall not limit any rights or remedies which may otherwise be available to any Indemnified Person at law or in equity. Deleted: 6

9. Effectiveness of Agreement. This Agreement shall become effective upon the later of (i) the execution and delivery hereof by the parties hereto and (ii) receipt by the Company and the Representatives of notice of the effectiveness of the Registration Statement (or, if applicable, any post-effective amendment thereto).

10. Termination. This Agreement may be terminated in the absolute discretion of the Representatives, by notice to the Company and the Selling Stockholders, if after the execution and delivery of this Agreement and prior to the Closing Date or, in the case of the Option Shares, prior to the Additional Closing Date (i) trading generally shall have been suspended or materially limited on or by any of the New York Stock Exchange, the American Stock Exchange, the National Association of Securities Dealers, Inc., the Chicago Board Options Exchange, the Chicago Mercantile Exchange or the Chicago Board of Trade; (ii) trading of any securities issued or guaranteed by the Company shall have been suspended on any exchange or in any over-the-counter market; (iii) a general moratorium on commercial banking activities shall have been declared by federal or New York State authorities; or (iv) there shall have occurred any outbreak or escalation of hostilities or any change in financial markets or any calamity or crisis, either within or outside the United States, that, in the judgment of the Representatives, is material and adverse and makes it impracticable or inadvisable to proceed with the offering, sale or delivery of the Shares on the Closing Date or the Additional Closing Date, as the case may be, on the terms and in the manner contemplated by this Agreement and the Prospectus.

11. Defaulting Underwriter. (a) If, on the Closing Date or the Additional Closing Date, as the case may be, any Underwriter defaults on its obligation to purchase the Shares that it has agreed to purchase hereunder on such date, the non-defaulting Underwriters may in their discretion arrange for the purchase of such Shares by other persons satisfactory to the Company and the Selling Stockholders on the terms contained in this Agreement. If, within 36 hours after any such default by any Underwriter, the non-defaulting Underwriters do not arrange for the purchase of such Shares, then the Company and the Selling Stockholders shall be entitled to a further period of 36 hours within which to procure other persons satisfactory to the non-defaulting Underwriters to purchase such Shares on such terms. If other persons become obligated or agree to purchase the Shares of a defaulting Underwriter, either the non-defaulting Underwriters or the Company and the Selling Stockholders may postpone the Closing Date or the Additional Closing Date, as the case may be, for up to five full business days in order to effect any changes that in the opinion of counsel for the Company, counsel for the Selling Stockholders or counsel for the Underwriters may be necessary in the Registration Statement and the Prospectus or in any other document or arrangement, and the Company agrees to promptly prepare any amendment or supplement to the Registration Statement and the Prospectus that effects any such changes. As used in this Agreement, the term "Underwriter" includes, for all purposes of this Agreement unless the context otherwise requires, any person not listed in Schedule 1 hereto that, pursuant to this Section 11, purchases Shares that a defaulting Underwriter agreed but failed to purchase. Deleted: 9

(b) If, after giving effect to any arrangements for the purchase of the Shares of a defaulting Underwriter or Underwriters by the non-defaulting Underwriters and the Company and the Selling Stockholders as provided in paragraph (a) above, the aggregate number of Shares that remain unpurchased on the Closing Date or the Additional Closing Date, as the case may be, does not exceed one-eleventh of the aggregate number of Shares to be purchased on such date, then the Company and the Selling Stockholders shall have the right to require each non-defaulting Underwriter to purchase the number of Shares that such Underwriter agreed to purchase hereunder on such date plus such Underwriter's pro rata share (based on the number of Shares that such Underwriter agreed to purchase on such date) of the Shares of such defaulting Underwriter or Underwriters for which such arrangements have not been made.

(c) If, after giving effect to any arrangements for the purchase of the Shares of a defaulting Underwriter or Underwriters by the non-defaulting Underwriters and the Company and the Selling Stockholders as provided in paragraph (a) above, the aggregate number of Shares that remain unpurchased on the Closing Date or the Additional Closing Date, as the case may be, exceeds one-eleventh of the aggregate amount of Shares to be purchased on such date, or if the Company and the Selling Stockholders shall not exercise the right described in paragraph (b) above, then this Agreement or, with respect to any Additional Closing Date, the obligation of the Underwriters to purchase Shares on the Additional Closing Date, as the case may be, shall terminate without liability on the part of the non-defaulting Underwriters. Any termination of this Agreement pursuant to this Section 11 shall be without liability on the part of the Company and the Selling Stockholders, except that the Company will continue to be liable for the payment of expenses as set forth in Section 12 hereof and except that the provisions of Section 8 hereof shall not terminate and shall remain in effect.

(d) Nothing contained herein shall relieve a defaulting Underwriter of any liability it may have to the Company, the Selling Stockholders or any non-defaulting Underwriter for damages caused by its default.

12. Payment of Expenses. (a) Whether or not the transactions contemplated by this Agreement are consummated or this Agreement is terminated, the Company will pay or cause to be paid all costs and expenses incident to the performance of its obligations hereunder, including without limitation, (i) the costs incident to the authorization, issuance, sale, preparation and delivery of the Shares and any taxes payable in that connection; (ii) the costs incident to the preparation, printing and filing under the Securities Act of the Registration Statement, the Preliminary Prospectus and the Prospectus (including all exhibits, amendments and supplements thereto) and the distribution thereof; (iii) the costs of reproducing and distributing this Agreement; (iv) the fees and expenses of the Company's counsel and independent accountants; (v) the fees and expenses incurred in connection with the registration or qualification and determination of eligibility for investment of the Shares under the laws of such jurisdictions as the Representatives may designate and the preparation, printing and distribution of a Blue Sky Memorandum (including the related fees and expenses of counsel for the Underwriters); (vi) the cost of preparing stock certificates; (vii) the costs and charges of any transfer agent and any registrar; (viii) all expenses and application fees incurred in connection with any filing with, and clearance of the offering by, the National Association of Securities Dealers, Inc. (excluding any related fees and expenses of counsel for the Underwriters); (ix) all expenses incurred by the

Company in connection with any "road show" presentation to potential investors; and (x) all expenses and application fees related to the listing of the Shares on the Nasdaq National Market.

(b) If (i) this Agreement is terminated pursuant to Section 10, (ii) the Company or the Selling Stockholders for any reason fails to tender the Shares for delivery to the Underwriters other than pursuant to Section 11 or (iii) the Underwriters decline to purchase the Shares for any reason permitted under this Agreement, other than pursuant to Section 11, the Company agrees to reimburse the Underwriters for all out-of-pocket costs and expenses (including the reasonable fees and expenses of their counsel) reasonably incurred by the Underwriters in connection with this Agreement and the offering contemplated hereby.

13. Persons Entitled to Benefit of Agreement. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and the officers and directors and any controlling persons referred to in Section 8 hereof. Nothing in this Agreement is intended or shall be construed to give any other person any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision contained herein. No purchaser of Shares from any Underwriter shall be deemed to be a successor merely by reason of such purchase.

14. Survival. The respective indemnities, rights of contribution, representations, warranties and agreements of the Company, the Selling Stockholders and the Underwriters contained in this Agreement or made by or on behalf of the Company, the Selling Stockholders or the Underwriters pursuant to this Agreement or any certificate delivered pursuant hereto shall survive the delivery of and payment for the Shares and shall remain in full force and effect, regardless of any termination of this Agreement or any investigation made by or on behalf of the Company, the Selling Stockholders or the Underwriters.

