Milbank

THE IPO AND PUBLIC COMPANY PRIMER

A Practical Guide to Going Public, Raising Capital and Life as a Public Company

Milbank, Tweed, Hadley & McCloy LLP
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A Practical Guide to Going Public, Raising Capital and Life as a Public Company

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THE IPO AND PUBLIC COMPANY PRIMER

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INTRODUCTION

Initial public offering (IPO) deal type, volume and size have changed significantly over the last decade. From 2001 through 2003, following the burst of the dot-com bubble, U.S. IPOs raised comparatively modest total proceeds of slightly more than $80 billion. The market revived from 2004 to 2007, producing about 200 U.S. IPOs and raising approximately $40 billion each year. In contrast to the market prior to 2001, this market was characterized by larger and more seasoned IPO companies, many with private-equity sponsors.

The effects of recession, however, made 2008 one of the worst IPO markets in decades. The market bottomed out after the world dipped into recession following the collapse of the financial markets. 2008 produced only 31 IPOs, with an astonishing single IPO for the entire fourth quarter. 2009 began the way 2008 ended. In March of 2009, stock indices fell to multi-year lows and there were only two IPOs in the first quarter. This would prove to be the low point of the market and 2009 ended as a modest rebound year, totaling 54 IPOs – 30 in the fourth quarter – with gross proceeds of $19.2 billion. 2009 also continued the trend of larger, more seasoned IPOs; the median annual revenue of IPO companies soared from $113.5 million to $229.0 million.

In 2010, the U.S. IPO market showed continued signs of improvement. More deals were completed in the first three quarters than in 2008 and 2009 combined, and in the fourth quarter the General Motors IPO alone raised $18.2 billion. The General Motors IPO aside, a greater concentration of small and midcap offerings reduced average offering proceeds significantly while the percentage of China-based IPOs increased to over one quarter of U.S. deal volume. In total, U.S. IPOs raised $38.7 billion in 2010 and global IPO proceeds rose to within 12% of 2007 peak levels.

Drawing on a strong deal pipeline from the fourth quarter of 2010, U.S. IPO markets continued to improve in the first half of 2011, only to falter in the third quarter with the relapse of the European debt crisis and decreasing demand for Chinese IPOs. Bolstered by the monetary policies of the Federal Reserve, a strong market for technology IPOs, and several large private equity/venture capital backed deals, however, the U.S. IPO market performed well relative to the rest of the global marketplace. U.S. IPOs raised $36.3 billion in 2011.

Buoyed by surging interest in the IPOs of maturing Web 2.0 companies such as Groupon, LinkedIn and Zynga, the technology sector gained a large share of U.S. IPO proceeds in 2011. Twenty-four internet companies went public and four of the five largest internet IPOs in U.S. history combined to raise nearly $2.5 billion. In addition to internet companies, software companies, including on-demand software firms, such as Cornerstone and OnDemand, contributed to the steady revival of this corner of the U.S. IPO market.

Although overall deal flow in the sector remained well below pre-2008 levels, private equity and venture capital backed IPOs raised $28.3 billion in 2011, with 86 such deals accounting for 78% of total U.S. IPO proceeds. The private equity backed offerings of HCA, Kinder Morgan and Nielsen combined to raise $8.3 billion in the first quarter.

Also notable in 2011 was the plunge in U.S.-listed Chinese IPOs, which resulted from both mounting evidence of fraud and improper reporting on the part of such companies and the steady cooling of the Chinese economy. Only 12 Chinese companies listed in the United States in 2011, down from 41 in 2010.

In 2012, the U.S. market produced 102 IPOs, a 5% increase over 2011, and gross proceeds increased 22%, from $28.7 billion in 2011 to $35.1 billion. Facebook's $16 billion offering contributed heavily to this increase. Two other IPOs topped $1 billion – Santander ($2.9 billion) and Realogy ($1.08 billion). However, median IPO size dropped to $94.3 million from $140 billion in 2011, which can be partly attributed to an increase in VC-backed IPOs to 51 from 42.

In 2013, a total of 222 companies went public in the U.S., raising more than $59 billion. Twitter's high profile IPO accounts for $1.8 billion of this total. Other notable IPOs included Hilton Worldwide's $2.3 billion IPO, the largest-ever hotel IPO. In addition to the technology sector, healthcare saw a significant increase in the number of IPOs to 38 in 2013 compared with 21 in 2012.

Many of 2013's notable IPOs used the confidential submission process established by the JOBS Act, including Twitter and Manchester United. For much of 2013, confidential submissions outpaced traditional IPOs, a trend that is expected to continue.

The information in this manual is organized by topic in the following chapters.

Chapter I, *DECIDING WHETHER TO GO PUBLIC*, focuses on the factors that should be evaluated in deciding whether to go public, including the benefits for "emerging growth companies" *(EGCs)* of the JOBS Act.

Chapter II, *PREPARING TO GO PUBLIC*, analyzes matters that the company should review in its business, its operations, its governance and its personnel to ensure that it is prepared to go public.

Chapter III, *KICKING-OFF THE PUBLIC OFFERING*, reviews the organizational meeting, structuring issues, the requirements for and drafting of the registration statement and issues related to pre-filing publicity.

Chapter IV, *FILING THE REGISTRATION STATEMENT*, sets forth the mechanics of filing the registration statement with the Securities and Exchange Commission *(SEC)*.

Chapter V, *THE WAITING PERIOD*, discusses the activities of the company between the initial filing of the registration statement and the time that the registration statement is declared effective by the SEC.

Chapter VI, *THE POST-EFFECTIVE PERIOD*, contemplates events that occur once the SEC declares the registration statement effective.

Chapter VII, *RAISING CAPITAL AS A PUBLIC COMPANY*, discusses the various ways that public companies raise additional capital in the public and private capital markets.

Chapter VIII, *LIFE AS A PUBLIC COMPANY*, details the obligations of the company and certain of its shareholders to comply with disclosure requirements and trading restrictions imposed by the Securities Act of 1933 *(Securities Act)*, the Securities Exchange Act of 1934 (*Exchange Act*), the Sarbanes-Oxley Act of 2002 (*Sarbanes-Oxley*), the Dodd-Frank Act and the rules of the national stock exchanges.

Chapter IX, *CROSS-BORDER SECURITIES TRANSACTIONS AND COMPLIANCE*, discusses the applicability of the U.S. federal securities laws to non-U.S. companies that conduct public offerings in the U.S. (including IPOs) and/or list their securities on a U.S. stock exchange. This chapter also discusses offshore securities transactions conducted by U.S. companies under Regulation S, which provides an exemption from registration under the Securities Act, and cross-border business combination transactions.

Chapter X, *SECURITIES ISSUANCES IN CONNECTION WITH MERGERS, ACQUISITIONS AND OTHER BUSINESS COMBINATIONS*, provides an overview of the advantages a public company has in making acquisitions and discusses how a public company may repurchase its own shares. In addition, this chapter provides a brief description of the process of taking a public company private.

Chapter XI, *THE HIGH YIELD BOND MARKET AND IPOS*, discusses the use of high yield bonds as a corporate finance instrument, including both public and private offerings of high yield bonds and the role that such bonds may play in IPOs of a company's equity securities. This chapter also provides an overview of some typical features of high yield bonds.

This text is not intended to constitute legal advice; each issuer and transaction is unique, and issuers are encouraged to consult qualified legal counsel early in the IPO process.

I. DECIDING WHETHER TO GO PUBLIC

A. TRADITIONAL REASONS TO GO PUBLIC

Reasons for going public have traditionally included:

- *Access to public capital markets*
- *Creation of equity currency*
- *Liquidity for investors*
- *Enhanced corporate reputation*

1. Access to Public Capital Markets

Public capital markets generally offer a company the ability to obtain capital at lower cost than private markets. Lowering the cost of capital contributes to an increase in the company's value. The company's securities are likely to have higher value in public markets for a number of reasons. The number of potential purchasers is maximized and transaction costs are minimized. In addition, potential purchasers of the securities of public companies collectively value the regulatory requirement that public companies disseminate, on a timely basis, full and fair information about the company's business, results of operations, cash flows and financial condition. Also, securities of public companies can generally be sold without subsequent trading restrictions and, accordingly, without discount for lack of liquidity.

After a successful IPO, a company can raise capital in subsequent primary offerings of equity, debt or hybrid securities. For larger companies with a sufficient public float and an established record of performance, "shelf registration" provides the ability to tap favorable capital markets within a few weeks, days or even hours. The largest public companies are permitted to file shelf registration statements with the SEC that are automatically effective and usable immediately after filing.

Private companies seeking financing are typically limited to debt and private equity financing. In order to borrow money, a company must generally have identifiable, valuable assets which, in the case of secured financings, serve as collateral as well as the demonstrable ability to repay the loan. Companies that meet these criteria must live with the ongoing cash drain of interest and principal payments and the lender's imposition of often onerous restrictive covenants on the company's operations and the use of the proceeds of the loan.

2. Creation of Equity Currency

Going public enables a company to use its publicly traded securities for various purposes, including for the acquisition of other businesses or technology and for compensating employees. More efficient use of equity—including through the issuance of "freely tradable" shares registered with the SEC or an agreement to register subsequent resales of shares by the holders—can preserve cash, provide tax benefits and create additional incentives for owners of target businesses or employees. This form of currency is more appealing to shareholders of a potential acquisition target than the illiquid shares of a privately-held company and generally creates additional flexibility to purchasers in structuring mutually advantageous transactions.

3. Liquidity for Investors

In an IPO or in a subsequent secondary offering, a company may register for sale shares that would otherwise be subject to a holding period and/or volume restrictions under Securities Act Rule 144, thereby achieving additional liquidity for shareholders. These include shares acquired in private transactions and shares that are held by officers, directors or other "affiliates" of the company.

4. Enhanced Corporate Reputation

The federal disclosure requirements imposed on the company both during and after the IPO process afford the company's investors, clients and suppliers access to information about the company that is generally more complete and standardized than the information voluntarily disclosed by the company prior to going public. The scrutiny by research analysts to which public companies are often subjected can provide further comfort to those with a stake in the company. In addition, the company's participation in highly regulated securities markets may serve to reassure investors that they will be treated fairly. For example, the SEC's securities fraud, insider trading and selective disclosure regulations seek to provide a fair and level playing field for buyers and sellers of stock, whether or not they have access to inside information. Finally, the company's public status and, in particular, a listing on an exchange may give it a competitive advantage over privately held companies in the same industry by providing greater visibility and enhanced corporate image.

B. DISADVANTAGES OF GOING PUBLIC

In addition to the relatively recent additional burdens placed on public companies by the Sarbanes-Oxley and Dodd-Frank Acts (as discussed in the next section), the disadvantages of going public include:

- periodic reporting;
- public disclosure pitfalls;
- restrictions on sales by insiders;
- possible loss of control by current shareholders;
- effect on management decisions; and
- diversion of management time during the IPO process and thereafter.

1. Periodic Reporting

As described in greater detail in Chapter VIII, public companies are subject to the periodic reporting requirements of the SEC. These requirements include annual (*Form 10-K*) and quarterly (*Form 10-Q*) reporting of financial results and business developments, prompt reporting of certain specified current material events (*Form 8-K*) and various other reporting requirements, such as those for purchases or sales of shares by affiliates and for tender offers. Complying with the SEC's reporting requirements demands significant time and financial commitments, and Sarbanes-Oxley and Dodd-Frank only added to these already significant burdens. Also, management must personally certify the information contained in periodic reports on Form 10-K and Form 10-Q and companies must have extensive disclosure controls and procedures in place to ensure the accuracy and timely filing of periodic reports. Gathering the necessary information to comply with these requirements requires robust accounting systems, additional accounting staff and a significant increase in the use of lawyers, auditors and other outside advisors. Securities analysts, public shareholders and the financial press also expect companies to include additional information in periodic reports. Additionally, under Sarbanes-Oxley, the SEC is required to review a company's annual report on Form 10-K and other disclosures, including financial statements, at least once every three years, and often does so in targeted reviews more frequently.

2. Public Disclosure Pitfalls

Companies going public must carefully consider the extensive disclosure regime applicable to publicly-held companies before undertaking an IPO. For example, a company going public is required to provide full disclosure of its business operations, competitive position, significant customers and material contracts. In addition, public companies are required to disclose information about executive compensation, transactions with insiders and off-balance sheet transactions. Also, SEC regulations, stock exchanges and the "real time" disclosure regime brought about by Sarbanes-Oxley may also require a company to disclose dynamic information at a time when it may be inconvenient or even damaging to do so. A company contemplating an IPO should consider carefully whether the required disclosures will disadvantage it vis-à-vis its competition, its vendors, customers, employees or other third parties. As discussed more fully in Section I.D, the JOBS Act affords a company with less than $1 billion in annual revenues that is contemplating an IPO the opportunity to complete substantially all of the review process with the SEC on a confidential basis until it decides to launch an IPO (although such a company must publicly file its registration statement with the SEC no later than 21 days before it begins the "road show" for the offering).

Newly public companies must recognize that the enhanced disclosure process for public companies creates increased scrutiny of the company and its management. Many private company disclosures are made informally through board presentations, shareholder meetings and ad hoc telephone calls. In contrast, given the large number of shareholders of a public company and the regulatory requirements of the SEC, together with those of stock exchanges, a public company is required to widely disseminate material information about the company. All of this information may be reviewed in light of subsequent events, potentially subjecting management's decisions and disclosures to "Monday morning quarterbacking" from analysts, regulators, the financial press, shareholders and potential litigants.

In addition, in the current legal environment, a public company and its officers and directors may become subject to a class action or derivative lawsuit alleging violations of corporate and securities laws. The performance of IPOs are particularly scrutinized. Even if the claim has no merit, establishing a defense can be time consuming, distracting and expensive.

3. Restrictions on Sales by Insiders

Although going public generally provides increased liquidity for investors, the federal securities laws impose restrictions on the sales of securities by directors, executive officers, principal stockholders and other insiders.

First, directors, executive officers and controlling stockholders of a public company may generally only sell shares of the company into the public markets under Rule 144 of the Securities Act (pursuant to the rule's volume, timing and manner of sale limitations) or under a registration statement.

Second, under Rule 10b-5 of the Exchange Act, it can be illegal for a person possessing material nonpublic information ("inside information") about the company to trade in the company's securities. Exchange Act Rule 10b5-1 (discussed in Section VIII.F) specifies that simply being "aware of" inside information while trading will be a basis of an insider trading violation (rather than a more lenient "use" standard some courts formerly imposed), although Rule 10b5-1 does contain affirmative defenses for trades made under certain trading plans entered into at a time when the insider was not aware of any inside information.

Third, the short-swing profit rules of Section 16(b) of the Exchange Act require that certain profits and deemed profits from the purchase and sale of stock by insiders within a six-month period be returned to the company. In order to minimize the possibilities for insider trading and violation of these rules, many public companies adopt pre-trade clearance procedures and trading policies that limit employee trading to specified window periods commencing after the reporting of quarterly earnings and ending several weeks later (although the window can be closed early or at any time during which insiders have inside information).

Finally, as described herein, contractual lock-ups of 180 days (subject to extensions in certain specified circumstances; see Section III.B.3) are typically imposed on directors, executive officers and major shareholders following an IPO and for 90 days after most follow-on offerings. Such lock-up agreements may be waived by the underwriter of an offering, but rules of the Financial Industry Regulatory Authority, Inc. *(FINRA)* require the book-running lead manager to notify the issuer of any impending waiver or release of a lock-up agreement at least two days before the waiver and also announce the impending release or waiver through a major news service. These requirements may affect the willingness of underwriters to grant such waivers.

4. Possible Loss of Control by Current Shareholders

In the U.S., an IPO usually dilutes the ownership of the company held by pre-IPO shareholders, who typically do not have a preemptive or participation right to maintain their ownership percentage (unlike shareholders of many European companies). In addition, public ownership entails the risk that pre-IPO shareholders, and the management that they have selected, may lose control of the company as a result of board elections or through a takeover. Management and principal pre-IPO shareholders may seek to minimize the risk of losing control by limiting the number of shares sold to the public, seeking to ensure a wide distribution of shares to the public, creating tiered classes of stock with differentiated voting rights that favor pre-IPO shareholders, entering into voting agreements among pre-IPO shareholders, limiting the ability of shareholders to take corporate actions, adopting supermajority provisions, staggering the terms of directors or adopting poison pills. Some of these measures, such as creating a dual-class voting structure by issuing "high voting," "light voting" or non-voting stock, for instance, may depress the price of the securities with less voting power.

5. Effect on Management Decisions

Managers frequently focus on the stock price of the company as a proxy for their performance. This phenomenon is exacerbated if the managers have significant equity ownership. As a result of this focus, managers may favor business opportunities that will benefit the company in the short run over those opportunities that could have a greater long-term benefit, but may have an adverse impact on the company's stock price in the near term.

6. Diversion of Management Time During the IPO Process and Thereafter

An IPO requires a substantial amount of management time and attention. A typical IPO takes anywhere from three to six months from the time of the organizational meeting to completion. Usually an additional two to three months of preparation have preceded the organizational meeting. During this time, there are periods when senior management time and attention, including that of the principal executive officer (*CEO*) and the principal financial officer (*CFO*), are devoted almost exclusively to the IPO process, leaving these most senior executives little time to manage the company's business. In order to successfully complete an IPO, a company must be able to operate with employees who are not involved in the IPO process carrying an increased load with respect to the day-to-day affairs of the company, while the senior management is conducting the IPO. Following an IPO, management should be prepared to expend a substantial amount of time dealing with disclosure and other compliance issues and investor relations.

C. IMPACT OF SARBANES-OXLEY AND DODD-FRANK ACTS ON PUBLIC COMPANIES

Following the collapse of Enron Corporation in late 2001, the administration of President George W. Bush, members of the U.S. Congress, the SEC and the stock exchanges, among many others, proposed expansive regulation to address what were generally seen as systemic failures in the governance, internal controls and disclosure practices of public companies and the existing regulation of these companies and the financial markets.

Meanwhile, numerous pieces of reform legislation worked their way through both houses of Congress, going widely unnoticed until the landmark disclosure of a multi-billion dollar accounting scandal at WorldCom, Inc., one of "history's largest frauds" in the words of the court-appointed monitor for the bankrupt company, who noted that misdeeds at WorldCom created and destroyed $200 billion in shareholder value.

The wave of corporate scandals culminating in WorldCom propelled Congress and the White House to action. Sarbanes-Oxley was signed into law by President Bush on July 30, 2002, just 35 days after WorldCom's announcement that it had overstated its revenues by several billions of dollars, and effected sweeping changes in securities, criminal and other federal laws affecting public companies, public accounting firms, investment banks, lawyers and public company directors and executive officers.

Sarbanes-Oxley was the most significant federal disclosure and corporate governance legislation since the Securities Act and the Exchange Act were adopted in the 1930s, but it is best understood not as a monolithic piece of legislation centered on a new concept of regulation, but as an ordering process which mandated that many major reforms proposed by various participants in the reform debate be implemented with all deliberate speed (in some cases, within 30 days) on the precise schedule specified by Congress. In that sense, the WorldCom debacle provided the impetus of public outrage that forced into effect some of the most readily available reform proposals of the moment, many of which had languished for years without sufficient political imperative to be enacted.

Key provisions of Sarbanes-Oxley include the following:

- increased regulation and oversight of the accounting profession;
- more stringent auditor and audit committee independence requirements;
- greater corporate responsibility and accountability;
- increased issuer disclosure;
- increased regulation of securities analysts;
- increased criminal penalties; and
- professional responsibility standards for attorneys.

It is important to note that certain provisions of Sarbanes-Oxley apply to a company from the moment that it files its first registration statement with the

SEC. These provisions include, among others, the prohibition against personal loans to senior executives and directors (discussed in Section VIII.J.8) and the prohibition against fraudulently influencing, coercing, manipulating or misleading an auditor (discussed in Section VIII.J.9).

On July 21, 2010, following the economic crisis of 2008-2009, President Barack Obama signed into law the Dodd–Frank Act, which included, in addition to sweeping reform of financial market regulation, a number of provisions aimed at further enhancing and increasing the corporate governance and disclosure obligations and practices of public companies. These governance provisions, which included many priorities of shareholder activists and reflected input from leading institutional investor groups, such as the Council of Institutional Investors, have a strong focus on executive compensation, including a requirement for a stockholder "say-on-pay" vote at least once every three years, enhanced compensation recoupment (so-called "clawback") provisions, and disclosure of internal pay equity (the rules for which were proposed in September 2013, as discussed further in Section VIII.D.1(c)) and pay for performance. The Dodd-Frank Act also required the SEC to adopt an expanded whistleblower program (discussed further in Section VIII.J.10) that provides significant financial incentives for reporting of suspected wrongdoing to the SEC. Although not as comprehensive or as fundamental a reform act with regard to corporate governance as Sarbanes-Oxley, the corporate governance provisions of the Dodd-Frank Act constitute the second major Congressional mandate in this area in a decade, continuing the trend of increased federalization of corporate governance, which erodes traditional deference to state law and further ups the ante for public companies in terms of additional compliance obligations and the associated costs and other burdens.

In 2012, certain aspects of the enhanced regulatory requirements and resulting costs imposed by Sarbanes-Oxley were significantly reduced for emerging growth companies, or EGCs, by the enactment of the JOBS Act, as described further in Section I.D.

1. Oversight of Accounting Profession

Sarbanes-Oxley established a five-member Public Company Accounting Oversight Board (*PCAOB*) to register, oversee, regulate, inspect and discipline public accounting firms, including foreign audit firms whose audit reports are included in SEC filings, and persons associated with such firms. The PCAOB is charged with establishing and enforcing auditing, quality control, ethics and independence standards and rules for public company accountants. The SEC will not accept an audit report from an accounting firm that is not registered with the PCAOB. Thus, companies seeking to go public must engage the services of a registered public accounting firm.

The PCAOB has the power to conduct regular and special investigations of registered accounting firms and to impose sanctions. Public companies have noticed that the oversight of auditors has in turn caused auditors to be ever more vigilant in their audits of publicly-held companies. In particular, standards created by the PCAOB by which outside auditors attest to the validity of a companion requirement that management evaluate the effectiveness of the company's internal controls over financial reporting, not only increase the expense for publicly-held companies (objections to which resulted in the Dodd-Frank Act permanently exempting public companies with a public float less than $75 million from the attestation requirement and, more recently, an exemption for EGCs pursuant to the JOBS Act) but also squarely place more responsibility and risk on management with regard to the effectiveness of the company's internal controls (management's assessment and report is required of public companies regardless of size). An investigation of an auditing firm by the PCAOB also increases the potential exposure of those public companies whose audit records are the subject of an investigation.

The SEC appoints the members of the PCAOB and has oversight and enforcement authority over it. The PCAOB is funded by fees imposed on publicly-traded companies based on their market capitalization—the fees range from as little as $100 for the very smallest companies to more than $1 million for a handful of the largest companies.

2. Auditor Independence

Sarbanes-Oxley amended the Exchange Act to prohibit registered public accounting firms from performing for a public company audit client any of the following services (most of which had previously been prohibited to some degree by pre-existing but generally more lenient SEC rules):

- bookkeeping and similar services;
- financial information systems design and implementation;
- appraisal or valuation services, fairness opinions or contribution-in-kind reports;
- actuarial services;
- internal audit outsourcing services;

- management functions or human resources;
- broker or dealer, investment advisor or investment banking services;
- legal services and expert services unrelated to audit; and
- any other services proscribed by the PCAOB.

The SEC adopted amendments to its rules on auditor independence consistent with the Sarbanes-Oxley prohibitions. These auditor independence rules are based on three general principles that the SEC determined were embodied in the Sarbanes-Oxley prohibitions: (a) an auditor cannot audit its own work, (b) an auditor cannot function in the role of management, and (c) an auditor cannot serve in an advocacy role for its client.

In addition, pursuant to Sarbanes-Oxley, and detailed rules subsequently adopted by the SEC, the provision of other non-audit services by outside auditors (such as permitted tax and other non-audit services) requires pre-approval by the company's audit committee and disclosure of the issuer's pre-approval policies in proxy statements and annual reports filed with the SEC. Under SEC rules, the audit committee may not delegate its responsibility with respect to its pre-approval policy to the company's management.

Tax services provided to clients by auditors have come under greater scrutiny with respect to auditor independence. Under ethics and independence rules by the PCAOB and approved by the SEC, an auditor may not provide certain tax services to executives of a company who are involved with the oversight of the company's financial statements as well as plan, market or opine in favor of certain tax transactions or provide tax services on a contingent basis.

In evaluating whether an auditor is independent of its audit client, companies and their potential auditors must consider, in addition to the detailed rules under Sarbanes-Oxley referred to above, the general standard of auditor independence set forth in SEC rules. Under those standards, an accountant will not qualify as "independent" if a reasonable investor, with knowledge of all relevant facts and circumstances, would conclude that the auditor is not capable of exercising objective and impartial judgment on all issues encompassed within the auditor's engagement.

Under Sarbanes-Oxley and SEC rules, the lead and concurring audit partners with responsibility for an issuer's audit must be rotated at least once every five years. The rules also preclude an audit firm from serving as outside auditor to an issuer where certain former employees of the audit firm work in any of certain specified financial or accounting positions at the company (in certain cases limited to the year following an individual's participation in the audit firm's audit of the client).

In response to liability concerns, auditors have on occasion attempted to allocate risks to clients through inclusion of various provisions in the engagement letter that seek to limit the auditor's liability with respect to (i) amount (e.g., the amount of fees paid), (ii) time period (e.g., no claims may be asserted after a fixed period of time) or (iii) the auditor's negligent conduct. The SEC has stated that such indemnity provisions would call into question an auditor's independence.

3. Corporate Responsibility

a. Audit Committee Independence

Sarbanes-Oxley directed the SEC to adopt rules that require that the listing standards of the national stock exchanges mandate that audit committees be comprised solely of "independent" members. Independence for these purposes means only those directors who do not receive any compensation from the issuer other than directors' fees and who are not "affiliated persons" (a term defined in SEC rules for this purpose) of the issuer or its subsidiaries.

Sarbanes-Oxley also amended the Exchange Act to mandate that audit committees:

- have direct responsibility for hiring and overseeing the work of the auditors;
- establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal controls or auditing matters, including procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters; and
- receive reports from the auditors regarding the company's critical accounting policies and material communications between the auditors and company management.

As provided for in the SEC rules, the listing standards provide for a cure period for companies not in compliance with the listing standards for audit committee member independence requirement.

b. Independence of Compensation Committee Members and of Compensation Consultants and Other Advisers

Section 952 of the Dodd-Frank Act added Section 10C to the Exchange Act which directed the SEC to establish enhanced independence requirements for all members of compensation committees. These requirements are in addition to existing independence standards under New York Stock Exchange (*NYSE*) and NASDAQ rules, and standards for "outside directors" under Section 162(m) of the Internal Revenue Code and for "non-employee directors" under Section 16 of the Exchange Act. Pursuant to Section 10C, the SEC issued a final rule (*Rule 10C-1*) directing the exchanges to prohibit the listing of any equity security of an issuer that does not have a compensation committee composed entirely of independent directors. Rule 10C-1 provides that, in determining the independence requirements for members of compensation committees, the exchanges must consider "relevant factors," which include, but are not limited to: (i) the source of compensation for each compensation committee member, including any consulting, advisory, or other compensatory fees paid by the company to the director and (ii) whether the compensation committee member is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company. Rule 10C-1 also grants the exchanges the discretion to exempt certain relationships from the requirement that all members of the compensation committee be independent, after taking into consideration the size of an issuer and any other relevant factors. See Section II.B.2(a) for a discussion of the rules that the exchanges have implemented pursuant to Rule 10C-1.

Section 10C provides an important exemption to the compensation committee independence requirement that does not apply to the audit committee independence requirement of Sarbanes-Oxley discussed above. The exemption is provided for a "controlled company," which is defined to include a company listed on a national securities exchange that holds an election for its board in which more than 50% of the voting power is held by a single person or group. Section 10C also requires that compensation committees have full authority to retain their own compensation consultants, legal counsel and other advisers. Similar to the current requirements for audit committees, the regulation provides for the compensation committee to have exclusive control over the appointment, compensation and oversight of any adviser that it hires, as well as reasonable access to funding for advisers. Compensation committees are not required to follow the advice of any advisers and retain full responsibility for exercising good judgment and fulfilling their responsibilities.

In exercising its authority to retain advisers and consultants, Section 10C and the rules promulgated thereunder require the compensation committee (other than the compensation committee of a controlled company) to consider six independence factors, including the size of the fees from the engagement versus total fees for any adviser or consultant; advisers' or consultants' internal conflict of interest policies and procedures; other services provided by the advisers or consultants to the public company; business and personal relationships of the advisers or consultants to the compensation committee members; share ownership by the adviser or consultant in the public company or its subsidiaries and affiliates; and business or personal relationships between any executive officer of the company and the adviser or consultant. Issuers must provide adequate funding so that the compensation committee can retain independent compensation consultants, counsel and other advisers. Both NYSE and NASDAQ have issued rules requiring the compensation committees of listed companies to consider these six factors in connection with retaining compensation consultants, legal counsel or other advisers. In addition to these six factors, the compensation committees of NYSE-listed companies must also consider any other factors that would be relevant to the adviser's independence from management.

Proxy or information statements for an annual meeting are required to disclose whether or not the compensation committee retained or obtained advice from a compensation consultant and whether any such services raised any conflict of interest and, if so, the nature of any conflict and the actions taken to address the conflict.

c. CEO and CFO Certifications

SEC rules adopted under Sarbanes-Oxley require that CEOs and CFOs of all issuers certify, to the best of their knowledge, the accuracy and completeness of each quarterly and annual report, that the financial statements in the report "fairly present" the company's financial condition, cash flows and results of operations, and that they are responsible for establishing and maintaining the issuer's disclosure controls and procedures and internal control over financial reporting. CEOs and CFOs are also required to state that they have evaluated the effectiveness of the issuer's disclosure controls and procedures and disclosed any change in the issuer's internal control over financial reporting that occurred during the most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting in such annual or quarterly report. The SEC staff has indicated that issuers should not change the language of this certification and that an altered certification may cause the annual and quarterly reports to be incomplete. This certificate is filed with the issuer's quarterly and annual reports and therefore subject to liability under the Exchange Act.

Sarbanes-Oxley also added another certification provision subject to federal criminal law under which the CEO and CFO are required to certify that quarterly and annual reports comply with securities laws and the information in such reports fairly presents the issuer's financial condition and results of operations. Because this certificate is furnished, and not filed, with the issuer's quarterly and annual reports, it is not subject to liability under the Exchange Act. This provision, however, specifies that a CEO or CFO who knowingly files a false certification may be fined up to $1 million and/or imprisoned for up to 10 years. A willful violation is punishable by a fine of up to $5 million and/or imprisonment of up to 20 years.

d. Disgorgement of Compensation and Stock Sale Profits by CEOs and CFOs upon Restatements Due to Misconduct

Sarbanes-Oxley requires forfeiture of certain bonuses and profits realized by the CEO and CFO of a company that is required to prepare an accounting restatement due to the issuer's "material noncompliance, as a result of misconduct, with any financial reporting requirement under the securities laws." Specifically, the CEO and CFO must reimburse to the issuer any bonus or other incentive- or equity-based compensation received, and any profit realized from the sale of the issuer's stock sold, during a specified recapture period. Reimbursement is required whether or not the CEO or CFO engaged in or knew of the misconduct. The "recapture period" is the 12-month period following "the first public issuance or filing with the SEC (whichever first occurs) of the financial document embodying such financial reporting requirement."

The courts have held that only the SEC may sue under this provision of Sarbanes-Oxley. The SEC has enforced this provision even in situations where the CEO or CFO was not accused of any misconduct. In July 2009, the SEC filed the first such action against a CEO, who was not charged with any violations of the securities laws (*SEC v. Jenkins*). In March 2011, the SEC settled an enforcement action that resulted in the recovery of incentive and stock sale payments to a CEO under Sarbanes-Oxley even though the CEO had not been charged with any misconduct. (*SEC v. McCarthy*). Further, in November 2012, the District Court for the Western District of Texas endorsed such an enforcement action by the SEC, thereby demonstrating growing judicial support of the SEC's right to seek to recoup bonus compensation as provided by Sarbanes-Oxley (*SEC v. Baker*).

Section 954 of the Dodd-Frank Act requires public companies to develop and implement "clawback" or compensation recovery policies with respect to incentive compensation, a provision which is much broader than the clawback provisions of Sarbanes-Oxley. Clawback policies will provide that if financial statements must be restated due to material non-compliance with financial reporting requirements under securities laws, then the company must recover from any current or former officer during a three-year look-back period any amount that exceeds the amount which would have been paid under the restated financial statements. This recovery right will exist regardless of whether there was misconduct. This requirement will be imposed by new exchange listing rules that are directed by the SEC. Once implemented, Section 954 will likely require public companies to amend any existing clawback policies. Although many companies have adopted new compensation clawback policies as a result of Section 954, the SEC has yet to promulgate regulations as required by the statute and there is no effective date for implementing such requirements.

e. Prohibition of Personal Loans to Executive Officers and Directors

Sarbanes-Oxley prohibits "personal loans" to executive officers and directors subject to certain narrow exceptions. In March 2013, the SEC for the first time issued interpretive guidance regarding this provision, confirming that an issuer that permits its directors and executive officers to participate in an equity-based incentive compensation (*EBIC*) program would not be deemed thereby to be extending credit or arranging for the extension of credit for purposes of Section 402 of Sarbanes-Oxley. The SEC further confirmed that an issuer would not be deemed to be extending or arranging for the extension of credit under such provision if it undertakes certain ministerial or administrative activities so as to enable its directors and executive officers to participate in an EBIC program.

This prohibition on personal loans applies to companies that have filed a registration statement even if it has not yet become effective. Companies must, therefore, comply with the prohibition before filing a registration statement. All personal loans made to directors or executive officers of a private company after July 30, 2002 will have to be repaid by the individual or forgiven by the company before the IPO registration statement is filed if the individual will hold one of those positions on or after the IPO registration statement filing date. Loans outstanding on July 30, 2002 are not subject to this prohibition provided the loans have not, thereafter, been renewed or materially modified.

f. Retirement Fund Blackout Periods

Sarbanes-Oxley and SEC Regulation BTR prohibit directors and executive officers from purchasing or selling the issuer's equity securities during certain "blackout periods" imposed on tax-qualified defined contribution plans, such as Section 401(k) plans. In general, a "blackout period" is defined under Sarbanes-Oxley as a temporary suspension of trading in company stock for more than three days applicable to 50% or more of the participants in a plan. The prohibition on purchases or sales is "with respect to such equity security if such director or officer acquires such equity security in connection with his or her service or employment as a director or executive officer." SEC and U.S. Labor Department rules have been adopted to clarify and implement this provision and provide for recapture of deemed profits from any trading that may occur in violation of this provision similar to that provided for violation of short-swing profit rules of Section 16 of the Exchange Act that have been applicable to executive officers and directors since the 1930s and which were also amended by Sarbanes-Oxley, as discussed below.

4. Enhanced Disclosure

a. Off-Balance Sheet Transactions, Contractual Obligations and Non-GAAP Financial Information

Sarbanes-Oxley required the adoption by the SEC of rules regarding enhanced financial information disclosures in periodic reports filed with the SEC, including information on off-balance sheet transactions, aggregated and tabular information about contractual obligations and reconciliation of any "non-GAAP financial measures" (so called "pro forma" or other measures that are calculated by adding or subtracting amounts, such as extraordinary "one-time" charges, to or from measures required under generally accepted accounting principles (*GAAP*)) to the most directly comparable GAAP measures. The SEC rules also apply to any public disclosures containing material information that use non-GAAP financial measures, such as press releases.

Sarbanes-Oxley also requires that each periodic report containing financial statements filed with the SEC must reflect all material correcting adjustments identified by the auditor.

b. "Real-Time" Disclosure

Sarbanes-Oxley requires issuers to disclose "on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer" as the SEC determines is necessary or useful. Since passage of Sarbanes-Oxley, the SEC has revised the current reporting form, Form 8-K, to include many additional reportable events and accelerated the filing deadline to four business days for most reportable events. The reportable events added to Form 8-K since Sarbanes-Oxley include:

- earnings releases and any other published material relating to a completed fiscal period;
- amendments to or waivers of a company's code of ethics for executive officers;
- a determination by the company or its auditor that security holders should no longer rely upon the company's financial statements;
- the entry into, material amendments to, and termination of material contracts;
- a decision to record a material write-off, restructuring charge or impairment charge;
- any new material direct or contingent financial obligations and the triggering of any provision included in such arrangement that would accelerate or increase the company's liability thereunder;
- any event which might lead to a delisting of the company's equity securities;
- amendments to a company's articles of incorporation or bylaws;
- unregistered issuances of the company's equity securities above a certain threshold;
- material modifications to the rights of security holders;
- the appointment and departure of any director or principal officer for any reason;
- material changes to the compensation arrangements of certain executive officers; and
- the voting results of shareholder meeting proposals.

Current reporting on Form 8-K is discussed in greater detail in Section VIII.A.1(e).

c. Accelerated Insider Transaction Reporting under Section 16 of the Exchange Act

Under Sarbanes-Oxley and related SEC rules, officers, directors and greater than 10% shareholders of public companies who are subject to the short-swing reporting and profit recapture provisions of Section 16 of the Exchange Act are required to report nearly all their transactions in company stock and related derivative securities electronically within two business days of any such transaction. Many public companies purchase EDGAR (the SEC's electronic filing system) filing software or subscribe to certain other proprietary filing services in order to assist their insiders in meeting the two-business day deadline. Section 16 is discussed in greater detail in Section VIII.G.

d. Audit Committee Financial Expert

Listed companies must disclose in their annual report whether—and if not, why not—they have at least one "audit committee financial expert," as such term is defined by SEC rules adopted pursuant to specified guidelines set forth in Sarbanes-Oxley. If a company has an "audit committee financial expert," such individual must be named in the company's annual report filed with the SEC.

e. Code of Ethics for CEO and Senior Financial Officers

Under SEC rules adopted pursuant to Sarbanes-Oxley, listed companies must disclose whether—and if not, why not—they have a code of ethics for the CEO and senior financial officers. Additionally, as mentioned above, U.S. companies must promptly disclose any subsequent waivers or changes to this code on a Form 8-K or, if they have indicated an intent to do so in their periodic reports, on their website. A sample code of ethics compliant with SEC rules adopted pursuant to Sarbanes-Oxley is included as **Exhibit A**, although many companies blend such codes into lengthier codes of ethics and standards of business conduct such as those required for NYSE-listed companies.

f. SEC Reviews of Periodic Filings

Sarbanes-Oxley requires the SEC to review the periodic reports of each issuer at least once every three years and provides criteria for the SEC to consider in prioritizing reviews, including, among others, the occurrence of a restatement, volatility in an issuer's stock price, size of market capitalization and emerging companies with disparities in price to earnings ratios.

5. Analyst Conflicts of Interest

As required under Sarbanes-Oxley, the SEC adopted rules designed to enhance protections against conflicts arising between the provision of securities research and investment banking. SEC Regulation Analyst Certification (*Regulation AC*) requires that brokers, dealers and associated persons that produce research reports include in those reports a statement certifying that the views expressed in the report accurately reflect the analyst's personal views about the subject securities and a certification as to whether any part of the analyst's compensation was, is, or will be directly or indirectly related to the specific recommendations or views contained in the research report. As discussed below, the JOBS Act, however, includes provisions that free analysts from certain restrictions regarding EGCs.

6. Expanded Criminal Penalties; Non-Discharge of Securities Claim Liabilities in Bankruptcy and Whistleblower Provisions

Sarbanes-Oxley provides for enhanced criminal penalties for a broad array of white-collar crimes and a lengthening in the statute of limitations for securities fraud claims.

Sarbanes-Oxley makes it a crime for an officer or director of an issuer to fraudulently influence, coerce, manipulate or mislead an independent auditor in its performance of an audit. The sample code of ethics included as Exhibit A contains an additional provision reinforcing this important proscription. Sarbanes-Oxley also imposes criminal penalties for the destruction, alteration or falsification of documents in federal investigations and bankruptcy proceedings, extends the maximum prison term to 25 years for securities fraud, enhances white-collar crime penalties and imposes corporate fraud accountability.

Under Sarbanes-Oxley, debts arising from claims that result from violations of securities law cannot be discharged in bankruptcy.

In addition, Sarbanes-Oxley provides for a temporary freeze on extraordinary payments to directors, officers and employees of companies under investigation by the SEC and makes it a crime to retaliate against corporate whistleblowers. What qualifies as “extraordinary” is examined based on the facts and circumstances surrounding the payment. As part of this examination, courts may take into account whether such a payment is customary in an entity's line of business, as well as the purpose of and the size of the payment.

The statute of limitations for private rights of action with respect to securities fraud was extended to the earlier of two years after the discovery of facts constituting the violation or five years after the occurrence of the violation.

7. Professional Responsibility Standards for Attorneys

Sarbanes-Oxley required the SEC to establish minimum standards of professional conduct for attorneys appearing and practicing before the SEC in any way in the representation of issuers. The rule adopted by the SEC requires attorneys:

- to report evidence of a material violation of securities laws or a material breach of fiduciary duty or a similar violation by the company or any agent thereof, to the chief legal officer (CLO) or to both the CLO and the CEO of the company (or the equivalents thereof); and
- if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the full board of directors.

The adopted rule permits (but does not require) an attorney to reveal to the SEC the information reported to the company, without the company's consent, to the extent the attorney reasonably believes that it is necessary (i) to prevent substantial injury to the financial or property interests of the company or its investors, (ii) to prevent the company from committing perjury or perpetrating fraud on the SEC, or (iii) to rectify the consequences of a material violation that caused, or may cause, substantial injury to the financial or property interests of the company or its investors. The SEC takes the position that its rule preempts contrary state laws of professional responsibility. See Section VIII.J.11.

8. Application to Non-U.S. Companies

Sarbanes-Oxley applies to any issuer "the securities of which are registered under section 12 of that Act … or that is required to file reports under section 15(d)." In practical terms, this includes any company that is required by the securities laws to file periodic reports with the SEC. Sarbanes-Oxley makes no distinction in this regard between U.S. and non-U.S. companies. Therefore, except to the extent that the SEC specifically exempts or accommodates foreign issuers, the provisions of Sarbanes-Oxley, including, for example, the prohibition on loans to executive officers and directors, apply to non-U.S. companies. See Chapter IX for further discussion of the application of Sarbanes-Oxley to "foreign private issuers."

D. RELIEF FOR "EMERGING GROWTH COMPANIES" PROVIDED BY THE JOBS ACT

On April 5, 2012, President Obama signed the Jumpstart Our Business Startups Act *(JOBS Act)*. The JOBS Act scales back a number of provisions of Sarbanes-Oxley, the Dodd-Frank Act, and other federal securities laws and regulations as they apply to "emerging growth companies," or EGCs, which includes all companies conducting an IPO other than those with $1 billion or more in revenues in their most recently completed fiscal year. Congress intended the JOBS Act to provide a so-called "on-ramp" for IPO issuers in order to make the IPO process less burdensome, ease their transition to public ownership and improve their access to capital.

It has been widely reported that members of the U.S. Congress from both sides of the aisle were frustrated with what they saw as the failure of the SEC to relax its rules to alleviate the impact of certain regulations on new and smaller issuers, particularly in light of the economic downturn and the weak IPO market since the economic crisis of 2008-2009. As a consequence, the JOBS Act is unusual in its implementation method. With few exceptions, the EGC provisions were self-executing and effective immediately; not to be accomplished through mandated SEC rulemaking but, rather, direct amendments to the applicable securities laws that have the effect of denying the SEC the power to make contrary rules.

The JOBS Act includes two general types of provisions related to EGCs: those intended to facilitate the IPO process itself and those intended to make the initial years of life as a public company less burdensome.

1. Emerging Growth Companies

An "emerging growth company" is any company that had total gross revenues of less than $1 billion during its most recently completed fiscal year. That amount is to be adjusted for inflation every five years. An issuer's EGC status ends upon the earliest of (1) the last day of the fiscal year in which it had total gross revenues over $1 billion, also as adjusted for inflation, (2) the last day of the fiscal year following the fifth anniversary of its IPO, (3) the date on which it has issued more than $1 billion (not inflation adjusted) in non-convertible debt in the previous three-year period, or (4) the date on which the issuer is deemed a "large accelerated filer," which generally means that it has $700 million or more of aggregate worldwide market value. For IPOs completed early in an issuer's fiscal year, the fifth-year anniversary provision could mean a reprieve of nearly six years.

The testing of EGC status is to be made at the end of the issuer's fiscal year, except with respect to the issuance of $1 billion of non-convertible debt in a three-year period, in which case termination would be immediate. Both domestic and non-U.S. issuers may qualify as an EGC.

The JOBS Act's EGC provision is directly targeted at new registrants and is intended to encourage IPOs. Companies that first sold common equity securities pursuant to a Securities Act registration statement on or before December 8, 2011, the date the JOBS Act was first introduced in the House, do not qualify as EGCs.

2. IPO Process Provisions

a. Financial Information

In connection with its IPO, an EGC must now provide only two years of audited financial statements, rather than the traditional three years, and need not provide selected financial data for periods prior to the earliest audited period presented. For non-EGCs, five years of selected financial data are required. In connection with other registration statements and periodic and other reports under the Securities Act and the Exchange Act, an EGC need not provide selected financial data for periods prior to the earliest audited period presented in connection with its IPO. It is interesting to note that the requirements for three years of audited financial statements and five years of selected financial data still applicable to non-EGCs far predate Sarbanes-Oxley.

The provision requiring just two years of financial statements specifically applies only to the EGC's IPO registration statement, while the provision concerning selected financial data also applies to "any other" registration statement. Addressing this inconsistency, the SEC Staff issued guidance that it will not object if (1) in a registration statement subsequent to an IPO, an EGC does not present audited financial statements for any period prior to the earliest audited period presented in connection with its IPO and (2) in connection with an IPO registration statement, an issuer presenting only two years of audited financial statements includes only two years of selected financial data.

Although auditing one less year of financial statements can be a significant savings, most EGCs are not taking advantage of the opportunity. Approximately two-thirds are providing three years.

b. Test the Waters

Section 5 of the Securities Act has been revised to allow EGCs and anyone acting on their behalf (including underwriters) to have oral or written communications with institutional accredited investors and "qualified institutional buyers," known as QIBs, before or after filing a registration statement.

c. Confidential Submissions

EGCs may now, in connection with an IPO but not any subsequent offering, submit draft registration statements, amendments and other documents to the SEC on a confidential basis for review. In order to ensure eventual full transparency, however, the JOBS Act requires that the confidential registration statement and all amendments must be filed publicly with the SEC not later than 21 days before the date on which the EGC first conducts a "road show" (which is broadly defined). These confidential submissions also will not be subject to disclosure under the Freedom of Information Act.

This provision has made it more attractive for a company to pursue an IPO. In the event of a delayed or unsuccessful offering, the otherwise confidential information contained in its registration statement is not made available to its competitors, customers, suppliers, employees and other parties. This "fish bowl" concern has always been a meaningful disincentive to pursuing an IPO because of the high percentage of filings that do not result in a successful sale.

It should also be noted that, for EGCs, this provision effectively reverses the SEC's recently imposed limits on the ability of foreign private issuers to submit draft filings on a confidential basis (see Section IX.B.7).

d. Research and Analysts

The JOBS Act makes it easier for investment banks to assist in preparing and marketing the offerings of EGCs. The JOBS Act prohibits the SEC and national securities exchanges from adopting or maintaining any rule or regulation prohibiting any broker, dealer or exchange member from publishing or distributing any research report or making a public appearance with respect to an EGC during any prescribed period after the EGC's IPO or prior to the expiration of an underwriters' lockup agreement. The elimination of these so called "quiet-period" restrictions after an offering is a substantial change.

Even more significantly, the JOBS Act amends Section 2(a)(3) of the Securities Act to provide that, in connection with any public offering of common stock by an EGC, not just its IPO, a research report — even one by a broker-dealer participating in the offering — about an EGC that has filed or intends to file a Securities Act registration statement does not constitute an offer of the security. The use of research reports before completion of an IPO has always been prohibited, initially by the requirement that the only permissible offering document was a statutory prospectus and later by FINRA rules. This provision of the JOBS Act allows, for the first time since the Securities Act was adopted, the publication of investment banker research reports even before the consummation of an offering, including an IPO, and even if directly used in marketing the offering.

The use of research reports as part of an IPO marketing process is a dramatic change. However, there are significant reasons why it is not becoming common practice. Certain liability provisions of the securities laws still apply to those underwriter-created documents and it is doubtful that underwriters will choose to expose themselves to that risk. If research reports are used to market a particular offering, the underwriting agreement will likely be revised (in addition to certain changes to bank's standard forms relating to EGCs and other JOBS Act provisions) to deal with liability, indemnification, issuer review and approval rights, and other issues that such early research reports would raise.

The JOBS Act also prohibits the SEC and any national securities association from adopting or maintaining any rule that would, in connection with the IPO of an EGC (1) restrict, based on functional role, the broker-dealer personnel who may arrange meetings between analysts and accredited investors, or (2) restrict a securities analyst from participating in communications with management of an EGC so long as non-analyst broker-dealer personnel are also participating. Investment bankers can now directly arrange for analysts to meet with accredited investors about EGC IPOs and analysts can participate in meetings with management to prepare the offering documents and presentations to be used in connection with the offering.

These provisions that free analysts from certain restrictions with respect to EGCs have been criticized broadly. However, it is important to note that there are still many other substantial restrictions in place designed to ensure the integrity of research reports. These include Regulation AC, adopted pursuant to Sarbanes-Oxley, which requires broker-dealers to include in a research report a certification by the research analyst that the report accurately reflects the analyst's personal views and to disclose whether or not the analyst received any compensation or other payments in connection with his or her specific recommendations or views. They also include stock exchange rules that, among other things, prohibit pre-publication review of research reports by investment banking personnel, solicitation of investment banking business by analysts, and influence by investment banking personnel on analyst compensation or retaliation against an analyst as a result of an unfavorable research report.

Finally, pursuant to the 2003 Global Research Analyst Settlement among the SEC and 12 investment banks, the banks agreed, among other things, to court-ordered restrictions on joint communications with clients by investment banking personnel and analysts. Such communications must be chaperoned by compliance or legal personnel and may only be for the purpose of due diligence. Unless the court grants relief from these restrictions or they are otherwise determined to be no longer in force, the investment banks party to this settlement will not be able to take advantage of the JOBS Act's relief in this area. To date, it appears that even investment banks that are not party to the settlement agreement are generally not taking advantage of these provisions.

3. Provisions to Ease Transition to Public Ownership

a. Internal Controls Audit

Perhaps the most widely-used accomodation, and one that can significantly reduce issuer compliance costs, is the amendment of Section 404(b) of Sarbanes-Oxley to eliminate, for EGCs, the requirement to obtain an internal controls attestation from their auditors. Since the adoption of Sarbanes-Oxley, the expense associated with this requirement has made it one of the most criticized provisions of Sarbanes-Oxley and so it was not surprising that scaling back this requirement was a key objective of Congress.

b. Accounting Standards

The JOBS Act also grants relief from requirements that are not yet in place. The JOBS Act provides that EGCs will not be required to comply with any new or revised financial accounting standard (i.e., any update issued by the Financial Accounting Standards Board to its Accounting Standards Codification after April 5, 2012) until the date on which companies that are not "issuers" under Sarbanes-Oxley must so comply.

This means that any new accounting standards that apply only to SEC-registered companies will not apply to EGCs and that any phase-in of accounting standards provided for private companies will also be available to EGCs. However, an EGC is required to make a decision whether or not to take advantage of this relief when it is first required to file a registration statement or report under the Exchange Act and must notify the SEC of its decision at that time. The SEC Staff has issued guidance stating that a choice at the time of initial filing to take advantage of this transition period for complying with new or revised accounting standards can later be changed by an EGC, so long as it complies with the requirements in the JOBS Act and prominently discloses in the first periodic report or registration statement following the company's decision, but Staff guidance also states that "any decision to opt out of the extended transition period … for complying with new or revised accounting standards is irrevocable." Whatever choice then applies, the JOBS Act provides that EGCs cannot pick and choose among standards with which to comply. Most EGCs seem to be making a choice to opt out of this relief with only about 20% taking advantage of it.

c. Disclosure of Executive Compensation

EGCs are exempted from the provisions of Section 953 of the Dodd-Frank Act which require additional disclosure about certain compensation matters, including pay-for-performance and the ratio between the CEO's total compensation and the median total compensation of all other company employees. EGCs are also exempt from the detailed Compensation Discussion and Analysis disclosure requirements and permitted to report scaled down executive compensation under the rules that apply to "smaller reporting companies" (i.e., companies with a public float of less than $75 million or, if the company cannot calculate its public float, revenues of less than $50 million in the last fiscal year). The overwhelming majority of EGCs appear to be taking advantage of this relief

d. Shareholder Votes on Pay

The JOBS Act amends Section 14A of the Exchange Act to provide that EGCs need not comply with the requirements to provide shareholders with a "say-on-pay," "say-on-frequency" or "say-on-golden parachutes." Those latter provisions were mandated by the Dodd-Frank Act and adopted by the SEC in February of 2011.

When an issuer ceases to be an EGC, it will still be afforded an exemption from the "say-on-pay" provision that will last until the later of three years after its IPO or one year after it ceases to be an EGC.

e. Other Auditing Provisions

The JOBS Act exempts EGCs from provisions of any future PCAOB regulations that might require mandatory auditor rotation or a supplement to the auditor's report in which the auditor would be required to provide a so-called "Auditor Discussion and Analysis" akin to "Management's Discussion and Analysis" and "Compensation Discussion and Analysis." In August 2013, the PCAOB proposed two such auditing standards intended to (1) increase the informational value, usefulness and relevance of the auditor's report and (2) expand the auditor's responsibilities for information outside the financial statements. The PCAOB release indicates that the proposed standards and amendments would be effective for audits of financial statements for fiscal years beginning on or after December 15, 2015; however, the effective date will depend on the timing of approval by the PCAOB and the SEC of any final standard and related amendments.

In addition, any future rules adopted by the PCAOB will not apply to an EGC unless the SEC determines the application is "necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition and capital formation."

4. Opt-In Regime

An EGC can choose to forego the benefit of any exemption provided by the JOBS Act and, instead, comply with the requirements applicable to non-EGCs, subject to the provisions described above regarding the relief relating to new or revised financial accounting standards.

E. CAPITAL-RAISING ALTERNATIVES FOR PRIVATE COMPANIES POST-JOBS ACT

While the ability to raise capital in the public markets is a main attraction for private companies to go public, private companies are still able to raise capital from investors in non-public offerings exempt from registration with the SEC and in offshore offerings. These alternative capital-raising techniques vary widely in scope, ranging from small Regulation A offerings to private placements, Rule 144A offerings and Regulation S offerings with no limits on the amount of capital that can be raised. The JOBS Act also created additional capital-raising options for private companies.

1. "Crowdfunding" Transactions

Crowdfunding has been used in the last few years to fund various projects such as films and other works of art, software and inventions using the internet and social media. However, in these situations, the "funder" does not obtain any ownership interest and does not expect any financial return other than, for example, a sample of a product or tickets to or crediting on a film. Without registering an offering with the SEC or an exemption from registration requirements, using crowdfunding to issue securities would be illegal. In response to promoters of crowdfunding as a way of raising capital for small businesses, Congress created Section 4(a)(6) of the Securities Act, which is a new registration exemption for "crowdfunding" (an acronym for Title III of the JOBS Act, which is referred to as the "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012," or the "CROWDFUND Act"). On October 23, 2013, the SEC issued proposed rules and forms relating to Section 4(a)(6) and the new Regulation Crowdfunding, which will form the framework of Section 4(a)(6) and set forth specific rules relating to Section 4(a)(6) offerings. Until the SEC implements the final rules relating to Section 4(a)(6), issuers are not permitted to conduct offerings in reliance on Section 4(a)(6). The details set forth below relating to Section 4(a)(6) and Regulation Crowdfunding describe the rules as proposed by the SEC and may be different in the final versions of the SEC rules. Section 4(a)(6) will permit U.S. companies not registered under the Exchange Act to raise up to $1 million under Section 4(a)(6) within any 12-month period with greatly reduced legal and other costs and without needing to limit offers and sales to accredited investors. An issuer will be limited to seeking a maximum investment per investor of:

- in the event that the investor has an annual income and a net worth of less than $100,000, the greater of $2,000, 5% of the investor's annual income and 5% of the investor's net worth; and
- in the event that the investor has an annual income or a net worth of $100,000 or more, 10% of the investor's annual income or net worth up to a maximum aggregate amount of $100,000.

Issuers relying on Section 4(a)(6) must conduct the offering exclusively through the Internet platform of one registered broker or one registered "funding portal." In addition, issuers must file certain information relating to the Section 4(a)(6) offering on Form C with the SEC and provide such information to investors. Under the SEC's proposed rules, Form C will require the disclosure of information relating to, among other things, the issuer and its affiliates, the issuer's business plans, the use of proceeds, the rights of investors under the offering (including their right to cancel their purchase at any time up to 48 hours prior to a deadline disclosed in the offering documents), the offering price, the securities being offered, the intermediary conducting the offering and risk factors. Issuers will also be required to provide a description of their financial condition, including a narrative discussion of financial condition as well as different levels of financial information based on the proposed size of the offering. All issuers offering securities under Section 4(a)(6) will be required to provide financial statements prepared in accordance with U.S. GAAP for their two most recently completed fiscal years and their income tax returns for their most recently completed fiscal year. The issuer's principal executive officer will be required to certify that the financial statements and income tax returns are true and complete. Issuers conducting offerings of between $100,000 and $500,000 must also have their financial statements reviewed by an independent public accountant in accordance with AICPA standards and provide the accountant's review report. Issuers conducting offerings over $500,000 must have their financial statements audited by an independent auditor in accordance with AICPA or PCAOB standards and provide the audit report.

Issuers will be required (i) to amend their Form C by filing a Form C-A in connection with any material change in the information previously provided to investors and (ii) to file updates on Form C-U relating to the progress of the offering and in connection with the satisfaction of certain thresholds relating to the targeted offering amount. Issuers and certain of their affiliates and intermediaries will be liable to investors for material misstatements in and omissions from written and oral information provided in connection with a Section 4(a)(6) offering.

All advertising conducted in connection with a Section 4(a)(6) offering will be subject to information limitations similar to those imposed by Rule 134 under the Securities Act (i.e., the name of the intermediary, the terms of the offering and certain information relating to the issuer). Issuers will also be permitted to communicate with investors via the intermediary's Internet platform. Issuers relying on Section 4(a)(6) will be subject to "bad actor" disqualification rules similar to those implemented in connection with Rule 506 offerings. See Section VII.C.1.

Securities sold pursuant to Section 4(a)(6) will be subject to a one-year holding period, unless the holder transfers such securities to the issuer, an accredited investor, pursuant to an effective registration statement or, in certain circumstances, to his or her family members.

Issuers that sell securities in reliance on Section 4(a)(6) will be required to file an annual report on Form C-AR with the SEC within 120 days of the end of each fiscal year. The disclosure requirements of Form C-AR will be similar to the disclosure requirements required by Form C, including the scaled financial statement requirements.

In connection with its proposed rules relating to Section 4(a)(6) offerings, the SEC has proposed the enactment of Rule 12g-6 under the Exchange Act, which would exempt holders of securities issued pursuant to Section 4(a)(6) from the number of securityholders of an issuer counted for purposes of determining whether such issuer must register with the SEC under Section 12(g) of the Exchange Act and thereby become subject to the SEC's periodic reporting requirements.

2. Small Offering Exemptions

a. Regulation A *(currently effective)*

Regulation A under the Securities Act exempts from registration, offerings not exceeding $5 million in any 12-month period. Regulation A offerings share many characteristics with registered offerings, including: (1) the requirement to provide purchasers with a prospectus, which must also be filed with the SEC, and (2) the securities can be offered publicly and are not "restricted," meaning they are freely tradeable in the secondary market after the offering. However, unlike crowdfunding transactions, securities issued in Regulation A offerings must comply with state blue sky laws and holders will count towards the 2,000 shareholder trigger for public company reporting.

The principal advantages of Regulation A offerings, as opposed to full registration, are: (1) the financial statements do not need to be audited and (2) issuers do not automatically subject themselves to periodic reporting obligations under the Exchange Act absent exceeding the new 2,000 shareholder threshold described above.

b. Regulation "A+" *(effectiveness pending SEC final rulemaking)*

The JOBS Act required the SEC to amend Regulation A or adopt a new, similar regulation that exempts certain securities offerings of up to $50 million in any 12 month period from registration. In December 2013, the SEC proposed rules to amend Regulation A to establish two tiers of exempt offerings. Tier 1 remains the traditional Regulation A exemption described above. Tier 2 provides an exemption for offerings of up to $50 million in any 12-month period, including no more than $15 million in securities sold on behalf of selling stockholders. Tier 2 is informally referred to as Regulation A+, since it is intended to be an improved version of the pre-JOBS Act Regulation A (Tier 1). Unlike the Tier 1 exemption, issuers relying on Tier 2 will be required to file audited annual financial statements with the SEC and will be subject to limited ongoing SEC reporting for so long as the stock is held by at least 300 record holders. Notably, the proposed rules preempt state blue sky laws for Tier 2 (Regulation A+) offerings by defining a "qualified purchaser" as any offeree or purchaser in a Tier 2 offering. By removing Tier 2 offerings from state law review, the proposed rules attempt to eliminate the most significant impediment associated with Tier 1 offerings.

The SEC is expected to issue final rulemaking on Regulation A+ in the spring or summer of 2014.

3. Private Placements and Offshore Offerings

Issuers can also raise capital in private placements that exempt specific transactions in securities from registration under the Securities Act and in offshore offerings. While the SEC has established a variety of registration exemptions, the ones most commonly used by issuers are the private placement and offshore offering exemptions provided by:

- *Section 4(a)(2) of the Securities Act, which exempts from registration offers and sales by the issuer that do not involve a public offering.* While Section 4(a)(2) does not limit the amount of capital an issuer can raise, it does require: (1) the securities can only be sold to sophisticated investors; (2) a limited number of potential investors; (3) prohibition on general solicitation and advertising; (4) transfer restrictions on the securities; (5) investors to buy the securities for their own account; and (6) not be offered with other similar offerings.
- *Regulation D of the Securities Act, a set of three regulatory exemptions from the Securities Act registration requirements, each with its own offeree qualifications and limitations.* The most prominent exemption is Rule 506 which, like Section 4(a)(2), does not limit the amount of capital an issuer can raise in a private placement, and it permits an unlimited number of accredited investors and up to 35 non-accredited investors to participate in the offering. The SEC adopted amendments to Rule 506 of Regulation D effective as of September 23, 2013 that eliminate the prohibitions on general solicitation and advertising under Rule 506 for offerings in which all purchasers are accredited investors.
- *Regulation S of the Securities Act, which provides an exemption from registration for offshore securities transactions.* Regulation S requires that the offer and sale be made in an "offshore transaction" and that no "directed selling efforts" are made in the U.S. Regulation S is routinely used concurrently with private placements of debt and equity securities made in the U.S. under registration exemptions. Regulation S transactions are discussed in greater detail in Section IX.F.
- *Rule 144A under the Securities Act, which provides a regulatory safe harbor for resales of unregistered securities to certain buyers in the U.S.* While Rule 144A is only a resale safe harbor not available to issuers, the term "Rule 144A offering" is often used to refer to offerings that typically rely on

the following two steps: (1) an issuer private placement of securities to one or more financial intermediaries under Section 4(a)(2) or Regulation D, followed by (2) resales of those securities by the financial intermediaries to QIBs under Rule 144A. Rule 144A transactions in the context of exchange offers are discussed in Section VII.D. Pursuant to the JOBS Act, the SEC revised Rule 144A to permit securities to be offered pursuant to Rule 144A to persons other than QIBs and to permit general solicitation and general advertising under Rule 144A as long as such securities are only sold to persons that the issuer and any person acting on behalf of the issuer reasonably believe to be QIBs. However, issuers that are not registered under the Exchange Act may still be limited by state "blue sky" laws from using general solicitation and general advertising in connection with a Rule 144A offering.

These private placements and offshore offering exemptions are discussed in greater detail in Sections II.F and VII.C.

F. EXPENSES OF GOING PUBLIC

1. Underwriters Compensation

An IPO involves substantial expense. First, the underwriters customarily receive a discount (the "spread") between the price at which they buy stock from the issuer or selling shareholders and the price at which the underwriters resell the same stock to the public. The amount of the spread is negotiated based on the size and risk of the offering, as well as other factors. In a typical firm commitment offering, the spread usually ranges from 3.5%-7% depending upon the size and nature (i.e., a venture capital backed emerging technology company versus a more mature company with a private equity sponsor) of the offering, but more frequently closer to 7% of the public offering price of the stock. In a best efforts offering (which are far less common), there is no spread because the underwriters do not take title to the shares. Instead, a commission is paid by the company to the underwriters for the shares sold.

In addition to the spread or commission, underwriters may receive other compensation, including warrants, as partial compensation for an offering. Additionally, underwriters compensation may include reimbursement of expenses, equity participation in the company, rights of first refusal on future underwritings, directorships and consulting or financial advisory arrangements. FINRA reviews the reasonableness of the underwriters compensation, taken as a whole. Under amended rules, FINRA has created a non-exclusive objective list of items of value that are considered underwriters compensation as well as a list of items that are not deemed to be underwriters compensation. The amended rules state that cash compensation received for acting as placement agent for a private placement or for providing a loan or credit facility shall not be considered an item of value, and securities of the issuer purchased in certain private placements by an underwriter, or received as compensation by an underwriter for a loan or credit facility, prior to the filing date of the public offering shall be excluded from underwriters compensation. If the underwriters compensation exceeds what FINRA considers fair and reasonable, the underwriters will not be permitted to go forward with the offering.

2. Legal and Accounting Fees

The lawyers' and accountants' fees depend on the amount of work involved in conducting necessary corporate housecleaning, reviewing corporate documents, preparing the registration statement and reviewing the financial statements and other financial data. Depending on the company's state of incorporation, companies may be required to engage separate "local counsel" in addition to the company's primary securities lawyers. The underwriters will also engage a law firm to protect the underwriters' interests. Most underwriting engagement letters provide that the underwriters will pay the legal fees of their lawyers.

3. Printing Costs and Filing Fees

Printing expenses principally depend upon the extent and frequency of prospectus revisions during preparatory meetings or in response to SEC comments, and upon the size and number of printed prospectuses needed for circulation by the underwriters.

Other expenses, such as the SEC and FINRA fees, will primarily depend on the dollar amount of the offering. The SEC filing fee (as of October 1, 2013) is $128.80 per $1 million of the maximum aggregate price at which the securities are proposed to be offered, and the FINRA fee is $500 plus 0.015% of the proposed maximum aggregate offering price of the securities (with a maximum fee of $225,500). The SEC's Electronic Data Gathering, Analysis and Retrieval System (*EDGAR*) will not accept the registration statement filing unless the filing fee has been paid. As a result, the SEC filing fee is often paid the day before the filing of the initial registration statement in order to guarantee that the registration statement will be accepted. The FINRA fee must be paid no later than one business day after the filing of the registration statement with the SEC. Stock exchange listing fees are based upon the stock exchange and the number of shares being issued in the IPO. While SEC and FINRA fees are due to be paid at the time the registration statement is filed with the SEC, stock exchange listing fees are not due until the SEC has declared the registration statement effective and the shares have been admitted for trading on the applicable exchange.

4. Sample Accounting of Costs

Offering expenses are highly dependent not only on the size and complexity of the offering but also on the quality and efficiency of the company's counsel, underwriters' counsel and accountants. Often the issuer may already have incurred the cost of obtaining audited financial statements, which tends to reduce incremental expenses. The following estimated company expenses are based on an IPO of 10 million shares raising $150 million in gross proceeds.

	Amount	Percentage of Gross Proceeds
Total gross proceeds	$150,000,000	100.00%
Underwriters' spread	10,500,000	7.00%
	$139,500,000	93.00%
SEC registration fee	19,320	0.01%
FINRA filing fee	23,000	0.02%
NASDAQ Global Market listing fee*	125,000	0.08%
Printing and engraving expenses	500,000	0.33%
Legal fees and expenses	1,250,000	0.83%
Accounting fees and expenses	1,250,000	0.83%
Transfer agent and registrar fees	25,000	0.02%
Miscellaneous (including road show)	250,000	0.17%
Total	$ 3,442,320	2.29%
Net proceeds to company	$136,057,680	90.71%

* It is possible to reduce these fees by listing on NASDAQ's small-cap market known as the "NASDAQ Capital Market." Initial listing fees on the NASDAQ Capital Market for this listing would be $50,000.

The foregoing figures do not include any allowance for the salaries and expenses of the company's employees, some of whom may work almost exclusively on the IPO for a period of months, nor do they include the additional expenses (principally legal and accounting fees) that the company will incur in the future in order to comply with its new responsibilities as a public company (See Chapter VIII.) The fee estimates set forth above would be typical for a "plain vanilla" IPO, assuming the company is relatively "IPO ready." If a company has completed a number of acquisitions or divestitures in the months or years preceding an IPO, operates in many jurisdictions, including foreign jurisdictions, has an unusually complex business, or requires significant pre-IPO corporate housekeeping, costs can be considerably more for professional fees and related expenses.

II. PREPARING TO GO PUBLIC

A. FAVORABLE FINANCIAL TRENDS AND OTHER FACTORS

Determining the appropriate time for an IPO is a complex decision, usually made by a company after obtaining a great deal of input from potential underwriters, lawyers, accountants and others. First and foremost, a company planning for an IPO should have a favorable financial history and outlook. IPO investors like to see a pattern of historical growth in revenues, earnings or cash flow and enough cash on hand to provide some assurance that the company has a reasonable chance of successfully executing its strategy—and most importantly, realizing its growth projections—after the IPO. While offerings of technology, life sciences and other emerging industry companies have from time to time deviated from the historical threshold for revenues and earnings considered necessary to attract underwriters' and market interest, underwriters generally look to more conventional requirements.

B. CORPORATE HOUSECLEANING

Evaluating whether a company is well organized from a legal and business perspective is critical to deciding when a company is ready to commence the IPO, particularly in light of the need for a company to have the ability to comply with the extensive requirements of Sarbanes-Oxley. This evaluation involves reviewing the corporate organization, capital structure, corporate governance structure and qualifications of the directors and management, accounting practices, organizational documents (e.g., certificate or articles of incorporation and by-laws), anti-takeover strategies and existing contractual arrangements.

1. Corporate Organization, Size and Capital Structure

Ideally, the corporate organization should be easy for an investor to understand. Complex structures tend to create difficulties in valuing a company's stock and may so confuse investors that the underwriters have difficulty selling the offering. However, if a compelling tax or business reason exists for a more complex structure, and that reason can be clearly explained, a more sophisticated structure may be appropriate.

Determining whether a company is substantial enough to go public has traditionally been based on an analysis of its revenue and earnings. While underwriters' standards vary depending on a company's management, product and market, a record of consistently high growth and potential for continuing that growth are desirable. Innovative products, control of significant market share or a niche market in a favored industry further enhance a company's attractiveness.

a. Convertible and High Vote/Low Vote Securities

Relatively complex equity structures are common while a company is privately-held. A company that has convertible preferred stock or convertible debt should review the governing documents for anti-dilution clauses, special voting rights and redemption rights. In order to concentrate control, many private companies also have different classes of equity securities with disproportionate voting rights. These features can be troublesome to public company investors, and accordingly many of these provisions are often eliminated before an IPO. However, there are many exceptions, including notable situations such as the ten votes per share voting rights of shares of Facebook, Inc. held by Mark Zuckerberg and others and similar structures in the IPOs of technology companies such as Google, Groupon, LinkedIn and Zynga, as well as corporate stalwarts like Ford Motor Company and Berkshire Hathaway. If the outstanding convertible securities do not provide for automatic conversion into common stock upon an IPO, it may be necessary prior to commencing the IPO process to obtain the agreement of the security holders to convert their securities into common stock at the time of the IPO or to modify existing provisions in organizational documents that trigger automatic conversion.

b. Authorized Equity Capital

It is important to have a sufficient amount of authorized equity capital prior to going public. In addition to authorizing the number of shares of common stock required for the IPO and for the conversion of outstanding warrants, options and convertible securities, the company's certificate or articles of incorporation should authorize sufficient shares to cover foreseeable stock splits, capital-raising or acquisition needs. If there are not enough authorized but unissued shares, then a shareholder vote to amend the certificate or articles of incorporation usually becomes necessary. Authorization of "blank-check" preferred shares may also be advisable for future financing purposes and for implementing takeover defenses. It is generally easier and quicker to obtain shareholder approval prior to going public than it is following an IPO. Some IPO investors have investment guidelines that may prohibit investing in a company with too much excess authorized capital, however, so the company's underwriters should be consulted when considering this issue.

c. Recapitalization Adjustments in Pricing the Offering

The eligibility standards for listing on a national securities exchange set a floor price per share and a minimum number of shares to be sold to the public. A price that is too high limits the number of potential individual investors by making “round lots” of 100 shares too expensive. As a result, companies generally steer a middle course in setting an offering price and public float (the number of shares publicly held, usually meaning other than by affiliates of the company). In most IPOs, a company will recapitalize prior to or upon effectiveness of an IPO in order to achieve the per-share offering price and public float desired. The recapitalization may be done by way of a stock split, reverse stock split or other reclassification of shares. Potential underwriters should always be consulted before undertaking any recapitalizations in anticipation of an IPO, because advice varies among firms on these matters.

d. Registration Rights

Granting registration rights to investors is usually necessary to attract capital through private transactions while a company is privately-held. Pre-IPO investors typically obtain demand registration rights in connection with their investments which can enable them, subject to favorable market conditions, to force a company to go public on their timetable, which may not be the same as that desired by the company’s management or its founders. Incidental or “piggyback” registration rights entitle investors to have their shares included in a registration statement that the company files for itself or other selling shareholders.

If investors holding registration rights elect to include their shares in the IPO, the offering might be more difficult to market. New investors will likely question why existing shareholders are exiting their investment. A company should therefore consider the possibility of limiting or eliminating the number of shares to be sold in the IPO pursuant to the exercise of registration rights.

e. Pre-IPO Transactions in Company Securities

Careful consideration should be given to pre-IPO sales of the company’s securities, especially those occurring within the six months prior to the IPO since they could be deemed to be “integrated” with the IPO and therefore not covered under an exemption from registration under the Securities Act. The company will be required to disclose in the IPO registration statement all unregistered sales of company securities during the three-year period preceding the filing date of the IPO registration statement and to describe the legal basis for not registering those sales with the SEC. The information required also includes the consideration received, which may raise the “cheap stock” issues described below in Section II.B.3.

As mentioned above, where there has been an unregistered sale of company securities in proximity to the IPO, the company must disclose in the registration statement the private placement exemption it relied upon in making such sales. If the SEC does not agree that the unregistered sale qualified as a valid private placement, the IPO may be delayed while corrective actions are taken. If a problem cannot be remedied, the SEC may require a "recission risk factor" in the IPO prospectus that indicates that prior sales may have been illegal and the purchasers may have a right to recover their purchase price. For these reasons, company counsel should review each transaction that occurred during the three-year window preceding the IPO to identify any possible issues.

A common area of focus is offerings and sales of stock options and other securities to company employees occurring prior to an IPO. A company contemplating an IPO should be able to demonstrate its compliance with an exemption from SEC registration requirements for such offerings, and would be well-advised in that regard, when appropriate, to have structured such offerings to comply with Rule 701 of the Securities Act. Similar considerations apply with regard to state blue sky laws, and IPOs for many issuers with employees in California contain a "rescission risk factor" for failure to have complied with California's unusual "blue sky" securities law requirements with regard to employee stock options.

One example of pre-IPO sales that raised issues in the late 1990s was the offering of "free stock" to website visitors and purchasers of company products. The SEC expressed the view that most of such shares are not issued without consideration either because the website visitor had spent time and effort to visit the site and fill out the application for the shares or the purchaser had purchased the product and the shares together for the price paid. The SEC views these offerings of "free stock" as public offerings, which must be registered.

Another example of pre-IPO "sales" that have attracted SEC attention is the issuance of IPO "participation rights." Venture capitalists, customers and corporate partners have sought rights to purchase a specific number of shares or a specific dollar amount of shares in an issuer's IPO as a condition to investing in or transacting business with the issuer prior to the IPO. In "hot" IPO markets, these rights are eagerly sought because of the substantial run-up in prices of many IPO stocks and the fact that such shares are not usually subject to a lock-up period, thus allowing significant short-term profit. The SEC has challenged the grant of participation rights within 12 months of the filing of a registration statement as illegal "gun-jumping," (i.e., the making of an offer before the filing of a registration statement).

Lastly, unregistered sales of company securities in so-called "formation transactions" entered into immediately prior to or in connection with the IPO must also qualify as private placements. In order to avoid having these private transactions "integrated" with the public offering that commences upon the filing of the IPO registration statement such that the private placements would fail to have a valid exemption from registration, companies should execute these formation transaction agreements prior to such filing and avoid making any material amendments to the terms of these agreements after the IPO registration statement is filed. Preferably these agreements should be signed prior to the filing of the IPO registration statement so that the company may rely on the SEC's safe harbor from integration provided under Rule 152. If the company cannot rely on the safe harbor provided by Rule 152, the company may be asked by the SEC to explain why the private offering should not be integrated with the public offering.

It is also possible for a company to conduct a private placement of securities even while the IPO is pending, provided it complies with the requirements for an unregistered offering in a manner that does not justify integrating the offering with the IPO. In addition, as required by the JOBS Act, the SEC has revised its rules to relax a prohibition regarding "general solicitation" and "general advertising." See Section II.F for further discussion of concurrent private placements and Section VII.C.1 for further discussion of Regulation D, including the revised rules relating to "general solicitation" and "general advertising."

f. Existing Debt

Generally speaking, the company's indebtedness should be reviewed prior to the IPO. It may be desirable for marketing reasons for related party debt to be repaid or replaced by commercial loan arrangements with third parties. While there is no SEC requirement that this be done (other than with regard to loans to executive officers or directors prohibited by Sarbanes-Oxley as discussed in Section I.C.3(e) above), any non-standard arrangement requires an explanation in the IPO prospectus and may make the IPO more difficult to sell.

2. Directors and Management

a. The Board of Directors

The size of the board of directors varies widely from company to company. For most newly public companies, the board has between five and twelve members. Experienced outside (i.e., non-management) directors improve the company's profile in the capital markets and are often sources of expertise and new business connections for the company. SEC rules and the listing standards of the NYSE and NASDAQ:

- require that listed companies (other than controlled companies) have a majority of independent directors on the board;
- include definitions of "independence," particularly as it relates to members of the audit committee;
- require that the listed company's audit and (other than controlled companies) compensation and nominating committees consist entirely of independent directors; and
- mandate certain responsibilities for audit, compensation and nominating committees.

These requirements, coupled with a concern for potential director liability, can make it difficult for IPO companies to find suitable candidates willing to sit on the board.

While the stock exchanges provide newly-public companies a reasonable transition period to meet these independence requirements, most underwriters will advise that, upon completion of the IPO, a company's board have a majority of directors who meet the SEC's and the applicable exchange's definition of independence.

