PLI PRACTISING LAW INSTITUTE

Corporate Law and Practice
Course Handbook Series

Securities Offerings 2017:
A Public Offering: How It Is Done

Chair
LizabethAnn R. Eisen

CORPORATE LAW AND PRACTICE
Course Handbook Series
Number B-2305

Securities Offerings 2017:
A Public Offering: How It Is Done

Chair
LizabethAnn R. Eisen

To order this book, call (800) 260-4PLI or fax us at (800) 321-0093. Ask our Customer Service Department for PLI Order Number 186206, Dept. BAV5.

Practising Law Institute
1177 Avenue of the Americas
New York, New York 10036

 978-1-4024-2859-3

PLI Course Handbook Usage Policy

The Practising Law Institute publishes over 200 Course Handbooks each year. The primary function of each Course Handbook is to serve as an educational supplement for each program and to provide practical and useful information on the subject matter covered to attorneys and related professionals.

The printed and/or electronic copy of the Course Handbook each attendee and faculty member receives is intended for his or her individual use only. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting or other professional services. If legal advice or other expert assistance is required, the services of a professional should be sought.

Distribution of the Course Handbook or individual chapters is strictly prohibited, and receipt of the Course Handbook or individual chapters does not confer upon the recipient(s) any rights to reproduce, distribute, exhibit, or post the content without the express permission of the authors or copyright holders. This includes electronic distribution and downloading of materials to an internal or external server or to a shared drive. If a firm or organization would like to arrange access for a wider audience, printed copies of the Course Handbook are available at http://www.pli.edu. In addition, PLI offers firm or company-wide licensing of our publications through our eBook library, Discover PLUS. For more information, visit http://discover.pli.edu.

The methods of reproduction, both print and electronic, were chosen to ensure that program registrants receive these materials as quickly as possible and in the most usable and practical form. The Practising Law Institute wishes to extend its appreciation to the authors and faculty for their contributions. These individuals exemplify the finest tradition of our profession by sharing their expertise with the legal community and allied professionals.

Prepared for distribution at the
SECURITIES OFFERINGS 2017: A PUBLIC OFFERING: HOW IT IS DONE
Program
New York City, March 3, 2017

CONTENTS:

Program Attorney: Willis Goodmoore

Program Schedule

Securities Offerings 2017: A Public Offering: How It Is Done
New York City, March 3, 2017
Live Webcast, www.pli.edu, March 3, 2017

Program Schedule

9:00 Introduction to the Law of Securities Offerings

- Understand the legal framework for securities offerings under the Securities Act, including definitions and regulations of "offers" and "sales" of "securities"
- Understand the different types of issuers recognized under the Securities Act for public offerings and how issuer status plays out under the Securities Act

D. Scott Bennett, LizabethAnn R. Eisen, Robert Evans III

10:00 Working Effectively with the SEC: Preparing Your Registration Statement

- Preparation of the registration statement
- Discussion of registration process, including SEC review and comment process (including the public posting of those comments and processes for requesting confidential treatment of materials sent to the SEC)
- Substantive disclosure and other problem areas relevant to securities offerings
- Discussion of current SEC areas of focus and impact on the registration process

D. Scott Bennett, LizabethAnn R. Eisen, Joseph H. Kaufman, Pamela A. Long

11:45 Networking Break

12:00 Important Financial Statements, Accounting Disclosures and Key Securities Offering Documentation

- Discussion of the critical financial information that forms the backbone of disclosures in securities offerings, including annual financial statements, interim financial statements, management's discussion & analysis and pro formas
- Substantive financial disclosure and accounting problem areas relevant to securities offerings
- Discussion of rules on use of non-GAAP measures such as EBITDA
- Ethical issues in working with accountants and other "experts

D. Scott Bennett, LizabethAnn R. Eisen, Joseph H. Kaufman, Nicole J. Pinder

1:30 Lunch Break

2:30 Important Financial Statements, Accounting Disclosures and Key Securities Offering Documentation (Cont'd)

- Preparation of the Underwriting Agreement, including an analysis of the key provisions
- Behind the scenes: the agreement among underwriters—what is it and how does it work?
- Working with FINRA, including obtaining a "no objections" letter in a timely manner
- NYSE/NASDAQ listing mechanics

David K. Boston, LizabethAnn R. Eisen

3:15 Networking Break

3:30 Ethics, Due Diligence and the Offering Process

- Professional liability provisions and remedies under the Securities Act (MRPC 1.13)
- Importance of ethics in due diligence in the offering process, including comfort letters, 10b-5 statements and in-house counsel considerations (MRPC 4.1)
- Role of participants in the offering process, including avoiding ethical pitfalls (MRPC 4.1)
- Ethical issues in the underwriting process: Lawyers as gatekeepers (MRPC 1.6)

David K. Boston, LizabethAnn R. Eisen, Robert Evans III, Sophia Hudson, Hannah G. Ross

5:15 Adjourn

Chair

LizabethAnn R. Eisen
Cravath, Swaine & Moore LLP
New York City

Faculty

D. Scott Bennett
Cravath, Swaine & Moore LLP
New York City

David K. Boston
Willkie Farr & Gallagher LLP
New York City

Robert Evans III
Shearman & Sterling LLP
New York City

Sophia Hudson
Davis Polk & Wardwell LLP
New York City

Joseph H. Kaufman
Simpson Thacher & Bartlett LLP
New York City

Pamela A. Long
Assistant Director, Division of Corporate Finance
U.S. Securities and Exchange Commission
Washington, DC

Nicole J. Pinder
PwC
New York City

Hannah G. Ross
Bernstein Litowitz Berger & Grossmann
New York City

Faculty Bios

LizabethAnn R. Eisen

Partner, Corporate

Contact
T: +1 (212) 474-1930
F: +1 (212) 474-3700

Education

J.D. University of Pennsylvania Law School, 1997

B.A. Cornell University, 1994, *magna cum laude*

Professional Affiliations

American Bar Association

- Federal Regulation of Securities Committee
- NASD Corporate Financing Rules Subcommittee

New York City Bar Association

Organizations

The Fresh Air Fund

- Vice President
- Board of Directors, Executive Committee

President's Council of Cornell Women

LizAnn Eisen is a partner in Cravath's Corporate Department. Her practice focuses on domestic and international corporate finance transactions, corporate governance and reporting matters and restructurings.