15. Certain Defined Terms. For purposes of this Agreement, (a) except where otherwise expressly provided, the term "affiliate" has the meaning set forth in Rule 405 under the Securities Act; (b) the term "business day" means any day other than a day on which banks are permitted or required to be closed in New York City; and (c) the term "subsidiary" has the meaning set forth in Rule 405 under the Securities Act.

16. Miscellaneous. (a) *Authority of the Representatives.* Any action by the Underwriters hereunder may be taken by UNDERWRITER on behalf of the Underwriters, and any such action taken by UNDERWRITER shall be binding upon the Underwriters.

(b) *Notices.* All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if mailed or transmitted and confirmed by any standard form of telecommunication. Notices to the Underwriters shall be given to the Representatives c/o UNDERWRITER'S NAME & ADDRESS. Notices to the Company shall be given to it at COMPANIE'S NAME & ADDREWS, Attention: LEGAL COUNSEL.. Notices to the Selling Stockholders shall be given to the Attorney-in-Fact at COMPANIES NAME & ADDRESS

(c) *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

(d) *Counterparts.* This Agreement may be signed in counterparts (which may include counterparts delivered by any standard form of telecommunication), each of which shall be an original and all of which together shall constitute one and the same instrument.

(e) *Amendments or Waivers.* No amendment or waiver of any provision of this Agreement, nor any consent or approval to any departure therefrom, shall in any event be effective unless the same shall be in writing and signed by the parties hereto.

(f) *Headings.* The headings herein are included for convenience of reference only and are not intended to be part of, or to affect the meaning or interpretation of, this Agreement.

If the foregoing is in accordance with your understanding, please indicate your acceptance of this Agreement by signing in the space provided below.

Very truly yours,

COMPANY

By_____
Name:
Title:

SELLING STOCKHOLDERS

By_____
Name:
Title:

As Attorney-in-Fact acting on behalf of each of the Selling Stockholders named in Schedule II to this Agreement.

Accepted: _____, 2005

UNDERWRITER

For themselves and on behalf of the
several Underwriters listed
in Schedule 1 hereto.

By_____
Authorized Signatory

By_____
Authorized Signatory

NY\1013570.8

Schedule 1

Underwriter	Number of Shares
UNDERWRITER'S NAME & ADDRESS	
Total	

NY\1013570.8

Schedule II

Selling Stockholders:	Number of Underwritten Shares:	Number of Option Shares:

NY\1013570.8

Annex A

[Form of Opinion of Counsel for the Company]

(a) The Registration Statement was declared effective under the Securities Act as of the date and time specified in such opinion; the Prospectus was filed with the Commission pursuant to the subparagraph of Rule 424(b) under the Securities Act specified in such opinion on the date specified therein; and, to such counsel's knowledge, no order suspending the effectiveness of the Registration Statement has been issued and no proceeding for that purpose is pending or threatened by the Commission.

(b) The Registration Statement and the Prospectus (other than the financial statements and schedules, and other financial and statistical data derived therefrom, contained therein, as to which such counsel need express no opinion) comply as to form in all material respects with the requirements of the Securities Act.

(c) The Company has been duly organized and is validly existing and in good standing under the laws of the State of Delaware, is duly qualified to do business and is in good standing in the State of New York, and has all corporate power and authority necessary to own or hold its properties and to conduct the businesses in which it is engaged as described in the Prospectus.

(d) The Company has an authorized capitalization as set forth in the Prospectus under the heading "Capitalization"; all the outstanding shares of capital stock of the Company (including shares to be sold by the Selling Stockholders) have been duly and validly authorized and issued and are fully paid and non-assessable; the capital stock of the Company conforms in all material respects to the description thereof contained in the Registration Statement and the Prospectus.

Deleted: ; and all the outstanding shares of capital stock or other equity interests of each subsidiary of the Company have been duly and validly authorized and issued, are fully paid and non-assessable

(e) The Company has full right, power and authority to execute and deliver the Underwriting Agreement and to perform its obligations thereunder; and all action required to be taken for the due and proper authorization, execution and delivery of the Underwriting Agreement and the consummation of the transactions contemplated thereby have been duly and validly taken.

(f) The Underwriting Agreement has been duly authorized, executed and delivered by the Company.

(g) The Shares to be issued and sold by the Company hereunder have been duly authorized, and when delivered to and paid for by the Underwriters in accordance with the terms of this Agreement, will be validly issued, fully paid and non-assessable and the issuance of the Shares is not subject to any preemptive or similar rights under the Company's certificate of incorporation or by-laws or, to such counsel's knowledge, any other agreement or instrument.

(h) The execution, delivery and performance by the Company of the Underwriting Agreement, the issuance and sale of the Shares being delivered on the Closing Date or the Additional Closing Date, as the case may be, and compliance by the Company with the terms of, and the consummation of the transactions contemplated by, the Underwriting Agreement will not (i) conflict with or result in a breach or violation of any of the terms or provisions of, or constitute a default under, or result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Company or any of its subsidiaries pursuant to, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument filed as an exhibit to the Registration Statement, (ii) result in any violation of the provisions of the charter or by-laws of the Company or (iii) result in the violation of any law, statute or regulation, or, to such counsel's knowledge, any judgment or order of any court or arbitrator or governmental or regulatory authority.

Deleted: or similar organizational documents

Deleted: or any of its subsidiaries

Deleted: or

Deleted: ,

Deleted: or regulation

(i) No consent, approval, authorization, order, registration or qualification of or with any court or arbitrator or governmental or regulatory authority is required for the execution, delivery and performance by the Company of the Underwriting Agreement, the issuance and sale of the Shares being delivered on the Closing Date or the Additional Closing Date, as the case may be, and compliance by the Company with the terms thereof and the consummation of the transactions contemplated by the Underwriting Agreement, except for the registration of the Shares under the Securities Act, the registration of the Common Stock under the Securities and Exchange Act of 1934, as amended, and such consents, approvals, authorizations, orders and registrations or qualifications as may be required under the rules of the Nasdaq National Market , the NASD and applicable state securities laws in connection with the purchase and distribution of the Shares by the Underwriters (which, as to the NASD and the state securities laws, such counsel need express no opinion).

(j) To such counsel's knowledge, except as disclosed in the Prospectus, there are no pending or threatened legal, governmental or regulatory actions, suits or proceedings against or affecting the Company, any of its subsidiaries or any of their respective properties that are required to be disclosed in the Registration Statement.

(k) The statements in the Prospectus under the headings "Business–Legal Proceedings," "Management–Employment Agreements and Change of Control Arrangements," "Management–2004 Stock Option Plan," "Certain Relationships and Related Party Transactions," "Description of Capital Stock," "United States Federal Income Tax Consequences to Non-United States Holders," "Shares Eligible for Future Sale" and "Underwriting," and in the Registration Statement in items 14 and 15, to the extent that they constitute summaries of the terms of stock, matters of law or regulation or legal conclusions, fairly summarize the matters described therein in all material respects. To the best knowledge of such counsel, there are no statutes, regulations or contracts or other documents that are required under the Securities Act to be filed as exhibits to the Registration Statement or described in the Prospectus, as the case may be, and that have not been so filed or described.

(l) The Company is not and, after giving effect to the offering and sale of the Shares and the application of the proceeds thereof as described in the Prospectus, will not be required to register as an "investment company" or an entity "controlled" by an "investment company" within the meaning of the Investment Company Act.