The definition of "independence" varies with respect to the applicable exchange and whether or not the candidate will serve on the company's audit or compensation committee.

i. Audit Committee

Both the NYSE and NASDAQ require that listed companies have audit committees comprised solely of individuals that meet the SEC's strict definition of independence, which requires that the member:

- not accept, directly or indirectly, any compensation from the company other than board and committee fees; and
- not be an "affiliated person" of the company or any subsidiary of the company. A person that is not an executive officer of the company and does not own more than 10% of the company's voting equity securities will not be an affiliated person under the SEC's definition.

Both the NYSE and NASDAQ require a minimum of three directors on the audit committee. In addition to meeting the SEC's independence requirement, each member of the audit committee must have a basic understanding of financial statements, and at least one member of the audit committee must, in the board's judgment, have "financial management expertise." Separately, the SEC requires companies to disclose on an annual basis, in their annual report on Form 10-K and in their proxy statement, whether or not—and if not, why not—their audit committee has a member who qualifies as an "audit committee financial expert." The listing standards provide that an "audit committee financial expert," as defined in the SEC rules, satisfies the lesser standard of "financial management expertise."

ii. Compensation and Nominating Committees

In addition to an audit committee, listed companies that are not "controlled companies" must also have a compensation committee and a nominating committee composed entirely of independent directors. NASDAQ-listed companies are not required to have a nominating "committee" per se, as long as decisions with respect to nominations are made exclusively by independent directors.

"Independent" directors who sit on the compensation and nominating committees must meet the stock exchange's definition of independence (which, as shown below, is more nuanced than the stricter requirement for the independence of audit committee members described above). Under the NYSE corporate governance rules, no director qualifies as independent for <u>any</u> listing purpose unless:

- the board of directors affirmatively determines that the director has no material relationship with the company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company);
- in such affirmative determination, the board of directors considers all factors specifically relevant to determining whether a director has a relationship to the company that is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:
    - the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the company to such director; and

- whether such director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company;

- the company complies with the disclosure requirements set forth in Item 407(a) of Regulation S-K;
- the director is not, nor has been within the last three years, an employee of the company, and any member of the director's immediate family is not, nor has been within the last three years, an executive officer of the company;
- neither the director, nor any member of the director's immediate family, has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the company other than director or committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);
- neither the director, nor any member of the director's immediate family, is a current partner or employee of a firm that is the company's internal or external auditor (and, in the case of an immediate family member that is an employee of such firm, he or she does not personally work on the company's audit);
- neither the director, nor any member of the director's immediate family, was within the last three years a partner or employee of a firm that is the company's internal or external auditor and personally worked on the company's audit within that time;
- neither the director, nor any member of the director's immediate family, is or has been within the last three years employed as an executive officer of another company where any of the company's present executive officers at the same time serves or served on that company's compensation committee; and
- the director is not a current employee, and any member of the director's immediate family is not a current executive officer, of a company that has made payments to, or received payments from, the company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million or 2% of such other company's consolidated gross revenues.

In addition to the general independence criteria listed above, additional rules apply to members of the compensation committees of NYSE-listed companies. Namely, in affirmatively determining the independence of any director who will serve on the compensation committee, the board must consider all factors specifically relevant to determining whether a director has a relationship to the company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (i) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to the director; and (ii) whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. The commentary to the NYSE listing rules also provides that the board should consider whether a director's ability to make independent judgments about the company's executive compensation could be impaired by (A) the director's receipt of compensation from any person or entity and/or (B) an affiliate relationship that places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management.

Under the NASDAQ definition of independence, no director qualifies as independent unless:

- the director is not an employee of the company and has not been an employee for at least three years, and the director is not a member of the immediate family of any person who is, or who was during the past three years, an executive officer of the company or a subsidiary of the company;
- neither the director, nor any member of the director's immediate family, has accepted any payments from the company in excess of $120,000 during the current or any of the past three fiscal years, other than in respect of (i) board or committee service, (ii) payments arising solely from investments in the company's securities, (iii) compensation paid to a family member who is not an executive-level employee, benefits under tax-qualified retirement plans, or non-discretionary compensation, or (iv) permissible loans under the Exchange Act;
- neither the director, nor any member of the director's immediate family, is a partner in, or controlling shareholder or executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the consolidated gross revenues for that year, or $200,000, whichever is more, other than in connection with (i) payments arising solely from investments in the company's securities, or (ii) payments under non-discretionary charitable contribution matching programs;

- neither the director, nor any member of the director's immediate family, is employed as an executive officer of another company where at any time during the past three years any of the executive officers of the listed company served on such other company's compensation committee; and
- neither the director, nor any member of the director's immediate family, is a current partner of the company's outside auditor, or was a partner or employee of the outside auditor who worked on the company's audit at any time during the past three years.

In addition to the general independence criteria listed above, additional rules apply to members of the compensation committees of NASDAQ-listed companies, which are similar to NYSE's rules. Namely, in affirmatively determining the independence of any director who will serve on the compensation committee, the board must consider (i) the source of any compensation of the director (including regular board and committee compensation), including consulting, advisory or other compensatory fees paid by the company to the director and (ii) whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. NASDAQ's interpretive guidance also provides that the board should consider whether a director's ability to make independent judgments about the company's executive compensation could be impaired by (A) the director's receipt of compensation from any person or entity and/or (B) an affiliate relationship that places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management.

For both general independence and compensation committee member independence determinations, owning even a significant amount of company securities is not considered a bar to independence under either the NYSE or NASDAQ rules because, in the words of the commentary to the NYSE rules, the issue is "independence from management."

In addition to the requirements of the applicable stock exchange, independent compensation committees approve certain compensatory stock and derivative (e.g., options) transactions between the company and its executive officers as a means to exempt transactions from potential "short-swing" profit liability under Section 16 of the Exchange Act. In addition, in order to ensure full deductibility of executive compensation for tax purposes and assure investors that compensation decisions are made by disinterested directors, most public companies use a compensation committee comprised solely of "outside directors" (as defined in federal tax regulations) to make decisions with respect to executive compensation. Because standards of "independence" vary depending on the particular requirements being considered, counsel should be consulted during the process of selecting directors and committee members. See Section I.C.3.b. for a discussion of the Dodd-Frank Act's required changes to the rules governing compensation committees.

iii. Other Board Committees

There is no "one-size-fits-all" structure for boards of directors. Many companies have executive committees empowered to take all appropriate actions between meetings of the board. These committees can improve the ability of the company to react quickly without assembling a widely scattered board but may alienate board members who are not members of the executive committee, especially in the formative years of a public company's life. All public companies should have at least three standing committees: audit, compensation and nominating and corporate governance. Companies subject to unique risks may have committees to deal with those risks. For example, most companies in the financial services sector have a risk management committee. In addition to the minimum corporate governance requirements imposed by the SEC and the applicable stock exchange, "best practices" have developed within specific industries.

b. Officers

A capable management team is one of the key ingredients that underwriters and investors seek in evaluating a prospective public company. The management team of a public company will have significant new responsibilities. Besides managing the business aspects of a growing company, the management team must deal effectively with outside financial analysts, relevant regulatory agencies, the financial press and public shareholders. It is advisable to hire at least one senior executive with public company experience if the existing management team lacks such experience. In particular, given the legal risks associated with financial statement irregularity, which, even before Sarbanes-Oxley, was a priority for SEC enforcement, no company would be well-advised to go public without a chief financial officer with public company experience and, where possible, an audit committee member who qualifies as an "audit committee financial expert."

Public companies are required to disclose the names and compensation of its principal executives. The company should consider in advance any issues that may arise in connection with these disclosures, and it may be advisable that unconventional arrangements be modified or terminated. Further, a company should consider obtaining key-man life insurance for any executives whose death or disability could have a material adverse effect on the company.

As discussed further in Section VIII.J.8 and in Section I.C.3(e), Sarbanes-Oxley prohibits personal loans to directors and executive officers. Given this prohibition, companies considering a public offering should include a provision in any loan note or document evidencing a personal loan entered into after July 30, 2002 to a director, executive officer or potential executive officer expressly reserving for the company the right to accelerate repayment of such loan in the event the company elects to file a registration statement to go public.

c. Liability Issues—D&O Insurance

In order to attract qualified directors and officers, a company seeking to go public should obtain liability insurance for its officers and directors from a reputable insurer.

While in the past, directors and officers may have relied on indemnification provisions in a company's charter documents, more commonly such persons request indemnification agreements to ensure certain protections against future changes in the charter and specific procedures for advancement of legal costs and expenses. A sample indemnity agreement is included as **Exhibit B**.

However, even if a company has a legal obligation to fully indemnify an officer or director, if the company goes into bankruptcy, or otherwise is unable or unwilling (e.g., after a change of control or resignation) to satisfy its obligations, these protections may be worthless. Accordingly, knowledgeable directors and officers are interested in the exact terms of the D&O insurance policy, the amount of the deductible and the amount of insurance coverage.

Most companies have "entity" coverage in their D&O insurance which also covers the issuer in certain actions. In a securities lawsuit, for example, the insurance proceeds can be easily used up by the issuer, with little left for directors and officers. Even if a "priority of payments" clause or "order of payments" endorsement, which gives directors and officers priority over the company, is included in the coverage, in a company bankruptcy action, judges may reserve judgment on these clauses, in effect freezing insurance payments to officers and directors during the pendency of the action. Some companies purchase an additional and separate "Side A" coverage in which only the directors and officers are the beneficiaries and which cover losses not indemnified by the company. Insurance carriers also offer individual insurance policies so that an individual officer and director can be protected against sharing a pool of insurance proceeds with other directors and officers who may have significant liability. Each of these policies must be individually negotiated in order to assure maximum coverage.

Unfortunately, just as directors and officers are demanding greater coverage, obtaining adequate D&O insurance has become much more difficult and costly for public companies in the past decade. Due to the increase over time in the number of securities class action lawsuits and insurance claims, the trend towards larger settlements, the ripple effects of September 11 and the economic crisis of 2008-2009 on the insurance industry as a whole, D&O insurance providers have tightened their underwriting criteria and are charging higher premiums for coverage. D&O insurance applications include detailed questions about the applicant's readiness to comply with the various regulatory requirements for public companies, including Sarbanes-Oxley. As a result, insurance providers will review board and committee composition and charters, codes of conduct, internal corporate governance guidelines, and insider trading policies.

d. Equity Incentive Plans and Other Executive Compensation Arrangements

If the company has not previously adopted a stock option or other equity-based compensation plan, counsel will likely recommend adopting one prior to going public. A sample long-term incentive plan is included as **Exhibit C**. As described above, an equity incentive plan provides a company with additional means to reward the performance of management and other key employees and to align their interests with shareholders. Adoption of equity-based compensation plans is easier and quicker prior to going public because of the expense and difficulty associated with obtaining approval from public stockholders, especially due to NYSE Rule 452 applicable to member broker firms that prohibit them from voting with respect to equity compensation plan and most other matters without express direction from beneficial holders. Because Rule 452 applies to all voting by brokers it affects most public companies, not just those listed on the NYSE. The Dodd-Frank Act requires national securities exchanges to prohibit broker discretionary voting without the instruction of a beneficial owner on the following: (i) executive compensation, (ii) director elections and (iii) other significant matters. On September 9, 2010, the SEC approved an amendment to NYSE Rule 452 eliminating uninstructed voting on all executive compensation matters. See Section VIII.D.1(i) with regard to other modifications to the application of Rule 452 by the SEC and the NYSE.

Both the NYSE and NASDAQ listing criteria require shareholder approval of the adoption of any equity-compensation plan. While both the NYSE and

NASDAQ provide exemptions for employment inducement grants and certain tax-qualified plans, all other traditional stock option and restricted stock plans (or other compensatory grants of stock or options not made under a plan) will require shareholder approval. In addition, even if an IPO company adopts its equity-compensation plan before it goes public, both the NYSE and NASDAQ require shareholder approval for any material modification of the plan. For example, a material modification requiring shareholder approval includes an amendment to allow grants of restricted stock to a plan that only allowed stock options. Whether adopted before or after an IPO, any equity incentive plan should be drafted in such a manner to avoid any unintended tax consequences under Section 409A of the Internal Revenue Code (including properly valuing the shares underlying awards, setting exercise prices, and taking advantage of any statutory exemptions).

Shareholder approval of an equity compensation plan (either pre- or post-IPO) is also required in order for employees to receive certain tax treatment under the U.S. tax laws for grants of “incentive stock options” made under the plan and for the company to deduct certain performance-based compensation over $1 million to certain executives.

In addition to equity incentive plan considerations, companies contemplating going public should evaluate their other executive compensation arrangements and identify any arrangements that provide deferred compensation. If any executive compensation arrangements offer deferred compensation, then modifications may be required to assure compliance with the complex Section 409A tax rules governing deferred compensation (e.g., including a six-month delay for certain payments to specified employees).

3. Accounting Issues

Companies going public should expect extensive scrutiny of their financial statements from auditors, the SEC, the underwriters and their counsel and the potential purchasers of their stock. All potential accounting issues should be addressed well in advance of an IPO. Many IPOs have been delayed or indefinitely postponed because of accounting issues that should have been addressed in advance. Examples of such issues follow.

First, the issuance to employees or consultants of stock, options or warrants to purchase stock for less than fair value (generally referred to as “cheap stock”) is generally required to be treated as a form of compensation, which results in an expense charge to the company’s income statement and thus affects earnings. The SEC scrutinizes stock, option and warrant grants in the year leading up to an IPO (and sometimes even longer) and often asks companies to justify the fair value determination used. A company should consider carefully the fair value of its stock when making stock, option and warrant grants and should consult with its outside auditors when making the grants and when reporting the grants in its financial statements. The same issue arises when cheap stock is given to customers, although the expense in that case is charged to the cost of sales rather than compensation. In addition, pre-IPO issuances of securities that are convertible into stock of the company at a conversion price that turns out to be lower than the IPO price often require companies to recognize an expense relating the "beneficial conversion feature" of the convertible instrument.

Second, acquisitions in the three fiscal years preceding an IPO can complicate financial reporting, particularly if the acquired company or companies are significant when compared to the company going public, based on assets, operating income or purchase price. If the acquisitions are significant, either alone or in the aggregate, the company in most cases will be required to include separate historical audited financial statements and pro forma financial statements illustrating the effects of the acquisitions on the combined company. The company's outside auditors should be consulted to discuss the accounting treatment for acquired companies. Accounting for business combinations has also been affected by the elimination of pooling accounting. Issuers who acquire other companies prior to an IPO should be prepared for questions from the SEC relating to the allocation of the purchase to the target's tangible and intangible assets, including whether or not a portion of the purchase price should be allocated to goodwill.

Third, for companies that operate in more than one business sector, the accounting standards require that companies disclose segment data based on how management evaluates performance and makes decisions about allocating resources to segments. In many cases, the SEC staff has questioned whether a company should be breaking its financial information down by segment even if the company does not regularly prepare information on this basis. Careful consideration should be given to segment reporting issues. Outside auditor concurrence with proposed segment reporting should be received prior to filing the IPO registration statement.

Fourth, the SEC focuses on revenue recognition practices of issuers. In this connection, the SEC has issued detailed guidance (SEC Staff Accounting Bulletin No. 101) on revenue recognition. Accordingly, a company should discuss with its accountants the proposed revenue recognition principles used in the company's financial statements, and the footnotes that are required to describe the revenue recognition principles, and should be prepared to defend any revenue recognition principles that differ from those of its peers. The SEC may require a company to disclose in detail how it accounts for each of the components of these arrangements to determine whether it is accurately recognizing revenue under GAAP.

Other accounting issues that may arise concern consolidation issues and the classification of items within the income statement (e.g., gross vs. net presentation of revenue and expenses). While misclassifications may not affect net income, they nevertheless may be material to the financial statements taken as a whole. This has been especially true in technology companies, for which the revenue line item has been viewed by investors as the most significant measurement. For this reason, the SEC has urged auditors of technology companies to be especially diligent concerning classification decisions.

In addition to issues that may arise in the audit and SEC review process, companies should be aware of the ways in which their financial statements may change due to accounting requirements. For example, public companies are required to take into account stock options and warrants as outstanding for all relevant periods in preparing a "diluted earnings per share" line in their income statements and are required to discuss in the financial statement footnotes the effects stock options and warrants would have on their financial performance if fully exercised. While these disclosures may not have a direct impact on the market's perception of a company's financial strength or weakness, they enable readers of a company's financial statements to make comparative judgments on the company's employee compensation structure and may discourage investors if the structure is significantly more generous than that of other companies in the same industry. The SEC has frequently commented on disclosures relating to diluted and weighted average earnings per share and has required companies to disclose prominently in the financial statement footnotes the methods by which these numbers are calculated, including a detailed accounting of the components of the numerator and the denominator in the calculation.

As further discussed in Section I.D.3, the JOBS Act has changed a number of accounting practices as they relate to EGCs, including scaled financial disclosure and extended phase-in periods for an EGC's compliance with the Sarbanes-Oxley requirement that management assess the effectiveness of internal controls over financial reporting and the adoption of new and revised accounting standards.

Prior to commencing the IPO process, the company should review the SEC's financial statement disclosure requirements and other accounting issues with its auditors. If a company is considering going public and is not already being audited by a public accounting firm registered with the PCAOB, it must engage one as quickly as possible. Audited financial statements are required to accompany a company's registration statement, and the SEC will only accept an audit report from a registered public accounting firm. Since the audit process may be extremely time consuming, it is advisable to start early.

4. Organizational Documents

It is generally easier to obtain the requisite shareholder vote to amend the certificate or articles of incorporation or to reincorporate prior to going public when a small group of shareholders controls a majority interest. If a company is currently incorporated in a state in which the laws are not flexible with respect to corporate governance or do not insulate officers and directors from liability, the company should consider reincorporating in a state with more favorable laws. Public companies are often incorporated in Delaware because Delaware corporate law is well-established and is generally viewed as being among the most flexible for management and directors in many regards and Delaware courts often take a leading role in deciding issues of first impression regarding corporate law.

The certificate or articles of incorporation or organization and by-laws of a private corporation sometimes contain provisions that would be problematic for a public company. Preemptive rights to purchase equity securities or special corporate governance features, including requirements of supermajority approval, cumulative voting for directors, unconventional quorums and board composition requirements are examples of provisions that may be inappropriate or undesirable for a public entity.

5. Anti-Takeover Provisions

Companies should consider carefully their defensive posture with respect to unfriendly takeover attempts. Prior to going public, a company's options are much broader than after the IPO because of the general public's negative perception of anti-takeover defenses as mechanisms for entrenching management at the expense of increasing shareholder value and the need for charter amendments, requiring shareholder consent, to adopt some of the more effective defenses. Apart from the contractual arrangements financial sponsors will typically require to assure post-IPO control over a company in which the sponsor continues to hold a substantial interest, a number of devices exist for maximizing continued control over the company by existing shareholders of a typical emerging company, including:

- dual-class voting stock structures;
- voting agreements among pre-IPO shareholders;
- supermajority vote provisions for significant corporate actions;
- a "staggered" board of directors, so that only a portion of the directors are subject to reelection in any year;
- no right of shareholders to act by written consent;
- no right of shareholders to call special meetings;
- limitations on the right of shareholders to amend by-laws;
- requiring that directors be removed only for cause;
- requiring advance notice of matters to be brought before a shareholders' meeting;
- adoption of a shareholder protection rights plan ("poison pill"); and
- adoption of "fair price" provisions.

While the controlling persons of many IPO-stage companies implement a wide array of takeover defenses out of fear of losing control of the enterprise, these persons quickly realize that certain takeover defenses like staggered boards and poison pills incite the wrath of activist shareholders and the disapproval of institutional shareholders. With increasing success, activist shareholders have sponsored proxy statement proposals to dismantle staggered boards and poison pill plans. In response, many managing underwriters now encourage IPO companies not to adopt (or to eliminate) staggered boards and poison pills out of a concern about the effect of such mechanisms on the marketing and pricing of the IPO. At the very least, the company should consult with the managing underwriters prior to putting in place any defensive measures.

The pressure on companies to remove takeover defenses increased as a result of rules adopted in 2003 by the SEC relating to mutual funds. These rules require mutual funds and their investment advisers to disclose in annual reports their proxy voting policies and procedures. Since 2004 mutual funds have been required to disclose how they actually voted on proposals put to a shareholder vote by the companies in the funds' portfolio, including specifically whether or not the fund voted with or against management. While mutual funds have traditionally been considered relatively passive investors, these new disclosure rules are likely to cause mutual funds to take a more active role with respect to corporate governance.

6. Company Contracts

Companies should review their existing contracts to ensure they have not made any promises to others that would conflict with the ability to consummate the IPO or cause any onerous conditions upon the occurrence of an IPO. While reviewing existing contracts, companies should bear in mind that they will be required to file all material agreements with their IPO registration statement. Many of the terms of these material agreements will be available to everyone, including the company's competitors. Accordingly, the contract review phase of IPO preparation should include identification of contracts in which the counterparty's consent is required before publicly filing the contract or sensitive information would be disclosed as a result of the public filing.

The company may seek confidential treatment of sensitive portions of agreements that are required to be filed. In order to obtain confidential treatment, a company must file a separate application with the SEC describing the reasons that the company believes confidential treatment is merited. The SEC's view of the confidential treatment process is quite narrow. Accordingly, companies should expect that only very limited information, such as specific pricing information, will be protected and even then only for a limited amount of time. Any confidential treatment filing should be made early in the IPO process to allow sufficient time to request reconsideration of any unfavorable determinations on confidential treatment. Typically, the SEC staff prefers to receive the confidential treatment application at or near the time of the initial filing of the IPO registration statement so they can respond to the issuer in parallel with their comments on the registration statement. The SEC will not declare the registration statement effective until all confidential treatment requests have been resolved.

C. PREPARING FOR COMPLIANCE WITH CERTAIN SARBANES-OXLEY REQUIREMENTS

Sarbanes-Oxley mandated acceleration and improvement in the quality of public company disclosure. These new rules require public companies to establish controls and procedures designed to ensure timely, accurate and reliable public disclosure. There is no phase-in period for these rules, and companies considering going public must have these controls and procedures in place at the time that the IPO registration statement goes effective. For further discussion of the most significant Sarbanes-Oxley requirements, see Sections I.C, VIII.A.1 and VIII.J.

1. Disclosure Controls and Procedures

Public companies are required by Sarbanes-Oxley and related SEC rules to establish and maintain "disclosure controls and procedures." These are essentially controls and procedures designed to ensure that a company is able to timely collect, process and disclose the information, financial and non-financial, required to be disclosed in periodic reports. They include, but are not limited to, controls and procedures which allow information to be accumulated and communicated to a company's management in a manner that permits timely decisions regarding required disclosure. Management, with the participation of the company's CEO and CFO, is required to evaluate the effectiveness of the company's disclosure controls and procedures on a quarterly basis. The resulting conclusions of management must be disclosed in the corresponding annual or quarterly report. Each annual and quarterly report must include a separate certification by each of the company's CEO and CFO that they are responsible for and have established disclosure controls and procedures and have conducted the required evaluation and included their conclusions in the report. (See Section VIII.A.1 for a more detailed discussion of these officer certifications).

The SEC has recommended that companies establish a disclosure committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. The members of the disclosure committee should have the requisite qualifications and experience to enable them to evaluate and respond to disclosure issues in a timely and effective manner. The SEC has suggested that the disclosure committee could include the principal accounting officer or controller, the general counsel or another senior in-house attorney responsible for SEC disclosure matters, the principal risk management officer, the chief investor relations officer and other persons that the company deems appropriate. Most disclosure committees have charters that set forth the duties and responsibilities of the committee, the composition and qualifications of the committee and a subcommittee to act in response to time-sensitive disclosure issues when it is not practicable for the entire committee to convene. A sample disclosure committee charter is included as **Exhibit D**.

Failure to maintain adequate disclosure controls and procedures could result in an SEC enforcement action as well as civil and criminal liability. The SEC has indicated that failure to maintain adequate disclosure controls and procedures may be a violation of Section 13(a) or 15(d) of the Exchange Act and can lead to an SEC enforcement action, even if the violation did not result in faulty disclosure. If a failure in disclosure does result, certifying officers may face civil liability under the anti-fraud provisions of the Exchange Act and criminal penalties under Sarbanes-Oxley. Civil liability may also be imposed on the issuer itself if quarterly or annual reports containing the faulty disclosure were to be incorporated into a registration statement. If a failure in disclosure were to occur, a company would be more likely to receive favorable treatment from the SEC if it had adequate disclosure controls and procedures in place than if it did not.

2. Internal Control Over Financial Reporting

Public companies are also required to maintain "internal control over financial reporting." Internal control over financial reporting is, generally, a process designed to provide reasonable assurance that a company's financial reporting is reliable and that the financial statements it uses for external purposes are prepared in accordance with GAAP. Internal control over financial reporting includes the internal accounting controls also required of public companies under the Exchange Act. (See Section VIII.J.1). Public companies are required to include in their annual reports an internal control report which contains, among other things, a statement of management's responsibility for establishing adequate control over financial reporting and management's assessment of the effectiveness of the company's internal control over financial reporting. A company's CEO and CFO are required to certify in each annual and quarterly report that they are responsible for and have established internal control over financial reporting and that they have made required disclosures regarding the company's internal control over financial reporting in the report. (See Section VIII.A.1 for a more detailed discussion of these officer certifications). In addition, companies are required to disclose in each annual and quarterly report any change that occurred during the period covered by the report that may materially affect the company's internal controls.

D. DUE DILIGENCE PREPARATION

Prior to commencing the IPO process, a company should prepare a data room to facilitate review of materials by underwriters and counsel. The checklist of data room materials should include the materials called for in a legal due diligence request list, a sample of which is included as **Exhibit E**. Of course, the operations and risk profile of every company are unique and the due diligence checklist should be tailored accordingly. IPO deals frequently use "virtual" data rooms where documents are posted to password-protected web sites maintained by reputable third-party vendors.

There are three primary reasons for any party to conduct legal and business review of a company in conjunction with an IPO. The first is to assemble the information required by the registration statement. The second is to ensure that no information required by the SEC rules or that may be considered material to the offering is omitted. The third is to confirm the accuracy of all factual information disclosed in the registration statement.

The legal and business review conducted by and on behalf of the underwriters has added significance. First, it allows the underwriters to avail themselves of a "due diligence" defense under Section 11(b) of the Securities Act in the event of any litigation. (See Section III.C.2 below for a more detailed discussion of federal securities liability related to the registration statement, including the "due diligence" defense to Section 11 liability). Second, it helps the underwriters in the valuation and marketing of the company's stock.

In addition to supporting the drafting of the registration statement, the due diligence performed by the company's counsel and the underwriters' counsel supports the legal opinion required by the underwriters to be delivered by such counsel as a condition to closing in the underwriting agreement.

Generally, the underwriters and their counsel prepare a comprehensive due diligence request list based upon the organizational meeting and other information that they have been able to gather. In response to the request, the company and its counsel should supplement, as necessary, the documents contained in the data room. Because the underwriters and their counsel prepare the due diligence request list with only a preliminary understanding of the company's business, the company should expect that the initial due diligence request list will be supplemented in writing and orally with requests for additional information as the underwriters and their counsel understand the company and its business better.

In addition to reviewing the company's documents and other due diligence materials, the underwriters and their counsel will need to conduct due diligence on the company's executive officers and directors and review copies of the directors' and officers' (*D&O*) questionnaires. These questionnaires are usually prepared by the company's counsel and reviewed by underwriters' counsel and then completed by all officers, directors and principal stockholders of the company. The purpose of the D&O questionnaire is to allow the company to meet its disclosure obligations under the securities laws and to assist the underwriters in performing their legal and business review. D&O questionnaires should be distributed early in the IPO process, and a single person at the company should be assigned responsibility for making sure that they are completed and returned in a timely manner, but, in any event, prior to the initial filing of the registration statement. A sample D&O questionnaire is included as **Exhibit F**.

Some directors and officers may be offended by the length and intrusiveness of the D&O questionnaire. Although the questionnaire may be a rude awakening, it solicits the same information required of senior executives and directors at public companies on an ongoing basis. The D&O questionnaire has taken on increased importance in light of the changes to corporate governance mandated by Sarbanes-Oxley, the SEC and the stock exchanges. For example, failure to uncover the existence of personal loans from the company to its directors or executive officers in the pre-filing due diligence period could result in liability to the company.

In addition to legal review, the underwriters conduct a business review of the company. This review typically involves, among other things, interviewing the company's senior management, conducting on-site investigations at the company's facilities, if necessary, and interviewing the company's employees, suppliers and customers. A sample outline of business matters typically covered in business due diligence sessions is included as **Exhibit G**.

Management plays an important role in the legal and business review. In addition to preparing the requested documents, officers and key employees will discuss material aspects of the business with the working group. Any factual statement contained in the registration statement must be independently verifiable, and management should expect that verification will be requested by the underwriters or their counsel.

E. SELECTING THE MANAGING UNDERWRITER

The underwriter chosen by a company to manage its offering plays a critical role in the success of the IPO. The managing underwriter is actively involved in the preparation of the company's registration statement as well as managing the marketing and sale of the company's stock. While many companies elect to appoint more than one managing underwriter, the potential for differing views and approaches between them is significant and companies must be prepared to resolve any issues that may arise.

In selecting a managing underwriter, the following factors should be considered:

- *Industry Experience.* The underwriter should have substantial experience in IPOs in the company's industry and a good familiarity with the company and its business.

- *Individual Investment Bankers.* The company should feel comfortable with the individual investment bankers assigned to the transaction. The right chemistry between the bankers and management is critical.
- *Reputation and Attention.* While reputation is important, top tier underwriters may not give smaller companies as much attention as other underwriters. On the other hand, those less prominent underwriters may not be able to provide the resources available to more highly regarded underwriters.
- *Distribution Strength.* The potential managing underwriters and the company should discuss whether the issue should be sold primarily to retail investors or institutional investors, or both. The underwriters selected should have a substantial institutional or retail sales force, as required.
- *Aftermarket Support.* The underwriter should have a strong record of aftermarket price performance for the stock of the companies that it has recently taken public. A strong performance record indicates how well the underwriter priced and supported recent transactions.
- *Analyst Coverage.* The underwriter should have a well-known analyst in the industry that shows a willingness to provide coverage post-IPO. Having an analyst with a high profile in the relevant sector is a factor typically accorded great weight by companies contemplating an IPO. As discussed below, rules applicable to research analysts prohibit assurances that an underwriter's research analyst will provide coverage, and, if the underwriter's research analyst chooses to provide coverage, there is pressure on the research analyst to issue objective reports with respect to investment banking clients, including his or her duty under new Regulation AC to certify that the views expressed in the research report accurately reflect the analyst's personal views.

The company should discuss with potential underwriters and assess critically any potential conflicts in the representation. Conflicts may result from an underwriter's relationship with competitors or an underwriter's relationship with the company including prior purchases of securities aside from the underwriting relationship. For example, the FINRA rules require that the underwriters compensation be fair and reasonable in order to permit the underwriters to proceed with a proposed offering. The purchase of an equity stake in the company within 180 days of the IPO would likely be counted as "underwriters compensation". These and related issues should be thoroughly discussed with each potential underwriter. (See Section V.A.2 for a more detailed discussion of FINRA's review of underwriters compensation).

The company should also discuss with potential underwriters their policies and practices in post-IPO trading and price support for new issuances. Certain underwriter practices in the IPO “aftermarket” are prohibited by SEC rules, and the SEC has focused attention on these practices in enforcement actions against IPO underwriters. For example, the SEC has issued a release warning underwriters that they are prohibited from soliciting or requiring their customers to make aftermarket purchases during the time they are “distributing” the IPO stock. (Section VIII.J.6 contains a more extensive discussion of these requirements). While the sanctions for violation of these rules typically are imposed on underwriters, issuers whose stock price had been manipulated in the IPO aftermarket may find their shares tainted by an underwriter’s behavior or their prospectuses subject to claims by purchasers of their securities. Issuers and their counsel should therefore discuss with potential underwriters their aftermarket practices to avoid such risks.

While having an experienced and reputable research department is an important factor for companies to consider when selecting a managing underwriter, investment bankers may not guarantee research coverage to a prospective IPO company pursuant to conflicts of interest rules.

In recent years, research analysts have not been permitted to assist investment bankers in scouting potential IPO companies and could not attend pitch meetings to potential IPO companies. As a result, companies interviewing potential managing underwriters have had to separately meet with the firm’s research analysts to determine whether the firm’s research division understands the company’s business and whether such research division intends to cover the company post-IPO. The JOBS Act prohibits the SEC and any national securities association from adopting or maintaining any rule that would, in connection with the IPO of an EGC restrict, based on functional role, the broker-dealer personnel who may arrange meetings between analysts and accredited investors, or restrict a securities analyst from participating in communications with management of an EGC so long as non-analyst broker-dealer personnel are also participating. Investment bankers can now directly arrange for analysts to meet with accredited investors about EGC IPOs and analysts can participate in meetings with management to prepare the offering documents and presentations to be used in connection with the offering. Accordingly, FINRA’s rules prohibiting research analysts from participating in meetings with an EGC alongside investment banking personnel in connection with an EGC’s IPO are effectively rescinded.

However, it is important to note that several of the largest investment banks are parties to an April 2003 global settlement agreement with the SEC, NYSE, NASD (succeeded by FINRA) and state securities regulators which itself imposes substantial restrictions on the research activities of those banks. Unless and until those banks obtain relief from the terms of the global settlement they will be subject to greater restrictions than those banks that are not party to it.

Still, there are no guarantees that a managing underwriter's research department will initiate coverage (let alone positive coverage). Also, research analysts may not accompany the company and the investment bankers on the road show. As a result, companies should feel comfortable that the investment bankers that they select to act as managing underwriter have a firm understanding of the company's business and an ability to pitch the company to potential buyers on the road without the help of their industry analysts.

F. CONCURRENT PRIVATE PLACEMENTS

Concurrently with an IPO, a company may choose to offer securities through a private placement. This often occurs because the IPO process can be lengthy and a company's capital needs can change or cannot await the closing of the IPO. However, such a private placement raises potential issues regarding integration with the IPO. As described in Section VII.C.1, Section 4(a)(2) of the Securities Act and Regulation D offer exemptions from registration for transactions that do not involve a "public offering." The SEC uses its integration doctrine to prevent an issuer from improperly avoiding registration of its securities by dividing a single offering into multiple offerings, such that those exemptions would apply to each of the multiple offerings, but not considered as a single offering. Regulation D includes a list of factors that indicate whether a private placement should be integrated with the IPO, but the SEC will analyze the specific facts and circumstances surrounding a concurrent private placement to makes its determination regarding integration. Regulation D also provides that two offerings pursuant to its terms will not be integrated if they occur more than six months apart.

As part of its analysis, the SEC will consider both the nature of the private placement investors and whether securities were offered and sold to them through a general solicitation in the form of a registration statement. If the prospective private placement investor becomes interested in the concurrent private placement through some means other than a general solicitation, such as through a substantive, pre-existing relationship with the company, then the occurrence of the IPO concurrently with the private placement will not foreclose the availability of an exemption from registration.

To alleviate concerns regarding integration, it has become market practice to limit a concurrent private placement offering to accredited investors, including affiliates of the company, its directors and officers. These investors should have a substantive, demonstrable pre-existing relationship with the company and the company should contact them outside of the public offering effort. Additionally, the company should include representations in its subscription agreements for the concurrent private placement that each of the investors (i) did not become interested in the private placement through the registration statement, (ii) was not identified or contacted by the company through the marketing of the IPO, and (iii) did not independently contact the issuer as a result of general solicitation, through the registration statement or otherwise.

In July 2013, the SEC adopted amendments to Rule 506 of Regulation D to allow an issuer relying on its exemptions to offer securities through a general solicitation, provided that the issuer takes “reasonable steps” to verify that all *purchasers* in the private placement are accredited investors and that certain other conditions in Regulation D are satisfied. The SEC adopting release clarifies that, as required by the JOBS Act, Rule 506(c) will be treated as a “private placement” exemption even though general solicitation is permitted under the Rule; however, the statutory “private placement” exemption otherwise provided by Section 4(a)(2) of the Securities Act continues to be conditioned on the absence of general solicitation. Because offerings conducted under Rule 506(c) are deemed by the JOBS Act to not involve a public offering, hedge funds, private equity funds, and similar “private” funds may sell their securities using general solicitation under Rule 506(c) without losing the ability to satisfy the exemptions from registration under the Investment Company Act that are conditioned on the fund not making a public offering of its securities. The SEC has clarified that an issuer cannot rely on both Rule 506(b) and Rule 506(c) in the same offering and that the current integration rules will remain in effect for determining what constitutes a separate offering.

III. KICKING-OFF THE PUBLIC OFFERING

A. THE ORGANIZATIONAL MEETING

Once the company has chosen the managing underwriter(s), an organizational meeting is usually held to acquaint the key team members with each other, lay out the timetable for the proposed IPO and allocate responsibilities. A carefully planned schedule will provide sufficient time for the due diligence process, preparation of a registration statement and multiple rounds of SEC review of and comment on the registration statement. The timetable will culminate in a "road show" and pricing that occur outside of marketing "dead zones," such as the last two weeks in August and in December. A sample organizational meeting agenda and a timetable and responsibility checklist are included as **Exhibits H** and **Exhibit I**, respectively.

The managing underwriter usually arranges and presides over the organizational meeting. The organizational meeting usually has three fundamental parts: (1) a discussion of the offering size and other mechanics, including an allocation of responsibilities, (2) a brief overview by the company of its business and affairs and (3) a discussion among the parties of any significant issues identified thus far.

For the company, the organizational meeting is the first of many times over the following months when the company's story will be told. The story told at the organizational meeting is usually succinct, but is an important starting point for the IPO team assembled. For the IPO working group, the organizational meeting usually sets forth the broad themes that form the basis for the drafting of the description of the business in the prospectus and for the oral presentation that the CEO and CFO make repeatedly during the road show. The information helps underwriters' counsel understand which areas should be reviewed and how that review should be conducted. Ultimately, the positioning of the company as conveyed in the IPO registration statement forms the basis for the information that the company continues to disseminate after the IPO in periodic reports, press releases and analysts' meetings. Most practitioners view the company as being "in registration" and subject to restrictions on publicity from the date of the organizational meeting (with the caveat that emerging growth companies may choose to engage in testing-the-waters activities, as discussed in Section I.D.2(b)). For a more detailed discussion of restrictions on publicity, see Section III.D.

In addition, the organizational meeting is a good time for the company to raise for consideration and discussion any issues that the company and its lawyers and accountants believe may have an impact on the offering process. It is best for the company to meet together with its lawyers and accountants one or more times in advance of the organizational meeting to try to identify any issues. Underwriters and their counsel appreciate when companies are forthcoming about issues that may impact the public offering process because it provides underwriters the time to address these issues and contributes to the formation of a relationship of trust with the management team. When significant issues that should have been identified early by the company and its representatives are uncovered by the underwriters or their counsel during the course of due diligence (or later), the IPO process may be delayed or even derailed. Similarly, issuers expect the underwriters and their counsel to prepare themselves ahead of the organizational meeting by learning about the company and its industry, surveying the regulatory landscape applicable to the company and understanding the market for its stock.

While the rules relating to research analyst conflicts of interest described above do not specifically prohibit research analysts from attending organizational meetings and drafting sessions once the investment banking firm has been engaged as managing underwriter, most investment banking firms prohibit research analysts from attending such meetings to avoid the appearance of impropriety.

B. THE OFFERING

1. Offering Size

In advance of the organizational meeting, the company and the managing underwriters should determine the amount of money that the company wishes and is likely to be able to raise in the IPO and the approximate number of new shares it will need to issue in order to do so. In making these decisions, the company should bear in mind that it will be required to disclose the proposed uses of the funds in the prospectus.

The managing underwriter's valuation of the company and the number of shares currently outstanding, after giving effect to any pre-offering recapitalizations, determine the approximate number of new shares (called "primary shares") that the company will need to issue in order to raise the funds that it seeks. In addition, the company and its underwriters must decide whether or not current shareholders will be permitted to sell any of their stock (called "secondary shares") in the offering, although some holders of registration rights may have enough leverage to force the company to include their shares in the offering. The total size of the offering is the sum of the primary shares and the secondary shares to be offered. The managing underwriter may recommend that the company recapitalize prior to the offering so that the offering price per share falls within a range that the managing underwriter determines is most marketable.

The number of primary shares in an IPO has historically averaged between 15% and 25% of the company's total shares, calculated on a fully diluted basis after giving effect to the offering. The number of secondary shares that may be included in an IPO is usually subject to significant marketing constraints, and the underwriters often discourage the inclusion of secondary shares. Potential investors often view an IPO unfavorably if insiders use it to significantly reduce their interest in the company. The managing underwriter advises the company of how many shares, if any, may be sold by corporate insiders without negatively affecting the marketing effort. The managing underwriter may require existing shareholders to waive any, all or a portion of their registration rights as a condition to the IPO.

Another important factor to be considered in determining the size of the offering is the public float. In general, issues with a large float have greater liquidity and less volatility, while issues with a small float have greater volatility and less liquidity. Many institutional investors have internal guidelines that permit them to purchase securities that have only a specified quantitative and qualitative minimum float. The managing underwriter provides the company with guidance in determining how large a float is desirable to market the offered securities.

2. Listing Shares for Trading

At the same time that the company contemplates the ultimate offering size, it should also consider where to list the shares for trading. If the company wishes to become listed on a national exchange, specified quantitative and qualitative criteria must be met. Each of the exchanges offers different advantages and disadvantages and requires different levels of compliance from the company. The NYSE has listing standards that are often too stringent for smaller and younger companies. Thus, the choice for these companies is typically NASDAQ or NYSE MKT (which includes the former American Stock Exchange). The company should discuss with the managing underwriter which listing standards it can meet and which market best serves its needs. The tables on the following two pages summarize the financial requirements for initial listing on the NYSE and on the NASDAQ Global Market (the main NASDAQ trading market formerly known as the "NASDAQ National Market").

Summary of Financial Requirements For Initial Listing

NYSE

	Non-U.S. Companies		
Requirements	**Domestic Standard**	**Foreign Standard**	**U.S. Companies**
No. of round-lot holders (holders of 100 or more shares)	400 U.S. holders of 100+ shares, or, for companies listing in connection with a transfer or quotation, (i) 2,200 holders total and average monthly trading volume of at least 100,000 shares for the most recent six months, or (ii) 500 holders total and average monthly trading volume of at least one million shares for the most recent twelve months	5,000 holders worldwide	400 U.S. holders of 100+ shares, or, for companies listing in connection with a transfer or quotation, (i) 2,200 holders total and average monthly trading volume of at least 100,000 shares for the most recent six months, or (ii) 500 holders total and average monthly trading volume of at least one million shares for the most recent twelve months
No. of publicly held shares	1,100,000	2,500,000 worldwide	1,100,000[1]
Market value of publicly held shares	$40 million for IPOs, spin-offs, or carve-outs; $60 million for closed-end management investment companies; and $100 million for all other listings	$100 million worldwide	$40 million for IPOs, spin-offs, or carve-outs; $60 million for closed-end management investment companies; and $100 million for all other listings
Price per share	$4.00	$4.00	$4.00

	Non-U.S. Companies		
Requirements	**Domestic Standard**	**Foreign Standard**	**U.S. Companies**
Net tangible assets/net worth[2]	N/A	N/A	Net tangible assets applicable to common stock of investment companies must be at least $18,000,000, including a minimum of $8,000,000 composed of paid-in capital or retained earnings
Total assets	N/A	N/A	N/A
Net pre-tax income/revenue	(i) $10 million of pre-tax earnings aggregated over the last three years and a minimum of $2 million in each of the two most recent years and all three years must be profitable, or $12 million of pre-tax earnings aggregated over the last three years and minimum of $5 million in the most recent year and $2 million the next most recent year,[3] (ii) for companies with $500 million or more in global market capitalization and $100 million in	(i) $100 million aggregated over the last three years and a minimum of $25 million in each of the two most recent years,[4] (ii) for companies with $500 million or more in global market capitalization and $100 million in revenues during most recent 12 months, $100 million of operating cash flow aggregated over the last three years with a minimum of $25 million of operating cash flows in each of	(i) $10 million aggregated over the last three years and a minimum of $2 million in each of the two most recent years and all three years must be profitable, or $12 million of pre-tax earnings aggregated over the last three years and minimum of $5 million in the most recent year and $2 million the next most recent year, (ii) for companies with $500 million or more in global market

Requirements	Non-U.S. Companies: Domestic Standard	Non-U.S. Companies: Foreign Standard	U.S. Companies
	revenues during most recent 12 months, $25 million of operating cash flow aggregated over the last three years and all three years must be profitable, (iii) for companies with $750 million or more in global market capitalization, $75 million in revenues for the most recent fiscal year, or (iv) for companies with $150 million or more in global market capitalization, at least $75 million in total assets together with at least $50 million in stockholders' equity	the two most recent fiscal years, or (iii) for companies with $750 million or more in global market capitalization, $75 million in revenues for the most recent fiscal year	capitalization and $100 million in revenues during most recent 12 months, $25 million of operating cash flow aggregated over the last three years and all three years must be profitable, or (iii) for companies with $750 million or more in global market capitalization, $75 million in revenues for the most recent fiscal year
Net income	N/A	N/A	N/A
Active market makers	N/A	N/A	N/A
Operating history[5]	N/A	N/A	N/A

[1] If the unit of trading is less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionally. Any shares held by directors, officers (or their immediate family members) and other holdings of 10% or greater are excluded from the calculation of the number of publicly held shares.

[2] The net tangible assets test is only applicable to companies registered under the Investment Company Act of 1940 or the Small Business Investment Act of 1958. It requires that net tangible assets applicable to common stock be at least $18 million, including a minimum of $8 million composed of paid-in capital or retained earnings.

[3] For EGCs, the standard is $10 million of pre-tax earnings aggregated over the last two years and a minimum of $2 million in both years.

[4] For foreign private issuer EGCs, the standard is $100 million of pre-tax earnings aggregated over the last two years and a minimum of $25 million in both years.

[5] The NYSE will consider listing the securities of a special purpose acquisition company (SPAC) with no prior operating history that conducts an IPO of which at least 90% of the proceeds, together with the proceeds of any other concurrent sales of the SPAC's equity securities, will be held in a trust account controlled by an independent custodian until consummation of a business combination in the form of a merger, capital stock exchange, asset acquisition, stock purchase, reorganization or similar business combination with one or more operating businesses or assets with a fair market value equal to at least 80% of the net assets held in trust (net of amounts disbursed to management for working capital purposes, and excluding the amount of any deferred underwriting discount held in trust) on a case-by-case basis. The SPAC must have an aggregate market value of $250 million, a market value of publicly held shares of $200 million, 400 round-lot holders, 1.1 million publicly held shares, and a minimum IPO price of $4 per share.

NASDAQ Global Market

Requirements	Income Standard	Equity Standard	Market Value Standard	Total Assets/ Total Revenue Standard
Stockholders' equity	$15 million	$30 million	N/A	N/A
Market capitalization	N/A	N/A	$75 million[1]	N/A
Total assets and Total revenue (in latest fiscal year or in two of last three fiscal years)	N/A	N/A	N/A	$75 million and $75 million
Income from continuing operations before income taxes (in latest fiscal year or two of last three fiscal years)	$1 million	N/A	N/A	N/A
Public float (shares)[2]	1.1 million	1.1 million	1.1 million	1.1 million
Operating history	N/A	2 years	N/A	N/A
Public float (value)	$8 million	$18 million	$20 million	$20 million
Minimum bid price	$4	$4	$4	$4
Shareholders (round-lot holders)	400	400	400	400
Market makers[3]	3	3	4	4

[1] Currently traded issuers seeking a NASDAQ listing must meet the market capitalization requirement and have a minimum bid price of $4 for 90 consecutive trading days prior to applying for listing under the Market Value Standard.

[2] Public float is defined as shares that are not held directly or indirectly by any officer or director of the issuer or by any other person who is the beneficial owner of more than 10% of the total shares outstanding.

[3] An electronic communications network (ECN) is not considered a market maker for purposes of these rules.

In addition to the quantitative criteria, each of the national securities exchanges has qualitative criteria for inclusion (provisions regarding majority board independence, and independent compensation and nominating committees do not apply to "controlled" companies, as discussed below), including:

- a requirement that a company's board be comprised of a majority of independent directors;
- a requirement that the company have an audit committee composed entirely of independent and financially literate directors, one of whom has "financial management expertise" (whether or not the committee has an "audit committee financial expert" as defined in the SEC disclosure-only rule, although a person so qualified will automatically meet the financial management expertise requirement) and an audit committee charter that meets certain minimum standards;
- a requirement that the company have compensation and nominating committees composed entirely of independent directors (NYSE), or that all compensation and nominating decisions be made exclusively by independent directors (NASDAQ);
- a requirement that the nominating process be reduced to a written charter that meets certain minimum standards (NYSE), or included in a charter or board resolution that reflects the requirements of the federal securities laws (NASDAQ);
- a requirement that the compensation committee have a written charter that meets certain minimum standards (NYSE);
- a requirement that the company obtain shareholder approval for all equity compensation plans and grants made outside of plans and material modifications to equity compensation plans (subject in all cases to certain exceptions);
- a requirement that the company obtain shareholder approval for changes of control of the company and significant issuances of company stock (generally, issuance of more than 20% of the number of outstanding shares) at below fair market value or in connection with acquisitions, even where state law does not require shareholder approval;
- a requirement that the board adopt "corporate governance guidelines" that meet certain minimum standards (NYSE);
- a requirement that companies adopt and make publicly available codes of conduct applicable to all directors, officers and employees;

- a requirement that the audit or another independent committee approve all related party transactions subject to disclosure as such in the company's Form 10-K and proxy statement (NASDAQ); and
- a requirement that a company's CEO (NYSE) or duly authorized officer (NASDAQ) annually certify as to the company's compliance with corporate governance listing standards and that the CEO of the company promptly notify NYSE or NASDAQ, as the case may be, after any executive officer becomes aware of any material non-compliance (NASDAQ) or any non-compliance (NYSE) with any corporate governance listing standard.

With respect to board committee composition requirements, both the NYSE and NASDAQ provide transition relief consistent with SEC requirements to IPO companies. IPO companies that do not meet the board committee composition requirements at the time of the IPO may list as long as (i) they have an audit committee with at least one independent member (and at least one independent director on each of the compensation and nominating committees, if any), (ii) they have a majority of independent directors on their board within one year of listing, (iii) they have a majority of independent directors on each committee within 90 days of listing (in the case of the compensation and nominating committees) and within 90 days of the effective date of their registration statement (in the case of the audit committee), and (iv) they achieve 100% independence on such committees within one year of listing (in the case of the compensation and nominating committees) and within one year of the effective date of their registration statement (audit committee).

For "controlled companies," such as those with private equity or other financial sponsors maintaining a significant post-IPO stake in the company, the maintenance of control (i.e., more than 50% voting power for the election of directors) allows such companies the following relief from listing standards:

- the company is not required to have a majority of independent directors;
- the company's board need not have a compensation committee, and if it chooses to have one, the committee need not be composed entirely of independent directors (NYSE) or have independent director oversight of executive compensation (NASDAQ);
- the board is not required to have a nominating/corporate governance committee, and if it chooses to have one, the committee need not be composed entirely of independent directors (NYSE) or have independent director oversight of the nomination process (NASDAQ); and

- the company is not required to conduct an annual performance evaluation of any board nominating/corporate governance or compensation committee if it chooses to have one.

Non-U.S. companies are subject to the same qualitative requirements as domestic companies, although the NYSE and NASDAQ rules grant foreign private issuers exemptions from certain requirements that conflict with a foreign country's regulatory practices. For example, NYSE rules exempt foreign private issuers from the requirements of having a majority independent board and a nominating/corporate governance committee and compensation committee, among other things. Non-U.S. companies who take advantage of such exemptions must disclose the use of such exemptions publicly. With the current level of scrutiny by investors, such exemptions, while seemingly positive for a company, may give potential investors pause.

Sample audit committee, compensation committee and nominating and corporate governance committee charters, as well as sample corporate governance guidelines, are included as **Exhibit J**, **Exhibit K**, **Exhibit L** and **Exhibit M**, respectively.

Companies that qualify for listing on NASDAQ, in part, based on their market capitalization, and that are currently publicly traded on another market and that apply for listing under the Market Value Standard will be required to meet the minimum bid price and market capitalization requirements for 90 consecutive trading days prior to applying to NASDAQ. This requirement is designed to ensure that companies qualifying to list under the Market Value Standard have demonstrated the ability to sustain their market capitalization and bid price prior to listing.

3. Lock-Up Agreements

In most IPOs, the company, officers, directors and significant shareholders (often all those holding greater than 1%) of the company are required to enter into lock-up agreements with the underwriters pursuant to which they agree not to sell any securities of the company for a specified period of time after the IPO, generally 90 to 270 days and most typically 180 days. The company and any selling shareholders are locked up through the "lock-up" or "clear market" covenant of the underwriting agreement, and officers, directors and significant shareholders will be locked up through separate lock-up agreements. The purpose of the lock-up is two-fold. First, the lock-up protects post-IPO investors from the risk that either the company or its pre-IPO shareholders will sell large quantities of the company's shares soon after the IPO and thereby depress the market price.

Second, the lock-up avoids the negative market perception that would otherwise result from insiders liquidating (leaving aside the question of whether or not secondary shares are sold in the IPO) and addresses the underwriters' legitimate concern about the number of shares that may come onto the market while the underwriters are supporting the price of the IPO shares.

The traditional lock-up for an IPO has come under increasing pressure, and many IPOs in recent years have varied the theme. Studies have shown that there is an adverse impact on share prices of IPO stock just before and after the expiration of the lock-up period. The phenomenon became visible enough that "unlock" dates (i.e., the date of expiration of the relevant lock-up period) are occasionally published in the financial press, and several websites are dedicated to tracking unlock dates. As a result, underwriters and issuers have experimented with techniques to minimize the effect of unlocking a significant number of shares for resale on the open market. Underwriters have also tried techniques including staggered release dates, in which a portion of the shares are released at various times. In recent years underwriters increasingly have arranged early follow-on offerings, allowing shares held by insiders to be sold in an orderly fashion in advance of the lock-up release date and establishing a new lock-up period in return.

In addition, FINRA rules prohibit, with certain exceptions, the underwriters of an offering from publishing research during the 15 days before or after the expiration or waiver of a lock-up. In order to (1) allow the research departments of the participating underwriters to, upon an earnings release or other material news announcement, publish a report without violating these rules and (2) prevent insiders from benefiting from an increase in share price after a research report is issued, lock-up agreements usually provide for an automatic extension of the lock-up period if either (i) during the last 17 days of the period, the company releases material information (including earnings) or a material event occurs, or (ii) before the expiration of the period, the company announces its intent to release earnings during the 16-day period beginning on the last day of the lock-up period. In EGC IPOs, JOBS Act provisions prohibit the SEC and national securities exchanges from adopting or maintaining any rule or regulation prohibiting any broker, dealer or exchange member from publishing or distributing any research report with respect to an EGC during any prescribed period after the EGC's IPO or prior to the expiration of an underwriters' lockup agreement. As a result of these prohibitions, EGC lock-up agreements generally do not include such a provision.

4. Directed Share Programs

Companies often ask that a portion of the shares to be sold in the IPO be set aside for a "directed share program," also sometimes referred to as a "friends and family" program. In these programs, a small portion (often around 5% but more in some cases) of the shares sold are allocated to investors of the company's choosing. These programs are generally viewed by issuers as giving employees, customers and suppliers a greater interest in the issuer and a reason to support the issuer's future endeavors. Traditionally, directed shares have not been subjected to an underwriter's lock-up, although underwriters have increasingly begun to lock up directed shares in the same way as they lock up insiders' shares.

Establishment of directed share programs may have unintended consequences, however. First, companies should be careful not to let interest and demand outstrip supply in spite of fear of upsetting those who are not chosen to be part of the program and those who will not receive the number of shares to which they believe themselves to be entitled. Second, because the existence of a substantial directed share program will be disclosed in the IPO registration statement, a company should assume that its directed share program will not be a secret from those that it does not invite to participate.

Finally and perhaps most significantly, directed share programs are difficult to administer. There are very strict limitations imposed on the content and timing of correspondence (including email) relating to a directed share program as well as the terms under which participant money may be accepted for payment before the IPO registration statement is effective. Even minor and unintentional breaches of these limitations may result in additional disclosure in the IPO registration statement of the fact and consequences of the breaches (including rescission risk factors) and may delay the IPO.

The SEC also focuses on directed share programs in its review of IPO registration statements. As a result, companies that decide to establish a directed share program in connection with their IPOs should anticipate that the SEC will comment on the program and its administration. Often the SEC will inquire about the procedures used by the underwriter to establish and administer the program, and will ask questions relating to the size of the program, the number of participants, the number of shares purchased by each participant, the percentage of shares allocated to employees, the categories of participants in the program and whether the shares will be subject to a lock-up agreement (the details of which would have to be described).

In addition, it is likely that the SEC will require the issuer to provide as supplemental information any communications sent to the potential participants, including emails and the "friends and family letter," and may seek assurances from the issuer that the offer and sale of shares in the directed share program will meet the requirements of Section 5 of the Securities Act and the related rules and regulations. Because of the serious potential consequences of an illegal offer and sale of stock, all communications with potential participants in a directed share program should be handled by one of the managing underwriters as a formal adjunct to the IPO.

In comment letters, the SEC has focused on procedures in directed share programs that permit confirmation of the purchase of a security in a directed share program by power of attorney when the purchaser is not available to verbally confirm the purchase after pricing. The SEC has indicated that confirmation by power of attorney in these circumstances is acceptable, provided that the attorney-in-fact is chosen by the purchaser and is not the underwriter or its affiliates. If the participants in a directed share program were required to deliver the power of attorney prior to pricing and were required to appoint the underwriter (or its affiliates) as attorney-in-fact, the SEC has indicated that the confirmation by the underwriter relying on the power of attorney would constitute a sale of securities prior to the effectiveness of the registration statement in violation of Section 5 of the Securities Act.

5. E-brokers and Online Offerings

The sale of securities online has become widely accepted as a means of conducting securities offerings. Established issuers such as the World Bank, The Goldman Sachs Group and Ford Motor Credit have conducted online debt offerings, and online-only IPOs have been consummated with increasing regularity. Many public equity offerings are conducted with one or more "e-brokers" as underwriters or at least as members of the distribution syndicate.

A company contemplating an IPO should consider with the managing underwriter the advisability of offering its shares online and including e-brokers in the underwriting syndicate. While online investors as a general rule are more technologically oriented, they are perceived by some as more likely to exit the investment in the short term.

The application of the federal securities laws to online offerings is continuing to develop, and the SEC has tended to react to issuer and underwriter requests on a case-by-case basis. A list of some acceptable procedures for online offerings was outlined in the Wit Capital no-action letter, dated July 14, 1999 (*Wit Capital Letter*). The procedures in the Wit Capital Letter continue to provide guidance to practitioners regarding online offerings because the SEC has yet to issue definitive rules or guidelines governing online registered offerings. For these reasons, companies are urged to plan ahead for the decision of whether to go online for all or a part of their offering and to consult their counsel and the managing underwriter early in the offering process.

The importance of prior planning is heightened by the SEC's focus on the manner in which e-brokers participate in offerings. In online offerings, the SEC often asks issuers and managing underwriters to represent that any e-broker will comply with the federal securities laws. In response, the communications sent by most managing underwriters that invite investment banks to become a part of the syndicate include a deemed representation by the invitee either that it does not conduct online offerings or that the SEC has approved its online procedures. Many of the SEC's concerns in this area are based on matters beyond the issuer's control. As part of the decision to offer shares online, issuers and their counsel should understand the specific manner in which an e-broker proposes to offer the shares and, in particular, how offers and final confirmations will be made, how conditional offers to buy are solicited, how and when they are accepted, how reconfirmations will be obtained after effectiveness of the registration statement and how and when purchasers will fund their purchase. Issuers and underwriters contemplating online offerings should also assess the impact of the SEC's 2005 reform of the securities offering rules (*Securities Offering Reform*) on traditional e-broker practices. See Section VII.B.2.

C. THE REGISTRATION STATEMENT

The first draft of the registration statement is usually prepared by the company and its counsel. The document is then revised during a series of drafting sessions attended by working group members over several weeks. A final drafting session is usually held at the company's financial printer on the day before the registration statement is scheduled to be initially filed with the SEC or confidentially submitted to the SEC, in the case of an EGC or foreign private issuer. The prospectus, which forms the heart of the registration statement, is used not only to comply with the disclosure requirements under the securities laws but also as the primary marketing document for the IPO.

1. Preparing the Registration Statement

a. SEC Forms

Most registration statements for IPOs of U.S. companies are prepared on SEC Form S-1, which can be used by any company. Non-U.S. companies generally use Form F-1 for their IPO registration statement. A draft registration statement filed by an EGC or foreign private issuer is prepared on the appropriate form type (S-1, F-1, etc.) but is submitted to the SEC as a Form DRS. The instructions to the SEC forms refer to Regulations S-K and S-X, which further describe the information to be contained in the registration statement. "Smaller reporting companies" must use the same SEC forms as other reporting companies. Regulations S-K and S-X do, however, provide scaled back disclosure for smaller reporting companies, in some cases consistent with relaxed disclosure available to EGCs under the JOBS Act that will eventually be reflected in revisions to Regulation S-K and S-X. All IPO registration statements consist of a cover sheet, a prospectus and certain additional "Part II" information not required to be in the prospectus.

b. The Prospectus

The registration statement initially filed (or confidentially submitted under the JOBS Act as a draft in the same form as if filed) with the SEC contains a preliminary form of the prospectus that will ultimately be used for marketing purposes. The preliminary prospectus is incomplete at this point because it omits information not finalized prior to the registration statement being declared effective, such as the pricing information, the identities of the underwriting syndicate members, commissions to underwriters and dealers and the net proceeds. The preliminary prospectus is generally distributed by the underwriters, once the issuer has received the SEC's initial comment letter and the issuer has submitted at least one amendment (and often several) to the registration statement responding to comments, and the registration statement and all amendments in any draft confidential submission process are publicly "filed." The preliminary prospectus that is distributed is often referred to as a "red herring."

Set forth below is a discussion of the major items generally required in a prospectus.

i. Front and Back Covers

The front outside cover displays key facts about the offering, including the name of the company, the title, amount and a brief description of the securities offered, the market for the securities, the offering price and the date of the prospectus. If the company is an EGC, the front cover will include a statement to that effect. The front outside cover also provides information about the nature of the underwriting arrangements, including underwriting discounts and commissions. If the offering is a secondary (a resale of previously issued shares) or partial secondary offering, the front cover will include a statement to that effect and the proceeds to selling shareholders. The managing underwriters' names are also included.

The inside front or outside back cover includes a table of contents, and the back cover describes dealers' prospectus delivery requirements.

ii. Prospectus Summary

This section contains a summary of the most important information in the prospectus and usually includes an overview of the company and its business, a brief description of the securities offered, the estimated net proceeds and use of those proceeds and summary financial data. The company's strengths and strategies described in the prospectus summary are often fleshed out in greater detail in the business section. In addition, the SEC is increasingly requiring that companies include a short list of their most significant risks in the prospectus summary. Because of its capsule form and placement at the front of the document, the prospectus summary is a vital portion of the prospectus from a marketing standpoint.

iii. Risk Factors

Another critical part of the prospectus is the Risk Factors section, in which the company describes the potential risks inherent in making an investment in its stock. While many companies view the seemingly endless disclosure contained in this section as either overblown or useless, the Risk Factors in fact provide valuable protection if an issuer is adversely impacted by one of the risk factors described and may even provide protection to a company that falls prey to an ill not specifically mentioned. Issuer's and underwriters' counsel should devote sufficient attention to this section to ensure that the risks are carefully tailored to the company and are therefore more meaningful to the potential investor. Extensive SEC comments are typically received on this section, most frequently focused on making the section more readable and specific to the company. Investors largely recognize that an investment in an IPO is risky and are unlikely to be deterred by disclosure of risks that are of a general character. While responding to SEC comments, companies should not revert to a formulation of risks that implies in any way that the enumerated risks constitute all possible risks of an investment in the offering. If an EGC is taking and intends to take advantage of relaxed disclosure requirements and other benefits of the JOBS Act, a risk factor should be added to advise of possible risks to investors of those choices.

iv. Use of Proceeds

The prospectus must include disclosure of the principal intended use of the offering's net proceeds, including specific details if the offering proceeds are to be used to reduce debt or acquire a new business. If there is no specific plan for the proceeds, the company must nevertheless provide a reason for the offering, such as funding for general corporate purposes.

v. Selected Financial Data

This section includes specified financial information for each of the last five years (or for the life of the company and its predecessor(s), if less) for companies other than EGCs, plus any interim period included in the registration statement and the comparative interim period for the immediately preceding year. Pursuant to the JOBS Act, EGCs may but need not provide more than two years of selected financial data (although many EGCs include three to five years of data for marketing reasons, if available). This data is required to include net sales or operating revenue, income (or loss) from continuing operations (both in total and per-share amounts), total assets, capital leases, redeemable preferred stock and long-term debt and any cash dividends declared per common share, if any. Companies typically include additional metrics that enhance an understanding of their financial condition and operations.

vi. Management's Discussion and Analysis

Management's Discussion and Analysis of Financial Condition and Results of Operations, which is commonly referred to as the "MD&A," requires management to describe the financial condition and operations as presented in the financial statements. For issuers other than smaller reporting companies and EGCs, generally MD&A should address the three-year period covered by the financial statements included in the registration statement, and where trend information is relevant, reference to the five-year selected financial data appearing in the registration statement may be necessary. A smaller reporting company's discussion should cover the most recent two fiscal years (or such shorter period as the company has been in business). Pursuant to the JOBS Act, an EGC need not provide MD&A for any period prior to the earliest audited period presented in the prospectus.

The purpose is to provide investors with management's view of the company and its financial condition in the long and short term. The discussion includes information on liquidity and capital resources, including both short-term and long-term commitments, capital expenditure plans and expected sources of capital. MD&A also includes other information that the issuer believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Finally, the MD&A section includes a discussion of "known trends and uncertainties" affecting liquidity, capital resources, net sales or revenues or income from continuing operations.

This requirement to discuss known trends and uncertainties continues to be a source of concern for issuers because of its inherently predictive or forward-looking nature. While the SEC encourages the release of forward-looking information, only in MD&A is information of a forward-looking nature required to be disclosed. The SEC has used this requirement to pursue issuers for disclosure deficiencies without demonstrating that existing financial statements were defective in any way. SEC proceedings have focused on the fact that a deteriorating trend in financial condition or an uncertainty that could have a material impact was known to exist at the time that MD&A was prepared but not disclosed.

The SEC has been conducting a campaign to improve MD&A disclosure for over a decade, issuing a series of releases designed to clarify and expand the scope of required financial disclosure. In 2001, the SEC strongly encouraged companies to include in MD&A a separately-captioned section to explain the "critical accounting policies" that underlie the company's reported results and the discussion of those results contained in the MD&A. Companies were encouraged to identify such policies in the MD&A, along with the judgments and uncertainties affecting the application of such policies, and the likelihood that materially different amounts would be reported under different conditions or using different assumptions (and to quantify such differences, if possible).

In 2002, the SEC issued a "policy statement" reminding companies that the MD&A rules require companies to disclose in their MD&A material risks related to off-balance sheet arrangements, non-exchange traded contracts and related party transactions.

In accordance with a requirement of Sarbanes-Oxley, the SEC adopted amendments to the MD&A rules requiring companies to include a separately-captioned section in MD&A devoted to disclosure of any off-balance sheet arrangements (defined to include such things as guarantees, retained or contingent interests and certain derivative instruments). If a company has any off-balance sheet arrangements that either have, or are reasonably likely to have, a current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that are material to investors, the company must include this separately-captioned section in its MD&A and disclose all material facts about such arrangement.

Additionally, the SEC rules also require that companies aggregate in a separate table included in MD&A information about all of the company's contractual obligations. This "Contractual Obligations Table" must include all such obligations, segregated by type (i.e., long-term debt, capital leases, operating leases, etc.), and must disclose the amount of payments due under such specified categories over specified time periods.

In 2003, the SEC issued an interpretive release advising companies that MD&A should not simply be the financial statements in narrative form. Companies were strongly encouraged to include an executive overview at the beginning of the MD&A section that would provide a context for the discussion and analysis of the company's financial results. This introductory section should provide management's view of the financial, non-financial and industry indicators that are most crucial to the company's success. The SEC also encouraged companies not to simply duplicate disclosure from the notes to their financial statements when discussing their critical accounting policies.

The 2003 interpretive release also warned companies to avoid boilerplate presentations in MD&A. The SEC requested companies to focus on the presentation of information and to disclose only such information in MD&A that is material to the company. MD&A disclosure should be organized in such a way as to prioritize for the reader the most material information from management's perspective.

In 2010, the SEC issued an interpretative release relating to the discussion of liquidity and capital resources in MD&A. The 2010 release provides guidance to registrants on the presentation of liquidity, leverage ratio and contractual obligations table disclosures in MD&A. With respect to liquidity, the 2010 release focuses on the existing disclosure rules regarding trends and uncertainties, intra-period variations, certain repurchase agreements that are accounted for as sales and cost management policies.

The 2010 release suggests particular trends and uncertainties that may require disclosure, including "difficulties accessing the debt markets, reliance on commercial paper or other short-term financing arrangements, maturity mismatches between borrowing sources and the assets funded by those sources, changes in terms requested by counterparties, changes in the valuation of collateral and counterparty risk." The SEC encourages registrants to update their disclosure about risks, uncertainties, trends and commitments, particularly when such issues will result in, or are reasonably likely to result in, a material increase or decrease to the registrant's liquidity.

The 2010 release also urged registrants to consider using their MD&A to aid in an investor's understanding of the registrant's liquidity position if the financial statements do not adequately convey the registrant's financing arrangements during the relevant period. For example, disclosure of intra-period variations is required if borrowings during a reporting period are materially different than the period-end amounts recorded in the financial statements. The 2010 release also provides guidance that certain repurchase transactions that have been accounted for as sales, and other short-term financings, may require disclosure in MD&A if the transaction is reasonably likely to result in the use of a material amount of cash or other liquid assets.

Lastly, the 2010 release notes that companies should consider describing cash management and risk management policies relevant to an assessment of their financial condition. Specifically, banks should consider including a discussion of their policies and practices in meeting applicable banking agency guidance on funding and liquidity risk management, in addition to a discussion of their policies and practices that differ from applicable agency guidance. In addition, a registrant that maintains or has access to a portfolio of cash and other investments that is a material source of liquidity should consider providing information about the portfolio's nature and composition, including describing the assets held, and any related market risk, settlement risk or other risk exposure.

In a companion release, the SEC proposed amendments to enhance the disclosure that registrants present about short-term borrowings. The proposals in that release would require a registrant to provide, in a separately captioned subsection of MD&A, a comprehensive explanation of its short-term borrowings, including both quantitative and qualitative information. Final rules have not been adopted.

vii. Market Risk

Issuers are required to provide quantitative information about the market risks to which they are exposed, with a distinction being made between instruments entered into for trading or speculative purposes and those entered into for hedging or other purposes. This disclosure may be provided in tabular format including fair values and expected cash flows, by providing sensitivity analysis disclosures that express the potential loss in future earnings, fair values or cash flows resulting from one or more selected hypothetical changes in the market measure in question or by providing "value at risk" disclosures that express the potential loss in future earnings, fair values or cash flows over a selected period of time with a selected likelihood of occurrence from changes in the market measure in question. This disclosure is typically provided as a subsection of MD&A.

viii. Description of Business

This section provides a detailed description of the company, its subsidiaries and any predecessor(s) during the past five years (or such shorter period as the company may have been engaged in business), the industry within which it operates, the market opportunity for the company and the company's strategy for seizing the market opportunity and achieving its objectives.

This detailed description of the company's business often includes:

- the company's history;
- operating plans or strategies;
- factors that differentiate the company from its competitors;
- principal products or services and their markets;
- status of any publicly announced new products or business segments;
- competitive conditions;
- material contracts;
- manufacturing information, including sources and availability of raw materials;
- patents, trademarks, licenses, franchises and concessions held by the company;
- litigation;
- the regulatory environment in which the company operates;
- number of employees and employee relations;
- properties and facilities; and
- backlog.

Companies are required in the business section to provide a breakdown of revenues and assets attributed to the company's home country, all foreign countries combined and any individual country from which a material portion of revenues are derived or in which a material portion of assets are located. In addition, if applicable, companies will need to indicate whether their business (or any segment of their business) is dependent on a single customer, or few customers, identify any customer that accounted for more than 10% of the company's total sales and describe the relationship with that customer.

ix. Management

This section provides biographical information regarding the directors, executive officers and other key employees. Additionally, this section often includes information regarding what board committees, if any, the company has, what the responsibilities are for each committee and the members of each committee. With respect to the audit committee, companies must disclose the presence or absence of an audit committee financial expert on the audit committee who is "independent" as that term is defined under the Exchange Act.

x. Executive Compensation

The amount paid by companies to their executives is a hot topic not only for the SEC but also shareholders and investors. Since 2006, companies have been required to provide an expanded discussion with respect to the compensation awarded to, earned by, or paid to their executive officers under the "Compensation Discussion and Analysis" section, or "CD&A." In this section, companies need to discuss the objectives of their compensation programs, what the compensation program is designed to reward, each element of compensation and why such element was chosen, how the company determines the amount for each element to be paid and how each element fits into the company's overall compensation objectives and decision making process concerning compensation. The JOBS Act exempts EGCs from this disclosure requirement, and EGCs have almost universally elected not to include this disclosure in their CD&A.

In addition, companies are required to provide detailed compensation information for the company's CEO, CFO and the three most highly compensated executive officers (only the CEO and two other executive officers for EGCs). Specific compensation information to be provided for each of these individuals includes generally salary, bonus, stock awards, option awards, perquisites and other compensation received by each individual, which is aggregated in a total compensation column. In addition, companies must provide various other tables detailing compensation plan-based awards that these executives may receive or have received. Each table must be accompanied by a narrative description of factors material to an understanding of the information provided. Additionally, the company will have to provide disclosure regarding its non-qualified deferred compensation and retirement plans. In addition to more limited narrative disclosures in lieu of these tables, EGCs need only provide a summary compensation table and a table showing outstanding equity awards.

Under the SEC's compensation disclosure rules, companies must also provide a compensation table for director compensation.

The requirements for director and executive compensation are further detailed in Section VIII.D.1.

xi. Related Person Transactions

This section describes any transaction or series of similar transactions to which the company is a party that involves amounts in excess of $120,000 in which any director, executive officer, 5% shareholder or any member of their immediate family has a direct or indirect material interest. Companies must also disclose their policies and procedures regarding the approval or ratification of related person transactions. It is important to remember that extensions of credit in the form of a personal loan by issuers to directors and executive officers made after July 30, 2002, with certain limited exceptions, are expressly prohibited under Sarbanes-Oxley and related SEC rules and regulations. The term "issuers" for the purposes of this prohibition includes public companies as well as companies that have filed a registration statement with the SEC that has not become effective. As a result, directors and executive officers of pre-IPO companies must repay any outstanding loan amounts prior to filing the IPO registration statement. Also described in this section are relationships between the company and entities in which directors or executive officers have an interest.

xii. Principal Shareholders

This section describes the company equity holdings of all officers and directors, and of those shareholders who beneficially own more than 5% of any class of shares. It is important to describe completely and accurately—and, in some cases, to highlight in the risk factors—the ownership of company shares by insiders and significant shareholders, as well as any unusual arrangements that those persons may have with respect to their shares.

xiii. Underwriting

This section outlines the arrangements between the company and the underwriters, including underwriter compensation and the makeup of the underwriting syndicate.

xiv. Financial Statements

This section contains the following company financial statements, including the auditor report:

- audited balance sheets as of the end of each of the last two fiscal years;
- audited statements of income, cash flows and shareholders' equity for each of the last three fiscal years (two fiscal years for EGCs); and
- unaudited interim statements, if the anticipated effective date of the registration statement is more than 134 days after the fiscal year-end.

c. Information Not Required in the Prospectus.

i. Other Information

This section contains disclosures not included in the prospectus and is thus not provided to the investing public as part of the printed prospectus. However, the information is filed with the SEC and is thus available for public inspection and readily accessible via the electronic filing system called EDGAR, which is maintained by the SEC. The following items are included:

- expenses of issuance and distribution;
- sales of unregistered securities in the last three years;
- indemnification or insurance arrangements for liability of the company's directors and officers;
- various financial statement schedules; and
- undertakings by the company in certain circumstances.

ii. Exhibits

The SEC also requires various documents to be filed as exhibits to the registration statement, including the underwriting agreement, the company's charter documents, material contracts and the written consent of all experts and others who have prepared or certified any of the material included in the registration statement. Determining which contracts qualify as material is a decision made during the due diligence process.

d. Plain English

Over many years, prospectuses had become difficult to read. Seeking to minimize the chances of liability, many companies often over-disclosed information, repeating it several times. Instead of being summarized, documents and agreements were repeated verbatim to avoid claims that any important piece of information had been omitted. Identical boilerplate sections muddled prospectuses, even where they were unnecessary. The language used in prospectuses was technical and legalistic, making the documents intimidating and difficult to read.

To simplify prospectuses and make them more "user-friendly," the SEC adopted "Plain English" rules in 1998. The Plain English rules do not require less disclosure, but shorter, clearer sentences using the active voice are favored by the SEC. Overly legalistic and technical terms and presentations must be avoided. Complex documents must be summarized so that they can be understood clearly. Disclosures must be tailored to each prospectus, and boilerplate must be eliminated when not necessary. Repetition of information should be avoided. In addition, the cover, summary and risk factors section of the prospectus must be specifically formatted to be reader friendly. No legal or technical terms may be used in these parts. Instead, they must consist of short sentences in everyday language with complex material presented in a table or with bullet points.

The SEC also applies these Plain English rules to the artwork typically contained on the inside front and inside back covers of the prospectus distributed to potential investors. In addition to requiring that any text accompanying the artwork be written in Plain English, the SEC also requires that no artwork or gatefold repeat the prospectus summary, that the layout of the artwork not be too "busy" to avoid confusion, that accompanying text be sufficient only to put the artwork in context and that listings of customers or awards be eliminated.

In 2006, the SEC additionally required that executive compensation, director compensation, corporate governance and related person transactions disclosure in all SEC filings (e.g., proxy statements) comply with the Plain English rules.

2. Federal Securities Law Liability Related to the Registration Statement

The IPO registration statement should be accurate and complete. Inaccuracies in the registration statement may lead to liability under the federal securities laws.

a. Section 11 of the Securities Act

Section 11 of the Securities Act imposes liability for any "material" misstatement or omission in the registration statement on the company, its directors and its officers who sign the registration statement (namely the CEO, the CFO and the controller or principal accounting officer), the underwriters and any accountants, engineers, or other experts who have consented to be named as having prepared or certified a part of the registration statement. While there is authority to the contrary, a selling shareholder that participates in the distribution of securities to the public may be deemed an underwriter and may thus bear Section 11 liability.

"Material" in this context refers to information as to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether or not to purchase the shares. A plaintiff need not prove intent to deceive ("scienter"), reliance or negligence, but instead only the existence of a misstatement of a material fact or the omission of a material fact necessary to prevent the statements made from being misleading. However, damages are not recoverable to the extent that the defendant proves the damages did not result from the misstatement or omission.