Ms. Eisen's clients have included Amdocs, Flagstone Reinsurance Holdings, Mantis Vision, MIH Limited, Orbotech, Starbucks, Tengelmann, Unilever, Universal Orlando, UTi Worldwide, Weyerhaeuser and Xerox. Her work includes corporate reporting, governance and disclosure advice, securities offerings and mergers and acquisitions for these clients. In addition, she represents underwriters in IPOs, including for Amplify Snack Brands, Francesca's Holdings, Global Brass and Copper and Tumi Holdings as well as in follow-on and secondary offerings, including for Amplify Snack Brands, Cooper-Standard Holdings, Darling International, Francesca's Holdings, Global Brass and Copper, Huntsman, Tumi Holdings and Metals USA, and in investment grade and high-yield debt offerings, including for Allegion, Chrysler, Dell, Entegris, Waterjet, Terex Corp., Clear Channel Communications, Clear Channel Outdoor and Reynolds Group. Ms. Eisen's recent M&A and acquisition financing work includes representing Goldman Sachs in connection with the bridge facility and debt

offering for Fortis Inc.'s acquisition of ITC Holdings Corp.; UTi Worldwide in its sale to DSV; and Orbotech in a senior secured syndicated Term Loan B facility to finance its acquisition of SPTS Technologies Group.

Ms. Eisen is a frequent speaker and author on the securities laws. She has chaired the Practising Law Institute's (PLI) annual program on public offerings for many years and has written on debt financing commitments and the SEC rules on completing IPOs as market conditions shift. In addition, in March 2016, Ms. Eisen spoke at a conference on "Compliance in a Global Arena: U.S., EU and Israeli Perspectives" in Tel Aviv, Israel. In June 2014, she spoke on a live webcast entitled "Underwriter's Counsel: Latest Developments" at a program presented by TheCorporateCounsel.net.

In addition, Ms. Eisen is one of the six partners who oversee the Firm's pro bono project with the Children's Hospital at Montefiore and the Children's Hospital of New York-Presbyterian through which free legal services are provided to patients and their families. She currently serves on the board of directors of Good Shepherd Services and as Vice President of the Board of The Fresh Air Fund. Ms. Eisen is also a member of the President's Council of Cornell Women, the New York City Bar Association and the American Bar Association.

Ms. Eisen has been recognized as one of the leading practitioners in securities law by *The Legal 500* from 2010 through 2016 and *IFLR1000* in 2008, 2009 and from 2013 through 2017. She received Euromoney Legal Media Group's Americas Women in Business Law Award for "Best in Capital Markets" in 2015. Ms. Eisen was also named to *Lawdragon* magazine's 500 New Stars, New Worlds, a list of the nation's top 500 up-and-coming talent and innovative seasoned professionals who are "carrying

- Member

Good Shepherd Services
- Board of Directors

Professional Recognition

IFLR1000
- Capital Markets: Debt & Equity - US (2017-2013, 2009)
- Capital Markets: High-Yield Debt - US (2017-2014, 2009, 2008)

Lawdragon
- 500 New Stars, New Worlds (2006)

The Legal 500 US
- Capital Markets: Debt Offerings (2015-2012, 2010)
- Capital Markets: Equity Offerings (2016, 2015, 2014)
- Capital Markets: Global Offerings (2011, 2010)
- Capital Markets: High-Yield Debt Offerings (2015-2011)

Americas Women in Business Law Awards - Best in Capital Markets, Euromoney Legal Media Group, 2015

EXTRAS

Six Cravath Partners Shortlisted for Euromoney Legal Media Group's 2016 Americas Women in Business Law Awards

the legal profession to new frontiers."

Ms. Eisen comes from Portland, Oregon. She received a B.A. *magna cum laude* in 1994 from Cornell University and a J.D. in 1997 from the University of Pennsylvania. Ms. Eisen joined Cravath in 1997 and became a partner in 2005.

Ms. Eisen can be reached by phone at +1-212-474-1930 or by email at lizann.eisen@cravath.com.

RELATED STORIES

Fortis's $2 Billion Debt Offering

Cravath Represents the Initial Purchasers in Fortis's $2 Billion Debt Offering

Orbotech's Registered Ordinary Shares Offering

Cravath Represents Orbotech in its Registered Ordinary Shares Offering

Cravath's Pro Bono Work for The Cystic Fibrosis Foundation and its Cross-Border Program

Cravath Works Pro Bono for The Cystic Fibrosis Foundation and its Cross-Border Program

Cooper-Standard Holdings's Registered Secondary Common Stock Offering

Cravath Represents the Underwriters in Cooper-Standard Holdings's Registered Secondary Common Stock Offering

Cravath's Pro Bono Work with The Cystic Fibrosis Foundation Noted in *The Wilton Bulletin*

LizAnn Eisen, John Buretta and Ben Gruenstein Speak at Compliance Conference in Israel

LizAnn Eisen Chairs, and Scott Bennett Speaks at, PLI's 2016 Securities Offerings Conference

D. Scott Bennett

Partner, Corporate

Contact
T: +1 (212) 474-1132
F: +1 (212) 474-3700

Education

J.D. Emory University Law School, 2006, *James Colson Scholar;*

B.A. Duke University, 2002

Professional Recognition

IFLR1000

- Banking - US (2017, 2016)
- Capital Markets: Debt and Equity - US (2017, 2016)
- Capital Markets: High-Yield Debt - US (2017, 2016)

The Legal 500 Latin America

- Capital Markets – Latin America: International Firms (2016, 2015)
- Corporate and M&A – Latin America: International Firms (2016)

The Legal 500 US

- Capital Markets: Debt

Scott Bennett is a partner in Cravath's Corporate Department. His practice primarily focuses on representing issuers and investment banking firms in connection with public and private offerings of securities, as well as representing corporate clients in mergers and acquisitions.