Such counsel shall also state that during the preparation of the Registration Statement and the Prospectus, such counsel has participated in conferences with officers and other representatives of the Company, representatives of the independent registered public accountants of the Company and representatives of the Underwriters at which conferences the contents of the Registration Statement and the Prospectus and any amendment and supplement thereto and related matters were discussed and, although such counsel has not independently checked or verified or assumed responsibility for the accuracy, completeness or fairness of the Registration Statement or the Prospectus and any amendment or supplement thereto (except as to the extent stated in item (k) above), on the basis of such participation and information that such counsel has gained in the course of its representation of the Company in connection with its preparation of the Registration Statement and Prospectus, nothing has come to such counsel's attention that cause it to believe that the Registration Statement at the time such Registration Statement became effective contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that the Prospectus or any amendment or supplement thereto as of its date or the Closing Date contained or contains an untrue statement of a material fact or omitted or omits to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading (it being understood that such counsel need express no opinion with respect to the financial statements and schedules, and other financial information, contained or incorporated by reference in the Registration Statement or Prospectus).

In rendering such opinion, such counsel may rely as to matters of fact on certificates of responsible officers of the Company and public officials that are furnished to the Underwriters.

The opinion of ISSUER COUNSEL described above shall be rendered to the Underwriters at the request of the Company and shall so state therein.

Annex B

[Form of Opinion of Counsel For
The Selling Stockholders]

(a) The Underwriting Agreement has been duly authorized, executed and delivered by or on behalf of each of the Selling Stockholders.

(b) A Power of Attorney and a Custody Agreement have been duly authorized, executed and delivered by each Selling Stockholder and constitute valid and binding agreements of each Selling Stockholder in accordance with their terms.

(c) Upon delivery to the Underwriters of the stock certificates representing the Shares to be sold by the Selling Stockholders, endorsed to the Underwriters and payment therefor pursuant to the Agreement, each Underwriter who has purchased such Shares will acquire all of the Selling Stockholders' rights in such Shares, free of any adverse claim within the meaning of Section 8-102 of the New York Uniform Commercial Code, assuming each Underwriter has purchased such Shares without notice of an adverse claim.

Deleted: Each Selling Stockholder is the record, beneficial and lawful owner of all of the Shares to be sold by such Selling Stockholder and has valid and marketable title to such Shares, and upon delivery of and payment for the Shares, the Underwriters will acquire valid and marketable title to the shares, free and clear of any mortgage, pledge, security interest, lien, claim or other encumbrance or restriction on transferability or any adverse claim.

(d) The sale of the Shares and the execution and delivery by the Selling Shareholder of, and the performance by the Selling Shareholder of its obligations under, the Underwriting Agreement, and the consummation of the transactions contemplated therein, (i) have been duly authorized on the part of each of the Selling Stockholders, and (ii) to such counsel's knowledge, will not conflict with or result in a breach of any of the terms or provisions of, or constitute a default under, any indenture, mortgage, deed of trust, loan agreement or other material agreement or instrument to which any Selling Stockholder is a party or by which any Selling Stockholder is bound or to which any of the property or assets of any Selling Stockholder is subject, nor, to such counsel's knowledge, will any such action result in any violation of the provisions of the charter or by-laws or similar organizational documents of any Selling Stockholder, any applicable law or statute or any order, rule or regulation of any court or governmental agency or body having jurisdiction over such Selling Stockholder or any of its properties; and, to such counsel's knowledge, no consent, approval, authorization, order, registration or qualification of or with any such court or governmental agency or body is required for the sale of the Shares or the consummation by the Selling Stockholders of the transactions contemplated by the Underwriting Agreement, except such consents, approvals, authorizations, registrations or qualifications as have been obtained under the Securities Act or Exchange Act and as may be required under state securities or Blue Sky laws in connection with the purchase and distribution of the Shares by the Underwriters.

Deleted: [

Deleted: ||

Deleted:]

The opinion of counsel described above shall be rendered to the Underwriters at the request of the Selling Stockholders and shall so state therein. The opinion of counsel with respect to the matters covered in (a), (b) and (d) above shall be based solely upon certain factual statements in a certificate of each of the Selling Stockholders delivered to such counsel.

Annex C

[Form of Opinion of General Counsel for the Company]

(a) Neither the Company nor any of its subsidiaries is (i) in violation of its charter or by-laws or similar organizational documents; (ii) in default, and no event has occurred that, with notice or lapse of time or both, would constitute such a default, in the due performance or observance of any term, covenant or condition contained in any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which it is a party or by which it is bound or to which any of its property or assets is subject; or (iii) in violation of any law or statute or any judgment, order, rule or regulation of any court or arbitrator or governmental or regulatory authority, except in (in cases (i), (ii) or (iii)) for any such default or violation that would not, individually or in the aggregate, have a Material Adverse Effect.

Deleted: the case of clause (ii)

(b) To the best knowledge of such counsel, except as described in the Prospectus, there are no legal, governmental or regulatory investigations, actions, suits or proceedings pending to which the Company or any of its subsidiaries is or may be a party or to which any property of the Company or any of its subsidiaries is or may be the subject which, individually or in the aggregate, if determined adversely to the Company or any of its subsidiaries, could reasonably be expected to have a Material Adverse Effect; and to the best knowledge of such counsel, no such investigations, actions, suits or proceedings are threatened or contemplated by any governmental or regulatory authority or threatened by others.

(c) To such counsel's knowledge, each of the Company and its subsidiaries owns, possesses or has obtained all licenses, permits, certificates, consents, orders, approvals and other authorizations from, and has made all declarations and filings with, all Governmental Authorities (including foreign regulatory agencies), all self-regulatory organizations and all courts and other tribunals, domestic or foreign, necessary to own or lease, as the case may be, and to operate its properties and to carry on its business as conducted as of the date hereof, and neither the Company nor any such subsidiary has received any actual notice of any proceeding relating to revocation or modification of any such license, permit, certificate, consent, order, approval or other authorization, except as described in the Registration Statement and the Prospectus; and, to such counsel's knowledge, each of the Company and its subsidiaries is in compliance with all laws and regulations relating to the conduct of its business as conducted as of the date of the Prospectus.

Deleted: E

(d) Each of the Company and its subsidiaries owns, possesses or has the right to use the Intellectual Property employed by it in connection with the business conducted by it as of the date hereof, except where the failure to own, possess or have such rights would not, individually, or in the aggregate, reasonably be expected to have a Material Adverse Effect.

In rendering such opinion, such counsel may rely as to matters of fact on certificates of responsible officers of the Company and public officials that are furnished to the Underwriters.

The opinion of GENERAL COUNSEL described above shall be rendered to the Underwriters at the request of the Company and shall so state therein.

Exhibit A

FORM OF LOCK-UP AGREEMENT

NY\1013570.8

Informational memo to employees regarding red herring, reverse split and lock up

To: All Employees

From:

Re: IPO Update

Dated:

CONFIDENTIAL – INTERNAL ONLY

I am pleased to report that a short time ago COMPANY filed an amended preliminary prospectus (the "S-1") with the SEC and has begun the process of printing the so-called "red herring" prospectus that describes our stock offering to prospective investors. The prospectus will be distributed in connection with the Company's "roadshow" – the series of presentations that CFO and I will begin giving to investors in the next several days. This memo is meant to explain what these developments may mean to you.