There are affirmative defenses to liability, including proof that the purchaser knew of the misstatement or omission, which is usually impractical to establish in a broadly marketed public offering. For persons other than the company, "due diligence" is also a defense. Moreover, if the misstatement or omission is alleged to have been made fraudulently, then the suit must comply with strict pleading rules, or it will be dismissed.

A purchaser of securities registered under the Securities Act who is successful in his or her suit is entitled to damages equal to the excess of the purchase price (not exceeding the original public offering price) over the value of the securities at the time of the lawsuit. If the securities have been disposed of in the open market prior to the bringing of the lawsuit, the measure of damages is the purchase price less the resale price. Assuming that none of the potentially liable persons noted above has acted fraudulently, each of the potentially liable persons other than outside directors may be held responsible for all damages but may recover contribution from any other party who would have been liable to make the same payment. Outside directors are liable only according to their relative fault, unless they knowingly committed the violation of the securities laws.

The company itself is strictly liable, without regard to fault or due diligence, for any material misstatement or misleading statement in the registration statement. The officers of the company required to sign the registration statement and the current and any named future directors (whether or not they actually sign), as well as underwriters and experts, have the benefit of a "due diligence" defense.

The "due diligence" defense is available to persons who can prove that, as to any non-expertized part of the registration statement (defined below), *after reasonable investigation* they had reasonable grounds to believe, and did believe, that a challenged statement was true and that there was no omission to state a material fact required to be stated therein or necessary to make the statement not misleading. The standard of reasonableness is "that required of a prudent man in the management of his own property." Whether or not an investigation is "reasonable" depends upon the relevant facts and circumstances.

A due diligence defense may be quite difficult to establish for officers signing the registration statement and directors who are employees. In hindsight, it may be difficult to prove that they had reasonable grounds to believe that the challenged misstatement was true given their knowledge of the company's business. However, some portions of the registration statement are "made on the authority of an expert" (e.g., the audited financial statements covered by an independent accountant's opinion) and are therefore "expertized." Directors and signing officers have less theoretical exposure to liability for a misstatement or omission arising from an expertized portion, as to which they need not prove that they made a reasonable investigation. They need only show that they had no reasonable grounds to believe, and did not believe, that there was a misstatement or omission.

b. Section 12(a)(2) of the Securities Act

Section 12(a)(2) of the Securities Act supplements Section 11. It imposes liability on any person who offers or sells a security in a public offering by means of an untrue statement of a material fact or an omission to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading. A person may avoid liability by proving that he or she did not know, and in the exercise of "reasonable care" could not have known, of the untruth or omission. As with Section 11 liability, a plaintiff in an action under Section 12(a)(2) need not prove scienter, reliance or negligence, but merely misstatement or omission. However, as with Section 11 liability, damages are not recoverable to the extent that the defendant proves the damages did not result from the misstatement or omission.

Unlike Section 11, Section 12(a)(2) extends to oral statements made in the course of the public offering, including those made in the underwriters' road show and private meetings with large potential investors. Also in contrast to Section 11, Section 12(a)(2) liability extends functionally to those who offer or sell the securities. The U.S. Supreme Court has construed liability to include not only the persons who pass title to the securities, such as the company or underwriters in a primary offering, but also others who actively participate in the solicitation and have a financial interest in the sale. Thus, directors, officers (including those who are not registration statement signatories) and principal shareholders of a company have been held liable as "sellers" where they authorized the promotional efforts of the underwriters, helped prepare the offering documents and worked closely with the underwriters in conducting due diligence meetings or roadshow meetings with prospective investors. Moreover, as under Section 11, Section 12(a)(2) liability may extend to "control persons" (discussed in subsection (d) below) unless those persons prove that they had no knowledge, or reasonable grounds to believe in the existence, of the facts giving rise to the liability of those that they controlled.

Anyone who is deemed to be a "seller" may be liable to the purchaser for the consideration paid for the security, with interest, less any income received thereon (if the purchaser tenders the security to the seller) or damages (if the purchaser no longer owns the security).

c. Section 17(a) of the Securities Act

A company and its directors and officers may also face liability under Section 17(a) of the Securities Act for material misstatements and omissions in the IPO registration statement, although these provisions are narrower than Sections 11 and 12(a)(2). Section 17(a) imposes liability on any person who commits fraud in connection with the offer or sale of a security, or obtains money or property in connection with the offer or sale of a security by means of any untrue statement of a material fact or any omission to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading. Rule 10b-5 under the Exchange Act, which is similar in scope, is discussed in more detail in Section VIII.E.2.

The majority of courts have held that Section 17(a) does not provide a private right of action and is enforceable only by the SEC. The U.S. Supreme Court has held that the SEC does not need to prove scienter to establish a Section 17(a) violation. Mere negligence will suffice. Those courts that do recognize a private right of action under Section 17(a) have required proof of scienter, reliance, causation and materiality. Rule 10b-5 may also be the basis of either SEC enforcement or a private cause of action if the plaintiff is either a buyer or a seller of a security.

d. Liability Attaches at "Time of Sale"

In connection with securities offering reform rules adopted in 2005, the SEC clarified that liability under Section 12(a)(2) and 17(a) for material misstatements or omissions should be measured at the "time of sale," which the SEC defined as the time that a purchaser makes his "investment decision," not when payment for the securities is made or when confirmations of the purchase are sent. This clarification has caused issuers to be more circumspect about the completeness and accuracy of the information contained in the "red herring" prospectus, as most investment decisions flow from this document and not the final prospectus which is delivered at settlement.

e. Liability of Control Persons under the Securities Act

Section 15 of the Securities Act provides that a person controlling any person liable under the Securities Act may be liable jointly and severally and to the same extent as its controlled person for violations of the Securities Act. For a plaintiff to have a prima facie case that the defendant is liable as a "control person," the plaintiff typically must show that the defendant (1) had actual power or influence over the controlled person and (2) had knowledge of or reasonable grounds to believe in the facts underlying the misconduct or culpably participated in the alleged illegal activity. The more actively involved in a company's affairs a person becomes, the greater the risk that such person will be subject to liability based on the company's actions. Courts have held that one director of a company may be a control person while other directors of the same company are not, depending upon each director's knowledge of the facts on which liability is based.

D. COMMUNICATIONS PRIOR TO FILING ("GUN JUMPING")

The federal securities laws were intended to limit the kind and amount of pre-offering publicity permitted in registered public offerings of securities. In particular, issuers are prohibited from "conditioning the marketplace" or influencing investor sentiment about the issuer before the investor has been given the opportunity to receive and review the prospectus mandated by the SEC's rules. The SEC enforces these rules strictly and has forced issuers to delay their IPOs while the marketplace "cools off" from impermissible publicity. The SEC has also from time to time instituted proceedings seeking penalties, injunctions or other sanctions against violators. Issuers that engage in this behavior are said to have "jumped the gun." The Internet has made it easier for the SEC to monitor an issuer's public communications.

The federal securities laws prohibit the making of any offer from the time that the company reaches an understanding with the managing underwriter as to the IPO until the filing of the IPO registration statement. For these and other purposes, the submission of a draft confidential registration statement and draft amendments by an EGC under the JOBS Act are not considered “filings.” The JOBS Act does, however, provide for oral and written “testing the waters” communications by EGCs, and anyone acting on their behalf, including underwriters, with “accredited investors” and QIBs, as discussed in Section I.D.

The period prior to the filing of a registration statement is commonly called the “quiet period.” The term “offer” is interpreted very broadly, with the effect that any pre-filing publicity constitutes gun-jumping if it cannot be justified on the grounds that it was made for the permissible purposes of building identity in the business marketplace and not for the impermissible purposes of conditioning the investing marketplace. At the same time, the SEC recognizes the legitimate needs of issuers to promote themselves in the marketplace, to establish an identity, to develop name recognition among suppliers and customers and otherwise to carry out their ordinary course business objectives without disruption from the public offering process.

Under the Securities Offering Reform rules adopted in 2005, the SEC created two safe harbors for companies going public. The Rule 163A safe harbor protects communications made more than 30 days before filing a registration statement. Such communications must not reference a securities offering and must provide factual business information and forward-looking information only. The company must, however, take reasonable steps within its control to prevent further distribution or publication of the communication during the 30-day period immediately prior to filing the registration statement. During such 30-day period, a separate safe harbor, Rule 169, covers communication containing only regularly released factual information and no references to the registered offering. These safe harbors codified existing SEC staff positions and were created to encourage issuers to continue to provide regularly released ordinary course communications prior to an offering. As always, a communication referencing a security offering that is or will be the subject of a registration statement falls outside the protections of these safe harbors. Impermissible purposes may be found even in publicity that makes no reference to the IPO. Companies in the quiet period are well advised to review with counsel any and all communications before release and to consider carefully the need and justification for publicity.

This restraint on publicity may seem onerous to issuers, and in some circumstances it is. Consider also the company contemplating going public that finds itself the target of negative publicity on an online bulletin board or social media site to respond might be deemed gun-jumping, yet to not respond may harm the company's business. The SEC's treatment of gun-jumping issues fortunately seems to recognize the need for companies, especially newly-formed companies, to promote and defend themselves.

Most companies make available on their websites significant amounts of information. While practices vary as to the pre-clearance and posting of information on websites, most sites contain a mixture of sales, marketing and investor information from a variety of sources inside and outside of the company. The SEC views publication of information on a website as written communication, and any information on a company's website viewed by the SEC as an offering of securities or as conditioning of the market for such offering will constitute gun-jumping. During the period leading up to and during the IPO process, the company's website should be reviewed carefully to see if any of the information present in or linked to the site may influence investor decisions about the company's IPO. Companies establishing websites shortly before or during the IPO process may face similar issues and should discuss the timing issues involved with their counsel.

Another safe harbor provision, Rule 135, permits announcements containing only specified and limited information prior to the filing of a registration statement. IPO companies are allowed to state no more than their name, the title, amount and basic terms of the securities to be offered, the amount of the offering to be made by selling shareholders, if any, the expected timing of the offering and a brief statement as to the manner and purpose of the offering, without naming the underwriters. The purpose of the Rule 135 safe harbor is to allow the company to succinctly address questions about its IPO and to avoid having to answer questions from the media with heavily hedged responses or with a "no comment" response.

A prominent example of gun-jumping occurred in connection with the 1999 IPO of Webvan Group Inc., an entity which had been formed less than nine months before its IPO. While other publicity issues also played a role, according to published reports, the SEC forced the delay of the Webvan IPO from early October to early November 1999 based in part on pre-filing publicity. This publicity included a Business Week article featuring an interview with the chairman of Webvan as one of the top 25 personalities of the Internet economy. Similar delays impacted the 2004 Google IPO after one of its founders was featured in a *Playboy* article that was published while the company was in registration. More recently, in 2011, after Groupon had filed a registration statement with the SEC for its proposed IPO, the company's CEO and co-founder sent an email to employees defending Groupon's business model. The email leaked and went viral, resulting in a delay of the IPO as well as the SEC requiring Groupon to include the email as an appendix to its prospectus and thus assume liability for its contents.

The new rules permitting general solicitation and general advertising under Rule 506(c) and Rule 144A did not exempt such activities from the definition of "offer" for purposes of Section 5 of the Securities Act. Therefore, issuers that have decided to proceed with a public offering or that have filed a registration statement that has not yet gone effective must also consider whether any general solicitation and general advertising conducted in connection with a Rule 506(c) or Rule 144A offering would be integrated with the public offering and thereby constitute gun-jumping for purposes of the public offering. However, issuers will still be able to rely on the Rule 135c and 163A safe harbors with respect to such communications. See Section VII.C.1 for a more detailed discussion of the SEC's new rules relating to general solicitation and general advertising.

IV. FILING THE REGISTRATION STATEMENT

A. FINAL DRAFTING SESSION

A final drafting session typically begins the day before the registration statement is proposed to be filed or a draft confidentially submitted by an EGC under the JOBS Act. This final session often lasts well into the night and the next day, so it should begin early to increase the likelihood of completing the registration statement on the target filing or submission date.

B. EDGAR—ELECTRONIC FILING

The SEC requires U.S. companies to file all, and non-U.S. companies to file most, disclosure documents electronically via EDGAR. Other than draft registration statements filed by EGCs or foreign private issuers, all filings made on EDGAR are immediately available for public viewing. The SEC maintains a free website at http://www.sec.gov at which users can search the EDGAR archives. Text search capabilities for EDGAR filings are available on the SEC website. A wide variety of business and investment websites offer free and more user-friendly access. Some sites offer instant email notification of filings of issuers on a user's "watchlist."

In order to file electronically via EDGAR on a given day and receive that day's date as the filing date, the filing must be submitted electronically to the SEC by 5:30 p.m., Eastern time. All filings submitted after that time (until EDGAR closes at 10:00 p.m., Eastern time) are deemed filed on the next business day. Because preparing the registration statement form for transmission via EDGAR usually takes several hours, ample time should be allocated after final "sign-off" to ensure a timely filing.

Companies are encouraged to conduct a test filing, where a filing of the registration statement is simulated, with the SEC to ensure all codes are proper and to address any unexpected filing problems before the actual filing of the registration statement with the SEC.

The SEC accepts filings submitted either in HyperText Markup Language (*HTML*) or American Standard Code for Information (*ASCII*) format. Companies also have the option of accompanying required filings with unofficial copies in Portable Document Format (*PDF*). Documents in HTML, unlike ASCII, accommodate indentation, spacing, bullet points and highlighting, which are the types of presentation that the SEC recommends for Plain English. In addition, HTML documents permit the use of embedded hypertext links that cross-refer to another location within or outside the same document. In contrast to ASCII documents, HTML and PDF documents may incorporate different fonts, graphics and visual presentations. The SEC, however, does not permit submissions that include files with audio, video and moving corporate logos, or other animation.

While HTML documents add convenience and legibility to persons downloading filings from the SEC's database, they may also provide unintended pitfalls. For example, the SEC rules permit the use of hypertext links to different sections within the same HTML document, but do not give effect to hypertext links to information external to the HTML document, other than for enforcement and liability purposes. Companies should not use external hypertext links in HTML-formatted documents filed with the SEC.

Until the SEC fully implements a system that provides for electronic transmission and receipt of confidential submissions, the SEC asks that draft registration statements be submitted in a text searchable PDF file on a CD/DVD. Alternatively, the draft registration statement may be submitted in paper. The SEC asks that a transmittal letter be included in which the company confirms its status as an EGC.

Electronic files submitted under the JOBS Act should comply with all of the EDGAR requirements and best practices applicable to actual EDGAR filings, because all prior draft submissions of the registration statement and amendments must be made public via EDGAR concurrently with the first public filing of the registration statement.

C. REGISTRATION FEES; IDENTIFICATION AND ACCESS CODES

At least one business day prior to filing, the company must submit to the SEC's account the SEC registration fee, which is a percentage of the maximum aggregate offering price, either by wire transfer or by U.S. postal money order, certified check, bank cashier's check or bank money order. Any filings submitted to the SEC are rejected unless the proper registration fee has been paid. Draft submissions under the JOBS Act do not require a filing fee, which is due only upon first filing on EDGAR of the registration statement. If the amount of securities to be registered is increased, the company must pay an additional registration fee in respect of the increased amount.

Prior to filing with the SEC, the company obtains identification and access codes to utilize EDGAR. To accomplish this, the company should file a Form ID two or three weeks before the proposed filing date, although the SEC usually grants EDGAR codes on an expedited basis where this requirement has been overlooked. Form IDs must be filed electronically (rather than by mail or by fax as had been the case previously), which should facilitate the process of obtaining EDGAR codes. Procedures for obtaining EDGAR filing codes electronically and payment of filing fees are explained in **Exhibit N**.

A company must identify a Standard Industrial Classification (SIC) code on the cover page of the registration statement, which it uses to indicate the company's line of business. The SIC code will appear in a company's EDGAR filings and is used by the SEC's Division of Corporation Finance to designate what industry group within its disclosure operations will be responsible for reviewing the company's SEC filings.

D. CUSIP NUMBER

Following the initial filing of the registration statement, issuer's counsel arranges with CUSIP Global Services at Standard & Poor's for the assignment of a CUSIP number for the company's stock. CUSIP is an acronym for the Committee on Uniform Security Identification Procedures of the American Bankers Association, which created the CUSIP system. Certain documents, including a copy of the preliminary prospectus, must be submitted to CUSIP Global Services when requesting a CUSIP number. The request for a CUSIP number may be submitted online at *www.CUSIP.com*. The CUSIP number identifies the stock for trading and settlement purposes. All securities that are listed on an exchange are required to have CUSIP numbers. If the Company has any certificated shares, the CUSIP number will also appear on the company's stock certificates and would be provided to the engraver preparing specimen certificates for the IPO.

V. THE WAITING PERIOD

A brief lull will usually follow the filing of the IPO registration statement or the confidential submission of the draft registration statement, as the SEC and other regulators begin the process of reviewing the various filings and submissions made. Upon the first actual public filing of the registration statement, there is likely to be an initial flurry of press inquiries upon the release of a limited news announcement permitted by SEC rules, and as the news services pick up the filing from the SEC's EDGAR system. This period following the filing of the registration statement and before the time that the registration statement is declared effective by the SEC is called the waiting period. During the waiting period, the parties prepare for and conduct the road show and other marketing efforts, formalize underwriting and syndicate arrangements and update and amend the registration statement as necessary to respond to comments from the SEC and FINRA.

A. REGULATORY REVIEWS

1. SEC Review

Upon receipt of the registration statement, the Division of Corporation Finance assigns responsibility for the filing or submission to an examiner for review. Virtually all IPO registration statements are fully reviewed by the Division. The examiner reviews the filing or submission for compliance with the requirements of the federal securities laws, rules and regulations. The SEC Staff has issued guidance that a confidential submission of a draft registration statement under the JOBS Act must be as "substantially complete" as is required for a filed registration statement, including a signed auditor's report and exhibits. As the confidential submission of the draft registration statement does not constitute a "filing" for purposes of Securities Act Sections 5(c) and 6(a), it is not required to be signed or to include the consent of auditors and other experts. If a draft registration statement submitted confidentially is not substantially complete, the Division might deem it "materially deficient" and defer its review. In reviewing a registration statement, the SEC staff is likely to read all public statements by and about the company, to visit the company's website and to retrieve available market data information. The examiner generally continues to update his or her review as the filing progresses. A member of the Division's accounting staff simultaneously leads a review of the company's financial disclosures.

Usually within 30 days, the Division responds formally regarding the adequacy of the disclosure contained in the registration statement by way of a "comment letter." The Division's review does not go to the merit of the transaction or the registered security. Rather, the Division's comment letters generally focus on (1) technical issues, such as compliance with the specific rules of the SEC, (2) disclosure issues, such as the adequacy of the risk factors, issues regarding information found in company press releases or third-party statements but not reflected in the registration statement, (3) drafting issues, such as compliance with the SEC's Plain English rules, and (4) accounting issues. Because disclosure and accounting issues can be time-consuming and troublesome, it is best to try to identify these issues before the initial filing.

The Division is rarely able to commit to a specific date on which the company may expect to receive the comment letter, but members of the working group should clear their schedules so that the necessary time and attention may be devoted to responding promptly to the Division's comments. Absent major issues raised by the comment letter, parties typically try to respond to Division comments within days of receiving the comment letter. The SEC staff routinely requests that issuers respond to comments within 10 business days and that counsel or the company contact the SEC staff if they do not believe they will be responding to the comments within this timeframe. Most companies respond to Division comments by amending the registration statement and refiling it along with a letter responding formally to the Division's comments individually. Both the amended registration statement and the response letter are filed with the SEC via EDGAR. Some companies may choose to speak directly with the examiner or the Division's accounting staff to gain clarification or try to justify why a particular comment should not be reflected in the registration statement. In certain cases, a company may even seek to "pre-clear" a specific response with the examiner or the accounting staff, in order to avoid filing a publicly-available amended version of the text that might be subject to further comment on a particular issue. In any event, a formal filing will ultimately be made which responds to each item in the comment letter, indicating where and how a particular comment was reflected or why it was not.

Comment letters and response letters relating to reviewed filings are released publicly on a filing-by-filing basis through the EDGAR system at the SEC's website. The Division makes the comment letters public no earlier than 20 business days after the SEC has declared a registration statement effective. The only way that companies can keep information in an SEC response letter from being publicly disclosed is to formally request confidential treatment of information in the response letter on one or more of the limited bases for such treatment provided under FOIA. Comment and response letters that are issued by the SEC and the company, respectively, during confidential review of a draft registration statement are required to be filed on EDGAR, but will not be made public until 20 business days after the registration statement has been declared effective.

Depending on the approach taken in responding to the first comment letter, the company may expect to see one or more additional comment letters as the Division notes additional issues or expresses disagreement with the company's response to its original comments. There is an informal "appeal" process, by which companies are encouraged to discuss continuing disagreements with more senior members of the Division. Ultimately, however, the Division and the company need to resolve all issues. At this point, the Division will "clear" the registration statement.

After a registration statement is cleared, the company generally picks the date and time that it desires the registration statement to be declared effective. The date of effectiveness of the registration statement is important, because it is the date on which certain liabilities with respect to the registration statement are fixed. Specifically, it is the date as of which the statements made in the registration statement must be accurate for purposes of Section 11 liability. Requests for effectiveness that specify a particular time of day for effectiveness should be made at least two business days prior to the proposed date of effectiveness. Registration statements may only be declared effective during the SEC's official business hours, which are 9:00 a.m. to 5:30 p.m.

As more fully described in Section 1.D, a draft registration statement that has been confidentially reviewed under the JOBS Act must be publicly filed on EDGAR not later than 21 days before the date the EGC first conducts a "road show."

2. FINRA Review

FINRA regulates the underwriters and, among other things, administers rules intended to ensure that the underwriting terms or arrangements are not unfair or unreasonable. The SEC will not declare a registration statement effective until FINRA confirms that it has no objections to the underwriting arrangements for the offering by issuing a "no objections" letter.

Not later than one business day after the original filing of the registration statement with the SEC, the underwriter must file with FINRA the registration statement and a filing fee. When available, copies of the proposed underwriting agreement, any agreement among underwriters, any selected dealers agreement and any other document that describes the underwriting or other arrangements in connection with the offering must also be filed with FINRA. FINRA filings are required to be made electronically through FINRA's Public Offering System, which is available directly through FINRA's website (www.finra.org) and does not require any special software. Traditionally, underwriters' counsel makes the FINRA filing on behalf of the underwriter. The FINRA filing includes a description of the various arrangements and relationships through which the underwriters might benefit from the offering. The information provided in the FINRA filing is generally solicited by using a FINRA questionnaire prepared by the underwriters' counsel that may be distributed concurrently with the D&O questionnaire. FINRA reviews the underwriting syndicate and underwriting compensation to ensure that these arrangements are not unfair or unreasonable. The SEC will not declare a registration statement effective until these arrangements have been approved by FINRA in a "no-objection" letter.

Underwriting compensation under FINRA's rules includes not only the cash underwriting discount, but also securities issued to the underwriters or their affiliates, financial consulting and advisory fees, rights of first refusal to underwrite or participate in future public offerings, expense reimbursements and other items of value. FINRA Rule 5110 provides an objective standard to determine what items of value will be considered underwriting compensation. FINRA requires disclosure of all arrangements between an underwriter and the issuer and its affiliates during the 180-day period immediately preceding the filing of a registration statement to allow FINRA to determine whether any such arrangements involved underwriting compensation. This rule contains a non-exclusive list of items of value that will be deemed to be underwriting compensation and a list of items that will not be considered underwriting compensation. Among other things, the rule states that cash compensation received for acting as placement agent for a private placement or for providing a loan or credit facility shall not be considered an item of value, and securities of the issuer purchased in certain private placements by an underwriter or received as compensation by an underwriter for a loan or credit facility prior to the filing date of the public offering, subject to certain conditions, shall be excluded from underwriting compensation. Additionally, subject to several limited exceptions and possible case-by-case exemptions, the rule requires a 180-day lock-up period for certain unregistered equity securities beneficially owned by underwriters (and related persons) and deemed to be underwriting compensation. FINRA rules also prohibit the holders of securities subject to such a lock-up from hedging, shorting or engaging in derivative transactions with respect to the locked-up securities if such transactions effectively transfer the economic risk of the locked-up securities.

FINRA has internal guidelines on what it considers to be fair and reasonable compensation. While not published, it is believed that the upper limits of those guidelines range from 8% to 10% of aggregate IPO proceeds, depending on the size of the offering.

3. State Securities Laws

In years past, a company engaged in an IPO had to concern itself not only with the SEC but also with the securities regulatory agency of each state in which its securities were sold. Unlike the SEC, state reviewers did not limit their review to determining whether a registration statement included all required disclosures. Instead, many state agencies performed "merit reviews" of companies. Thus, a company would be reviewed by a state agency to determine whether, in the state's opinion, the investment was suitable for that state's residents. Massachusetts and Tennessee were two states that, among others, were renowned for preventing IPOs from being sold in their state. In one now perhaps ironic example, residents of these states were not allowed to invest in the IPO of the company then named Apple Computer Inc. because the respective securities commissions of those states considered an investment in Apple too speculative.

Gradually, however, in the 1980s all states adopted laws that exempted any securities from state review if such securities were listed, or approved for listing, on any major stock exchange. Notice of the offering and the payment of a filing fee was nonetheless required in each state. Because most companies going public met this requirement, state requirements became a mere formality and expense. In 1996, the U.S. Congress preempted states from regulating or requiring fees or a notice of offering with respect to any offering of securities that are listed or authorized for listing on the NYSE or NASDAQ, among others.

B. UNDERWRITING ARRANGEMENTS

1. The Underwriting Syndicate

To assemble an underwriting syndicate, the managing underwriter generally invites a number of underwriters to participate in the offering. These underwriters agree to underwrite a certain allotment of the offered shares. The company should be involved in the process of selecting the syndicate members, and companies frequently ask the managing underwriter to include in the syndicate investment banks with which they have a relationship or that may provide research coverage. (See Section II.E above for a discussion of the impact of the analyst conflict of interest rules on the selection of investment banks for the underwriting syndicate.)

2. The Underwriting Agreement

Generally speaking, the form of underwriting agreement should be agreed upon by all parties before the initial filing of the registration statement, primarily to avoid any embarrassment resulting from friction between the company and its underwriters after the public becomes aware of the IPO filing. Each underwriter has its own form of underwriting agreement. It is customary for the managing underwriter's form of agreement to be used and to survive the negotiation process without wholesale changes.

a. Firm Commitment vs. Best Efforts

The two principal underwriting arrangements are the firm commitment underwriting and the best efforts underwriting. The term "firm commitment" is based on the underwriters' commitment to buy all of the offered securities at a fixed price. This commitment is made in an underwriting agreement. Before signing an underwriting agreement for a firm commitment underwriting, however, the underwriters contact investors and solicit "indications of interest," which are technically non-binding obligations on the part of the investors to purchase the company's securities. Obtaining these commitments is referred to as "building the book." Generally, unless the managing underwriter accumulates a book of indications of interest from investors at least equal to the amount of securities being offered, and thus minimizes the underwriters' risk of holding unsold shares, the underwriters will not sign the underwriting agreement. If the underwriting agreement is signed, the underwriters then resell the securities to the investors who have provided indications of interest. Most IPOs are underwritten on a firm commitment basis.

A "best efforts underwriting," as the name implies, only obligates the underwriters to use their reasonable best efforts to sell the company's shares on behalf of the company. At no time do the underwriters obligate themselves to purchase the shares. The shares issued to the investors identified by the underwriters pass directly to the investor from the company without the underwriters ever taking title.

b. Overallotment Option

A provision which has become standard in firm commitment underwriting is the overallotment option, which is commonly called the "green shoe" or the "shoe" after The Green Shoe Manufacturing Company of Boston, which pioneered the practice in 1963. Under the "shoe," the company and other sellers of securities grant an option to the underwriters to purchase additional shares, limited by FINRA rule to 15% of the number of original shares in the total IPO, on the same terms as the original shares are offered to the underwriters. The overallotment option allows the underwriters significant flexibility in managing the syndicate and providing aftermarket support for the stock during a 30-day period immediately following a public offering. The overallotment option also provides a source of stock that an underwriter may use to cover any short position it may have.

Ordinarily in an IPO, the underwriters actually sell up to as much as 115% of the originally offered shares to their customers. If the price for the shares rises and stays above the initial offering price, the underwriters typically exercise the overallotment option and buy the shares from the company at the initial offering price to fill the "overalloted" customer orders. The underwriters make no money other than the spread in this transaction, since they have committed to sell the excess shares at the initial offering price as well. If the price does not rise or dips below the initial offering price at any time, the underwriters typically purchase shares in the open market to cover the additional customer orders. This purchasing acts to support the company's stock price. Consequently, the overallotment option is generally exercised only if the shares perform well in the aftermarket. Without an overallotment option, the underwriters would be limited in their flexibility. If they sell only the number of firm commitment shares and then customers fail to take up the number of shares specified in their "indications of interest" (which is more likely to occur if the shares trade down), then the underwriters would be left holding an unsold allotment. If, on the other hand, the underwriters sell more shares than the firm commitment and customers all take their full "indications of interest" (which is most likely to occur if the shares trade up), then the underwriters would have to buy more expensive shares in the open market in order to cover the syndicate short position, thus locking in a loss on those shares.

In addition to this "covered" short position, underwriters may establish a "naked" short position in offerings where the underwriters believe that a 15% overallotment short position will not be sufficient to offset expected downward market pressures on the company's stock price. This practice is called a "naked" short because the underwriters do not have a right to purchase shares to cover the overallotment. Because of the potential impact on the stock price, companies should understand these concepts and how the underwriter expects to use them in the offering. In response to SEC concerns, expanded disclosure with respect to "naked" shorts is required in the prospectus.

c. Impact of Sarbanes-Oxley, the USA PATRIOT Act and the JOBS Act on Underwriting Agreements

Underwriters are requesting companies to represent and warrant in the underwriting agreement to certain matters covered by the Sarbanes-Oxley Act, including:

- a representation that mirrors the language in the principal officers' Section 302 certifications relating to disclosure controls and procedures; and
- a representation that the company has not made any personal loans to its directors and executive officers.

While commercial banks have always been subject to anti-money laundering laws that required them to become familiar with the background of their customers, the USA PATRIOT Act, adopted in 2001 in response to the September 11 terrorist attacks, broadened the scope of these laws to include investment banks as well. Investment banks, like commercial banks, are required to adopt procedures to ensure that they are not facilitating the financing of terrorism. Some investment banks have begun requesting a representation in underwriting agreements from the issuer that none of the participants in the offering are individuals or entities identified under the USA PATRIOT Act as a sponsor of terrorism.

As a result of the adoption of the JOBS Act in 2012, underwriters regularly request that the underwriting agreement include:

- representations regarding the issuer's status as an EGC, if applicable, the authority to engage in "testing-the-waters" communications with qualified institutional buyers and accredited investors, the use of written communications in connection with "testing-the-waters" activities and the accuracy and adequacy of each such "testing-the-waters" written communication taken together with the time of sale information;
- covenants to notify the underwriters if the issuer loses EGC status and to amend "testing-the-waters" written communications if corrections are necessary; and
- issuer indemnification of the underwriters for liability relating to "testing-the-waters" written communications.

C. MARKETING EFFORTS DURING THE WAITING PERIOD

While the regulatory review process continues, the company and its underwriters begin to market the IPO. Because publicity continues to be restricted and sales of stock are prohibited, marketing efforts generally revolve around solicitations of indications of interest through distribution of the preliminary prospectus, follow-up telephone calls and the company's "road show." In addition, the JOBS Act now permits EGCs to communicate, either orally or in writing, to QIBs or institutional accredited investors only "to determine whether such investors might have an interest" in the offering.

1. Restrictions on "Written" Communications; "Free Writing Prospectuses"

After the IPO registration statement is filed on EDGAR, the company is permitted to offer its stock to all prospective investors orally and by means of the preliminary prospectus. Prior to 2005, the only written marketing material that could be used was the preliminary prospectus. Any other written material distributed by or on behalf of the company (with limited exceptions for basic information concerning the offering released under the rule 134 safe harbor) would be considered a gun jumping violation. The SEC significantly loosened those communication restrictions in 2005 as part of the Securities Offering Reform rules (see Section VII.B.2 for a more detailed discussion of these rules). As part of the Securities Offering Reform rules, the SEC permitted the use of so-called "free writing prospectuses," which are defined as any written communication that constitutes an "offer to sell" that is not a statutory "prospectus." Companies doing an IPO are permitted to distribute written materials that constitute a "free writing prospectus," but only under certain conditions. First, an IPO company desiring to use a "free writing prospectus" must have previously (or contemporaneously with such "free writing prospectus") delivered a copy of the most recent "statutory prospectus" to all recipients. This statutory prospectus must include a price range (and many IPO registration statements leave blank the anticipated price range and include it in a subsequently filed amendment prior to the road show). In order to use a "free writing prospectus," an IPO company must assume that the most recent statutory prospectus is actually provided to anyone who might receive the "free writing prospectus." Practically speaking, this means that a broadly disseminated "free writing prospectus" will have to be in electronic form and contain a hyperlink to the statutory prospectus. A cross-reference to the availability of the statutory prospectus on the SEC's or company's website will not satisfy this condition. Second, the SEC requires that the information contained in any "free writing prospectus" does not conflict with any information in the filed registration statement. Last, if a company uses a "free writing prospectus," it must file it with the SEC on or before the date that it is first used. Free writing prospectuses are subject to the liability provisions of Section 12(a)(2), and may also be the basis for a claim under the anti-fraud provisions of the federal securities laws (e.g. Rule 10b-5).

The SEC also used the Securities Offering Reform rules as a good occasion to clarify what "written" materials are in the context of today's multi-media environment. Put simply, as defined, "written communications" are all methods of communication that are not "oral communications." A "written communication" is any communication that is written or printed, a radio or television broadcast, or a "graphic communication." The term "graphic communication" covers all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD-ROM, email, web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation (the last category commonly referred to as "blast voicemails" or "spam," respectively). A live, real time road show presentation is considered an "oral communication," but if it is taped, recorded and retransmitted at any time after it is delivered "live," it becomes a "graphic communication" and thus subject to the restrictions on "written communication" during the "waiting period."

To assist their internal sales force in selling the IPO to accounts, underwriters generally prepare internal sales memoranda. These memoranda are not to be distributed outside of the underwriters' offices, however, and are neither shown nor read to potential purchasers of stock in the IPO. They are often printed with combinations of ink and paper color that will thwart attempts at black and white photocopying. The distribution of such materials to potential IPO investors can have adverse consequences for an issuer as well as its offering.

Not paying attention to the rules relating to written communications during the waiting period can have potentially disastrous effects on an IPO. For example, in the 2001 IPO of a large U.S. company, some of the underwriters mistakenly left written copies of a pre-marketing feedback questionnaire at the offices of certain potential investors following meetings with those investors. The questionnaire was designed by the underwriters for internal use only and was meant to orally elicit certain information from selected investors for offering strategy formulation purposes. As a result of this distribution, the SEC required the company to amend the risk factor disclosure in its registration statement to describe the distribution of the questionnaire to potential IPO purchasers by the underwriters. In effect, the disclosure stated that the questionnaire may have been mistakenly interpreted by potential investors as a prospectus, which failed to meet the requirements of the securities laws. The disclosure further provided that investors who received the questionnaire (i.e., the deficient prospectus), directly or indirectly, and then purchased shares in the company's IPO would have been entitled to exercise certain rescission remedies for a period of one year following the date of violation. Post-Securities Offering Reform, however, these types of oversights may be avoided by quickly filing such written documents as "free writing prospectuses" if the conditions to such use, as outlined above, can be met.

The timing of printing the preliminary prospectus varies from transaction to transaction, but for IPOs generally, the preliminary prospectus is printed only after receiving and responding to at least the first two SEC comment letters. In this way, the company and its underwriters have some comfort that no major issues will be raised between the time of circulating the preliminary prospectus and the actual sale of the stock.

2. Restrictions on Oral Communications

Although oral offers regarding the company's stock are permitted after the registration statement is filed with the SEC, the content of oral communications must be carefully considered. Generally speaking, issuers are permitted to cover only the information included in the preliminary prospectus, because to provide more information to some investors would be fundamentally unfair to the other investors. Companies often provide more detail about matters discussed in the preliminary prospectus, but when doing so, they must not disclose material information not included in the prospectus, such as projected revenues or earnings.

3. Restrictions on Other Publicity

Restrictions on marketing the IPO tend to affect the company's other advertising and publicity campaigns during the waiting period even to a greater degree than before the initial filing of the registration statement. Advertising and publicity campaigns, whether or not targeted at the investment community, may raise publicity issues during the waiting period, especially if the level of advertising and publicity increases from pre-filing levels. Interviews with senior management, appearances at conferences and speeches at trade shows may all raise issues.

Any proposed publicity regarding the company or its senior executives should be discussed with the company's counsel before proceeding, and the same rules that applied to the company's website during the pre-filing period should be followed through the waiting period. Obviously, a company cannot completely prevent third parties from writing stories about the company during the waiting period, but the company should be careful about cooperating with these third parties. Cooperation may lead to a conclusion that the company was in fact the "source" of the story.

In considering publicity issues, both before filing and during the waiting period, the best of intentions may be misunderstood by the SEC or by disgruntled investors after the closing of the IPO. Because neither the SEC nor these investors can be consulted ahead of time, companies should err on the side of caution.

4. The Road Show

a. Live Road Shows

The centerpiece of the marketing process for an IPO traditionally has been the live road show where the company and its underwriters traverse the U.S., and frequently Europe and other regions outside the U.S., for a seemingly endless series of meetings with potential investors, securities analysts, brokers and potential underwriting syndicate members.

In a live road show, some of these meetings are one-on-one, but most are group meetings. Many senior executives remark that the IPO road show is one of the most draining experiences of their lives, in part because of the number of stops and the duration. The group often visits as many as three cities per day, and there are several meetings in most cities. IPO road shows typically last at least two full weeks, longer when touring outside the U.S., with few breaks.

The road show is generally regarded as the most important opportunity to sell an IPO successfully. Because the road show is conducted in the weeks immediately preceding the effectiveness and pricing of the IPO, many indications of interest are placed immediately after a road show stop. The company's story—which may have been first told at the organizational meeting and then refined during the pre-filing process and subsequently converted into an onscreen summary to be conveyed in 30 minutes or less to an astute and inquisitive audience—can make or break an IPO. A successful road show typically has a meaningful impact on the IPO price and on initial aftermarket trading.

The SEC clarified in the Securities Offering Reform rules that a live, real-time road show transmitted to a live audience is not a "graphic communication" and therefore not "written communication" subject to the restrictions on written communications during the waiting period. Most road shows are conducted as live presentations by members of the company's management and representatives of the underwriters, assisted with an on-screen slide presentation. To avoid the restrictions against the distribution of "written information," however, copies of the slides should not be handed out.

The tale of Webvan Group Inc. should serve as a cautionary note on the road show. During the Webvan road show, the financial press became aware that the story being told in the road show included financial projections not included in the preliminary prospectus. According to press reports, the SEC required Webvan to include the financial projections in its registration statement and to recirculate the preliminary prospectus to all investors, and further imposed a one month "cooling-off" period before allowing Webvan to go public.

It is unclear the extent to which Regulation G (see Section VIII.B.4) impacts road show communications. Regulation G requires that all public companies provide comparable GAAP information whenever they publicly disclose or release non-GAAP financial measures of their performance. It is clear that Regulation G (technically required under a matching provision of Regulation S-K which has the same requirements as Regulation G, plus some additional prohibitions and requirements) requires IPO companies to include comparable GAAP information and reconciliation to such GAAP information in the IPO registration statement if they also choose to include non-GAAP financial measures. It is also clear that all public disclosures or releases made after the IPO company becomes public must comply with Regulation G. The SEC has not specifically stated that all road show presentations are public disclosures and therefore must comply with Regulation G. However, the requirement that a company's road show message be consistent with the disclosure in its preliminary prospectus leads to the conclusion that companies should err on the side of caution and disclose comparable GAAP figures in road show presentations as well.

b. Internet and Electronic Road Shows

Internet road shows historically were regarded as written offers by the SEC and therefore generally not permitted prior to registration statement effectiveness. Since 1997, the SEC has permitted Internet road shows prior to effectiveness under limited circumstances pursuant to a series of no-action letters.

Prompted by advances in electronic media, the SEC has clarified the treatment of electronic road shows in the Securities Offering Reform rules released in 2005.

As discussed above, under the Securities Offering Reform rules, a live, real-time road show to a live audience even if transmitted graphically is an oral communication and not a graphic communication, and therefore not a written communication or a free writing prospectus. Also excluded from the definition of a written communication are communications (such as slides or other visual aids) that are provided or transmitted simultaneously as part of the live road show, provided that such communications are transmitted in a manner designed to make them available only as part of the road show and not separately.

Internet road shows that do not originate live, in real-time to a live audience and are graphically transmitted are considered written communications and are therefore free writing prospectuses under the new rules. As such, their use is permitted only if they satisfy the conditions applicable to free writing prospectuses, subject to the qualifications in the following paragraph.

In the case of an initial public offering of equity and/or securities convertible into equity, the SEC filing conditions will apply to an Internet road show that is a free writing prospectus unless the company makes at least one version of a "bona fide electronic road show" with respect to such offering readily available without any restriction to any potential investor at or prior to the time the company makes another version available.

The SEC rules define bona fide electronic road show as "a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management ... and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications."

To meet the "bona fide" requirement, a version of an electronic road show does not need to address all of the same subjects or provide the same information as the other versions of an electronic road show, nor need there be an opportunity for questions or answers, even if the other versions of the road show provide this opportunity.

The SEC rules permit the use of electronic road shows without many of the conditions the SEC previously required in its no-action letters. For example, the road show audience does not need to be limited in any way; the road show does not have to be the re-transmission of a live presentation in front of an audience; viewers may be given a copy and are allowed to download the road show; multiple versions of the road show are permitted; and each road show is a separate free writing prospectus.

5. Use of Communications Technologies During the Marketing Period

a. References to the Company's Website Address in the Prospectus

The SEC encourages companies to provide their Internet address, if available, in the IPO registration statement. Although the inclusion of a company's website address in the registration statement might imply that the company views the information on its website to be part of the registration statement, the SEC's interpretative release on use of electronic media (Release No. 33-7856 (April 28, 2000), the *2000 Release*) has assured issuers that this would not be the case if certain conditions are met. The 2000 Release does state that a hyperlink embedded in a document required to be filed or delivered under the securities laws causes the hyperlinked information to be part of the document.

The 2000 Release, however, also states that the mandated and encouraged disclosures of the SEC's and the issuer's website addresses, respectively, do not cause the SEC's or issuer's website to be part of the document as long as the Internet address is inactive and a statement is included in the document that the website address is an inactive textual reference only. As a general matter, companies should use extreme caution when making reference to their own or any other website address in the registration statement (other than the SEC's website address, which must be included in each registration statement). The 2000 Release emphasized that an issuer in registration must consider the application of Section 5 of the Securities Act to all its communications with the public and that these communications include information on the issuer's website or another website if referenced in the registration statement without the proper disclaimers.

The SEC clarified in the Securities Offering Reform rules that any information posted on a company's website that constitutes an "offer" (broadly defined under securities law) will also constitute a free writing prospectus (with certain exceptions relating to limited notice safe harbors). The SEC provided a new safe harbor, however, for "historical" information about the company if that information is separately identified as such on the company's website. These new rules highlight the importance of "organizing" the information on a website before starting the IPO process.

b. Electronic Prospectus Delivery

The Securities Offering Reform rules acknowledge the pervasiveness of the Internet and the use of electronic communications by adopting an "access equals delivery" model for meeting the prospectus delivery obligations of Section 5(b)(2) under the Securities Act. Rule 172 provides that a prospectus will be deemed to precede or accompany a security for sale if the final prospectus has previously been filed with the SEC or if the issuer makes a good faith and reasonable effort to file the final prospectus within the timeframe required by SEC rules.

Rule 172 also eases the burden of underwriters in registered offerings by providing an exemption from Securities Act Section 5(b)(1) to allow written confirmations and notices of allocation to be sent after the registration statement becomes effective without being accompanied or preceded by a final prospectus.

In order that investors who purchased securities in a registered offering may be placed on notice of their right to assert a claim under Section 11 of the Securities Act in respect of the registered securities, Rule 173 requires that those investors receive from the underwriter or dealer from whom they purchased the securities, or from the company in a direct offering, not later than two business days after completion of the sale, a final prospectus or a notice that informs them of the "registered" nature of their securities. Significantly, Rule 173 is not a condition to the exemption from final prospectus delivery found in new Rule 172, and failure to comply with Rule 173 does not result in a violation of Section 5 of the Securities Act.

The changes to the prospectus delivery rules do not benefit only issuers and underwriters. Rules 153 and 174 effectively eliminate the aftermarket prospectus delivery obligations of brokers and dealers as well.

c. Bulletin Boards and Chat Rooms

During the waiting period, issuers may be unfairly constrained from responding to negative publicity on online bulletin boards and in online chat rooms. As is the case in the pre-filing period, however, the SEC has tended to be somewhat understanding of these issues and may permit responses to negative publicity so long as the responses are consistent with the disclosure in the prospectus.

VI. THE POST-EFFECTIVE PERIOD

A. ACCELERATION, EFFECTIVENESS AND PRICING

1. Acceleration and Effectiveness

After the SEC is satisfied with the registration statement and the underwriters have an adequate book of indications of interest, there is usually a final pre-effectiveness due diligence call among management, the accountants, the underwriters and the underwriters' counsel to ensure the continued accuracy of the information in the preliminary prospectus. Assuming that all is well, acceleration of the effectiveness of the registration statement will be requested by the company and the underwriters. The SEC staff will generally declare the registration statement effective at the time requested, provided it has had at least 48 hours notice.

Sometimes after a registration statement has been declared effective, the underwriters and the company wish to increase the size of the offering, either through an increase in the price per share or the number of shares being offered, beyond that described in the preliminary prospectus. Rule 462(b) permits the registration of additional shares in the same offering by filing an abbreviated registration statement that incorporates the original one by reference. This abbreviated registration statement may be filed after the original registration statement is declared effective and may register an increase in the offering size of up to 20%. It becomes effective immediately upon filing and does not require any SEC review or action. This useful mechanism affords underwriters and the company the flexibility to increase the size of the offering at the last moment. The opinions and consents filed with the initial registration statement (or a pre-effective amendment) should include language indicating that they may be incorporated by reference in any such abbreviated registration statement. If this language is not included, new opinions and consents are required to be filed with the abbreviated registration statement. In addition, the power of attorney provided by directors on the registration statement signature page should expressly refer to any Rule 462(b) registration statement, and the board resolutions authorizing the IPO should cover such a filing. The delay involved in obtaining these documents anew, if not provided for as indicated, may practically prevent the use of the abbreviated registration statement, which must be filed before the underwriters send confirmations of sale.

Sometimes after the preliminary prospectuses have been distributed and the road show has been completed, it becomes evident that the planned offering was too large or too small to fit with investor demand or it may be discovered that some event has occurred that makes the prospectus inaccurate or incomplete. If either event occurs and is deemed sufficiently material, companies will need to communicate such changes to potential investors. Underwriters may also request a redistribution of revised preliminary prospectuses in order fully to acquaint their investors with all of the then current facts material to an offering. In prior years, the SEC staff may have also raised recirculation issues prior to accelerating the effectiveness of the registration statement. When companies were confronted with this issue, they had to prepare an amended prospectus, file it with the SEC and distribute it to investors. Under the Securities Offering Reform rules, however, companies may utilize a free writing prospectus. The free writing prospectus is less burdensome as it may contain only the updated information. Companies must file the free writing prospectus with the SEC. In addition, as a result of the Securities Offering Reform rules, the SEC staff indicated that it will no longer raise recirculation questions. The SEC staff now only seeks assurance that material information has been conveyed to the purchasers at the time of sale and does not inquire as to how, when or why this information is conveyed.

2. Pricing and Final Prospectus

Once the registration statement is declared effective, the company and the underwriters agree upon the offering price and discount and execute the underwriting agreement. Before signing the underwriting agreement, the underwriters require a "comfort letter" from the accountants. The comfort letter, which is an important aspect of the underwriters' legal and business review of the company and the registration statement, calls upon the company's accountants to confirm the audited financial statements, the information derived from those statements in the registration statement, the interim period financial information and other financial information contained in the registration statement. The comfort letter also typically provides some assurance to the underwriters that there have been no material changes since the date of the latest financial information in the registration statement that are not disclosed in the registration statement.

The offering price is typically negotiated by the company and the underwriters. Generally speaking, the company will seek the highest price that will facilitate the distribution of the number of shares being offered. On the other hand, the underwriters are seeking a price that will assure that the offering will be oversubscribed and that the secondary market will be strong. Rarely is an offering aborted because the parties are unable to agree on a price. The price is traditionally set after the capital markets close. Trading commences the next morning.

A final prospectus including the pricing information must be filed with the SEC no later than the second business day after pricing or the first use of such prospectus following the effective date.

B. THE CLOSING

The closing takes place three or four days after pricing. Compared to the excitement of pricing and the commencement of trading, the closing of an IPO is typically uneventful. The underwriters' counsel usually prepares a closing memorandum identifying the documents to be exchanged and the actions to be taken to effect the closing. This closing memorandum serves as a checklist for all parties to assure that all of the closing conditions under the underwriting agreement have been satisfied. Several important documents are customarily required to be delivered to the underwriters by the company and others at closing. The nature and scope of these documents are generally described in the underwriting agreement. Some of these documents include:

- a certificate by the company's management confirming the accuracy and completeness of the statements of material fact contained in the registration statement as of the time of closing and that no material adverse changes have occurred since the registration statement was declared effective;
- an opinion letter from company counsel discussing certain corporate and related matters as requested by the underwriters and including a statement (subject to numerous qualifications) that such counsel is not aware of any material misstatement or omissions in the registration statement; and
- a "bringdown" of the comfort letter by the company's accountants confirming that the statements made in the comfort letter delivered by the accountants at the time of pricing still hold true as of the time of the closing.

A final "bringdown" due diligence conference call among management, the underwriters and underwriters' counsel is held immediately prior to closing to ensure that there have been no material adverse developments since the registration statement was declared effective. Once the closing documents are delivered, the company and any selling shareholders receive wire transfers of immediately-available funds for their respective portions of the proceeds of the public offering, net of the underwriting discounts and commissions, and the shares are released to the underwriters.

VII. RAISING CAPITAL AS A PUBLIC COMPANY

A. LEVERAGING LIQUIDITY

Given a choice, investors prefer “freely tradable” shares. Accordingly, companies whose shares are robustly traded in public markets are less likely to issue shares of its publicly traded equity in “private placement” transactions exempt from registration under the Securities Act, unless the company also agrees to register the shares with the SEC for resale by the purchasers, such as required in a PIPE (an acronym for “private investment, public equity”) transaction, in order that purchasers of shares are not constrained by holding periods or volume limitations in selling their shares. In addition, public companies may issue securities in a private placement followed by an exchange offer in which the privately issued securities are exchanged for substantially identical registered securities. In each case the objective of the company is to get the best price possible for the securities issued in the most efficient manner possible without a discount for the illiquidity usually associated with unregistered securities. Below is a brief overview of the current regulatory framework of the federal securities laws for both public and private offerings of securities by public companies, highlighting the principal types of transactions conducted.

B. PUBLIC OFFERINGS OF EQUITY AND DEBT

Public offerings after an IPO are typically conducted from a legal and marketing perspective substantially the same as an IPO, except the company can usually expect the offering will require significantly less time, effort and expense. After a newly minted public company becomes a “seasoned issuer”—one year after its IPO—and the public float of its publicly traded securities has a market value of at least $75 million, or the public float is below $75 million but other specified conditions discussed below have been met, it becomes eligible to use the SEC’s short form registration statement (Form S-3 for domestic companies), for “follow-on” public offerings of securities issued for cash consideration, including “secondary” offerings by the company’s insiders or other shareholders where the company has agreed to register their shares for resale. Form S-3 registration also facilitates continuous offerings of securities because the prospectus included as part of the Form S-3 registration statement is automatically updated by the company’s filings of its periodic reports (e.g., 10-Ks and 10-Qs), current reports on Form 8-K and proxy materials filed with the SEC under the Exchange Act through what is referred to as “incorporation by reference.”

As further discussed below, as significant potentially for public companies as the Sarbanes-Oxley Act and related regulation, was a comprehensive revision in 2005 of SEC rules pertaining to registered securities offerings under the Securities Act which substantially modernized the offering process in the United States and significantly enhanced the benefits of Form S-3 shelf registration, especially for certain “well-known seasoned issuers.” Additionally, in 2007, the SEC revised the rules governing eligibility to register offerings on Form S-3, to increase access to the capital markets by smaller companies.

1. Securities Act Registration by Public Companies

Available forms for registration with the SEC of sales of company securities by a public company and its shareholders include the following.

a. Form S-1

Until a company becomes eligible to use Form S-3, it is required to use Form S-1 to register any of its debt or equity securities to be sold in a public offering (other than employee benefit plan offerings where Form S-8 is available, as discussed below) by the company or any of it shareholders. The disclosure requirements applicable to such a registration are largely the same as those applicable to the IPO registration statement, with some variations applicable in the case of an offering of debt securities.

A company may use Form S-1 to maintain a “shelf” registration statement as described below, but doing so is more cumbersome than using Form S-3. Because Form S-1 does not permit incorporation of any information by reference, the shelf in this case has to be “manually” updated periodically by filing supplements or amendments with the SEC to reflect information contained in the company’s quarterly and other Exchange Act filings. In addition, the shelf registration procedures described below would be available only for certain types of offerings made under Form S-1, such as continuous medium-term note offerings and equity offerings by selling shareholders.

b. Form S-3

In addition to permitting incorporation by reference of the periodic filings made by the company under the Exchange Act, Form S-3 also permits the company to take full advantage of the SEC’s “shelf” registration procedures. Form S-3 can be used for a single or continuous offering of one type of securities, such as a common stock offering by the company and/or by a group of selling stockholders, or for a broad array of possible securities offerings. A “universal shelf” is a registration on a Form S-3 of debt, equity, hybrid and/or other securities without a specific allocation of offering amounts among the classes of securities being registered. In a universal shelf filing the company would register a blanket amount (e.g., $500 million), or (for WKSIs) an indeterminate amount, of debt securities, preferred stock, common stock, common stock warrants, and other types of securities, without any pricing information and without naming an underwriter. The universal shelf registration statement lists in a base prospectus the types of securities covered and a prospectus supplement would specify the amount of the particular security to be offered, as well as the plan of distribution, the underwriters, pricing information and other specifics about the tranche subject to the "takedown" off the shelf (e.g., debt terms). After a universal shelf registration statement becomes effective (automatically for WKSIs), takedowns can occur immediately. Prospectus supplements are filed with the SEC as they are used. The additional benefits of Form S-3 shelf registration for "well known seasoned issuers" are further discussed in Section VII.B.2. below.

Shelf registration enables a company to sell debt and other securities from time to time on an agency basis, in underwritten offerings or otherwise, as well as to sell newly issued stock in block trades or otherwise. Shelf registration may also be used to provide liquidity to affiliates of the issuer and recipients of privately issued stock (e.g., stock issued to target company shareholders in acquisitions), by enabling the holder to sell its holdings into the public market from time to time at their election, subject only to the requirement that they deliver a copy of the Form S-3 prospectus in connection with the resales. However, during periods when a company's stock is being offered and sold under a shelf or any other registration statement, the company is subject to the requirements of the Securities Act, which could require disclosure of prospective material developments sooner than would be required if the company were subject only to the ongoing reporting requirements of the Exchange Act. For example, the Form 8-K would require a company to file a current report within 4 days of entering into (i.e. signing) a "material definitive agreement" relating to the acquisition of a significant amount of assets; however, if that same company were "in registration" the Securities Act disclosure rules might compel the company to disclose the agreement before it is even signed if the company believes that completion of the acquisition is "probable." As a result, a company may become obligated to disclose pending developments, such as negotiations regarding a potential material acquisition or divestiture, before it would otherwise wish or need to do so.

Prior to January 2008, only companies with a public float of $75 million or more were eligible to utilize a Form S-3. However, in December 2007, the SEC revised the rules to permit companies with less than $75 million in public float to register primary offerings of their securities on Form S-3, provided the company satisfies the eligibility requirements for the use of the Form S-3, has a class of common equity securities listed and registered on a national securities exchange, and the company does not sell more than the equivalent of one-third of its public float in primary offerings registered on Form S-3 within a twelve month period. Instead of abandoning the $75 million public float requirement all together, the amended rules retain the public float as a factor in determining a company's eligibility, which affects if and when the one-third limitation mentioned above is removed. While the amended rules allow more companies to benefit from the greater flexibility in accessing the public securities markets afforded by Form S-3, the revised rules exclude from eligibility shell companies and companies that have been shell companies within twelve months of filing the registration statement.

c. Form S-8

Public companies that file regular reports under the Exchange Act are permitted to register under the Securities Act shares issuable to employees pursuant to stock award and option plans on the relatively simple Form S-8. Form S-8 registration enables companies to issue shares to employees without having to comply with a private placement exemption and enables the employees who receive the shares to resell them freely in the public market (subject to any resale restrictions imposed by the plans or separate agreements) without having to deliver a prospectus, provided that the employees are not "affiliates" of the issuer. Employees who are affiliates are permitted to resell their stock in reliance on Rule 144 under the Securities Act without having to comply with the six-month holding period requirement of that rule, as described below. Form S-8 may, however, be modified to include a brief form of resale prospectus that may be used by affiliates to resell stock issued to them under employee benefit plans, in which case the affiliates would not have to comply with the requirements of Rule 144 (other than the volume limit in the case of resales prior to the first anniversary of the effective date of the IPO registration statement).

d. Form S-4

Issuances of new stock in an acquisition directly to the target company shareholders are usually registered on Form S-4 at the time of the offering. Like Form S-3, Form S-4 permits information about the issuer to be incorporated by reference from its Exchange Act filings if the issuer is eligible. Alternatively, acquisition shares may be issued privately to the target shareholders and subsequently registered for resale by the holders, typically done on Form S-3. The use of Form S-4 is further discussed in Section X.A.

2. Securities Offering Reform

Securities Act rule reforms that were adopted by the SEC in 2005 freed various types and methods of communications about issuers and their securities offerings (including, to a limited extent, IPOs as discussed elsewhere in this guide) from some legal uncertainty and outdated restraints that have been widely thought to unduly hinder capital raising. Larger, mature public companies—termed "well-known seasoned issuers" (*WKSIs*) by the SEC—also benefit from revised rules regarding shelf registration designed to enhance more timely, efficient access to capital markets. In general, the revised rules are not applicable in the context of the offering of securities in a business combination transaction.

Under the revised rules, a "well-known seasoned issuer" is defined as an Exchange Act reporting company which is eligible to register the original sale of its own securities on Form S-3 (F-3, for a foreign company) and either (i) the market value of the issuer's common equity held by non-affiliates is at least $700 million or (ii) the issuer has issued at least $1 billion in principal amount of non-convertible securities (excluding common equity) in primary registered offerings for cash in the prior three years (excluding exchange offers). A "seasoned issuer" is an Exchange Act reporting company which is eligible to register the original sale of its own securities on Form S-3 or F-3. An "unseasoned issuer" is an Exchange Act reporting company which is not eligible to register the original sale of its own securities on Form S-3 or F-3.

Exhibit O is a chart that summarizes the effects of the most significant rule changes to the extent that they vary according to category of issuer.

a. Registration Procedures for Well-Known Seasoned Issuers

The revised rules regarding shelf registration for WKSIs include automatic effectiveness and more "base" prospectus disclosure flexibility, which means that these issuers are not generally subject to an SEC review-related risk of delay.

WKSIs are able to add additional registrants, such as subsidiary guarantors of debt securities, or classes of securities using automatically effective post-effective amendments and will have the option of paying registration fees as they conduct takedowns (i.e., "pay as you go") rather than in advance for a total amount of securities registered. Under this system, WKSIs can register an indeterminate amount of securities subject only to a requirement that a new registration statement be filed at least once every three years.

Almost all information regarding a WKSI and its securities can be excluded from a shelf registration statement's base prospectus. Instead required information may be incorporated by reference from reports filed under the Exchange Act or included in a supplement to the base prospectus. In addition, a material change to the plan of distribution or identification of selling securityholders can be updated through a prospectus supplement or an incorporated Exchange Act report rather than by a post-effective amendment to the shelf registration statement.

b. Communications Rules

The revised communications provisions adopted in 2005 better define and effectively narrow—to the point of elimination for WKSIs—the "quiet period" for securities offerings and significantly expand beyond the traditional "statutory prospectus" the types of permissible communications that can be used during the offering process. This flexibility is accompanied by liability rules and interpretations that require that issuers, underwriters and their counsel fully appreciate, and appropriately address issuer and underwriter accountability for, a range of newly allowed communications in various media, including, most significantly, "free writing prospectuses."

The rules regarding free writing prospectuses adopted in 2005 were an extraordinary new construct within the regulatory regime governing securities offerings in the U.S. Free writing prospectuses are communications that constitute written offers of securities, but need not satisfy the requirements of the Securities Act governing the content of traditional prospectuses. They are, however, subject to a vast array of rules that set conditions on their use in various ways by different issuers in a wide range of circumstances. For example, this may include, depending upon the circumstances, filing the free writing prospectus with the SEC, simultaneous or prior "delivery" of the offering's statutory prospectus, and legend and record retention requirements.

Free writing prospectuses are also subject to certain liability provisions of the Securities Act applicable to prospectuses, so although this liberalization of communications comes with many benefits, free writing is not free of risk.

The revised communications rules embrace and seek to accommodate current and future communications technology. The rules provide that all communications that are not oral are "written communications" and thus subject to the meaningful potential consequences associated with written offers.

The revised rules provide helpful guidance as to what may be comfortably viewed as an "oral" communication. Accordingly, when taken together with the exemptions and safe harbors described below, issuers will have less reason to be unsure whether a particular form of communication is an "offer," a "written communication" or a "prospectus" and will have more (albeit not perfect) clarity about the conditions under which a particular communication is permitted and the potential consequences of its use.

For example, the rules adopted in 2005 established that "electronic road shows" that do not originate live to a live audience constitute written offers and must comply with particular aspects of the free writing prospectus rules specially tailored to such events (including limited filing obligations of electronic road shows for IPOs). By contrast, a real-time road show before a live audience transmitted so that it is only available live, even via the Internet or teleconference, is considered an oral communication not subject to the requirements applicable to written communications.

Under an exemption consistent with prior practice, a business communication by eligible issuers that does not reference a securities offering and that is made more than 30 days prior to the filing of a registration statement is not an illegal "gun jumping" offer, provided that, for issuers other than WKSIs, the issuer has taken reasonable steps to prevent the communication from being further distributed during such 30 day period. WKSIs are provided an exemption from *any* communications restrictions in the period prior to filing, subject to certain conditions, including a requirement that in certain cases a WKSI using a free writing prospectus in connection with an offering prior to filing a registration statement must file the free writing prospectus upon filing the registration statement.

In addition, if the conditions of a safe harbor are satisfied, all SEC-reporting companies (i.e., all companies other than those conducting an IPO) may publish "regularly released factual business information" and forward-looking statements during an offering without such communications being considered an illegal prospectus. Non-reporting issuers are precluded from using a similar safe harbor for any forward-looking statements, but may use the safe harbor for factual business information of a type that has been regularly released in the past to persons other than in their capacity as current or potential investors of the company.

Following the filing of a registration statement, a prior safe harbor for straightforward notices of offerings was liberalized in 2005 to allow issuers to publish many more procedural and administrative details about offerings and basic factual data about the issuer. This does not extend to term sheets, which are generally subject to the rules governing free writing prospectuses.

The liberalization of communications rules in 2005 also extended to the use of research reports, making prior safe harbors from gun-jumping concerns available for more types of issuers, expanding the times when research may be issued during registered offerings and relaxing certain limitations on analyst coverage.

With respect to EGCs, the JOBS Act scales back communications restrictions even further by permitting oral or written “testing the waters” communications by an EGC (or any person acting on its behalf, including underwriters), prior to or after the filing of the registration statement, to QIBs or institutional accredited investors for the purpose of determining “whether such investors might have an interest in a contemplated offering.”

The JOBS Act also provides that, for any public offering of common stock by an EGC, in an IPO or otherwise, a research report — even one by a broker-dealer participating in the offering — about an EGC that has filed or intends to file a registration statement does not constitute an “offer” of the security under Section 2(a)(3) of the Securities Act. A literal reading of this provision of the JOBS Act appears to allow, for the first time ever, the publication of investment banker research reports even before the consummation of an offering, including an IPO, and even if directly used in marketing the offering. In addition, with respect to post-IPO communications, the JOBS Act permits the publication and distribution of research reports as well as public appearances by brokers, dealers or exchange members with respect to an EGC during any prescribed period after the EGC’s IPO or prior to the expiration of an underwriters’ lockup agreement. The elimination of these so called “quiet-period” restrictions is a very substantial change.

As discussed in Section I.D.2.d, the use of research reports as part of an IPO marketing process would be a radical change, but seems unlikely to become common practice, since underwriters would likely want to avoid exposure to the liability provisions of the securities laws applicable to those underwriter-created documents. Additionally, if research reports are used to market offerings, underwriting agreements will need to be revised substantially to deal with liability, indemnification, issuer review and approval rights, and other issues that such early research reports would raise.

C. PRIVATE PLACEMENTS

Although, as discussed above, publicly held companies are more likely to register their securities offerings with the SEC, there are occasions when a traditional private placement may be desirable to avoid the cost and trouble of a public offering and where the purchasers do not insist on receiving freely tradable securities. Also, both PIPEs and Rule 144A/exchange offer transactions begin with private placements. The exemptions under the federal securities laws available for the issuance of securities without registration are essentially the same as exist for non-public companies and include the following.

1. Section 4(a)(2) of the Securities Act

The private placement exemption under Section 4(a)(2) of the Securities Act exempts "transactions by an issuer not involving any public offering" and provides a means to effect a securities transaction without SEC registration. Rule 506 of Regulation D of the Securities Act specifies "safe harbor" conditions that must be satisfied for a transaction to be deemed not to involve a "public offering:"

- there must be no more than (or the issuer must reasonably believe that there are no more than) 35 purchasers (excluding certain high net-worth persons known as "accredited investors") of securities from the issuer; and
- each purchaser who is not an accredited investor either alone or with his or her designated representatives must have sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment, or the issuer must reasonably believe that such purchaser comes within this description.

The SEC has implemented new rules, as mandated by the JOBS Act, which now permit general solicitation and general advertising in connection with offerings conducted pursuant to Rule 506(c) under the Securities Act, subject to the satisfaction of certain conditions. In traditional Rule 506 offerings, which prohibit general solicitation and general advertising and are still permitted under new Rule 506(b) under the Securities Act, issuers and placement agents generally rely on representations and warranties of the purchasers to confirm that the purchasers are accredited investors. However, in a Rule 506(c) offering, an issuer is required to take reasonable steps to verify that the purchasers are accredited investors in addition to still complying with the integration and resale restrictions of Regulation D. The SEC's release states that such "reasonable steps" are a principles-based requirement based on an objective determination relating to the particular facts and circumstances of each transaction. As long as it does not know that a purchaser is not an accredited investor, an issuer will be deemed to have taken reasonable steps to verify that the purchaser is an accredited investor if it uses one of the following non-exclusive, non-mandatory means of verifying the accredited investor status of a purchaser:

- in the event that the purchaser is claiming accredited investor status on the basis of income, it (i) reviews any IRS forms that confirm the purchaser's income for the two most recent years and (ii) obtains a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;
- in the event that the purchaser is claiming accredited investor status on the basis of net worth, it (i) reviews certain documentation dated within the prior three months, including, among others, bank statements, brokerage and other securities holding statements, and consumer reports from at least one nationwide consumer reporting agency, and (ii) obtains a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed;
- it obtains a written confirmation from certain persons or entities, including registered broker-dealers, registered investment advisers, certain attorneys and certain certified public accountants, that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor; or
- it obtains a certification from the purchaser that he or she qualifies as an accredited investor and such purchaser purchased the issuer's securities in a Rule 506 offering as an accredited investor prior to September 23, 2013 and continues to hold such securities.

Issuers are now effectively permitted to use almost any form of communication in connection with a Rule 506(c) offering. However, issuers should be aware that any communications used in connection with a Rule 506(c) offering might be integrated with another public or private offering (including a Rule 506(b) offering) and will be subject to the antifraud provisions of U.S. federal and state securities laws and that such communications may violate non-U.S. securities laws if disseminated outside the United States. See Section II.F for a more detailed discussion of the doctrine of integration and Section VIII.E for a more detailed discussion of the liability provisions under U.S. securities laws. Finally, if it is a reporting issuer under the Exchange Act, the issuer will have to determine whether any communications made pursuant to a Rule 506(c) offering are compliant with Regulation FD. See Section VIII.B.1 for a more detailed discussion of Regulation FD.

Rules 501(a) and 215 under the Securities Act define "accredited investors" as:

- certain financial institutions and employee benefit plans;
- private business development companies;
- certain for- and non-profit entities with total assets in excess of $5,000,000 not formed for the specific purpose of acquiring the securities offered;
- certain affiliates of the issuer;
- natural persons whose net worth, or joint net worth with a spouse, exceeds $1,000,000 (where such person's primary residence shall not be included as an "asset" and any mortgage secured by such residence shall not be included as a "liability" up to the estimated fair market value of such residence);
- natural persons (i) whose income exceeds $200,000 or joint income with a spouse exceeds $300,000, in each case, in each of the two most recent years, and (ii) who has a reasonable expectation of reaching the same income level in the current year;
- certain trusts with total assets in excess of $5,000,000 not formed for the specific purpose of acquiring the securities offered; and
- any entity in which all of the equity owners are accredited investors.

There are no specific disclosure requirements if all of the purchasers are accredited investors. If, however, there is at least one non-accredited investor, the acquirer will be required to provide disclosure meeting the requirements of a full prospectus.

Securities issued to purchasers in a Regulation D private placement will be "restricted securities." Holders of restricted securities may resell their securities only pursuant to a registration statement covering the securities to be resold or pursuant to an exemption from the registration requirements of the Securities Act and any applicable state securities laws.

Pursuant to the Dodd-Frank Act, the SEC approved Rule 506(d) of Regulation D, which prohibits an issuer from relying on Rule 506 of Regulation D if certain "bad actors" participating in the offering or connected to the issuer have been involved in a "disqualifying event." Persons covered by Rule 506(d) include, among others, the issuer, the issuer's directors, certain of the issuer's officers, certain significant shareholders of the issuer, promoters, investment managers (if the issuer is a pooled investment fund), persons that have been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale, general partners or managing members of any such investment manager or solicitor, and directors, executive officers or other officers participating in the offering of any such investment manager, solicitor, general partner or managing member of such investment manager or solicitor.

The disqualifying events include, among others, certain convictions and orders relating to securities offerings, certain orders barring a person from participating in the securities, insurance or banking industries, certain orders relating to a violation of any law or regulation that prohibits fraudulent, manipulative or deceptive conduct, certain orders of the SEC under the Exchange Act or the Investment Advisers Act of 1940, certain SEC cease and desist orders relating to violations of the anti-fraud provisions of the Securities Act or Section 5 of the Securities Act, certain suspensions, expulsions or bars from association from or with securities exchanges, securities associations or members thereof, certain refusal or stop orders relating to registration statements or Regulation A offering statements, and United States Postal Service false representation orders.

Rule 506(d) does not apply to certain disqualifying events, including those that occurred prior to September 23, 2013, as long as the issuer discloses such disqualifying events to persons purchasing securities under the offering. In addition, Rule 506(d) does not apply to a disqualifying event if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that such event had occurred or the court or regulatory authority that entered the relevant order, judgment or decree advises in writing that disqualification under Rule 506(d) should not arise as a consequence of such order, judgment or decree.

An issuer intending to rely on Rule 506 in connection with an offering must conduct a reasonable investigation into the background of each Rule 506(d) covered person and, where appropriate, obtain the relevant representations, warranties and covenants from third-party covered persons participating in the offering.

2. Section 3(a)(10) of the Securities Act

Section 3(a)(10) of the Securities Act exempts an issue of securities in exchange for other securities that meet the following conditions:

- a U.S. or foreign court or authorized governmental entity must:

  (i) before approving the transaction, find at a hearing that the terms and conditions of the exchange are "fair" both from a procedural and substantive perspective to those who will be issued securities, and

  (ii) be advised before the hearing that the issuer will rely on the exemption based on its approval;
- the fairness hearing must be open to everyone to whom securities will be issued in the exchange and adequate notice must be given to such persons; and
- there may be no improper impediments to the appearance by those persons at the hearing.

Although the initial issuance of options, warrants, or other convertible securities is exempted from registration by Section 3(a)(10), this section does not exempt the later exercise or conversion of such securities.

3. Regulation S

Regulation S under the Securities Act provides an exemption from registration for offshore securities transactions. An issuance by an issuer (U.S. or foreign) to a non-U.S. purchaser may be exempt from registration pursuant to this regulation.

Any offering of securities by the Company outside the United States must satisfy the general conditions of Regulation S. These conditions require that the offer and sale be made in an "offshore transaction" and that no "directed selling efforts" are made in the United States. Qualifying as an offshore transaction requires that the offer not be made to a person located in the United States and that when a buy order is originated, the buyer is, or the seller reasonably believes that the buyer is, outside the United States. In addition, restrictions may apply to the ability to resell the securities into the United States for a period of time depending on the type of securities offered. Directed selling efforts include activities, such as promotional seminar or advertisements in the United States, that are undertaken or reasonably could be expected to result in the conditioning of the U.S. market for the securities offered.

Section IX.F contains a detailed description of Regulation S, which is available to both domestic and foreign private issuers engaged in offshore securities transactions, either in connection with an acquisition or else in connection with a capital raising.

D. RULE 144A EXCHANGE OFFER TRANSACTIONS

1. General

An alternative to raising additional capital by a public company through the public capital markets is a Rule 144A offering. Typically, the Rule 144A offering is followed by a subsequent exchange offer registered with the SEC. A Rule 144A/exchange offer transaction is a financing technique in which an issuer offers securities in a private placement pursuant to Section 4(a)(2) or in accordance with Regulation D of the Securities Act, and agrees to exchange the initial securities within a certain period of time after the closing of the private placement for securities registered on Form S-4 under the Securities Act.

The staff of the SEC's Division of Corporation Finance has permitted Rule 144A/exchange offer transactions to be used in connection with nonconvertible debt securities, investment grade, nonconvertible preferred stock, unrated non-convertible preferred stock that is exchangeable into debt securities, broker-remarketed or auction preferred stock and, in certain cases, common stock of foreign issuers. It is not available to U.S. issuers issuing additional common stock. The securities acquired in the 144A offering, which are restricted securities sold in private placements and thus subject to resale limitations, are resold by the initial purchasers, typically investment banks, to QIBs, under Rule 144A (note that Rule 144A is a resale-only exemption), to institutional accredited investors and, typically, to non-U.S. persons pursuant to Regulation S. In general, QIBs are certain institutions that own or invest on a discretionary basis at least $100 million of securities of unaffiliated issuers. The issuer prepares an offering memorandum that contains substantially the same disclosure as that in a registered public offering in order to facilitate the later registration of the initial securities. The exchange securities are virtually identical to the initial securities, except that the exchange securities are not subject to resale restrictions of the type applicable to the initial securities.

Rule 144A/exchange offer transactions allow an issuer to bring a transaction to market faster than a registered offering, because the issuer can avoid the lengthy SEC registration and review process, although SEC rules adopted in 2005 allowing automatically effective shelf registration for "well-known seasoned issuers" means that those issuers are generally no longer subject to an SEC review-related risk of delay and, accordingly, less likely to conduct Rule 144A/exchange offerings. For other issuers, these transactions permit an issuer to obtain pricing at rates close to those provided by a registered public offering since this type of private placement is more attractive to institutional bond purchasers that, for legal or policy reasons, may be reluctant to be subject to the resale restrictions of traditional private placements and prefer the liquidity of a security that can be traded to other QIBs immediately and would be generally freely transferable once the S-4 is effective.

2. Mechanics

A Rule 144A/exchange offer transaction provides many advantages over a traditional private placement. In a Rule 144A/exchange offer transaction, only the issuer, not the person receiving the exchange securities, is subject to the prospectus delivery requirements and to liability for any material misstatements and omissions in the exchange offer documents, subject to certain limited exceptions. Furthermore, resales of the exchange securities are generally not subject to the registration and prospectus delivery requirements of the Securities Act.

Another important advantage of a Rule 144A/exchange offer transaction is that it provides an issuer with a broader market for its securities, which affords significant savings on the rate or price of the privately placed securities. Additional savings will be achieved as a result of not having to maintain an effective shelf registration statement or comply with multiple demand registrations. In contrast, while there is the promise of future liquidity with registration rights, the privately placed securities remain restricted until they are sold pursuant to an effective registration statement. The restricted nature of the securities is a significant problem for certain institutional investors that are limited, for legal or policy reasons, to holding a certain amount of restricted securities in their portfolio. With exchange rights, these restricted securities may be transferred out of the restricted securities portfolio while allowing institutions to keep such securities. The use of exchange rights in this fashion provides a more efficient and liquid aftermarket for institutional private placements.

Finally, the exchange offer component of a Rule 144A/exchange offer transaction can be executed quickly after the closing of the placement of the initial securities. The holders of the initial securities are not involved in the exchange offer registration process, there is no FINRA review required and the offering memorandum used in the placement of the initial securities can be converted quickly into a Form S-4 registration statement. Once the exchange offer is consummated, the issuer generally has no continuing registration obligations with respect to the holders of the initial securities.

E. PIPE TRANSACTIONS

1. General

The financing methods discussed above may be unavailable or undesirable to a public company looking to raise additional capital. Follow-on offerings on Form S-1 require significant time to prepare and are subject to the SEC review process in order to consummate the offering and smaller issuers will not qualify as a seasoned issuer or a WKSI and may not be eligible to register shares on Form S-3 or, if eligible, to register a significant amount of shares on Form S-3. Conventional debt financing sources such as lines of credit typically require the borrower to agree to strict financial and operational covenants to which a company may be unwilling or unable to adhere.

Primarily due to these considerations, over the past decade, PIPE transactions have become increasingly popular as a relatively quick and inexpensive way, when compared to an underwritten public offering, for a public company to raise capital. In a typical PIPE transaction, the company issues securities to accredited investors pursuant to Regulation D and will often undertake to file a resale registration statement covering the resale of the securities subsequent to the closing of the placement. By filing the registration statement after the closing of the PIPE transaction, the delays associated with preparing a registration statement and engaging in the comment process with the SEC are deferred until after the company has already received the proceeds from the offering.

More recently, registered direct offerings have become a popular capital raising alternative to the traditional PIPE transaction, in part due to the increased eligibility of issuers to use Form S-3 for shelf registration statements. In a registered direct offering, the securities that will be sold (through a placement agent) are registered prior to the offering, resulting in the investors acquiring freely tradable shares. The benefit for the issuer is that the shares will not be subject to a liquidity discount as they generally are in a traditional PIPE transaction, where the investor acquires restricted shares.