Representative capital markets and syndicated loan transactions include representing:

- the underwriters in connection with the $663 million registered offering of common units of Phillips 66 Partners LP;
- Qualcomm Incorporated in connection with its $10 billion debut registered debt offering and the establishment of its $4 billion commercial paper program;
- the underwriters in connection with the $500 million registered senior debt offering and the $230 million registered offering of common units of MPLX LP, and the agents in connection with the establishment of a

$500 million at-the-market program;

- JB y Compañía, S.A. de C.V. (Jose Cuervo) in connection with its $500 million 144A/Reg. S senior debt offering;
- GasLog Ltd. in connection with its $116 million and $172 million registered offerings of common shares and its $100 million registered offering of series A cumulative redeemable perpetual preference shares;
- Weyerhaeuser Company in connection with its split-off exchange offer related to the merger of Weyerhaeuser Real Estate Company with a subsidiary of TRI Pointe Homes, Inc. in a Reverse Morris Trust transaction and the related $900 million 144A/Reg. S senior notes offering of Weyerhaeuser Real Estate Company;
- the underwriters in connection with the $1.1 billion senior debt offering of AmerisourceBergen Corporation;
- GasLog Partners LP, a master limited partnership, in connection with its $203 million initial public offering of common units and its $160 million secondary offering of common units;
- the initial purchasers in connection with the $225 million 144A/Reg. S high-yield senior secured debt offering of Waterjet Holdings, Inc. to finance its acquisition of Flow International Corporation;
- Grupo Gigante S.A.B. de C.V. in connection with $343 million and MXN 4.438 billion of credit facilities to finance its $690 million acquisition of Office Depot, Inc.'s 50% joint venture interest in Office Depot de

Offerings (2016, 2014)
- Capital Markets: Equity Offerings (2015, 2014)
- Capital Markets: Global Offerings (2014)
- Capital Markets: High-Yield Debt Offerings (2015)
- Technology: Transactional (2016)

Super Lawyers - Rising Stars - New York
- Securities & Corporate Finance (2016)

EXTRAS

LizAnn Eisen Chairs, and Scott Bennett Speaks at, PLI's 2016 Securities Offerings Conference

LizAnn Eisen Chairs, and Scott Bennett Speaks at, PLI's Securities Offerings Conference

Mexico S.A. de C.V., and a subsequent $350 million 144/Reg. S high-yield senior debt offering of Office Depot de Mexico;

- the underwriters in connection with the $874 million registered common stock offering of Darling International Inc.;
- the initial purchasers in connection with the $300 million 144A/Reg. S. senior debt offering of Allegion US Holding Company Inc.;
- the underwriters in connection with the $89 million initial public offering of common stock of Global Brass and Copper Holdings, Inc.;
- the agent in connection with a $700 million PIK holdco bridge loan provided to Bausch & Lomb Holdings Incorporated;
- the initial purchasers in connection with the $2 billion 144A/Reg. S high-yield senior secured and senior unsecured debt offering of Reynolds Group Issuer LLC, Reynolds Group Issuer Inc. and Reynolds Group Issuer (Luxembourg) S.A.;
- the initial purchasers in connection with the $2.5 billion 144A/Reg. S high-yield senior debt offering of Novelis Inc.;
- the initial purchasers in connection with the $425 million 144A/Reg. S high-yield senior secured debt offering of Diamond Resorts Corporation; and
- Symetra Financial Corporation in its $420 million initial public offering of common stock.

Mr. Bennett has also been involved in many complex and high profile M&A transactions which include representing:

- the independent directors of JDA Software Group in the $2 billion leveraged buyout of JDA by affiliates of New Mountain Capital;
- White Mountains Insurance Group, Ltd. in the $1 billion sale of its Esurance and Answer Financial businesses to The Allstate Corporation;
- Genpact Limited in its $550 million acquisition of Headstrong Corporation; and
- Time Warner Inc. in its spin-off of AOL.

Mr. Bennett has been recognized for his work in the capital markets arena by *The Legal 500 United States* from 2014 through 2016; *The Legal 500 Latin America* in 2015 and 2016; *IFLR1000* in 2016 and 2017; and *Super Lawyers* in 2016. He also has been recognized as a leading practitioner in mergers and acquisitions by *The Legal 500 Latin America* in 2016.

Mr. Bennett was born in Sarasota, Florida. He received a B.A. in Economics from Duke University in 2002. Mr. Bennett received a J.D. with High Honors from Emory University in 2006 where he was valedictorian, a notes and comments editor of the Law Journal and was elected to the Order of the Coif. He joined Cravath in 2006 and became a partner in 2014.

Mr. Bennett may be reached by phone at +1-212-474-1132 or by email at sbennett@cravath.com.

RELATED STORIES

Costamare's Registered Offering of Common Stock

Cravath Represents Costamare in its Registered Offering of Common Stock

Qualcomm's $47 Billion Acquisition of NXP

Cravath Represents Qualcomm in its $47 Billion Acquisition of NXP

Phillips 66 Partners LP's $1.125 Billion Registered Senior Debt Offering

Cravath Represents the Underwriters in Phillips 66 Partners LP's $1.125 Billion Registered Senior Debt Offering

Alcoa's $1.25 Billion High-Yield Senior Debt Offering

Cravath Represents the Initial Purchasers in Alcoa's $1.25 Billion High-Yield Senior Debt Offering

David K. Boston
Partner

New York
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099
T 212 728 8625
F 212 728 9625
dboston@willkie.com

My Practices
Corporate and Financial Services
Capital Markets
Mergers and Acquisitions
Private Equity/Venture Capital
Asset Management

Education
Columbia University School of Law, J.D., 1991
Stanford University, B.A., 1988

Bar Admissions
Connecticut, 1991
New York, 1992

David K. Boston is a partner in the Corporate and Financial Services Department and Co-Chair of the Mergers & Acquisitions Practice Group. He has significant experience in merger and acquisition transactions involving public and private companies and in public and private offerings of equity and debt securities. Dave regularly advises boards of directors and senior management on strategic and governance matters.

M&A

Dave represents strategic companies and private equity firms in a wide range of merger and acquisitions transactions, including purchases and sales of public companies and private companies, strategic equity investments, cross-border transactions, spin-offs and corporate control contests. His practice covers companies in a variety of industries and geographies, with a focus on financial services, asset management and communications.

Capital Markets

Dave represents issuers and underwriters in capital markets transactions. He has extensive experience in IPO's, follow-on equity offerings by seasoned companies and Rule 144A and registered debt offerings. These securities offerings are by issuers across a variety of industries. In addition, Dave advises companies regarding disclosure matters under the securities laws.