1. The Offering.

You will see from our prospectus that the total shares being offered in the IPO is ___ million, and the price range expected to be obtained is $____ to $____ per share. (Don't do the math just yet – see Reverse Stock Split below.) Of the ___ million shares, the Company will be selling _____ million new shares, which means we are seeking to raise approximately $____ million for the Company. The remainder of the shares will be sold by certain current stockholders, most of whom are selling about ___% of their holdings. Our current stockholders will continue to own a significant majority of our stock after the IPO. After the IPO, our stock will be listed on NASDAQ under the symbol, "_____".

2. Reverse Stock Split.

A reverse stock split is typically necessary before an IPO when a company's shares are worth less per share than the normal trading price per share of publicly held stock. This does not imply a low company valuation – it just means there are too many shares outstanding. To bring the value of each of our shares within the range of $___ to $___, our Board of Directors has approved a 1-for-9.308 reverse stock split. This means that every stockholder receives one share of new stock for every 9.308 shares of old stock. The total value of a stockholder's shares remains the same; it is only the number of shares and value per share that changes.

How does this affect your stock options? You can figure out approximately how many new options you have by dividing the total number of your current options by 9.308. You then can figure out the new exercise price by multiplying the old exercise price per share by the same number, 9.308, and rounding to the nearest cent.

For example: Say you have 1,000 options with an exercise price of 12 cents per share.

Your new option holding will be: 1,000 / 9.308 = 108 options; and your new exercise price will be: $0.12 x 9.308 = $1.12 per share. This means that if our stock is priced at the midpoint of the range of $___ to $___, the shares you purchase from your options would be worth (on the day of the IPO) ($___ minus $1.12) x 108 = $_____. (The actual value of our stock on the day of the IPO and on any day thereafter of course may be different.)

3. Exercising Options.

The Company will not be accepting or processing any option exercises from now until the effective date of the IPO. This is so we can "freeze" the number of options and shares reported in our prospectus during the roadshow period.

After the effective date of the IPO, you may exercise options according to your option agreements, but you will not be permitted to sell any shares until the end of the Lock Up period (see below). The reverse stock split operates

automatically (without any written amendment to your agreements), and your shares and exercise price per share will be calculated accordingly.

4. The Lock Up Period.

From now until the date 180 days (about 6 months) after the date of the IPO, neither the Company nor any current option holder or stockholder may sell any shares. The lock-up period may be extended for up to 34 additional days under certain circumstances. You are not prohibited from purchasing stock in the open market, subject to compliance with insider trading rules (see below). You only will be restricted from selling stock (which includes any "short" sales or sales of options).

5. Sales after the Lock Up Period.

Any purchase of shares (whether before or after the Lock Up period expires) or sale of shares by you will be subject to your compliance with our insider trading policy and applicable securities regulations. We have adopted a Company insider trading policy to help ensure that the Company and all its employees, officers and directors comply with applicable securities laws when it comes to trading in shares of Company stock. These regulations prohibit any buying or selling of shares at a time when you have material non-public information about the Company. You'll receive more information on this subject separately as the IPO draws nearer.

6. Operating as a Public Company.

If the IPO is successful, we will immediately become subject to complex regulations regarding the disclosure of information about the Company and our internal financial controls. We will need to limit the information we disclose, even among our employees, except during scheduled reporting periods. We will integrate these disclosure and operational rules into our processes with minimal disruption to business. Our business fundamentally will not change. In fact, we are committing to our new investors that we will continue to operate our business in the same manner we always have: with a focus on customer service, innovation, and drive to be and remain the market leader.

7. No Guarantees.

As we've said all along, the market may or may not cooperate with us, and the IPO could be postponed or withdrawn depending on the mood of investors. Our Company is financially healthy and we are not planning on using the IPO proceeds for day-to-day operating expenses in any case. Whether or not the IPO happens, COMPANY will carry on, building its market share and continuing to transform the way businesses exchange information.

Thank you, and stay tuned…

LATHAM & WATKINS

Number 546 October 16, 2006

Client Alert

Latham & Watkins Corporate Department

Recirculation and IPOs — Pricing Outside of the Range

The decision whether to recirculate a revised preliminary prospectus to reflect changes to the disclosure in the context of an initial public offering that is pricing outside of the anticipated range has always been a tricky one. There are a number of technical rules in play here and there are usually some important materiality judgment calls to be made as well.

The recirculation question is always asked in a time-sensitive setting and, in some circumstances, the answer can kill the deal. So it is important to plan your answers to the questions that might come up on the night of pricing long before the moment of truth is upon you.

In this client alert, we have assembled our learning on the issue in one place to facilitate your decision-making when the heat is on. We also offer our thoughts on the impact on this process of the reforms to the Securities Act of 1933 (the Securities Act or the 1933 Act), which became effective on December 1, 2005.

"There are a number of technical rules in play here and there are usually some important materiality judgment calls to be made as well."

What are the Applicable Rules?

There are a number of SEC rules and telephone interpretations that apply to the question of recirculation. Prime among them are:

- Rule 430A (including the Instruction to Paragraph (a))
- Telephone interpretations 91 and 92
- Rule 159
- Rule 433 and Rule 15c2-8
- Rule 457 (in particular, Paragraphs (a) and (o))
- Rule 462(b)
- Telephone interpretations 95 and 131

As a first step in your decision-making process, you will want to assemble these reference points on your desk. The text that follows includes a review of each of these rules and telephone interpretations.

Rule 430A

Rule 430A is a very special rule. It allows you to insert information retroactively into a registration statement as of its effective date. Rule 430A provides that pricing-related information (which includes the price per share and the number of shares offered) that is contained in a prospectus filed pursuant to Rule 424(b) *after* effectiveness of the registration statement will be *deemed* to have been part of the registration statement as of the effective date.

This is a particularly useful tool for complying with Section 11 of the Securities Act, which requires that the registration statement be free of material misstatements and omissions as of its effective date. However, Rule 430A only applies to pricing information.[1] Rule 430A also does not help you comply

with Section 12 of the Securities Act, as we will see when we discuss Rule 159 below, because it does not allow you to retroactively add to the prospectus given to investors. Rule 430A only helps you with the registration statement and your "Section 11 file" as of the effective date.

Rule 430A's most important contribution to the recirculation analysis in an IPO is found in the instruction to paragraph (a), which states:

> *Instruction to Paragraph (a).* A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness. Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(l) or Rule 497(h) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

In other words, where the 20 percent safe harbor threshold is not exceeded, changes in price and deal size can be poured backwards in time into the registration statement using a Rule 424(b) filing of the final prospectus *after* the effectiveness of the registration statement and will be *deemed* to have been part of the registration statement at the time it became effective. This is a very useful device indeed. It allows you to change the size of your deal by 20 percent in either direction without having to go back to the SEC. This timing advantage is critical when you are trying to price a deal. Having to go back to the SEC to get a post-effective amendment declared effective may not be consistent with holding a book of orders together (particularly in the context of a deal that is being downsized). As a result, understanding the exact scope of this 20 percent safe harbor is critical.

Telephone Interpretations 91 and 92

Telephone Interpretation 91
Telephone interpretation 91 reads as follows:

91. Rule 430A, Instruction to paragraph (a)

> The second sentence of this Instruction provides that a Rule 424(b) prospectus supplement may be used, rather than a post-effective amendment, where the 20 percent threshold is not exceeded, ***regardless of the materiality or non-materiality of resulting changes to the registration statement disclosure*** that would be contained in the Rule 424(b) prospectus supplement. When there is a change in offering size or deviation from the price range beyond the 20 percent threshold noted in the second sentence of the Instruction, a post-effective amendment would be required only if such change or deviation materially changes the previous disclosure. Regardless of the size of the increase, a new registration statement must be filed to register any additional securities that are offered. Additional securities can not be registered by post-effective amendment. [Emphasis added.]