2. Mechanics

Typically, the securities issued in a PIPE transaction are common or preferred stock, secured or unsecured debentures or some combination. Because the securities are restricted when issued, the purchase price per share (on an as converted basis) is usually discounted from the price of the company's freely tradable public shares. In many PIPE transactions, the company will also issue warrants to the investors, to provide them with additional upside on their investment should the stock price rise. Preferred stock and debentures may be convertible into, and warrants are exercisable into common stock at a specified conversion or strike price and each may provide for full ratchet or weighted average anti-dilution protection if the company issues or is deemed to issue shares of common stock at a price that is lower than the conversion or strike price.

The securities are issued pursuant to a securities purchase agreement, which contains customary representations and warranties of the investors and the issuer and affirmative and negative covenants and other provisions that are negotiated by the issuer and the investors.

In order to complete the transaction, the issuer is required to list the shares on the relevant exchange and there must be enough shares authorized for issuance to cover all the shares underlying the securities sold in the PIPE transaction. In addition, if shares of common stock are sold at a discount to the greater of market or book value, then if the amount of shares that are deemed to be issued are greater than 20% of the outstanding common stock of the company or the issuance is deemed to be a change in control of the company by virtue of a single shareholder owning greater than 20% of the outstanding common stock, then under applicable NYSE and NASDAQ MKT Rules, shareholder approval is required. The shares underlying any derivative securities which may potentially be issued or shares which may potentially be issued as liquidated damages are deemed to be issued for purposes of calculating the number of new shares being issued. Also, the SEC will integrate any offerings within the prior six-month period and deem it part of the current offering. In order to avoid having to obtain shareholder approval, the securities purchase agreement may contain a blocker provision which limits the amount of shares which may be issued in the PIPE transaction to 19.99%.

In most PIPE transactions, the company is required to file the registration statement covering the resale of the shares of common stock sold to the investors (and the shares of common stock underlying any convertible preferred stock, convertible debentures or warrants) within a specified period of time, which can range from less than 30 days if the company is S-3 eligible, to more than 90 days if the company will have to file an S-1. Eligibility to use these forms is discussed in Section VII.B.1 above. In addition, the registration rights agreement will generally require that the company have the SEC declare the registration statement effective within a specified period of time from when it is filed, which will vary depending on whether the registration statement is reviewed by the SEC. Investors will generally require that monthly liquidated damages of 1% to 2% of the aggregate purchase price apply if the company fails to have the registration statement filed by the filing deadline and/or if it fails to have the registration statement declared effective by the SEC by the effectiveness deadline, with a cap on the total amount of liquidated damages that can be incurred. However, since the amendments to Rule 144 took effect in early 2008, whereby the holding periods for restricted securities were shortened, investors may be more inclined to agree to PIPE transaction terms that do not include registration rights.

VIII. LIFE AS A PUBLIC COMPANY

As noted above, the many advantages of going public should always be weighed against the costs and burdens of doing so. Being a public company is considerably more expensive from an administrative point of view than being private. Sarbanes-Oxley, the Dodd-Frank Act and the attendant rulemakings by the SEC and the stock markets have dramatically increased the compliance costs of being a public company. Published estimates show that the annual regulatory compliance costs for public companies with less than $1 billion in revenues have on average increased by up to $2 million per year, primarily due to increased audit fees, since the passage of Sarbanes-Oxley, with the greatest relative impact falling on smaller public companies. Newly public companies need to hire or outsource additional investor relations, legal, financial, accounting and internal auditing staff to comply with the various requirements of being a public company. The increase in regulation of the auditing profession, highlighted by the creation by Sarbanes-Oxley of the PCAOB, and tightened restrictions on the types and amount of non-audit services that an auditor may provide to a public company audit client, have also increased costs for public companies as well (both in the form of expected higher audit fees and the costs of engaging alternative providers for the non-audit services that used to be provided by auditors).

The JOBS Act's elimination of the Sarbanes-Oxley requirement for an independent public accounting firm audit of the internal control over financial reporting of EGCs is intended to reduce somewhat these costs for as long as five years after a company goes public. See Section I.D.

In addition to being costly, being public involves a significant time commitment. Executives find that a significant amount of their time is consumed by public company issues, such as analyst meetings, investor relations, review of public filings and determining the proper timing of disclosures. The following is a brief summary of some of the more significant ongoing obligations of a public company.

There is generally no phase-in period. Many of these obligations apply from the day that the IPO registration statement is declared effective (and, as discussed above in Section II.C, certain provisions of Sarbanes-Oxley become effective at the time a company first files its IPO registration statement and becomes an "issuer"), so companies must be prepared to execute, with policies in place and executives educated regarding, the obligations of public companies.

A. REPORTING REQUIREMENTS AND OTHER REQUIRED COMPANY DISCLOSURES

The ability to raise money from the public through the sale of securities is a powerful financing tool for a growing company. Access to the U.S. capital markets carries with it certain responsibilities, particularly the duty to keep company shareholders and the investing public fully informed of the company's financial condition and any events that have, or could have, a material impact on the company. This duty is principally embodied in the periodic reporting requirements and disclosure obligations imposed by the Exchange Act, the listing rules of the NYSE and other national exchanges.

1. SEC Reporting Requirements; Officer Certifications

As a result of filing a registration statement with the SEC and listing securities on the NYSE, NYSE MKT or NASDAQ, companies become subject to the SEC's continuing reporting requirements. These requirements for domestic companies involve filing with the SEC annual reports on Form 10-K, quarterly reports on Form 10-Q and reports of specified events on Form 8-K. Except with respect to the reporting of certain events included on Form 8-K (see Sections I.B and VIII.A.1(e)), timely filings are a prerequisite to the availability of simplified or short-form registration statement forms for future public offerings of securities and other accommodations generally available to reporting companies. A missed filing deadline, whether intentional or not, can have a significant negative impact on the company's ability to conduct follow-on financings and on insiders' ability to sell company shares in the open market.

Although companies are required to file all of these reports by EDGAR, there is no requirement that the reports be distributed to shareholders. While some companies distribute quarterly financial information to shareholders, all that is generally required is that shareholders be sent an annual report and a proxy statement each year before their votes are solicited for the annual meeting.

Sarbanes-Oxley requires the SEC to review the periodic disclosure reports of all companies a minimum of once every three years (although for "large accelerated filers" (see definition below) or companies in industries considered critical by the SEC, such as financial services, these reviews can be more regular). These reviews are often primarily focused on financial and accounting issues.

a. Disclosure Controls and Procedures and Internal Controls Over Financial Reporting

The federal securities laws have always required that public companies maintain a system of internal accounting controls that are designed to safeguard the company's assets and correctly report the company's assets and results of operations. (See Section VIII.J.1 below for a discussion of accounts and accounting controls). Sarbanes-Oxley and related SEC rules require companies, under the leadership of the CEO and CFO, to design, establish, maintain and periodically evaluate controls and procedures that assure timely, accurate and reliable disclosure of information, which the SEC calls "disclosure controls and procedures." To differentiate this larger category of controls and procedures from the subset of internal financial controls which forms a part of this new larger category, SEC rules refer to financial controls plus safekeeping of assets as "internal control over financial reporting." As discussed below, the CEO and CFO are required to periodically certify that they have indeed established such disclosure controls and procedures and have recently evaluated their effectiveness. Because internal control over financial reporting is much more difficult to evaluate "fully" on a quarterly basis, the CEO and CFO are required to evaluate internal control over financial reporting as of the fiscal year-end and, for the end of each of the other three quarters, to disclose any material changes to internal control over financial reporting on a quarterly basis. Companies are required to disclose such changes and the results of the required evaluations in their periodic reports.

As discussed in Section II.C above, IPO companies must establish disclosure controls and internal control over financial reporting before they go public, and most companies have responded to this requirement for disclosure controls and procedures by forming a disclosure committee (a management-level, not a board-level committee) to coordinate the company's public disclosure and assist the CEO and CFO in giving their periodic certifications. A sample disclosure committee charter is attached as Exhibit D.

Annual reports on Form 10-K are required to include a separate management report stating that management conducted a comprehensive review and evaluation of the company's internal control over financial reporting as of the end of the fiscal year and including management's assessments of such internal control. "Large accelerated filers" and "accelerated filers" (see definitions below) are also required to have their auditors review management's report and include the auditor's own attestation that it concurs with management's assessment. Newly public companies, EGCs and smaller public companies are not required to include auditor attestation reports with respect to internal control over financial reporting in their annual reports. The Dodd-Frank Act eliminated the requirement for auditor attestation reports for "non-accelerated filers" (i.e., newly public companies that have not (a) been public at least 12 months and (b) filed at least one annual report; and public companies with a public float less than $75 million). Accordingly, the SEC altered its rules on September 15, 2010. The JOBS Act similarly eliminated the requirement for EGCs. These changes could significantly reduce the ongoing costs of being a public company for qualifying businesses. However, all public companies must still provide a management report on internal control over financial reporting in their annual reports.

b. Annual Reports on Form 10-K

The filing deadlines for the SEC's periodic reports depend on the size of the company. Companies with a common equity public float of $700 million or more (as of the last business day of its most recently completed second fiscal quarter) who have been subject to the periodic reporting requirements for at least 12 calendar months and have filed at least one annual report are "large accelerated filers" under SEC rules. Companies with a common equity public float of $75 million or more but less than $700 million on such date and who have been subject to the periodic reporting requirements for at least 12 calendar months and have filed at least one annual report are "accelerated filers." Companies with a common equity public float of less than $75 million on such date are "non-accelerated filers."

The Form 10-K annual report must be filed by large accelerated filers no later than 60 calendar days after fiscal year-end, by accelerated filers no later 75 calendar days after fiscal year-end, and by "non- accelerated filers" no later than the traditional 90 calendar days after fiscal year-end. In its first year, an IPO company is, by definition, not an accelerated or large accelerated filer even if it has a public float greater than $75 million or $700 million after the offering. As a result, an IPO company will have 90 calendar days from the end of its first fiscal year as a public company to file its annual report on Form 10-K (e.g., a company that goes public in 2014 with a fiscal year ending on December 31, 2014 has until March 31, 2015 to file its Form 10-K).

The Form 10-K must be signed by a person on behalf of the company, a majority of the directors of the company, and each of the company's CEO (referred to by the SEC as the principal executive officer), CFO (referred to by the SEC as the principal financial officer) and principal accounting officer (or controller).

In addition, each of the CEO and CFO must include two separate certifications as exhibits to the report. In the first certification, referred to as the Section 302 certification for its location in Sarbanes-Oxley, these officers must certify that:

- they have read the report;
- that, to their knowledge, the non-financial information in the report is accurate and complete;
- that, to their knowledge, the financial information in the report is fairly presented;
- that they are responsible for the company's disclosure controls and procedures and internal control over financial reporting;
- that they have evaluated the effectiveness of these controls as of the end of the period reported;
- that they have disclosed in the report any material changes to the company's internal controls that occurred in the fourth fiscal quarter; and
- that they have disclosed to the company's audit committee and outside auditors any significant deficiencies and material weaknesses in the design or operation of the company's internal controls, or any evidence of fraud on the part of members of the company's finance department.

In the second certification, referred to as the Section 906 certification, the CEO and CFO must similarly certify that:

- the report complies with the requirements of the Exchange Act; and
- the financial information in the report is fairly presented.

Failure to include either the Section 302 certification or the Section 906 certification with an annual report is a violation of the Exchange Act. The Section 906 certification is required by a separate federal criminal statute, and the failure to include such certification, or including a false Section 906 certification, can be prosecuted as a federal crime.

With limited exceptions, the Section 302 certification must be given in the exact wording required by the SEC. Attempts to modify or qualify the Section 302 certification in any way (except for permissible conforming modifications for those companies who are not required to provide an auditor attestation of management's assessment of internal control over financial reporting in the Form 10-K annual report) will not be accepted. The U.S. Justice Department, which has purview over the Section 906 requirement, has not been as insistent as the SEC as to the wording for the certification required by Section 906, as long as it clearly delivers the substance of the required certification.

Form 10-K is a comprehensive report, requiring updated disclosure, in plain English, with respect to much of the information that appears in the company's IPO registration statement, including:

- a description of the business, properties and legal proceedings;
- information about activity between the company or its affiliates and certain transactions or dealings with Iran;
- a risk factors section;
- MD&A covering the three latest fiscal years;
- audited financial statements for the three latest fiscal years (with balance sheets as of the end of the two latest fiscal years), together with the auditor's report;
- selected financial data for the five latest fiscal years, except that an EGC need not provide selected financial data for periods prior to the earliest period presented in its IPO registration statement;
- information about the issuer's industry segments, classes of similar products and services and foreign and domestic operations;
- quantitative and qualitative disclosure about market risks (e.g., exposure to interest rate, foreign currency exchange, commodity price, equity price and other market risks);
- information about market prices of and dividends on the shares;
- information about directors, executive officers, executive compensation, corporate governance, related person transactions, outside auditors, approval of auditor services and fees, and compliance or noncompliance with the requirements for filing the Section 16 reports described below (all of these items may be incorporated by reference from the company's proxy statement for that year as long as it is filed with the SEC within 120 days of the fiscal year-end);
- tabular information about the *c*ompany's equity compensation plans, including a break out of the number of shares issued under shareholder-approved plans and non-shareholder approved plans, details of any non-shareholder approved plans or arrangements, and a copy of any such written plans or arrangements (also may be incorporated from the proxy statement);
- detailed information relating to any company repurchases of its own equity securities during the fourth fiscal quarter (similar quarterly disclosure is

required in the quarterly reports on Form 10-Q, as discussed below), including a month-by-month break out of the total number of shares repurchased and average price per share;

- the CEO's and CFO's conclusions regarding the effectiveness of the company's disclosure controls and procedures;
- a separate report from management on the effectiveness of the company's internal control over financial reporting and auditors attestation thereon (as discussed above, not required for non-accelerated filers, newly public companies and EGCs);
- the company's website address, and whether or not the company posts copies of its periodic reports on its website–and if not, why not;
- whether or not–and, if not, why not–the company has adopted a code of ethics for its chief executive officer and senior financial officers; and
- whether or not–and, if not, why not–its audit committee has at least one member who qualifies as an "audit committee financial expert" under the SEC's rules.

In addition, in August 2012, the SEC announced a rule requiring a "resource extraction issuer" to include in its Form 10-K specified disclosures regarding payments made to any government, U.S. or foreign, for the purpose of the commercial development of oil, natural gas or minerals. A "resource extraction issuer" is any issuer that is required to file an annual report with the SEC and engages in the commercial development of oil, natural gas or minerals. This rule has since been vacated by a U.S. federal court, and the SEC is expected to revise the rule based on the court's findings.

A company must disclose whether an identified "audit committee financial expert" also qualifies as "independent" under the SEC's rules (independence only being required for companies listed on an exchange). The SEC defines "audit committee financial expert" as a person with the following attributes:

- an understanding of GAAP and financial statements;
- the ability to apply GAAP to estimates, accruals and reserves;
- experience with financial statements at least as complex as the company's financial statements;
- an understanding of internal control over financial reporting; and
- an understanding of audit committee functions.

Significant portions of the information required by Form 10-K may be incorporated by reference from the company's glossy annual report to shareholders (traditionally mailed to shareholders with the proxy statement) for the same fiscal year (e.g., MD&A, financial statements and selected financial data) and from the proxy statement for the company's annual meeting of shareholders if held during the early part of next fiscal year (e.g., management and compensation matters). Timing issues should be considered each year in establishing a schedule for filing the Form 10-K, filing and mailing the proxy statement, mailing the glossy annual report to shareholders and holding the annual meeting in a way that permits this incorporation by reference. Company counsel should assist in the preparation of an appropriate checklist and schedule for action. A sample timetable and responsibility checklist is included as Exhibit I. As part of this year-end schedule, the company should distribute a questionnaire to directors, officers and more than 5% shareholders to update information from the IPO registration statement. This questionnaire is very similar to the D&O questionnaire distributed in connection with the IPO.

The company's audit committee is required to recommend to the board of directors whether or not the audited financial statements should be included in the Form 10-K. Typically, the audit committee will review the financial information in advance of its inclusion in the Form 10-K and preferably in advance of any release of that information to the public by press release. The mechanics required by Section 302 certifications (discussed above) must also be incorporated into the audit committee's review cycle. The entire board of directors will usually discuss the Form 10-K prior to its filing with the SEC.

If a company is required to provide a Compensation Discussion and Analysis (as discussed below), the Form 10-K must also include a compensation committee report in which the company's compensation committee certifies that it has reviewed and discussed the Compensation Discussion and Analysis with management, and, based on this review and discussion, recommended that it be included in the company's annual report.

c. Quarterly Reports on Form 10-Q

Quarterly reports filed by large accelerated filers and accelerated filers must be filed within 40 days of the end of the fiscal quarter. Quarterly reports for non-accelerated filers must be filed within the traditional 45 days of the end of the fiscal quarter. No quarterly report is required for the fourth quarter, since the 10-K will be filed for the whole year shortly thereafter. Form 10-Q reports are comprised mainly of condensed, unaudited financial information for the quarter and fiscal year to date, with comparative information for the corresponding periods of the prior fiscal year, and an MD&A covering these periods.

Public companies are required to have their quarterly financial statements reviewed (but not audited) by independent public accountants. Form 10-Q also requires disclosure about legal proceedings and quantitative and qualitative disclosure about market risk, and it requires updates to any information previously filed that may no longer be accurate or that may need updating as a result of the passage of time.

Form 10-Q also includes disclosure concerning:

- the CEO's and CFO's conclusions on the effectiveness of the company's disclosure controls and procedures as of the end of the quarter;
- any material changes to the company's internal control over financial reporting during the quarter;
- disclosure relating to the company's repurchase of its own equity securities during the applicable fiscal quarter;
- any material changes to the risk factors contained in the Form 10-K; and
- information about activity between the company or its affiliates and certain transactions or dealings with Iran.

The Form 10-Q must be signed by a person on behalf of the company and by the company's principal financial or principal accounting officer. Section 302 certifications and Section 906 certifications are also required to be included as exhibits to the Form 10-Q. Again, the audit committee typically reviews the financial information in advance of its inclusion in the 10-Q and preferably in advance of any earlier release of that information to the public by press release.

d. Iran Sanctions Disclosure

The Iran Threat Reduction and Syria Human Rights Act of 2012, a law which expands the jurisdictional reach of U.S. sanctions to apply to entities that are owned or controlled by U.S. persons, added Section 13(r) to the Exchange Act. Section 13(r) requires companies to disclose in their quarterly and annual reports whether, during the reporting period, they or their affiliates have knowingly engaged in any transaction or dealing:

- with the government of Iran, including (i) its political subdivisions, agencies and instrumentalities, any entity owned or controlled thereby, or any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, acting or purporting to act on behalf of any of the foregoing; and (ii) any individuals or entities on the Specially Designated Nationals (*SDN*) list as representatives of the government of Iran;
- relating to Iran's petroleum sector or the development of weapons of mass destruction (*WMD*);

- with persons and entities identified on the SDN list as supporters of terrorism or proliferators of WMD;
- relating to the transfer of goods, technologies or services to Iran, any entity organized under the laws of Iran or otherwise subject to its jurisdiction, or a national of Iran, likely to be used by Iran to commit serious human rights abuses; or
- involving certain financial institutions or financial communications service providers or related to the issuance of Iranian sovereign debt or the debt of any entity that the government of Iran owns or controls.

"Transaction or dealing" would include purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating or guaranteeing. "Knowingly" means that the issuer has actual knowledge, or should have known, of the activity.

An affiliate for purposes of Section 13(r) includes any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with the company. Control means the direct or indirect possession of the power to direct or cause the direction of the management and policies of the company, whether through the ownership of voting securities, by contact, or otherwise. This definition implicates directors, officers, significant stockholders, subsidiaries and sister companies of the company.

The Section 13(r) disclosure must include a detailed description of each activity, including the nature and extent of the activity, the gross revenue and net profit attributable to the activity, if any, and whether the issuer or its affiliate intends to continue the activity. There is no materiality or de minimis value threshold for reporting such disclosure. An issuer with no sanctionable activity to report need not include a statement in its periodic report to that effect.

If a company includes such disclosure in a periodic report, it must file simultaneously with the SEC a notice (on form IRANNOTICE) that the disclosure has been included in the periodic report. The SEC is required to send all such periodic reports to the President, and the foreign relations and banking committees of each of the U.S. House of Representatives and the Senate. The President must initiate an investigation and determine within 180 days if sanctions should be imposed on the issuer or its affiliate as a result of the activity described in the disclosure.

In response to the new requirements under Section 13(r), companies should review and adjust as necessary their policies, procedures and training with respect to diligence and reporting to ensure compliance with the expanding U.S. sanctions regime against Iran and compliance with the requirement to report any sanctionable activity. Because the definition of "affiliate" includes directors, companies should issue, either as part of their annual director questionnaire or separately, questions to their directors regarding their transactions and dealings with Iran. A sample questionnaire specific to Section 13(r) is included as **Exhibit P**.

e. Current Reports on Form 8-K

Over the years, the SEC has continued to amend Form 8-K to increase the number of reportable events. With the exception of the triggering events relating to suspensions of trading, earnings releases, Regulation FD disclosure, reports on how frequently say-on-pay votes will be conducted and voluntary "other events" reports, all of the reportable events need to be disclosed on a Form 8-K within four business days (with no opportunity for a brief extension for good reason as is the case with a Form 10-K or Form 10-Q).

The items reportable on Form 8-K include:

- entry into a "material definitive agreement";
- amendment or termination of a material definitive agreement;
- mine safety, reporting of shutdowns and patterns of violations;
- creation of a material "direct financial obligation" or material obligation under an off-balance sheet arrangement;
- events that accelerate or materially increase a material direct financial obligation or off-balance sheet obligation;
- decisions to record a write-off, restructuring charge or impairment charge (other than a decision made in connection with the preparation of quarterly or annual financial statements);
- notices of delisting and prior circumstances where it is clear that the company has fallen out of compliance with any listing standard;
- a conclusion by the company or the company's auditors that previously issued financial statements should no longer be relied upon;
- unregistered sales of the company's equity securities above a certain threshold;
- material modifications to the rights of security holders;

- the election of directors (if not at a shareholders' meeting), the appointment of certain senior executive officers or the departure of a director (other than due to death) or certain senior executive officers;
- the entry into a new compensatory plan, contract or arrangement or amendment to an existing compensatory plan, contract or arrangement or material grant under an existing compensatory plan;
- amendments to the company's articles of incorporation or bylaws in addition to amendments relating to change in the company's fiscal year;
- the voting results from shareholder meetings, including the results of say-on-pay votes (see Section VIII.D.1.b below);
- change in control of the company;
- acquisition or disposition of a significant asset (including a business);
- bankruptcy or receivership;
- changes in the company's auditor;
- disagreements between the company and a director that leads to a director's resignation;
- change in fiscal year;
- change in shell company status;
- amendments to or waivers of the company's code of ethics for senior executive officers;
- temporary suspensions of trading under the company's employee benefit plans;
- release of any material nonpublic information relating to the company's performance in a completed fiscal period (i.e., an "earnings release");
- Regulation FD disclosure (see Section VIII.B.I below);
- the frequency of say-on-pay votes, i.e., every one, two or three years (this must be reported within 150 days of a meeting at which a frequency vote was conducted and at least 60 days before the deadline for submitting shareholder proposals for the next annual meeting; see Section VIII.D.1.b below); and
- any "other events" that the company deems of importance to its shareholders (because this is voluntary disclosure, Form 8-K does not enforce a deadline for such disclosure other than to request that the company makes sure that the disclosure is indeed current if the event is deemed to be important to shareholders).

In the past, most companies found that the most burdensome requirement of the Form 8-K rules was the requirement to report a significant acquisition. An acquisition is "significant" if it exceeds applicable percentage thresholds (ranging from 10-20%) of three separate comparative tests based on total assets, pretax income and amount of investment. The report is required to include the date and manner of the acquisition or disposition, a description of the assets, the nature, amount and method of determination of the purchase price, the source of funds used (if an acquisition) and the identity of the persons from whom the assets are acquired or to whom they are sold and the nature of any material relationship between such persons, on one hand, and the company and its directors, officers and affiliates, on the other hand.

In addition, in the case of a significant acquisition, the company is required to file audited financial statements of the business acquired and *pro forma* financial statements of the company reflecting the acquisition. These financial statements may be filed by amendment to the Form 8-K up to 71 days after the date on which the initial report on Form 8-K must be filed.

Because many of the reportable events added to the Form 8-K in 2004 require companies to quickly assess the materiality of an event or to determine whether a disclosure obligation has been triggered, the SEC adopted a limited safe harbor from the liability provisions of Exchange Act Section 10(b) and Rule 10b-5 from public and private fraud claims based on a failure to timely file a Form 8-K in respect of certain of the new items added to Form 8-K. The safe harbor extends only to the time of the company's next periodic report for the period in which the Form 8-K filing was missed. If the company does not cure such failure by including appropriate disclosure about such event in such periodic report, then the protection under the safe harbor will be lost. The limited safe harbor adopted by the SEC does not modify in any way the separate disclosure obligations which arise when a company is selling or repurchasing its own securities in the market.

The failure to timely report these same specified events on Form 8-K will not jeopardize a company's ability to use short-form registration on Form S-3 to register securities under the Securities Act as long as the company is current in its Form 8-K filings at the time that the company actually files such registration statement and is otherwise eligible to use those forms.

In addition, the SEC amended Rule 144 to clarify that, notwithstanding the condition that a company be current in its public reporting for 12 months prior to a sale made in reliance on Rule 144, sellers of restricted securities may continue to rely on the Rule 144 safe harbor even if such company has failed to file reports on Form 8-K with respect to certain reporting items during the immediately preceding 12-month period.

f. Interactive Financial Data in XBRL Format

On January 30, 2009, the SEC issued rules and related guidance that require domestic and non-U.S. public companies to provide their financial statements to the SEC in a separate exhibit to certain reports and registration statements in an interactive data format using eXtensible Business Reporting Language *(XBRL)*.

With interactive data, all of the items in a financial statement are labeled with unique computer-readable "tags," which make financial information more searchable on the internet and readable by spreadsheets and other software. The XBRL rules are designed to make it easier for analysts and investors to find and compare data on financial and business performance.

The XBRL rules apply to all SEC reporting companies that prepare their financial statements in accordance with U.S. generally accepted accounting principles (*U.S. GAAP*) or International Financial Reporting Standards (*IFRS*).

Each company must provide the same XBRL data on its corporate website that it files with the SEC. The data must be posted for at least 12 months and must be posted not later than the end of the calendar day that the report or registration statement was filed, or was required to be filed, with the SEC, whichever is earlier. Companies are not permitted to satisfy this requirement by including a hyperlink to the documents available electronically on the SEC's website.

Companies file a separate exhibit containing their financial statements, including the footnotes and financial statement schedules, in XBRL format with periodic reports on Forms 10-Q, 10-K, 20-F and 40-F and to current reports on Form 8-K and, in some cases, Form 6-K that contain updated interim financial statements or financial statements that have been revised to reflect the effects of subsequent events, and for transition reports to Forms 10-Q, 10-K and 20-F. Registration statements filed pursuant to the Securities Act (e.g., Forms S-1, S-3, S-4), other than for initial public offerings, will also require an XBRL exhibit when financial statements are included directly in the registration statement, rather than being incorporated by reference. The exhibit is required for the first filing of a covered registration statement in which an offering price or price range has been determined and any time thereafter when the financial statements, including footnotes, are changed.

The exhibit is not required for data included in management's discussion and analysis; executive compensation; or other financial, statistical or narrative disclosure. Additionally, financial statements of acquired businesses and pro forma financial statements required under the SEC's Regulation S-X are not subject to the interactive data requirements.

Companies convert their financial statements into an interactive data file using the SEC-approved list of tags. The rules require that the entirety of the financial statements be tagged, although there is a phase-in for the tagging of footnotes and schedules. The tags establish a consistent structure that can be recognized and processed by a variety of software applications, such as databases, financial reporting systems and spreadsheets.

Tagging is accomplished using commercially available software that guides the company in mapping information in the financial statements to the appropriate tags in the most recently issued list of approved tags. Each element in the standard list of tags has a standard label.

To a limited extent, companies will be able to add to the standard list of tags in order to accommodate unique items in their financial disclosures. When a financial statement element does not exist in the standard list of tags, the company may add a customized tag (i.e., an extension), but whenever possible and when a standard element is appropriate, companies are required to change the label for a financial statement element that exists in the standard list of tags instead of creating a new customized tag. The adopting release provides as an example a company using the label "gross margin" in its financial statements. In that case, in its XBRL submission, the company would use the standard tag "gross profit" and change the label for that data tag to "gross margin."

The final rules provided a grace period for the tagging of financial statement footnotes. Most companies are now required to tag the following details of the footnotes:

- Each significant accounting policy within the significant accounting policies footnote as a single block of text
- Each table within each footnote as a separate block of text
- Within each footnote, each amount (*i.e.*, monetary value, percentage and number)

Companies have a 30-day grace period for the filing of the first XBRL exhibit that requires detailed tagging of footnotes.

The final rules permit, but do not require, tagging of narrative disclosures within footnotes, other than the required tagging of significant accounting policies.

Each company must provide the XBRL data filed with the SEC on its corporate website. The data must be posted for at least 12 months and must be posted not later than the end of the calendar day that the report or registration statement was filed, or was required to be filed, with the SEC, whichever is earlier. Companies are not permitted to satisfy this requirement by including a hyperlink to the documents available electronically on the SEC's website.

If a company does not make its XBRL submission, or post the data on its corporate website, it is deemed ineligible to use short form registration statements on Forms S-3, S-8 or F-3 and would be deemed not to have adequate public information available for purposes of the resale exemption safe harbor provided by Rule 144. Once a company complies with the interactive data submission and posting requirements—provided it previously filed its financial statement information in traditional format on a timely basis—it would be deemed to have timely filed all of its periodic reports.

g. Conflict Minerals and Form SD

On August 22, 2012, the SEC adopted rules requiring reporting companies to make certain annual disclosures if "conflict minerals" are necessary to the functionality or production of a product it manufactured. The rules preliminarily identified cassiterite, columbite-tantalite, gold and wolframite as "conflict minerals," but other minerals may be included in the classification by the U.S. Secretary of State in the future. The conflict minerals rules require annual disclosures by those companies that identify conflict minerals as necessary to the manufacture of their products. The report is included in a specialized disclosure report on Form SD for every calendar year from January 1 to December 31 (regardless of the issuer's fiscal year end), and due to the SEC on May 31 of the following year. In addition, the company must make the Form SD publicly available on its corporate website. The first reporting period under the new rules is for the fiscal year from January 1, 2013 to December 31, 2013. The new rules do not apply to conflict minerals that were outside of the company's supply chain prior to January 31, 2013.

If a company determines that a conflict mineral is necessary in the manufacture of its product but that the conflict mineral it used did not originate in the Democratic Republic of the Congo ("DRC") or an adjoining country (such countries together with the DRC, the "covered countries") or if they are not newly-mined (*e.g.*, are from scrap or are recycled), it must disclose in its Form SD a brief description of this determination.

If a company determines that the conflict minerals originated in a covered country, the company must also submit a report to the SEC as an exhibit to its Form SD that includes a description of the measures taken by the company to exercise due diligence on the minerals' source and chain of custody, including whether the conflict minerals financed or benefited certain armed groups in a covered country. The due diligence measures taken by the company must include an independent audit of the report stating that the report comports with certain specified standards. The report must include a description of the products manufactured or contracted to be manufactured that are used to finance or benefit armed groups in a covered country, as well as information on the location and facilities used to process the conflict minerals.

2. Reporting Requirements of the NYSE, NYSE MKT and NASDAQ

In connection with listing on the NYSE, NYSE MKT or NASDAQ, a company is required to enter into a listing agreement. The listing agreement obligates the company to release quickly to the public any news or information that may reasonably be expected to materially affect the market for its stock, although each market recognizes that companies may defer the reporting of this information for a limited time for legitimate business reasons if precautions are taken to ensure that the information is not traded on by those who are aware of the development and is not otherwise leaked. Markets reserve the right to halt trading in a company's stock or to require disclosure of events in the face of market rumors or unusual trading activity, though these are considered drastic measures. The markets are proactive in requesting explanations of unusual trading activity.

One of the difficulties faced by investors is determining whether they are entitled to receive a dividend already declared by the board of directors but not yet paid, or a right which is not yet exercisable. The board of directors sets a "record date" for the payment of the dividend, or distribution of the right. Following the record date for the payment of a dividend or the distribution of rights, but prior to payment of such dividend or rights, the stock of the company trades "ex-div" (short for excluding dividend) or "ex-rights," except in the case of certain exceptional dividends. That is, any stockholder who purchases stock following the ex-div date is not entitled to receive the dividend. These dates are very important to the capital markets and the investing public. Therefore, the SEC, pursuant to Rule 10b-17 under the Exchange Act, requires that notice be sent to the exchange on which the company's shares are listed ten days prior to the record date of any of the following:

- a dividend or other distribution in cash or in kind, including a dividend or distribution of any security;

- a stock split or reverse split; or
- a rights or other subscription offering.

In addition, if the company's shares are listed on the NYSE or NYSE MKT, the exchange should be given ten days' notice of any record date set for any purpose, including meetings of shareholders. NASDAQ does not require such a notice. Both NYSE and NASDAQ require a listed company to submit a copy of any press release to be issued shortly before public dissemination.

Both the NYSE and NASDAQ listing standards require CEOs of listed companies to certify annually to the stock exchange that their companies are in compliance with the corporate governance listing standards. NASDAQ also require CEOs to promptly notify the stock exchange whenever any executive officer of the company becomes aware that the company is materially non-compliant with any of the corporate governance listing standards and the NYSE requires CEOs to promptly notify the stock exchange whenever any executive officer of the company becomes aware of any non-compliance by the company with any of the corporate governance listing standards.

3. A Company's Duty to Disclose

As described above, a company is well-advised, even in the absence of a legal duty, to promptly disclose material events that have occurred or are certain to occur, absent a legitimate business reason for delay. Materiality in this context means that the event is something that a reasonable investor would consider important in making a decision to buy, sell or hold an investment in the company. The application of these rules is less clear with respect to events that are developing. For example, what duty is there to disclose merger negotiations that may but are not certain to lead to the acquisition of the company? Where an event has not yet occurred and is not certain to occur, premature disclosure may mislead investors into thinking that the event is certain to happen, and the disclosure itself may impact the likelihood of the event's occurrence. Under these circumstances, companies generally are obligated to consider both the probability of an event's occurrence and the magnitude of the event on the company should it occur, in determining whether the event is material for purposes of disclosure.

Public companies also may have a duty to disclose in situations where a prior public statement becomes misleading because of the occurrence of intervening events. It is widely agreed that a firm and unwavering policy of not commenting on market rumors (including, for example, negative publicity on an online bulletin board) and responding to inquiries with a "no comment" response does not create a "duty to update," while a statement denying a rumor that later becomes true usually does. This policy may not solve all of the problems created by leaks and rumors but generally it is helpful.

As a result of Regulation FD, whenever a U.S. public company, or a person acting on its behalf, discloses material nonpublic information to a securities market professional or a holder of the company's securities (under circumstances where it is reasonably foreseeable that the holder might trade on such information), the company is required to make public disclosure of the information simultaneously if the disclosure is "intentional," or promptly thereafter if it is "nonintentional." The SEC staff has issued an interpretation stating that a disclosure is only "nonintentional" if the speaker did not know, and was not reckless in not knowing, that the disclosure was inside information. Inadvertently disclosing inside information otherwise is not considered by the SEC staff to be "nonintentional." A company is also required to make public disclosure with the same speed if it discloses inside information to a holder of its securities in circumstances in which it is reasonably foreseeable that the holder will purchase or sell company securities on the basis of that information. This duty to disclose is discussed in greater detail below.

It is also worth noting that a company is required to respond fully and accurately to specific items of disclosure in SEC filings. This can create issues when material events that require some secrecy would fall during the time SEC filings are due.

SEC guidance and requirements as to disclosure obligations are constantly evolving. A company's duty to disclose various events or information needs to be evaluated, on an ongoing basis, together with counsel. Because of the need to make many reasoned judgment calls in this realm, an experienced securities lawyer can be invaluable to a company in this area.

The willingness of companies to make public disclosure of forward-looking information has increased since the passage of the Private Securities Litigation Reform Act of 1995 (*PSLRA*). Until the adoption of Regulation FD, however, far more companies disclosed forward-looking information to securities analysts without broader public disclosure. These companies believed that the risk of litigation, even with the protections of the PSLRA, was too great to risk public disclosure of information, such as expected future revenues or earnings. Regulation FD, which requires any disclosures of material nonpublic information to be made simultaneously to securities analysts and the public, presents companies with the difficult decision of whether to disclose forward-looking information publicly or not at all other than under a confidentiality agreement or to a person or organization owing the company a duty of trust.

B. COMMUNICATIONS WITH THE PUBLIC—PRESS RELEASES AND PUBLIC, INVESTOR AND ANALYST RELATIONS

A company often desires to discuss important matters with its customers, suppliers, employees, shareholders and the investing community. Once the IPO is complete, there are fewer restrictions on what companies may say and when they may say it. Nonetheless, companies should be mindful of the potential liability resulting from any corporate announcement.

1. Regulation FD (Fair Disclosure)

Before discussing the rules and practices in this area, it may be helpful to provide some background. Companies often desire to announce positive corporate developments as they occur. Companies are typically less eager to publicly broadcast adverse corporate developments (although they are usually well-advised to do so), and have historically been wary of disclosing forecasts, predictions or other forward-looking information. All of this information, however, is of interest to the public, and companies may find themselves under intense pressure from stockholders and analysts to promptly disclose either bad news or forward-looking information.

Not surprisingly, the two most influential constituencies of a company are typically the company's analysts and major stockholders. Major stockholders' influence derives not only from their voting power, but also from the impact on the company's stock price should a major stockholder begin liquidating a position or should it become known that a major stockholder has done so or is doing so. Companies are generally motivated to keep analysts who cover them well informed because of the risk of impact on stock price from an analyst's downgrade or from an analyst dropping coverage of a company.

These forces helped shape a set of practices to manage expectations that were generally well accepted until the SEC's adoption of Regulation FD. Before the adoption of Regulation FD, companies generally felt free to conduct conference calls solely for analysts at which they provided the backup for publicly available numbers and in some cases provided forward-looking information that they did not share with the investing public generally. Companies also routinely received and responded to telephone calls from individual analysts seeking answers to specific questions. Often, when a particular analyst's forecast of earnings for a coming period is different from a company's internal estimates, that analyst might receive some guidance to bring his or her number in line with the company's estimates. This practice was defended on the grounds that analysts need the deeper level of information to develop independent views of the company's prospects. In some cases, companies extended these same privileges to major investors as well.

It had been argued that this additional information was more likely to confuse than to inform individual retail investors. Over time, however, investors and the SEC began to attack the practice of providing additional information to analysts and selected investors. With the introduction of online trading and chat rooms, individual investors wanted access to all available information and no longer were willing to receive secondary or delayed materials from analysts, citing principles of fundamental fairness and pointing out that in many cases the "analyst-only" calls were open to select investors as well.

Regulation FD has significantly changed the way companies communicate with their stockholders. While all companies face the same difficult decisions—whether to disseminate forward-looking information or not—a number of different solutions have been adopted. In general, companies have continued to conduct analyst conference calls, but have made those calls open to the public. Beyond this generally agreed practice, however, policies diverge. While many companies allow only analysts to ask questions in an analyst call open to the public, others accept questions from any interested person. While many companies are unwilling to talk one-on-one with analysts or major investors, others continue to conduct such private conversations and simply monitor more carefully the information being disseminated in them. Finally, while some companies refuse to provide forward-looking information to anyone, many others routinely broadly disclose and update projected earnings and other forward-looking information. No single practice is right for all companies, and each issuer should consider carefully their particular circumstances before settling on a policy. Most important, once a policy or practice is adopted, the company should be consistent in its implementation to avoid confusing investors or risking violation of Regulation FD.

In November 2002, the SEC announced that it had settled three enforcement actions brought against three companies and two officers for violations of Section 13(a) of the Exchange Act and Regulation FD, and issued a report of its investigation brought pursuant to Section 21(a) of the Exchange Act against a fourth company, which it did not otherwise sanction. Consistent with the SEC's early guidance after the adoption of Regulation FD, it brought actions only in cases where clear violations of Regulation FD were present and the selective disclosures were potentially material to investors—earnings guidance and significant new contracts. Both topics had been identified by the SEC in the adopting release for Regulation FD as subject matters that issuers should carefully consider prior to selective disclosure. However, unlike the early guidance, which some took to mean that the SEC would only bring enforcement actions against "egregious violations" of Regulation FD, these actions demonstrate that the SEC will examine an issuer's determination regarding the materiality of the information selectively disclosed and will not hesitate to institute investigatory proceedings if its judgment regarding materiality differs from that of the subject company.

In a later enforcement action brought against Schering-Plough and its CEO in September 2003, the SEC issued a cease-and-desist order in which it found that Schering-Plough and its CEO had violated Regulation FD and Section 13(a) of the Exchange Act, in part based on the CEO's "combination of spoken language, tone, emphasis, and demeanor" that the SEC believed communicated material nonpublic information about the company's earnings to analysts and portfolio managers in private meetings. The SEC ordered Schering-Plough and its CEO to pay civil penalties of $1,000,000 and $50,000, respectively. The sanctions imposed by the SEC in the Schering-Plough enforcement action are the most severe sanctions imposed to date under Regulation FD, and should be viewed by public companies and their executive officers and investor relations representatives as a warning that the SEC will vigorously pursue violations of Regulation FD. In addition, in one of the earlier cases, the SEC cautioned in an investigative report that reliance upon the advice of counsel in an attempt to comply with Regulation FD will not necessarily provide a successful defense for alleged violations of Regulation FD. Accordingly, it is essential for issuers to adopt formal, written disclosure policies and procedures to ensure compliance with the requirements of Regulation FD.

In a 2005 case, the SEC issued an order that found Flowserve Corporation violated Regulation FD when, in a private meeting with analysts near the end of a reporting period, the company reaffirmed its previous earnings guidance, the first Regulation FD case filed by the SEC involving a reaffirmation of earnings by an issuer and the first settled enforcement action against a Director of Investor Relations for violating the rule. The SEC's written findings included the following: At a meeting with analysts the company was asked about its earnings guidance for the year; neither the CEO nor the Director of Investor Relations gave the response required by the Company's policy (i.e., that earnings guidance was effective at the date given and would not be updated until the company publicly announced updated guidance); the Director of Investor Relations did not caution the CEO before he answered the analyst's questions and instead remained silent; and in response to the question, the CEO reaffirmed the previous public guidance, which the SEC found constituted the provision of material nonpublic information. Without admitting or denying the Commission's allegations and findings, Flowserve and its CEO consented to the entry of a final judgment by the federal court that required them to pay civil penalties of $350,000 and $50,000 respectively.

In September 2013, the SEC charged the head of investor relations for First Solar Inc., Lawrence Polizzotto, with violating Regulation FD when he selectively informed certain analysts and investors, but not others, of the fact that First Solar would not be receiving a government guarantee from the Department of Energy that the company had previously publicly expressed confidence it would receive. When the Department of Energy sent a notice to the company indicating it would not be providing the guarantee, Polizzotto set up calls with certain analysts and investors during which he and a subordinate went through talking points regarding the loss of the guarantee, despite knowing that First Solar had not publicly announced this information to the public and despite receiving advice from the company's lawyer to adhere to Regulation FD in making any communications with the public. Without admitting or denying the SEC's findings, Polizzotto agreed to pay $50,000 to settle the SEC's charges. The SEC decided not to bring an enforcement action against First Solar due to the company's cooperation with the investigation, the company's environment of compliance through the use of a disclosure committee that focused on Regulation FD issues, and other remedial actions taken by the company in the wake of Polizzotto's actions.

Not all Regulation FD cases have gone the SEC's way, however, as one court has chided the SEC for "nitpicking" what it considered minor variations in a company's statements that did not reveal material nonpublic information. In 2005, a Federal court dismissed an SEC lawsuit that alleged that Siebel Systems, Inc. violated Regulation FD. The SEC's complaint alleged that Siebel had disclosed material non-public information during private meetings with investors. The SEC alleged that by disclosing that Siebel's business activity levels were "good" and "better" and that its sales were "growing" and "building," the CFO implied that the company's business was improving. The SEC claimed that this information was significantly different from public statements made by the company's CEO, where he had allegedly indicated that Siebel's business would track weakness in the general economy. According to the SEC, institutional investors who attended the private meetings interpreted the statements as a sign that Siebel's business was improving and advised clients of this, which caused Siebel's stock price to rise. In its opinion, granting Siebel's motion to dismiss, the Court held that the SEC's approach put an unreasonable burden on companies, resulting in inappropriate scrutiny of syntax and phrasing. The Court found that "Regulation FD was never intended to be utilized in the manner attempted by the SEC under these circumstances" and that "excessively scrutinizing vague general comments has a potential chilling effect which can discourage, rather than encourage, public disclosure of material information."

2. Public Disclosure Policies

With this backdrop, companies should consider the following recommendations for avoiding liability with respect to their public disclosures.

a. Adopt a Board Policy Tailored to FD Compliance

Companies should carefully consider adopting a formal comprehensive communications policy. Adherence to such a policy should ensure compliance with Regulation FD and other applicable laws and regulations of the SEC and any other regulatory bodies, such as the NYSE or NASDAQ, governing the nature and timing of the company's communications. Companies would be well advised to seek the advice of qualified counsel in the preparation of such policies.

b. Limit the Number of Persons Authorized to Speak for the Company

A very limited number of authorized spokespersons should be empowered to make all public statements by and about the company, and the express prior consent of an authorized spokesperson should be required before anyone else may make or respond to any such public statement. This requirement should be broadly interpreted, even to include announcements made only to employees or customers, local or regional advertising campaigns and promotions, press interviews and additions to the company's website. This policy should apply not just to material targeted at investors, but to all public statements by and about the company. Such a policy is advisable from a legal standpoint because the company is only liable under Regulation FD for statements made by it and any person acting on its behalf and it demonstrates consistency in the company's approach to disclosure issues. In addition, the policy may assist the company to present a clear public presence and to facilitate the circulation of marketing ideas and approaches throughout the company. Authorized spokespersons might be limited, for example, to the CEO, CFO, Vice President of Investor Relations, Vice President of Media Relations and General Counsel. Once selected, the authorized spokespersons should be kept informed about corporate developments.

c. Coordinate Record Keeping

A company's communications policy should provide for coordination among authorized spokespersons, central record keeping and a repository of public statements. In particular, communications covered by Regulation FD should be scripted in advance wherever possible, vetted by the Company's general counsel and recorded or summarized and retained under the policy guidelines.

d. Monitor Marketplace Information About the Company

It is important for the authorized spokespersons, in this case most likely media relations and legal, to monitor public statements made by third parties about the company as well. Whether reported in the press, seen on online bulletin board postings or received otherwise, market rumors may be traceable to internal leaks, which may give rise to a duty to disclose the information officially. Also, an alert media office may head off market rumors before they begin to take on a life of their own and provide valuable feedback to management about the company's positioning in the marketplace.

Management should provide the appropriate monitoring office with information about all events at the company, whether or not then material, so that publicity may be judged in the light of all facts about the company before being cleared for release.

e. Monitor for Required Disclosures under Regulation FD

Any disclosure of information to securities market professionals or investors should be carefully monitored for compliance with Regulation FD. Most disclosures should be scripted ahead of time so that careful review and considered decisions may be made as to the advisability of particular statements and public filing of the statements. In those circumstances where disclosures are made that are unscripted, the person making the disclosure should immediately review with the general counsel's office or other appropriate authorized spokespersons the substance of the discussion to see if any nonintentional disclosure of material nonpublic information occurred. Disclosures may be considered "intentional" for purposes of Regulation FD even if the speaker was making an offhand remark. An authorized spokesperson should understand all that has been communicated to each analyst and major investor, not only for purposes of Regulation FD, but as a matter of good relations. Companies generally should not favor some analysts over others.

f. Monitor for Other Selective Disclosure Issues

The authorized spokespersons should monitor company publicity with a particular eye to selective disclosure issues, even if they do not trigger Regulation FD. Information that is disseminated to a particular group of people, such as customers, should be disseminated more broadly by means of a press release if that information would be important to investors in the company or the market at large. This principle applies not only to targeted information, but also to means of dissemination that may not reach all investors. For example, press releases issued through customary business channels and Forms 8-K are each sufficient to accomplish the goal of widespread dissemination. The SEC has indicated that companies can also use corporate websites and social media outlets to make announcements and disseminate information publicly but only if certain conditions, which are discussed in more detail below, are met.

g. Consider the Need for a Current Report on Form 8-K

Whenever a public disclosure is made about a company, the media relations office together with the general counsel's office should consider whether a current report on Form 8-K should be filed with or furnished to the SEC. Such a filing may be required to correct the company's prior filings. Alternatively, the significance of the event may render filing or furnishing a report on Form 8-K advisable.

3. Adopting the Statements of Others

Companies should be careful to ensure that statements about them are not interpreted as statements by them. Companies should also be mindful that direct company input into the drafting of research materials prepared by analysts and third-party press reports, including interviews, may result in the statements being "adopted" by the company for liability purposes. The same concern is presented when companies disseminate, typically in press packets or investor relations packets, copies of investment research or newspaper articles about the company. Further, hypertext links to or the hosting of websites, bulletin boards and chatrooms in which a company's prospects are discussed quite understandably may confuse investors, who may assume that the company agrees with what is being said there. Finally, participation by employees and other insiders of the company in bulletin boards or chatrooms should be explicitly forbidden because of the risk that the statements may be imputed to the company.

4. Earnings Releases and "Non-GAAP" Financial Information—Regulation G

Generally accepted accounting principles often make period-to-period and company-to-company comparisons difficult. Excluding the effects of unusual events such as corporate acquisitions and dispositions, restructuring charges, goodwill write-offs and the like can make such comparisons easier for the investing public. Results reported other than on the basis of GAAP (historically referred to as "pro forma" financial information, but since the adoption of Regulation G—"non-GAAP financial measures") can therefore serve a useful purpose.

However, as useful as it may be to some companies to use non-GAAP measures for reporting purposes, the SEC began to crack down on the use of non-GAAP financial measures when it became clear that some companies were using non-GAAP reporting to mislead investors. In January 2002, the SEC brought an enforcement action against Trump Hotels & Casinos based on Trump's misleading use of non-GAAP reporting in an earnings release. In the Trump Hotels case, the earnings release reported a pro forma profit for the quarter, excluding a one-time charge, and pro forma earnings per share that exceeded analysts estimates. However, according to the SEC, the release failed to mention that the earnings calculation included a one-time accounting gain stemming from the termination of a lease agreement. Without that gain, Trump Hotels would have posted a much lower quarterly profit and would have fallen far below analysts earnings per share estimates. Silently including the one-time gain while publicly excluding the one-time charge was materially misleading in the SEC's view.

To remedy these abuses and in response to the Sarbanes-Oxley mandate, the SEC adopted Regulation G which became effective in March 2003. Regulation G applies to any public disclosure of material information that includes a non-GAAP financial measure. Specifically, non-GAAP financial measures are numerical measures of a company's historical or future financial performance, financial position or cash flows that exclude amounts that are included by GAAP or include amounts that are excluded by GAAP.

Whenever a company chooses to use a non-GAAP financial measure, it must also:

- include the most directly comparable GAAP figure; and
- include a reconciliation of the non-GAAP financial measure to such directly comparable GAAP figure.

Regulation G applies to press releases, conference calls and webcasts. Conforming amendments to Regulation S-K require that companies comply with the requirements of Regulation G and certain other rules regarding the use of non-GAAP measures in SEC filings.

In November 2008, the SEC announced the settlement of its first enforcement action brought pursuant to Regulation G. In the case, filed against the public company SafeNet, Inc. and certain of its directors, officers and accountants, the SEC alleged that, among other things, the defendants engaged in an earnings management scheme in order to meet earnings targets that resulted in SafeNet reporting materially misleading financial information in its securities filings, press releases and earnings calls. In one of the charges, the SEC alleged that the defendants improperly excluded certain ordinary expenses as non-recurring charges in violation of Regulation G. These exclusions were allegedly made without factual support, and when SafeNet's independent auditor raised questions, the auditor allegedly received false and misleading explanations.

5. Earnings Conference Calls

Historically, companies have conducted quarterly earnings conference calls with analysts in order to comment in depth on their recently-released results for a completed quarter and perhaps "spin" the results. Although some "bullish" optimism is not necessarily inappropriate, companies should keep potential liability risk under Rule 10b-5 in mind and be balanced in all their formal and informal disclosures about material information. These earnings calls fall squarely within the confines of Regulation FD, Regulation G and the requirement that earnings releases be filed on Form 8-K. In order to comply with this "Bermuda Triangle" of regulation, some companies have adopted the following approach to quarterly earnings calls:

- issue a press release at least a week in advance of the earnings call notifying the public of the earnings call, the call-in information, the fact that the earnings call will be simulcast on the company's website and the length of time that the simulcast will be archived on the website (most companies are leaving the simulcast on the website for 30 days);
- post such press release on the company's website;
- issue a written earnings press release after the close of the market on the eve of the earnings call and file the press release on a Form 8-K either that same evening (the EDGAR filing window is technically open until 10:00 p.m.) or early the next morning before the actual earnings call;

- if the company chooses to include non-GAAP financial measures in its earnings release, comply with Regulation G in the press release by including the most comparable GAAP figures and reconciliations;
- conduct the earnings conference call within 48 hours after filing of Form 8-K (usually it is the morning after the issuance of the press release or later in the same day that the Form 8-K is filed) and make the conference call accessible to members of the public (and not just analysts); and
- comply with Regulation G on the call if any non-GAAP financial measures are disclosed either in management's presentation or in the discussion with analysts by disclosing during the call or directing listeners to the most comparable GAAP figures and any reconciliation information contained in the earnings release or another document posted on the company's website.

6. SEC Guidance on the Use of Company Websites

In August 2008, the SEC issued a release (the *August 2008 Release*) providing interpretive guidance, including with respect to how a public company may use its website in compliance with the Exchange Act and the antifraud provisions of the federal securities laws.

The SEC's guidance in the August 2008 Release focuses principally on four areas: (a) the status of information posted on a company website for Regulation FD purposes, (b) company liability for information posted on its website (including the continued availability of previously-posted content, hyperlinks to third-party information, the use of summary information and interactive website features), (c) the applicability of disclosure controls and procedures to website content and (d) the format of information on a company website.

a. Application of Regulation FD.

Generally speaking, the August 2008 Release notes that Regulation FD was designed to address the problem of selective disclosure of material information by a company, in which a privileged few gain an informational edge—and the ability to use that edge to profit—from superior access to corporate insiders, rather than from skill, acumen, or diligence. Regulation FD requires a company to publicly disseminate any material non-public information that is disclosed privately to selective market participants.

The August 2008 Release provides guidance with respect to circumstances under which information posted on a company website would be considered "public" for Regulation FD purposes, as well as the satisfaction of Regulation FD's "public disclosure" requirement.

If information on a company's website is deemed to be public, then subsequent selective disclosure of it would not trigger any further Regulation FD disclosure obligations because such information, even if material, would not be considered to have been selectively disclosed in a non-public manner. However, if website content is not deemed to be public, then subsequent selective disclosure of that information could trigger Regulation FD obligations. In addition, posting information in an insufficiently public manner could constitute selective disclosure, resulting in a Regulation FD disclosure obligation. When assessing whether information is public for Regulation FD purposes, companies should consider the following:

- *Is a company's website a recognized channel of distribution? Among other factors, this evaluation will depend on how well the company has informed the market of its website and disclosure practices (such as including the website address in its reports and press releases), as well as how investors and the market use the company's website.*
- *Does posting information on a company's website make it readily available to the securities marketplace in general? To determine whether information has been "disseminated" so that it can be considered public the company should assess, among other things, the manner in which information is posted on the company's website and the timeliness and accessibility of website information to investors and the markets. Relevant factors include: whether the website is designed to inform investors about the company; whether the information is prominently disclosed in a known and routinely used location; whether the information is presented in readily accessible format; and whether the company maintains a current and accurate website.*
- *Has there has been a reasonable waiting period for investors and the market to react to the posted website information? What constitutes a reasonable waiting period depends on the circumstances of the dissemination, which may include, among other things: the size and market following of the company; the extent to which investor-oriented information on the website is regularly accessed; the level of awareness by investors that the company uses its website as a means for disseminating information; and the nature and complexity of the website disclosure.*

b. Company Liability under Antifraud and Other Exchange Act Provisions.

The antifraud provisions of the federal securities laws contain a general prohibition on making material misstatements and omissions of fact in connection with the purchase or sale of securities. The August 2008 Release notes that in the context of a company's website disclosure, the company must be mindful of its responsibility for the accuracy of statements that reasonably can be expected to reach investors, regardless of the medium through which the statements are made (including the Internet). The August 2008 Release includes guidance on the following website-related issues:

i. Historical Information.

The August 2008 Release states that historical information should not be considered reissued or republished for purposes of the antifraud provisions just because such information remains publicly accessible. To ensure that investors recognize that historical information speaks as of a period earlier than when the investor may be accessing such information, the SEC suggests that companies separately label such information as historical and specify the applicable period. Additionally, companies should consider relocating non-current information to a separate section of the website containing other historical information.

ii. Hyperlinks to Third-Party Information.

The August 2008 Release contains the principles under which a company may be held liable for third-party information to which the company links on its website. A company may be liable with respect to such information if the company is involved in its preparation (i.e., under the SEC's "entanglement" theory), or if the company explicitly or implicitly endorses or approves the information (i.e., per what is known as the "adoption" theory). To avoid liability for third-party information, companies should take steps to prevent implications of endorsement or approval of third-party information. Such steps may include the following:

- Explaining why the third-party information is being provided, or labeling such information differently (i.e., indicating it as "news articles," etc.).
- Ensuring that third-party information presents a variety of viewpoints, including negative viewpoints about the company.
- Adding "exit notices" or "intermediate screens" to hyperlinks that indicate that the hyperlink leads away from the company's website to third-party information.
- Avoiding hyperlinks to third-party information that the company knows or is reckless in not knowing is materially false or misleading.

In the August 2008 Release however, the SEC cautions that the use of disclaimers alone is not sufficient to insulate a company from responsibility for information that the company makes available through use of a hyperlink or otherwise, and the SEC reaffirms its view that specific disclaimers of antifraud liability are contrary to the policies underpinning the federal securities laws.

iii. Summary Information.

The August 2008 Release states that if a summary or overview (particularly regarding financial information) is used on a company's website, the company should consider ways to alert readers to the location of the full disclosure to which the summary or overview relates, as well as to other information about the company on its website. The SEC suggests the following techniques to highlight the nature of summary or overview information:

- Using appropriate titles and headings that identify the information as a summary or overview.
- Using additional explanations to identify the disclosure as a summary or overview and the location of the more detailed information.
- Placing summary or overview information in close proximity to hyperlinks to the more detailed information.
- Using "layered" or "tiered" formats with embedded links that enable readers to obtain the more detailed information by clicking on the links.

iv. Interactive Website Features.

The August 2008 Release notes the increased popularity of interactive features such as "blogs" and "electronic shareholder forums" on company websites, and the SEC reiterates that companies are responsible for statements made via these features by the company or on its behalf. The SEC indicates that statements made in interactive blogs and forums by or on behalf of a company will be treated the same as any other company statements from the perspective of antifraud provisions of the federal securities laws. Company representatives cannot avoid the applicability of such laws to the company even if they purport to comment in their "individual" capacities. In addition, companies may not require participants in a blog or forum to waive protections under the federal securities laws as a condition to their participation. However, the August 2008 Release indicates that a company is not responsible for third party statements posted on a website that the company sponsors, nor is the company obligated to respond to or correct such statements.

c. Disclosure Controls and Procedures.

According to the August 2008 Release, information posted on a company's website also may implicate rules adopted under the Exchange Act governing certification requirements relating to disclosure controls and procedures. A company can satisfy certain SEC reporting obligations and NYSE disclosure obligation by making available the relevant information on its website. However, if a company elects to satisfy such reporting obligations by posting such information on its website, the failure to properly do so will have the same consequences as the failure to properly include the information in an SEC filing. Accordingly, companies should ensure that their disclosure controls and procedures are designed to address and include the posting of such information on their websites.

However, disclosure controls and procedures do not apply to disclosures of information on a company's website that are not being posted as an alternative to being provided in an Exchange Act report. Therefore, certifications would not apply to such information, although other securities law provisions (including those described above) might be relevant.

d. Format of Information.

The August 2008 Release states that the format of information presented on a company website should be focused on readability, not printability, unless SEC rules otherwise explicitly require a printer-friendly format.

e. Social Media.

In July 2012, Reed Hastings, the CEO of Netflix, Inc. announced through his Facebook page that Netflix had streamed 1 billion hours of content in the month of June 2012. The information had not previously been disseminated to the company's shareholders in any other manner. The SEC commenced an investigation regarding whether Hastings and Netflix violated Regulation FD by selectively disclosing material, nonpublic information. The SEC decided not to pursue an enforcement action, and instead issued guidance on the application of Regulation FD to social media sites, such as Facebook and Twitter. For one, a company must provide a notice to investors that it intends to use a particular social media channel to communicate information to the market, such as on the company's corporate investor relations website and on its financial press releases and periodic filings with the SEC. In addition, if a company chooses to use social media to communicate to the market, it must still comply with applicable technical disclosure requirements under the SEC rules and regulations, such as Regulation FD. If a company is contemplating using social media to communicate to investors, it should carefully consider the SEC guidance prior to doing so.

C. STATUTORY PROTECTION FOR FORWARD-LOOKING STATEMENTS

Companies are under only a few discrete obligations to publish forecasts, predictions or other forward-looking information, such as those described above with respect to MD&A disclosure of known trends and uncertainties. Also, under Regulation FD, public companies making disclosure of material forward-looking information must do so publicly. The SEC and Congress have each recognized, however, that forward-looking information is useful to investors and that disclosure of this information is to be encouraged. In order to provide such encouragement, Congress enacted PSLRA, which created safe harbor protection against liability in private lawsuits arising under the federal securities laws for forward-looking statements.

The statutory safe harbors are available for both written and oral forward-looking statements. The safe harbor is available only to companies which are public at the time of making the forward-looking statement in question. In other words, the safe harbors do not apply to IPOs. However, the court-created "bespeaks caution" doctrine that is codified in the statute should apply even to IPOs so the same cautionary statements encouraged by the statute should be made in the "Risk Factors" section of the IPO prospectus. For a forward-looking statement to come within the statutory safe harbor, it must be:

- identified as a forward-looking statement; and
- accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements.

The accompanying cautionary statements should convey substantive information about factors that realistically could cause the results to differ. Boilerplate or "catch-all" cautionary statements afford a company less protection than disclosure carefully tailored to the company and circumstances. Statements that fail to satisfy one or both of these requirements may still fall within the safe harbor if the statements are immaterial or if the plaintiffs fail to prove that the statements were made with actual knowledge of their false or misleading nature.

Including the entire cautionary statement in an oral statement may be impractical. However, if made orally, the forward-looking statements should be accompanied by:

- a cautionary oral statement that the statements are, in fact, forward-looking statements and that actual results could differ materially; and
- an oral statement that additional information as to factors that could cause actual results to differ is contained in a readily available written document (i.e., one filed with the SEC or publicly disseminated), which document is identified.

Of course, the document identified should itself meet the requirements for the safe harbor described above.

Whether forward-looking information is disclosed optionally or compulsorily, issuers should seek to avail themselves of the statutory safe harbor. In response to the PSLRA a practice has developed (1) to include in the company's reports on Forms 10-K and 10-Q a fulsome set of "risk factors" similar to those included in the IPO registration statement and updated each quarter (Forms 10-K and 10-Q have been required since 2006 to include "risk factors" disclosure), (2) to include a brief listing of those risk factors in each press release issued that includes or may include forward-looking information and (3) to begin each oral statement or presentation that may contain material forward-looking information with a qualifying statement referring the listener to the company's most recent report on Form 10-K or 10-Q.

D. THE ANNUAL REPORT AND THE ANNUAL MEETING

The annual report is a valuable means of communicating with shareholders and the investment community. Companies are generally required by state law to hold an annual meeting of shareholders, and SEC rules require that a proxy statement and annual report to shareholders be distributed with or before the solicitation of proxies for the annual election of directors and the conduct of other business at the annual meeting.

Most companies prepare a glossy annual report to shareholders and retain consultants to help design the layout and photographs to accompany the required information. Preparation of an annual report may be an expensive and time-consuming process, however, and therefore some companies simply distribute copies of their reports on Form 10-K on plain paper with some minor additional information required in an annual report and a cover letter to shareholders from the CEO. In addition, some companies make quarterly reports to their shareholders consisting of the same information found in their reports on Form 10-Q. Distribution of quarterly reports on Form 10-Q to shareholders is not mandatory and given wide awareness of the availability of SEC reports on the SEC's and companies' websites and the increasing use of more reader-friendly formats *(e.g.*, HTML and PDF) for SEC filings, doing so would appear to serve no useful purpose.

1. Proxy Rules

Solicitations of proxies or consents in respect of a company's shares are subject to the SEC's proxy rules. These rules apply, for example, to the solicitation of proxies regarding the election of directors at each annual meeting of shareholders and at any special meeting called to consider an extraordinary transaction, such as a merger or a large share issuance. Because few shareholders attend annual meetings in person and because state law ordinarily requires at least a majority of shares to be represented in person or by proxy at a meeting in order to conduct any business, almost all public companies solicit proxies for all meetings. Even if a company is assured of attaining a quorum at all meetings, solicitation of proxies is required by the rules of the NYSE, NYSE MKT and NASDAQ.

a. Content of Proxy Statement

Each person solicited must receive a proxy statement containing the information required by the SEC's Schedule 14A. This includes:

- Biographical information about the current directors of the company, nominees for directors and, if not included in the Form 10-K as is commonly the case, the executive officers;
- The compensation of the company's directors and "named executive officers" (generally the CEO, CFO and the three other most highly compensated executive officers or, for EGCs and SRCs, the CEO and two other most highly compensated executive officers);
- Related person transactions;
- Corporate governance matters;
- Security ownership of significant stockholders and management and Section 16 reporting compliance;
- Audit and audit committee matters;
- Qualified stockholder proposals (see Section VIII.D.3); and
- Specified information with regard to non-routine matters to be put to a vote of stockholders, such as a charter amendment.

For a routine annual meeting the most extensive disclosure in the proxy statement concerns executive and director compensation, especially after the overhaul of these rules in 2006, which includes the following elements:

i. Compensation Discussion and Analysis.

Disclosure in the form of a Compensation Discussion and Analysis must address the objectives and implementation of executive compensation programs—focusing on the most important factors underlying each company's compensation policies and decisions. This must include a discussion of how the most recent say-on-pay vote affected the issuer's compensation decisions. Unlike the prior requirement for a compensation committee report that discussed compensation determinations that was considered "furnished," the Compensation Discussion and Analysis is considered "filed" under the Exchange Act and thus is subject to certification by a company's CEO and CFO provided with the Form 10-K (into which the disclosure is incorporated by reference). Smaller reporting companies (*SRCs*) and EGCs (pursuant to the JOBS Act) are exempt from this requirement.

ii. Compensation Committee Report.

The Compensation Committee Report consists of a statement of whether the compensation committee has reviewed and discussed the Compensation Discussion and Analysis with management and, based on this review and discussion, recommended that it be included in the company's annual report on Form 10-K and proxy statement.

iii. Tabular and Narrative Disclosure.

Following the Compensation Discussion and Analysis section and Compensation Committee Report, executive compensation disclosure is organized into three broad categories (although scaled down for EGCs and SRCs):

- Compensation over the last three years;
- Holdings of outstanding equity-related interests received as compensation that are the source of future gains; and
- Retirement plans, deferred compensation and other post-employment payments and benefits.

iv. Summary Compensation Table.

The Summary Compensation Table is the principal disclosure vehicle for named executive officer compensation. The Summary Compensation Table must be accompanied by narrative disclosure and a Grants of Plan-Based

Awards Table (similar information required for EGCs and SRCs as narrative disclosure) that is designed to explain the compensation information presented in the table. The Summary Compensation Table includes, in addition to columns for salary and non-performance based bonus:

- A dollar value for all equity-based awards, shown in separate columns for stock and stock options, measured at grant date fair value computed in accordance with FASB Codification Topic 718;
- A column reporting the amount of compensation under non-equity incentive plans, which in most cases will be annual performance based bonus;
- A column reporting the annual change in the actuarial present value of accumulated pension benefits and above-market or preferential earnings on nonqualified deferred compensation (these amounts can be deducted from total compensation for purposes of determining the named executive officers);
- A column showing the aggregate amount of all other compensation not reported in the other columns of the table, including perquisites and other personal benefits. Perquisites are included in the table unless the aggregate amount is less than $10,000. Reimbursements of taxes owed with respect to perquisites or other personal benefits must be included and separately identified and quantified even if the associated perquisite is less than $10,000; and
- A column reporting total compensation.

Disclosure regarding outstanding equity interests includes:

- The Outstanding Equity Awards at Fiscal-Year End Table, which show outstanding awards representing potential amounts that may be received in the future, including such information as the amount of securities underlying exercisable and unexercisable options, the exercise prices and the expiration dates for each outstanding option (rather than on an aggregate basis); and
- The Option Exercises and Stock Vested Table (not required for EGCs and SRCs), which shows amounts realized on equity compensation during the last fiscal year.

Retirement plan and post-employment disclosure includes:

- The Pension Benefits Table (not required for EGCs and SRCs), which requires disclosure of the actuarial present value of each named executive officer's accumulated benefit under each pension plan, computed using the same assumptions (except for the normal retirement age) and measurement period as used for financial reporting purposes under generally accepted accounting principles;

- The Nonqualified Deferred Compensation Table (not required for EGCs and SRCs), which requires disclosure with respect to nonqualified deferred compensation plans of executive contributions, company contributions, withdrawals, all earnings for the year (not just the above-market or preferential portion) and the year-end balance; and
- A narrative description of any arrangement that provides for payments or benefits at, following, or in connection with any termination of a named executive officer, a change in responsibilities, or a change in control of the company, including quantification of these potential payments and benefits assuming that the triggering event took place on the last business day of the company's last fiscal year and the price per share was the closing market price on that date (required for EGCs and SRCs on scaled-down basis).

Director Compensation for the last fiscal year is required in a *Director Compensation Table* (along with related narrative), which is in a format similar to the Summary Compensation Table described above.

The disclosure requirements for related person transactions includes:

- A dollar threshold for transactions required to be disclosed of $120,000; and
- Disclosure of a company's policies and procedures for the review, approval or ratification of related person transactions.

Disclosure requirements regarding director independence and related corporate governance matters conform to stock exchange listing standards, and include:

- Disclosure of whether each director and director nominee is independent;
- A description, by specific category or type, of any transactions, relationships or arrangements not disclosed as a related person transaction that were considered by the board of directors when determining if applicable independence standards were satisfied;
- Disclosure of any audit, nominating and compensation committee members who are not independent (all three of which are now required to be composed of only independent directors subject to certain exceptions); and

- Disclosure about the compensation committee's processes and procedures for the consideration of executive and director compensation.

In addition, all proxy statements are required to contain a report of the company's audit committee, stating whether the audit committee has:

- reviewed and discussed the audited financial statements with management;
- discussed with the company's outside auditors any matters the outside auditors are required to bring to their attention;
- received from the company's outside auditors a report regarding the auditors' "independence" from the company and discussed the auditors' independence with them; and
- recommended to the board of directors that the audited financial statements be included in the company's annual report on Form 10-K.

Proxy statements must also disclose separately the amount of fees billed for both audit and non-audit services rendered by the company's auditors and disclosure of the audit committee's pre-approval policies.

Companies are also required to disclose in proxy statements whether or not—and, if not, why not—the board of directors provides a process for security holders to send communications to the board of directors. The proxy statement also requires specific information about the director nominating process. Specifically, companies are required:

- to disclose whether or not—and, if not, why not—they have a standing nominating committee, and if so, whether they qualify as independent;
- to disclose whether or not such committee has a written charter, and if so to disclose whether or not it is available on the company's website (and, if not, it must be filed with the proxy statement once every three years);
- to disclose whether the nominating committee will consider director candidates recommended by security holders, and, if not, why not;
- to disclose the nominating committee's own process for identifying and evaluating director candidates;
- to disclose whether the nominating committee considers diversity when evaluating a nominee; and
- to disclose whether nominees for director were recommended by (i) security holders, (ii) non-management directors, (iii) the CEO, (iv) other executive officers, or (v) a search firm or some other source.

In addition, the SEC proxy rules require the following disclosures:

- a brief description of the company's board leadership structure, and, if the board chairman is also the CEO, then a description of the role of the "lead director";
- the extent of the board's role in risk oversight of the company and how the board administers its risk oversight role; and
- disclosure of fees paid to compensation consultants for non-executive compensation advisory services in certain circumstances and the nature of any conflict of interest raised by the work of the compensation consultant.

b. Say-on-Pay

The SEC has implemented rules under the Dodd-Frank Act requiring public companies to provide their shareholders with non-binding, advisory votes on the company's compensation arrangements for the named executive officers disclosed in the proxy statement at least once every three years at the annual or other meeting for which proxies are solicited for the election of directors. Shareholders must also be given a vote at least once every six years on how often the say-on-pay vote will occur (i.e. every one, two or three years). Since these votes are advisory in nature, they do not bind the issuer's board of directors to any particular course of action. However, companies are required to disclose whether, and if so, how, they considered the results of say-on-pay votes in future proxy statements. Say-on-pay was effective for shareholder meetings held on or after January 21, 2011. Additionally, as discussed in Section I.D.3(d), EGCs are exempt from these requirements pursuant to the JOBS Act. Foreign private issuers are also exempt from these rules because they are generally not subject to the SEC's proxy rules.

c. Pay Ratio Disclosure

On September 18, 2013, the SEC proposed rules to implement Section 953(b) of the Dodd-Frank Act, which directs the SEC to require disclosure of (i) the median of the annual total compensation of all employees (other than the CEO), (ii) the CEO's annual total compensation, and (iii) the ratio of the median of the annual total compensation of all employees to the annual total compensation of the CEO. Under the proposed rules, pay ratio disclosure would be required in Form 10-Ks, Securities Act and Exchange Act registration statements, and proxy and information statements, to the extent that executive compensation disclosure is required to be included in such statements. The pay ratio disclosure requirements would not apply to emerging growth companies, smaller reporting companies or foreign private issuers and would not be required in a company's IPO registration statement.

Under the proposed rules, a public company could identify the median of the annual total compensation of all of its employees by using its entire employee population or "statistical sampling or other reasonable methods." According to the SEC, the determination of a sample size would ultimately depend upon how widely employee compensation is distributed (in other words, how widely employee compensation is spread out around the company's mean employee compensation). Once the sample size is determined, the company would then need to identify the median annual total compensation in the sample. The proposed rules do not set forth any required calculation methodologies for identifying the median, but instead provide that public companies may use "a methodology that uses reasonable estimates to identify the median." Such methodology could include any compensation measure that is consistently applied to all employees included in the median calculation, such as the company's tax or payroll records. In addition, public companies would be required under the proposed rules to disclose and consistently apply the methodology and any estimates that they use to identify the median. The required median employee compensation disclosure must be calculated in accordance with the rules that apply to the calculation of the total compensation of named executive officers, but the proposed rules permit the use of "reasonable estimates to calculate the annual total compensation or any elements of total compensation" for employees other than the CEO. In the event that estimates are used, the company would be required to disclose the estimates and clearly identify any estimated amounts.

The ratio of the median of the annual total compensation of all employees to the annual total compensation of the CEO may be disclosed in either of two ways under the proposed rule: (1) as a ratio in which the median of the annual total compensation of all employees is equal to one, or (2) narratively, in terms of the multiple that the CEO total compensation amount bears to the median. (For example, if the median employee's total compensation was \$5 and the CEO's total compensation was \$25, the disclosure under the first alternative would be "1 to 5," and could be expressed narratively under the second alternative as "the CEO's annual total compensation is 5 times that of the median of the annual total compensation of all employees.") Under the proposed rules, the pay ratio disclosure would apply to the last completed fiscal year only, thus making it clear that the disclosure only needs to be updated once annually.

d. Pay for Performance and Hedging

The Dodd-Frank Act directs the SEC to adopt rules requiring public companies to publish information in their proxy statements showing the correlation between executive compensation and financial performance, taking stock price, dividends and any other distributions into account. Section 955 of the Dodd-Frank Act directs the SEC to issue rules requiring public companies to disclose in their proxy materials whether employees and directors are allowed to purchase financial instruments designed to hedge against the value of the company's stock, whether given to them as part of their compensation or otherwise owned by them. Actual hedging transactions need not be disclosed, but rather only a public company's policy with regard to hedging transactions of its directors and employees. The SEC is expected to adopt the rules pertaining to Section 955 in the near future. As discussed in Section I.D.3.(c), the JOBS Act exempts EGCs from this disclosure requirement.

e. Disclosure of Voting on Executive Compensation by Institutional Investment Managers

On October 18, 2010 the SEC proposed new rules to implement Section 951 of the Dodd-Frank Act. Pursuant to the Dodd-Frank Act, institutional investment managers who are subject to Section 13(f) of the Exchange Act because they manage at least $100 million of public securities will be required to file an annual report detailing how they voted on executive compensation shareholder votes required by new Sections 14A(a) and 14A(b) of the Exchange Act. Section 14A(a) requires shareholder voting (i) to approve executive compensation and (ii) to approve the frequency of executive compensation votes, while 14A(b) requires voting on executive compensation related to the acquisition, merger, consolidation or proposed sale or any other disposition of all or substantially all of a company's assets. Institutional investment managers will be required to identify on Form N-PX (i) the securities voted, (ii) the executive compensation matters voted on, (iii) the number of shares that the manager had voting power over, (iv) the number of shares actually voted and (v) how the manager voted. The SEC is expected to propose and adopt rules pertaining to Section 951 in the near future.

f. Filing and Dissemination

The proxy statement and form of proxy generally are filed with the SEC on the date they are first sent or given to shareholders. Where matters other than routine annual meeting matters (which for this purpose include the election of directors, selection of auditors, say-on-pay votes and approval of stock incentive or similar plans and some shareholder proposals) are to be acted upon, a preliminary proxy statement and form of proxy must be filed with the SEC at least 10 days prior to the date on which they are first sent or given to shareholders. In addition, personal solicitation materials (e.g., written material furnished to or by persons making personal solicitations) must be filed with the SEC before or at the same time as they are disseminated. Soliciting material in the form of speeches and press releases must be filed not later than the date on which they are first used or published.

g. Electronic Delivery of Proxy Materials (*E-Proxy*)

Since January 1, 2009, all companies are now required to furnish proxy materials to shareholders through a "notice and access" model using the Internet. An issuer, and other soliciting persons, must furnish proxy materials to shareholders by posting its proxy materials on a specified, publicly-accessible Internet website (other than the SEC's EDGAR website) and providing record shareholders with a notice of the availability of such materials and directions to access them. An issuer may comply with these guidelines either by (1) the "notice only option," whereby the issuer posts its proxy materials on an Internet website and sends a Notice of Internet Availability of Proxy Materials (*Notice*) to shareholders at least 40 calendar days before the shareholder meeting date; or (2) the "full set delivery option," whereby the issuer provides a full set of proxy materials on paper to shareholders, including the Notice, and posts its proxy materials on an Internet website. Issuers are not required to choose a single option as the exclusive means for providing proxy materials to shareholders. An issuer may choose to use the "notice only option" to provide proxy materials to some shareholders and the "full set delivery option" to deliver proxy materials to other shareholders.