Chambers USA (2016) ranks Dave among the leading individuals practicing Corporate/M&A Law in New York.

Selected Significant Matters

M&A
Dave's representative M&A transactions include advising:

- Virtus Investment Partners in its agreement to acquire RidgeWorth Investments, a multi-boutique asset management firm

- Level 3 Communications in numerous acquisitions and divestitures, including its:
  - sale to CenturyLink ($34 billion)
  - acquisition of tw telecom ($7.3 billion)
  - acquisition of Global Crossing Limited ($3 billion)
  - acquisition of Broadwing Corporation ($1.4 billion)
  - acquisition of TelCove, Inc. ($1.1 billion)
  - acquisition of WilTel Communications from Leucadia ($680 million)
  - and its sale of Technology Spectrum to Insight Enterprises, Inc.
- Providence Equity Partners and Warburg Pincus in their $1.15 billion sale of Telcordia Technologies to Ericsson
- Neuberger Berman in its $2.6 billion sale to Lehman Brothers
- Hedge fund manager Ramius LLC in its business combination with Cowen Group
- Cowen Group in its acquisition of LaBranche & Co., Concept Capital Markets and Conifer Securities, LLC
- Aberdeen Asset Management in its acquisition of Artio Global Investors, FLAG Capital Management, LLC and Arden Asset Management LLC
- Elior in its acquisition of TrustHouse Services Group
- The Titan Corporation in its $2.6 billion sale to L-3 Communications
- América Móvil in its $1.8 billion acquisition of Telecomunicaciones de Puerto Rico from Verizon
- Teléfonos de Mexico in several transactions, including its:
  - acquisition of AT&T Latin America
  - acquisition of MCI's controlling interest in Embratel Participacoes
  - and the sale of its equity interest in MCI to Verizon
- Cadmus Communications in its sale to Cenveo
- Warburg Pincus in its acquisition of TransDigm Holding
- Marsh in its sale of Crump Group to an affiliate of J.C. Flowers
- Peter Kiewit Sons' in its spin-off of Kiewit Materials
- Kiewit Materials in its sale to Rinker Materials

Capital Markets
Dave's representative capital markets transactions, include advising:

- Underwriters in an aggregate $950 million public offering of senior notes by Arch Capital Group Ltd.
- Level 3 Communications in numerous offerings of common stock, convertible notes and notes
- Lennar in numerous notes offerings
- Ventas, Inc. in numerous offerings of common stock, convertible notes

and notes

- Wells Fargo Securities and Deutsche Bank Securities in notes offerings of Rialto Holdings
- BofA Merrill Lynch, Barclays Capital, Goldman, Sachs and Citigroup in notes offerings of Marsh & McLennan Companies
- Deutsche Bank Securities and J.P. Morgan in numerous common stock, preferred stock and convertible notes offerings of Strategic Hotel & Resorts
- Wells Fargo Securities and BofA Merrill Lynch in a preferred shares offering of Arch Capital
- Telcordia Technologies in offerings of notes
- Cowen Group in its initial public offering following its combination with Ramius
- Neuberger Berman in offerings of common stock and convertible notes

SHEARMAN & STERLING LLP

Biography

Robert Evans III
(Rob)

New York
T +1.212.848.8830
F +1.646.848.8830
revans@shearman.com

Practice

Mr. Evans is a partner in the Capital Markets—Americas practice group of Shearman & Sterling. He has extensive experience in public and private securities offerings. He advises corporate clients and investment banks on various corporate and securities law matters. He joined the firm in 1990 and became a partner in 1996.

Recent Experience

- Offerings of convertible securities and high yield debt securities
- Initial public offerings
- Development of new corporate finance products
- SEC and general corporate advice

Education

Boston University School of Law, J.D., *cum laude*, 1985
Harvard College, A.B., *cum laude*, 1982

Bar Admission/Qualifications

New York

Professional Affiliations and Business Activities

- Member, American Bar Association
- Member, American Law Institute
- Member, New York State Bar Association
- Member, TriBar Opinion Committee
- Editor, Ethics Corner Column, *Business Law Today*

Bar Admissions

- State of New York

Education

- A.B., History, Princeton University
- J.D., University of Michigan Law School
  - *magna cum laude*
  - Order of the Coif
  - *Michigan Law Review*

Sophia Hudson

PARTNER

212 450 4762 tel
sophia.hudson@davispolk.com

Ms. Hudson is a partner in Davis Polk's Corporate Department, practicing in the Capital Markets Group. She advises U.S. and non-U.S. issuers and underwriters on capital markets transactions, including initial public offerings and other equity offerings, public and private high-yield, investment-grade and convertible debt offerings and private placements of equity and convertible securities for early stage companies. She also advises her corporate clients, including management teams and boards of directors, on governance, corporate and securities law matters.

Her experience ranges across a variety of industries, including biotech, consumer, financials, industrials, mining, retail, specialty pharmaceuticals and technology.

She has represented all the major U.S. investment banks.

WORK HIGHLIGHTS

Ms. Hudson's recent transactional experience includes the following representations:

IPOs and Other Equity Offerings

- Affimed, Auris, Biotie, OneMain Financial, Prosensa and Warner Chilcott in connection with their IPOs and/or follow-on equity offerings
- The underwriters in connection with the IPOs and/or other equity offerings of AK Steel, ConforMIS, EndoChoice, Evolent, Galapagos, OncoMed, PTC Therapeutics, REGENX, Spark, Summit Materials, SXC (now Catamaran) and Wesco Aircraft

High-Yield and Convertible Debt

- The underwriters in connection with high-yield or convertible debt offerings of Academy, AK Steel, Blackhawk Network, CEVA Logistics, Coinstar (now Outerwall), GNC, Insulet, Meritor, OneMain Financial, Pittsburgh Glass Works, Stillwater Mining, Unit and Universal American

RECOGNITION

- *Law360* – "Rising Star," Life Sciences, 2016

OF NOTE

- Fellow, 2016-2017 Class of David Rockefeller Fellows of the Partnership for New York City
- Co-Chair, Practising Law Institute's "How to Prepare an Initial Public Offering," 2015, 2016 and 2017

- Regular participant in panels on securities law and governance topics in the United States and Europe

PROFESSIONAL HISTORY

- Partner, 2014-present
- Associate, 2006-2014

Pam Long is an Assistant Director in the Division of Corporation Finance at the Securities and Exchange Commission. Pam joined the Division staff in 1996 and has also served as an attorney-examiner and a special counsel in the Division. Before joining the staff, Pam worked as an associate in the Baltimore office of Piper & Marbury and in the Chicago office of Vedder, Price, Kaufmann & Kammholz.