This telephone interpretation establishes two important points. First, for purposes of Rule 430A (and hence Section 11 of the Securities Act), retroactive changes in price below the 20 percent threshold can be made after the fact by way of a 424(b) filing *even if the effects of those changes are material*, and second, changes above the 20 percent threshold can be made using Rule 424(b) if the changes do not materially change the disclosure.

These are important points – and not entirely intuitive – so let's spend another minute here. Rule 430A effectively lets you make pricing-related changes to your registration statement without SEC review (*i.e.*, without filing a post-effective amendment) even if those changes are material. This special privilege is limited to "pricing information" as contemplated by Rule 430A, but it is a very special privilege nevertheless. The second point is equally important – changes in excess of 20 percent may not be material (and hence may not require SEC review of a post-effective amendment).

How can this be, you ask? Good question. Consider, for example, a $1 billion offering that is half primary and half secondary shares. If the secondary shares are reduced to $250 million, but the primary shares stay at $500 million, the offering has been reduced by 25 percent but the reduction may well not be material. There will still be a very substantial public "float" after the offering and the proceeds to the issuer (and hence the use of proceeds), the pro forma number of shares outstanding and the pro forma earnings per share will not change at all. This sort of fact pattern is right in the center of telephone interpretation 91's fairway.

Telephone Interpretation 92
Telephone interpretation 92 reads as follows:

92. Rule 430A, Instruction to paragraph (a)

> An issuer sets forth a bona fide estimate of the maximum aggregate offering price in its Form S-1 prospectus of $7-$10. The price at which the issuer will be able to sell the securities turns out to be $6. The 20 percent threshold noted in the second sentence of Instruction to paragraph (a) should be measured as a 20 percent decrease from $7 or a 20 percent increase from $10, even if the issuer chose to register in the calculation of registration fee table at the $10 per share maximum end of the bona fide range. Thus, where no other changes are made, a post-effective amendment would not be required since $6 does not represent more than a 20 percent decrease in $7.

This telephone interpretation effectively makes a significant change to the text of the original instruction to Rule 430A's paragraph (a), since it directs that a 20 percent decrease be measured from the bottom of the range and a 20 percent increase be measured from the top of the range (as opposed to both being measured from the "Calculation of Registration Fee" table, as the original instruction to paragraph (a) commands).

Is your head spinning yet? If not, keep reading.

Rule 159

Rule 159, which was introduced as part of the securities offering reforms that became effective on December 1, 2005, adds an important wrinkle to the landscape. Rule 159 makes clear that, for purposes of Section 12 of the Securities Act, which requires that the prospectus actually used to sell securities be free of material misstatements and omissions, information conveyed to a securities purchaser after the time of sale does not count. In other words, Section 12 liability is a function of what you actually gave the purchaser prior to confirming her order – anything delivered after that moment is ignored. All of the magic of Rule 430A and its famous instruction to paragraph (a) and telephone interpretations 91 and 92 is of no use for purposes of Section 12. Rule 159 makes clear that Section 12 operates only in real time, and there is no substitute for actual delivery.[2] This may have been clear to some even before Rule 159 came along, but now it is crystal clear to everyone.

Rule 433 and Rule 15c2-8

So what does all this mean for you? It means that those material pricing changes that can be retroactively poured into the "Section 11 file" after

the fact under Rule 430A must actually be conveyed to purchasers in real time prior to confirming orders in order for the "Section 12 file" to be up to snuff. There are a number of ways to make the required conveyance – the rules are agnostic as to the actual method of conveyance – but the key point is that the conveyance must be made and it must be made prior to confirming orders.

The developing market practice is that simple information that can be effectively reduced to sound bites can be conveyed orally. The easiest example of this would be a 20 percent decrease in deal size in an all-secondary offering by a selling stockholder. More complicated information may require that changed pages be circulated to accounts in the form of a "free writing prospectus" as contemplated by new Rule 433. An example of this situation would be a decrease in offering size that results in a change to the use of proceeds that ripples through the pro formas. And finally, where the changes are so fundamental that the original preliminary prospectus must be completely rewritten, it may be necessary to recirculate a completely new preliminary prospectus in order to satisfy 1934 Act Rule 15c2-8(b). Rule 15c2-8(b) requires that brokers and dealers participating in an IPO "deliver a copy of *the preliminary prospectus* to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation." [Emphasis added.]

The line between a complete recirculation and a supplemental circulation of changed pages is a blurry one. The free writing prospectus concept introduced in the securities offering reforms by new Rule 433 was intended, we believe, to obviate the need for a full recirculation of a completely new preliminary prospectus in all but the most extreme cases. However, when changed pages become so pervasive that the original preliminary prospectus can no longer be said to be "the preliminary prospectus" within the meaning of Rule 15c2-8(b), then a full recirculation will be required. If the changes are less than pervasive, a free writing prospectus consisting of changed pages (or even just a summary of the changes) should suffice.

The key import of this distinction between a full recirculation of a new preliminary prospectus and a supplemental circulation of changed pages relates to timing. If you have tripped the Rule 15c2-8(b) wire, you need to give investors 48 hours (generally thought to mean two full business days)[3] to consider the revised disclosure. If you are in free writing prospectus land, however, you may conclude that investors only need a few hours (or even minutes) to digest the new disclosure. The SEC has, to date, intentionally refrained from offering any guidance on the question "How long is long enough?" as it relates to delivery of new information for purposes of Rule 159 and Section 12. The prevailing view among law firms seems to be that most information can be digested upon receipt and only very complicated changes need a full business day to be absorbed. Somewhat complicated changes may need more than a few minutes to be digested but less than a full business day.

We continue to feel that the better view of Rule 433 and the new free writing prospectus that it ushered in is that a properly crafted and conveyed free writing prospectus should eliminate the need for a full recirculation in all but the most extreme cases.

One wrinkle in Rule 433 that could be construed to require a full recirculation in a very limited circumstance deserves discussion. Rule 433(b)(2)(i) requires that an IPO issuer's free writing prospectus be:

> accompanied or preceded by the most recent . . . [preliminary] prospectus [on file with the SEC]; *provided, however*, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus.

This proviso is somewhat confusing since in practice there would generally not seem to be a particular reason to circulate a free writing prospectus if there were nothing material to report. We would prefer, therefore, to interpret the proviso as meaning that a free writing prospectus for an IPO issuer is only allowed to convey material changes if the free writing prospectus *and the original preliminary prospectus* (and each other broadly distributed free writing prospectuses, if any), *taken together*, contain materially the same information as is at the time on file with the SEC. We think that this interpretation is more in keeping with the overall purpose of Rule 433 – namely, to encourage sending information to accounts on an as-needed, real-time basis.

In any event, however, the notes to paragraph (b)(2)(i) of Rule 433 make clear that this technical issue is not a problem for a free writing prospectus delivered by e-mail as long as it includes a hyperlink to the most recent preliminary prospectus on file with the SEC. As a result of this helpful note, every free writing prospectus to be sent by e-mail in connection with an IPO should include such a hyperlink. Once every investment bank is able to distribute free writing prospectuses to all accounts by e-mail, there will be no further need to struggle with the interpretive issue discussed in the prior paragraph.