The use of electronic delivery for furnishing proxy materials seeks to substantially decrease the expense incurred by issuers to comply with the proxy rules and provide persons other than the issuer with a more cost-effective means to undertake their own proxy solicitations.

The Notice must be written in plain English and contain a prominent legend that advises shareholders of the date, time, and location of the meeting; the availability of the proxy materials at a specified website address; a toll-free phone number, e-mail address and a website that shareholders may use to request copies of the proxy materials; a statement that the Notice is not a form to be used for voting and an explanation of the notice and access process and a clear and impartial description of the matters to be considered at the meeting. When initially adopted, the e-proxy rules provided limited flexibility in the content and format of the Notice. However, in response to a study and comments indicating that the voting rate following notice only delivery was much lower than the rate following full set delivery, the SEC adopted amendments providing for more flexibility in the form and content of the Notice.

When using the "notice only option," the issuer must send copies of the materials to a shareholder, at no charge, within three business days after receiving such a request. An issuer also must allow shareholders to make a permanent election to receive all proxy materials in paper or by e-mail with respect to future proxy solicitations conducted by the issuer or soliciting person.

The issuer must also provide shareholders with a means to vote when the Notice is first sent to shareholders. Voting can be accomplished through a variety of means, such as an Internet voting platform, a toll-free telephone number or a printable and downloadable proxy card on the website. An issuer may not send a paper or e-mail proxy card to a shareholder until 10 or more days after sending the Notice to the shareholder, unless the proxy card is accompanied or preceded by a copy of the proxy statement and any annual report, if required, to shareholders sent in the same manner.

The Internet website that is maintained for posting proxy materials must protect the anonymity of the shareholders who access the materials by, for example, refraining from using cookies and other tracking software; however, automatic tracking of IP addresses is permitted.

Under the notice and access model, brokers, banks and similar intermediaries must prepare and send their own notices designed for beneficial shareholders. The issuer or other soliciting person must provide the intermediaries with sufficient information to prepare and send its Notice to beneficial shareholders within the required timeframe. A beneficial shareholder desiring a paper or e-mail copy of the proxy materials must request one from the intermediary.

A soliciting person other than the issuer must comply with the notice and access model in substantially the same manner as an issuer, except that the non-issuer soliciting person may send proxy materials to only select shareholders. However, its Notice must be sent to shareholders by no later than the filing date of the soliciting person's definitive proxy statement, so long as the soliciting person files a preliminary proxy statement within 10 days of the issuer's filing of its definitive proxy statement. This proposed rule is designed to permit soliciting persons other than the issuer to use the notice only method in cases where the SEC's review of preliminary proxy materials exceeds 10 calendar days. If the soliciting person sends a Notice to a shareholder, it also must send that shareholder a paper or e-mail copy upon request.

The notice and access model does not apply to proxy solicitation for a business combination transaction, or if state law in which the issuer is incorporated prohibits providing proxy materials in such a manner.

The E-Proxy rules do not affect the availability of other means of providing proxy materials to shareholders, such as obtaining affirmative consents for electronic delivery pursuant to the prior SEC interpretative release. A company may presume consent by employee-shareholders to delivery through the company's email system when the email prominently states that paper versions are available upon request and such employee-shareholders use the email system in the ordinary course of performing their duties and are expected to routinely use the system, or they have alternative means of receiving messages such as through other employees.

In March 2008, the SEC issued a release (the *March 2008 Release*) containing amendments to certain rules and forms relating to mergers and acquisitions. Among other things and perhaps most notably, the March 2008 Release clarifies in Rules 14a-3(a)(3)(i) and 14a-16(m) that the use of the notice and access model with respect to Internet availability of proxy materials is not permitted for all business combinations, including both cash and stock transactions. Although the related adopting release indicated that the notice and access model was not available in the case of business combinations, the final rules did not include cash transactions as a business combination.

h. "Householding" Proxy Materials

SEC rules governing delivery of proxy statements provide a company with additional means of lowering printing and mailing costs by permitting a company to deliver a single proxy statement and annual report to two or more shareholders with the same address. In order to "household," a company must first obtain the shareholders' affirmative written consent or implied consent. Written consent requires the shareholder to be informed of the duration of the consent, the specific types of documents to which the consent will apply, the procedure for revoking consent, and the company's obligation to send individual copies within 30 days of a revocation of consent. Written consent will be required when shareholders living at the same address do not have the same last name and the company is unable to reasonably determine whether they are members of the same family. A company may also household proxy materials and annual reports by obtaining a shareholder's implied consent. Consent may be implied where shareholders at the same address have the same last name or the company reasonably believes they are members of the same family and at least 60 days prior to beginning householding the company sends a separate notice to each shareholder notifying them that it intends to household proxy statements and annual reports. The notice (and the envelope if the notice is sent with other materials) must include the following statement in prominent, boldface type: "Important Notice Regarding Delivery of Security Holder Documents."

Assuming a company has obtained valid consent, it may send a single copy of its proxy statement and annual report addressed to the shareholders living at the same address as a group (e.g., the "XYZ Corp. Shareholders" or the "John Smith Household"), to each of the shareholders (e.g., "John and Jane Smith"), or by an alternative addressing provision to which each shareholder in the household specifically consents in writing (e.g., using an existing account title, such as one individual in the group). Even if a company has obtained valid consent, however, each shareholder must receive separate proxy cards, which may be included in the same envelope as the single set of proxy materials. It is important to note that state law governs the notice requirements for shareholder meetings and a company must consider whether a separate notice of meeting should be sent to each shareholder in order to satisfy the particular state law under which the company is organized. The new rules also require specific disclosures in a company's proxy statement when it households its proxy statement or annual report.

i. Broker Discretionary Voting

Generally, NYSE Rule 452 provides that brokers may give a proxy to vote stock if they have transmitted proxy soliciting material to the beneficial owner and they have not received voting instructions from the beneficial owner. Brokers may not give a proxy to vote stock when the matter to be voted on relates to certain fundamental matters (i.e., mergers, appraisal rights, etc.). The Dodd-Frank Act further restricted brokers' discretionary voting by prohibiting their ability to give a proxy to vote stock on matters relating to the election of directors, executive compensation and certain other fundamental matters.

On January 25, 2012, the NYSE announced a modification to the application of NYSE Rule 452 that restricts when brokers may exercise discretionary voting authority on certain corporate governance proxy proposals.

The change in the application of NYSE Rule 452 does not impact discretionary voting authority on ratification of auditors. As long as brokers have discretion to vote on at least one proposal to be considered at a shareholder meeting, uninstructed shares can still be deemed present at the meeting for quorum purposes. Therefore, so long as they present an auditor ratification proposal, public companies may still use broker discretionary votes to ensure a quorum at shareholder meetings.

2. Annual Report to Shareholders

If the company solicits proxies for the election of directors, the company is required to furnish to shareholders, in addition to the required proxy statement, an annual report to shareholders containing some of the information required to be provided in Form 10-K, including audited financial statements and other financial information and an MD&A covering the most recent three fiscal years. Further, the annual report must include a graph (previously required in the proxy statement) depicting the cumulative total return to company shareholders over the period since the IPO (or five years, whichever is less) and the return for stocks included in a broad equity market index and a published industry index or peer group of companies over the same period. Copies of the annual report to shareholders must be mailed to the SEC not later than the date on which the report is first sent, given or made available to shareholders or the date on which copies of solicitation materials for the election are filed with the SEC, whichever is earlier.

3. Shareholder Proposals

The SEC's Rule 14a-8 requires a company to include specified shareholder proposals in its proxy statement and proxy card relating to a particular shareholder meeting if the proposals are submitted by eligible shareholders (i.e., those who have beneficially owned at least $2,000 or 1% of the company's stock for at least one year and continue to do so at the meeting date), are submitted by the applicable deadline (generally 120 days before a scheduled annual meeting and a "reasonable time" before the solicitation for a special meeting) and do not fall into the proscribed categories (e.g., proposals that under applicable state law are not appropriate for action by shareholders or that deal with matters relating to the conduct of ordinary business operations). However, even if a shareholder proposal falls into one or more of the proscribed categories, companies must first seek SEC approval (in the form of a no-action letter) before unilaterally excluding the shareholder proposal from its proxy statement.

In addition, SEC Rule 14a-4 adds a 45-day rule. The 45-day rule is intended to require stockholders who intend to present a proposal at the annual meeting to notify the company at least 45 days in advance of the presumed mailing date (i.e., the anniversary date of the prior year's mailing of proxy statement). If this notice is not given within the 45-day period, management proxies are free to use discretionary authority to vote against the proposal without any condition. If the appropriate notice is given within the 45-day period, discretionary authority vested in management proxies can be voted against the proposal only if certain conditions are followed as set forth in Rule 14a-4. One of the requirements of 14a-4 is that the proxy statement contains a general description of the proposal and the fact that the management's proxies will use discretionary authority to vote against the proposal. The proposal itself will not be put in the proxy statement as would be required if the stockholder complied with the 120-day notice provision as provided in Rule 14a-8. This 45-day rule has nothing to do with limiting the stockholder's ability to make the proposal at the meeting. The SEC's release adopting Rule 14a-4 makes clear that the 45-day notice can be overridden by a reasonable alternative period in the company's by-laws.

4. Proxy Access

On August 25, 2010, the SEC adopted new Rule 14a-11 requiring shareholder access to a company's proxy materials. The rule would have required a company, at its own expense, to incorporate shareholder director nominees into its proxy materials, whether submitted by one shareholder or a group of shareholders, so long as certain conditions were met. Conditions to proxy access included a minimum percentage ownership requirement and that the nominating shareholder or group was not attempting to change control of the company. In addition, the SEC relaxed certain of its proxy solicitation rules to facilitate shareholders communicating with each other for the purposes of forming a group to seek proxy access or supporting nominees who are included in the company's proxy materials.

In relation to the facilitation of shareholder director nominations, the SEC also amended other rules that excluded or impeded shareholder participation in the election of directors. Specifically, changes to Rule 14a-8(i)(8) limit the bases on which a company may exclude a shareholder proposal related to director nomination or election procedures. Under the amended rule, a company may exclude such a shareholder proposal only if it (1) would disqualify a standing nominee; (2) would remove a director from office before the director's term expired; (3) questions the competence, business judgment or character of a nominee or director; (4) nominates an individual for election to the board of directors; or (5) in any other way could affect the outcome of the election of directors.

Although the proxy access rules described above had been finalized by the SEC, on October 4, 2010 the SEC stayed their implementation pending the outcome of litigation in the U.S. Court of Appeals for the D.C. Circuit which challenged, among other things, the constitutionality of new Rule 14a-11 (the amendments to Rule 14a-8(i)(8) were not challenged). The Court of Appeals vacated Rule 14a-11 on July 22, 2011 and the SEC indicated that it would not seek a rehearing. On September 13, 2011, the SEC lifted the stay on amended Rule 14a-8(i)(8), and the amended Rule became effective at that time. The Court of Appeals' rejection of Rule 14a-11 combined with the implementation of amended Rule 14a-8(i)(8) has lead to proposals to amend public company bylaws governing proxy access; however, the speculation about the potential for the use of private ordering to adopt proxy access bylaws has not as of yet proven accurate.

5. Other Timing Issues

As described above, the proxy rules do not provide a deadline for the holding of the annual or any special meeting of shareholders. The timing requirements for meetings arise under the law of the issuer's state of incorporation and the issuer's charter and by-laws. Delaware law, for example, requires that annual meetings be held at least once every 13 months. However, the proxy rules require a company to set forth in the proxy statement for each annual meeting the deadline by which shareholder proposals to be considered at the next annual meeting must be submitted (generally 120 days before the next such meeting). If the date for the next annual meeting is subsequently advanced by more than 30 days or deferred by more than 90 days, the company is required to notify shareholders of the change and any revised deadline for submitting proposals. This is usually accomplished by inclusion of the information in a Form 10-Q. With respect to shares held of record in "street name" or otherwise by a nominee, including a nominee of The Depository Trust Company, companies are required to make inquiry of the record holders at least 20 business days (or as soon as otherwise practicable in the case of a special meeting) prior to the record date for a shareholder meeting, in order to determine the number of beneficial owners on whose behalf shares are held. Companies are then required to furnish a sufficient number of copies of the annual report and proxy statement to each record holder to enable the record holder to forward the documents to the beneficial owners prior to the meeting.

6. Duty of Directors and Officers

Directors and officers of public companies have a duty to ensure that shareholders receive adequate disclosure of compensation and other information required under the federal securities laws. For example, in a proceeding against W.R. Grace & Co., the SEC stated that "officers and directors who review, approve or sign their company's proxy statements or periodic reports must take steps to ensure the accuracy and completeness of the statements contained therein, especially as they concern those matters within their particular knowledge or expertise." In that case, W.R. Grace & Co. was found to have failed to disclose that J. Peter Grace, Jr., the former CEO of the company, had received as a retirement benefit substantial perquisites that cost the company $3.6 million in 1993 and were described in that company's proxy statement simply as "certain other benefits." Although the value of these benefits was very small in relation to the issuer's financial position and earnings, the SEC concluded that the benefits should have been described in the proxy statement in detail in response to the applicable compensation disclosure requirements. The SEC emphasized that the directors and officers who signed the defective filings and were familiar with Mr. Grace's retirement agreement should not have relied on legal counsel to draft the disclosure without discussing the matter with counsel. In addition to federal securities laws, most state laws impose a duty of full disclosure when shareholder votes are being sought.

7. Virtual Stockholder Meetings

The Delaware General Corporation Law provides that a company can hold its shareholder meetings in part or entirely over the Internet. While many companies already broadcast their annual meetings over the Internet, enabling their shareholders to listen, the effect of Delaware law is to expressly eliminate the requirement of a physical meeting location. In April 2000, Inforte Inc. became the first company to take advantage of these amendments and reported considerable cost and time savings as a result. Before a company holds a virtual meeting, however, it should consider several obstacles and detriments that may outweigh the potential cost savings. For example, a company may not want to encourage increased participation in otherwise routine annual meetings. Conversely, because not every shareholder will have access to the Internet, a company must be prepared to respond to those shareholders who may complain of their lack of access. Also, certain investment groups such as the Council of Institutional Investors and the AFL-CIO object to online-only meetings, citing the lack of ability to confront management personally. In addition, procedures must be implemented to verify identities of the participants and to record voting results.

8. Electronic Shareholder Forums

In an age where the internet serves as a leading source of information and vehicle for communication, the SEC adopted certain amendments to the proxy rules in 2008 in an effort to promote electronic shareholder forums as a convenient and efficient means of communication among shareholders and between shareholders and their companies. The rules clarify that a statement made in electronic shareholder forum is exempt from most of the Exchange Act's proxy rules if all of the conditions to the exemption are satisfied. Specifically, a communication made in an electronic forum is exempt from the proxy rules if it is made by or on behalf of any person who (i) does not seek, directly or indirectly, the power to act as a proxy for a shareholder, and (ii) does not furnish or otherwise request a form of revocation, abstention, consent or authorization. Furthermore, such communication must be made more than 60 days before the announced date of the company's annual or special meeting or more than two days after the announcement of the meeting if the announcement is made less than 60 days prior to the meeting date. However, any solicitation that remains available on the forum within the 60-day period must comply with the proxy rules, so arrangements should be made to timely remove such communication. Any person permissibly relying on this exemption remains eligible to later request proxy authority, after the exemption period has passed, so long as the solicitation complies with the proxy rules.

In addition, to further promote the use of electronic forums, the SEC provided liability protection for any shareholder, company or third party acting on behalf of a shareholder or company that establishes, maintains or operates an electronic forum. Under these new rules, these parties are not liable under the federal securities laws for the information posted in the forum by a participant. However, the person posting the communication remains liable.

These rules provide additional means for communications and do not in any way restrict a shareholder's ability to submit proposals for inclusion in a company's proxy statement (as described above).

E. LIABILITY FOR MISSTATEMENTS AND OMISSIONS UNDER THE EXCHANGE ACT

Companies with stock listed on the NYSE, NYSE MKT or NASDAQ are subject to the ongoing anti-fraud requirements of the Exchange Act and its rules and regulations. The following section describes those requirements.

1. Section 18 of the Exchange Act

Section 18 of the Exchange Act imposes liability for false and misleading statements in documents filed with the SEC. Under Section 18, any person who makes or causes to be made any statement in a document filed with the SEC that:

> "was at the time and in light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading."

Liability is not limited to the company filing the document with the SEC and may extend to officers and directors, especially those who sign the filed document. Actions for such false or misleading statements may be brought by private parties. In addition, an action may be brought by the SEC under Section 21 of the Exchange Act for violations of any provision of the Exchange Act.

Section 18 liability covers material misstatements in a company's annual report on Form 10-K. The information contained in Part I of a quarterly report on Form 10-Q, which consists of the condensed, unaudited financial statements, and market risk disclosure (i.e., the principal contents of a Form 10-Q), is not deemed to be "filed" with the SEC for purposes of Section 18 and, therefore, is not subject to the liability created by Section 18. However, all of the information contained in a company's reports on Form 10-Q (as well as in its reports on Form 10-K) is subject to liability under Exchange Act Rule 10b-5 as discussed below.

2. Rule 10b-5 Under the Exchange Act

Rule 10b-5 under the Exchange Act broadly prohibits fraudulent and deceptive practices and untrue statements or omissions of material facts in connection with the purchase or sale of any security. A cause of action under Rule 10b-5 requires proof of all of the following elements:

- that the defendant acted with "scienter," which means an intent to deceive, or at least reckless misconduct;

- that the plaintiff acted in reliance on the material misstatement or omission (this element may sometimes be met through the application of a "fraud on the market" theory, under which a showing that a material misstatement or omission adversely affected the market price creates a presumption of reliance);
- that the plaintiff suffered damage as a consequence of relying on the misstatement or omission; and
- that the misstatement or omission concerned a material fact.

Unlike Section 18 of the Exchange Act, Rule 10b-5 applies not only to documents filed with the SEC but also to any information released to the public by the issuer and its subsidiaries, including press releases and annual and quarterly reports to shareholders. As in the case of Section 18, private parties may sue for damages arising from material misstatements in or omissions from this information, including a failure to update the information when necessary. As with Section 18 liability, potential liability is not limited to the issuer. In addition, the SEC may institute a formal investigation and seek a cease and desist order.

3. Liability of Control Persons Under the Exchange Act

Similar to Section 15 of the Securities Act (discussed in Section III.C.2(e)), Section 20 of the Exchange Act provides that a person controlling any person liable under the Exchange Act may be liable jointly and severally and to the same extent as its controlled person for violations of the Exchange Act. Notwithstanding some recent decisions to the contrary, many courts will dismiss a lawsuit seeking damages pursuant to Section 20, if the allegations of the underlying violation by the controlled person do not meet the strict pleading standards enacted by Congress.

The liability of the control person is not necessarily coextensive with that of the controlled person. Under Section 20, a control person may avoid liability if he or she can establish that he or she acted in good faith and did not directly or indirectly induce the violation. The potential liability of control persons under Section 20 of the Exchange Act also applies with respect to liability arising from violations of Section 18 and Rule 10b-5.

F. MISUSE OF INSIDE INFORMATION

Under many circumstances it is a violation of law, with potential criminal and other sanctions, for any person to purchase or sell securities, or to tip others who may purchase or sell securities, on the basis of material, non-public information about the issuer known to that person. Liability depends in part on the nature of the relationship between the issuer and the person in question. Generally, directors, officers and employees of an issuer fall within this prohibition.

Companies should adopt policies and procedures designed to ensure that their directors, officers and employees do not misuse "inside" information. For example, the company should require that confidential information about the company (including its subsidiaries and other affiliated entities) made available to its directors, officers and employees be kept confidential by them. In addition, those who have access to inside information should be made aware of their obligation to refrain from trading on inside information and from disclosing it improperly to others. Companies should also adopt policies and procedures designed to ensure that the disclosure of inside information to anyone outside the company is made in a controlled, non-selective manner by officials who are knowledgeable about the matters in question and familiar with the applicable disclosure requirements.

Company employees are particularly susceptible to claims of insider trading when material information is released shortly after the employee's trade is consummated. In this situation, insiders are put in the uncomfortable position of having to demonstrate that their trade was not made with awareness of the information at the time of the trade. For this reason, most public companies impose "blackout" periods commencing several days or weeks before the end of each fiscal quarter and ending when the company's earnings information is released and absorbed over one to three trading days into the public markets. Alternatively, companies sometimes establish limited "window periods" to permit trading only during portions of the time when a blackout period as described in the preceding sentence would not be in effect. In any event, the company must reserve the right to shut the window or extend or impose an additional blackout period whenever necessary due to the existence of material non-public information that might form the basis for insider trading allegations, or even just the appearance of insider trading.

Effective in October 2000, the SEC adopted Rule 10b5-1 to clarify issues with respect to insider trading. Subject to the affirmative defenses discussed below, the rule creates a presumption that a purchase or sale of a security of an issuer is made on the basis of inside information if the person making the purchase or sale was aware of inside information when the person made the purchase or sale. As an affirmative defense to the presumption, the person making the purchase or sale may demonstrate that, prior to becoming aware of the inside information, such person:

- entered into a binding contract to purchase or sell the security;
- had instructed another to execute a trade; or
- had adopted a written plan for trading securities.

In other words, the rule can enable insiders to purchase and sell company shares as long as they committed in advance to do so and had no inside information when they made the commitment. Many corporate insiders, especially chief executive officers, enter into Rule 10b5-1 trading plans to facilitate trading over one- or two-year periods, including outside of established trading "windows."

G. INSIDER REPORTING REQUIREMENTS AND SHORT-SWING PROFITS

Under Section 16 of the Exchange Act, public company "insiders" (i.e., directors, executive officers and significant shareholders) are required to report their ownership of shares in the public company, to disgorge "short-swing profits" from trading in these shares and to refrain from making short sales of the shares. These requirements are set forth in Sections 16(a), (b) and (c) and in the rules adopted by the SEC under Section 16, which were amended in 2003 to implement the requirements of Sarbanes-Oxley. Section 16 requirements become applicable when a Company's Exchange Act registration statement becomes effective. The Section 16 rules are strict in their application, and Section 16 insiders should be cautious about any transaction in or involving company securities for this reason. While compliance with the Section 16 rules is principally the responsibility of the Section 16 insider, many companies coordinate Section 16 filings for directors and executive officers internally to ensure filings are made promptly and accurately. Persons violating Section 16 may be subject to criminal penalties and civil penalties for each violation of Section 16 in addition to liability for the deemed profits resulting from the violation.

The SEC amended the Section 16 rules following the adoption of Sarbanes-Oxley to require: (i) electronic filing of Forms 3, 4 and 5; (ii) posting of Forms 3, 4 and 5 on the subject company's website; and (iii) acceleration of the filing due date for Form 4. Section 16 insiders are required to file Forms 3, 4 and 5 electronically with the SEC via EDGAR. This means that each Section 16 insider must obtain from the SEC a Central Index Key (*CIK*), an EDGAR password and a CIK Confirmation Code (*CCC*) prior to the time of filing the applicable form with the SEC. (As discussed in Section IV.C above, the SEC has rules relating to obtaining EDGAR access codes online; see also Exhibit N). To respond to frequently asked questions regarding Section 16 electronic reporting, the SEC has issued a release, which can be found at http://www.sec.gov/divisions/corpfin/sec16faq.htm.

In addition, companies are required to post all Forms 3, 4 and 5 filed by Section 16 insiders by the end of the business day following the day that a form is filed with the SEC by or on behalf of a Section 16 insider. Companies can satisfy the website posting requirement by posting a copy of the Form 3, 4 or 5 as filed with the SEC on the company's website, or providing a link on the company's website to the filings as posted on the SEC's website or to a third-party provider's database. If access is provided via a link to the SEC's website or to a third-party provider's database, certain requirements must be satisfied to ensure that access to the forms is readily available.

Perhaps the most significant change to Section 16 that resulted from the adoption of Sarbanes-Oxley is the acceleration of the due date for filing a Form 4 to the second business day following the day on which the reportable transaction was executed. This accelerated due date for filing Form 4 resulted in the adoption of measures by companies, including mandatory pre-clearance procedures prior to the execution of transactions by directors and officers, creating broker interface procedures, developing systems for periodic preventive email alerts to directors and officers, assisting directors and officers with compliance procedures and taking steps to have directors and officers execute powers of attorney authorizing the company to file Forms 3, 4 and 5 on their behalf.

1. Reporting

Section 16(a) requires that each director, "officer" and beneficial owner of more than 10% of the common stock of a company file with the SEC reports of his, her or its beneficial ownership of shares. The SEC has issued detailed rules for determining which shares are deemed to be beneficially owned for purposes of 10% ownership, which may include more shares than are economically owned by the Section 16 insider. Under these rules, beneficial ownership includes shares over which the insider has or shares voting or investment power, so "beneficial ownership" may extend to securities held indirectly through partnerships, trusts and estates as well as by close relatives of the Section 16 insider. Securities underlying options, convertible debt and other derivative instruments are considered to be beneficially owned if the holder has the right to acquire the underlying equity securities within 60 days. In addition, any person who with others is acting as a "group" with regard to the shares may be deemed to beneficially own the shares beneficially owned by the other members of the group. Once 10% ownership is assessed, however, all other determinations are made according to pecuniary (economic) interest. A "pecuniary interest" exists where there is the direct or indirect opportunity to profit or share in any profit derived from a transaction in the common stock of the company. In comparison, an "indirect pecuniary interest" includes securities owned by another that might be attributable to a Section 16 insider. This distinction may lead to some unusual results, such as a person's being determined to be a 10% beneficial owner with a pecuniary interest in none of the shares that he or she beneficially owns. This person would nonetheless be required to file the reports described below and would be subject to all other provisions of Section 16.

"Officers" are defined under the Section 16 rules as the president, principal financial officer, principal accounting officer, any vice president in charge of a principal business unit, division or function, any other officer who performs a significant policy-making function and any other person who performs similar policy-making functions. This definition can extend to officers of subsidiaries who perform policy-making functions for a company. Individuals identified in the IPO registration statement or any annual report on Form 10-K as being executive officers of a company are presumed to be Section 16 insiders.

a. Form 3

The Section 16 rules require each Section 16 insider to file with the SEC an initial report on Form 3 via EDGAR setting forth his, her or its initial beneficial ownership position in the company's shares and each derivative security relating to the company. An insider reports any changes in that initial beneficial ownership position on Form 4. Each person who is a Section 16 insider at the time that the Company's first Exchange Act Registration Statement with respect to equity securities is declared effective must file a Form 3 on or before that date, regardless of whether such person owns the company's equity securities. Any person who becomes a Section 16 insider thereafter must file a Form 3 within 10 calendar days after becoming a Section 16 insider. Filers have until 10:00 p.m. Eastern time on the due date to electronically file the Form 3. Because of the accelerated filing deadline for Form 4 (discussed below), there could arise a situation in which a Section 16 insider is required to file a Form 4 before the Form 3 deadline. The SEC has urged, but not required, insiders in such a situation to file the Form 3 concurrently with the Form 4 by the Form 4 filing deadline.

b. Form 4

In most cases, each Section 16 insider is required to file a Form 4 by the end of the second business day after the day on which a transaction resulting in a change in beneficial ownership has been executed. As with the filing of a Form 3, a Form 4 may be filed via EDGAR as late as 10:00 p.m. Eastern time on the due date and will be deemed timely filed. In addition, Section 16 insiders must now report on Form 4 most transactions which were previously reported on Form 5. Transactions that must be reported on Form 4 pursuant to the rules adopted pursuant to Sarbanes-Oxley include (among others):

- open market purchases and sales;
- stock awards, performance share awards and stock appreciation rights awards;
- all exercises and conversions of derivative securities;
- option re-pricings, cancellations, re-grants and other material amendments;
- discretionary transactions pursuant to employee benefit plans;
- dispositions to the issuer; and
- all grants, awards and other acquisitions from the issuer (including derivative securities transactions).

The SEC has adopted special limited deferred reporting rules (up to five business days depending upon the circumstances) for the following transactions:

- transactions pursuant to a contract, instruction or written plan for the purchase or sale of issuer equity securities that satisfies the affirmative defense conditions of Rule 10b5-1(c) and where the Section 16 reporting person does not select the date(s) of execution (such as the first date of each month);
- discretionary transactions where the Section 16 reporting person does not select the date(s) of execution;
- deferred compensation plan investments in a company stock fund but only if they fall within the scope of a Rule 10b5-1 plan; and
- transactions that occur over more than one day but only if they fall within the scope of a Rule 10b5-1 plan.

These transactions are subject to reporting on Form 4 within two business days of the "deemed execution" date of the transaction. The deemed execution date of the transaction will be the earlier of (a) the date on which the executing broker, dealer or plan administrator notifies the Section 16 reporting person of execution of the transaction, and (b) the third business day following the trade date. The SEC noted in its release adopting these rules that a trade confirmation sent through the mail could take several days to arrive and the SEC would, therefore, usually expect brokers, dealers and plan administrators to provide the information needed for Section 16(a) reporting purposes to the Section 16 reporting person either electronically or by telephone.

c. Form 5

Form 5s, due within 45 days of the issuer's fiscal year-end, are used for reporting a limited number of exempt transactions, including gifts, expiration of options without consideration, certain small acquisitions, stock splits and stock dividends, pro rata distributions, transfers under domestic relations orders, changes in form of beneficial ownership and regular dividend reinvestment plan contributions. Also, any transactions that were not reported as required on a Form 4 during the previous year are required to be reported on a Form 5. Each Section 16 insider who was subject to Section 16 at any time during the company's fiscal year should file a Form 5 via EDGAR within 45 days after the end of the company's fiscal year, unless during the fiscal year there were no transactions required to be reported or all transactions otherwise required to be reported on Form 5 were reported previously on Form 4. As with the filing of Forms 3 and 4, Form 5 may be filed via EDGAR as late as 10:00 p.m. Eastern time on the due date and will be deemed timely filed. As stated above, a number of transactions that were formerly reported on Form 5 are now required to be reported on Form 4.

d. Delinquent Filings

A public company is required to disclose in its annual proxy statement and its annual report on Form 10-K information regarding any Section 16 insider who fails to file the required reports on a timely basis.

2. Short-Swing Profits

Section 16(b) of the Exchange Act requires Section 16 insiders to pay over to the company any "short-swing profits" realized on a purchase and sale, or a sale and purchase, of the company's shares within a period of less than six months. Liability under Section 16(b) is strict. No proof of possession or use of inside information is necessary. The concepts of "purchase" and "sale" are broadly construed and extend to many different types of transactions, including the acquisition or disposition of an option or other derivative instruments related to company shares. Any purchase and sale within the six-month period may be matched, and the lowest purchase price will be matched with the highest sale price during the period. Losses are not offset against profits. As a result, it is possible to have short- swing profits even when a series of transactions has resulted in an overall economic loss. The requirement that a Section 16 insider disgorge short-swing profits to the company may be enforced by the company, but is ordinarily enforced by specialized strike lawyers representing shareholders of the company, who are entitled to do so if the company fails to institute suit within 60 days after being requested to do so. The Section 16 reporting provisions provide a relatively easy method of determining when Section 16(b) violations have occurred, and there are persons who monitor the Section 16 reports of most public companies for violations.

While "beneficial ownership" for purposes of determining whether a person is a 10% holder is broadly interpreted, it is important to realize that Section 16(b) liability attaches only to purchases and sales of securities in which the Section 16 insider has a pecuniary (economic) interest.

There are several important exemptions from the short-swing profit requirement of Section 16(b). Perhaps most importantly, Rule 16b-3 exempts stock grants and awards made to directors and officers as well as any other purchases from or sales to the company, so long as the transactions are approved by the board of directors, by a board committee composed solely of two or more non-employee directors or by a majority vote of the shareholders at a meeting, or if the subject securities are held for at least six months before disposition.

3. Short Sales

Section 16(c) of the Exchange Act prohibits Section 16 insiders from making short sales of the company's stock. This prohibition includes sales "against the box" (i.e., a sale covered by borrowing shares when the seller has a long position in the shares sold).

H. REPORTS BY 5% HOLDERS

1. Schedule 13D

Section 13(d) of the Exchange Act and the related SEC rules require any person who acquires beneficial ownership of more than 5% of a class of a company's stock registered under the Exchange Act to send to the company and to file with the SEC within ten days after the acquisition a statement containing the information required by the Schedule 13D. “Beneficial owner” is broadly defined as any person who has or shares, directly or indirectly, voting or investment power with respect to a security, whether through contract, arrangement, understanding, relationship or otherwise. Any security as to which beneficial ownership may be acquired through the exercise of an option or other right within 60 days is also deemed to be beneficially owned. The filing requirement of Section 13(d) also applies to any group of persons who agree to act together for the purpose of holding, voting or disposing of equity securities of the issuer.

Schedule 13D requires a statement of facts relating to the stock and the holdings of the reporting person, the source of funds for the acquisition, a list of transactions in the prior 60 days, any plans that the reporting person has regarding the company and any understandings with others with respect to securities of the company. Schedule 13D filings should be amended promptly to reflect any material change in the information reported. Acquisitions or dispositions involving 1% or more of the outstanding class of securities are deemed material.

Certain passive investors and persons who beneficially own more than 5% of the stock because their acquisitions were made in the pre-public period are permitted to file a (shorter) Schedule 13G rather than Schedule 13D as described below.

2. Schedule 13G

Institutional investors, such as broker-dealers, banks, insurance companies and investment companies and advisers, who cross the 5% threshold but who acquire the securities in the ordinary course of business and do not intend to exercise control over the issuer may file a short-form statement on Schedule 13G within 45 days after the end of the calendar year in which the acquisition occurs unless they acquire more than 10% (in which case the filing is due within 10 days of the end of the month). Moreover, if their beneficial ownership no longer exceeds 5% at the end of the calendar year, they need make no filing at all.

Schedule 13G is also available to report holdings that result from acquisitions made before the issuer becomes a public company, as long as acquisitions do not exceed 2% of the relevant class during any 12-month period. Acquisitions made during the pre-public period are counted for this purpose if they occurred during the applicable 12-month period.

In addition, investors of any type who acquire securities for a passive investment purpose and who beneficially own less than 20% of the subject class of securities are permitted to report on Schedule 13G. However, the filing and amendment requirements applicable to these investors are somewhat more stringent than those applicable to the institutional investors discussed above.

I. RESALES UNDER RULE 144

Absent an exemption under the Securities Act, resales of securities acquired in exempt transactions (i.e., those not previously registered under the Securities Act or "restricted securities") may require registration under the Securities Act. Sales of securities, whether or not previously registered, by an "affiliate" of an issuer also generally require registration under the Securities Act. An "affiliate" of an issuer is defined in Rule 144 (and for most other purposes under the securities laws) as a person that, directly or indirectly, controls, is controlled by or is under common control with the issuer. Reporting companies often treat their directors and officers that are Section 16 insiders as affiliates for purposes of Rule 144. However, affiliate status depends on the facts and circumstances of the particular relationship in question and may encompass a narrower or broader group of persons than Section 16 insiders. Rule 144 provides a safe harbor exemption from Securities Act registration for resales of both "restricted securities" and "control securities" if specified requirements are met.

For non-affiliate sellers of reporting issuers (i.e. issuers that have been subject to the periodic reporting requirements for a period of at least 90 days), Rule 144 is available after the non-affiliated seller has held the "restricted securities" for at least six months. The only condition that non-affiliate sellers must meet to satisfy the Rule 144 safe harbor is that the issuer be current in its own periodic reporting at the time that the non-affiliate seller wants to sell. This condition will apply for any attempted resales by a non-affiliate seller during the six-month period that immediately follows the initial six-month holding period where no resales by such non-affiliate seller are permitted. The condition is no longer applicable after this six-month period.

For non-affiliate sellers of non-reporting issuers, no resales are permitted during an initial one-year holding period. After the one-year holding period, the non-affiliate seller of the non-reporting issuer may resell freely without any conditions.

For affiliates of reporting issuers, the same initial six-month holding period applies. After the expiration of the initial six-month holding period, the affiliate seller may resell under the safe harbor afforded by Rule 144 only if (i) the issuer remains current in its own periodic reporting, (ii) the seller limits the volume of securities sold during any three month period (1% of the outstanding shares or the average weekly reported trading volume in the shares during the four calendar weeks prior to the notice filing described below, whichever is greater, and certain aggregation rules apply), (iii) the seller only sells in "brokers's transactions" or to "market makers" (in each case without solicitation prior to the sale), and (iv) the seller files a notice of sale on Form 144 with the SEC prior to the first sale covered by the notice.

For affiliates of non-reporting issuers, no resales may be made during an initial one-year holding period and, after the expiration of the initial one-year holding period, the affiliate seller may resell under the safe harbor afforded by Rule 144 only if (i) the issuer remains current in its own periodic reporting, (ii) the seller limits the volume of securities sold during any three month period (1% of the outstanding shares or the average weekly reported trading volume in the shares during the four calendar weeks prior to the notice filing described below, whichever is greater, and certain aggregation rules apply), (iii) the seller only sells in "brokers's transactions" or to "market makers" (in each case without solicitation prior to the sale), and (iv) the seller files a notice of sale on Form 144 with the SEC prior to the first sale covered by the notice.

J. OTHER REQUIREMENTS OF THE FEDERAL SECURITIES LAWS

1. Books, Records and Accounts and Accounting Controls

Pursuant to Section 13(b)(2) of the Exchange Act, a reporting company is required to keep books and records that accurately and fairly reflect its transactions and disposition of its assets. A reporting company is also required to maintain a system of internal accounting controls sufficient to provide reasonable assurance that transactions are executed in accordance with management's authorization, that transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and that access to assets is permitted only in accordance with management's authorization.

Rules 13b2-1 and 13b2-2 under the Exchange Act prohibit (1) the falsification of corporate books, records and accounts of a reporting company and (2) the making of materially false or misleading statements to an accountant in connection with an audit of the financial statements of a reporting company or the filing of its required reports under the Exchange Act.

Any person who knowingly circumvents or fails to comply with Section 13(b), or who knowingly falsifies the books and records of a reporting company, may be subject to criminal liability.

2. Foreign Corrupt Practices Act

Reporting companies are subject to Section 30A of the Exchange Act, which makes it a crime for a reporting company, any officer, director, employee or agent of a reporting company or any shareholder of a reporting company acting on its behalf to bribe any foreign official, political party or candidate for political office for the purpose of obtaining or retaining business. For this purpose, a "bribe" includes any payment or gift of money or other thing of value, as well as any offer or promise to make such a payment or gift, in order to influence an official decision or induce a foreign official, candidate or party to act in violation of its lawful duty or otherwise to secure an improper advantage.

3. Self-Tenders

Rule 13e-4 under the Exchange Act applies to any tender offer for a company's shares made by the company or one of its affiliates. Normally, open-market purchases by a company of its own shares pursuant to Rule 10b-18, as described below, do not constitute a tender offer. However, the term "tender offer" is not clearly defined in the federal securities laws, and counsel should be consulted before any purchases of company stock or securities convertible into or exchangeable for a company's stock are made. Under Rule 13e-4, the proposed purchaser is required to file with the SEC not later than the offer commencement date and promptly to disseminate publicly or to shareholders a statement on Schedule TO setting forth financial and other information about the proposed purchaser, the issuer and the offer. Rule 13e-4 also imposes requirements on the conduct of a self-tender offer, including a requirement that the offer be held open for a specified minimum period, that shareholders tendering in the offer be given withdrawal rights, that the consideration offered for tendered shares be paid or the tendered shares be returned promptly after the offer expires, that all shareholders who tender shares receive the highest price paid for any tender and that tenders be accepted on a pro rata basis (if not all the shares tendered will be purchased).

4. "Going Private" Transactions

Rule 13e-3 under the Exchange Act imposes filing and disclosure requirements that apply to "going private" transactions. The transactions subject to the rule include share purchases and tender offers by a company or an affiliate of a company, as well as mergers, sales of assets and other transactions involving a company and an affiliate of that company, that are likely to cause that company's shares to be held by less than 300 persons or to be delisted from a stock exchange.

5. Open-Market Repurchases

Rule 10b-18 under the Exchange Act provides a safe harbor from the anti-manipulation requirements of the Exchange Act for open-market bids and purchases made by an issuer with regard to its own shares. Reporting companies typically rely on this rule when conducting share repurchase programs in the open market.

Rule 10b-18 sets forth detailed conditions under which bids and purchases by an issuer should be made in order to qualify for the safe harbor. These requirements relate to timing, price, volume and manner.

The Rule 10b-18 safe harbor is non-exclusive. Bids and purchases made otherwise than in compliance with the conditions of the rule are not necessarily deemed to violate the anti-manipulation requirements of the Exchange Act.

Rule 10b-18 provides a safe harbor only from the anti-manipulation, not the disclosure requirements of the Exchange Act. Consequently, in making repurchases pursuant to this rule, companies should ensure that the purchases are not made at times when material developments have not been publicly disclosed.

On January 26, 2010, the SEC proposed amendments to Rule 10b-18 to clarify and modernize its safe harbor provisions. These proposed amendments would (i) relax the price condition in Rule 10b-18 for certain volume-weighted average price transactions, (ii) increase the length of time when the Rule 10b-18 safe harbor is not available to be used in connection with an acquisition by a special purpose acquisition company *(SPAC)*, (iii) limit the "disqualification provision" (which provides that if an issuer fails to meet any of Rule 10b-18's four conditions for one of its repurchases, all of the issuer's Rule 10b-18 purchases will be excluded from the safe harbor on that day) under certain conditions in fast moving markets, and (iv) modify the timing condition to prohibit a Rule 10b-18 purchase from being the opening purchase in the security's principal market (in addition to the current prohibition against Rule 10b-18 purchases as the opening purchase reported in the consolidated system). To date, the SEC has not finalized any of these proposed amendments to Rule 10b-18.

As noted above in Section VIII.A.1, public companies are required to disclose in Form 10-Ks and 10-Qs detailed information relating to any company repurchases of its own equity securities during the fiscal quarter, including a month-by-month break out of the total number of shares repurchased and average price per share. These periodic reporting obligations apply regardless of whether the repurchases were made under a repurchase program designed to meet the Rule 10b-18 safe harbor.

6. Regulation M

At any time during which a company is making or proposes to make a "distribution" of its stock, it is subject to the restrictions of Regulation M under the Exchange Act. Under these restrictions, neither the company nor any of its "affiliated purchasers" is permitted to bid for or purchase, or to induce others to bid for or purchase, any company stock during the applicable "restricted period" unless a specified exception is available. Assuming the average daily trading volume for the company's stock exceeds $100,000, the restricted period normally begins one business day prior to the pricing of the distribution and ends when the distribution is completed. The prohibition applies to all bids and purchases involving the company's stock, whether made in the open market or privately, and requires that any pre-existing bid on the stock be withdrawn. Generally, the prohibition applies not only to the company, but to all its subsidiaries and other affiliated entities, as affiliated purchasers. Directors and senior officers of the company also may be deemed to be affiliated purchasers.

Under Regulation M, a "distribution" is defined to include any offering of securities that may be distinguished from ordinary trading transactions by both the magnitude of the offering and the presence of special selling efforts and methods. Underwritten offerings, as well as large block trades or private sales of company stock may constitute distributions, thereby triggering the restrictions of Regulation M on bids, purchases and inducements involving that stock. Regulation M also applies to distributions of other securities of the company, such as debt securities, and the prohibition on bids, purchases and inducements apply to the class of securities being distributed rather than the company stock.

7. Third-Party Tender Offers

Any person who makes a tender offer for a publicly traded company's stock and who after consummation of the purchase would be the beneficial owner of more than 5% of the company's stock is required by Section 14(d) of the Exchange Act and related SEC rules to file with the SEC and deliver to the company and the relevant market on the offer commencement date a statement on Schedule TO setting forth financial and other information about the bidder and the offer. Any such person would also be required to comply with the SEC's tender offer rules, Regulations 14D and 14E, which regulate the timing and manner in which tender offers may be made.

Within ten business days after a third-party tender offer is commenced, the company must respond to the offer by recommending acceptance or rejection of the bid or by stating that it is remaining neutral or is unable to take a position with respect to the bid. The company's response must be published or sent to shareholders. If the response includes a recommendation on the offer, the company must file with the SEC as soon as practicable a statement on Schedule 14D-9 setting forth its recommendation and background information about any negotiations that it has had with the bidder.

8. Prohibition Against Personal Loans to Directors and Executive Officers

As noted before, Section 402 of the Sarbanes-Oxley Act, codified as Section 13(k) of the Exchange Act, makes it unlawful for any issuer (domestic and foreign private issuers) "directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or the equivalent thereof) of that issuer." This provision of Sarbanes-Oxley is perhaps the most difficult provision for companies to administer, because there exists no Congressional or judicial interpretation of the intended scope of its terms.

IPO companies that entered into personal loan arrangements with directors or executive officers prior to the effective date of Sarbanes-Oxley (July 30, 2002) do not need to unwind such loans because they are specifically grandfathered under Sarbanes-Oxley. However, any material modification after July 30, 2002 to the terms of such personal loan arrangement would be a violation of Sarbanes-Oxley. Private companies that entered into personal loan arrangements with directors and executive officers after July 30, 2002 must unwind these arrangements prior to filing an IPO registration statement. Private companies considering going public should avoid personal loans to directors or executive officers and should consider how such loans will be repaid. Some public companies have chosen to forgive such loans prior to filing a registration statement to go public.

9. Prohibition Against Improperly Influencing Auditors

Pursuant to Section 303 of the Sarbanes-Oxley Act, codified as Rule 13b2-2(b) of the Exchange Act, "no officer or director of an issuer, or any other person acting under the direction thereof, shall directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence any independent public or certified public accountant engaged in the performance of an audit or review of the financial statements of that issuer that are required to be filed with the [SEC] . . . if that person knew or should have known that such action, if successful, could result in rendering the issuer's financial statements materially misleading."

Companies should note that this prohibition applies as soon as they file a registration statement under the Securities Act. Companies should also note that a violation of this provision would result even if the influence brought to bear by the company (or its agents) on the auditors proved unsuccessful. The sample code of ethics included as Exhibit A contains a provision addressing this important proscription.

10. Whistleblower Procedures and Rules

Pursuant to Section 301 of the Sarbanes-Oxley Act, codified as Section 10A(m) of the Exchange Act, audit committees must establish procedures for the "receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters." These procedures must provide employees confidentiality and anonymity. Many public companies are choosing to set up a call-in telephone number, or a special audit committee email address, for the receipt of such anonymous complaints. While some management involvement will likely be required to administer this complaint process, companies are advised not to establish a complaint system that allows management to "screen" complaints before they are delivered to the audit committee.

The SEC has adopted rules to implement the whistleblower program through which monetary awards are to be given to whistleblowers who disclose fraud directly to the SEC. The rules require voluntary submission of original information that leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million. Whistleblowers may then be entitled to between 10% and 30% of the monetary sanctions paid to the SEC. Many companies expressed concern publicly that these rules would undermine their own compliance programs by improperly incentivizing their employees to disclose potential fraud directly to the SEC. Providing some comfort to these companies, the rules require individuals to satisfy specified eligibility requirements, list detailed criteria in determining the amount of any award and provide a 90-day grace period where individuals who report potential fraud to internal compliance programs may still be eligible for an award if appropriate action is not taken by the company. A new body named the Office of Market Intelligence has been created by the SEC to handle the increase in tips.

11. Standards of Professional Conduct for Attorneys

Pursuant to Section 307 of the Sarbanes-Oxley Act, codified in the SEC's Rules of Practice, attorneys who appear and practice "before the SEC" must report evidence of material violations of the securities laws, a material breach of a fiduciary duty or a similar violation of law to a company's CLO. If the CLO does not respond appropriately, the reporting attorney is required to report the violation "up the ladder" to a committee of independent directors or to the full board of directors.

IX. CROSS-BORDER SECURITIES TRANSACTIONS AND COMPLIANCE

The U.S. securities laws governing the issuance and sale of securities apply not only to activities in the U.S., but also in a number of instances to activities conducted across international borders. The SEC regulates activities by foreign companies seeking to access U.S. markets, as well as conduct by U.S. and foreign issuers in ostensibly "offshore" transactions that, nevertheless, have consequences in the U.S. This chapter outlines the manner in which such international securities transactions, including, but not limited to IPOs, are regulated by the SEC.

International securities transactions that implicate U.S. securities laws typically involve an offer of a foreign issuer's securities for sale into the U.S. or a sale of a U.S. company's securities abroad. Exchange offers or business combinations by U.S. or foreign companies for securities of foreign companies that have U.S. security holders or by foreign companies for securities of U.S. companies also implicate U.S. securities laws. Accordingly, this chapter discusses international securities transactions under three broad categories: (a) public offerings of securities in the U.S. by foreign companies, (b) cross-border exchange offers, business combinations, and rights offerings, and (c) offshore securities transactions under the SEC's Regulation S.

A. "FOREIGN PRIVATE ISSUERS" UNDER U.S. SECURITIES LAWS

As an accommodation by the SEC to foreign practices, foreign private issuers are subject to slightly less burdensome prospectus disclosure, as compared to a U.S. company, in conducting securities offerings, including IPOs, and significantly less required disclosure compared to a U.S. company filing periodic reports with the SEC under the Exchange Act. If a company organized outside the U.S. does not meet the SEC's definition of foreign private issuer, it becomes subject to the more extensive disclosure requirements applicable to domestic U.S. public companies. Furthermore, as described below, the applicability of certain provisions of the U.S. securities laws to international securities transactions depends on whether one or more of the entities involved is a foreign private issuer. However, it should be noted that given the current investment climate, some foreign private issuers may wish to voluntarily disclose information not required (such as detailed information regarding management compensation) in order to build investor confidence and compete effectively in the market with U.S. companies. Some foreign private issuers actually reorganize in the U.S. prior to a public offering in order to enhance their marketability to investors.

The term “foreign private issuer” can be misleading. For purposes of SEC regulation, a foreign private issuer is considered “private” when it is a non-governmental entity, not when it has no public stockholders. Foreign sovereigns are subject to a different disclosure system. Qualifying as a foreign private issuer may be somewhat more difficult for foreign companies with substantial U.S. operations and a large U.S. shareholder base. A non-U.S. company will be considered a U.S. company for purposes of SEC regulation if it meets the following conditions as of the last business day of its most recently completed fiscal quarter:

- more than 50 percent of the outstanding voting securities of such company are directly or indirectly owned of record by residents of the United States; and
- any of the following:
  - the majority of its executive officers or directors are U.S. citizens or residents;
  - more than 50 percent of the assets of the company are located in the United States; or
  - the business of the company is administered principally in the United States.

Foreign private issuers are required to test their foreign private issuer status on the last business day of each second fiscal quarter. If a foreign private issuer determines that it no longer qualifies as a foreign private issuer, it must comply with the domestic issuer reporting regime effective the first day of its next fiscal year after the determination date, which gives companies that lose their foreign private issuer status six months to prepare for the domestic issuer disclosure and compliance regime.

B. U.S. PUBLIC OFFERINGS BY FOREIGN PRIVATE ISSUERS

1. Registration and General Prospectus Disclosure

Foreign private issuers conducting an IPO in the U.S. must generally register the offering on Form F-1 under the Securities Act, which incorporates the disclosure requirements of Form 20-F, in much the same manner as domestic Form S-1 incorporates the disclosure requirements of Regulation S-K. Form 20-F is also the form used for the filing of annual reports with the SEC by foreign private issuers. Certain Canadian foreign private issuers have the option of complying with alternative forms and disclosure requirements under the country-specific Multijurisdictional Disclosure System (*MJDS*), which, along with other country-specific aspects of international securities transactions, are beyond the scope of this chapter.

Form F-1 with some variations requires much the same disclosure as domestic Form S-1. Foreign private issuers are permitted to provide less information concerning individual executive compensation and transactions between the company and its directors and other management. These relaxed disclosure items are viewed as a substantial advantage, since these disclosure items are generally considered among the most sensitive. If, however, a foreign private issuer's home jurisdiction requires more detailed disclosure on these items or any other material items, including financial statements, than the minimum required by the SEC, the SEC rules require that the issuer make the same level of disclosure in its filings with the SEC as well.

Generally speaking, foreign private issuers benefit to the same extent as domestic issuers from the rules that became effective on December 1, 2005 reforming and modernizing the offering process in the U.S. and from the rules that became effective in January 2008 broadening the eligibility for the use of short-form registration statements (see Section VII.B for a discussion of such rules). Significantly, a foreign private issuer may qualify as a "well-known seasoned issuer," allowing it to use the streamlined automatic shelf registration process, or meet the requirements to use a Form F-3 registration statement. The availability of these procedures to eligible foreign private issuers may encourage them to extend rights offerings to U.S. investors, which are typically announced and launched in a very short time period.

2. Foreign Issuer-Specific Disclosure

Some of the information required under Form 20-F is specific to foreign private issuers, including:

- governmental regulations applicable to the company that restrict the import or export of capital or affect the remittance of dividends, interest, or other payments to security holders;
- limitations on the right to hold or vote securities applicable to persons who are not citizens or residents of the company's home country;
- the country in which the company is organized and any applicable tax treaty;
- exchange rates between U.S. dollars and the home country currency;

- a complete description of organizational documents (e.g., the nature and extent of any principal non-U.S. trading market for the company's securities); and
- tax disclosure covering U.S. and home jurisdiction taxation.

3. U.S. GAAP and GAAS Requirements

Financial statements of foreign private issuers must be presented in accordance with U.S. GAAP, IFRS or another recognized comprehensive body of generally accepted accounting principles (except financial statements filed by Canadian issuers on MJDS forms) (please see Section 5 below for accommodations made for certain foreign private issuers that submit financial statements prepared in accordance with IFRS). If financial statements are not presented in U.S. GAAP or IFRS, a detailed reconciliation to U.S. GAAP must be provided, including the material differences in accounting principles, the impact on balance sheets and income statements, and explanations for variations in accordance with Item 17 or Item 18 of Form 20-F, as applicable. In an IPO, foreign private issuers are required to reconcile the last two fiscal years and subsequent interim periods. Because of the difficulty and expense of reconciliation, if a foreign private issuer's principal listing is in the U.S., it will often present its financial statements in accordance with U.S. GAAP. In addition, the SEC requires that all audits be conducted in accordance with U.S. generally accepted auditing standards (*GAAS*). For example, it is not sufficient, as was the case previously, that an audit report state that an audit was conducted in accordance with U.K. GAAS and that U.K. GAAS are substantially the same as U.S. GAAS. Beginning with fiscal years ending on or after December 15, 2011, foreign private issuers have been required to provide full U.S. GAAP reconciliation pursuant to Item 18 of Form 20-F. Previously, Item 17 of Form 20-F permitted the omission of footnote disclosure with respect to pension assets, obligations and assumptions, lease commitments, tax attributes, stock compensation awards, financial instruments and derivatives and many other topics, unless they were otherwise required by the home country GAAP of the foreign private issuer. These changes do not apply to Canadian issuers using the MJDS or financial statements of non-registrants to be included in an issuer's annual report or registration statement (such as financial statements of a significant acquired business).

4. Changes in and Disagreements with Certifying Accountants

Foreign private issuers are required to disclose in their annual reports changes in and disagreements with certifying accountants substantially identical to the public disclosure required of U.S. reporting companies beginning with fiscal years ending on or after December 15, 2009.

5. International Financial Reporting Standards

Since January 1, 2005, a European Union (*EU*) company with securities listed on an EU exchange was required to prepare its financial statements in accordance with IFRS. To assist in this transition to IFRS reporting, the SEC adopted amendments to Form 20-F granting a one-time accommodation for foreign private issuers that adopted IFRS for the first time for any fiscal year beginning no later than January 1, 2007. To provide an additional incentive for the adoption of IFRS in filings with the SEC, the Foreign Issuer Reporting Enhancements, which became effective on December 6, 2008, extend this accommodation indefinitely. This accommodation allows the issuer to provide financial statements prepared in accordance with IFRS in a registration statement or an annual report on Form 20-F for only the two (rather than three) most recent fiscal years, provided that the issuer include certain related disclosure and reconcile financial statements items to U.S. GAAP.

Effective March 4, 2008, the SEC implemented new rules permitting foreign private issuers that file on Form 20-F to submit financial statements prepared in accordance with IFRS as issued by the International Accounting Standards Board (*IASB*) without reconciliation to U.S. GAAP. These new rules apply not only to audited annual financial statements but also to unaudited interim period financial statements of such foreign private issuers.

In addition to extending the two-year accommodation described above for first-time adopters of IFRS, the new rules require foreign private issuers that are taking advantage of the option to submit financial statements prepared in accordance with IFRS as issued by the IASB to state explicitly in their financial statement notes that the financial statements comply with IFRS and to provide an auditor's report opining on that compliance.

Reconciliation to U.S. GAAP is still required for any foreign private issuer whose financial statements deviate from IFRS as issued by the IASB, that does not state explicitly and unreservedly that its financial statements are in compliance with IFRS as issued by IASB, that does not provide an auditor's opinion on compliance with IFRS as issued by IASB, or that provides an auditor's opinion that contains qualifications relating to such compliance.

Further acknowledging an increasing use of IFRS in major capital markets throughout the world, the SEC has proposed a "roadmap" setting out milestones that, if achieved, could lead the SEC to require the use of IFRS by U.S. issuers in 2014. In connection with this roadmap, the SEC has proposed amendments to certain regulations, rules and forms that would allow certain U.S. issuers to use IFRS earlier, if such use would enhance the comparability of financial information to investors.

6. Financial Statement "Staleness"

Under the SEC rules, a registration statement generally must include audited financial statements no more than 15 months old and unaudited six-month interim financial statements if the audited financial statements are more than nine months old.

7. Confidential Review

Unlike domestic companies, foreign private issuers can submit their IPO registration statements to the SEC for a preliminary review on a confidential basis. This confidential review procedure is not available for any subsequent offerings conducted by the same issuer. This can present problems in a dual listing if a non-U.S. jurisdiction requires a confidential filing in order to comply with foreign listing rules requiring a "quiet" filing until a listing is approved. The SEC's confidential review process, when available, does allow a company an opportunity to resolve any difficult issues, such as those arising from the need to reconcile financial statements to U.S. GAAP, before publicly disclosing the fact that it is planning an offering. Effective as of December 8, 2011, the SEC limited confidential submissions of initial registration statements by foreign issuers to:

- foreign governments registering their debt securities;
- foreign private issuers that are listed or are concurrently listing their securities on a non-U.S. securities exchange;
- foreign private issuers that are being privatized by a foreign government; and
- foreign private issuers that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

Nevertheless, even if a foreign issuer falls within one of the categories described above, the SEC may still request a foreign issuer to file publicly if the SEC believes circumstances warrant public disclosure (such as when there has already been significant publicity about the offering or registration).

Alternatively, foreign private issuers that also qualify as EGCs may elect to follow the confidential review process applicable to EGCs. See Section I.D for a more detailed discussion of JOBS Act provisions applicable to EGCs.

8. American Depositary Receipts

With the notable exceptions of most Canadian and Israeli companies, many non-U.S. companies entering the U.S. capital markets offer American depositary shares represented by American depositary receipts (*ADRs*). The ADR represents an ownership interest and a specified number of securities that have been deposited with a depository by the holder of such securities. The benefits of ADRs include facilitation of share transfers and conversion of dividends paid in foreign currency. ADRs and deposited securities are considered separate securities, each subject to the registration requirements of the Securities Act unless an exemption is available. SEC Form F-6 requires that the registrant describe the ADRs being registered in the prospectus. Beginning with fiscal years ending on or after December 15, 2009, Item 12D of Form 20-F requires foreign private issuers to include fees and charges payable by ADR holders on an ongoing basis in their annual reports. In addition, Item 12D requires foreign private issuers to disclose any payments they have received from depositories in connection with their ADR programs.

9. Listing Requirements

Most foreign private issuers with sufficient capitalization that give reasonable consideration to a NASDAQ listing will meet the following national market requirements, which are the same for foreign private issuers and domestic companies. See Section III.B.2 for NASDAQ's listing requirements.

NASDAQ allows a foreign private issuer to follow its home country practices in lieu of certain NASDAQ corporate governance requirements provided that the issuer provide a letter from outside counsel in the issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws. The foreign private issuer still must comply with (1) those NASDAQ corporate governance requirements mandated by U.S. securities laws and regulations, such as the audit committee requirements of Rule 10A-3 of the Exchange Act, (2) the listing agreement requirement and (3) certain NASDAQ notification and disclosure requirements.

The NYSE also has alternate listing standards that foreign private issuers may use to qualify for listing if they choose not to qualify under the NYSE domestic listing criteria. An applicant company must meet all of the criteria under which it seeks to qualify for listing. See Section III.B.2 for the NYSE's listing standards.

NASDAQ and the NYSE have traditionally granted exemptions from their rules when it can be shown that the rules would require a company to undertake actions contrary to the generally accepted business practice of a company's home country.

Listed foreign companies are required to make their U.S. investors aware of the significant ways in which their home-country practices differ from those followed by U.S. companies under the U.S. securities exchanges' listing standards. Although listed foreign private issuers will not be required to present a detailed, item-by-item analysis of these differences, the NYSE has suggested that U.S. shareholders should be aware of the significant ways that the governance of a listed foreign private issuer differs from that of a listed domestic company.

For its part, NASDAQ requires non-U.S. IPO companies to disclose in their IPO registration statement and all subsequent annual reports filed on Form 20-F, any corporate governance exemptions received from NASDAQ and the alternative home country practices that the non-U.S. company will follow in lieu of the NASDAQ requirements.

Under the Foreign Issuer Reporting Enhancements, new Item 16G of Form 20-F requires foreign private issuers with securities listed on a U.S. securities exchange, including the NYSE and NASDAQ, to provide in their annual reports a summary of the significant ways in which such issuer's corporate governance practices differ from the corporate governance practices followed by U.S. companies listed on the same exchange. Issuers that previously provided this information to investors solely by posting it on their websites must include this summary in their annual reports. In order for a class of securities of a non-U.S. company to be traded on a U.S. stock exchange or quoted on NASDAQ, the class must be registered under the Exchange Act.

10. Foreign Private Issuer Deregistration

In March 2007, the SEC adopted amendments to the rules governing when a foreign private issuer may terminate its registration of equity securities under the Exchange Act and exit the SEC reporting system. Under the Foreign Issuer Reporting Enhancements adopted in December 2008, Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, was amended to reflect the SEC's adopted amendments pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations. Under the prior rules, a foreign private issuer could deregister if the subject class of the issuer's securities had fewer than 300 record holders that were U.S. residents. Under the amendments, new Exchange Act Rule 12h-6 permits deregistration if the issuer's U.S. average daily trading volume of the subject class of the issuer's securities has been no greater than 5% of the average daily trading volume of that class of securities in the worldwide trading market during a recent 12-month period provided that the following other conditions are met:

- the issuer must have been a reporting company for at least one year before deregistration, must have filed at least one annual report, and must be current in its reporting obligations;
- the issuer must have not sold its securities in a registered offering in the United States, except for certain offerings, during the preceding 12 months; and
- the issuer must have maintained a listing on one or more exchanges for at least a year in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities.

An issuer that delists in the U.S. or terminates a sponsored ADR facility prior to deregistering must either i) have met the trading volume test at the date of delisting or termination or ii) wait 12 months before it can proceed with deregistration in reliance on the trading volume test.

The amendments also amend Exchange Act Rule 12g3-2(b) to allow a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon deregistration, rather than having to wait 18 months as was previously required, provided that the issuer publish English versions of its home country reports and financial statements on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market.

It is unclear what amendments, if any, the SEC will implement to Rule 12g3-2(b) in connection with the JOBS Act amendments to the Section 12(g) Exchange Act registration requirements, which increased the number of shareholders that triggers public company reporting obligations from 500 to 2,000 (provided that fewer than 500 of such shareholders are non-accredited investors).

C. ONGOING DISCLOSURE FOR U.S.-LISTED FOREIGN PRIVATE ISSUERS

1. Exchange Act Obligations

A foreign private issuer with securities registered under the Exchange Act is:

- required to file with the SEC an annual report on Form 20-F within four months following the end of each fiscal year;
- not required to file current reports on Form 8-K as is required of a U.S. company, but instead, is required to furnish to the SEC, under cover of Form 6-K, copies of all material information (e.g., earnings releases) that the company makes or is required to make public under the laws of its home jurisdiction, files or is required to file under the rules of any stock exchange and which is made public by the exchange, or otherwise distributes or is required to distribute to its stockholders;
- not required to file quarterly reports on Form 10-Q, although it will need to furnish to the SEC quarterly earnings reports under cover of Form 6-K if it makes or is required to make such information public in its home jurisdiction or by an agreement with underwriters;
- exempt from the proxy solicitation requirements, and its directors, officers and principal stockholders are not subject to the short-swing and short-selling trading restrictions and reporting obligations (Forms 3, 4, and 5) imposed by Section 16 of the Exchange Act; and
- not subject to Regulation FD, which prohibits selective disclosure of material non-public information by domestic SEC registrants, although some foreign private issuers adopt Regulation FD compliant policies as a best practice.

2. Mandatory Electronic Filings by Foreign Private Issuers

Subject to certain very limited exceptions, foreign private issuers have been required to submit most Securities Act and Exchange Act submissions via EDGAR in electronic format since 2002. Under these rules, the following documents are required to be filed electronically, including, among others:

- Securities Act registration statements (i.e., Forms F-1, F-3, F-4, F-6);
- Exchange Act registration statements and reports (i.e., Form 20-F);
- statements of beneficial ownership on Schedules 13D and 13G that pertain to a foreign private issuer;
- tender offer schedules that pertain to a foreign private issuer;

- reports on Form 6-K;
- Form F-X, which designates a U.S. agent for service of process for the foreign private issuer;
- most forms under the Trust Indenture Act of 1939 (i.e., Forms T-1, T-2 and T-3); and
- Form CB for cross-border rights offers, exchange offers, and business combinations exempt from Securities Act registration when the party filing or submitting the Form CB is an Exchange Act reporting company.

Rule 306 of SEC Regulation S-T governs the treatment of foreign language documents in EDGAR filings. Rule 306(a) provides that all EDGAR submissions must be in the English language, except as otherwise provided by this rule. If a submission requires the inclusion of a document that is in a foreign language, filers must submit a “fair and accurate English translation” of the foreign language document in accordance with the rules governing the treatment of foreign language documents. Alternatively, if the foreign language document is an exhibit or attachment to a filing or submission to the SEC, a party may provide a fair and accurate English summary of the foreign language document if permitted by the foreign language rules.

At the same time, the foreign language rules provide that filings subject to review by the SEC may not summarize certain documents, such as:

- articles of incorporation, memoranda of association, bylaws, and other comparable documents, whether original or restated;
- instruments defining the rights of security holders, including indentures qualified or to be qualified under the Trust Indenture Act;
- voting agreements, including voting trust agreements;
- contracts to which directors, officers, promoters, voting trustees, or security holders named in a registration statement are parties;
- contracts on which a filer’s business is substantially dependent;
- audited annual and interim consolidated financial information; and
- any document that is or will be the subject of a confidential treatment request under Securities Act Rule 406 or Exchange Act Rule 24b-2.

Other documents may be the subject of an English summary instead of an English translation. English summaries must fairly and accurately summarize the terms of each material provision of the foreign language document and fairly and accurately describe the terms that have been omitted or abridged.

Electronic and paper filers must provide either an English translation or English summary. An English "version" (something short of a fair and accurate English summary) is not permitted.

D. EXCHANGE OFFERS, BUSINESS COMBINATIONS AND RIGHTS OFFERINGS

1. Registration under the Securities Act

Securities to be issued in the U.S. in an exchange offer, merger or acquisition must be registered under the Securities Act unless an exemption from registration is available. Exchange offers by foreign private issuers are registered with the SEC on Form F-4. The key disclosure requirements of Form F-4 are:

- a business description of the acquiror and target;
- a detailed description of the terms of the offer;
- a comparison of the terms of the securities of both companies;
- historical financial statements for the acquiror; and
- in most cases, the target's audited financial statements (in U.S. GAAP, IFRS or in local GAAP with U.S. GAAP reconciliation) as well as pro forma financial information.

If either the acquiror or the target is a reporting company in the U.S., Form F-4 may incorporate by reference to previously filed materials and can be prepared more expeditiously. A transaction typically commences upon the filing of the registration statement, but the acquiror may not actually purchase any securities until the registration statement is declared effective by the SEC. The SEC has traditionally undertaken to review any registration statement on an expedited basis while an offer is pending.

In addition to such Securities Act regulation, if a transaction is structured as an exchange offer rather than as a merger, it will be extensively regulated by the tender offer rules of the Exchange Act, which apply equally to domestic as well as foreign private issuers. See Sections VIII. and X. for a more detailed discussion regarding the registration, tender offer and other requirements applicable to business combinations. However, it bears noting that the tender offer rules of the Exchange Act exempt tender offers for securities of foreign private issuers from most of the tender offer rule requirements if the level of U.S. ownership of the foreign private issuer is below a certain threshold as set forth in Section 2 below.

2. Exclusions and Exemptions from Registration under the Securities Act

Due to the significant costs and time delays involved, Securities Act registration is often too burdensome and may be impracticable for issuers that are not already reporting issuers. Accordingly, U.S. companies and foreign private issuers often seek to avoid registration of their transaction by ensuring that the U.S. jurisdictional means are not used (i.e., by excluding U.S. holders from the offer of securities altogether) or by permitting their international securities transaction to proceed on the basis of one or more of the statutory exemptions from the registration requirements of the Securities Act.

a. Tier I and Tier II Exemptions from Tender Offer Rules

Effective December 8, 2008, the SEC amended its regulatory scheme for cross-border tender and exchange offers and other business combinations. The amendments are designed to encourage the inclusion of U.S. security holders in cross-border transactions. While the SEC's threshold percentages of U.S. ownership that trigger Tier I (10%) and Tier II (40%) exemptions remain the same, the amendments modified the "look-through" analysis used to determine U.S. beneficial ownership in foreign entities. The amendments eliminate the previous requirement to exclude securities held by persons that hold more than 10% of the subject securities from the beneficial ownership calculation. The amendments also change the timing and reference date for calculating U.S. ownership percentages.

Additionally, as an alternative to the "look-through" analysis, an "average daily trading volume" test is defined. This test may be used in all non-negotiated transactions and in negotiated transactions where the issuer or acquirer is unable to conduct a "look-through" analysis. The amendments extend the exemption from enhanced disclosure contained in Exchange Act Rule 13e-3 beyond "going-private" transactions to include any form of affiliated transaction that otherwise meets the conditions of a Tier I exemption. Under the amendments, Tier II exemptions are available for tender offers governed by Regulation 14E, and remain available for transactions subject to Exchange Act Rule 13e-4 and Regulation 14(d) of the Exchange Act. The amendments also expand Tier II relief to eliminate recurring conflicts with non-U.S. law, including situations involving: (1) multiple non-U.S. offers, (2) termination of withdrawal rights while counting tendered securities, (3) terminating withdrawal rights immediately after reproducing or waiving a minimum acceptance condition, and (4) purchasing target securities outside a tender offer. Additionally, the amendments altered numerous subsequent offering period rules, including: (1) the elimination of the 20-business day time limit on the length of a subsequent offering period during which securities may be tendered and purchased on a rolling or "as tendered" basis if certain conditions are met, (2) changes to prompt payment rules, (3) permission for bidders to pay interest on securities tendered, and (4) changes to rules related to offers where bidders offer a fixed mix of cash and securities in exchange for each target security but permit tendering holders to request a different portion of cash or securities. The new regulatory scheme also provides bidder's with greater flexibility to commence an exchange offer before a registration statement has become effective. Finally, the amendments allow certain foreign institutions to comply with beneficial ownership reporting requirements by filing a short-form Schedule 13G, as opposed to Schedule 13D.

b. Rule 802 Exemption (Issuance to U.S. Holders of a Foreign Private Issuer)

Securities Act Rule 802 provides a significant exemption from registration for securities issued in cross-border exchange offers or business combinations (i.e., mergers, amalgamations, consolidations and schemes of arrangement) to holders of securities of foreign private issuers. The exemption is available to both U.S. and foreign companies provided that the target company is a foreign private issuer and provided the level of U.S. ownership in the target company is below a certain threshold.

The basic requirements of the rule are as follows:

- U.S. holders hold 10% or less of the securities subject to the offer;
- U.S. holders are permitted to participate in the transaction on terms at least as favorable as those offered to any other holder;
- there are no specific disclosure requirements; however, the acquiror must furnish to (rather than file with) the SEC an English translation of the same materials sent to non-U.S. holders;
- if the acquiror is a foreign private issuer, it must appoint an agent for service of process in the U.S. by filing a Form F-X with the SEC; and
- the issuer must disseminate any transaction documents (translated into English) to U.S. holders on a basis comparable to that used with respect to foreign holders.

Special rules apply to the determination of U.S. ownership of the target company. In order to gauge the "public float" more accurately, securities held by all persons owning more than 10% of the outstanding securities, as well as securities held by the acquiror, are excluded from the calculation of the percentage of the class held by U.S. holders. In addition, in the same way as one determines U.S. ownership levels in order to qualify as a foreign private issuer, the acquiror must “look through” the record ownership of certain brokers, dealers, banks, or nominees holding securities of the target for the accounts of their customers to determine the percentage of the securities held in nominee accounts that have U.S. addresses. The SEC has adopted a 30-day “look back” rule requiring measurement 30 days before the offer or solicitation for a merger. In any unsolicited or “hostile” offer, the acquiror may presume that the U.S. ownership limitations are not exceeded, based on the level of trading volume in the U.S.

The Rule 802 exemption is an issuer-only exemption and cannot be used by an affiliate of the issuer or by any other person for resales of the issuer’s securities. Securities acquired in a Rule 802 transaction may be resold in the U.S. only if they are registered under the Securities Act or pursuant to an exemption from registration.

In addition, Securities Act Rule 801 provides a corresponding exemption from registration for rights offerings by foreign private issuers if U.S. holders hold less than 10% of the class of securities that are subject to the rights issue and certain other conditions are met.

c. Private Placements to U.S. Holders

The private placement exemption under Section 4(a)(2) of the Securities Act and the Regulation D safe harbor thereunder exempt “transactions by an issuer not involving any public offering” and provide a further means to effect an international securities transaction without registration.

The acquiror will typically require all U.S. security holders who tender their securities in connection with the merger or acquisition to certify that they are accredited investors before receiving the acquiror’s securities. There are no specific disclosure requirements if all of the security holders of the target are accredited investors. If, however, there is at least one non-accredited investor, the acquiror will be required to provide disclosure meeting the requirements of a full prospectus.

Securities issued to target security holders in a Regulation D private placement will be “restricted securities.” Holders of restricted securities may resell their securities only pursuant to a registration statement covering their securities or pursuant to an exemption from registration. See Section VII.C for a more detailed discussion of Section 4(a)(2) of the Securities Act and Regulation D under the Securities Act.

d. Section 3(a)(10) Exemption

Section 3(a)(10) of the Securities Act exempts an offering of securities in exchange for other securities that meets the following conditions:

- a U.S. or foreign court or authorized governmental entity must:

  (i) before approving the transaction, find at a hearing that the terms and conditions of the exchange are "fair" both from a procedural and substantive perspective to those who will be issued securities, and

  (ii) be advised before the hearing that the issuer will rely on the exemption based on its approval;

- the fairness hearing must be open to everyone to whom securities will be issued in the exchange and adequate notice must be given to such persons; and
- there may be no improper impediments to the appearance by those persons at the hearing.

Although the initial issuance of options, warrants or other convertible securities is exempted from registration by Section 3(a)(10), this section does not exempt the later exercise or conversion of such securities. A scheme of arrangement under the law of the United Kingdom is one such example of a procedure that qualifies for this Section 3(a)(10) exemption.

e. Issuance to Non-U.S. Holders of a Target

Regulation S under the Securities Act provides an exemption from registration for offshore securities transactions. An issuance by an acquiror (U.S. or foreign) to non-U.S. security holders of a target corporation may be exempt from registration pursuant to this regulation.

Section IX.F below contains a detailed description of Regulation S, which is available to both domestic and foreign private issuers engaged in offshore securities transactions, either in connection with an acquisition or else in connection with a capital raising.

f. "Regulation A+"

The JOBS Act created a "mini-registration" process, which has been referred to informally as Regulation A+. On December 18, 2013, the SEC proposed new rules implementing Regulation A+ that are intended to facilitate access to capital for certain smaller U.S. and Canadian issuers by permitting such issuers to sell securities to the public on an exempt basis. See Section I.E.2.b. for a more detailed discussion of Regulation A+.

E. IMPACT OF SARBANES-OXLEY ON FOREIGN PRIVATE ISSUERS

Sarbanes-Oxley is discussed in greater detail in Sections I.C, II.C and VIII.J. As adopted by the U.S. Congress, Sarbanes-Oxley makes virtually no distinction between domestic companies and non-U.S. companies. As a result, if a non-U.S. company chooses to register securities under Section 12 of the Exchange Act (which it would have to do to conduct a registered public offering in the U.S. and/or list its securities on a U.S. stock exchange), the provisions of Sarbanes-Oxley apply to such non-U.S. companies. As discussed in Section VIII.J above, many of the provisions of Sarbanes-Oxley were implemented through amendments to the Exchange Act or are reflected in the rules of the SEC or the stock exchanges.

While the SEC has some statutory leeway to exempt foreign private issuers from certain provisions of the Exchange Act, and the stock exchanges similarly have some ability to exempt foreign private issuers from their own listing rules, the SEC and the stock exchanges have generally provided only modest accommodations to foreign private issuers with respect to their rules adopted pursuant to Sarbanes-Oxley.

The following provisions of Sarbanes-Oxley (or from SEC rules or stock exchange listing standards derived from Sarbanes-Oxley) affect foreign private issuers in the manner described:

- the CEOs and CFOs of foreign private issuers must include Section 302 and Section 906 certifications with their annual reports;
- foreign private issuers must design and periodically evaluate disclosure controls and procedures (i.e., the procedures designed to ensure the accuracy and timeliness of disclosure in general);
- foreign private issuers must comply with the requirements of Section 404 of the Sarbanes-Oxley Act to include a management report on internal control over financial reporting and, subject to certain exceptions, an auditor attestation report on internal control over financial reporting in annual

reports on Form 20-F for the following fiscal years. A newly public foreign private issuer is required to comply commencing with its second annual report.