Nicole Pinder is a partner in the PricewaterhouseCoopers' Transaction Services practice, based in New York. She has over 15 years of experience providing assurance and advisory services to companies across a broad range of industries in the US, Europe and South Africa with a focus on complex financial reporting matters. She has advised corporates and private equity houses on the execution of their capital markets transactions (public and private debt and equity offerings), divestitures, and on complex accounting and reporting matters under various GAAPs. Nicole also has several years of experience advising companies on the adoption of, and reporting under International Financial Reporting Standards ("IFRS"). Current and recent clients include News Corporation, Hertz, McGraw-Hill, Visteon, Bunge, Stanley Black & Decker, General Motors, Duke Energy, National Grid, KeySpan Energy, Wendy's, Toys "R" Us, Sycamore Partners, BC Partners, Golden Gate Capital, Express, Apollo Management, Hexion Specialty Chemicals and Bain Capital.

Prior to her relocation to New York, Nicole was based in London, United Kingdom. During her 5 years with the Global Capital Markets Group in London, a technical specialist group within the Transaction Services practice, she was primarily responsible for assisting utility, oil and gas, and mining companies with the application of US GAAP and IFRS, and the SEC reporting requirements for foreign private issuers. Nicole has a significant amount of experience in the Energy, Mining and Utilities industries. Her client base in this industry sector, several of which she advised during their conversion to IFRS, included British Energy, Powergen, E.ON, ScottishPower, Rio Tinto, Sasol and ENI. Key clients outside of this industry sector include Unilever and the London Stock Exchange.

Nicole is a chartered accountant and, prior to joining the accounting profession, qualified as a lawyer. She has been based in New York since November 2004.

BLB&G Bernstein Litowitz Berger & Grossmann LLP

Hannah Ross

Partner
Tel: +1 (212) 554-1411
Fax: +1 (212) 554-1444hannah@blbglaw.comDownload vCard

Ms. Ross is involved in a variety of the firm's litigation practice areas, focusing in particular on securities fraud, shareholder rights and other complex commercial matters. She has over a decade of experience as a civil and criminal litigator, and represents the firm's institutional investor clients as counsel in a number of major pending actions.

A key member and leader of trial teams that have recovered billions of dollars for investors, Ms. Ross is widely recognized by industry observers for her professional achievements. Named a "Future Star" and one of the "Top 250 Women in Litigation" in the nation by *Benchmark*, she has earned praise from *Legal 500 US* for her achievements, and is one of the "500 Leading Lawyers in America," part of an exclusive list of the top practitioners in the nation as compiled by leading legal journal *Lawdragon*.

Ms. Ross was a senior member of the team that prosecuted *In re Bank of America Securities Litigation*, which resulted in a landmark settlement shortly before trial of $2.425 billion, one of the largest securities recoveries ever obtained. In addition, she led the prosecution against Washington Mutual and certain of its former officers and directors for alleged fraudulent conduct in the thrift's home lending operations, an action which settled for $208.5 million and represents one of the largest settlements achieved in a case related to the fallout of the subprime crisis and the largest recovery ever achieved in a securities class action in the Western District of Washington. Ms. Ross was also a key member of the team prosecuting *In re The Mills Corporation Securities Litigation*, which settled for $202.75 million, the largest recovery ever achieved in a securities class action in Virginia and the second largest recovery ever in the Fourth Circuit.

Most recently, she is a key member of the team that has obtained $204.4 million in partial settlements in the securities litigation arising from the collapse of former leading brokerage MF

Global, which are currently pending court approval. Ms. Ross is also prosecuting a number of high-profile securities class actions, including the litigation arising from the failure of major mid-Atlantic bank Wilmington Trust, as well as securities fraud class actions against payday lending company, DFC Global Corp.; home healthcare and pharmaceuticals company, BioScrip, Inc.; and Altisource Portfolio Solutions, a provider of support and technology services for mortgage loan servicing.

She has been a member of the trial teams in numerous other major securities litigations which have resulted in recoveries for investors in excess of $2 billion. Among other matters, Ms. Ross prosecuted the securities class action against New Century Financial Corporation, the Federal Home Loan Mortgage Corporation ("Freddie Mac") as well as *In re Tronox Securities Litigation*, *In re Delphi Corporation Securities Litigation*, *In re Affiliated Computer Services, Inc. Derivative Litigation*, *In re Nortel Networks Corporation Securities Litigation* and *In re OM Group, Inc. Securities Litigation.*

Ms. Ross handles *pro bono* matters on behalf of the firm and has also served as an adjunct faculty member in the trial advocacy program at the Dickinson School of Law of the Pennsylvania State University.

Before joining BLB&G, Ms. Ross was a prosecutor in the Massachusetts Attorney General's Office as well as an Assistant District Attorney in the Middlesex County (Massachusetts) District Attorney's Office.

1

The Statutory Arrangement for Public and Private Securities Offerings Under the Securities Act of 1933 (December 1, 2015)

John W. White
William P. Rogers, Jr.
William J. Whelan III
LizabethAnn R. Eisen
D. Scott Bennett
Kimberley S. Drexler
Sophia Tawil

Cravath, Swaine & Moore LLP

Introductory Note: The material discussed in this outline is for training and illustrative purposes only and does not purport to reflect appropriate or inappropriate disclosure or procedures that should be followed or inquiries that should be made, if any, in any particular situation.

Reprinted from the PLI Course Handbook, Securities Offerings 2016: A Public Offering: How It Is Done (Order #149609)

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

Table of Contents

PUBLIC AND PRIVATE SECURITIES OFFERINGS
UNDER THE SECURITIES ACT OF 1933

The Securities Act of 1933 (as amended, the "1933 Act")[1] which became law on May 27, 1933, establishes the principal legal framework for the offer and sale of securities in the U.S. It is fundamentally premised on disclosure, rather than "qualitative" evaluations of different securities. The preamble of the 1933 Act sets forth that its purpose is to ensure "full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails."