Rule 457's Trap for the Unwary

Rule 457 deals with the seemingly mundane issue of the calculation of the registration fee. It offers issuers several alternative ways to calculate the filing fee at the time the registration statement is initially filed. We mention Rule 457 here because the choice you make under Rule 457 at the time of filing could have significant consequences months later if you are seeking to increase the size of a successful IPO at the time of pricing.

Rule 457(a) allows you to register a particular number of shares and pay a filing fee based upon the estimate of the maximum offering price of those shares at the time of filing the registration statement. If you choose this option, you will not have to pay more filing fees if your offering price per share later increases. You will, however, be required to pay additional filing fees if you later increase the number of shares to be offered, even if the total offering size (number of shares sold times sale price) does not go above the original estimate used to calculate the original filing fee. In addition, the added shares will need to be registered on a pre-effective amendment or through the magic of Rule 462(b)'s immediately effective registration statement.[4]

Rule 457(o), on the other hand, allows you to register an offering based on its maximum aggregate offering price – without regard to the number of shares to be issued. If you choose this option, you will not have to pay additional filing fees if your per share price goes down and you increase the number of shares offered so as to maintain the original aggregate offering price. You will, however, be required to pay additional filing fees if your aggregate offering price later increases, which can be done through a pre-effective amendment or by using Rule 462(b)'s automatically effective mechanism (even though the face of Rule 462(b) speaks only of "registering additional securities").[5] In other words, the results under Rule 457(o) are the mirror image of the results under Rule 457(a).

Why are we telling you all of this? Because there is an interplay between the choice you make at the time of the original filing under Rule 457 and the way Rule 430A works in the event that you are seeking to upsize your deal after effectiveness. It does not make a difference if you are downsizing your deal – telephone interpretation 92 governs in that case – but it does matter if you are upsizing.

The SEC takes the position that if you raise your price range in a preliminary prospectus contained in a pre-effective amendment from the range used to calculate the filing fee *and you originally elected to proceed under*

Rule 457(a), then the 20 percent safe harbor contemplated by the instruction to paragraph (a) of Rule 430A is calculated on the basis of the original maximum aggregate offering price and not the offering price range contained in the preliminary prospectus mailed to investors. In other words, the beauty of Rule 457(a) – namely that you do not need to go back to the SEC if you increase your estimated price per share after the initial filing – has a serious qualification when you later seek to upsize your deal.

This qualification can be eliminated if you "voluntarily" pay an additional filing fee when you increase your offering range, but that is not standard practice in our experience. This SEC position can be difficult for the unwary issuer who elects to use Rule 457(a) to calculate the filing fee. There is no such problem for users of Rule 457(o), as they are required to pay additional filing fees at the time they increase the range, as discussed above, so the SEC staff position is inapplicable.

Negative Assurance Letter Practice

Negative assurance letter practice among law firms has been dramatically altered by the Securities Act reforms, particularly by Rule 159. Negative assurance letters now cover three important items:

- the registration statement as of its effective date, as measured against the requirements of Section 11 of the Securities Act;
- the final prospectus, as of its date and as of the closing date, as measured against the requirements of Section 12 of the Securities Act; and
- the "Pricing Day Disclosure Package" as of the time the underwriters commence to confirm orders, as measured against the requirements of Section 12 of the Securities Act.

This last bullet point was added to address Rule 159. It becomes directly relevant in the context of a recirculation discussion because it, in essence, requires the issuer's and the underwriters' law firms to pass upon the collection of information that has been conveyed to accounts at the time the underwriters begin to confirm orders. The magic of Rule 430A and its permission to go back in time to rewrite history is critical for the negative assurance given in the first bullet point above, which relates to the registration statement, but it is of no use for purposes of the third bullet point, which relates to the Rule 159 "Pricing Day Disclosure Package."

The only way to satisfy Rule 159 is actually to convey information to accounts.[2] In the context of a deal that is being upsized or downsized at the last minute, conveying information – or even preparing the information so that it can be conveyed – may not be easy to do in a timely manner. As a result, pressure may be applied to the lawyers to make hard decisions – "What do we absolutely have to send to investors?" is a common question in this context.

Tying It All Together

So how does all of this fit together, you ask? Simple, really. The underwriters and the issuer start the dialogue while the road show is progressing about how the market is reacting to the deal. These are the questions that come up:

- Is there sufficient demand for the stock within the suggested range?
- If not, is it possible to get a smaller deal done within the range or do you need to reduce the deal's size and the per share price?
- If the size of the deal decreases, will the use of proceeds need to change?
- Is there sufficient excess demand that we can increase the price to a price that is above the top end of the range?
- Can we increase the price above the range and also increase the number of shares being offered?
- If the deal size increases, what will the extra proceeds be used for?

It is important to get this dialogue going long before it is time to price the deal so the deal team can plan for every possible outcome. Extra filing fees may need to be paid and changed pages may need to be recirculated to accounts reflecting new disclosures. In the most extreme cases, an entirely new preliminary prospectus may be required to be recirculated to all accounts expecting to play in the deal. The accountants' comfort letters will need to change to reflect the revised disclosure. If there are other changes that do not qualify as pricing information within the meaning of Rule 430A or if the Rule 430A 20 percent safe harbor is not available, an amendment to the registration statement may be required. All these procedural items take time. There is no substitute for advance planning.

Advance planning comes in two phases. It is very handy if the original preliminary prospectus includes "sensitivity" disclosure reflecting how changes in share price or deal size ripple through critical elements of the disclosure (dilution per share, pro forma earnings per share, amount of proceeds, for example). It is also useful if the original preliminary prospectus presents key disclosures in an "if/then" format ("We will apply the net proceeds from this offering first to repay all borrowings under our credit facility and then, to the extent of any proceeds remaining, to general corporate purposes," for example). Good advance planning and carefully crafted disclosure in the preliminary prospectus may make it possible to conclude that a change in deal size is not a material change. The second phase of advance planning occurs during the road show, as soon as it becomes clear that an upsizing or downsizing is even a possibility. Once the possibility of a change in deal size is in the air, the deal team should be reviewing their options under the rules described above and preparing revised disclosure (either in the form of a free writing prospectus or an amendment to the registration statement or both).

The underwriters will need changed pages (or whatever form of free writing prospectus or telephone script they intend to use to convey the new information to accounts) immediately after pricing. Timing is critical and there is no margin for error. Follow the Boy Scouts' and Girl Scouts' motto: Be Prepared!

Summary

In summary, this is tricky stuff. However, with appropriate advance planning and carefully crafted disclosure in the original preliminary prospectus, it is possible to navigate the many technical requirements and focus on the judgment calls. What is a material change to the disclosure depends in part on what was disclosed in the first instance, so the advance planning really begins at the first drafting session. Those who are thinking ahead to pricing from the very beginning will have an easier time when they get there, even if the deal changes materially at the last minute.

Endnotes

[1] Rule 430A defines pricing information as: "information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date."

[2] The only exception to the general rule that only actual delivery to prospective purchasers counts for Rule 159 and Section 12 purposes is where information is incorporated by reference into a prospectus. In that case, which is more common away from the world of IPOs than in it, the filing of a 1934 Act report that is incorporated by reference into the prospectus will be considered to be constructive delivery, at least where the market has been given a sufficient period of time to absorb the new information (one business day or less in most cases).