- foreign private issuers are exempt from Regulation G, but only if the foreign private issuer's securities are listed on a non-U.S. exchange, the non-GAAP financial measures included in the foreign private issuer's public communication are derived from or based on accounting principles other than U.S. GAAP, and the communication is made outside of the U.S.;
- in the MD&A portions of their annual reports on Form 20-F, foreign private issuers must include the new disclosure relating to off-balance sheet arrangements and the table of contractual obligations;
- foreign private issuers that want to list securities on a U.S. stock exchange must have an audit committee that is composed entirely of "independent" directors. The SEC's definition of "independence" does contain certain accommodations for foreign private issuers. For example, the inclusion of a non-management affiliated person with only observer status or a non-management governmental representative on the audit committee will not violate the "affiliated person" prong of the SEC's "independence" definition;
- foreign private issuers must disclose in their Form 20-F annual reports whether their audit committee has at least one member who qualifies as an "audit committee financial expert" under the SEC's rules and, if not, why not;
- foreign private issuers are subject to the same auditor independence rules that apply to domestic companies, and foreign private issuers must disclose in their Form 20-F annual reports the audit and non-audit fees paid to their auditor and their pre-approval policies with respect to the provision of non-audit services by the company's auditor;
- officers, directors and agents of foreign private issuers may not coerce, manipulate, mislead or fraudulently induce an auditor in such a way as to render financial statements materially misleading;
- all financial statements included in Form 20-F annual reports must reflect all material correcting adjustments that are identified by an auditor in the course of its audit;
- foreign private issuers must disclose in their Form 20-F annual reports whether or not they have adopted a code of ethics for senior executive

officers that meets the minimum standards enumerated in the SEC's rules and, if not, why not. The code of ethics must be filed as an exhibit to the Form 20-F or posted on the company's website. In addition, foreign private issuers must disclose any amendments to and any waivers granted under the code of ethics during the fiscal year in their Form 20-F annual reports;

- foreign private issuers are subject to the blackout trading restrictions and notification requirements of Regulation BTR. Regulation BTR requires domestic companies to notify in a timely fashion each director or officer and the SEC of an imminent blackout period. Domestic companies are required to file this notice on a Form 8-K current report. Curiously, while foreign private issuers are required under Regulation BTR to provide the same advance notice as domestic companies, they are not required to file such notice on a current report with the SEC (on Form 6-K) but are permitted to include such notice as an exhibit to their Form 20-F annual reports (which could be well after the blackout period);
- because foreign private issuers are subject to Regulation BTR, insiders of the foreign private issuer that trade in violation of the restrictions of Regulation BTR are liable to the company for any profits received in such trades (and shareholders may enforce this provision derivatively);
- foreign private issuers are prohibited from making personal loans to directors, executive officers or their equivalents; and
- CEOs and CFOs of foreign private issuers must forfeit any cash bonuses, other incentive-based compensation (including equity-based compensation) received from a foreign private issuer, and any profits realized from the sale of the issuer's securities during the 12-month period following the filing with the SEC (or first public announcement of) financial results that are later restated due to "the material non-compliance of the issuer or as a result of misconduct" under the financial reporting requirements or securities laws.

F. OFFSHORE SECURITIES TRANSACTIONS UNDER REGULATION S

Regulation S under the Securities Act governs offers and sales of securities made outside the U.S. without registration under the Securities Act. Generally speaking, Regulation S codified long-standing principles of extraterritoriality adopted in interpretive rulings by the SEC and provides that the registration requirements of the Securities Act apply only to offerings of securities within the U.S. and not to offerings outside the U.S. This exclusion is available to both domestic companies and foreign private issuers.

1. Structure of Regulation S

Regulation S consists of two "safe harbor" provisions that, when satisfied, will qualify an offshore transaction for non-registration with the SEC. The two safe harbors are: an "issuer" safe harbor and a "resale" safe harbor. Each safe harbor has its own conditions, but to qualify under either safe harbor exemption, a transaction must satisfy two primary conditions: (1) the "offshore transactions" condition, and (2) the "directed selling efforts" condition; and certain additional conditions depending on the nature of the transaction and the issuer.

a. Offshore Transactions

An "offshore transaction" is an offer or sale made to a person outside the U.S. in which either (a) at the time the buy order is originated, the buyer is outside the U.S. or the seller and any person acting on its behalf reasonably believes that the buyer is outside the U.S., or (b) the transaction is executed on the physical trading floor of an established foreign securities exchange located outside the U.S., in the case of the issuer safe harbor, or through the facilities of a "designated offshore securities market" and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the U.S., in the case of the resale safe harbor. The London Stock Exchange, the Frankfurt Stock Exchange and the Paris Bourse are examples of foreign stock exchanges that the SEC has included in its list of "designated offshore securities markets."

Generally, the buyer, rather than its agent, must be outside the U.S. If the buyer is a corporation, however, it is sufficient that an authorized person or employee is outside of the U.S. Offers and sales made inside the U.S. are also considered offshore transactions if they are made to (a) certain U.S. fiduciaries of non-U.S. investors or (b) certain international organizations.

b. Directed Selling Efforts

The second primary condition of Regulation S is that "directed selling efforts" may not be made in the U.S. Directed selling efforts refer to any activity undertaken for the purpose of conditioning the market in the U.S. or that could reasonably be expected to have such an effect. Examples include placing advertisements in publications with general circulation in the U.S., mailing printed material in the U.S., or conducting promotional seminars in the U.S.

A publication has a general circulation in the U.S., if it is printed primarily for distribution in the U.S. or has had an average circulation in the U.S. of at least 15,000 during the preceding 12 months. The U.S. edition of The Financial Times, for example, would fall into this definition. Routine corporate communication, such as press releases of material events, are not considered directed selling efforts.

In the case of a global offering, marketing efforts in connection with a registered U.S. public offering or an offering exempt from the Securities Act registration requirements, such as a U.S. private placement, generally are not treated as directed selling efforts for a concurrent offering outside the U.S. being made pursuant to Regulation S.

2. Issuer Safe Harbor

The first safe harbor set forth in Securities Act Rule 903 applies to offers or sales of securities by issuers, distributors, their affiliates and persons acting on their behalf. Generally, the safe harbor's availability is determined separately for the issuer and each distributor. In order to qualify under this safe harbor provision, a transaction must meet the offshore transaction and directed selling efforts conditions described above and must fit into one of three categories described below.

a. Category 1 Offering

Securities issued by a non-U.S. issuer are eligible for Category 1 if (a) no "substantial U.S. market interest" exists for the securities, (b) the offer and sale is in an overseas directed offering, (c) the securities are backed by the full faith and credit of a non-U.S. government, or (d) the securities are offered and sold to employees of the issuer pursuant to an employee benefit plan established and administered in accordance with the laws of a country other than the U.S.

"Substantial U.S. market interest," with respect to equity securities, means (a) the U.S. public market was the largest market for the securities, or (b) 20% or more of all trading in the securities took place in the U.S. and less than 55% of such trading took place in a single foreign country during the specified period. With respect to debt securities, it means (a) 300 or more U.S. persons are holders of record for the securities, (b) $1 billion or more in aggregate principal amount is held of record by U.S. persons, and (c) 20% or more in aggregate principal amount is held of record by U.S. persons.

Many non-U.S. issuers qualify for Category 1 since, as a practical matter, relatively few non-U.S. issuers have substantial U.S. market interest in their securities, particularly in their equity securities. One exception is that certain emerging market issuers have extensive U.S. shareholder bases. As a result, such issuers may be treated as Category 2 or Category 3 issuers. No additional conditions beyond meeting the offshore transaction and directed selling efforts conditions exist for Category 1 issuers.

b. Category 2 Offering

Securities ineligible for Category 1 and that are equity securities of a reporting foreign issuer, debt securities of a reporting U.S. or foreign issuer, or debt securities of a non-reporting foreign issuer are eligible for Category 2. The following requirements, in addition to the offshore transaction and directed selling efforts conditions, apply to Category 2 issuers: (a) implementation of offering restrictions, (b) a distribution compliance period, generally ending 40 days after the closing date, during which offers or sales may not be made to U.S. persons, and (c) a confirmation or notice sent to any purchaser that is a distributor or dealer stating the restricted period prohibitions.

In order to meet the first condition, implementation of offering restrictions, the distributors must agree in writing to comply with the distribution compliance period and other selling restrictions. Any offering materials used during the distribution compliance period must disclose that the securities have not been registered under the Securities Act and may not be offered or sold in the U.S. or to a U.S. person during the restricted period.

c. Category 3 Offering

Category 3 offerings include equity securities of non-reporting foreign issuers with substantial U.S. market interest, equity securities of all U.S. issuers, and debt securities of non-reporting U.S. issuers. Very few foreign issuers will fall into this category. Category 3 offerings have more elaborate procedural requirements in addition to the distribution offering restrictions, compliance period and notice requirements.

With respect to equity securities, the following conditions apply: (a) a one-year distribution compliance period, (b) certification by the purchaser that it is not a U.S. person nor acting for a U.S. person, (c) the purchaser must agree, either by contract or through a provision in its bylaws, articles, charter or other comparable document, not to resell the securities except in compliance with Regulation S, pursuant to registration under the Securities Act or pursuant to an available exemption, and (d) there must be a legend on the securities to the effect that transfer is prohibited except in compliance with Regulation S.

With respect to debt securities, the following conditions apply: (a) when issued, the security must be represented by a temporary global security until the expiration of a 40-day distribution compliance period, and (b) the certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased the securities in a transaction that did not require registration under the Securities Act.

3. Resale Safe Harbor

The second safe harbor set forth in Securities Act Rule 904 applies to resales of securities outside the U.S. by persons other than issuers, distributors, their affiliates, and persons acting on their behalf. Securities that are initially offered outside the U.S. or in the U.S. as a private placement or as a Securities Act Rule 144A placement may be resold immediately outside the U.S. if the provisions of the safe harbor are met. In most cases, a transaction need only comply with two general conditions: the offshore transaction and directed selling efforts conditions described above.

The resale safe harbor also applies to resales outside the U.S. of “restricted securities” acquired in a private placement in the U.S.

An important effect of this application of the resale safe harbor is the increased liquidity of privately placed securities of a foreign issuer.

X. SECURITIES ISSUANCES IN CONNECTION WITH MERGERS, ACQUISITIONS AND OTHER BUSINESS COMBINATIONS

A. USING COMPANY STOCK AS CONSIDERATION—FORM S-4

Form S-4 is used for the registration of securities issued in merger and acquisition transactions: (a) statutory mergers; (b) statutory consolidations; (c) reclassifications of securities which involve the substitution of a security for another security (stock splits, reverse stock splits and changes in par value do not require the filing of a Form S-4); and (d) transfers of assets by a target company to an acquiring company in exchange for securities of the acquiring company. A Form S-4 is filed after the target company's security holders have voted on, or otherwise consented to, a plan or agreement to carry out the transaction. Registered investment companies and business development companies, as defined under the Investment Company Act of 1940, do not file Forms S-4 for the foregoing types of transactions.

Form S-4 requires disclosure with respect to the acquiring company, the target company and the business combination transaction being undertaken. The breadth of Form S-4 disclosure requirements enable companies to use the Form S-4 as both the proxy statement of the target company in its board of directors' solicitation of shareholder approval of the business combination transaction and the prospectus of the acquiring company in connection with the securities it offers as consideration in the transaction. Like Form S-3, Form S-4 permits information about the issuer to be incorporated by reference from its Exchange Act filings if the issuer is eligible. If the Form S-4 incorporates by reference information about either the acquiring company or the target company, the prospectus must be sent to security holders at least twenty days prior to the vote of the shareholders or the closing of the transaction.

The Securities Act limits the type of business combination transaction communications that may be made prior to the filing of a Form S-4 registration statement. Any communications made in advance of a Form S-4 filing that relate to the transaction must comply with one of the following rules which provide exceptions to the Section 5 prohibitions on communications concerning the sale of unregistered securities: Rule 135 (Notice of Proposed Registered Offerings), Rule 165 (Offers Made in Connection with a Business Combination Transaction) or Rule 166 (Exemption from Section 5(c) for Certain Communications in Connection with Business Combination Transactions).

Securities acquired in such a transaction can usually be offered for immediate sale by shareholders of the acquired company who received the securities as consideration. However, where either party to such a transaction is a "shell company" (i.e., a company with no or nominal operations and either has no or nominal assets or assets consisting solely or cash and cash equivalents), then Securities Act Rule 145 places certain resale restrictions on those parties considered to be "underwriters" within the meaning of the rule. Generally, any party to such transactions (other than the issuer) who offers or sells securities of the issuer in connection with the transaction, or any person or entity that is an affiliate of such a party, is deemed to be an underwriter. In order for these deemed underwriters to resell the securities received in the transaction without taking on underwriter liability to any purchaser, the issuer must be current in all of its periodic filings (except for Form 8-Ks) during the preceding twelve-month period (or such shorter period that the issuer has been subject to the periodic reporting rules) and must have filed current "Form 10" information reflecting the fact that it is no longer a shell company. "Form 10" information is the information that would otherwise accompany a registration of a new class of securities under the Exchange Act. If the issuer meets these conditions, then the deemed underwriters may resell their securities if they meet all of the conditions of Rule 144. If these deemed underwriters hold these securities for a period of six months after the transaction, they may sell the securities freely as long as the issuer remains current in its periodic reporting obligations. After one-year, these deemed underwriters may sell freely without any conditions, as long as they are not at such time, or within the previous three months, an "affiliate" of the issuer.

B. ACQUISITION SHELF

Rule 415 under the Securities Act allows, if certain conditions are met, for the registration of securities to be made in the future on a continuous or delayed basis. Once registered, these "on the shelf" securities may be used by companies in acquisitions in which all, or part, of the consideration given to the shareholders of the target company is stock of the acquiring company.

Form S-4 may be utilized as a shelf registration statement for securities to be issued in the future in connection with acquisition transactions even if the transaction does not technically fall within the list of transactions that require registered securities or otherwise fit within General Instruction A.1 of Form S-4. Form S-4 sets forth the disclosure required in connection with an acquisition shelf registration statement. In addition to the Form S-4 instructions, the SEC staff (see, e.g., *Service International Corporation* interpretive letter, December 2,

1985) has provided guidance for the procedures to be followed when making acquisitions pursuant to a shelf registration, including the following points:

- the Form S-4 should be filed at the commencement of negotiations with the target company;
- the Form S-4 need not contain information about the specific acquisition or the company being acquired;
- after the transaction is consummated, if the acquisition is material a post-effective amendment to the Form S-4 should be filed that contains all information about the transaction and the target company otherwise required by Form S-4.

Due to the flexibility offered by an acquisition shelf, a company may use the same acquisition shelf for a series of transactions. Since the securities are registered, once an acquisition is negotiated it may close relatively quickly. On the downside, however, since a company does not have to use all of its acquisition shelf registered securities, the acquisition shelf has the potential to create a market "overhang" that could affect the issuer's stock price.

XI. THE HIGH YIELD BOND MARKET AND IPOS

High yield bonds, often referred to as "junk bonds," are debt securities issued by companies that are rated below investment grade. High yield bonds are a popular instrument in corporate finance and are often first issued in connection with financing a large acquisition, frequently in a leveraged buyout (*LBO*) of a target company by a private equity firm. These LBOs can be either acquisitions of private companies or "going private" acquisitions of publicly traded companies.

A. "GOING PUBLIC" THROUGH HIGH YIELD BOND OFFERINGS

High yield bonds are typically issued in private offerings that rely on exemptions from registration under the Securities Act for both issuance, relying on Section 4(a)(2) of the Securities Act, the Regulation D safe harbors for private placements and, to the extent applicable to an offering, Regulation S (regarding offerings outside the U.S. to "non-U.S. persons"), and, for resales of these securities, Rule 144A (for resales to QIBs) and Regulation S. In connection with these private offerings, issuing companies frequently enter into registration rights agreements with the initial purchasers that rely on the so-called *Exxon Capital* "no-action" letter issued by the SEC, which permits an exchange offer registered under the Securities Act of a new series of debt securities that has all of the same substantive terms as the initial debt securities, but following which the debt securities issued in the registered exchange are freely tradable.

Equity securities are not eligible under *Exxon Capital* for this means of completing an offering expeditiously and without the possible delay of SEC review followed by the relatively short path to liquidity for the bond holders through the registered exchange offering. Under a typical registration rights agreement, the company is usually required to complete the exchange offer within 120 to 270 days (the period agreed to being subject to negotiation based on the company's ability and willingness to promptly complete the exchange and market conditions) of completion of the initial private placement, subject to modest increases in the interest rate payable on the bonds if the exchange offer is not timely completed.

These registered exchange offers result in private companies becoming public reporting companies to a limited extent under the Exchange Act, even though their equity securities remain privately held. Following the registered exchange offer, the company will be required to file periodic and current reports with the SEC (Forms 10-K, 10-Q and 8-K for domestic companies and

Forms 20-F and 6-K for foreign private issuers), but the SEC's proxy rules do not apply and the company's insiders and 10% equity holders are not required to file Section 16 reports. The company is often, but not always, required by the terms of the indenture governing the bonds to continue to voluntarily file the periodic and current reports even if they are no longer obligated to do so under Section 15(d) of the Exchange Act. This number of "voluntary filers" is sufficiently large that the Staff of the SEC has adopted reporting rules and exceptions specifically applicable to them.

In cases where a bond indenture does not require voluntary reporting, Section 15(d) allows a company to suspend reporting obligations triggered by a registration of securities under the Securities Act once it has fewer than 300 "holders of record" (which is often the case as the bonds are in large part held of record by broker-dealers on behalf of beneficial owners) and the company has completed one full year of reporting, which is the minimum reporting period for a company the completes a registered offering under the Securities Act, and has not voluntarily for independent reasons (usually in connection with listing equity securities on an national exchange) registered a class of securities under the Exchange Act or is not required to register such a class under the Exchange Act because it has greater than an applicable specified number of holders of its equity securities and assets.

B. HIGH YIELD BONDS AND EQUITY IPOS

In addition to providing companies with a taste of what it means to be a public reporting company, high yield bond offerings also usually contain provisions tailored to accommodating subsequent IPOs of the company's equity securities. One common example of this is the "equity clawback" feature.

High yield bonds generally only allow the issuer to redeem these long-term securities at a premium starting at one-half of the coupon on the bonds (e.g., a bond with a 10% coupon would require the issuer to pay a 5% premium above the face amount of any redeemed bonds) once the bonds have been outstanding for half of their maturity, or, in some cases, at a very expensive "make-whole" premium in the preceding years. This inability to "call" the bonds for a period of time ensures investors that they will continue to receive the coupon on the bonds or be handsomely compensated in the event the company finds a more cost-effective source of capital and refinances the bonds.

An exception to the "no-call" period is the equity clawback feature, which generally allows the company during the first three years of the no-call period to redeem up to 35% of the outstanding bonds with proceeds of a public equity offering at a premium equal to the coupon on the bonds (e.g., a bond with a 10% coupon would require the company to pay a 10% premium above the face amount of any redeemed bonds).

While equity clawbacks are an expensive alternative for the company, they nonetheless afford a company the ability to use IPO proceeds to “delever” the company by reducing its indebtedness and thereby reducing the risk of bankruptcy or similar restructurings that could reduce or eliminate the equity value of the company.

C. TENSIONS BETWEEN HIGH YIELD BONDS AND EQUITY IPOS

While the equity clawback feature is a prominent feature that incentivizes companies to “go public,” most of the covenants applicable to high yield bonds actually run counter to the interests of equity holders and could impair the ability of a company’s equity holders to fully realize the potential equity value of the company. The most prominent of these restrictive covenants restricts the ability of the company to enter into mergers or similar transactions and restricts the ability of the company to declare and pay cash dividends.

The limitations on mergers covenant generally prohibits the company from merging with other companies unless certain conditions are satisfied, including that the surviving company be organized in an acceptable jurisdiction (often limited to U.S. states) and that the transaction not result in unacceptable debt (or leverage) levels. For example, high yield bonds generally allow the company to incur only certain specified amounts of specific debt (e.g., debt under a credit agreement or capital leases) unless the company generates enough cash flow to satisfy its interest expense by a multiple of two. The limitations on mergers covenant often only permits mergers after which the surviving entity can incur $1 of debt under this interest coverage ratio or, sometimes, if the merger improves the ratio by reducing the overall debt level compared to the combined cash flows of the resulting company.

A related provision to the merger covenant is the change of control repurchase provision found in nearly all high yield bonds. This provision requires the company, or sometimes a third party buyer, to offer to purchase all outstanding bonds at a 1% premium above the face amount of the bonds following the occurrence of a change of control. This feature could, therefore, make it very expensive for a potential acquirer of the company because they may have to factor in the cost of replacing the bonds at a premium, particularly if the coupon on any debt incurred to refinance the bonds is higher than the coupon on the bonds.

The limitations on mergers covenant and change of control purchase provision can inhibit transactions that may result in significant value to public equity holders, for example in situations where the company is a target and the potential buyer is willing to pay a significant premium to the trading value of the public equity. Similarly, if the company plans to implement its growth strategy through acquisitions, the merger and change of control provisions may restrict the company from using both debt, in the case of the merger covenant, or equity, in the case of the change of control provision, to finance significant acquisitions.

Finally, the "restricted payments" covenant specifically limits the company's ability to pay dividends on its common stock or to repurchase common stock from equity holders. Both dividends and stock buybacks are important ways that public companies can return value to public equity holders, so limiting the ability to distribute cash profits to equity holders can limit the upside trading value of the stock.

The typical restricted payments covenant strikes a 50/50 deal with respect to earnings of the company, allowing the company to accumulate 50% of its earnings over time and use that amount to, among other things, pay dividends or undertake stock buybacks. The company must, however, keep the other 50% in the company to support the credit and collateral value of the company for bondholders, subject to enumerated exceptions, such as repurchasing specified amounts of equity securities from management.

High yield bond covenants also restrict the ability of the company to incur debt, so the combination of limitations on incurring debt and paying dividends can also limit the ability of a public company to undertake "dividend recapitalizations" whereby a large dividend is paid to shareholders that is funded with debt proceeds.

In recent years, high yield bond investors have been more accommodating to IPOs, in large part because of the typically credit-enhancing value that public equity brings to the company's risk profile, by allowing the company to also pay up to a 6% annual dividend on public equity, even if that amount exceeds the cumulative 50% earnings build-up.

The restricted payments covenant also restricts the ability of the company to invest in undertakings that the company does not control, including joint ventures, or that would have to be undertaken through a subsidiary that is not subject to the restrictive bond covenants for any of a number of reasons, including the ability to finance the undertaking with debt that the bond covenants do not permit. As a result, issuers of high yield bond covenants may be prevented from investing in ventures that have high growth potential or may generate significant returns, but for which the issuer must rely on another entity to control.

Similarly, high yield bonds often require guarantees to be provided from subsidiaries, which can limit the ability of the company to find investors who are willing to invest in a company-controlled investment in which the venture entity must provide a guaranty of the company's debt.

D. OTHER HIGH YIELD BOND FEATURES

Investors in high yield bonds share equity investors' interest in seeing the company grow in a way that will better allow it to meet its payment obligations under the bonds. Nonetheless, bond investors are creditors to the company, so they are also highly interested in ensuring that the company's cash flows are protected in ways that better ensure payment of the bonds. To this end, one of the most important concepts on which high yield bond investors focus is subordination in all of its forms.

Subordination is an assessment of how a company's high yield bonds "rank" with respect to other debt or equity of the company. This ranking can be affected by express contractual provisions, the provision of collateral to some debt, the identity of the issuer or borrower of other debt or equity and the tenor of other debt and equity.

1. Contractual Subordination

High yield bonds are often issued in the form of "senior subordinated" notes. What distinguishes senior subordinated notes from other debt of the company is that senior subordinated notes contain provisions that expressly subordinate the notes to other specified "senior debt" of the company.

Contractual subordination provisions generally provide that, in the event of a bankruptcy or similar restructuring, all senior debt must be paid in full before the senior subordinated notes are entitled to be paid. Senior debt is usually defined to include specified types of debt, such as credit facilities, as well as all debt of the company that is not expressly junior or equal to the senior subordinated notes in right of payment, as well as obligations to trade creditors and lenders that are affiliates of the company. Often, certain designated senior debt holders are afforded additional rights to not only be paid prior to the senior subordinated notes in a bankruptcy, but also to actually prohibit the company from making payments on the senior subordinated notes if the company is in default on the designated senior debt. These "blocking" rights are often an important feature that bank lenders will require in order to lend to the company on more favorable terms.

An important feature of most senior subordinated notes is an "anti-layering" covenant, which prohibits the company from incurring debt that is contractually subordinated to certain debt of the company, but also seeks to be senior to the senior subordinated notes. Allowing for such debt would allow the company to "layer" a level of debt between the senior debt the senior subordinated notes agreed to rank behind, but ahead of the senior subordinated notes.

2. Collateral Subordination

Another way that debt can rank ahead of high yield bonds or other unsecured debt is through the use of collateral to secure the other debt. For example, it is customary for high yield issuers to also have one or more credit facilities with various lending institutions. These credit facilities often include both a term loan and a revolving credit facility that the company can access and repay over time to help manage working capital and other ongoing operational expenses. Because bank facilities generally include a revolving facility, the company may depend heavily and frequently on this debt to be available to fund the business. Similarly, banks view revolving facilities as higher risk commitments because the bank faces uncertainty as to whether credit lines will be drawn and must reserve precious capital in the event that these facilities are drawn by the borrowing company.

As a result, bank facilities generally have the most lender-friendly provisions of the company's debt instruments, including the benefit of collateral from the borrower to secure payment on any debt outstanding under the credit facilities. Sometimes this collateral will include substantially all of the assets of the company, but certain types of facilities, such as "asset-based loans" (*ABLs*), are secured by specific short-term assets, such as inventory and accounts receivable.

In a bankruptcy or liquidation, secured lenders are given a preference over unsecured lenders, so secured lenders expect to recover more than unsecured lenders. As such, providing collateral to the bank lenders provides the lenders with additional assurance of payment that then reduces the cost of secured bank facilities, which unlike typical high yield bonds, generally have a floating rate of interest that is expressed as a spread above a particular index, such as the London Interbank Offered Rate (*LIBOR*) that will adjust overtime as market interest rates rise and fall.

In recent years, collateral has been increasingly utilized, or "spread," across several debt instruments by adopting contractual subordination concepts and applying them to liens. For example, a common structure provides a "first lien" to a company's credit facilities and a "second lien" to its high yield bonds. By spreading the collateral in this fashion, the senior bank lenders continue to benefit in the first instance and take comfort from the contractual lien subordination provisions that provide the junior lien holders access to the collateral only after the senior lienholders are paid in full.

This structure is beneficial to secured high yield bondholders because, even though they continue to be junior to the priority lien granted to the bank lenders, by having a second lien they are treated as secured lenders in a bankruptcy or liquidation and are entitled to be paid ahead of unsecured creditors, including senior but unsecured bonds or other general obligations of the company, such as general contractual obligations or even litigation awards. As a result, secured bonds offer the company a lower coupon than unsecured notes.

High yield bonds also contain restrictive covenants that limit the ability of the company to secure debt or other obligations ahead of the bonds. The typical liens covenant, or "negative pledge," provides that the company may not secure debt or, in some cases, other obligations, unless they provide an equal and ratable lien to secure the bonds, except for specified permitted liens. Permitted liens will generally allow the company to secure a certain amount of bank debt, capital leases, purchase money debt, secured debt existing at a company that is acquired and a range of ordinary course of business liens. The negative pledge covenant is sometimes limited to just restricting the securing of debt, rather than other obligations, of the company, which avoids a company defaulting this covenant by failing to include an ordinary course of business transaction within the definition of permitted liens.

3. Structural Subordination

One of the most complicated forms of subordination is called structural subordination, which looks to the identity and ownership of the entity to determine ranking. Structural subordination arises when the issuer of debt, such as high yield bonds, is a parent company to other subsidiaries and is particularly acute when the issuer is a holding company that does not have its own operations. In this situation, creditors of the subsidiaries, whether as lenders, bondholders, trade creditors or others, rank ahead of creditors of the parent because the subsidiary creditors have a claim against the assets of the obligor subsidiaries, whereas the parent company has only a claim as the owner of the subsidiaries common stockholder. Similarly, if the subsidiary issues preferred stock to parties other than the parent, then the claims of those preferred stockholders will rank ahead of the company's common stock claims.

For example, if a subsidiary produces a product that results in a products liability tort claim in which the claimant successfully obtains an award against the subsidiary, then the claimant may enforce the judgment against the actual assets of the subsidiary. On the other hand, for the parent has to rely on the ability of the subsidiary to pay the parent dividends or similar distributions in order to recognize the value of the subsidiary's assets. In a bankruptcy or liquidation of the subsidiary, then, the tort victim's claim will rank ahead of the parent because the parent holds equity of the subsidiary, while the tort victim holds a senior claim. As a result, creditors of the parent also only have the parent's equity interest in the subsidiaries to support their extensions of credit to the parent.

High yield bonds respond to structural subordination in three ways to help protect against being structurally subordinated to the parent company's subsidiary obligors: (1) upstream guarantees of the bonds from subsidiaries; (2) limitations on the ability of subsidiaries to incur debt; and (3) limitations on the ability of subsidiaries to restrict the ability to pay dividends and similar distributions.

Subsidiary guarantees are present in nearly all high yield bonds in which the company has subsidiaries because such a guarantee represents a direct debt claim against the subsidiary ranking equally with other similar obligations of the subsidiary. So, subsidiary guarantees can be contractually subordinated or secured to produce the same results as discussed above but with respect to the ranking of a bondholder's claim against a subsidiary guarantor.

By limiting the amount of debt subsidiaries can incur, high yield bonds limit the amount of obligations that subsidiaries can incur that could rank ahead of the bondholders' claims. This limitation does not, however, restrict the ability of subsidiaries to incur trade credit nor does it protect from obligations other than debt, such as litigation awards or other contractual obligations.

Limitations on dividend restrictions, called "dividend stoppers," also help ensure that subsidiaries are able to distribute cash to the parent, cash which the parent creditors are relying upon to be available to service the parent's debt.

4. Temporal Subordination

Finally, the tenor of debt can affect the effective ranking of debt because even debt that is contractually subordinated to high yield bonds that matures sooner than the high yield bonds will get paid ahead of the high yield bonds in time. This raises the risk that the company is able to pay junior debt in full with cash or other assets that then become unavailable to pay the bonds and result in the bonds not being paid in full. High yield bonds address this risk by limiting the ability to refinance junior debt ahead of its maturity with other debt that matures either sooner than the maturity of the debt being refinanced or sooner than the maturity of the notes.

E. VARIOUS OTHER HIGH YIELD BOND COVENANTS

In addition to the foregoing restrictive covenants, high yield bond indentures often include covenants that restrict a range of other activities, such as affiliate transactions, selling assets and entering new lines of business. Also, in those cases where a company is not required to undertake a registered exchange offer for new bonds, the bond indenture will contain a robust list of reporting requirements that will borrow from or mirror those of public reporting companies, but rely on websites and other means of making such information available to bondholders or potential bondholders.

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EXHIBIT A

SAMPLE

CODE OF ETHICS APPLICABLE TO SENIOR EXECUTIVES

On , 201 , the Board of Directors of adopted this Code of Ethics Applicable to Senior Executives as contemplated by the Sarbanes-Oxley Act of 2002. It is critical to the success of the Company and in the best interests of its stockholders that its employees conduct themselves honestly and ethically. In particular, each senior executive of the Company, including the Chief Executive Officer, the Chief Financial Officer, [*the principal accounting officer, if not the CFO*], the Controller [*name any other positions performing similar functions and consider expanding policy to cover others in the Company serving in finance, accounting, treasury, tax or investor relations roles*] ("Senior Executives"), are required to observe the highest standards of ethical business conduct, including strict adherence to this Code of Ethics Applicable to Senior Executives ("this Code") and the Company's [*name of general Code of Ethics and/or Standards of Business Conduct*] applicable to all employees, which this Code supplements. Accordingly, each Senior Executive must comply with the letter and spirit of the following:

- Each Senior Executive will act at all times honestly and ethically, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships. For purposes of this Code, the phrase "actual or apparent conflict of interest" shall be broadly construed and include, for example, direct conflicts, indirect conflicts, potential conflicts, apparent conflicts and any other personal, business or professional relationship or dealings that has a reasonable possibility of creating even the mere appearance of impropriety.
- Each Senior Executive must ensure that all reasonable and necessary steps within his or her areas of responsibility are taken to provide full, fair, accurate, timely and understandable disclosure in reports and documents that the Company files with or submits to the Securities and Exchange Commission or state regulators, and in all other regulatory filings. In addition, Senior Executives must provide full, fair, accurate, and understandable information whenever communicating with the Company's stockholders or the general public.
- Each Senior Executive must take all reasonable measures to protect the confidentiality of non-public information about the Company, its business, operations and customers obtained or created in connection with such

Senior Executive Officer's activities and to prevent the unauthorized disclosure of any such information, unless required by law, regulation or legal or regulatory process.

- All Senior Executives must conduct Company business in compliance with all applicable federal, state, foreign and local laws, rules and regulations.
- Senior Executives shall not directly or indirectly take any action to fraudulently influence, coerce, manipulate or mislead the Company's independent public auditors for the purposes of rendering the financial statements of the Company misleading.
- It is each Senior Executive's responsibility to notify promptly the General Counsel or Chairman of the Audit Committee of the Board of Director's regarding any actual or potential violation of this Code and/or any applicable securities or other laws, rules or regulations by any Senior Executive or of the Company's [*name of general Code of Ethics and/or Standards of Business Conduct*] by any employee. Senior executives may choose to remain anonymous in reporting any possible violation of this Code. All Senior Executives are responsible for ensuring that their own conduct complies with this Code.
- Anyone who violates the provisions of this Code by engaging in unethical conduct, failing to report conduct potentially violative of this Code or refusing to participate in any investigation of such conduct, will be subject to disciplinary actions, up to and including termination of service with the Company. Violations of this Code may also constitute violations of law and may result in civil or criminal penalties for a Senior Executive or the Company.
- The Board of Directors of the Company shall be responsible for the administration of this Code and shall have the sole authority to amend this Code or grant waivers of its provisions. Waivers will be disclosed as required by the Securities Exchange Act of 1934 and the rules thereunder and the applicable rules of the New York Stock Exchange.

ACKNOWLEDGMENT

The undersigned Senior Executive hereby acknowledges that the Executive has received a copy of the Company's Code of Ethics Applicable to Senior Executives and that he or she has read and understood this Code in its entirety and agrees to abide by it. The Senior Executive further acknowledges that it is his or her responsibility to seek clarification from the office of the Company's General Counsel if any application of the Code to a particular circumstance is not clear. The Senior Executive acknowledges that the Senior Executive's continued service with the Company requires the Senior Executive to fully adhere to this Code and that failure to do so can result in disciplinary action up to and including termination of the Senior Executive's employment by the Company.

____

Name:

Dated:______________________________

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EXHIBIT B

SAMPLE INDEMNITY AGREEMENT
[For a Delaware Corporation]

This Indemnity Agreement, dated as of , 201 (the “Agreement”) is made by and between , a Delaware corporation (the “Company”) and , (the “Indemnitee”).

RECITALS

A. The Company is aware that competent and experienced persons are increasingly reluctant to serve as directors or officers of corporations unless they are protected by adequate indemnification, due to increased exposure to litigation costs and risk resulting from their service to such corporations, and due to the fact that the exposure frequently bears no reasonable relationship to the compensation of such directors and officers;

B. The statutes and judicial decisions regarding the duties of directors and officers are often difficult to apply, ambiguous, or conflicting, and therefore fail to provide such directors and officers with adequate, reliable knowledge of legal risks to which they are exposed or information regarding the proper course of action to take;

C. Plaintiffs often seek damages in such large amounts and the costs of litigation may be so great (whether or not the case is meritorious), that the defense and/or settlement of such litigation is usually beyond the personal resources of directors and officers;

D. Based upon their experience as business managers, the Board of Directors of the Company (the “Board”) has concluded that, to retain and attract talented and experienced individuals to serve as officers and directors of the Company and its “subsidiaries” (as defined in Section 1 below) and to encourage such individuals to take the business risks necessary for the success of the Company and its subsidiaries, it is necessary for the Company to contractually indemnify its directors and certain of its officers, and the directors and certain of the officers of its subsidiaries, and to assume for itself maximum liability for expenses and damages in connection with claims against such officers and directors in connection with their service to the Company and its subsidiaries, and has further concluded that the failure to provide such contractual indemnification could result in great harm to the Company and its subsidiaries and the Company’s stockholders;

E. The Certificate of Incorporation of the Company, the Bylaws of the Company and the General Corporation Law of the State of Delaware provide for the elimination of personal liability on the part of directors, officers, employees and agents of the Company for monetary damages resulting from certain actions taken in such capacity and permit the indemnification of directors, officers, employees and agents of the Company and specifically provide they are not exclusive, and thereby contemplate that contracts may be entered into between the Company and persons providing services to it; and

F. The Company desires and has requested the Indemnitee to serve or continue to serve as a director or officer of the Company and/or one or more of its subsidiaries free from undue concern for claims for damages arising out of or related to such services to the Company and/or one or more of its subsidiaries.

NOW, THEREFORE, the parties hereto, intending to be legally bound, hereby agree as follows:

1. *Definitions*. For the purposes of this Agreement, the following terms shall have the meanings set forth below:

(a) *Agent*. "Agent" means any person who (i) is or was a director, officer, employee, or other agent of the Company or a subsidiary of the Company, (ii) is or was serving at the request of, for the convenience of, or to represent the "interest of the Company" or a subsidiary of the Company as a director, officer, trustee, partner, employee or agent of another foreign or domestic corpo- ration, partnership, limited liability company, joint venture, trust, foundation, association, organization or other legal entity or enterprise or (iii) is or was serving in any capacity with respect to any employee benefits plans of the Company or any subsidiary. For purposes of subsection (ii) of this Section 1(a), if Indemnitee is serving or has served as a director, officer, trustee, partner, employee or agent of a subsidiary, Indemnitee shall be deemed to be serving at the request of the Company.

(b) *Controlled*. "Controlled" means subject to the power to exercise a controlling influence over the management or policies of a corporation, partnership, joint venture, trust or other entity.

(c) *Expenses*. "Expenses" includes all direct and indirect costs, fees and expenses of any type or nature whatsoever (including, without limitation, all reasonable attorneys' fees and related disbursements and retainers, other out-of-pocket costs such as fees and disbursements of expert witnesses, private investigators and professional advisors, court costs, transcript costs, fees of experts, duplicating, printing and binding costs, telephone and fax transmission charges, postage, delivery services, secretarial services and other disbursements and expenses and reasonable compensation for time spent by the Indemnitee for which he is not otherwise compensated by the Company or any third party) actually and reasonably incurred by the Indemnitee in connection with either the investigation, defense, settlement or appeal of, or otherwise related to a proceeding or establishing or enforcing a right to indemnification under this Agreement, Section 8.75 or otherwise.

(d) *Proceeding*. "Proceeding" means any threatened, pending, or completed claim, action, suit, arbitration, alternate dispute resolution process, investigation, administrative hearing, appeal or any other proceeding, whether civil, criminal, administrative, investigative or any other type whatsoever, whether formal or informal, including a proceeding initiated by Indemnitee pursuant to Section 7 of this Agreement to enforce Indemnitee's rights hereunder.

(e) *Subsidiary*. "subsidiary" means (i) any corporation of which 50% or more of the outstanding voting securities are owned directly or indirectly by the Company, or which is otherwise controlled by the Company, (ii) any partnership, joint venture, limited liability company, trust or other entity of which 50% or more of the equity interest is owned directly or indirectly by the Company, or which is otherwise controlled by the Company or (iii) the Company owns a general partner or managing member or similar interest.

2. *Agreement to Serve*. The Indemnitee agrees to serve and/or continue to serve as an agent of the Company, at its will (or under separate agreement, if such agreement exists), in the capacity Indemnitee currently serves as an agent of the Company; provided, however, that nothing contained in this Agreement is intended to or shall (i) restrict the ability of the Indemnitee to resign at any time and for any reason from its current position, (ii) create any right to continued employment of the Indemnitee in its current or any other position, or (iii) restrict the ability of the Company to terminate the employment or agency of Indemnitee at any time and for any reason.

3. *Indemnification as Agent*.

(a) *Third Party Actions*. If the Indemnitee was or is a party or is threatened to be made a party to any proceeding (other than an action by or in the right of the Company) by reason of the fact that he is or was an agent of the Company, or by reason of anything done or not done by him in any such capacity or otherwise at the request of the Company or any of its officers, directors, or stockholders, the Company shall indemnify the Indemnitee against any and all expenses and liabilities of any type whatsoever (including, but not limited to, judgments, damages, liabilities, losses, fines, excise taxes, penalties and amounts paid in settlement) actually and reasonably incurred by him in connection with the investigation, defense, settlement or appeal of, or otherwise related to such proceeding, if she acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Company, and, with respect to any criminal action or proceeding, if she had no reasonable cause to believe his conduct was unlawful.

(b) *Derivative Actions*. If the Indemnitee was or is a party or is threatened to be made a party to any proceeding by or in the right of the Company to procure a judgment in its favor by reason of the fact that he is or was an agent of the Company, or by reason of anything done or not done by him in any such capacity, the Company shall indemnify the Indemnitee against any amounts paid in settlement of any such proceeding and any and all expenses and liabilities of any type whatsoever (including, but not limited to, judgments, damages, liabilities, losses, fines, excise taxes, penalties and amounts paid in settlement) actually and reasonably incurred by him in connection with the investigation, defense, settlement, or appeal of, or otherwise related to such proceeding, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Company; *except* that no indemnification under this subsection shall be made with respect to any claim, issue or matter as to which such person has been finally adjudged by a court of competent jurisdiction to have been liable to the Company, unless and only to the extent that the court in which such proceeding was brought shall determine upon application that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court shall deem proper.

(c) *Other Actions and Amendments*. In addition to the indemnification provided above, the Company shall indemnify Indemnitee to the fullest extent now or hereafter permitted by law, with respect to any expenses and liabilities of any type whatsoever arising because the Indemnitee was or is a party or is threatened to be made a party to any proceeding by reason of the fact that he is or was an agent of the Company, or by reason of anything done or not done by him in any such capacity or otherwise at the request of the Company or any of its officers, directors, or stockholders. If the [General Corporation Law of the State of Delaware (the "Delaware Law")] is amended after the date hereof to permit the Company to indemnify Indemnitee for expenses or liabilities, or to indemnify Indemnitee with respect to any action or proceeding, not contemplated by this Agreement, then this Agreement (without any further action be either party hereto) shall automatically be deemed to be amended to require that the Company indemnify Indemnitee to the fullest extent permitted by the [Delaware Law].

4. *Indemnification as Witness*. Notwithstanding any other provision of this Agreement, to the extent the Indemnitee is, by reason of the fact that she is or was an agent of the Company, a witness in any proceeding, the Indemnitee shall be indemnified against any and all expenses actually and reasonably incurred by or for her in connection therewith.

5. *Advancement of Expenses*. Subject to Section 8(a) below, the Company shall advance all expenses actually and reasonably incurred by the Indemnitee in connection with the investigation, defense, settlement or appeal of, or otherwise related to any proceeding to which the Indemnitee is a party or is threatened to be made a party by reason of the fact that the Indemnitee is or was an agent of the Company. Indemnitee hereby agrees to repay such amounts advanced, without interest, only if, and to the extent that, it shall ultimately be determined pursuant to Section 7 below that the Indemnitee is not entitled to be indemnified by the Company. The advances to be made hereunder shall be paid by the Company to the Indemnitee within ten (10) days following delivery of a written request therefor by the Indemnitee to the Company.

6. *Indemnification Procedures*.

(a) *Notice by Indemnitee*. Promptly after receipt by the Indemnitee of notice of the commencement of or the threat of commencement of any proceeding, the Indemnitee shall, if the Indemnitee believes that indemnification with respect thereto may be sought from the Company under this Agreement, notify the Company of the commencement or threat of commencement thereof; provided that the failure to give such notice shall not impair Indemnitee's rights under this Agreement.

(b) *Notice to Insurer*. If, at the time of the receipt of a notice of the commencement of a proceeding pursuant to Section 6(a) above, the

Company has in effect an insurance policy or policies providing directors' and officers' liability insurance, the Company shall give prompt notice of the commencement of such proceeding to the insurers in accordance with the procedures set forth in the respective policies. The Company shall thereafter take all necessary or desirable action to cause such insurers to pay, on behalf of the Indemnitee, all amounts payable as a result of such proceeding in accordance with the terms of such policies.

(c) *Assumption of Defense.* In the event the Company shall be obligated to pay the expenses of the Indemnitee with respect to any proceeding, the Company shall be entitled to assume the defense of such proceeding, with counsel of its choosing, upon the delivery to the Indemnitee of written notice of its election to do so, which written notice shall be delivered within ten (10) calendar days after receipt of written notice of the proceeding pursuant to Section 6(a) above. After delivery of such notice, the Company will not be liable to the Indemnitee under this Agreement for any fees and expenses of counsel which are subsequently incurred by the Indemnitee with respect to the same proceeding; provided, however, that the Indemnitee shall have the right to employ her counsel in any such proceeding at the Indemnitee's expense; and provided further, that if (i) the employment of counsel by the Indemnitee has been previously authorized by the Company, or (ii) the Indemnitee shall have reasonably concluded that there may be a conflict of interest between the Company and the Indemnitee in the conduct of any such defense or that Indemnitee may have separate defenses or counterclaims to assert with respect to any issue which may not be consistent with the position of other defendants in such proceeding, or (iii) the Company shall not, in fact, have employed counsel to assume the defense of such proceeding in a timely manner, then, in any such case, the fees and expenses of Indemnitee's counsel shall be at the expense of the Company. In addition, if the Company fails to comply with any of its obligations under this Agreement or in the event that the Company or any other person takes any action to declare this Agreement void or unenforceable, or institutes any action, suit or proceeding to deny or to recover from Indemnitee the benefits intended to be provided to Indemnitee hereunder, Indemnitee shall have the right to retain counsel of Indemnitee's choice, at the expense of the Company, to represent Indemnitee in connection with any such matter. The Company shall not, without the prior written consent of Indemnitee, consent to the entry of any judgment against Indemnitee or enter into any settlement or compromise which (i) includes an admission of fault of Indemnitee or (ii) does not include, as an unconditional term thereof, the full release of Indemnitee from all liability in respect of such Proceeding, which release shall be in form and substance reasonably satisfactory to Indemnitee. This Section 6(c) shall not apply to a Proceeding brought by Indemnitee under Section 7 below or pursuant to Section 8(a) below.

(d) *Subrogation.* In the event of payment under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of the Indemnitee. Indemnitee shall execute all documents required and shall do everything that may be necessary to secure such rights, including the execution of such documents necessary to enable the Company to effectively bring suit to enforce such rights.

7. *Determination of Right to Indemnification.*

(a) *Successful Proceeding.* To the extent the Indemnitee has been successful, on the merits or otherwise, in the defense of any proceeding referred to in Section 3 above, the Company shall indemnify the Indemnitee against any and all expenses actually and reasonably incurred by her in connection therewith. If Indemnitee is not wholly successful in such proceeding but is successful, on the merits or otherwise, as to one or more but less than all claims, issues or matters in such proceeding, the Company shall indemnify Indemnitee against any and all expenses actually and reasonably incurred by or for her in connection with each successfully resolved claim, issue or matter. For purposes of this Section 7(a), the termination of any proceeding, or any claim, issue or matter in such a proceeding, by dismissal, with or without prejudice, by reason of settlement, judgment, order or otherwise, shall be deemed to be a successful result as to such proceeding, claim, issue or matter, so long as there has been no finding (either adjudicated or pursuant to Section 7(c) below) that Indemnitee (i) did not act in good faith, or (ii) did not act in a manner reasonably believed to be in, or not opposed to, the best interests of the Company, or (iii) with respect to any criminal proceeding, had reasonable grounds to believe his conduct was unlawful.

(b) *Other Proceeding.* In the event that Section 7(a) above is inapplicable, or applicable only in part, the Company shall nevertheless indemnify the Indemnitee unless, and only to the extent that, the Company shall prove by clear and convincing evidence to a forum listed in

Section 7(c) below that the Indemnitee has not met the applicable standard of conduct set forth in Section 3 above, if any, which entitles Indemnitee to such indemnification.

(c) *Forum in Event of Dispute.* The Indemnitee shall be entitled to select the forum in which the validity of the Company's claim under Section 7(b) hereof that the Indemnitee is not entitled to indemnification will be heard, from among the following:

(1) a quorum of the Board consisting of directors who are not parties to the proceeding for which indemnification is being sought;

(2) if a quorum of the Board is not obtainable (or, even if obtainable, if a quorum of the Board described in clause (i) above concurs), legal counsel (with no prior relationship to Indemnitee) selected by the Indemnitee, and reasonably approved by the Board, which counsel shall make such determination in a written opinion; or

(3) the stockholders of the Company.

(d) *Submission of Company's Claim.* As soon as practicable, and in no event later than thirty (30) days after written notice of the Indemnitee's choice of forum pursuant to Section 7(c) above, the Company shall, at its own expense, submit to the selected forum in such manner as the Indemnitee or the Indemnitee's counsel may reasonably request, its claim that the Indemnitee is not entitled to indemnification. The Company shall act in the utmost good faith to assure the Indemnitee a complete opportunity to defend against such claim.

(e) *Appeal to Court.* Notwithstanding a determination by any forum listed in Section 7(c) above that Indemnitee is not entitled to indemnification with respect to a specific proceeding, the Indemnitee shall have the right to apply to the court in which that proceeding is or was pending or any other court of competent jurisdiction, for the purpose of enforcing the Indemnitee's right to indemnification pursuant to this Agreement.

(f) *Indemnity for Expenses in Enforcement of Agreement.* Notwithstanding any other provision in this Agreement to the contrary, the Company shall indemnify the Indemnitee against all expenses incurred by the Indemnitee in connection with any hearing or proceeding under this Section 7 involving the Indemnitee and against all expenses incurred by the Indemnitee in connection with any other proceeding between the Company and the Indemnitee involving the interpretation or enforcement of the rights of the Indemnitee under this Agreement unless a court of competent jurisdiction finds that each of the claims and/or defenses of the Indemnitee in any such proceeding was frivolous or made in bad faith.

(g) *Effect of Certain Resolutions.* Neither the settlement or termination of any proceeding nor the failure of the Company to award indemnification or to determine that indemnification is payable shall create a presumption that Indemnitee is not entitled to indemnification hereunder. In addition, the termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent shall not create a presumption that Indemnitee did not act in good faith and in a manner which Indemnitee reasonably believed to be in or not opposed to the best interests of the Company or, with respect to any criminal Proceeding, had reasonable cause to believe that Indemnitee's action was unlawful.

(h) *Failure to Act Not a Defense.* The failure of the Company (including its Board of Directors or any committee thereof, independent legal counsel, or stockholders) to make a determination concerning the permissibility of indemnification hereunder or the advancement of expenses under this Agreement shall not be a defense in any action brought under Section 7 above, and shall not create a presumption that such indemnification or advancement is not permissible.

8. *Exceptions.*

(a) *Claims Initiated by Indemnitee.* Any other provision herein to the contrary notwithstanding, the Company shall not be obligated pursuant to the terms of this Agreement to indemnify or advance expenses to the Indemnitee with respect to proceedings or claims initiated or brought voluntarily by the Indemnitee and not by way of defense or counterclaims asserted by Indemnitee in a proceeding brought against Indemnitee, except with respect to proceedings brought to establish or enforce a right to indemnification under this Agreement or any other statute or law or otherwise as required under the General Corporation Law of the State of Delaware, but such indemnification or advancement of expenses may be provided by the Company in specific cases if the Board finds it to be appropriate.

(b) *Lack of Good Faith.* Any other provision herein to the contrary notwithstanding, the Company shall not be obligated pursuant to the terms of this Agreement to indemnify the Indemnitee for any expenses incurred by the Indemnitee with respect to any proceeding instituted by the Indemnitee to enforce or interpret this Agreement, if a court of competent jurisdiction determines that each of the material assertions made by the Indemnitee in such proceeding was frivolous or made in bad faith.

(c) *Unauthorized Settlements.* Any other provision herein to the contrary notwithstanding, the Company shall not be obligated pursuant to the terms of this Agreement to indemnify the Indemnitee for any amount paid in settlement of a proceeding effected without the prior written consent of the Company. The Company agrees not to unreasonably withhold its consent to any settlement.

(d) *No Duplicative Payment.* The Company shall not be liable under this Agreement to make any payment of amounts otherwise indemnifiable hereunder if and to the extent that Indemnitee has otherwise actually received such payment under any insurance policy, contract, agreement or otherwise.

9. *Non-exclusivity.* The provisions for indemnification and advancement of expenses set forth in this Agreement shall not be deemed exclusive of any other rights which the Indemnitee may have under any provision of law, the Company's Amended and Restated Certificate of Incorporation or Bylaws, the vote of the Company's stockholders or disinterested directors, other agreements, or otherwise, both as to action in his official capacity and as to action in another capacity while occupying a position as an agent of the Company.

10. *Interpretation of Agreement; Scope.* It is understood that the parties hereto intend this Agreement to be interpreted and enforced so as to provide indemnification to the Indemnitee to the fullest extent now or hereafter permitted by law. The benefits of this Agreement shall inure to the Indemnitee both with respect to acts done or not done by him both before and after this date.

11. *Burden of Proof.* In making a determination with respect to entitlement to indemnification hereunder, the person or persons or entity making such determination shall presume that Indemnitee is entitled to indemnification under this Agreement, and the Company shall have the burden of proof to overcome that presumption in connection with the making by any person, persons or entity of any determination contrary to that presumption.

12. *Severability.* If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable for any reason whatsoever, (i) the

validity, legality and enforceability of the remaining provisions of the Agreement (including, without limitation, all portions of any paragraphs of this Agreement containing any such provision held to be invalid, illegal or unenforceable, that are not themselves invalid, illegal or unenforceable) shall not in any way be affected or impaired thereby, and (ii) to the fullest extent possible, the provisions of this Agreement (including, without limitation, all portions of any paragraph of this Agreement containing any such provision held to be invalid, illegal or unenforceable, that are not themselves invalid, illegal or unenforceable) shall be construed so as to give effect to the intent manifested by the provision held invalid, illegal or unenforceable and to give effect to Section 10 hereof.

13. *Modification and Waiver.* Except as contemplated by Section 3(c), no supplement, modification or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar) nor shall such waiver constitute a continuing waiver.

14. *Survival, Successors and Assigns.* The Indemnitee's rights under this Agreement shall continue after the Indemnitee has ceased acting as an agent of the Company. The terms of this Agreement shall be binding on and inure to the benefit of the Company and its successors and assigns and shall be binding on and inure to the benefit of Indemnitee and Indemnitee's heirs, executors and administrators.

15. *Gender.* The masculine, feminine or neuter pronouns used herein shall be interpreted without regard to gender, and the use of the singular or plural shall be deemed to include the other whenever the context so requires.

16. *Notice.* All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed duly given (i) if delivered by hand and received by the party addressee or (ii) if mailed by certified or registered mail with postage prepaid, on the third business day after the mailing date. Addresses for notice to either party are as shown on the signature page of this Agreement, or as subsequently modified by written notice.

17. *Governing Law.* This Agreement shall be governed exclusively by and construed according to the laws of the State of Delaware without regard to principles of conflicts of laws.

18. *Consent to Jurisdiction*. The Company and the Indemnitee each hereby irrevocably consent to the jurisdiction of the courts of the State of Delaware for all purposes in connection with any action or proceeding which arises out of or relates to this Agreement and agree that any action instituted under this Agreement shall be brought only in the state courts of the State of Delaware.

19. *Counterparts*. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all such counterparts shall together constitute one and the same instrument.

The parties hereto have entered into this Indemnity Agreement effective as of the date first above written.

[Name of Company]

By: ______________________________

Its: ______________________________

Address: ______________________________

____

INDEMNITEE: ____________

____

Address: __________________

____

EXHIBIT C
Sample Long-Term Incentive Plan

ARTICLE 1.
BACKGROUND AND PURPOSE OF THE PLAN

1.1. Background. This 201 Long-Term Incentive Plan (the "Plan") permits the grant of Incentive Stock Options, Nonstatutory Stock Options, Stock Appreciation Rights, Restricted Stock, Restricted Stock Units, and other equity-based awards.

1.2. Purpose. The purposes of the Plan are (a) to attract and retain highly competent persons as Service Providers; (b) to provide additional incentives to Service Providers by aligning their interests with those of the Company's shareholders; and (c) to promote the success of the Company's business.

1.3. Eligibility. Service Providers who are Employees, Consultants determined by the Committee to be significantly responsible for the success and future growth and profitability of the Company, or Directors are eligible to be granted Awards under the Plan. However, Incentive Stock Options may be granted only to Employees.

1.4. Definitions. Capitalized terms used in the Plan and not otherwise defined herein shall have the meanings assigned to such terms in the attached Appendix.

ARTICLE 2.
SHARE LIMITS

2.1. Shares Subject to the Plan.

(a) *Share Reserve*. Subject to adjustment under Section 2.3 of the Plan, Awards may be made under the Plan for up to **[insert: applicable number]** Shares plus the number of Shares previously authorized for issuance under the Company's 200 Stock Option Plan (the "Existing Plan")[1] (i) which are not subject to outstanding awards on **[insert: date]**; or (ii) which become available for future award grants as a result of the subsequent forfeiture, lapse or expiration of awards granted pursuant to the Existing Plan that were outstanding as of **[insert: date]**. All of the available Shares may, but need not, be issued pursuant to the exercise of Incentive Stock Options. At all times the

1 Alternatively, the Company could terminate the Existing Plan as of the initial public offering and not rollover shares to the post-initial public offering plan.

Company will reserve and keep available a sufficient number of Shares to satisfy the requirements of all outstanding Awards made under the Plan and all other outstanding but unvested Awards made under the Plan that are to be settled in Shares.

(b) *Shares Counted Against Limitation.* If an Award is exercised, in whole or in part, by delivery or attestation of Shares under Section 5.4(b), or if the tax withholding obligation is satisfied by withholding Shares under Section 10.7(b), the number of Shares deemed to have been issued under the Plan (for purposes of the limitation set forth in this Section 2.1) shall be the number of Shares that were subject to the Award or portion thereof so exercised and not the net number of Shares actually issued upon such exercise.[2]

(c) *Lapsed Awards.* If an Award: (i) expires; (ii) is terminated, surrendered, or canceled without having been exercised in full; or (iii) is otherwise forfeited in whole or in part (including as a result of Shares constituting or subject to an Award being repurchased by the Company pursuant to a contractual repurchase right), then the unissued Shares that were subject to such Award and/or such surrendered, canceled, or forfeited Shares (as the case may be) shall become available for future grant or sale under the Plan (unless the Plan has terminated), subject however, in the case of Incentive Stock Options, to any limitations under the Code.

(e) *Substitute Awards.* The Committee may grant Awards under the Plan in substitution for stock and stock based awards held by employees, directors, consultants or advisors of another company (an "Acquired Company") in connection with a merger, consolidation or similar transaction involving such Acquired Company with the Company or an Affiliate or the acquisition by the Company or an Affiliate of property or stock of the Acquired Company. The Committee may direct that the substitute Awards be granted on such terms and conditions as the Committee considers appropriate in the circumstances. Any substitute Awards granted under the Plan shall not count against the share limitations set forth in Section 2.1(a) and 2.2.

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2 This share counting practice is consistent with the manner in which Institutional Shareholder Services Inc. (ISS) counts shares in adjusting the pool available for awards under an equity compensation plan.

2.2. Individual Share Limit. In any Tax Year, no Service Provider shall be granted Awards with respect to more than Shares.[3] The limit described in this Section 2.2 shall be construed and applied consistently with Section 162(m) of the Code, except that the limit shall apply to all Service Providers.

(a) *Awards not Settled in Shares*. If an Award is to be settled in cash or any medium other than Shares, the number of Shares on which the Award is based shall count toward the individual share limit set forth in this Section 2.2.

(b) *Canceled Awards*. Any Awards granted to a Participant that are canceled shall continue to count toward the individual share limit applicable to that Participant set forth in this Section 2.2.

2.3. Adjustments.

(a) If there is any dividend or distribution payable in Shares, or any stock split, reverse stock split, combination or reclassification of Shares, or any other similar change in the number of outstanding Shares, then the maximum aggregate number of Shares available for Awards under Section 2.1 of the Plan, the maximum number of Shares issuable to a Service Provider under Section 2.2 of the Plan, and any other limitation under this Plan on the maximum number of Shares issuable to an individual or in the aggregate shall be proportionately adjusted (and rounded down to a whole number) by the Committee as it deems equitable in its discretion to prevent dilution or enlargement of the rights of the Participants. The Committee's determination with respect to any such adjustments shall be conclusive.

(b) In the event that there is any extraordinary dividend or other distribution in respect of the Shares, recapitalization, reclassification, merger, reorganization, consolidation, combination, sale of assets, split-up, exchange, spin-off or other extraordinary event, then the Committee shall make provision for a cash payment, for the substitution or exchange of any or all outstanding Awards or a combination of the foregoing, based upon the distribution or consideration payable to holders of the Shares in respect of such event or on such other terms as the Committee otherwise deems appropriate.

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3 Plans may provide separate limits for the number of whole share awards (such as restricted stock) versus partial share awards (such as stock options and stock appreciation rights).

Article 3.
Administration of the Plan

3.1. Administrator. The Plan shall be administered by the Committee.

3.2. Powers of the Committee. Subject to the provisions of the Plan, Applicable Law, and the specific duties delegated by the Board to the Committee, the Committee shall have the authority in its discretion: (a) to determine the Fair Market Value; (b) to select the Service Providers to whom Awards may be granted hereunder and the types of Awards to be granted to each; (c) to determine the number of Shares to be covered by each Award granted hereunder; (d) to determine whether, to what extent, and under what circumstances an Award may be settled in cash, Shares, other securities, other Awards, or other property; (e) to approve forms of Award Agreements; (f) to determine, in a manner consistent with the terms of the Plan, the terms and conditions of any Award granted hereunder, based on such factors as the Committee, in its sole discretion, shall determine; (g) to construe and interpret the terms of the Plan and Award Agreements; (h) to correct any defect, supply any omission, or reconcile any inconsistency in the Plan or any Award Agreement in the manner and to the extent it shall deem desirable to carry out the purposes of the Plan; (i) to prescribe, amend, and rescind rules and regulations relating to the Plan, including stock option grant procedures and rules and regulations relating to sub-plans established pursuant to Section 12.1 of the Plan; (j) to authorize withholding arrangements pursuant to Section 10.7(b) of the Plan; (k) to authorize any person to execute on behalf of the Company any instrument required to effect the grant of an Award previously granted by the Committee (l) to accelerate the vesting of an Award; and (m) to make all other determinations and take all other action described in the Plan or as the Committee otherwise deems necessary or advisable for administering the Plan and effectuating its purposes.

3.3. Compliance with Applicable Law. The Committee shall administer, construe, interpret, and exercise discretion under the Plan and each Award Agreement in a manner that is consistent and in compliance with a reasonable, good faith interpretation of all Applicable Laws, and that avoids (to the extent practicable) the classification of any Award as “deferred compensation” for purposes of Section 409A of the Code, as determined by the Committee.

3.4. Effect of Committee’s Decision and Committee’s Liability. The Committee’s decisions, determinations and interpretations shall be final and binding on all Participants and any other holders of Awards. Neither the Committee nor any of its members shall be liable for any act, omission, interpretation, construction, or determination made in good faith in connection with the Plan or any Award Agreement.

3.5. Delegation to Executive Officers. To the extent permitted by Applicable Law, the Committee may delegate to one or more Executive Officers the powers: (a) to designate Service Providers who are not Executive Officers as eligible to participate in the Plan; and (b) to determine the amount and type of Awards that may be granted to Service Providers who are not Executive Officers.[4]

3.6. Awards may be Granted Separately or Together. In the Committee's discretion, Awards may be granted alone, in addition to, or in tandem with any other Award or any award granted under another plan of the Company or an Affiliate. Awards granted in addition to or in tandem with other awards may be granted either at the same time or at different times.

ARTICLE 4.
VESTING AND PERFORMANCE OBJECTIVES

4.1. General. The vesting schedule or Period of Restriction for any Award shall be specified in the Award Agreement.[5] The criteria for vesting and for removing restrictions on any Award may include (i) performance of substantial services for the Company for a specified period; (ii) achievement of one or more Performance Objectives; or (iii) a combination of (i) and (ii), as determined by the Committee.

4.2. Period of Absence from Providing Substantial Services. To the extent that vesting or removal of restrictions is contingent on performance of substantial services for a specified period, a leave of absence (whether paid or unpaid) shall not count toward the required period of service unless the Award Agreement provides otherwise.

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4 Grants by Executive Officers should be made pursuant to stock option granting procedures setting forth the total number of shares (both on an aggregate and per participant basis), award terms and time period for the delegation from the Committee.

5 Some plans provide for a default vesting schedule that will apply in the absence of a vesting schedule in the Award Agreement.

4.3. Performance Objectives.

(a) *Possible Performance Objectives.* Any Performance Objective shall relate to the Service Provider's performance for the Company (or an Affiliate) or the Company's (or Affiliate's) business activities or organizational goals, and shall be sufficiently specific that a third party having knowledge of the relevant facts could determine whether the Performance Objective is achieved. The Performance Objectives with respect to any Award may be one or more of the following financial indicators of the Company's success: earnings per share, net earnings, net income, operating earnings, customer satisfaction, revenues, net sales, financial return ratios such as return on equity, return on assets, return on capital, and return on investment, ratio of debt to earnings or shareholders' equity, market performance, market share, balance sheet measurements, economic profit, cash flow, shareholder return, margins, productivity improvement, distribution expense, inventory turnover, delivery reliability, cost control or operational efficiency measures, and working capital, any of which may be measured in absolute terms, growth or improvement during a performance period designated by the Committee or as compared to another company or companies. Performance Objectives may be absolute in their terms or measured against or in relationship to other companies comparably, similarly or otherwise situated or other external or internal measures and may include or exclude extraordinary charges, losses from discontinued operations, restatements and accounting changes and other unplanned special charges such as restructuring expenses, acquisitions, acquisition expenses, (including without limitation expenses related to goodwill and other intangible assets), stock offerings, stock repurchases and strategic loan loss provisions. Performance objectives may be particular to an Affiliate, a line of business or other unit, and may, but need not, be based upon a change or an increase or positive result.

(b) *Stockholder Approval of Performance Objectives.* The list of possible Performance Objectives set forth in Section 4.3(a) above, and the other material terms of Awards of Restricted Stock or Restricted Stock Units that are intended to qualify as "performance-based compensation" under Section 162(m) of the Code, shall be subject to reapproval by the Company's stockholders at the first stockholder meeting that occurs in 20 .[6] No Award of Restricted Stock or Restricted Stock Units that is intended to qualify as "performance-based

[6] Stockholder approval is required every five years for Performance Objectives that are selected for Awards by the Committee in its sole discretion.

compensation" under Section 162(m) of the Code shall be made after that meeting unless stockholders have reapproved the list of Performance Objectives and other material terms of such Awards, or unless the vesting of the Award is made contingent on stockholder approval of the Performance Objectives and other material terms of such Awards.

(c) *Documentation of Performance Objectives*. With respect to any Award, the Performance Objectives shall be set forth in writing no later than 90 days after commencement of the period to which the Performance Objective(s) relate(s) (or, if sooner, before 25% of such period has elapsed) and at a time when achievement of the Performance Objectives is substantially uncertain. Such writing shall also include the period for measuring achievement of the Performance Objectives, which shall be no greater than five consecutive years, as established by the Committee. Once established by the Committee, the Performance Objective(s) may not be changed to accelerate the settlement of an Award or to accelerate the lapse or removal of restrictions on Restricted Stock that otherwise would be due upon the attainment of the Performance Objective(s).

(d) *Committee Certification*. Prior to settlement of any Award that is contingent on achievement of one or more Performance Objectives, the Committee shall certify in writing that the applicable Performance Objective(s) and any other material terms of the Award were in fact satisfied. For purposes of this Section 4.3(d), approved minutes of the Committee shall be adequate written certification.

(e) *Negative Discretion*. The Committee may reduce, but may not increase, the number of Shares deliverable or the amount payable under any Award after the applicable Performance Objectives are satisfied.

ARTICLE 5.
STOCK OPTIONS

5.1. <u>Terms of Option</u>. Subject to the provisions of the Plan, the type of Option, term, exercise price, vesting schedule, and other conditions and limitations applicable to each Option shall be as determined by the Committee and shall be stated in the Award Agreement.

5.2. <u>Type of Option</u>.

(a) Each Option shall be designated in the Award Agreement as either an Incentive Stock Option or a Nonstatutory Stock Option. It is intended that each Nonstatutory Stock Option shall be exempt from requirements applicable to nonqualified deferred compensation under Section 409A of the Code.

(b) Neither the Company nor the Committee shall have liability to a Participant or any other party if an Option (or any part thereof) that is intended to be an Incentive Stock Option does not qualify as an Incentive Stock Option or if a Nonqualified Stock Option is or becomes deferred compensation subject to Section 409A of the Code. In addition, the Committee may make an adjustment or substitution described in Section 2.3 of the Plan that causes the Option to cease to qualify as an Incentive Stock Option without the consent of the affected Participant or any other party.

5.3. Limitations.

(a) *Maximum Term.* No Option shall have a term in excess of 10 years measured from the date the Option is granted. In the case of any Incentive Stock Option granted to a 10% Stockholder (as defined in Section 5.3(e), below), the term of such Incentive Stock Option shall not exceed five years measured from the date the Option is granted.

(b) *Minimum Exercise Price.* Subject to Section 2.3(b) of the Plan, the exercise price per share of an Option shall not be less than 100% of the Fair Market Value per Share on the date the Option is granted. In the case of any Incentive Stock Option granted to a 10% Stockholder (as defined in Section 5.3(e), below), subject to Section 2.3(b) of the Plan, the exercise price per share of such Incentive Stock Option shall not be less than 110% of the Fair Market Value per Share on the date the Option is granted.

(c) *Repricing Prohibited.* Except as provided in Section 2.3, the Committee shall not amend any outstanding Option to reduce its exercise price, and shall not grant an Option with a lower exercise price within six months before or after an Option with a higher exercise price is canceled.[7]

(d) *$100,000 Limit for Incentive Stock Options.* Notwithstanding an Option's designation, to the extent that Incentive Stock Options are exercisable for the first time by the Participant during any calendar year with respect to Shares whose aggregate Fair Market Value exceeds $100,000 (regardless of whether such Incentive Stock Options were granted under this Plan, the 1997 Plan, or any other plan of the Company or any Affiliate), such Options shall be treated as Nonstatutory Stock Options. For purposes of this Section 5.3(d), Fair

[7] Repricing restrictions are included in stock exchange listing requirements and considered by corporate governance services such as ISS.

Market Value shall be measured as of the date the Option was granted and Incentive Stock Options shall be taken into account in the order in which they were granted.

(e) *10% Stockholder.* For purposes of this Section 5.3, a "10% Stockholder" is an individual who, immediately before the date an Award is granted, owns (or is treated as owning) stock possessing more than 10% of the total combined voting power of all classes of stock of the Company (or an Affiliate), determined under Section 424(d) of the Code.

5.4. Form of Consideration. The Committee shall determine the acceptable form of consideration for exercising an Option, including the method of payment. In the case of an Incentive Stock Option, the Committee shall determine the acceptable form of consideration at the time of grant. To the extent approved by the Committee, the consideration for exercise of an Option may be paid in any one, or any combination, of the forms of consideration set forth in subsections (a), (b), (c), and (d) below.

(a) *Cash Equivalent.* Consideration may be paid by cash, check, or other cash equivalent approved by the Committee.

(b) *Tender or Attestation of Shares.* Consideration may be paid by the tendering of other Shares to the Company or the attestation to the ownership of the Shares that otherwise would be tendered to the Company in exchange for the Company's reducing the number of Shares issuable upon the exercise of the Option. Shares tendered or attested to in exchange for Shares issued under the Plan must be held by the Service Provider for at least six months prior to their tender or their attestation to the Company and may not be Shares of Restricted Stock at the time they are tendered or attested to. The Committee shall determine acceptable methods for tendering or attesting to Shares to exercise an Option under the Plan and may impose such limitations and prohibitions on the use of Shares to exercise Options as it deems appropriate. For purposes of determining the amount of the Option price satisfied by tendering or attesting to Shares, such Shares shall be valued at their Fair Market Value on the date of tender or attestation, as applicable.

(c) *Broker-Assisted Cashless Exercise.*[8] Consideration may be paid by the Participant's (i) irrevocable instructions to the Company to deliver the

8 Any broker-assisted cashless exercises should be structured in light of the prohibition against personal loans to executive officers under Section 402 of the Sarbanes-Oxley Ac

Shares issuable upon exercise of the Option promptly to a broker (acceptable to the Company) for the Participant's account, and (ii) irrevocable instructions to the broker to sell Shares sufficient to pay the exercise price and upon such sale to deliver the exercise price to the Company. A Participant may use this form of exercise only if the exercise would not subject the Participant to liability under Section 16(b) of the Exchange Act or would be exempt pursuant to Rule 16b-3 promulgated under the Exchange Act or any other exemption from such liability. The Company shall deliver an acknowledgement to the broker upon receipt of instructions to deliver the Shares, and the Company shall deliver the Shares to such broker upon the settlement date. Upon receipt of the Shares from the Company, the broker shall deliver to the Company cash sale proceeds sufficient to cover the exercise price and any applicable withholding taxes due. Shares acquired by a cashless exercise shall be deemed to have a Fair Market Value on the Option exercise date equal to the gross sales price at which the broker sold the Shares to pay the exercise price.

(d) *Other Methods*. Consideration may be paid using such other methods of payment as the Committee, at its discretion, deems appropriate from time to time.

5.5. *Exercise of Option*.

(a) *Procedure for Exercise*. Any Option granted hereunder shall be exercisable according to the terms of the Plan and at such times and under such conditions as set forth in the Award Agreement. An Option shall be deemed exercised when the Committee receives: (i) written or electronic notice of exercise (in accordance with the Award Agreement) from the person entitled to exercise the Option and (ii) full payment for the Shares (in a form permitted under Section 5.4 of the Plan) with respect to which the Option is exercised.

(b) *Termination of Relationship as a Service Provider*. Following a Participant's Termination of Service, the Participant (or the Participant's Beneficiary, in the case of Termination of Service due to death) may exercise his or her Option within such period of time as is specified in the Award Agreement, subject to the following conditions:

(i) An Option may be exercised after the Participant's Termination of Service only to the extent that the Option was vested as of the Termination of Service;

(ii) An Option may not be exercised after the expiration of the term of such Option as set forth in the Award Agreement;

(iii) Unless a Participant's Termination of Service is the result of the Participant's Disability, the Participant may not exercise an Incentive Stock Option more than three months after such Termination of Service;

(iv) If a Participant's Termination of Service is the result of the Participant's Disability, the Participant may exercise an Incentive Stock Option up to 12 months after Termination of Service; and

(v) After the Participant's death, his Beneficiary may exercise an Incentive Stock Option only to the extent that the deceased Participant was entitled to exercise such Incentive Stock Option as of the date of his death.

In the absence of a specified time in the Award Agreement, the Option shall remain exercisable for three months after the Participant's Termination of Service for any reason other than Disability or death, and for 12 months after the Participant's Termination of Service on account of Disability or death.

(c) *Rights as a Stockholder*. Shares subject to an Option shall be deemed issued, and the Participant shall be deemed the record holder of such Shares, on the Option exercise date. Until Shares are issued following exercise of an Option, no right to vote or receive dividends or any other rights as a stockholder shall exist with respect to the Shares subject to the Option.[9] In the event that the Company effects a split of the Shares by means of a stock dividend and the exercise price of, and number of Shares subject to, an Option are adjusted as of the date of distribution of the dividend (rather than as of the record date for such dividend), then a Participant who exercises such Option between the record date and the distribution date for such stock dividend shall be entitled to receive, on the distribution date, the stock dividend with respect to the Shares subject to the Option. No other adjustment shall be made for a dividend or other right for which the record date is prior to the date the Shares are issued.

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9 Plans sometime provide dividend equivalencies payable in cash with stock options. If provided, dividend equivalencies must be paid in compliance with (or under an exemption from) Section 409A of the Code to avoid income taxation and a 20% penalty prior to actual payment

5.6. Repurchase Rights. The Committee shall have the discretion to grant Options that are exercisable for unvested Shares.[10] If the Participant ceases to be a Service Provider while holding such unvested Shares, the Company shall have the right to repurchase any or all of those unvested Shares at a price per share equal to the lower of (i) the exercise price paid per Share, or (ii) the Fair Market Value per Share at the time of repurchase. The terms upon which such repurchase right shall be exercisable by the Committee (including the period and procedure for exercise and the appropriate vesting schedule for the purchased Shares) shall be established by the Committee and set forth in the document evidencing such repurchase right.

Article 6.
Stock Appreciation Rights

6.1. Terms of Stock Appreciation Right. The term, base amount, vesting schedule, and other conditions and limitations applicable to each Stock Appreciation Right, except the medium of settlement, shall be as determined by the Committee and shall be stated in the Award Agreement. All Awards of Stock Appreciation Rights shall be settled in Shares issuable upon the exercise of the Stock Appreciation Right, except as otherwise provided by the Committee.[11]

6.2. Exercise of Stock Appreciation Right.

(a) *Minimum Exercise Price.* Subject to Section 2.3 of the Plan, the per Share base amount of a Stock Appreciation Right shall be determined in the sole discretion of the Committee and shall not be less than 100% of the Fair Market Value per Share on the date the Stock Appreciation Right is granted.

(b) *Procedure for Exercise.* Any Stock Appreciation Right granted hereunder shall be exercisable according to the terms of the Plan and at such times and under such conditions as set forth in the Award Agreement. A Stock

10 Options granted in this manner are often referred to as either “early exercise” or “reverse vested” stock options. The advantage of this form of stock option grant is that it allows a participant to exercise early and file a Section 83(b) election in order to secure capital gains tax treatment on future stock appreciation.

11 SARs may also be settled for cash. Cash-settled SARs are not commonly used because increases in stock value will be treated as compensation expense until settlement of the liability.

Appreciation Right shall be deemed exercised when the Committee receives written or electronic notice of exercise (in accordance with the Award Agreement) from the person entitled to exercise the Stock Appreciation Right.

(c) *Termination of Relationship as a Service Provider.* Following a Participant's Termination of Service, the Participant (or the Participant's Beneficiary, in the case of Termination of Service due to death) may exercise his or her Stock Appreciation Right within such period of time as is specified in the Award Agreement to the extent that the Stock Appreciation right is vested as of the Termination of Service. In the absence of a specified time in the Award Agreement, the Stock Appreciation Right shall remain exercisable for three months following the Participant's Termination of Service for any reason other than Disability or death, and for 12 months after the Participant's Termination of Service on account of Disability or death.

(d) *Rights as a Stockholder.* Shares subject to a Stock Appreciation Right shall be deemed issued, and the Participant shall be deemed the record holder of such Shares, on the date the Stock Appreciation Right is exercised. Until such date, no right to vote or receive dividends or any other rights as a stockholder shall exist with respect to the Shares subject to the Stock Appreciation Right. If the Company effects a split of the Shares by means of a stock dividend and the exercise price of, and number of Shares subject to, a Stock Appreciation Right are adjusted as of the date of distribution of the dividend (rather than as of the record date for such dividend), then a Participant who exercises such Stock Appreciation Right between the record date and the distribution date for such stock dividend shall be entitled to receive, on the distribution date, the stock dividend with respect to the Shares subject to the Stock Appreciation Right. No other adjustment shall be made for a dividend or other right for which the record date is prior to the date the Shares are issued.

Article 7.
Restricted Stock

7.1. Terms of Restricted Stock. Subject to the provisions of the Plan, the Period of Restriction, the number of Shares granted, and other conditions and limitations applicable to each Award of Restricted Stock shall be as determined by the Committee and shall be stated in the Award Agreement. Unless the Committee determines otherwise, Shares of Restricted Stock shall be held by the Company as escrow agent until the restrictions on such Shares have lapsed.