The 1933 Act relies on a combination of regulatory oversight and private litigation to ensure compliance with its requirements. Regulatory oversight is carried out by the Securities and Exchange Commission (the "SEC") which, among other things, administers the "registration process". Absent an exemption, § 5 of the 1933 Act prohibits offers and sales of securities unless the registration process is utilized. It is worth underscoring that it is the offer or sale (that is, the transaction) that needs either an exemption or registration in every case.[2]

The "civil liability" provisions of the 1933 Act impose strict liability on issuers, underwriters, directors, certain named officers and experts for material misstatements and omissions in connection with the offer and sale of securities, subject only to limited defenses, including a "due diligence" defense (for persons other than the issuer).

I. Key Definitions under the 1933 Act.

Pursuant to Section 5 of the 1933 Act, a person must either have an exemption available or use the registration process with regard to any offer or sale of securities. The 1933 Act defines several key categories of persons who might be involved in offers or sales of a security (although the general principle just noted applies to anyone). In particular, "issuer" and "underwriter" are defined in § 2 of the 1933 Act and can have significantly broader meanings than what may apply to them in lay person English. So who or what is an "issuer" and an "underwriter" for securities law purposes?

A. Issuer: § 2(a)(4) defines an issuer as every person who issues or proposes to issue a security. Note that issuers must potentially register all sales, even small sales and even resales of previously publicly traded securities—e.g., an issuer cannot purchase 100 shares of its own stock on a stock exchange and later resell those shares without registration or reliance on an available exemption.

[1] Unless otherwise noted, all section references in this outline are to the 1933 Act.

[2] In contrast, many non-U.S. jurisdictions rely on "company" registration.

B. Underwriter: § 2(a)(11) defines an underwriter as any person (note then that this term is not limited to investment banks or others who expressly call themselves underwriters) who has purchased a security either

> from an issuer (or any person who offers or sells a security for an issuer) or
>
> from "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer" (a "controlling person")

in either case with a view to distribution of the security.

The definition of "underwriter" in § 2 also includes any person (i) who "offers or sells for an issuer in connection with the distribution of any security," or (ii) who "directly or indirectly participates in any such undertaking or the underwriting of such an undertaking".

1. This definition clearly includes a managing underwriter and other members of an underwriting syndicate.

2. Excluded are dealers who are so-called "selling group" members-- § 2(a)(11) and related Rule 141 provide that, if a person's interest in the sale of a security is limited to a commission from an underwriter (but not from the issuer) which is not in excess of a usual and customary seller's commission, such person is not an underwriter.

3. If an investment bank (that is, a "dealer") purchases securities for resale from a "controlling" person, the investment bank is an "underwriter" and the registration process must be used. It is not relevant how the controlling person acquired the securities--open market purchase, directly from the issuer or in a registered public offering--registration is required on resale, unless an exemption is available.

4. Non-controlling persons (which the vast majority of people are with regard to the vast majority of issuers) may sell unrestricted securities through a dealer without registration, since the dealer is not deemed to be an underwriter and is exempt in its capacity as a "dealer" pursuant to § 4(a)(3).

II. **Need to Register: § 5**

A. Section 5 is the heart of the Act and provides in its most simple terms that securities cannot be sold or delivered, absent an exemption, unless an effective registration statement is in place. This section also prohibits offers with regard to securities unless a registration statement is on file, and establishes the general rule that § 10 governs prospectuses and their content.

III. **Exemptions from Registration: §§ 3 and 4 and Related Rules.**

A. Exempted Securities.

Section 3(a) exempts all transactions in certain securities from registration:

1. § 3(a)(2) exempts, among others, securities issued or guaranteed by:

   a. the U.S. Government and its agencies;

   b. state and local governments; and

   c. banks (but not bank holding companies); this includes a letter of credit issued by a bank that is guaranteeing a non-exempt security.

2. § 3(a)(3) exempts commercial paper arising out of current transactions (or the proceeds of which have been or will be used for current transactions) with a maturity not exceeding 9 months. Note that the § 3(a)(3) exemption is irrelevant to a commercial paper program that avails itself of the exemption under § 4(a)(2).

3. § 3(a)(6) exempts certain railroad equipment trust certificates.

4. § 3(a)(9) exempts any security of an issuer exchanged with its own existing security holders exclusively where no commission is paid for soliciting the exchange. For example, this exemption covers issuance of common stock upon conversion of outstanding convertible debt (assuming no fee is paid to solicit the exchange), but does not cover issuance of common stock upon exercise of a warrant by payment of a cash exercise price. There are extensive "no action" letters under § 3(a)(9). "Restricted securities," described below, retain their character as "restricted securities" following a § 3(a)(9) exchange.

5. § 3(a)(10) exempts any security issued in exchange (except in a Chapter 11 bankruptcy proceeding) for one or more outstanding securities, claims

or property interests (and partly for cash), where the exchange terms have been approved (after a fairness hearing) by a court (U.S. or foreign) or state or federal agency expressly authorized by law to grant the approval. The exchanged securities are not considered "restricted securities" for purposes of Rule 144 and are freely tradeable so long as the seller is not an affiliate of the issuer and has not been an affiliate in the 90 days before the § 3(a)(10) transaction.

6. § 3(a)(11) exempts any security that is part of an issue offered and sold only to persons in the state where the issuer is resident, does its business and, in the case of a corporation, is incorporated. Rule 147 outlines requirements that, if met, satisfy the § 3(a)(11) exemption.