[3] In other words, if prospective investors actually have the revised preliminary prospectus in their hands at 9:00 a.m. on Monday morning, it would be appropriate to price on Tuesday after the market closes.

[4] Rule 462(b) provides that a post-effective amendment to register additional securities will be immediately effective if the amount and price of the new securities together represent an increase of less than 20 percent of the previous maximum aggregate offering price.

[5] See telephone interpretation 131 which clarifies this ambiguity in the text of Rule 462(b).

[6] See footnote 2 above.

HELLER EHRMAN VENTURE LAW GROUP CONTACTS

The memos, checklists and handbook that follow are intended only as general guidelines. If, after having had a chance to review these materials, you have any questions or require further guidance, please do not hesitate to contact any of the following Heller Ehrman Venture Law Group attorneys:

Stephen M. Davis	+1 (212) 847-8798	Stephen.Davis@hellerehrman.com
Karen A. Dempsey	+1 (415) 772-6540	Karen.Dempsey@hellerehrman.com
Nora L. Gibson	+1 (415) 772-6835	Nora.Gibson@hellerehrman.com
Jeffrey Marcus	+1 (212) 847-8709	Jeffrey.Marcus@hellerehrman.com

Session Overview

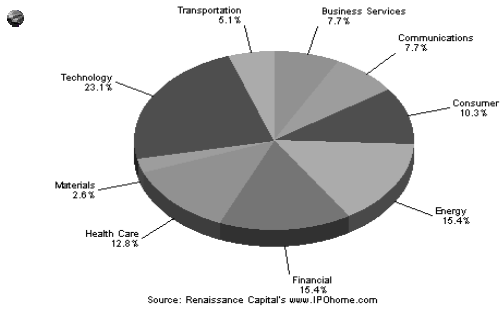
- 1. Planning and Process Overview
- 2. Managing Communications (Quiet Period, etc.)
- 3. Registration Statement Drafting & Issues
- 4. Dealing with Certain Constituents:
  The Board, Management, Employees & Shareholders
- 5. Public Company Governance
- 6. Roadshow, Pricing & Closing
- 7. Last words

Summary IPO Data 2003-2007

	2003	2004	2005	2006	9Mos. 07	Q3 06	Q3 07
No. of Deals	68	216	194	198	154	31	40
Total Proceeds (billions)	$15	$43	$34	$43	$38	$6.3	$11.3
Avg. Deal Size (millions)	$224	$198	$175	$217	$244	$204	$282

Source: Renaissance Capital's IPOhome.com

IPO Industry Breakdown – Q3 07



Source: Renaissance Capital's www.IPOhome.com

Process Overview

Deciding to go public, selecting underwriters and getting organized

Day 1- 30	*Day 31-90*	*Day 90-110*
Structuring	Comments	Roadshow
Due Diligence	Amendments	Red Herring
Drafting	Roadshow Prep	Pricing
Filing		Closing

Process Overview

Capitalization audit	**SEC, auditor & analyst feedback**
Other internal audits	**Consents & charter amendments**
D&O questionnaires	**Public company governance and compliance readiness**
Lock-ups	**Secondary mechanics**
Telling the story	

Public relations, employee relations

Organize Structure & Draft Diligence File Amend Roadshow Market Price Close

Internal reviews **Mark Stachiw**

Capitalization

Regulatory compliance

Intellectual property

Capitalization Audit

If a company has been privately held for a long period of time before going public, a capitalization audit should be performed long before the IPO process begins; issues include:

- Is there an adequate chain of title for each existing shareholder?
- Has the company exceeded securities law limits on stock option grants and similar equity compensation for exemptions from registration?
- Have all stock options and other equity compensation been granted in accordance with the company's existing plans, including all necessary board and committee action? Unanimous consents?
- Does the company have the full picture on its beneficial ownership and key affiliates of its current owners?
- Does the company know about all related parties?
- Are there any backdating issues?
- 409A issues?

Regulatory and IP Audit

Consider performing an intellectual property audit and, in highly regulated industries, a regulatory audit before the IPO process begins; issues include:

- Licenses and permits are valid and current
- Material regulatory proceedings are understood and disclosed
- Ownership issues are fully vetted, including foreign ownership
- Intellectual property is properly documented and licensed
- Challenges to intellectual property

Managing Communications

August Moretti

- The Quiet Period
- Analyst Communications
- Investor and Public Relations

The Quiet Period

- Illegal to offer to sell any security unless registration statement filed
  - Sell only by means of statutory prospectus
  - Other communications may constitute "gun jumping"
  - Sales made close in time to public offering
- Commencement of quiet period
  - Somewhat unclear
    - Selection of bankers
    - Organizational meeting
  - Rule 163A protects certain communications made more than 30 days prior to filing

Communications "consistent with past practices"

- Not necessary to cease all press releases, publication of articles, etc.
- Securities Act Rule 169
  - Non-exclusive safe harbor
  - "regularly released" factual business information
  - Does not protect forward looking statements

Sample Problems & Tips

- Recent issues-2004
  - Google
    - text of Playboy article attached as exhibit to prospectus
    - Section 5 violation risk factor
  - Salesforce.com - one month delay
- Ancient history – Cetus
  - Scientific American billboard
  - Today show interview
- Scrub the company website; look out for blogs

Need for Pre-IPO Roadshow

- Necessary for small capitalization companies
  - Buyers don't know the company or managment
- Requires forward planning
  - Needs to be completed long before the quiet period
  - Usually requires help from a banker
  - Not protected by Rule 163A

Analysts and Bankers

- Global Analyst Research Settlement 2003
  - Separation between research and banking
  - Independent contact with research
  - Requirement of research "approval"
  - Inability to guarantee favorable research
  - Rules on coverage initiation, etc.
- Increased effort and time for management

Authorized Spokespersons

- Who speaks for the company
- Roadshow, press releases, investor conferences, analyst communications
- Cold calls
  - The press
  - SEC/NASD/Regulatory agencies
  - Hedge funds

Life as a Public Company

- Corporate web site
  - What links
  - How long to retain press releases
- Dealing with the financial community
  - Reg FD
  - The "two person" rule
  - What is "inadvertent"
- Analyst reports
- Internal review of 1934 Act filings
- IR firm

Registration Statement Drafting Gary Hirsch

- Principal sections of the S-1
  - Risk Factors
  - Business
  - MD&A
  - CD&A (compensation)
  - Beneficial Ownership
- Precedents: ipovitalsigns.com

Registration Statement Drafting Cont.

- What do you mean you're not a CPA?

  (It's not just about option backdating…)
  - Revenue recognition
  - Cheap stock charges
  - Internal controls
  - Restatements = Material weaknesses

Key Internal IPO Constituents & Concerns

Ken Siegel

- Board of Directors
- Management
- Employees
- Existing equity holders
  - Employee equity holders
  - Non-employee (investors) equity holders

Board: D&O/NASD Questionnaires

- Questionnaires are the principal means by which the Company obtains information for its SEC filings from its officers and directors
  - A major problem is that many directors expect the company to complete much of the questionnaire for the director
  - This increases the risk of incorrect disclosures in SEC filings

Questionnaires, cont.

- Accordingly, directors need to be specifically focused on checking the items in the questionnaire that will appear in a prospectus, such as their holdings in the company or their related party transactions, if any
  - For example: family members, investment holdings, conflicts, independence
- Collect and review EARLIER rather than LATER

- Tip: Be sure to review draft bio's that will be used in S-1 with each director and executive officer before filing to ensure compliance with Reg S-K

Board, cont.