7.2. Transferability. Except as provided in this Article 7, Shares of Restricted Stock may not be sold, transferred, pledged, assigned, or otherwise alienated or hypothecated until the end of the applicable Period of Restriction.

7.3. Other Restrictions. The Committee, in its sole discretion, may impose such other restrictions on Shares of Restricted Stock as it may deem advisable or appropriate.

7.4. Removal of Restrictions. Except as otherwise provided in this Article 7, and subject to Section 10.5 of the Plan, Shares of Restricted Stock covered by an Award of Restricted Stock made under the Plan shall be released from escrow, and shall become fully transferable, as soon as practicable after the Period of Restriction ends, and in any event no later than 2½ months after the end of the Tax Year in which the Period of Restriction ends.[12]

7.5. Voting Rights. During the Period of Restriction, Service Providers holding Shares of Restricted Stock granted hereunder may exercise full voting rights with respect to those Shares, unless otherwise provided in the Award Agreement.

7.6. Dividends and Other Distributions. During the Period of Restriction, Service Providers holding Shares of Restricted Stock shall be entitled to receive all dividends and other distributions paid with respect to such Shares unless otherwise provided in the Award Agreement.

(a) If any such dividends or distributions are paid in Shares, the Shares shall be subject to the same restrictions (and shall therefore be forfeitable to the same extent) as the Shares of Restricted Stock with respect to which they were paid.

(b) If any such dividends or distributions are paid in cash, the Award Agreement may specify that the cash payments shall be subject to the same restrictions as the related Restricted Stock, in which case they shall be accumulated during the Period of Restriction and paid or forfeited when the related Shares of Restricted Stock vest or are forfeited. Alternatively, the Award Agreement may specify that the dividend equivalents or other payments shall be unrestricted, in which case they shall be paid as soon as practicable after the dividend or distribution date. In no event shall any cash dividend or distribution

[12] Transferability within two and one half months is required in order to avoid becoming subject to Section 409A of the Code.

be paid later than 2½ months after the Tax Year in which the dividend or distribution becomes nonforfeitable.[13]

7.7. Right of Repurchase of Restricted Stock. If, with respect to any Award, (a) a Participant's Termination of Service occurs before the end of the Period of Restriction or (b) any Performance Objectives are not achieved by the end of the period for measuring such Performance Objectives, then the Company shall have the right to repurchase forfeitable Shares of Restricted Stock from the Participant at their original issuance price or other stated or formula price (or to require forfeiture of such Shares if issued at no cost).

Article 8.
Restricted Stock Units

8.1. Terms of Restricted Stock Units. Subject to the provisions of the Plan, the Period of Restriction, number of underlying Shares, and other conditions and limitations applicable to each Award of Restricted Stock Units shall be as determined by the Committee and shall be stated in the Award Agreement.

8.2. Settlement of Restricted Stock Units. Subject to Section 10.5 of the Plan, the number of Shares specified in the Award Agreement, or cash equal to the Fair Market Value of the underlying Shares specified in the Award Agreement, shall be delivered to the Participant as soon as practicable after the end of the applicable Period of Restriction, and in any event no later than 2½ months after the end of the Tax Year in which the Period of Restriction ends.

8.3. Dividend and Other Distribution Equivalents. The Committee is authorized to grant to holders of Restricted Stock Units the right to receive payments equivalent to dividends or other distributions with respect to Shares underlying Awards of Restricted Stock Units. The Award Agreement may specify that the dividend equivalents or other distributions shall be subject to the same restrictions as the related Restricted Stock Units, in which case they shall be accumulated during the Period of Restriction and paid or forfeited when the related Restricted Stock Units are paid or forfeited. Alternatively, the Award Agreement may specify that the dividend equivalents or other distributions shall be unrestricted, in which case they shall be paid on the dividend or distribution payment date for the underlying Shares, or as soon as practicable thereafter. In no event shall any unrestricted dividend equivalent or other

13 This provision is required in order for the dividends to comply with Section 409A of the Code.

distribution be paid later than 2½ months after the Tax Year in which the record date for the dividend or distribution occurs.

8.4. Deferral Election. Notwithstanding anything to the contrary in Sections 8.2 or 8.3, a Participant may elect in accordance with the terms of the Award Agreement and Section 409A of the Code to defer receipt of all or any portion of the Shares or other property otherwise issuable to the Participant pursuant to a Restricted Stock Unit Award to the extent permitted by the Committee.

8.5. Forfeiture. If, with respect to any Award, (a) a Participant's Termination of Service occurs before the end of the Period of Restriction, or (b) any Performance Objectives are not achieved by the end of the period for measuring such Performance Objectives, then the Restricted Stock Units granted pursuant to such Award shall be forfeited and the Company (and any Affiliate) shall have no further obligation thereunder.

Article 9.
Other Equity-Based Awards

9.1. Other Equity-Based Awards. The Committee shall have the right to grant other Awards based upon or payable in Shares having such terms and conditions as the Committee may determine, including deferred stock units, the grant of Shares upon the achievement of a Performance Objective and the grant of securities convertible into Shares.

Article 10.
Additional Terms of Awards

10.1. No Rights to Awards. No Service Provider shall have any claim to be granted any Award under the Plan, and the Company is not obligated to extend uniform treatment to Participants or Beneficiaries under the Plan. The terms and conditions of Awards need not be the same with respect to each Participant.

10.2. No Effect on Employment or Service. Neither the Plan nor any Award shall confer upon a Participant any right with respect to continuing the Participant's relationship as a Service Provider with the Company; nor shall they interfere in any way with the Participant's right or the Company's right to terminate such relationship at any time, with or without cause, to the extent permitted by Applicable Laws and any enforceable agreement between the Service Provider and the Company.

10.3. No Fractional Shares. No fractional Shares shall be issued or delivered pursuant to the Plan or any Award, and the Committee shall determine whether cash, other securities, or other property shall be paid or transferred in lieu of any fractional Shares, or whether such fractional Shares or any rights thereto shall be canceled, terminated, or otherwise eliminated.

10.4. Transferability of Awards. Unless otherwise determined by the Committee, an Award may not be sold, pledged, assigned, hypothecated, transferred, or disposed of in any manner other than by will or by the laws of descent or distribution and may be exercised, during the lifetime of the Participant, only by the Participant. Subject to the approval of the Committee in its sole discretion, Nonstatutory Stock Options may be transferable to members of the immediate family of the Participant and to one or more trusts for the benefit of such family members, partnerships in which such family members are the only partners, or corporations in which such family members are the only stockholders. "Members of the immediate family" means the Participant's spouse, children, stepchildren, grandchildren, parents, grandparents, siblings (including half brothers and sisters), and individuals who are family members by adoption. To the extent that any Award is transferable, such Award shall contain such additional terms and conditions as the Committee deems appropriate.

10.5. Conditions On Delivery of Shares and Lapsing of Restrictions. The Company shall not be obligated to deliver any Shares pursuant to the Plan or to remove restrictions from Shares previously delivered under the Plan until (a) all conditions of the Award have been met or removed to the satisfaction of the Committee, (b) subject to approval of the Company's counsel, all other legal matters (including any Applicable Laws) in connection with the issuance and delivery of such Shares have been satisfied, and (c) the Participant has executed and delivered to the Company such representations or agreements as the Committee may consider appropriate to satisfy the requirements of Applicable Laws.

10.6. Inability to Obtain Authority. The inability of the Company to obtain authority from any regulatory body having jurisdiction, which authority is deemed by the Company's counsel to be necessary to the lawful issuance or sale of any Shares hereunder, shall relieve the Company of any liability in respect of the failure to issue or sell such Shares as to which such requisite authority shall not have been obtained.

10.7. Withholding.

(a) *Withholding Requirements.* Prior to the delivery of any Shares or cash pursuant to the grant, exercise, vesting, or settlement of an Award, the Company shall have the power and the right to deduct or withhold, or to require a Participant or Beneficiary to remit to the Company, an amount sufficient to satisfy any federal, state, and local taxes (including the Participant's FICA obligation) that the Company determines is required to be withheld to comply with Applicable Laws. The Participant or Beneficiary shall remain responsible at all times for paying any federal, state, and local income or employment tax due with respect to any Award (including any arising under Section 409A of the Code), and the Company shall not be liable for any interest or penalty that a Participant or Beneficiary incurs by failing to make timely payments of tax.

(b) *Withholding Arrangements.* The Committee, in its sole discretion and pursuant to such procedures as it may specify from time to time, may permit a Participant or Beneficiary to satisfy such tax withholding obligation, in whole or in part, by (i) electing to have the Company withhold otherwise deliverable Shares, or (ii) delivering to the Company already-owned Shares having a Fair Market Value equal to the amount required by Applicable Law to be withheld. The Fair Market Value of the Shares to be withheld or delivered, or with respect to which restrictions are removed, shall be determined as of the date that the taxes are required to be withheld.

10.8. Other Provisions in Award Agreements/Change in Control. In addition to the provisions described in the Plan, any Award Agreement may include such other provisions (whether or not applicable to the Award of any other Participant) as the Committee determines appropriate, including restrictions on resale or other disposition, provisions for the acceleration of vesting and/or exercise ability of Awards upon a Change in Control of the Company, provisions for the cancellation of Awards in the event of a Change in Control of the Company, and provisions to comply with Applicable Laws.

A Change in Control means and shall be deemed to occur upon the first of the following events:

(a) the acquisition, after the date hereof, by an individual, entity or group within the meaning of Sections 13(d)(3) or 14(d)(2) of the Exchange Act, of beneficial ownership (within the meaning of Rule 13d-3 promulgated under the Exchange Act) of twenty percent (20%) or more of the combined voting power of the Voting Securities of the Company then outstanding after giving effect to such acquisition; or

(b) the Company is merged or consolidated or reorganized into or with another company or other legal entity, and as a result of such merger, consolidation or reorganization less than a majority of the combined voting power of the Voting Securities of such company or entity immediately after such transaction is held in the aggregate by the holders of Voting Securities of the Company immediately prior to such merger, consolidation or reorganization; or

(c) the Company sells or otherwise transfers all or substantially all of its assets (including but not limited to its Subsidiaries) to another company or legal entity in one transaction or a series of related transactions, and as a result of such sale(s) or transfer(s), less than a majority of the combined voting power of the then outstanding Voting Securities of such company or entity immediately after such sale or transfer is held in the aggregate by the holders of Voting Securities of the Company immediately prior to such sale or transfer; or

(d) approval by the Board or the stockholders of the Company of a complete or substantial liquidation or dissolution of the Company.

Notwithstanding the foregoing, unless otherwise determined in a specific case by majority vote of the Board, a Change in Control shall not be deemed to have occurred solely because (a) the Company, (b) a Subsidiary, (c) any one or more members of executive management of the Company or its Affiliates, (d) any employee stock ownership plan or any other employee benefit plan of the Company or any Subsidiary or (e) any combination of the Persons referred to in the preceding clauses (a) through (d) becomes the actual or beneficial owner (within the meaning of Rule 13d-3 promulgated under the Exchange Act) of twenty percent (20%) or more of the Voting Securities of the Company. For the purposes of this Section 10.8, the following terms shall have the meanings set forth below:

"*Affiliate*" means, with respect to a Person, another Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person.

"*Person*" means any individual, Company, partnership, group, association or other "person," as such term is used in Section 14(d) of the Exchange Act.

"*Subsidiary*" means a Company, company or other entity (a) more than 50 percent (50%) of whose outstanding shares or securities (representing the right to vote for the election of directors or other managing authority) are, or (b) which does not have outstanding shares or securities (as may be the case in a partnership, joint venture, or unincorporated association), but more than 50 percent (50%) of whose ownership interest representing the right generally to make decisions for such other entity is, now or hereafter, owned or controlled, directly or indirectly, by the Company.

"*Voting Securities*" means, with respect to any Person, any securities entitled to vote (including by the execution of action by written consent) generally in the election of directors of such Person (together with direct or indirect options or other rights to acquire any such securities).

10.9. Section 16 of the Exchange Act. It is the intent of the Company that Awards and transactions permitted by Awards be interpreted in a manner that, in the case of Participants who are or may be subject to Section 16 of the Exchange Act, qualify, to the maximum extent compatible with the express terms of the Awards, for exemption from matching liability under Rule 16b-3 promulgated under the Exchange Act. The Company shall have no liability to any Participant or other person for Section 16 consequences of Awards or events in connection with Awards if an Award or related event does not so qualify.

10.10. Compensation Recovery.

(a) *Section 304 of the Sarbanes-Oxley Act.* The Company shall require the chief executive officer and chief financial officer of the Company to disgorge bonuses, other incentive or equity-based compensation, and profits on sale of Common Stock received within the 12 month period following the public release of financial information if there is a restatement of such financial information because of material noncompliance, due to misconduct, with financial reporting requirements under the federal securities laws. In no event shall the amount to be recovered by the Company be less than the amount required to be repaid or recovered as a matter of law. The operation of this paragraph shall be in accordance with the provisions of Section 304 of the Sarbanes-Oxley Act and applicable guidance.

(b) *Section 954 of Dodd-Frank Act.* The Company shall require each current and former executive officer to disgorge bonuses or other incentive or equity-based compensation received within 36 months prior to the public release of the restatement of financial information due to material noncompliance with the financial reporting requirements under federal securities laws. The amount to be recovered shall be the percentage of incentive compensation, including equity awards, in excess of what would have been paid without the restated results. The operation of this paragraph shall be in accordance with the provisions of Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and any applicable guidance.

10.11. Not Benefit Plan Compensation. Payments and other benefits received by a Participant under an Award made pursuant to the Plan shall not be deemed a part of a Participant's compensation for purposes of determining the Participant's benefits under any other employee benefit plans or arrangements provided by the Company or an Affiliate, except where the Committee expressly provides otherwise in writing.

Article 11.
Term, Amendment, and Termination of Plan

11.1. Term of Plan. The Plan shall become effective on the Effective Date.

11.2. Termination of the Plan. The Plan shall terminate upon the earliest to occur of (i) ______, 2021; (ii) the date that is 10 years after the Plan is approved by the Company's stockholders; (iii) the date on which all Shares available for issuance under the Plan have been issued as fully vested Shares; or (iv) the date determined by the Board pursuant to its authority under Section 11.3 of the Plan.

11.3. Amendment of the Plan. The Board or the Committee may at any time amend, alter, suspend, or terminate the Plan, without the consent of the Participants or Beneficiaries. The Company shall obtain stockholder approval of any Plan amendment to the extent necessary to comply with Applicable Laws.

11.4. Effect of Amendment or Termination. Except as provided in Section 11.5 of the Plan, no amendment, alteration, suspension, or termination of the Plan shall impair the rights of any Participant or Beneficiary under an outstanding Award, unless required to comply with an Applicable Law or mutually agreed otherwise between the Participant and the Committee; any such agreement must be in writing and signed by the Participant and the Company. Termination of the Plan shall not affect the Committee's ability to exercise the powers granted to it hereunder with respect to Awards granted under the Plan prior to the date of such termination.

11.5. Adjustments of Awards Upon the Occurrence of Unusual or Nonrecurring Events. The Committee may, in its sole discretion (but subject to the limitations and conditions expressly stated in the Plan, such as the limitations on adjustment of Performance Objectives), adjust the terms and conditions of Awards during the pendency or in recognition of (a) unusual or nonrecurring events affecting the Company or an Affiliate (such as a capital adjustment, reorganization, or merger) or the financial statements of the Company or an Affiliate, or (b) any changes in Applicable Laws or accounting principles. By way of example, the power to adjust Awards shall include the power to suspend the exercise of any Option or Stock Appreciation Right.

ARTICLE 12.
MISCELLANEOUS

12.1. Authorization of Sub-Plans. The Committee may from time to time establish one or more sub-plans under the Plan for purposes of satisfying applicable blue sky, securities, and/or tax laws of various jurisdictions.[14] The Committee shall establish such sub-plans by adopting supplements to this Plan containing (i) such limitations as the Committee deems necessary or desirable, and (ii) such additional terms and conditions not otherwise inconsistent with the Plan as the Committee shall deem necessary or desirable. All sub-plans adopted by the Committee shall be deemed to be part of the Plan, but each sub-plan shall apply only to Participants within the affected jurisdiction and the Company shall not be required to provide copies of any sub-plans to Participants in any jurisdiction which is not the subject of such sub-plan.

12.2. Governing Law. The provisions of the Plan and all Awards made hereunder shall be governed by and interpreted in accordance with the laws of the State of Missouri, regardless of the laws that might otherwise govern under any state's applicable principles of conflicts of laws.

12.3. Committee Manner of Action. Unless otherwise provided in the bylaws of the Company or the charter of the Committee: (a) a majority of the members of a Committee shall constitute a quorum, and (b) the vote of a majority of the members present who are qualified to act on a question assuming the presence of a quorum or the unanimous written consent of the members of the Committee shall constitute action by the Committee. The Committee may delegate the performance of ministerial functions in connection with the Plan to such person or persons as the Committee may select.

12.4. Expenses. The costs of administering the Plan shall be paid by the Company.

[14] Sub-plans are often used for grants to individuals residing outside of the United States.

12.5. Severability. If any provision of the Plan or any Award Agreement is determined by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any jurisdiction, or as to any person or Award, such provision shall be construed or deemed to be amended to resolve the applicable infirmity, unless the Committee determines that it cannot be so construed or deemed amended without materially altering the Plan or the Award, in which case such provision shall be stricken as to such jurisdiction, person, or Award, and the remainder of the Plan and any such Award shall remain in full force and effect.

12.6. Construction. Unless the contrary is clearly indicated by the context, (1) the use of the masculine gender shall also include within its meaning the feminine and vice versa; (2) the use of the singular shall also include within its meaning the plural and vice versa; and (3) the word "include" shall mean to include, but not to be limited to.

12.7. No Trust or Fund Created. Neither the Plan nor any Award Agreement shall create or be construed to create a trust or separate fund of any kind or a fiduciary relationship between the Company (or an Affiliate) and a Participant or any other person. To the extent that any person acquires a right to receive payments from the Company (or an Affiliate) pursuant to an Award, such right shall be no more secure than the right of any unsecured general creditor of the Company (or the Affiliate, as applicable).

12.8. Headings. Headings are given to the sections and subsections of the Plan solely as a convenience to facilitate reference. Such headings shall not be deemed in any way material or relevant to the construction or interpretation of the Plan or any provision thereof.

12.9. Complete Statement of Plan. This document is a complete statement of the Plan.

APPENDIX

As used in the Plan, the following terms shall have the following meanings:

(a) "*Affiliate*" means, except for purposes of Section 10.8, an entity in which the Company has a direct or indirect equity interest, whether now or hereafter existing; provided however, that with respect to an Incentive Stock Option, an Affiliate means a "parent corporation" (as defined in Section 424(e) of the Code) or a "subsidiary corporation" (as defined in Section 424(f) of the Code) with respect to the Company, whether now or hereafter existing.

(b) "*Applicable Laws*" means the requirements relating to, connected with, or otherwise implicated by the administration of long-term incentive plans under applicable state corporation laws, United States federal and state securities laws, the Code, any stock exchange or quotation system on which the Shares are listed or quoted, and the applicable laws of any foreign country or jurisdiction where Awards are, or will be, granted under the Plan.

(c) "*Award*" means, individually or collectively, a grant under the Plan of Options, Stock Appreciation Rights, Restricted Stock, Restricted Stock Units, or other equity-based awards.

(d) "*Award Agreement*" means a written agreement setting forth the terms and provisions applicable to an Award granted under the Plan. Each Award Agreement shall be subject to the terms and conditions of the Plan.

(e) "*Beneficiary*" means the personal representative of the Participant's estate or the person(s) to whom an Award is transferred pursuant to the Participant's will or in accordance with the laws of descent or distribution.

(f) "*Board*" means the board of directors of the Company.

(g) "*Code*" means the Internal Revenue Code of 1986, as amended. Any reference to a section of the Code herein shall be a reference to any regulations or other guidance of general applicability promulgated under such section, and shall further be a reference to any successor or amended section of such section of the Code that is so referred to and any regulations thereunder.

(h) "*Committee*" means the Compensation Committee of the Board, which has been constituted by the Board to comply with the requirements of Rule 16b-3 promulgated under the Exchange Act, Section 162(m) of the Code, and/or other Applicable Laws. In no event shall an inadvertent failure to comply with these requirement invalidate any prior Awards made under the Plan.

(i) "*Company*" means , a corporation, or any successor thereto.

(j) "*Consultant*" means any natural person, including an advisor, engaged by the Company or an Affiliate to render services to such entity.

(k) "*Director*" means a member of the Board.

(l) "*Disability*" means total and permanent disability as defined in Section 22(e)(3) of the Code.

(m) "*Effective Date*" means 2011; provided that the Plan and any Awards granted hereunder shall be null and void if the Plan is not approved by the Company's stockholders before any compensation under the Plan is paid.

(n) "*Employee*" means any person who is an employee, as defined in Section 3401(c) of the Code, of the Company or any Affiliate or any other entity the employees of which are permitted to receive Incentive Stock Options under the Code. Neither service as a Director nor payment of a director's fee by the Company shall be sufficient to constitute "employment" by the Company.

(o) "*Exchange Act*" means the Securities Exchange Act of 1934, as amended.

(p) "*Executive Officer*" means an individual who is an "executive officer" of the Company (as defined by Rule 3b-7 under the Exchange Act) or a "covered employee" under Section 162(m) of the Code.

(q) "*Fair Market Value*" means, with respect to Shares as of any date (except in the case of a cashless exercise pursuant to Section 5.4(c)) the closing sale price per share of such Shares (or the closing bid, if no sales were reported) as reported in The Wall Street Journal or, if not reported therein, such other source as the Committee deems reliable.[15]

(r) "*Incentive Stock Option*" means an Option intended to qualify as an incentive stock option within the meaning of Section 422 of the Code.

(s) "*Nonstatutory Stock Option*" means an Option not intended to qualify as an Incentive Stock Option.

15 The closing stock price is often used as the exercise price for stock options in light of proxy rule requirement to report the difference between this amount and any other formula used to determine fair market value for a stock option exercise price.

(t) "*Option*" means an option to purchase Shares that is granted pursuant to Article 5 of the Plan. An Option may be an Incentive Stock Option or a Nonstatutory Stock Option.

(u) "*Participant*" means the holder of an outstanding Award granted under the Plan.

(v) "*Performance Objective*" means a performance objective or goal that must be achieved before an Award, or a feature of an Award, becomes nonforfeitable, as described in Section 4.3 of the Plan.

(w) "*Period of Restriction*" means the period during which Restricted Stock, the remuneration underlying Restricted Stock Units, or any other feature of an Award is subject to a substantial risk of forfeiture. A Period of Restriction shall be deemed to end when the applicable Award ceases to be subject to a substantial risk of forfeiture.

(x) "*Restricted Stock*" means Shares that, during a Period of Restriction, are subject to restrictions as described in Article 7 of the Plan.

(y) "*Restricted Stock Unit*" means an Award that entitles the recipient to receive Shares or cash after a Period of Restriction, as described in Article 8 of the Plan.

(z) "*Service Provider*" means an Employee, Director, or Consultant.

(aa) "*Share*" means a share of the Company's common stock.

(bb) "*Stock Appreciation Right*" means an Award that entitles the recipient to receive, upon exercise, the excess of (i) the Fair Market Value of a Share on the date the Award is exercised, over (ii) a base amount specified by the Committee which shall not be less than the Fair Market Value of a Share on the date the Award is granted, as described in Article 6 of the Plan

(cc) "*Tax Year*" means the Company's taxable year. If an Award is granted by an Affiliate, such Affiliate's taxable year shall apply instead of the Company's taxable year.

(dd) "*Termination of Service*" means the date an individual ceases to be a Service Provider. Unless the Committee or a Company policy provides otherwise, a leave of absence authorized by the Company or the Committee (including sick leave or military leave) from which return to service is not guaranteed by statute or contract shall be characterized as a Termination of Service if the individual does not return to service within three months; such Termination of Service shall be effective as of the first day that is more than three months after the beginning of the period of leave. If the ability to return to service upon the expiration of such leave is guaranteed by statute or contract, but the individual does not return, the leave shall be characterized as a Termination of Service as of a date established by the Committee or Company policy. For purposes of the Plan and any Award hereunder, if an entity ceases to be an Affiliate, Termination of Service shall be deemed to have occurred with respect to each Participant in respect of such Affiliate who does not continue as a Service Provider in respect of the Company or another Affiliate after such giving effect to such Affiliate's change in status.

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EXHIBIT D

SAMPLE DISCLOSURE COMMITTEE CHARTER

I. PURPOSE

The   (the "Company") has adopted a corporate governance policy to ensure that all disclosures made by the Company to its security holders and the investment community fairly and accurately present the Company's financial condition and results of operations in all material respects. In furtherance of this policy, the Company has implemented and documented disclosure controls and procedures, including the formation of a disclosure committee (the "Disclosure Committee"), and endeavors to make all disclosures on a timely basis as dictated by applicable securities laws [and stock exchange] requirements. This Disclosure Committee Charter (the "Charter") has been adopted by the Chief Executive Officer and the Chief Financial Officer (collectively, the "Senior Officers") of the Company to set forth the responsibilities of the Disclosure Committee and to provide guidance to the Disclosure Committee as it fulfills its obligation to ensure the accuracy and timeliness of the Company's public reporting process.

II. RESPONSIBILITIES

The Disclosure Committee shall have the following responsibilities:

(A) To maintain and evaluate the Company's "disclosure controls and procedures" that have been designed and adopted to ensure that information required to be disclosed by the Company in the reports filed or submitted by it under the Exchange Act is recorded, processed, summarized, and reported fairly within the time periods specified in the rules and regulations of the SEC;

(B) To regularly report to the Senior Officers regarding the effectiveness of the Company's disclosure controls and procedures in order to enable the Senior Officers to evaluate and certify as to the effectiveness of the Company's disclosure controls and procedures as of the end of the period covered by the periodic reports;

(C) To consider the materiality of information required to be disclosed in the Company's periodic reports under the Exchange Act and to review and supervise the preparation of such reports prior to their filing with the SEC;

(D) To disclose any significant deficiencies in the design or operation of the Company's disclosure controls and procedures and internal controls over financial reporting that could adversely affect the Company's ability to record, process, summarize and report financial data and other material data; and

(E) To review and reassess this Charter annually and recommend any proposed changes to the Senior Officers for approval.

In fulfilling its responsibilities, the Disclosure Committee shall have full access to the Company's books, records, facilities, and personnel including the internal auditors and management.

III. MEMBERSHIP

The members of the Disclosure Committee shall consist of the following officers and employees of the Company: the principal accounting officer (or the controller), the general counsel or other senior legal official with responsibility for disclosure matters who reports to the general counsel, the principal risk management officer, the chief investor relations officer (or an officer with equivalent responsibilities) and such other officers or employees, including individuals associated with the Company's business units, as the Senior Officers of the Company deem appropriate. The members of the Committee shall be appointed and may be replaced by the Senior Officers in their sole discretion.

The Senior Officers shall appoint one member of the Disclosure Committee as chairperson. The chairperson shall be responsible for scheduling and presiding over meetings including "internal drafting sessions" for the Company's periodic reports, and preparing agendas. The chairperson shall report to the Senior Officers results of any meetings.

IV. MEETINGS

The Disclosure Committee shall meet as frequently as circumstances require to (i) ensure the accuracy and completeness of the Company's periodic reports and public disclosure statements, (ii) reassess the effectiveness of the Company's disclosure controls and procedures, and (iii) determine whether it is necessary to make any changes to the Company's disclosure controls and procedures in connection with the preparation of the Company's periodic reports or other public disclosure statements, taking into account any developments affecting the business of the Company since the most recent meeting, including any changes in economic or industry conditions.

V. OTHER RESPONSIBILITIES

The Disclosure Committee shall have such other responsibilities as the Senior Officers may deem necessary from time to time.

EXHIBIT E

SAMPLE LEGAL DUE DILIGENCE REQUEST LIST

Note: The most relevant date to be inserted where indicated by [*] will be the later of the (a) fiscal year-end five years prior to the date of the request list and (b) date of inception of the company (or any predecessor).

A. *Corporate Records*

1. Certificate of Incorporation of [Name of Company] (the "Company") and its subsidiaries, and any amendments or restatements thereto.
2. By-laws of the Company and its subsidiaries, and any amendments or restatements thereto.
3. Corporate organizational chart including the type of entity (including joint ventures), jurisdiction and date of organization, share capital and percentage ownership of the Company.
4. Minutes of meetings and written consents (or drafts) of the Board of Directors and any committees thereof and of the shareholders of the Company since [*], including organizational minutes and any agenda for any such upcoming meetings.
5. Minutes of meetings and written consents (or drafts) of the Boards of Directors and any committees thereof and of shareholders of each of the subsidiaries since [*], including organizational minutes and any agenda for any such upcoming meetings.
6. Resolutions of the Board of Directors authorizing the issuance of the Company's shares and related corporate acts of the Company.
7. A list of the members of the Board of Directors (indicating which directors are independent), the Audit Committee (indicating the audit committee financial expert, if any), the Compensation Committee and the Nominating/Corporate Governance Committee, if any, together with the committee charters.
8. The Code of Ethics adopted by the Company (or to be adopted by the Company in connection with the IPO), and a description of any waivers therefrom.
9. Annual reports, quarterly reports and any other reports or communications to shareholders of the Company since [*].
10. Any reports to the Board of Directors of the Company or any subsidiary regarding foreign payments or compliance with the Foreign Corrupt

Practices Act, executive perquisites and other matters reflecting upon internal corporate records.

11. A description of all outstanding securities of the Company.
12. A list of states and countries in which the Company and each significant subsidiary are qualified to do business.
13. A confirmation of the registered office, the place of incorporation and the chief executive office of the Company and each significant subsidiary.
14. Corporate management organization chart including title, function and responsibility.
15. A list of all direct and indirect subsidiaries of the Company showing for each such subsidiary the equity percentage owned by the Company and each other subsidiary of the Company.

B. *Governmental Regulations and Filings*

1. The Company's and the subsidiaries' federal or state filings with any governmental authority or regulatory agency since [*].
2. The Company's and any subsidiaries' proxy materials since [*].
3. Offering circulars, stock private placement agreements, prospectuses and other documents related to the sale of capital stock or debt by the Company or its subsidiaries.
4. All material government orders, approvals, permits, licenses, concessions, consents etc. of the Company and its subsidiaries and material correspondence relating thereto.
5. Significant correspondence with, reports of or to, filings with, internal memoranda addressing compliance with and any other material information with any foreign, state, or regulatory agencies that regulate a material portion of the Company's business, since [*].
6. A schedule setting forth the names of all governmental agencies or authorities having jurisdiction over the business of the Company or any significant subsidiary.
7. Internal reports to the Board of Directors of the Company and any significant subsidiary or otherwise, and details of and copies of all documents (including training materials) relating to, any anti-corruption policies and procedures that have been implemented to ensure compliance with any applicable anti-corruption, bribery and anti-money laundering laws and regulations, including the U.S. Foreign Corrupt Practices Act.

8. A list of any countries included on the list of "Sanction Countries" published by the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC") in which or with whom the Company or any significant subsidiary conducts business.

C. *Internal Financial Information and Accounting*

1. Reports to management of the Company or any of its subsidiaries by any of their respective independent accountants, including management's responses thereto, since [*].
2. Any internal audit reports or other reports prepared by or for the Company or any significant subsidiary regarding material accounting matters, including with respect to critical accounting policies, reserves, asset write-downs, revenue recognition, deferred tax assets, off-balance sheet treatment of liabilities or accounting for accounts receivable, inventory or marketable securities.
3. Summaries provided to the Audit Committee or senior management of any material weakness or significant deficiencies in internal control over financial reporting.
4. Memoranda or other materials analyzing any known errors in the published financial statements (whether or not resulting in a restatement) of the Company or any significant subsidiary.
5. Any correspondence in respect of a disagreement with the Company's or any significant subsidiary's external auditor.
6. Any complaints regarding accounting, internal controls over financial reporting or auditing matters received by the Company since [*].
7. Any strategic plans, budgets and forecasts prepared by the Company or any of its subsidiaries, since [*].
8. Interim unaudited financial statements to the latest practicable date.
9. Any documentation relating to a change in accounting standards used in preparing the Company's financial statements.

D. *Financing*

1. All indentures, loan agreements, note purchase agreements, bank credit agreements and lines of credit relating to outstanding long-term and short-term debt and available credit lines and other evidences of indebtedness and all guarantees of the Company or any of its subsidiaries entered into or amended since [*].

2. All offering memoranda, registration statements, prospectuses and offering circulars relating to sales of debt and equity securities, if any, of the Company and any significant subsidiaries.
3. A description of all material off-balance sheet transactions or arrangements of the Company or any of its subsidiaries together with copies of all relevant documentation.
4. Certificates of internal reports since [*] concerning compliance with covenants contained in the agreements referred to in D(1) above.
5. Any documents or agreements of the Company or any of its subsidiaries evidencing material financing arrangements, including mortgages, sale and leaseback arrangements, installment purchases, etc. entered into or modified since [*].
6. A list of all lines of credit available to the Company or any of its subsidiaries together with bank letters or agreements confirming such lines of credit.
7. Any presentation materials for rating agency qualification and any responses received from or published by rating agencies since [*].
8. Correspondence with lenders (including entities committed to lend) since [*], including all compliance reports submitted by the Company or its subsidiaries or its independent public accountants.
9. All other material agreements of the Company or its subsidiaries with creditors.
10. Any presentations given to creditors in connection with obtaining credit or prepared for potential lenders in connection with a proposed financing.
11. A schedule summarizing short-term and long-term debt (including intercompany debt), capital lease obligations of the Company and each subsidiary.

E. *Material Agreements*

1. All agreements relating to the acquisition or disposition of assets of the Company or any of its subsidiaries and any currently proposed for the future.
2. All joint venture and partnership agreements to which the Company or any of its subsidiaries is a party.
3. All [specify types of contracts relevant to the Company] agreements to which the Company or any of its subsidiaries is a party.

4. All agreements with change-in-control provisions to which the Company or any of its subsidiaries is a party.
5. All intercompany agreements.
6. All agreements that limit the ability of the Company or any of its subsidiaries to compete in a particular line of business and all non-disclosure agreements.
7. All material licensing agreements (including licensing of marketing rights), distribution, franchises, sales agency and conditional sales contracts to which the Company or any of its subsidiaries is a party.
8. A schedule of all agreements with any wholesalers or distributors which accounted for more than 5% of the Company's revenues in its most recent fiscal year.
9. Agreements with sales representatives and details of payments.
10. Advisory board arrangements and details of payments.
11. All contracts relating to the Company's securities to which the Company or any of its subsidiaries is a party, including stock option plans, forms of stock option agreements pursuant to which the Company or any subsidiary has agreed to register outstanding securities with the SEC.
12. All agreements relating to recapitalization of the Company or any of its subsidiaries.
13. All material supply or requirement contracts to which the Company or any of its subsidiaries is a party.
14. Any documents or agreements between the Company and any of its affiliates, including management contracts, support agreements, tax sharing agreements, etc.
15. A schedule of all material insurance policies of the Company and its subsidiaries and all correspondence with the insurers to the Company or any of its subsidiaries regarding cancellation of policies or denying coverage with respect to claims.
16. All material sales, agency, distribution and advertising contracts to which the Company or any significant subsidiary is a party.
17. Any agreements that define or limit the rights of shareholders, including any restrictions upon transfers or voting rights.

18. Any agreements relating to the voting of shares, including any voting trusts or outstanding proxies.
19. All material agreements with any government or government agency, other than ordinary course contracts.
20. Agreements relating to the purchase or sale by the Company or any significant subsidiary of securities (equity or debt).
21. All material secrecy, confidentiality and nondisclosure agreements of the Company or any significant subsidiary.
22. Samples of all form purchase and sales orders, invoices and other forms of agreements and instruments regularly used by the Company and each significant subsidiary.
23. All other material contracts and agreements of the Company or its subsidiaries not otherwise covered by the foregoing.

F. *Employment Matters and Shareholder Relationships*

1. Any documents representing any bonus, retirement, profit sharing, incentive compensation, pension and other employee benefit plans or agreements of the Company or its subsidiaries.
2. All contracts relating to the securities, including stock option plans and forms of stock option agreements of the Company or any of its subsidiaries.
3. A description of all outstanding loans by the Company to directors and executive officers of the Company or its subsidiaries (including the name of the director/executive officer to whom the loan was made, the original principal amount of the loan and the current outstanding amount of the loan, the date the loan was made, the maturity date, the interest rate, whether there has been any material modification to terms of the loan since [*], if relevant, and any other material terms).
4. Any agreements or documents setting forth any arrangement with or pertaining to the Company or any of its subsidiaries to which directors, officers or owners of more than 5% of the voting securities of the Company or any of its subsidiaries are parties, including material employment and consulting agreements.
5. All documents pertaining to any preemptive rights outstanding with respect to the equity interests of the Company.

6. A schedule describing all unfunded and related liabilities under any pension or other employee plans.

7. Equity ownership of directors and of the five most highly compensated officers of the Company.

8. All other material collective bargaining agreements, employment agreements and material consulting agreements to which the Company or any of its subsidiaries is a party.

9. A description of any and all strikes, lockouts, slow downs and other labor disruptions at any of the Company's or any subsidiary's facilities and any claim of unfair labor practices or petitions filed with the National Labor Relations Board with respect to workers at the Company's or any subsidiary's facilities.

G. *Environmental matters*

1. Letters or certificates or any documents of the Company or its subsidiaries pertaining to environmental or potential liability under environmental laws.

2. A list of all known conditions that may give rise to material expenditures by the Company or any subsidiary due to the existence of toxic or hazardous materials in or on property owned, leased or operated by the Company or any subsidiary, or in or on any other property as a result of or allegedly as a result of operations of the Company or any subsidiary.

3. All environmental reports and other internal documents describing environmental concerns relevant to [specify], land, buildings or space owned by the Company or any subsidiary.

4. Copies of all reports filed by the Company or any subsidiary with any federal, state or local environmental regulatory agency in any other country in which the Company or any subsidiary operates since [*].

5. Material environmental permits required for the Company's operations or facilities, including any material pending permit applications or renewal proceedings.

H. *Litigation and similar proceedings*

1. Most recent internal report prepared by corporate counsel of the Company relating to current status of litigation and other legal issues affecting the Company or any of its subsidiaries.

2. Any material complaints, pleadings, briefs, internal documents and other documents pertaining to any material litigation or investigations or other proceedings before any court or regulatory or administrative body involving the Company or any of its subsidiaries, since [*].

3. Any consent decrees, orders or settlement agreements to which the Company or any of its subsidiaries is a party or is bound since [*].

4. Any litigation involving an executive officer or director or affiliate of the Company concerning bankruptcy, criminal activity, securities law or business practices since [*].

5. All audit response letters from the Company's attorneys to the independent public accountants regarding litigation in which the Company or any subsidiary is or may be involved.

I. *Real Property*

1. A schedule of all properties owned, operated or managed by the Company or any of its subsidiaries, identifying for each such property:

    (a) Approximate acreage of land and square footage of improvements;

    (b) Whether owned, managed or leased and, if leased, the name of the landlord;

    (c) Identification of the properties which are subject to national, state and local laws and regulations governing the use, discharge and disposal of hazardous materials;

    (d) Copies of any recent site assessment reports, appraisals or other valuations; and

    (e) Description of any liens, easements, etc. thereon.

2. Copies of all deeds, policies of title insurance, legal descriptions, title reports, surveys, appraisals, mortgages and other evidences of title to or interest in, and purchase and sale agreements relating to, all real property owned by the Company or a subsidiary.

3. Copies of all leases and rental commitments for real or personal property to which the Company or any of its subsidiaries is a party, either as lessor or lessee.

4. Copies of any options in favor of the Company or a subsidiary for the purchase or lease of real property.

5. All agreements encumbering real property owned by the Company or its subsidiaries.

J. *Personal Property, including Intellectual Property Rights*

1. A schedule listing of all patents, patent applications, trademarks, service marks, trade or brand names, copyrights, domestic or foreign, licenses, franchises or concessions that relate to or are employed in the Company's or its subsidiaries' business, including all information on registrations and or applications and status thereof regarding the same.

2. All agreements encumbering personal property owned by the Company or its subsidiaries.

3. Copies of all contracts, leases or other commitments relating to material personal property of the Company or any subsidiary.

4. All material pending or threatened infringement claims asserted by or against the Company or its subsidiaries or material challenges to the intellectual property rights of the Company or its subsidiaries.

K. *Tax Matters*

1. Any material documents related to the United States Internal Revenue Service or any foreign taxation authorities, including all correspondence filed with or received since [*] by the Company or any of its subsidiaries.

2. A list of open taxation years of the Company and its subsidiaries with respect to any federal, state, local and foreign tax for the Company and its subsidiaries.

3. A list of all waivers or extensions of limitation periods with respect to any federal, state, local and foreign tax agreed to by the Company or its subsidiaries and an explanation of the duration thereof and reasons therefor.

4. Copies of all tax sharing, tax funding, tax allocation and other similar agreements entered into by the Company or its subsidiaries with any of its affiliates.

L. *Miscellaneous*

1. Any recent significant analysis of the Company or its subsidiaries or its industry, financial or otherwise.

2. All materials (studies, surveys, etc.) which support statements to be made in the prospectus regarding the market position of the Company or any subsidiaries in a particular product, segment or location.

3. All other documents to be quoted, summarized or cited as a source in the prospectus for the offered securities.
4. Written estimates, if any, of future expenditures for capital programs of the Company or any subsidiaries.
5. Transcripts held by the Company of all presentations to securities analysts with respect to the Company or any subsidiary since [*], and copies of all material distributed at, or in connection with, such presentations.
6. Company projections for future periods.
7. Press releases of the Company or its subsidiaries since [*].
8. Any readily available newspaper articles, analyses or reports (including investment reports) since [*], discussing material developments at the Company or its subsidiaries or otherwise containing an analysis of the Company or its subsidiaries of special significance.
9. Financial statements of the Company and its subsidiaries [*] if not otherwise provided.
10. A list of all companies or other business entities in which the Company owns, directly or indirectly, any equity interest.
11. Schedule of major suppliers and customers of the Company and its subsidiaries, giving annual dollar amounts purchased or sold, since [*].
12. Any brokers, finders, financial advisory or similar agreements to which the Company or any of its subsidiaries is a party.
13. Any indemnification agreements or arrangements to which the Company or any of its subsidiaries is a party.
14. Directors' and officers' questionnaires for the Company or any of its subsidiaries prepared since [*].
15. Any other material documents or information that are significant or should be reviewed and considered with respect to the business and financial condition of the Company or any of its subsidiaries.

EXHIBIT F

SAMPLE DIRECTOR, OFFICER, AND STOCKHOLDER QUESTIONNAIRE[1]

NAME: ____

TITLE: ____

INSTRUCTIONS FOR PREPARATION AND DISTRIBUTION OF THE QUESTIONNAIRE

Preparation

In preparing the Questionnaire for distribution, these Instructions should not be included, and the references in the form of Questionnaire set forth below to the following lettered paragraphs of these Instructions should be deleted:

(a) Insert the title of the securities being registered.

(b) Include only if there are selling shareholders.

(c) Delete if the Company is subject to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 or is exempt from Section 13(a) by virtue of Section 12(g)(2)(G) thereof.

(d) Insert the last day of the last fiscal year.

(e) If the Company is a foreign private issuer (as defined in Rule 3b-4 under the Securities Exchange Act of 1934), it may be appropriate to revise or omit Question 22 because a foreign private issuer is required to respond to SK-Item 404 only to the extent it discloses to its security holders or otherwise makes public the information specified in that Item (Instruction 2 to S-K-Item 404).

(f) Insert the date of commencement of the third preceding fiscal year.

(g) Voting securities are those securities the holders of which are presently entitled to vote for the election of directors. The phrase "voting securities as listed in the first column below" should be changed to Common Stock if this is the only voting security. The classes of the Company's voting securities should be listed under the first column and information should be set forth in a footnote as to how many shares of each class of voting securities constitute 5% of such class.

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1 SEC and stock exchange regulations are frequently revised. Accordingly the requirements applicable to the information solicited by this sample questionnaire at the time of its use must be confirmed.

(h) Insert the latest practicable date.

(i) Exclude with respect to offerings for which a filing with the Financial Industry Regulatory Authority, Inc. pursuant to FINRA Rule 5110 is not required.

(j) Insert titles of additional **executive officers** of the Company. Persons identified as "executive officers" will be presumed to be subject to the liability and reporting requirements of Section 16 of the Securities Exchange Act of 1934.

(k) Insert titles of 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.

Distribution

The Questionnaire should be sent to each director, each nominee for director, each officer, each person chosen to become an executive officer, each person who owns of record or beneficially more than 5% of any class of voting securities of the Company and each selling shareholder, if any. If the Company is neither subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 nor exempt therefrom by virtue of Section 12(g)(2)(G) of such Act, the Questionnaire should also be sent to each person who is a significant employee. Certain information may be required by Regulation S-K as to former directors and executive officers and consideration may be given in appropriate circumstances and where practicable to the use of the Questionnaire to verify this information.

Form of Transmittal Letter

Dear ,

[Company Name], a [ ] corporation] (the "Company"), is preparing a Registration Statement in connection with the registration of shares of of the Company under the Securities Act of 1933. The information being requested in the attached Questionnaire is for use in the Registration Statement. The numerical references in parentheses are to explanatory notes at the end of the Questionnaire. If the space provided for an answer is not adequate, please answer the question on an attachment to the Questionnaire and refer in the space provided to such attachment.

You should treat the Company's proposed initial public offering as confidential, and it should not be discussed with anyone except the Company's officers who are working on this project.

The Company's time schedule contemplates receipt of copies of the Questionnaire, completed and signed by you, not later than , 201 . Please return your completed questionnaires to [Name and Email or Other Address].

The answers should be given as of the date you sign the Questionnaire. In case of any change before completion of the offering, please be sure to let me know immediately.

Very truly yours,

____

Secretary

DIRECTOR, OFFICER, AND STOCKHOLDER QUESTIONNAIRE

[Company Name] (the "Company") is preparing a Registration Statement under the Securities Act of 1933 in connection with an initial public offering of its [ ] **(a)** (the "Offering"). This Questionnaire is being distributed to (i) all persons who are directors (and nominees for election of directors, if any) of the Company, (ii) all persons who are or will be officers of the Company, [and] (iii) each person who own of record or beneficially more than 5% of any class of voting securities of the Company [(iv) selling shareholders, including those who have elected to exercise registration rights in connection with the Offering ("Selling Shareholders") and (iv) all persons who are or will be significant employees of the Company]. Please see the accompanying Explanatory Notes for an explanation of certain terms used **herein**.

The information requested in this Questionnaire is for your protection and that of the Company. The information supplied in response to this Questionnaire will be used to assure that any required information with respect to you that is included in the Registration Statement will be correct. Accordingly, you should exercise great care in the completion of this Questionnaire.

In addition, the Company is required to furnish certain information relating to its shareholders, directors and officers to the U.S. Financial Industry Regulatory Authority Inc. ("FINRA"). FINRA oversees and regulates arrangements between companies, underwriters and brokers with regard to public offerings, and must approve the terms of such arrangements before a public offering may be commenced. The information requested in this questionnaire will also be used to inform FINRA whether any of the Company's directors, officers and security holders are members of, affiliated with or associated with members of, FINRA.

It is very important that an answer be given for each question you are instructed to answer (see next page); if the answer to any question is "No," "None" or "Not Applicable," please indicate. Where necessary, you should continue your responses on a separate sheet attached to your completed questionnaire. Please type or print your answers.

Please complete the Questionnaire and return it no later than , 201__ to:

[Name and Contact Information]

If you have any questions with respect to this matter, please call [Name of Contact] at the above telephone number.

PLEASE NOTE THAT NO ANNOUNCEMENT HAS BEEN MADE CONCERNING THE OFFERING. U.S. FEDERAL SECURITIES LAWS REQUIRE THAT THE MATTER BE KEPT IN STRICT CONFIDENCE.

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

Please note that certain terms (for example, "**affiliate**," "**associate**," "**beneficial ownership**," "**executive officer**," "**immediate family**" and "**transaction**") used in this Questionnaire have special meanings under the U.S. federal securities laws and FINRA rules. Such terms are defined in the "Explanatory Notes" at the end of this Questionnaire and are bolded throughout this Questionnaire for your convenience. Some of these definitions are long and complex. You should read these definitions carefully before completing this Questionnaire.

Instructions as to which Questions to Answer:

(i) Current non-employee directors and non-employee nominees for election as directors should answer all questions.

(ii) Current **executive officers** and persons chosen to be executive officers should answer all questions (to the extent applicable) except Questions 5-18.

(iii) Holders of more than 5% of any class of the Company's voting securities should answer Questions 25, 30, 32, 41 and 45. Any such holder who is a control person (i.e., possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the Company, whether through the ownership of voting securities, by contract, or otherwise.) should also answer Questions 19-22.

[(v) Selling Shareholders should answer Questions 30-32 and 39-45. If you are a Selling Shareholder, your name will be set forth in the Registration Statement as set forth above. If your name as set forth above is not correct, please make the necessary changes. You should also indicate any position, office or other material relationship you have had within the past three years with the registrant or its predecessor(s) or affiliates.] **(b)**

[(vi) Persons who are **significant employees** should answer Questions 1 and 2.] **(c)**

GENERAL

QUESTION 1. (S-K-Items 401(a), (b), (c) and (e)(1) and 407(b)(1); S-1-Item 11(k)):

(a) Please provide the following information

Full Name: ____________________

Date of Birth: ____________________

Home Address
& Telephone Number: ____________________

Business Address
& Telephone Number: ____________________

Spouse's Name: ____________________

(b) We plan to report your name, age and principal occupation, your principal occupations and employment during the last five years, and the name and principal business of any corporation or other organization in which such occupations and employment are or were carried on substantially as specified below (or if a draft biography is not provided, please provide such information. If the following is not correct, please make the necessary corrections.

[Insert draft biography.]

(c) If you are an **executive officer** [or a **significant employee**] **(c)** and have been employed by the Company or one of its **subsidiaries** for less than five years, explain briefly the nature of your responsibilities in prior positions during the past five years to the extent not set forth under (a) above.

(d) The Company is required to briefly discuss in the Registration Statement for each director or person nominated or chosen to become a director, the specific experience, qualifications, attributes or skills that led to the conclusion that such director or nominee should serve as a director for the Company, in light of its business and structure. If material, this disclosure should cover more than the past five years, including information about the person's particular areas of expertise or other relevant qualifications. Please provide below any information you believe relevant to this required disclosure not reflected in the draft biography set forth above.

(e) Please state whether you attended the prior year's annual meeting of stockholders.

Yes ______ No ______

(f) Please state below the total number of meetings the board of directors (including regularly scheduled and special meetings) held during [ ]**(d)**.

Number of Meetings:_________

(g) During [ ]**(d)**, did you attend all meetings of the board of directors of the Company? If your answer is "No," please indicate the number of meetings you missed.

Yes ______ No ______

Number of Meetings Missed: ________

QUESTION 2. (S-K-Items 401(a), (b), and (c); S-1-Item 11(k)):

Describe any arrangement or understanding between you and any other **person** or **persons** (other than directors and officers of the Company acting solely in their capacities as such) pursuant to which you were selected as a director, as a nominee for election as director, as an **executive officer** or as a person chosen to be an executive officer [or as a **significant employee**] **(c)** of the Company. Include the name or names of such other person or persons.

FAMILY RELATIONSHIPS

QUESTION 3. (S-K-Item 401(d); S-1-Item 11(k)):

Describe any relationships by blood, marriage or adoption (not more remote than first cousin) between you and any other director or **executive officer** of the Company, or any person nominated or chosen to become a director or an executive officer of the Company or any of its **subsidiaries**.

DIRECTORSHIPS

QUESTION 4. (S-K-Item 401(e)(2); S-1-Item 11(k)):

Name any other companies (including investment companies) of which you are currently a director or of which you were a director within the last five years which file periodic reports (e.g., Forms 10-K or 20-F, 10Q and 8-K) with the Securities and Exchange Commission. You need not indicate any such relationships previously referred to in your response to Question 1.

DIRECTOR INDEPENDENCE

For Companies listed on the NYSE, the following questions should be included:

QUESTION 5. (NYSE Listed Company Manual §303A.02)

(a) Do you have an **immediate family** member who is now, or has been in the past three years, an **executive officer** of the Company or any of its **subsidiaries** or other **affiliates**?

Yes ______ No ______

(b) Are you now, or have you been in the past three years, employed by the Company or any of its **subsidiaries** or other **affiliates**?

Yes ______ No ______

(c) Have you, or has an **immediate family** member received, more than $120,000 per year in direct compensation from the Company during any twelve-month period within the Company's last three fiscal years, other than (i) director and committee fees, (ii) pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), or (iii) compensation received by an **immediate family** member for service as a non-executive employee of the Company?

Yes ______ No ______

(d) Are you currently, or within the last three years have you been, affiliated with or employed by, or is an **immediate family** member currently, or has any such person within the previous three years been, affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the Company?

Yes ______ No ______

(e) Are you or an **immediate family** member currently employed, or have you or an **immediate family** member been employed during the previous three years, as an **executive officer** of another company where any of the Company's present executives at the same time serves or served on that company's compensation committee?

Yes ______ No ______

(f) Are you currently or have you been during the previous three years an **executive officer** or an employee, or is an **immediate family** member currently or has an **immediate family** member during the previous three years been an **executive officer**, of a company (not a charitable organization) that makes payments to, or receives payments from, the Company for property or services in an amount which, in any single fiscal year, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues?

Yes ______ No ______

(g) Do you serve as an **executive officer** of any charitable organization to which the Company has made contributions, and within the preceding three years such contributions in any single fiscal year exceeded the greater of $1 million or 2% of such charitable organization's consolidated gross revenues?

Yes ______ No ______

Please list any charitable organizations on which you currently serve as an **executive officer**.

(h) To properly determine if your private interests in any way interfere with, or even appear to interfere with, the interests of the Company, please answer the following questions:

(1) If you are a current director or employee of the Company, please describe any personal benefits, such as loans or guarantees of obligations, that you or an **immediate family** member have received from the Company as a result of your position in the Company.

(2) Please list direct relationships between you and the Company, and any relationships between the Company and any business, nonprofit or other entity in which you are a partner, manager, director, trustee, officer, or significant stockholder or investor, or in which you have any significant financial interest. For this purpose, please consider relationships such as commercial, industrial, banking, consulting, legal, accounting, charitable and family relationships. Please also include any passive investments in any privately-held or publicly-traded companies with which, to your knowledge, the Company has had any business or other dealings.

(3) Other than the relationships listed in (h)(2) above, please briefly list any other current and proposed relationships between the Company and you, however slight or remote (other than your service on the Company's or its subsidiaries' board of directors or committees).

For Companies listed on NASDAQ, the following questions should be included:

QUESTION 5. (NASDAQ Manual Rule 5605)

(a) Are you now, or have you been during the previous three years, employed by the Company or a parent or **subsidiary** of the Company?

Yes ______ No ______

(b) Have you, or a **family member** of yours, accepted any payments from the Company or any parent or **subsidiary** of the Company in excess of $120,000 during the Company's current fiscal year or during the previous three years, *other than* (i) compensation for board or committee service, (ii) compensation paid to a **family member** of yours who is a non-executive employee of the Company or a **parent** or **subsidiary** of the Company, and (iii) benefits under a tax-qualified retirement plan or non-discretionary compensation?

Yes ______ No ______

(c) Are you a **family member** of an individual who is now or has been at any time during the previous three years an **executive officer** of the Company or a **parent** or **subsidiary** of the Company?

Yes ______ No ______

(d) Are you, or do you have any **family member** who is, a partner in, controlling shareholder or owner of, or **executive officer** of any organization (including any business entity or any nonprofit organizations) to which the Company made, or from which the Company received, payments for property or services, in the current fiscal year or during the previous three years, that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more?

Yes ______ No ______

(e) Are you or a **family member** now employed, or have you or a **family member** been employed during the previous three years, as an **executive officer** of another entity where at any time during the previous three years, any of the Company's **executive officers** now serve or served on the compensation committee of such other entity?

Yes ______ No ______

(f) To properly determine if your private interests in any way conflict with the interests of the Company, please answer the following questions:

(1) Please list direct relationships between you and the Company, and any relationships between the Company and any business, nonprofit or other entity in which you are a partner, manager, director, trustee, officer, or significant stockholder or investor, or in which you have any significant financial interest. For this purpose, please consider relationships such as commercial, industrial, banking, consulting, legal, accounting, charitable and family relationships. Please also include any passive investments in any privately-held or publicly-traded companies with which, to your knowledge, the Company has had any business or other dealings.

(2) Other than the relationships listed in (f)(1) above, please briefly list any other current and proposed relationships between the Company and you, however slight or remote (other than your service on the Company's or its **subsidiaries'** board of directors or committees).

COMPENSATION COMMITTEE QUALIFICATIONS

QUESTION 6. (NASDAQ Manual Rule 5605; NYSE Listed Company Manual §303A.02(a)(ii))

For purposes of determining whether you are qualified to serve as an independent member of the compensation committee of the Company's board of directors, please:

(a) List all sources of compensation you've received from the Company, including any consulting, advisory or other compensatory fees paid by the Company; and

(b) Indicate whether you are affiliated with the Company, a **subsidiary** of the Company or an **affiliate** of a **subsidiary** of the Company.

QUESTION 7. (S-K Item 407(e))

During the last three (3) fiscal years, have you participated in deliberations of the Company's board of directors (or compensation committee) concerning **executive officer** compensation? If your answer is "YES," please describe the details.

Yes ______ No ______

QUESTION 8. (S-K Item 407(e))

During the last three (3) fiscal years, have you (i) served as a member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of another entity, which had an **executive officer** who served as a director or member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of the Company or (ii) served as a director of another entity which had an **executive officer** who served as a member of the compensation committee (or other board committee performing equivalent functions or in the absence of any such committee, the entire board of directors) of the Company? If your answer is "YES," please describe the relationship.

Yes ______ No ______

QUESTION 9. (S-K Item 407(e)(3)(iii))

[Other than **[Insert Compensation Consultant Name]**, which the **[Insert Committee Name]** has engaged, are**]** [Are] you aware of any compensation consultant that has been engaged by the board of directors or any committee of the board of directors? If your answer is "YES," please provide details. For all compensation consultants engaged (including **[Insert Compensation Consultant Name**]), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the board of directors) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.

QUESTION 10. (S-K Item 407(e)(3)(iii))

[Other than **[Insert Compensation Consultant Name]**, which management of the Company has engaged, are**]** [Are] you aware of any compensation consultant that has been engaged by management of the Company? If your answer is "YES," please give details below. For all compensation consultants engaged (including **[Insert Compensation Consultant Name**]), please describe to the extent of your knowledge, each such consultant's name, the committee (if not engaged by the board of directors) that has engaged such consultant, the amount paid or agreed to be paid to such consultant, and the material elements of the instructions or directions given to the consultants with respect to the performance of their duties under the engagement.

AUDIT COMMITTEE QUALIFICATIONS

QUESTION 11. (Exchange Act Rule 10A-3(b)):

For purposes of determining whether you are qualified to be a member of the Company's audit committee, please:

(a) Indicate whether you have directly or indirectly (other than in your capacity as a member of the audit committee, the board of directors or any other board committee) accepted any consulting, advisory, or other compensatory fee from the Company or any of its **subsidiaries**, other than (i) fees for board or board committee service, or (ii) fixed amounts of compensation under a retirement plan, including deferred compensation, for prior service with the Company or any of its subsidiaries (provided that such compensation is not contingent in any way on continued service).

For purposes of this Question 11(a), you will be deemed to have accepted indirect fees when such fees are received by a member of your **immediate family** or from a law firm, accounting firm, consulting firm, investment bank, financial advisory firm, or similar entity in which you are a partner, member, **executive officer**, managing director, principal or in which you occupy a similar position.

Yes ______ No ______

If yes, please provide details.

(b) Indicate whether you have (other than in your capacity as a member of the audit committee, the board of directors or any other board committee) been an **affiliate**, of the Company or any of its subsidiaries, or whether you have been an **executive officer**, employee-director, general partner or managing member of an entity that is an affiliate of the Company or any of its subsidiaries.

For purposes of this Question 11(b), you will be deemed to be an affiliate, if you are (i) an executive officer of an affiliate, (ii) a director of an affiliate, who is also an employee of that affiliate, (iii) a general partner of an affiliate, or (iv) a managing member of an affiliate.

Yes ______ No ______

If yes, please provide details.

QUESTION 12. (NYSE Listed Company Manual §303A.07):

Please list public company audit committees on which you currently serve or expect to serve in the next year.

QUESTION 13. (NASDAQ Manual Rule 5605(c)(2)(A(iii)):[5]

Have you participated in the preparation of the financial statements of the Company or any of the Company's current **subsidiaries** at any time during the past three years?

Yes ______ No ______

If yes, please provide details.

QUESTION 14. (NASDAQ Manual Rule 5605(c)(2)(A)):

(a) Do you have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in your financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities?

Yes ______ No ______

Please explain the basis for any "yes" answer.

(b) Are you now or have you been within the past two years a member of the audit committee (or a similar committee reviewing financial information) of any entity other than the Company?

If yes, please provide the name of the entity.

QUESTION 15. (NASDAQ Manual Rule 5605(c)(2)(A)(iv)):

Are you able to read and understand fundamental financial statements, including the Company's balance sheet, income statement and cash flow statement?

Yes ______ No ______

Please explain the basis for any "yes" answer.

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5 For companies to be listed on the New York Stock Exchange, members of the audit committee or persons nominated to be a member of the audit committee should answer the questions on Annex B regarding their financial expertise in lieu of Questions 13 - 15.

QUESTION 16.

Please identify and describe any material relationship you or any of your **family members** currently have (or have had within the past three years) with any charitable organization or other non-public entity. Such relationships may include, but are not limited to, relationships as a partner, controlling shareholder, director or **executive officer** of the applicable organization or entity. Please include in your response the name of the applicable organization or entity, your relationship thereto and the applicable dates of such relationship.

QUESTION 17.

Please identify and describe any relationships you have with any other director or **executive officer** of the Company (other than serving as a director of the Company), whether personal or professional. This could include serving in some capacity in a charitable organization or other non-public entity, overlapping membership in an association or club and any other relationship in which you periodically interact with such person.

QUESTION 18. (NASDAQ Manual Rule 5605(a)(2); NYSE Listed Company Manual §303A.02)

Please provide any additional information that would be relevant, appropriate or helpful for the Company's board of directors to consider when evaluating your ability to exercise independent judgment in carrying out the responsibilities of a director and when determining whether you qualify as "independent" within the meaning of that term under the federal securities laws and the rules of **[NASDAQ][the NYSE]**.

Please include in your response any information regarding relationships between you, your **family members** or your **associates** on one hand, and the Company or any of its **affiliates** on the other hand, that has not been fully described elsewhere in the Questionnaire. Such relationships may be either direct or as a partner, member, shareholder or officer of an organization or entity that has a material relationship with the Company or any of its **affiliates**. Further, such relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others.

LEGAL PROCEEDINGS

Note: In determining your responses to the following Questions 19-28, for purposes of completing the ten year period, the date of the events referred to shall be deemed the date on which the final order, judgment or decree was entered, or the date on which any rights of appeal from preliminary orders, judgments or decrees lapsed. With respect to bankruptcy petitions, such date shall be the date of filing for uncontested petitions or the date upon which approval of a contested petition became final.

QUESTION 19. (S-K-Item 401(f)(1); S-1-Item 11(k)):

During the past ten years, has a petition under any Federal or state bankruptcy or insolvency law been filed by or against, or a receiver, fiscal agent or similar officer been appointed by a court for the business or property of, (i) you or your property, (ii) any partnership in which you were or, within the two years before the date thereof, had been a general partner, or (iii) any corporation or business association of which you were or, within the two years before the date thereof, had been an **executive officer**? If so, provide details.

QUESTION 20. (S-K-Item 401(f)(2); S-1-Item 11(k)):

During the past ten years, have you been convicted in a criminal proceeding or are you now the named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)? If so, provide details.

Please indicate whether there are any other legal proceedings, consent decrees, settlements or suits (civil or criminal) that are not covered by the foregoing question (whether due to the date on which they occurred or the subject matter thereof), but are so material to an evaluation of your ability or integrity to act as a director or officer that they should nonetheless be disclosed to investors.

QUESTION 21. (S-K-Items 401(f)(3) and (4); S-1-Item 11(k)):

During the past ten years, have you been the subject of any order, judgment or decree (not subsequently reversed, suspended or vacated) of:

(i) any court of competent jurisdiction permanently or temporarily enjoining or otherwise limiting you from (x) acting as a futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, floor broker, leverage transaction merchant, any other person regulated by the U.S. Commodity Futures Trading Commission, or an associated person of any of the foregoing, or as an investment adviser, underwriter, broker or dealer in securities, or as an affiliated person, director or employee of any investment company, bank, savings and loan association or insurance company, or engaging in or continuing any conduct or practice in connection with any such activity, (y) engaging in any type of business practice or (z) engaging in any activity in connection with the purchase or sale of any security or commodity or in connection with any violation of Federal or state securities laws or Federal commodities laws, or

(ii) any Federal or state authority barring, suspending or otherwise limiting, for more than 60 days, your right to be engaged in any activity described in (i) above or to be associated with persons engaged in any such activity?

If so, provide details.

QUESTION 22. (S-K-Items 401(f)(5) and (6); S-1- Item 11(k)):

During the past ten years, have you been found by a court of competent jurisdiction in a civil action or by the Securities and Exchange Commission to have violated any Federal or state securities law or have you been found by a court of competent jurisdiction in a civil action or by the Commodity Futures Trading Commission to have violated any Federal commodities law (which judgment or finding has not, in any such case, been subsequently reversed, suspended or vacated)? If so, provide details.

QUESTION 23. (S-K-Items 401(f)(7); S-1-Item 11(k)):

During the past ten years, have you been the subject of, or a party to, any Federal or state judicial or administrative order, judgment, decree, or finding, not subsequently reversed, suspended or vacated, relating to an alleged violation of:

(i) Any Federal or state securities or commodities law or regulation; or

(ii) Any law or regulation respecting financial institutions or insurance companies including, but not limited to, a temporary or permanent injunction, order of disgorgement or restitution, civil money penalty or temporary or permanent cease-and-desist order, or removal or prohibition order; or

(iii) Any law or regulation prohibiting mail or wire fraud or fraud in connection with any business entity?

(This question does not apply to any settlement of a civil proceeding among private litigants.)

If so, please provide details.

QUESTION 24. (S-K-Items 401(f)(8); S-1-Item 11(k)):

During the past ten years, have you been the subject of, or a party to, any sanction or order, not subsequently reversed, suspended or vacated, of any self-regulatory organization (as defined in Section 3(a)(26) of the Exchange Act, any registered entity (as defined in Section 1(a)(29) of the Commodity Exchange Act), or any equivalent exchange, association, entity or organization that has disciplinary authority over its members or persons associated with a member?

If so, please provide details.

QUESTION 25. (S-K-Item 103, Instruction 4; S-1- Item 11(c)):

Describe any material legal proceeding, other than ordinary routine litigation incidental to the business, to which you or any **associate** is a party adverse to the Company or any of its **subsidiaries** or in which you or such associate have a material interest adverse to the Company or any of its subsidiaries.

QUESTION 26. (S-K Item 103, Instruction 4)

Do you know of any legal, regulatory or administrative proceeding brought or contemplated by any governmental authority (including but not limited to antitrust, price-fixing, tax, environmental, copyright or patent litigation) to which the Company or any **subsidiary** is or may be a party or of which the property of the Company or any of its **subsidiaries** is subject? If your answer is "YES," please describe.

Yes ______ No ______

QUESTION 27. (Cal. Corp. Code §1502.1(a)(6))[1]

During the past ten years, have you been convicted of fraud? If so, please provide details.

QUESTION 28. (Sarbanes-Oxley §105(c)(7)(B))

During the past ten years, have you ever been: (i) suspended or barred from being associated with an issuer or public accounting firm; or (ii) suspended or barred from appearing or practicing before the SEC? If so, please provide details.

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1 Include to the extent the Company is required to file Form SI-PT in California.

COMPENSATION

QUESTION 29. (S-K-Items 402; S-1-Item 11(l)):

(a) Since [ ] (**d**), has any **compensation** (including securities, property **perquisites** or other personal benefits), other than board fees and executive salary, been distributed to you, directly or indirectly, or accrued for your account, by any person or entity other than the Company (i) for services rendered to the Company, (ii) pursuant to a **transaction** between the Company and such person or entity (iii) or on account of your position as an **executive officer** or director of the Company?

Yes ( ) No ( )

If "yes," please give details.

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(b) Are any payments (other than those payments of which the Company is aware) proposed to be made in the future to you or for your benefit, directly or indirectly pursuant to any existing contract, plan or arrangement, by any person, in connection with or related to your services to the Company?

Yes ( ) No ( )

If "yes," please give details.

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(c) Has the Company, directly or indirectly, including through any of the Company's subsidiaries, ever (i) extended or maintained credit, arranged for the extension of credit or renewed an extension of credit, in the form of a personal loan to or for you or (ii) guaranteed an obligation for you?

Yes ( ) No ( )

If "yes," please give details and describe the arrangement.

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(Directors Only) Since [   ] (**d**), did you receive any payments or promises of payments pursuant to director legacy programs or similar charitable award programs?

Yes (   )   No (   )

If "yes," please give details.

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The SEC has taken the position that certain non-monetary benefits to a director or an executive officer (commonly referred to as "fringe benefits" or "perquisites") must be valued and disclosed if such benefits (i) are not integrally and directly related to the performance of the director's or executive officer's duties (i.e., are not necessary to perform the director's or officer's job) and (ii) confer a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company. Tax treatment has no bearing on whether an item should be characterized or a perquisite.

Examples of potentially reportable personal benefits include, without limitation, the following: (1) club memberships not used exclusively for business entertainment purposes; (2) personal financial or tax advice; (3) personal travel using vehicles owned or leased by the company or personal travel otherwise financed by the company; (4) personal use of other property owned or leased by the company; (5) housing and other living expenses (including but not limited to relocation assistance and payments to a director or executive officer to stay at his or her personal residence); (6) security provided at a personal residence or during personal travel; (7) commuting expenses (whether or not for the company's convenience or benefit); (8) discounts on the company's products or services not generally available to employees on a non-discriminatory basis. For other examples of items that might be perquisites, depending upon the facts and circumstances, please see the list under **perquisites** in the Explanatory Notes.

Since [   ] (**d**), have you received any non-monetary benefits from the company or its subsidiaries?

Yes ______   No ______

If "Yes," please describe below, including the identity and address of the recipient of the benefit, the amount and nature of compensation and the nature of the transaction.

TRANSACTIONS(e) AND RELATIONSHIPS

QUESTION 30. (S-K-Item 404(a); S-1-Item 11(n)):

Describe briefly any **transaction**, or series of similar transactions, since [ ](**f**), or any proposed transaction, or series of similar transactions, to which the Company, any of its **subsidiaries** or any of its **affiliates** was or is to be a party, which exceeds $120,000 in amount and in which you, or, to your knowledge, any member of your **immediate family**, had or is to have a direct or **indirect** material interest.

QUESTION 31. (S-K-Item 402(j); S-1-Item 11(l)):

Describe each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) or the provision of other benefits, including perquisites and health care benefits, to you at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of your employment, or a change in control of the Company or a change in your responsibilities with the Company.

QUESTION 32. (S-K-Item 601; S-1-Item 16):

State whether you, or any **associate** of yours, are a party to any material contract not made in the ordinary course of business to which the Company or any of its **subsidiaries** is a party or has succeeded to a party by assumption or assignment, or in which the Company or any of its subsidiaries has a beneficial interest, which is either currently in effect or, if it is no longer to be performed in whole in part, was entered into not more than two years ago. If so, please identify such contract.

QUESTION 33. (Sarbanes-Oxley§402)

Have you received at any time during the previous 24 months, or do you currently have outstanding any loan or extension of credit in the form of a personal loan from the Company or any of its **affiliates**?

Yes ______ No ______

QUESTION 34. (Sarbanes-Oxley§402)

Has the Company or any of its **affiliates** arranged such a loan or an extension of credit in the form of a personal loan from any third party during the same time period?

Yes ______ No ______

QUESTION 35. (Sarbanes-Oxley§402)

Is any such loan or extension of credit proposed to be extended to you as of [ ]**(d)**?

Yes ______ No ______

If you answered "YES" to any of these questions, please describe below the material terms of the loan or extension of credit, including the original principal amount, the current balance and the material terms of the loan. Please also describe any modifications, amendments, renewals or forgiveness of such loans or extensions of credit made during the previous 24 months or intended to be made as of [ ]**(d)** to any preexisting loans or extensions of credit.

QUESTION 36. (S-K Item 403(c))

Do you know of any change in control of the Company that has occurred during any of the Company's last three (3) fiscal years or during the Company's current fiscal year? If your answer is "YES," please provide a brief description of the change in control.

Yes ______ No ______

QUESTION 37. (S-K Item 403(c))

Do you know of any arrangement, including any pledge by any person of securities of the Company, the operation of which may at a subsequent date result in a change in control of the Company? If your answer is "YES," please provide a brief description of the arrangement(s).

Yes ______ No ______

QUESTION 38.

Other than pursuant to a statutory provision or provision of the Company's charter or bylaws, do you know of any arrangement in which a director or officer of the Company is insured or indemnified in any manner against liability that he may incur in his capacity as such, including, without limitation, any indemnification agreement with the Company? If your answer is "YES," please provide a brief description of the arrangement(s).

SECURITY OWNERSHIP

To assist you in answering Questions 39 and 40, the amount, if any, of the Company's, its **parents'** and **subsidiaries'** equity securities registered in your name is set forth below:

Title	Amount

QUESTION 39. (S-K-Item 403(a); S-1-Item 11(m)):

You may limit your answer to this Question 39 to **beneficial ownership** by (i) you, (ii) members of your **immediate family**, (iii) any "group" in which you are a member, (iv) your **associates** and (v) any corporation or other organization with which you have an employment or other significant connection. Subject to those limitations, if any **person** (including for this purpose a "group," which may consist of two or more persons acting as a partnership, limited partnership, syndicate or other group for the purpose of acquiring, holding, voting or disposing of securities of the Company) is known to you to be the **beneficial owner** of more than 5% of any class of the Company's voting securities as listed in the first column below(**g**), complete the table below to the extent of the information available to you.

Please footnote the third column to show, to the extent of the information available to you, (i) the number of such securities with respect to which the beneficial owner has the right to acquire beneficial ownership, the number with respect to which the power of investment or the power to vote, or both, is held and, if any such power is shared, the persons with whom it is shared and (ii) where the holder(s) named in the table holds more than 5% of any class of the Company's voting securities pursuant to a voting trust or similar agreement, state the amount held or to be held subject to such trust or agreement, the duration of the agreement and the names and addresses of the voting trustees and outline briefly their voting rights and other powers under the trust or agreement.

Title of Class	Name and Address (business, mailing or residence) of Beneficial Owner	Amount and Nature of Beneficial Ownership on , 201_ (h)

QUESTION 40. (S-K-Item 403(b); S-1-Item 11(m)):

Set forth in the table below the information requested with respect to each class of **equity securities** (including any puts, calls, straddles or other options) of the Company, any of its **parents** or any of its **subsidiaries beneficially owned** by you. Please footnote the last column to show (i) the number of such securities with respect to which you have the right to acquire beneficial ownership, the number with respect to which the power of investment or the power to vote, or both, is held by you and, if any such power is shared, the persons with whom it is shared, and (ii) securities that are pledged for security.

Class of Equity Securities	Number of Shares (issued or issuable) Beneficially Owned on , 201	Exercise Price (also, purchase price, if any)	Vesting Schedule (including grant date and expiration dates, if any)	Nature of Ownership (trust Partnership, direct, personnel, etc.)

QUESTION 41. (S-K-Item 403(c); S-1-Item 11(m)):

Please state if you know of any arrangements that may result in a future change in control of the Company (other than ordinary default provisions contained in the Company's charter, trust indentures or other governing instruments relating to the Company's securities). These arrangements would include a pledge by a **person** of **equity securities**, a deposit of **equity securities** as collateral, creation of a voting trust or similar arrangement or contract providing for the sale or disposition of **equity securities**.

SELLING SHAREHOLDERS(b)

QUESTION 42. (S-K-Item 507; S-1-Item 7):

(a) Indicate, as to the securities being registered and sold for your account, the amount to be offered for your account and the amount to be owned by you after the offering.

(b) Indicate the nature of any position, office, or other material relationship not otherwise set forth in response to another question which you have had within the past three years with the Company or any of its predecessors or **affiliates**.

QUESTION 43. (Required for NASDAQ listing application):

Please provide a detailed description of all inquiries, investigations, lawsuits, litigation, arbitration, hearings, or any other legal or administrative proceedings against you:

(a) that are or were initiated or conducted by any regulatory, civil or criminal agency (including but not limited to the SEC, FINRA, PCAOB, state securities regulators, Commodities Futures Trading Commission, Department of Justice, state bar associations, state boards of accountancy, or any foreign regulatory, civil or criminal authority); or

(b) in which claims are or were asserted otherwise alleging fraud, deceit or misrepresentation and seeking damages in excess of $100,000.

Please note that there is no limit on the time frame covered by this question.

REPORTING OBLIGATIONS

QUESTION 44. (S-K Item 405)

If you are an **executive officer**, director or owner of 10% of any class of the Company's equity securities, you are subject to the reporting requirements of Section 16(a) of the Exchange Act and the rules promulgated thereunder. These rules may require you to file, within forty-five (45) days of the end of the Company's fiscal year, an Annual Statement of Changes in Beneficial Ownership on Form 5 with the SEC reflecting certain of your transactions in the Company's equity securities.

It is not necessary to make this annual Form 5 filing if: (i) you have not engaged in any **transactions** in the Company's equity securities during the past year which require annual reporting on Form 5, or if you have made a prior, voluntary disclosure of such **transactions** on Form 4 prior to the date the Form 5 is due; and (ii) you have no holdings or **transactions** which you were otherwise required to report as of [ ] **(d)** and which were not reported to the SEC.

NOTE: If you have already returned a separate Form 5 Certification or provided a Form 5 to the Company, you do not need to complete this question.

(a) On the basis of a review of all transactions in the Company's equity securities as of [ ]**(d)** and all filings made by you or on your behalf with the SEC during such period, are you required to file a Form 5 with the SEC for the past fiscal year? **(Answering "No" shall constitute your representation that no Form 5 filing is required, and your agreement that the Company may retain this Questionnaire and provide it to the SEC upon request.)**

Yes ______ No ______

If you answered "YES," please state the transactions that should be reported to the SEC.

(b) Did you file any reports on Form 3 or Form 4 later than the deadline for filing such reports as of [ ]**(d)** or any prior fiscal year (excluding any late reports that have previously been disclosed in the Company's proxy statements)?

Yes ______ No ______

If you answered "YES," please state the details of the transaction or provide the date on which the late Form 3 or Form 4 report was filed with the SEC.

FINRA(i)

QUESTION 45.