Pursuant to Section 3(b), as modified by the Jumpstart Our Business Startups Act (the "JOBS Act"), the SEC has modified the Regulation A exception (as modified, informally referred to as "Regulation A+") to create two tiers of exempt public offerings.[3]

	Tier 1	**Tier 2**
Annual Offering Limit	$20 million in offering and 12 month prior period	$50 million in offering and 12 month prior period
Selling Shareholder Participation	$6 million by affiliates	$15 million by affiliates
	Affiliate and non-affiliate selling shareholders limited to 30% of aggregate offering price in (i) initial Regulation A offering or (ii) any follow-on Regulation offerings within one year.	
Issuer Eligibility	U.S. and Canadian issuers; not a 1934 Act reporting company; and not otherwise a "bad actor"	
Investment Limit	None	For non-accredited investors of unlisted securities: Up to the greater of 10% of investor's annual income or net worth or annual revenue or net assets
Eligible Securities	Equity securities, debt securities and debt securities convertible or exchangeable into equity, including any guarantees of these types of securities	

[3] See SEC Release 33-9741 (March 25, 2015)

	Tier 1	Tier 2
1933 Act Status	Public offering exempt from registration. Not integrated with prior or subsequent offers or sales of securities (subject to limited exceptions)	
1934 Act Status	Securities issued in a Tier 2 offering will not count toward the registration thresholds of section 12(g) of the 1934 Act so long as the issuer is current in its reporting requirements, has a transfer agent and had either (i) a public float of less than $75 million as of its most recent semiannual period or (ii) if it had no public float, annual revenues of less than $50 million as of its most recently completed fiscal year.	
Offering Statement Filing and Qualification	• No offers before Form 1-A is filed with SEC. • "Testing the waters" solicitation materials permitted to be used before and after Form 1-A is filed, subject to legend and filing requirements. • Oral and regulated written offers permitted after filing and before qualification. • No sales before Form 1-A is "qualified". • Non-public review process is available for first-time issuers. • FINRA filing and review required if a FINRA member firm participates in the offering.	
Offering Statement Contents	Unaudited balance sheets, income statements, cash flows and stockholders' equity for two most recent years; business and other information analogous to Form S-1	AUDITED balance sheets, income statements, cash flows and stockholders' equity for two most recent years; business and other information analogous to Form S-1
Ongoing Reporting	Very limited disclosure obligations after qualifying an offering	Similar to public company reporting (annual reports, semiannual reports, current event updates)

	Tier 1	Tier 2
Potential Liability	Section 12(a)(2), NOT section 11	
State Law Pre-emption	No pre-emption	All persons to whom offers or sales are made in a Tier 2 offering; states may require notice filings, consents to service of process and filing fees

B. Exempt Transactions.

Section 4 exempts specific transactions from registration:

1. § 4(a)(1) exempts all transactions by any person other than an "issuer" (§ 2(a)(4)), an "underwriter" (§ 2(a)(11)) or a "dealer" (§ 2(a)(12)).

2. § 4(a)(2) exempts transactions by an issuer not involving any public offering:

   a. These are so-called "private placements" of securities by the issuer to a limited number of qualified purchasers who agree to resale restrictions. There can be no "general solicitation" in connection with a transaction that relies on the statutory exemption, but an issuer that is a public company can make a public announcement under Rule 135(c).

   b. Regulation D (described below) establishes a safe harbor under Section 4(a)(2) for certain eligible private placements. Certain transactions under that safe harbor can involve a "general solicitation".

3. "§4(1)(½) Exemption" (now §4(a)(1)(½)). This exemption has not been written into law but instead relies on a combination of §4(a)(1) and §4(a)(2). It allows parties that have acquired restricted securities in a §4(a)(2) private placement to resell these securities in a further private placement by following procedures necessary under §4(a)(2). However, because §4(a)(2) applies only to issuers, the actual exemption for this kind of transaction is §4(a)(1) because the third party avoids being deemed either an underwriter or a dealer. Note that these securities retain their "restricted" status.

4. § 4(a)(3) (and related Rule 174) exempts dealer transactions from § 5 so long as the transaction does not: (i) involve unsold allotments (i.e., the securities which are still in the hands of an underwriter but not sold as part of the initial distribution and are being held for distribution rather than investment) OR (ii) occur during the applicable 25 or 90 day period following an initial public offering. A "dealer" generally includes any person who acts as an agent, broker or principal in the business of dealing or trading in securities issued by another person (§ 2(a)(12)).

5. § 4(a)(5) exempts private placements to "accredited investors" of less than $5 million.

6. Section 4(a)(6), which was added by the JOBS Act, creates a "crowdfunding" exemption from registration, whereby small aggregate amounts of securities of an issuer can be sold through brokers or "funding portals" to investors in small individual amounts. On October 30, 2015, the SEC adopted rules to implement the crowdfunding exemption.[4] Securities issued under the crowdfunding exemption will be subject to the following:

    - Transfer of securities issued in crowdfunding transactions will be restricted for one year, with limited exceptions.

    - Securities issued in a crowdfunding transaction are "covered securities" under the Securities Act (i.e., exempt from state Blue Sky laws with respect to the issuance of the securities).

    - Securities issued in crowdfunding transactions will not count toward the registration thresholds of section 12(g) of the 1934 Act, so long as the issuer is current in its reporting, has a transfer agent and has no more than $25 million in assets.

    - Securities issued in crowdfunding transactions will not be integrated with other exempt offerings by the issuer, to the extent that each offering complies with the requirements of the applicable exemption being relied upon.

    - An issuer is required to prepare and file a Form C before the commencement of the offering and is subject to certain ongoing reporting requirements.

[4] See SEC Release 33-9974 (October 30, 2015)

- Under Section 4A(c), the issuer may be held liable for written or oral material misstatements or omissions in accordance with Sections 12(b) and 13, as if the liability were created under Section 12(a)(2).

Restrictions on crowdfunding transactions include:

- An issuer cannot raise more than $1 million through crowdfunding offerings in any 12-month period.

- An investor may not invest more than the following in crowdfunding offerings in any 12-month period

    - the greater of (i) $2,000 or (ii) 5 percent of the lesser of annual income or net worth of such investor, if either the annual income or the net worth of the investor is less than $100,000; and

    - 10 percent of the lesser of annual income or net worth of such investor (not to exceed an amount sold of $100,000), if both the annual income and net worth of the investor are equal to or more than $100,000.

- Crowdfunding transactions must be conducted through a broker or funding portal (a specially created intermediary for crowdfunding transactions).

Crowdfunding is not available for: (i) foreign issuers; (ii) issuers that are required to file reports pursuant to section 13 or 15(d) of the 1934 Act; (iii) investment companies as defined in section 3 of the Investment Company Act, or that are excluded from the definition of investment company by section 3(b) or 3(c) of that Act; and (iv) other categories of issuers designated by the SEC as prohibited.