- Be prepared to discuss the basics with your Board
  - '33 Act liabilities for IPO / Board due diligence
  - Insider trading
  - Section 16 restrictions and reporting
  - External communications
  - Secondary sales
  - Appointment of Pricing Committee
  - Post-closing governance
  - D&O insurance

Management

- Board should formally designate Section 16 "officers" (CEO, principal financial officer, principal accounting officer, others with policy-making authority who will be subject to short swing rules, filing Forms 3 & 4 and deemed "Affiliate" for Rule 144 purposes)
- Tip: Determining who is and who is not a Section 16 officer requires judgment based on actual role within company. Resist temptation/pressure to "treat 'officers' as equals."

Management, cont.

- This may be the first time your executive team members (and you) have served as an officer of a public company
- Be prepared to cover the same basic topics as with Board

Management, cont.

- Acknowledge cultural shifts
  - More restricted flow of material information
  - Disclosure of compensation
  - Accountability—actions can directly affect stock price

Employees

- IPO is a major event for all employees; be prepared to offer broadly information about key points:
  - IPO process and timeline
  - What it will mean to be public
  - What will IPO mean with respect to shares/options held, particularly if there will be a stock split
  - Quiet period and what employees may and may not say externally
  - Need to direct external inquiries to designated spokespeople
  - Insider trading
  - Impact on equity

Employees, cont.

- Need to provide clear training on
  - Code of Conduct and whistleblower facility
  - Insider trading law and company policy
  - External communications
    - Designated spokespeople
    - IPO and quarterly quiet periods

IPO Process Related Issues

- Lock-up agreements
- Secondary shares & registration rights
- Directed share programs
- Auto-conversion of preferred stock
- Pre-IPO shareholder approvals

Lock-Up Agreements

- Agreements of existing stock and option holders not to sell any shares for a stated period following the IPO
- Request and negotiate the form of agreement at outset of IPO process
- Discuss with underwriters early in process what lock-up they are requesting (duration and coverage)
  - Tip: By default, underwriters will inevitably ask that 100% of stock/option holders sign lock-ups. There is some room to negotiate, particularly as it relates to smaller holders.
- Note that soliciting lock-ups can be time consuming—start early and follow-up frequently
- Condition participation in secondary sales on lock-up signing

Secondary Shares & Reg Rights

- Discuss with underwriters at outset whether existing shareholders will be permitted to sell shares along side of the Company in the IPO (secondary shares)
- Review existing registration/stockholder rights agreements
- Tip: Registration rights agreements often allow secondary shares to be excluded from IPO if underwriters so require
- If secondary shares will be included, allow sufficient time to sign up selling shareholders

Directed Share Programs

- Program negotiated with underwriters up front to have a portion (~5%) of IPO shares offered to buyers designated by Company (generally employees and/or business partners)
- Requires additional disclosure in prospectus
- Requires buyers to open accounts with lead underwriter—can be time consuming
- Recall that share prices go down as well as up; consider impact on business of negative outcome

Auto-Conversion of Preferred Stock

Preferred Stock generally automatically converts to Common Stock in IPO *if* IPO meets certain conditions (size/valuation)

- Review charter documents
  - If IPO meets auto-convert conditions, no concerns;
  - If IPO misses (or near) auto-convert conditions, need to engage with preferred holders to ascertain willingness to amend terms

Pre-IPO Shareholder Approvals

- Consider what shareholder approvals you will want/need pre-IPO
  - Restated charter documents
    - Stock split
    - Blank Check preferred
    - Take-over defense provisions
  - Employee benefit plans (new or updated)
  - D&O indemnification agreements
  - Other matters

Changes to Corporate Fundamentals **Mark Stachiw**

- Board structure
- Articles and bylaws
- Policies and other corporate fundamentals

Board

- Board Composition
  - Total number of directors desired
  - Need to poll existing directors regarding continuing service
  - If gaps exist, begin recruiting early
  - Note post-IPO grace periods within which to flesh out full Board

Board Structure

- Establish mandatory Board committees
  - Audit Committee
  - Compensation Committee
  - Nominating & Governance
- Adopt/Review Committee charters
  - Tip: Review these carefully as you will have to live with them. Are they consistent with how your Board operates? Decide carefully what duties and authority the Board is delegating to its committees.

Board Structure

- Independence tests and financial expert designation
- Other Board committees
  - Finance & Planning Committee
  - Executive Committee

Board, cont

- Board Compensation
  - Cash (annual or per meeting)
  - Chair supplements
  - Equity
- Executive compensation consultants can help calibrate Board compensation for your company

Articles and Bylaws

- Staggered Board
  - Review board composition and, if a staggered board is chosen, who holds which staggered term
- Frequency and location of meetings
- Process for preparing and distributing board materials
- Majority voting vs. cumulative voting
- Blank check preferred stock
- Stockholder rights plans

Changes to Corporate Fundamentals

- Corporate policies
  - Code of Ethics
  - Whistleblower Policy
  - Up-The-Ladder Policy
  - Insider Trading Policy
- Disclosure Committee
- Corporate governance guidelines
- Review of risk management policies
- SOX compliance

10b-5 Plans and Insider Trading

- 10b-5 Plans allow individuals with material nonpublic information to nonetheless transact in Company stock via a "blind trust" mechanism
- The key to validity is lack of control by the investor
  - Must be set up in advance and remove all control by investor over decisions to buy and sell
  - Can be done by fixing mechanical buy/sell triggers, by placing all discretion with a broker, or by a combination of the two
  - The company should note plans as an option to its employees, but should not make recommendations as to whether an employee should or should not put a plan in place
- Provides an affirmative defense to insider trading liability, if entered into in good faith and not as part of a plan to evade the restrictions of the securities laws
- Should not be entered into or modified while an individual possesses material inside information or during blackout periods for individuals subject to blackout period restrictions

The Road Show **August Moretti**

- Who should represent the company
  - CEO/CFO
  - Investors want to see management (not just the CEO) but three can be unmanageable and, in general, if you bring a "geek" you will not make the sale
- Web roadshow presentation
  - Recorded during salesforce presentation
  - Some investors will review before you meet them

The Road Show

- Begins with presentation to the sales forces of the underwriters
- All major US cities with relevant investors
- Most include London/Frankfurt/Zurich
  - Canada seldom
  - Asia never
  - Foreign ownership issues

The Road Show

- One hour schedule
  - 25 minute presentation
  - 15 minute Q&A
  - 15 minutes to travel to the next meeting
- Generally, the company representatives and one banker and one sales person from the banker attend
  - Co-managers split the schedule
  - Certain investors insist on excluding the sales person and the banker

The Road Show

- Physically grueling
  - 2-3 weeks of travel
  - 100 or more meetings and conference calls
- Who is running the business while management is on the road?

Underwriting syndicate

- Co-managers or joint bookrunners
- How many banks
  - The company wants to assure adequate research coverage
  - Economics dictate whether firms will participate
  - Position on the cover is important to banks
  - Most banks have rules that they will not "work to the right" of certain other banks

Underwriting Agreement

- Usually a contract of adhesion
  - Filed as exhibits in all deals
    - Review filed exemplars from your underwriters
  - Conditions to close
  - Indemnification
  - Selling stockholders
- IPO fees are 7% in almost all IPO's
  - Google is exception that proves the rule