If you are a corporation the following five questions should also be answered with respect to your officers, directors, holders of 5% or more of your equity securities and any beneficial owner of the Company's unregistered equity securities that were acquired during the last 180 days; if you are a partnership such questions should also be answered with respect to your general partners.

(a)(I) Indicate below whether you have any information pertaining to underwriting compensation and arrangements or **items of value** received or to be received by any **underwriter or related person** or any dealings between any

underwriter or related person, **member of FINRA**, **person associated with a member** or **associated person of a member** on the one hand and the Company (including any selling security holder, any affiliate of the Company or any selling security holder, and the officers, directors, general partners, employees and security holders thereof) on the other hand, other than information relating to the proposed public offering by the Company of the Company's common stock.

I know of no such information____________________

I know of such information______________________

Description:

____

____

(II) State below whether you are (i) a **member of FINRA**, (ii) an affiliate of a **member of FINRA**, (iii) a **person associated with a member** or **an associated person of a member** of FINRA, or (iv) an **underwriter or a related person** with respect to the Offering? If so, describe the relationship.

If you answered "yes" above, then in connection with your direct or indirect affiliation or association with a member of FINRA, please furnish the identity of such FINRA member and any information, if known, as to whether such FINRA member intends to participate in any capacity in the offering, including the details of such participation.

Description: ____

If you answered "yes" in question (II) above, indicate below information as to all purchases and acquisitions (including contracts for the purchase or acquisition) of any securities of the Company by you, regardless of the time acquired or the source from which derived.

Name	Amount and Description of Securities	Price or Other Consideration	Date of Acquisition

(b) Please indicate below information as to all sales and dispositions (including contracts for the sale or disposition) of any securities of the Company during the last 180 days, or within the next 6 months, by you to an **underwriter or related person** with respect to the Offering.

Name	Amount and Description of Securities	Price or Other Consideration	Date of Acquisition

(c) Please set forth below any information, to the extent known, about any other arrangement entered into during the last 180 days that provides for the receipt of any item of value and/or the transfer of any warrants, options, or other securities from the issuer (including, but not limited to, the Company and the selling shareholders participating in the Offering) to a **member of FINRA**, a **person associated with a member** or **an associated person of a member** of FINRA, or an **underwriter or related person** with respect to the Offering.

Description: ____

(d) If you have had during the last 180 days, or are to have within the next 6 months, any transaction of the character referred to in either (a), (b) or (c) above, describe briefly the relationship, affiliation or association of both you and, if known, the other party or parties to any such transaction with an **underwriter or related person** with respect to the Offering. In any case where the purchaser (whether you or such other party or parties) is known by you to be a member of a private investment group, such as a hedge fund or other group of purchasers, furnish, if known, the names of all persons comprising the group and their association with or relationship to any broker-dealer.

Description: ____

(e) Please state whether you own stock or other securities of a member of FINRA not purchased in the open market. If so, describe the securities.

(f) If you or any of your associates has had a **material relationship** with or with any other investment firm or underwriting organization that might participate in the underwriting of the securities proposed to be registered by the issuer, please specify the names of the parties, their relationship to you and the nature of the relationship:

Description:

____

____

FOREIGN CORRUPT PRACTICES ACT

In connection with your response to this question, the following instructions apply:

(i) Your answers should relate 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.

(ii) Your answers should relate not only to activities or conduct within the United States, but outside the United States as well.

(iii) The terms "payments" and "contributions" include not only giving cash or hard goods but also giving anything else of value (*e.g.*, services or the use of property).

(iv) The term "indirectly" means an act done through an intermediary. Payments to sales agents or representatives that are passed on in whole or in part to purchasers, or compensation or reimbursement to persons in consideration for their acts, are examples of acts done through intermediaries.

(v) Your answers should include not only matters of which you have direct personal knowledge, but also 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 that case, your response would be "YES.")

QUESTION 46.

Do you have any 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:

(i) 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.

Yes ______ No ______

(ii) 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.

Yes ______ No ______

(iii) Any contributions, whether or not legal, made to any political party, political candidate or officeholder.

Yes ______ No ______

(iv) 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 the books of account.

Yes ______ No ______

(v) Any receipts or disbursements, the actual nature of which has been "disguised" or intentionally mis-recorded on the corporate books of account.

Yes ______ No ______

(vi) Any fees paid to consultants or commercial agents that exceeded the reasonable value of the services purported to have been rendered.

Yes ______ No ______

(vii) Any payments or reimbursements made to the Company's personnel to enable them to expend time or to make contributions or payments of the kinds or for the purposes referred to in subparts (i) – (vi) above.

Yes ______ No ______

If your answer is "YES" to any of the foregoing questions, please describe the details of the subject **transaction**.

SIGNATURE AND UNDERTAKING

The information set forth above is supplied by me for use in the preparation of the Registration Statement.

If I am a nominee for director or have been chosen to be an executive officer,

I confirm my consent to being named as such in the Registration Statement and to serve as such if elected or appointed.

I will notify the Company immediately of any changes in the foregoing answers which should be made as a result of any developments occurring prior to the effective date of the Registration Statement.

I understand and acknowledge that the Company, its counsel and the representatives of the underwriters and their counsel will rely on the information set forth herein for purposes of the preparation and filing of the Registration Statement covering an underwritten public offering of the Company's securities.

I further understand and acknowledge that the Company, its counsel and the representatives of the underwriters and their counsel will rely on the information set forth herein for purposes of the preparation and filing of materials with FINRA.

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, and to each officer and director of the Company signing the Registration Statement. I will notify you and the Company 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.

THE FOREGOING ANSWERS ARE CORRECTLY AND FULLY STATED TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

Dated: , 201

____
Signature

____
Print name of respondent

____
Name and title, if respondent is an entity

Explanatory Notes

1. ***"Affiliate"*** means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with the Company and includes the Company's parents, if any, and subsidiaries.[6] For the purposes of completing this Questionnaire, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

2. An ***"associate"*** of a person means:

   1. any corporation or organization (other than the Company or a majority-owned subsidiary of the Company) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10% or more of any class of equity securities;

   2. any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity; and

   3. any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the Company or any of its parents or subsidiaries. If a person was an "associate" at the time of the transaction in question, then that person should be considered an "associate" even though that person may no longer be an "associate".

3. ***"Beneficial ownership"***: For the purposes of this Questionnaire, a person is deemed to have "beneficial ownership" of securities over which such person, directly or indirectly through any contract, arrangement, understanding, relationship or otherwise, has or shares (i) voting power (which includes the power to vote or to direct the voting of such securities) or (ii) investment power (which includes the power to dispose or direct the disposition of such securities).

A person is also deemed to be the beneficial owner of securities:

   1. the beneficial ownership of which such person has the right, at any time within 60 days, to acquire, including, but not limited to, any right to

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[6] Add list of any affiliates of the Company other than any parents or subsidiaries.

acquire through the exercise of options, warrants or rights, the conversion of a convertible security or the revocation or automatic termination of a trust or discretionary account or similar arrangement;

2. the beneficial ownership of which such person has the right to acquire (as specified in (i)) at any time, where such right is acquired for the purpose, or with the effect, of changing or influencing control of the Company, or in connection with or as a participant in any transaction having such purpose or effect; or

3. with respect to which such person, directly or indirectly, through the creation or use of a trust, a proxy, power of attorney, pooling arrangement or any other contract, arrangement or device purports to have divested himself of beneficial ownership or to have prevented the vesting of beneficial ownership as part of a scheme to evade the reporting requirements of Section 13(d) or 13(g) of the Securities Exchange Act of 1934.

In interpreting the above-described provisions, the Securities and Exchange Commission has taken the position that a person has indirect beneficial ownership of securities where such person controls the person which has the power to direct the voting or investment of such securities.

4. ***"Compensation"***: For purposes of this Questionnaire, "*compensation*" includes all consideration, from whatever source, for services in all capacities to the Company and any of its subsidiaries, including transactions between the Company and a third party when the primary purpose of the transaction is to furnish compensation to you.

Compensation includes certain non-monetary benefits to a director or an executive officer (commonly referred to as "fringe benefits" or "**perquisites**"). See the definition of "**perquisites**" below.

5. ***"Equity security"*** means any stock or similar security, certificate of interest or participation in any profit-sharing agreement, pre-organization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest in a joint venture, or certificate of interest in a business trust; or any security convertible, with or without consideration, into such a security or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or tight; or any put, call, straddle or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

6. ***"Executive Officer"*** includes the Company's President and **(j)**. ["***Significant employee***" includes the Company's **(k)**] **(c)**. For purposes of Question 19, an "***executive officer***" of an entity includes the entity's President, any Vice President of the entity 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 for the entity, including any executive officers of subsidiaries of the entity who perform such policymaking functions for the entity.

7. For companies to be listed on NASDAQ, "family member" means a persons spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such persons home.

8. ***"Immediate family"***: For companies to be listed on NASDAQ, your "immediate family" means your spouse, parents, children and siblings, whether by blood, marriage or adoption or anyone residing in your home, and for companies to be listed on The New York Stock Exchange, your "*immediate family*" means your spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares your home. Specifically for purposes of Question 29, a person's "*immediate family*" means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, *and any person* (other than a tenant or employee) *sharing your household*.

9. An ***"indirect"*** interest in the transaction may arise because of a position or relationship with a firm, corporation or other entity which engages in the transaction, except that no material indirect interest is deemed to arise where he interest arises only from a position as a director of another corporation or organization which is a party to the transaction or (ii) the interest arises solely from the holding of an equity interest (including a limited partnership interest but excluding a general partnership interest) or a creditor interest in another party to the transaction and the transaction is not material as to such other party.

10. "**item of value**" includes, but is not limited to, any:

(i) Financial consulting and advisory fees, whether in the form of cash, securities, or any other item of value;

(ii) 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;

(iii) 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;

(iv) 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 in excess of that received by other members of the board of directors; and

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.

11. **"material relationship"** has not been defined by the Securities Exchange Commission. However, the Commission likely will construe as a "material relationship" any relationship which tends to prevent arm's-length bargaining in dealing with a company, whether arising from a close business connection or family relationship, a relationship of control or otherwise. You should conclude that you have a relationship, for example, with any organization of which you own, directly or indirectly, 10% 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.

12. ***"Member of FINRA"*** means any broker or dealer admitted to membership in the Financial Regulatory Authority, Inc.

13. ***"Parent"***: A list of the Company's parents, if any, is attached.

14. ***"Perquisites"***: Generally, a perquisite is a benefit to an executive that (1) is not integrally and directly related to the executive's duties as an officer, and (2) confers a direct or indirect benefit on the executive (or a family member of the executive). Tax treatment has no bearing on whether an item should be characterized as a perquisite.

In addition to the examples given in Question 23 about what may be a perquisite, below is an illustrative list of items that might be perquisites depending upon the facts and circumstances. This list is not exhaustive.

- Any other personal benefit (not described below), other than one of insubstantial value, which is not directly related to job performance
- Benefits from third parties or suppliers, such as favorable loans or discounted products or other benefits from third parties because the company compensates the suppliers or third parties (either directly or indirectly) for providing such benefit.
- Car Allowance
- Car Insurance
- Charitable contribution on behalf of the executive
- Club Dues
- Club Initiation Fee
- Commission for Sale of Home
- Commuting Expenses
- Computer Equipment
- Corporate Residence
- Costs Associated with Expatriate Work Assignment
- Currency Exchange Arrangements
- Discounts on Company's Products/Services Not Generally Available to All Employees
- Excess Liability Insurance
- Executive Office Benefits
- Financial Consulting Services
- Gas Allowance

- Goods and Services Differential (For Foreign Service)
- Home Office Costs
- Home Security
- Housing Allowance including housing expenses for home repairs, maintenance, domestic services, improvement, etc.
- Legal Expenses
- Life Insurance Premiums
- Living Expenses
- Loan forgiveness or company loans on favorable terms
- Long Term Disability Insurance
- Meals (other than for business purposes)
- Medical and Dental Claims/Premiums
- Parking Fees
- Personal Liability Insurance
- Personal Travel on Corporate Aircraft
- Personal Use of Company-Provided Admin. Support
- Personal use of Company Vehicles
- Physical Exam/Voluntary Health Screening
- Relocation Allowance or payments that permit the executive to continue living at personal residence
- School Tuition
- Secured Parking
- Security Concerning Fraudulent Data Access
- Security expenses for residence or personal travel
- Spouse/Family Member Accompanying Executive on Business Travel
- Subsidy for Effective Company Representation in the Community
- Supplemental Accidental Death and Dismemberment Insurance
- Tax Equalization Payments
- Tax Gross Ups
- Telephone Services
- Company Paid Trips other than Strictly for Business Purposes

- Use of Company tickets for sporting events, concerts, etc. for personal benefits (e.g., using on self, family, and friends)
- Use of Corporate Travel Agency for Personal Travel or Executive Dining Room
- Wellness Reimbursement (For Fitness Related Activities)
- Wireless Network for Computer Use

15. ***"Person"***: For the purposes of this Questionnaire, "**person**" means a natural person, a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under Title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such; or a government, or a political subdivision, agency or instrumentality of a government.

16. ***"Person associated with a member"*** or ***"associated person of a member"***: Article I (cc) of the FINRA's By-Laws defines the term "person associated with a member" or "associated person of a member" to mean a natural person who is registered or has applied for registration under the rules of FINRA, a sole proprietor, partner, officer, director or branch manager of any member of FINRA, 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 such person is registered or exempt from registration with FINRA.

17. ***"Subsidiary"***: A list of the Company's subsidiaries is attached as Annex A.

18. ***"Transaction"*** includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships. Note the following with regarding to Question 14:

4. If you or an immediate family member has a position or relationship with a firm, corporation, or other entity that engages in a transaction with the Company you or an immediate family member shall not have a reportable interest in the transaction where the interest arises only:

1. from your or your immediate family member's position as a director of another corporation or organization that is a party to the transaction; or

2. from the direct or indirect ownership by you or your immediate family members, in the aggregate, of less than a ten percent equity interest in another person (other than a partnership) which is a party to the transaction; or

3. from both such position and ownership specified in (A) and (B) above; or

4. from your or your immediate family member's position as a limited partner in a partnership in which you or your immediate family members have an interest of less than ten percent, and none of you or your immediate family members is a general partner of and does not hold another position in the partnership.

5. The following transactions may be excluded:

5. The transaction is one where the rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

6. The transaction involves services as a bank depositary of funds, transfer agent, registrar, trustee under a trust indenture, or similar services; or

7. Your interest in the transaction arises solely from the ownership of a class of equity securities of the registrant and all holders of that class of equity securities of the registrant received the same benefit on a pro rata basis.

6. In the case of a transaction involving indebtedness the following items of indebtedness may be excluded from the calculation of the amount of indebtedness and need not be reported: amounts due from you or your immediate family member for purchases of goods and services subject to usual trade terms, for ordinary business travel and expense payments and for other transactions in the ordinary course of business.

19. ***"Underwriter and related persons***" includes underwriters, underwriters' counsel, financial consultants and advisors, finders, FINRA members participating in the public Offering, and any other persons related to any participating FINRA member).

Annex A to Questionnaire

List of the Company's Subsidiaries

[To be completed]

Annex B to Questionnaire

Questions Regarding Financial Expertise

The Securities and Exchange Commission has adopted rules requiring the board of director of a public company to determine whether an "audit committee financial expert" serves on a company's audit committee. To qualify, a person must possess each of five attributes and must have attained the attributes through one or more of four means.

Please indicate whether you possess the following five attributes to be considered an "audit committee financial expert" and indicate the means through which you attained the required expertise.

1. Do you possess an understanding of GAAP and financial statements?
2. Do you possess the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves?
3. 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 do you have experience actively supervising one or more persons engaged in such practice?
4. Do you have an understanding of internal controls and procedures for financial reporting?
5. Do you have an understanding of audit committee functions?

If you answered "**yes**" to all of the questions above, the board of directors will consider all available facts and circumstances in making its determination as to whether you qualify as an "audit committee financial expert." In furtherance thereof, please indicate and provide details, on a separate sheet if necessary, of how you attained your audit committee financial expertise in one or more of the following means:

1. Through education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or through experience in one or more positions that involve performance of similar functions.

2. Through experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions.
3. Through experience actively overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements.
4. Through other relevant experience. If so, please describe such other relevant experience.

EXHIBIT G
SAMPLE BUSINESS DUE DILIGENCE OUTLINE
OVERVIEW

- The attached checklist represents a general outline. Some items may not be relevant while other items may be added during our discussions. Much of this data will be useful in completing the prospectus and the subsequent road show presentation.
- We defer to the Company as to how to address these various categories. Our goal is to complete our due diligence process with a minimal level of disruption to the Company. We would expect to utilize a combination of conference calls, meetings and physical and/or electronic delivery of financial and legal information.

I. Industry Information

A. Industry Overview

1. Industry description and size
2. Company's position within the industry
3. Trends
4. Factors affecting growth and demand
5. Growth opportunities
6. Profit margins
7. Comparison of Company's performance with that of industry
8. Discussion of key success factors and performance measures

B. Competitor Overview

1. List and description of significant competitors
2. Relevant competitive factors
3. Basis for competition
4. Company's competitive advantages/disadvantages
5. Potential future competition
6. Barriers to entry
7. Effect of pricing
8. Future opportunities
9. Market share data
10. The Company's cost position vis-à-vis its competitors

II. *Company Information*

A. Company Organization

1. Organizational and department overview
2. Organization chart
3. Key management and biographies
4. Members of the Board of Directors
   — Experience
   — Independence
   — Anticipated changes
5. Number of employees by function/segment, location, exempt/non-exempt, full-time/part-time, union/non-union, if applicable
6. Turnover

B. Overview of Business Strategy

1. Corporate strategy and goals
2. Expansion strategy
   — Strategic acquisitions/divestitures
   - historical and projected acquisition strategy
   - acquisition criteria
   - assimilation of acquired companies; financial performance since acquisition
   - revenue and profitability of acquired companies
   - all historical and planned acquisitions/divestitures and return on investment, multiples paid

   — New product development
   — Other growth opportunities
   — Existing vs. new product offerings
   — Development of proprietary products
3. Differentiating characteristics of the Company
   — Management expertise and style
   — Employee training, turnover, incentives
   — Inventory control
   — Vendor relationships
   — Other key strengths

C. Marketing and Customers

1. Customer profile
   - Consumer vs. institutional
   - Consumer/institutional demographics
2. Customer base/database
3. Promotion and advertising
   - Schedules of historical and projected advertising/promotion programs and expenses by medium
   - Extent and nature of co-op spending now and expected in the future
   - Multimedia opportunities

D. Products

1. Description of product categories
2. Sales and profit by product
3. Discuss trends by product for sales and profitability

E. Facilities

1. Size/capacity
2. Date opened
   - Update on integration
   - Ramp-up schedule
3. Ownership/lease status (and landlord relationships, if any)
4. Current operations and outsourcing arrangements
5. Environmental issues

F. Vendors

1. Significant vendors, volumes
2. Vendor shortages/interruptions, if any
3. Alternative vendors
4. Vendor concentration vis-à-vis competitors
5. Exclusive relationships/development of proprietary products
   - Terms of relationship

G. Management Information Systems

1. Description of systems in place
   - Database management
   - Financial
2. Capabilities and limitations of systems
3. Internal controls over financial reporting
4. Recent and planned innovations

III. Financial Information

A. Historical Financials to Date

1. Income statement
   - Detailed schedule of revenue and gross profit by product
   - Detailed schedule of SG&A by line item
   - Detailed depreciation and amortization schedules
   - Revenue and expense recognition policy and comparison to industry standards
   - Analysis of budget vs. actual results to date
   - Tax information
   - Detail on any historical or projected non-recurring items
   - Seasonality
2. Balance sheet
   - Accounts receivable (aging, delinquencies, reserve and write-off policies)
   - Inventory (valuation, reserves, shrinkage and composition by category)
   - Complete breakdown of prepaid expenses, other current and fixed assets (schedules, write-ups or downs, adjustments, reserves)
   - Accounts payable (terms, creditors)
   - Detailed breakdown of any accrued deferred or contingent liabilities
   - Recent appraisals
   - Historical analysis of borrowings
   - Bank credit agreements and any other loan documents

— Liens on real and personal property

3. Cash flow
   - Working capital detail by month
   - Detailed capital expenditure schedule (historical vs. planned)
4. Funding
   - Bank facilities
   - Other funding arrangements
   - Terms of securities issues, including preferred stock
5. Off-balance sheet transactions
   - Nature and business purpose
   - Cash flows and other benefits to the company arising from the transactions
   - Obligations or liabilities of the company arising from the transactions
6. Financial reporting controls and procedures
   - Internal controls and procedures
   - Auditor independence
7. Internal financial reporting packages

B. Overview and Description of Projections

1. Quarterly income statement, balance sheet and cash flow
2. Acquisition schedule
3. Overhead consolidation assumptions
4. Assumptions by product, category
5. Capital expenditure requirements
6. Future borrowings or debt paydown
7. Covenant compliance
8. Overall expected liquidity situation

IV. Legal and Administrative Information

A. Litigation and Legal Proceedings

1. Litigation and claims settled or concluded
2. Litigation and claims pending or threatened
3. Information on legal proceedings, if any

4. Overview of relevant regulations and local law considerations
5. Expected relevant legislative and regulatory changes
6. Summary of significant contractual obligations, other than leases

B. Personnel

1. Employment contracts
2. Consulting contracts
3. Employee benefits plans
4. Noncompetition agreements
5. Pension liabilities and retiree health plans
6. Information on any union representation, strikes
7. Incentive compensation plans
8. Existence of loans to directors and executive officers

C. Insurance

1. Insurance policies and coverage
2. Claims history and outstanding claims

D. Material Agreements

1. Lease agreements for facilities
2. Material supply, marketing, purchase, joint venture/merger/disposition agreements
3. Material agreements with vendors
4. Material financing arrangements/agreements
5. Indemnification agreements

E. Corporate Governance

1. Audit Committee
   - — Members (and their independence)
   - — Audit Committee Financial Expert
   - — Committee Charter
2. Disclosure Committee
   - — Members
   - — Procedures

— Committee Charter

3. Compensation Committee

— Members

— Committee Charter

4. Nominating/Corporate Governance Committee

— Members

— Committee Charter

5. Use/applicability of controlled company, EGC and foreign private issuer exemptions

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EXHIBIT H

SAMPLE ORGANIZATIONAL MEETING AGENDA

- **Organizational Matters**

  Introduce working group

  —Management

  —Underwriters

  —Company counsel

  —Underwriters counsel

  —Auditors

  —Review working group list

- **Structure of the Offering**

  Corporate entity to be taken public

  —Legal, tax, ownership issues

  Offering size

  —Overallotment option

  —Selling stockholders

  Use of proceeds

  Lock-up

  —Time period

  —Persons covered

  Distribution considerations

  —Domestic/International

  —Directed shares

  —Syndicate structure

  Road show

- **Public Relations during Registration Process**

  "Gun jumping" and testing-the-waters

  Control of information and press releases

  Employee briefings

- **Timing and Due Diligence**

  Timing of drafting sessions

  Schedule of underwriters' business and financial due diligence with the company (legal review to be coordinated by counsel)

  Underwriters' due diligence with management, audit committee and outside auditors

  Schedule of research analysts' due diligence meetings

  Facility visits

  Due diligence questions and document request list

  D&O and FINRA questionnaires

  Other legal review

  Target filing date

  SEC review process

  Road show preparation and schedule

- **Accounting Issues**

  Periods to be audited; timing

  Financial statements of acquired businesses

  Financial presentation in prospectus

  Pro forma financial information (reconciliation to GAAP measures)

  Off-balance sheet transactions

  Auditors—qualifications, approval and independence requirements

  Comfort letter

  Prior or other auditor consents required

- **Legal Issues**

  Corporate matters—tax considerations, amendments to certificate of incorporation and by-laws

  Board meetings—dates, preparation of resolutions, authority given to special or executive committee and power of attorney for interim amendments

  Intercompany relationships and transactions (including existing loans to directors and/or executive officers)

  Board of directors, including anticipated changes, if any

Audit Committee Compliance—authority, independence, existence of financial expert and whistleblower procedures (complaints regarding accounting/auditing matters)

Compensation Committee

Nominating/Corporate Governance Committee

Disclosure Committee—controls and procedures

Codes of Ethics for senior executives and senior financial officers (discuss any waivers therefrom)

Corporate governance guidelines

Insider policies and procedures

FCPA policy

Major existing/pending contingencies (including litigation and other corporate events)

Underwriting agreement (consider legal opinions from third parties for significant subsidiaries and/or selling stockholders)

D&O insurance

- **Other Logistics**

Employee purchases and awards of stock or options

Exchange listing(s) and stock symbol

Blue sky issues

Selection of registrar and transfer agent

Selection of financial printer

Selection of public relations firm

Photographs/artwork/logo for inside front and back cover of prospectus

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THE IPO AND PUBLIC COMPANY PRIMER

EXHIBIT I

SAMPLE TIMETABLE AND RESPONSIBILITY CHECKLIST

Summary Timetable

January 2014

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	

February 2014

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	

March 2014

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 2014

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			

	Event
● Week of January 6	● Organizational meeting; begin due diligence ● Begin legal review ● Begin preparation of registration statement
● Weeks of January 20 through February 17	● Continue preparation of registration statement ● Continue due diligence
● Week of February 24	● Complete pre-filing/draft submission due diligence ● File registration statement and confidential treatment request with

	Event
	the SEC or submit draft confidentially under JOBS Act
• Weeks of February 24 and March 3 and March 10	• Begin preparation of road show and other marketing plans
• Week of March 17	• Receive comments on registration statement from the SEC • Respond to SEC requests
• Week of March 24	• Re-file or submit registration statement with the SEC • Complete road show presentation
• Weeks of March 31, April 14 and April 21	• Receive final comments from SEC on registration statement and confidential treatment request • Print and circulate preliminary prospectus • Rehearse road show presentation with underwriters
• Weeks of April 28 and May 5	• Road show (note: must be not earlier than 21 days after registration statement first filed with SEC in event confidential submissions previously made under JOBS Act).
• Week of May 19	• Pricing • Closing

Participants

Company	CO	Underwriters' Counsel	UC
Managing Underwriter	UW	Accountants	A
Company Counsel	CC	Financial Printer	P

Week of	Activity	Responsibility
January 6	Organizational meeting	All
	Complete working group list	All
	Initial business due diligence	All
	Commence legal review, including review of corporate records	UC, CC
	Commence preparation of the following:	
	(a) Directors' and officers' questionnaires	CC
	(b) Powers of attorney for registration statement and amendments	CO, CC
	(c) Resolutions for directors' meeting	CO, CC
	Due diligence meetings	All
	Distribute final form of D&O questionnaire and FINRA questionnaire	CC, UC
	Review with management internal controls over financial reporting; meet with audit committee regarding auditor qualifications and independence and audit committee compliance; discuss comfort letter with accountants	CO, UW, UC, CC, A
	Commence preparation of first draft of registration statement	CO, CC
	Commence preparation of underwriting agreement	UC
	Begin preparation of listing application	CO, CC
	Select and reserve trading symbol	CO, CC

Week of	Activity	Responsibility
January 20—January 27	Meet to discuss proposed revisions to first draft of registration statement	All
	Select transfer agent, registrar and printer	CO, CC
January 27—February 10	Distribute drafts of registration statement to all parties	CO, CC
	Distribute draft of underwriting agreement	UC, UW
	Distribute draft of board resolutions	CO, CC
	Distribute drafts of revised charter and by-laws, if necessary	CO, CC
	Receive any outstanding D&O questionnaires	CC
	Prepare exhibits for registration statement, including redacted versions pursuant to confidential treatment request, if any, and execute signature pages and power of attorney	CO, CC
	Meet to discuss drafts of registration statement and underwriting agreement	All
	Provide form of comfort letter to underwriters	A
	Board of directors meets to adopt resolutions to: (a) Authorize execution and filing of registration statement and amendments thereto and approve form of underwriting agreement; (b) Authorize attorneys-in-fact to sign amendments to registration statement; (c) Authorize registration of the common stock; (d) Appoint transfer agent and registrar; and (e) Approve form of certificate of common stock	CO, CC

Week of	Activity	Responsibility
	Complete arrangements with transfer agent and registrar	CO
	Prepare drafts of Form 3 and Form 4, if applicable, for distribution to directors and executive officers; obtain EDGAR access codes for directors and executive officers	CO
February 17	Send revised draft of registration statement to printer	CC
	Obtain signature pages and powers of attorney for registration statement and amendments from directors and officers; furnish copy to underwriters' counsel and company counsel (signature pages required only with first filing of registration statement and not confidential drafts submitted under JOBS Act)	CO, CC
	Prepare filing/submission package, letter of transmittal and exhibits to registration statement	CC, UC
	Wire filing fee to SEC (unless submitting confidential draft under JOBS Act, in which case filing fee is due when registration statement is first filed publicly)	CO
	Distribute printed proof of registration statement to working group	CC, P
February 24	Meet at printer to review printed proof of registration statement and finalize documentation	All
	File or submit confidential draft registration statement with SEC via EDGAR	CC
	Contact SEC to determine review period	CC
	Send FINRA application and registration statement and related documents to FINRA, with filing fee	UC

Week of	Activity	Responsibility
	File listing application (possibly deferred until first filing of registration statement)	CC
March 3— March 17	Meet to discuss road show presentation (live and/or internet)	CO, UW
	Prepare preliminary road show schedule	UW
	Commence preparation of road show presentation	CO, UW
March 24	Receive SEC comments	All
	Respond to SEC requests	All
March 31	Complete road show presentation	CO
	Submit proposed syndicate list to company	UW
	File or submit amendment no. 1 to registration statement (to reflect SEC comments) to SEC via EDGAR (and FINRA if filed)	All
April 7— April 14	Receive additional comments from SEC	All
	File amendment no. 2 to registration statement with SEC and FINRA	All
	Provide printer with quantities required for preliminary prospectuses	UW
	Print preliminary prospectus	CC, UC
	Distribute preliminary prospectus	P
	Rehearse road show	CO, UW
	Receive stock certificate proofs (unless post-IPO shares to be certificate-less)	CC, UC
	Mail to proposed syndicate group registration statement, preliminary prospectus, form of underwriting agreement and managing underwriters' transmittal letter	UW
	Finalize any outstanding issues in comfort letter	UW, UC, A
	Finalize Forms 3 and 4, if applicable, for filing with the SEC via EDGAR	CO
	Execute required lock-up agreements	CO

Week of	Activity	Responsibility
	Finalize road show — issue invitations to institutions and dealers for meeting in selected cities	UW
	Management presentations to underwriters' sales forces	CO, UW
April 21— April 28	Begin road show	CO, UW
	Prepare requests for acceleration on behalf of Company and underwriters	CO, CC, UW, UC
	Prepare tombstone advertisement and press release announcing the offering	CO, UW
	Meeting of board of directors or executive committee to:	CO
	(a) Approve final prospectus;	
	(b) Approve underwriting agreement and authorize execution; and	
	(c) Ratify acts of officers in connection with offering	
	Submit acceleration request letters to SEC	CC, UC, P
	File Forms 3 and 4 with the SEC on or before effective date of the registration statement	CO, P

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EXHIBIT J

SAMPLE AUDIT COMMITTEE CHARTER
[NYSE Company Version]

1. STATUS

The Audit Committee (the "*Committee*") is a committee of the Board of Directors (the "*Board*") of   (the "*Company*").

2. PURPOSE

The Audit Committee is appointed by the Board for the primary purposes of:

- Performing the Board's oversight responsibilities as they relate to the Company's accounting policies and internal controls, financial reporting practices and legal and regulatory compliance, including, among other things:

—the quality and integrity of the Company's financial statements;

—the Company's compliance with legal and regulatory requirements;

—review of the independent auditors' qualifications and independence; and

—the performance of the Company's internal audit function and the Company's independent auditors;

- Maintaining, through regularly scheduled meetings, a line of communication between the Board and the Company's financial management, internal auditors and independent auditors, and
- Preparing the report to be included in the Company's annual proxy statement, as required by the Securities and Exchange Commission's ("*SEC*") rules.

3. COMPOSITION AND QUALIFICATIONS

The Committee shall be appointed by the Board and shall be comprised of three or more Directors (as determined from time to time by the Board), each of whom shall meet the independence and other qualification requirements of the Sarbanes-Oxley Act of 2002 (the "*Act*"), the New York Stock Exchange, Inc. and all other applicable laws and regulations. Each member of the Committee shall be financially literate and at least one member of the Committee shall have accounting or related financial management expertise, as each such qualification is interpreted by the Board in its business judgment. In addition, to the extent practicable, at least one member of the Committee shall be an "audit committee financial expert" as such term is defined by the SEC.

4. RESPONSIBILITIES

The Committee will:

(1) Review and discuss the annual audited financial statements and the Company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations" with management and the independent auditors. In connection with such review, the Committee will:

- Discuss with the independent auditors the matters required to be discussed by Statement on Auditing Standards No. 61 (as may be modified or supplemented) and the matters in the written disclosures required by the applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence;
- Review significant changes in accounting or auditing policies;
- Review with the independent auditors any problems or difficulties encountered in the course of their audit, including any change in the scope of the planned audit work and any restrictions placed on the scope of such work and management's response to such problems or difficulties;
- Review with the independent auditors, management and the senior internal auditing executive the adequacy of the Company's internal controls, and any significant findings and recommendations with respect to such controls;
- Review reports required to be submitted by the independent auditor concerning: (a) all critical accounting policies and practices used; (b) all alternative treatments of financial information within generally accepted accounting principles ("GAAP") that have been discussed with management, the ramifications of such alternatives, and the accounting treatment preferred by the independent auditors; and (c) any other material written communications with management;
- Review (a) major issues regarding accounting principles and financial statement presentations, including any significant changes in the Company's selection or application of accounting principles, and major issues as to the adequacy of the Company's internal controls and any special audit steps adopted in light of material control deficiencies; and (b) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues

and judgments made in connection with the preparation of the financial statements, including analysis of the effects of alternative GAAP methods on the financial statements and the effects of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the Company; and

- Discuss policies and procedures concerning earnings press releases and review the type and presentation of information to be included in earnings press releases (paying particularly attention to any use of "pro forma" or "adjusted" non-GAAP information), as well as financial information and earnings guidance provided to analysts and rating agencies.

(2) Review and discuss the quarterly financial statements and the Company's disclosures provided in periodic quarterly reports including "Management's Discussion and Analysis of Financial Condition and Results of Operations" with Management, the senior internal auditing executive and the independent auditor.

(3) Oversee the external audit coverage. The Company's independent auditors are ultimately accountable to the Committee, which has the direct authority and responsibility to appoint, retain, compensate, terminate, select, evaluate and, where appropriate, replace the independent auditors. In connection with its oversight of the external audit coverage, the Committee will:

- Have authority to appoint and replace (subject to stockholder approval, if deemed advisable by the Board) the independent auditors;
- Have authority to approve the engagement letter and the fees to be paid to the independent auditors;
- Pre-approve all audit and non-audit services to be performed by the independent auditors and the related fees for such services other than prohibited nonauditing services promulgated under the rules and regulations of the SEC (subject to the inadvertent *de minimus* exceptions set forth in the Act and the SEC rules);
- Obtain confirmation and assurance as to the independent auditors' independence, including ensuring that they submit on a periodic basis (not less than annually) to the Committee a formal written statement delineating all relationships between the independent auditors and the Company. The Committee is responsible for actively engaging in a dialogue with the independent auditors with respect to any disclosed

relationships or services that may impact the objectivity and independence of the independent auditors and for taking appropriate action in response to the independent auditors' report to satisfy itself of their independence;

- At least annually, obtain and review a report by the independent auditors describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and to assess the independent auditors' independence, all relationships between the independent auditors and the Company;
- Meet with the independent auditors prior to the annual audit to discuss planning and staffing of the audit;
- Review and evaluate the performance of the independent auditors, as the basis for a decision to reappoint or replace the independent auditors;
- Set clear hiring policies for employees or former employees of the independent auditors, including but not limited to, as required by all applicable laws and listing rules; and
- Assure regular rotation of the lead audit partner, as required by the Act, and consider whether rotation of the independent auditor is required to ensure independence.

(4) Oversee internal audit coverage. In connection with its oversight responsibilities, the Committee will:

- Review the appointment or replacement of the senior internal auditing executive;
- Review, in consultation with management, the independent auditors and the senior internal auditing executive, the plan and scope of internal audit activities;
- Review internal audit activities, budget and staffing; and
- Review significant reports to management prepared by the internal auditing department and management's responses to such reports.

(5) Review with the independent auditors and the senior internal auditing executive the adequacy of the Company's internal controls, and any significant findings and recommendations with respect to such controls.

(6) Resolve any differences in financial reporting between management and the independent auditors.

(7) Establish procedures for (i) 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 concerns regarding questionable accounting or auditing matters.

(8) Discuss policies and guidelines to govern the process by which risk assessment and risk management is undertaken.

(9) Meet periodically with management to review and assess the Company's major financial risk exposures and the manner in which such risks are being monitored and controlled.

(10) Meet periodically (not less than annually) in separate executive session with each of the chief financial officer, the senior internal auditing executive, and the independent auditors.

(11) Review periodically with the Company's General Counsel (i) legal and regulatory matters which may have a material effect on the financial statements, and (ii) corporate compliance policies or codes of conduct.

(12) As appropriate, obtain advice and assistance from outside legal, accounting or other advisers.

(13) Report regularly to the Board with respect to Committee activities.

(14) Prepare the report of the Committee required by the rules of the SEC to be included in the proxy statement for each annual meeting.

(15) Review and reassess annually the adequacy of this Committee Charter and recommend any proposed changes to the Board.

5. PROCEDURES

(1) *Action.*

A majority of the members of the entire Committee shall constitute a quorum. The Committee shall act on the affirmative vote a majority of members present at a meeting at which a quorum is present. Without a meeting, the Committee may act by unanimous written consent of all members. However, the Committee may delegate to one or more of its members the authority to grant pre-approvals of audit and permitted non-audit services, provided the decision is reported to the full Committee at its next scheduled meeting.

(2) *Fees.*

The Company shall provide for appropriate funding, as determined by the Committee, for payment of compensation: (a) to outside legal accounting or other advisors employed by the Committee; and (b) for ordinary administrative expenses of the Committee that are necessary or appropriate in carrying out its duties.

(3) *Limitations.*

While the Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Committee to plan or conduct audits or to determine that the Company's financial statements are complete and accurate and are in accordance with GAAP. This is the responsibility of management and the independent auditors.

SAMPLE AUDIT COMMITTEE CHARTER
[NASDAQ Company Version]

1. STATUS

The Audit Committee (the "*Committee*") is a committee of the Board of Directors (the "*Board*") of   (the "*Company*").

2. PURPOSE

The Committee is appointed by the Board for the primary purposes of:

- Performing the Board's oversight responsibilities as they relate to the Company's accounting policies and internal controls, financial reporting practices and legal and regulatory compliance, including, among other things:

—the quality and integrity of the Company's financial statements;

—the Company's compliance with legal and regulatory requirements;

—review of the independent auditors' qualifications and independence; and

—the performance of the Company's internal audit function and the Company's independent auditors;

- Maintaining, through regularly scheduled meetings, a line of communication between the Board and the Company's financial management, internal auditors and independent auditors, and
- Preparing the report to be included in the Company's annual proxy statement, as required by the Securities and Exchange Commission's ("*SEC*") rules.

3. COMPOSITION AND QUALIFICATIONS

The Committee shall be appointed by the Board and shall be comprised of three or more Directors (as determined from time to time by the Board), each of whom shall meet the independence requirements of the Sarbanes-Oxley Act of 2002 (the "*Act*"), the NASDAQ Stock Market, Inc. and all other applicable law. Each member of the Committee shall be financially literate and at least one member of the Committee 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, as each such qualification is interpreted by the Board in its business judgment. In addition, to the extent practicable at least one member of the Committee shall be an "audit committee financial expert" as such term is defined by the SEC.

4. RESPONSIBILITIES

The Committee will:

(1) Review and discuss the annual audited financial statements and the Company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations" with management and the independent auditors. In connection with such review, the Committee will:

- Discuss with the independent auditors the matters required to be discussed by Statement on Auditing Standards No. 61 (as may be modified or supplemented) and the matters in the written disclosures required by the applicable requirements of the Public Company Accounting Oversight Board regarding the independent accountant's communications with the audit committee concerning independence;
- Review significant changes in accounting or auditing policies;
- Review with the independent auditors any problems or difficulties encountered in the course of their audit, including any change in the scope of the planned audit work and any restrictions placed on the scope of such work and management's response to such problems or difficulties;
- Review with the independent auditors, management and the senior internal auditing executive the adequacy of the Company's internal controls, and any significant findings and recommendations with respect to such controls;
- Review reports required to be submitted by the independent auditor concerning: (a) all critical accounting policies and practices used; (b) all alternative treatments of financial information within generally accepted accounting principles ("GAAP") that have been discussed with management, the ramifications of such alternatives, and the accounting treatment preferred by the independent auditors; and (c) any other material written communications with management;
- Review (a) major issues regarding accounting principles and financial statement presentations, including any significant changes in the

Company's selection or application of accounting principles, and major issues as to the adequacy of the Company's internal controls and any special audit steps adopted in light of material control deficiencies; and (b) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analysis of the effects of alternative GAAP methods on the financial statements and the effects of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the Company; and

- Discuss policies and procedures concerning earnings press releases and review the type and presentation of information to be included in earnings press releases (paying particularly attention to any use of "pro forma" or "adjusted" non-GAAP information), as well as financial information and earnings guidance provided to analysts and rating agencies.

(2) Review and discuss the quarterly financial statements and the Company's disclosures provided in periodic quarterly reports including "Management's Discussion and Analysis of Financial Condition and Results of Operations" with Management, the senior internal auditing executive and the independent auditor.

(3) Oversee the external audit coverage. The Company's independent auditors are ultimately accountable to the Committee, which has the direct authority and responsibility to appoint, retain, compensate, terminate, select, evaluate and, where appropriate, replace the independent auditors. In connection with its oversight of the external audit coverage, the Committee will:

- Have authority to appoint and replace (subject to stockholder approval, if deemed advisable by the Board) the independent auditors;

- Have authority to approve the engagement letter and the fees to be paid to the independent auditors;

- Pre-approve all audit and non-audit services to be performed by the independent auditors and the related fees for such services other than prohibited nonauditing services as promulgated under rules and regulations of the SEC (subject to the inadvertent *de minimus* exceptions set forth in the Act and the SEC rules);

- Obtain confirmation and assurance as to the independent auditors' independence, including ensuring that they submit on a periodic basis (not less than annually) to the Committee a formal written statement delineating all relationships between the independent auditors and the Company. The Committee is responsible for actively engaging in a dialogue with the independent auditors with respect to any disclosed relationships or services that may impact the objectivity and independence of the independent auditors and for taking appropriate action in response to the independent auditors' report to satisfy itself of their independence;
- At least annually, obtain and review a report by the independent auditors describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and to assess the independent auditors' independence, all relationships between the independent auditors and the Company;
- Meet with the independent auditors prior to the annual audit to discuss planning and staffing of the audit;
- Review and evaluate the performance of the independent auditors, as the basis for a decision to reappoint or replace the independent auditors;
- Set clear hiring policies for employees or former employees of the independent auditors, including but not limited to, as required by all applicable laws and listing rules; and
- Assure regular rotation of the lead audit partner, as required by the Act, and consider whether rotation of the independent auditor is required to ensure independence.

(4) Oversee internal audit coverage. In connection with its oversight responsibilities, the Committee will:

- Review the appointment or replacement of the senior internal auditing executive;

- Review, in consultation with management, the independent auditors and the senior internal auditing executive, the plan and scope of internal audit activities;
- Review internal audit activities, budget and staffing; and
- Review significant reports to management prepared by the internal auditing department and management's responses to such reports.

(5) Review with the independent auditors and the senior internal auditing executive the adequacy of the Company's internal controls, and any significant findings and recommendations with respect to such controls.

(6) Resolve any differences in financial reporting between management and the independent auditors.

(7) Establish procedures for (i) 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 concerns regarding questionable accounting or auditing matters.

(8) Discuss policies and guidelines to govern the process by which risk assessment and risk management is undertaken.

(9) Meet periodically with management to review and assess the Company's major financial risk exposures and the manner in which such risks are being monitored and controlled.

(11) Meet periodically (not less than annually) in separate executive session with each of the chief financial officer, the senior internal auditing executive, and the independent auditors.

(12) Review and approve all "related party transactions" requiring disclosure under SEC Regulation S-K, Item 404.

(13) Review periodically with the Company's General Counsel (i) legal and regulatory matters which may have a material effect on the financial statements, and (ii) corporate compliance policies or codes of conduct.

(14) As appropriate, obtain advice and assistance from outside legal, accounting or other advisers.

(15) Report regularly to the Board with respect to Committee activities.

(16) Prepare the report of the Committee required by the rules of the SEC to be included in the proxy statement for each annual meeting.

(17) Review and reassess annually the adequacy of this Committee Charter and recommend any proposed changes to the Board.

5. PROCEDURES

(1) *Action.*

A majority of the members of the entire Committee shall constitute a quorum. The Committee shall act on the affirmative vote a majority of members present at a meeting at which a quorum is present. Without a meeting, the Committee may act by unanimous written consent of all members. However, the Committee may delegate to one or more of its members the authority to grant pre-approvals of audit and permitted non-audit services, provided the decision is reported to the full Committee at its next scheduled meeting.

(2) *Fees.*

The Company shall provide for appropriate funding, as determined by the Committee, for payment of compensation: (a) to outside legal accounting or other advisors employed by the Committee; and (b) for ordinary administrative expenses of the Committee that are necessary or appropriate in carrying out its duties.

(3) *Limitations.*

While the Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Committee to plan or conduct audits or to determine that the Company's financial statements are complete and accurate and are in accordance with GAAP. This is the responsibility of management and the independent auditors.

EXHIBIT K
SAMPLE COMPENSATION COMMITTEE CHARTER

1. STATUS

The Compensation Committee (the "*Committee*") is a committee of the Board of Directors (the "*Board*") of   (the "*Corporation*").

2. PURPOSE

The Committee shall discharge the responsibilities of the Board relating to compensation of the Corporation's executive officers.

3. MEMBERSHIP

The Committee shall consist of at least three members of the Board, as the Board shall from time to time determine. All Committee members shall be "Independent," as that term is defined in the applicable *[(New York Stock Exchange/NASDAQ)]* rules and in the Corporation's Corporate Governance Guidelines. Additionally, no director may serve unless he or she is (1) a "Non-employee director" as that term is defined for purposes of Rule 16b-3 under the Securities Exchange Act of 1934, as amended, and (2) an "outside director" as that term is defined for purposes of Section 162(m) of the Internal Revenue Code of 1986, as amended.

4. APPOINTMENT AND REMOVAL

The members of the Committee shall be elected by the Board at its first meeting following the Annual Meeting of Shareholders and shall serve until the first meeting of the Board following the Annual Meeting of Shareholders and until their successors are elected or until their earlier death, resignation or removal, with or without cause, in the discretion of the Board. In the event of a vacancy on the Committee for any reason, the Board shall elect an independent director to replace the departed Director for the remainder of the unexpired term. Unless a Chair is elected by the Board, the members of the Committee shall elect a Chair by majority vote of the full Committee membership.

5. DUTIES AND RESPONSIBILITIES

The Committee shall have the following duties and responsibilities:

- to review and approve corporate goals and objectives relevant to the compensation for executive officers, to evaluate the performance of executive officers in light of those goals and objectives, and to determine and approve the compensation level of executive officers based on this evaluation;

- *[The following is suggested as a best practice by NYSE rules as to CEO]* in determining the long-term incentive component of executive compensation, the committee shall consider the Corporation's performance and relative shareholder return, the value of similar incentive awards to executive officers in comparable positions at comparable companies, and awards given to the executive officers of the Corporation in past years;
- to administer incentive-compensation plans and equity-based plans *[specify other types of compensation and benefit plans]* established or maintained by the Corporation from time to time (each, a "*Plan*");
- to make recommendations to the Board with respect to the adoption, amendment, termination or replacement of the Plans;
- to recommend to the Board the compensation for Board members, such as retainer, committee chairman fees, stock options and other similar items as appropriate, and pursuant to the Corporation's corporate governance guidelines;
- to review and discuss the "Compensation Discussion and Analysis" disclosure with management, recommend to the Board its inclusion in the Company's annual proxy statement, and prepare a report for inclusion in such proxy statement that certifies that the Committee has discharged this duty; and
- Align the company's compensation polices with stockholders' long-term interests and avoid short-term rewards for management decisions that could pose undue long-term risks to the Company and its stockholders;
- *[specify other responsibilities]*.

6. POWERS AND AUTHORITY

The Board delegates to the Committee all powers and authority that are necessary or appropriate to fulfill its duties and obligations hereunder, including, without limitation:

- to interpret the provisions of the Plans;
- to establish such rules as it finds necessary or appropriate for implementing or conducting the Plans;
- to grant or to approve or disapprove participation of individual employees in the Plans;

- to make all other decisions and determinations required of the Committee by the terms of the Plans or as the Committee considers appropriate for the operation of the Plans and the distribution of benefits thereunder;
- to retain professionals (such as attorneys and compensation professionals) to assist in the evaluation of director and or senior executive compensation including sole authority to retain and terminate any such professional and to approve the professional's fees and other retention terms; and
- to establish subcommittees for the purpose of evaluating special or unique matters.

7. CONSULTANTS AND ADVISERS

The Committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel or other adviser. The Committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel or other adviser retained by the Committee. The Corporation must provide for appropriate funding, as determined by the Committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the Committee.

The Committee may select a compensation consultant, legal counsel or other adviser to the Committee only after taking into consideration all factors relevant to that person's independence from management, including the following:

- The provision of other services to the Corporation by the person that employs the compensation consultant, legal counsel or other adviser;
- The amount of fees received from the Corporation by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the Committee;
- Any stock of the Corporation owned by the compensation consultant, legal counsel or other adviser; and

- Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the Corporation.

The Committee may, but is not required to, implement or act consistently with the advice or recommendations of the compensation consultant, legal counsel or other adviser. The Committee shall exercise its own judgment in fulfillment of the Committee's duties, even where the Committee retains a compensation consultant, legal counsel or other adviser.

The Committee shall conduct the independence assessment outlined in this Section 7 with respect to any compensation consultant, legal counsel or other adviser that provides advice to the Committee, other than in-house legal counsel. Notwithstanding the foregoing, the Committee shall not be required to conduct such an independence assessment for a compensation consultant, legal counsel or other adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S-K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation in favor of executive officers or directors of the Corporation, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the compensation consultant, legal counsel or other adviser, and about which the compensation consultant, legal counsel or other adviser does not provide advice.

Nothing in this Section 7 shall require that a compensation consultant, legal counsel or other adviser be independent, only that the Committee shall conduct the independence assessment outlined in this Section 7 before selecting or receiving advice from a compensation consultant, legal counsel or other adviser. The Committee may select or receive advice from any compensation consultant, legal counsel or other adviser that the Committee prefers, including a compensation consultant, legal counsel or other adviser that is not independent, after conducting the independence assessment outlined in this Section 7.

8. COMMITTEE STRUCTURE AND OPERATIONS

- The Committee shall meet at least two times annually or more frequently in its discretion or at the request of the Chair of the Board. A majority of the Committee members shall constitute a quorum and a majority of the members present shall decide any question brought before the Committee.

- The chief executive officer may not be present during the Committee's voting or deliberations on the chief executive officer's compensation *[Required for NASDAQ-listed companies]*.
- The Committee may delegate its authority to a subcommittee or subcommittees.
- The Committee shall promptly inform the Board of the actions taken or issues discussed at its meetings. This will generally take place at the Board meeting following a committee meeting.

9. PROCEDURES

The Chairman of the Committee shall establish such rules as may from time to time be necessary or appropriate for the conduct of the business of the Committee. The Chairman shall appoint as secretary a person who may, but need not, be a member of the Committee or be eligible for benefits under one or more of the Plans. A certificate of the secretary of the Committee setting forth the names of the members of the Committee or actions taken by the Committee shall be sufficient evidence at all times as to the persons constituting the Committee or such actions taken.

10. PERFORMANCE REVIEW

The Committee shall conduct an annual performance evaluation of itself, including a review of the compliance of the Committee with this Charter. The Committee shall annually review and reassess the adequacy of this Charter and recommend any proposed changes to the Board for approval.

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EXHIBIT L

SAMPLE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE CHARTER

1. STATUS

The Nominating and Corporate Governance Committee (the "*Committee*") is a committee of the Board of Directors (the "*Board*") of (the "*Corporation*").

2. MEMBERSHIP

The Committee shall consist of at least three members of the Board of Directors as the Board shall from time to time determine. All Committee members shall be "Independent," as that term is defined in the Corporation's Corporate Governance Guidelines.

3. APPOINTMENT AND REMOVAL

The members of the Committee shall be elected by the Board at its first meeting following the Annual Meeting of Shareholders and shall serve until the first meeting of the Board following the Annual Meeting of Shareholders and until their successors are elected or until their earlier death, resignation or removal, with or without cause, in the discretion of the Board. In the event of a vacancy on the Committee for any reason the Board shall elect an Independent Director to replace the departed Director for the remainder of the unexpired term. Unless a Chair is elected by the Board, the members of the Committee shall elect a Chair by majority vote of the full Committee membership.

4. DUTIES AND RESPONSIBILITIES

The Committee's primary duties and responsibilities include:

Nominations

The Committee is responsible for:

- Recommending to the Board for its approval the criteria and qualifications for membership on the Board, including any specific, minimum qualifications that the Committee believes must be met by a nominee for a position on the Board or any specific qualities or skills that the committee believes are necessary for one or more of the Directors to possess.
- In consultation with the Chair of the Board, CEO [and the Lead Independent Director], identifying, considering, recommending, recruiting and selecting, or recommending that the Board select, candidates to

fill open positions on the Board consistent with the Board approved criteria and qualifications for membership.

- Developing and periodically evaluating a policy with regard to the consideration of any Director candidates recommended by stockholders, including the procedures to be followed by stockholders in submitting such recommendations.
- Establishing a process for identifying and evaluating nominees for Director, including nominees recommended by stockholders.
- Conducting appropriate inquiries into the backgrounds and qualifications of possible candidates.
- Recommending Director nominees for approval by the Board and the stockholders.
- Recommending Director nominees for each of the Board's committees.

The Committee shall have the sole authority to retain and terminate search firms used to identify Director candidates and shall have sole authority to approve the search firm's fees and other retention terms.

Corporate Governance

General

- Reviewing and recommending to the Board proposed changes to the Corporation's Certificate of Incorporation and By-laws.
- In consultation with the Chair of the Board, CEO [and the Lead Independent Director], periodically reviewing, revising, interpreting and confirming compliance with the Corporation's corporate governance policies and Corporate Governance Guidelines.
- Recommending to the Board ways to enhance services to and improve communications and relations with the Corporation's stockholders.
- Conducting, in consultation with the Chair of the Board, the CEO [and the Lead Independent Director], an annual review of the Corporation's [Code of Ethics and Standards of Business Conduct and its Code of Ethics Applicable to Senior Executives].

Board Oversight

- Overseeing periodic self-evaluations by the Board of its performance.
- Evaluating, in consultation with the Chair of the Board, CEO [and the Lead Independent Director], the size, needs and effectiveness of the Board.

- Recommending to the Board improvements to the corporate governance of the Corporation, including consideration of any specific standards for the overall structure and composition of the Board.
- Overseeing the development by the CEO of programs for continuing education for all Directors and for the orientation of new Directors to be administered by the Corporate Secretary.
- Evaluating any request for a waiver of the application of the Corporation's [Code of Ethics and Standards of Business Conduct and its Code of Ethics Applicable to Senior Executives] and reporting its findings and recommendations to the full Board.
- Monitoring the functions of the various committees of the Board and conducting periodic reviews of their contributions to the Corporation.
- Considering questions of possible conflicts of interest of Board members and of the Corporation's senior executives.
- Establishing criteria for an annual performance evaluation of the Committee by the Board.

Management Oversight

- Participating in evaluating the performance of the Chief Executive Officer as provided in the Corporation's Corporate Governance Guidelines.
- Reviewing annually with the Chair of the Board and Chief Executive Officer the job performance of elected corporate officers and other senior executives.
- Reviewing annually with the Chair of the Board and Chief Executive Officer the succession plans concerning positions held by senior executives and making recommendations to the Board in connection therewith.

5. COMMITTEE STRUCTURE AND OPERATIONS

- The Committee shall meet at least two times annually or more frequently in its discretion or at the request of the Chair of the Board. A majority of the Committee members shall constitute a quorum and a majority of the members present shall decide any question brought before the Committee.
- The Committee may delegate its authority to a subcommittee or subcommittees.

- The Committee shall promptly inform the Board of the actions taken or issues discussed at its meetings. This will generally take place at the Board meeting following a committee meeting.

6. PROCEDURES

The Chair of the Committee shall establish such rules as may from time to time be necessary or appropriate for the conduct of the business of the Committee. The Chair shall appoint as secretary a person who may, but need not, be a member of the Committee. A certificate of the secretary of the Committee setting forth the names of the members of the Committee or actions taken by the Committee shall be sufficient evidence at all times as to the persons constituting the Committee or such actions taken.

7. PERFORMANCE REVIEW

The Committee shall conduct an annual performance evaluation of itself, including a review of the compliance of the Committee with this Charter. The Committee shall annually review and reassess the adequacy of this Charter and recommend any proposed changes to the Board for approval.

EXHIBIT M

SAMPLE CORPORATE GOVERNANCE GUIDELINES

The following Corporate Governance Guidelines (the "*Guidelines*") have been adopted by the Board of Directors (the "*Board*") of (the "*Corporation*") to assist the Board in the exercise of its responsibilities. These Guidelines reflect the Board's commitment to monitor the effectiveness of policy and decision-making both at the Board and management level, and to enhance stockholder value over the long term. These Guidelines are a statement of policy and are not intended to change or interpret any federal or state law or regulation, including the Delaware General Corporation Law, or the Certificate of Incorporation or By-laws of the Corporation. The Guidelines are subject to periodic review by the Nominating and Corporate Governance Committee (the "*Committee*") of the Board and to modification from time to time by the Board.

BOARD COMPOSITION

1. Selection of Chair of the Board

The Board shall be free to choose its Chair in any way it deems best for the Corporation at any given point in time.

2. Size of the Board

The Board believes that it should generally have no fewer than and no more than directors subject to the provisions of the Corporation's Certificate of Incorporation and its By-laws. This range permits diversity of experience without hindering effective discussion or diminishing individual accountability.

3. Board Membership Criteria

Nominees for director shall be selected on the basis of their character, wisdom, judgment, ability to make independent analytical inquiries, business experiences, understanding of the Corporation's business environment, time commitment and acumen. Board members are expected to rigorously prepare for, attend and participate in all Board and applicable Committee meetings. Each Board member is expected to ensure that other existing and planned future commitments do not materially interfere with the member's service as an outstanding director.

The Committee shall be responsible for assessing the appropriate balance of skills and characteristics required of Board members.

The Board shall be committed to a diversified membership, in terms of both the individuals involved and their various experiences and areas of expertise.

4. Director Independence

An "Independent" director of the Corporation shall be one who meets the qualification requirements for being an independent director under the corporate governance listing standards of the [New York Stock Exchange ("*NYSE*")] [NASDAQ Stock Market ("NASDAQ")], including the requirement that the Board must have affirmatively determined that the director has no material relationships with the Corporation, either directly or as a partner, stockholder or officer of an organization that has a relationship with the Corporation. To guide its determination as to whether or not a business or charitable relationship between the Corporation and an organization with which a director is so affiliated is material, the Board has adopted the following categorical standards:

[Adoption of categorical standards suitable to the company to be discussed and developed].

5. Percentage of Independent Directors on Board

Independent directors shall constitute a majority of the Board.

6. Selection of New Directors

The entire Board shall be responsible for nominating candidates for election to the Board at the Corporation's annual meeting of stockholders and for filling vacancies on the Board that may occur between annual meetings of stockholders. The Committee shall be responsible for identifying, considering, recommending, recruiting and selecting, or recommending that the Board select, candidates for Board membership consistent with the Board approved criteria and qualifications for membership. When formulating its Board membership recommendations, the Committee shall consider any advice and recommendations offered by the Chief Executive Officer or the stockholders of the Corporation or any outside advisors the Committee may retain.

7. Director Orientation and Continuing Education

An orientation process for all new directors will be maintained. This process includes comprehensive background briefings by the Corporation's executive officers. In addition, all directors shall periodically participate in briefing sessions on topical subjects to assist the directors in discharging their duties. The orientation and continuing education programs, which are subject to the oversight of the Corporate Governance Committee, are the responsibility of the Chief Executive Officer and administered by the Corporate Secretary.

8. Chair of the Committee

The Chair of the Committee shall be an Independent director.

9. Retirement Age

No director after having attained the age of   years shall be nominated for re-election or reappointment to the Board, without the prior approval of the Committee.

10. Directors Who Change Their Present Job Responsibility

The Committee shall review the continued appropriateness of Board membership if a Board member has a material change in circumstances and the affected director shall be expected to act in accordance with the Committee's recommendation.

11. Term Limits

The Board does not mandate term limits for its directors.

12. Board Compensation

A director who is also an employee shall not receive additional compensation for service as a director. The Compensation Committee is charged with the responsibility for reviewing (at least annually) and recommending to the full Board the form and amounts of compensation and benefits for non-employee directors. In making its recommendation, the Compensation Committee shall seek to fairly compensate directors at levels that are competitive with other companies in the industries in which the Corporation competes and to align directors' interests with the long-term interests of the Corporation's stockholders. In its deliberations, the Committee and the Board shall consider whether the levels of director compensation could impair independence and shall critically evaluate any consulting, charitable contribution or other potential indirect compensation arrangements.

13. Evaluation of Board

The Board shall be responsible for periodically, and at least annually, conducting a self-evaluation of the Board as a whole. The Committee shall be responsible for establishing the evaluation criteria and overseeing the implementation of the process for such evaluation.

14. Evaluation of Committees of the Board

The Committee shall conduct periodic reviews of each committee's contribution to the Corporation. In its review of the committees, the Committee shall review each committee's objectives, as stated at the beginning of each fiscal year, and compare those stated objectives to the results and time expended to achieve such results at the end of that year.

15. Board Contact with Senior Management

Board members shall have complete access to management. Board members shall use sound business judgment to ensure that such contact is not distracting, and, if in writing, shall be copied to the Chief Executive Officer and the Chair of the Board.

Furthermore, the Board encourages senior management, from time to time, to bring employees into Board meetings who: (a) can provide additional insight concerning the items being discussed because of personal involvement in these areas; (b) represent significant aspects of the Corporation's business; and (c) assure the Board of exposure to employees with future potential to assure adequate plans for management succession within the Corporation.

16. Access to Independent Advisors

The Board and its Committees, including the non-management or Independent directors when convening in executive session, shall have the right, at any time, to retain independent outside financial, compensation, legal or other advisors.

17. Board Interaction with Institutional Investors and Press

The Board believes that management generally should speak for the Corporation, consistent with all regulations governing such communications and with common sense. Unless otherwise agreed to or requested by the Chair, each director shall refer all inquiries from institutional investors and the press to designated members of senior management or to the Chair.

BOARD MEETINGS

18. Frequency of Meetings

There shall be at least regularly scheduled meetings of the Board each year. It is the responsibility of each of the directors to attend the meetings of the Board and the committees on which he or she serves.

19. Selection of Agenda Items for Board Meetings

The Chair of the Board, in consultation with the Corporate Secretary and the Chief Executive Officer, shall annually prepare a "Board of Directors Master Agenda." This Master Agenda shall set forth a minimum agenda of items to be considered by the Board at each of its specified meetings during the year. Each meeting agenda shall include an opportunity for each committee chair to raise issues or report to the Board. Thereafter, the Chair of the Board, the Chief Executive Officer [and the Lead Independent Director,] may adjust the agenda to include special items not contemplated during the initial preparation of the annual Master Agenda.

Upon completion, a copy of the Master Agenda shall be provided to the entire Board. Each Board member shall be free to suggest inclusion of items on the Master Agenda for any given meeting. Thereafter, any Board member may suggest additional subjects that are not specifically on the agenda for any particular meeting. In that case, the Board member should contact the Chair or the Secretary at least ten days prior to the relevant meeting.

20. Strategic Discussions at Board Meetings

At least one Board meeting will be primarily devoted to long-range strategic plans. It is also probable that specific short and/or long-range strategic plans will be discussed at other Board meetings throughout the year.

21. Executive Sessions of Non-Management and Independent Directors

The non-management directors (all those who are not "officers" of the Corporation, as such term is defined by [NYSE] [NASDAQ] listing standards) shall meet in an executive session at each regularly scheduled Board meeting and, if any of the non-management directors are non-Independent, the Independent directors should also meet in an executive session at least once a year. These meetings can be in person or held telephonically. The Corporate Secretary shall establish, maintain and publicly disclose a method for interested parties to communicate directly with the non-management directors as a group [and the Lead Independent Director].

22. Lead Independent Director

[To be discussed whether company wishes to establish a Lead Independent Director position or have a different presiding officer for each session of independent and non-management directors.]

The Independent directors shall in a manner and for a term or terms of their choosing select a Lead Independent Director from the Independent directors to develop the agenda for and preside at executive sessions of the non-management directors and the Independent directors or establish a process by which a presiding director is selected for each such executive session.

23. Board Materials Distributed in Advance

Information and data is important to the Board's understanding of the business and essential to prepare Board members for productive meetings. Presentation materials relevant to each meeting will generally be distributed in writing to the Board for their review in advance of the meeting.

COMMITTEE MATTERS

24. Board Committees

The Corporation shall have the following standing committees: Audit, Compensation, Nominating and Corporate Governance and *[specify any others]*. The duties for each of these committees shall be outlined in each of the committee's charter and/or by further resolution of the Board. The Board may form new committees or disband a committee depending on circumstances. The Audit, Compensation and Nominating and Corporate Governance committees shall be composed entirely of Independent directors, and all members of the Audit Committee shall also meet the additional independence requirements of the [NYSE] [NASDAQ] adopted pursuant to the Sarbanes-Oxley Act of 2002 that are applicable to members of that committee.

25. Assignment and Rotation of Committee Members

The Committee shall be responsible, after consultation with the Chair of the Board, for making recommendations to the Board with respect to the assignment of Board members to various committees. After reviewing the Committee's recommendations, the Board shall be responsible for appointing the members to the committees and, if applicable, respective chairs thereof, on an annual basis.

The Chair and the Committee shall annually review the Committee assignments and shall consider the rotation of committee chairs and members with a view toward balancing the benefits derived from continuity against the benefits derived from the diversity of experience and viewpoints of the various directors.

26. Annual Review by Committee

Each Board committee shall annually review its charter and recommend to the Board any changes it deems necessary. In addition to its charter, the Committee will annually review the Corporate Governance Guidelines and recommend to the full Board any changes it deems necessary.

LEADERSHIP DEVELOPMENT

27. Evaluation of Chief Executive Officer

The Board shall conduct an ongoing evaluation of the Chief Executive Officer. The evaluation of the Chief Executive Officer is accomplished through the following process:

- The Chief Executive Officer meets with the Committee to develop appropriate goals and objectives for the next year, which are then discussed with the entire Board.
- At year end, the Committee, with input from the Board, evaluates the performance of the Chief Executive Officer in meeting those goals and objectives.
- This evaluation is communicated to the Chief Executive Officer at an executive session of the Board.
- The Compensation Committee uses this evaluation in its determination of the Chief Executive Officer's compensation.

28. Succession Planning

The Corporation understands the importance of succession planning. Therefore, the Committee, along with the Chief Executive Officer, shall analyze the current management, identify possible successors to senior management, and timely develop a succession plan including the succession in the event of an emergency or retirement of the Chief Executive Officer. The plan shall then be reviewed by the entire Board, and reviewed periodically thereafter.

29. Management Development

The Board, with the assistance of the Committee, shall periodically review the plans for the education, development, and orderly succession of senior and mid-level managers throughout the Corporation.

30. Interpretation

In cases where the Chair of the Board and the Chief Executive Officer are the same individual, procedures calling for consultation or communications between such positions need not be followed.

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EXHIBIT N

PROCEDURES FOR OBTAINING EDGAR CODES AND PAYMENT OF FILING FEES

1. Preferably at least a couple of weeks prior to the filing date, the applicant should file (electronically) a Form ID with the SEC. Please note that each new filer (such as an officer or director that does not already have EDGAR codes, which should be confirmed by searching for such person's names on EDGAR) must apply for an individual CIK (Central Index Key) number. In the case of individual filers filing Forms 3, 4 and 5, Schedules 13D or 13G, for example, a CIK code will be required for the filer, and not the CIK code of the Company.

2. Under the SEC's system for filing a Form ID electronically, applicants for EDGAR codes will be required to access the EDGAR Filer Management website located at www.filermanagement.edgarfiling.sec.gov to fill out and submit the forms, as EDGARLink filing is not available for submission of these forms. Other types of filers (i.e., those who are not new filers) that wish to obtain access codes will be able to do so through the EDGAR Filer Management website or the EDGAR Filer or Online Forms websites, in all cases without filing a Form ID. To access and file Forms ID through the EDGAR Filer Management website, each applicant must have available all of the information that a Form ID requires when the applicant accesses the website because the system will not provide a way to save an incomplete form on-line from session to session. The completed Form ID must be submitted electronically along with a PDF of a hardcopy version of the Form ID that has been manually signed by the applicant and notarized. The purpose of this requirement is to assure that the Form ID is authentic.

   In addition to contact information for the filer, Form ID requires each applicant to identify itself as a prescribed entity type, which are listed and defined on the Form ID. The SEC uses the applicant's specified type to route the Form ID to the appropriate internal office or division for efficient processing. Applicants should select only one type when completing Form ID (though in the case of an applicant who is an individual, the applicant must choose "Individual" and another type). If the applicant qualifies for more than one type, it should select the type related to the first filing it plans to submit on EDGAR. The applicant may then use the access codes it retrieves from the SEC to submit filings on EDGAR for any type.

3. The SEC will reply via e-mail indicating a Central Index Key (CIK), which the recipient then uses to generate a CIK Confirmation Code (CCC), a Password (PW) and a Password Modification Authorization Code (PMAC).

4. Once a CIK code has been obtained, when a filing fee is required, the issuer should arrange for a wire transfer to the Treasury account designated for SEC filers at U.S. Bank in St. Louis, Missouri before the date of filing. The following information will be required in order to effect the transfer.

   - Receiving Bank's ABA Number: 021030004
   - Bank Name: TREAS NYC
   - US Treasury account number designated for SEC filers: 850000001001
   - The SEC's account number at U.S. Bank 152307768324
   - Type Code (field 3): 1040
   - Name of Registrant and name of payor, if different: ORG=*Newco Corp.*
   - Transaction Code (field 11): CTR/
   - Beneficiary of payment (field 12): BFN=SEC/AC-9108739/WRE
   - Reference for Beneficiary (field 13): RFB: *Insert filer's CIK Number.*
   - Payment Details (field 14): OBI=N. *In some special cases, fees for certain forms will be designated as "restricted."*

EXHIBIT O

VARIABLE EFFECTS OF SECURITIES OFFERING REFORM RULES EFFECTED IN 2005 FOR DIFFERENT ISSUER TYPES

	Non-reporting (including voluntary filers)	**Unseasoned (but reporting)**	**Seasoned**	**WKSI**
Shelf registration statement reforms	N/A	N/A	Additional information may be omitted from base prospectus, and incorporated by reference, e.g., description of business and capital stock (Rule 430B)	←Same as—and base prospectus omissions can include description of securities, plan of distribution, whether or not a primary or secondary offering and names of selling shareholders
	N/A	N/A	Selling shareholders and plan of distribution in base prospectus may be modified after effectiveness by supplement or Exchange Act reports	←Same as
	N/A	N/A	Can register any amount of securities but need to refile every three years (limited six month extension while awaiting a new registration statement becoming effective)	←Same as, except that registration statement does not need to provide the amount of securities to be registered and new registration statement is automatically effective

	Non-reporting (including voluntary filers)	**Unseasoned (but reporting)**	**Seasoned**	**WKSI**
	N/A	N/A	No restriction on immediate takedown	←Same as
	N/A	N/A	Limits on "at the market" equity offerings eliminated	←Same as
	N/A	N/A	N/A	Automatic / Immediate Effectiveness
Shelf registration statement reforms (continued)	N/A	N/A	N/A	"Pay-as-you-go" registration fees permitted
	N/A	N/A	N/A	After effectiveness can add new classes of securities, securities of an eligible subsidiary and selling shareholders by post-effective amendment that is immediately effective
Gun jumping safe harbors from §5 of Securities Act	For regularly released factual business information by or on behalf of the issuer that is not offering-related and that is intended for use by persons other than as investors (Rule 169)	For regularly released factual business and forward-looking information by or on behalf of the issuer that is not offering-related (Rule 168)	←Same as	←Same as

	Non-reporting (including voluntary filers)	**Unseasoned (but reporting)**	**Seasoned**	**WKSI**
	Communications made 30 days before filing of registration statement by or on behalf of the issuer that do not refer to the offering are not “offers,” provided that the issuer takes reasonable steps within its control to prevent further distribution or publication during such 30 day period (Rule 163A)	←Same as	←Same as	←Same as, however, less significant because no restrictions on pre-filing offers (Rule 163) and because will usually have registration statement on file under new automatic shelf registration process
Rule 134 – limited public notices <u>after</u> filing registration statement containing a statutory prospectus not considered a prospectus	Rule allows basic information including issuer contact, terms of securities, offering mechanics, and marketing events.	←Same as	←Same as	←Same as

	Non-reporting (including voluntary filers)	Unseasoned (but reporting)	Seasoned	WKSI
Free writing prospectus (defined in Rule 405) can be used by issuer[1]	After filing registration statement containing a statutory prospectus if preceded or accompanied by statutory prospectus, includes required legends and is filed within certain deadlines (Rules 164 and 433(b)(2))	←Same as	After filing registration statement containing a statutory prospectus if includes required legends notifying recipient of the filing of the registration statement and the SEC URL location of statutory prospectus and is filed within certain deadlines (Rules 164 and 433(b)(1))	←Same as And can even be used pre-filing, if filed upon filing of registration statement and includes required legends (Rule 163)
Electronic road shows that are free writing prospectuses[2]	Must be filed for common or convertible offering unless at least one bona fide version is readily available to all potential investors on an unrestricted basis (Rule 433(d)(8)(ii))	Need not be filed (Rule 433)	←Same as	←Same as

1 If an "ineligible issuer" (defined in amendments to Rule 405) free writing prospectus can only describe securities offered and offering (Rule 164(e)(2)).

2 Meaning those that do not originate live, in real-time to a live audience and are graphically transmitted.

	Non-reporting (including voluntary filers)	Unseasoned (but reporting)	Seasoned	WKSI
Unaffiliated media publication or broadcast[3]	After filing of registration statement not required to be preceded by statutory prospectus so long as media piece filed with the required legend if the issuer or an offering participant participates (i.e., provides, authorizes or approves information) (Rule 433)	←Same as	←Same as	←Same as And also so even if registration statement not yet filed so long as media piece filed with the required legend if the issuer or an offering participant participates
Broker or Dealer Research	Broker or dealer that publishes research but is not participating in registered offering or receiving compensation is not considered to be an underwriter (Rule 137)	←Same as And any broker or dealer research report on equity securities is not an offer of debt securities and *vice versa* (Existing Rule 138 extended) And industry-related research reports are permitted (Rule 139)	←Same as And issuer-specific research reports are permitted as long as they are not the initiation or re-initiation of coverage of the issuer (Rule 139)	←Same as

[3] If media piece is paid for or prepared by the issuer it must also satisfy applicable issuer free-writing prospectus rules, meaning unseasoned and non-reporting issuers cannot pay for or prepare such pieces.

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EXHIBIT P
SAMPLE IRAN DISCLOSURE QUESTIONNAIRE

____

(the "Company")

IRAN-RELATED ACTIVITIES QUESTIONNAIRE

Pursuant to the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "Act"), the Company is required to disclose specific information about certain Iran-related activities of the Company and any of the Company's "affiliates" in its annual and quarterly reports filed with the Securities and Exchange Commission ("SEC"). In 2013, the SEC confirmed, through interpretive guidance, that for purposes of this disclosure requirement, the term "affiliates" should be read to include any "person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with," the Company. Accordingly, as a member the Company's board of directors, you may be deemed to be an "affiliate" of the Company for purposes of this disclosure requirement.

As such, we ask that you please review and respond to the following six questions on behalf of yourself and any legal entity that you personally control (and, for this purpose, this would NOT include another public company for which you serve as a member of the board of directors). Your signature at the end of this Questionnaire will constitute your consent to the disclosure, if required, of the information contained in your answers in the Company's SEC filings.

Please answer all questions fully, using the reverse sides of these pages or extra sheets of paper if necessary. If there is any situation about which you have any doubt, please contact __________.

In order for the Company to include any responsive disclosure in its Form 10-K annual report, it is requested that an executed copy of this Questionnaire be returned not later than ______ to: ______.

Please retain a duplicate copy of this Questionnaire and contact __________ immediately if, during the current fiscal year, a situation arises which would cause you to update any of your responses to the questions below, as the Company must also include this disclosure in its Form 10-Q quarterly reports and the Company does not currently intend to solicit this information on a quarterly basis.

During the most recently ended fiscal year, have you knowingly engaged in or conducted any of the following:

a) activities or transactions relating to Iran's petroleum industry or Iran's development, procurement or proliferation of weapons of mass destruction or conventional weapons or development of other military capabilities;

Answer: Yes ______ No ______

b) the transfer of goods, technology or services to Iran that are likely to be used by the Government of Iran to commit human rights abuses against the Iranian people, including firearms or ammunition, surveillance technology or hardware, software, telecommunications equipment, or any other technology or related services used to restrict the free flow of unbiased information in Iran, or to disrupt, monitor, or otherwise restrict speech of the people of Iran;

Answer: Yes ______ No ______

c) activities or transactions relating to the financing of the Government of Iran's acquisition or development of weapons of mass destruction, facilitating or providing support for terrorist activities or engaging in transactions benefitting the Iranian Revolutionary Guard Corps;

Answer: Yes ______ No ______

d) transactions with persons who are sanctioned by the U.S. government for their involvement in terrorism or with weapons of mass destruction (Complete list of specially designated persons available at http://www.treasury.gov/ofac/downloads/sdnlist.txt. See persons with designation [NPWMD] and/or [SDGT]); or

Answer: Yes ______ No ______

e) transactions with the Government of Iran, its delegates, or entities owned or controlled by the Government of Iran without the specific authorization of a department or agency of the U.S. federal government (For delegates and entities owned or controlled by the Government of Iran, see complete list of specially designated persons available at http://www.treasury.gov/ofac/downloads/sdnlist.txt. See persons with designation [IRAN])?

Answer: Yes ______ No ______

If you answered "yes" to any of the above questions, please furnish details on a separate sheet, including the nature and extent of the

activity or activities; the gross revenues and net profits, if any, attributable to the activity or activities; and whether you intend to continue the activity or activities. Please note that the Company may be required to report your activities in its annual or quarterly reports filed with the SEC and to file a separate notice with the SEC regarding such activities, which will be made public.

I agree to notify the Company immediately on becoming aware of any changes in the foregoing information.

Dated __________ ______________________________

Signature of Director

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