Issuers and intermediaries must fulfill a number of other requirements, including several related to disclosure and investor education.

Regulation D.

Regulation D, which implements several of the exemptions under §§ 3 and 4, provides both (i) exemptions for certain limited offerings by issuers of securities not exceeding $1 million and $5 million and (ii) a non-exclusive safe harbor for issuer private placements under § 4(a)(2) (Rule 506). The safe harbor in Rule 506 has no limit on the dollar amount of the offering, the number of offerees, or the number of “accredited investor” purchasers (non-accredited investor purchasers are limited to a total of 35).

Prior to the JOBS Act, Regulation D prohibited all forms of general solicitation and general advertising, although a Rule 135(c) announcement by a 1934 Act reporting company was permitted. Issuers may continue to rely on these provisions.

As a result of a rule change mandated by the JOBS Act, the SEC amended Regulation D to allow issuers to choose to engage in general solicitation and general advertising, *provided* that (i) all purchasers of the securities are accredited investors and (ii) the issuer takes reasonable steps to verify that such purchasers are accredited investors. Amended Rule 506 contains a non-exclusive list of methods that issuers may use to satisfy the verification requirement.[5] These include obtaining tax returns, bank statements or brokerage statements, together with written representations or third party confirmations from a broker dealer, accountant, investment advisor or attorney. Practice is still developing around what steps constitute legally sufficient reasonable verification.

A second JOBS Act required amendment to Regulation D disqualified certain "bad actors" from relying on Regulation D. Bad actors include issuers where the issuer, and any predecessor or affiliate or 20% owner (i) has been convicted within the past 10 years of a felony or misdemeanor in connection with the sale of securities, or of making a false filing with the SEC, (ii) is subject to any order, judgment or decree entered within the past five years enjoining the person from engaging in the activities noted above, (iii) is the subject of an order of the SEC or banking regulator suspending the person's ability to engage in such businesses or (iv) has been the subject within 5 years of an order to cease and desist from any disclosure violation under the securities laws.[6]

As outlined below, securities acquired in unregistered, private sales from the issuer or from an affiliate of the issuer are one category of "restricted securities".[7] The transferability of these securities is limited because any holder runs the risk of being deemed an underwriter in that transfer.

Regulation S.

The SEC has also recognized a non-statutory "exemption" for securities offered and sold outside the United States under Regulation S (adopted in SEC Release

[5] See SEC Release No. 33-9415 (July 10, 2013)

[6] See SEC Release No. 33-9414 (July 10, 2013)

[7] See the SEC investor publication, "Rule 144: Selling Restricted and Control Securities," available at http://www.sec.gov/investor/pubs/rule144.htm.

No. 33-6863 (April 23, 1990)). Rule 901 sets out the "general statement" that Section 5 of the Securities Act applies to offers and sales that occur within the U.S. and does not apply to offers and sales that occur outside the U.S.

Resolution S also provides safe harbors for

a. offers and sales by issuers, distributors and their affiliates (Rule 903), and

b. resales by others (Rules 904 and 905).

Rule 903 sets out three safe harbors

"Category 1" includes offers and sales of

(i) securities of foreign private issuers for which there is no substantial U.S. market interest in the class offered (in the case of an offering of equity securities) or in its debt securities generally (in the case of an offering of debt securities) or in the underlying securities (in the case of an offering of warrants or convertible securities); (ii) an overseas directed offering (i.e., directed to a single country) of any security of a foreign private issuer or non-convertible debt securities or preferred stock of a U.S. issuer; (iii) foreign government securities; and (iv) certain employee benefit plan offerings of any issuer.

For purposes of Regulation S, "substantial U.S. market interest" ("SUSMI") means, with respect to the most recent fiscal year (or if less period since incorporation),

a. in the case of equity securities, either (A) the U.S. exchanges represent the largest single market or (B) 20% or more of the worldwide trading took place on U.S. exchanges and less than 55% of the trading took place on the exchanges in any single non-U.S. country; and

b. in the case of non-convertible debt and preferred stock and asset-backed securities (collectively defined as "debt securities" in Rule 902(a)), (A) there are more than 300 U.S. "holders of record" of all of such securities (exclusive of Section 3(a)(2) commercial paper), (B) more than $1 billion in principal or liquidation amount of such securities are held of record by U.S. persons AND (C) more than 20% in principal or liquidation amount of such securities are held of record by U.S. persons. Note that because this prong of the SUSMI definition requires all three tests to be

"flunked", it is extremely unlikely for a foreign issuer's non-convertible debt, preferred stock and asset backed securities to have SUSMI.[8]

"Category 2" includes offers and sales of securities that

a. do not qualify for Category 1; and

b. are any of the following

(i) equity securities of a foreign private issuer that is an Exchange Act reporting company that has filed all reports required for at least 12 months (or, if less, as long as has been a reporting company); or

(ii) debt securities of any Exchange Act reporting issuer that has made its required filings as specified in (i) above; or

(iii) debt securities of any foreign private issuer that is not an Exchange Act reporting company.

"Category 3" includes all securities that

a. Do not qualify for Category 1 or 2.

b. Examples

[8] While it may seem illogical to require an issuer to flunk all three tests, the adopting release makes it reasonably clear that this result was intended. See note 92, 46 SEC Docket 52-2, Release No. 33-6863 (April 24, 1990); *See also* Reproposing Release at 6, 43 SEC Docket 2008-557, SEC Release No. 33-6838 (July 11, 1989). The effect of clauses (B) and (C) of this definition is that an issuer must have at least $1.0 billion of debt, preferred stock and asset backed securities held by U.S. persons, which in turn represents at least 20% of the total amount outstanding (so, for example, SUSMI would not exist where (i) the issuer has less than $1.0 billion of such securities held by U.S. persons OR (ii) less than 20% of the total outstanding amount of such securities is held by U.S. persons).

Clause (A) additionally requires that these securities must be held "of record" by 300 or more U.S. Persons under Rule 12g5-1. The Staff interpretations under that rule make clear that for securities held through the DTC, the number of holders of record is the number of DTC participants that hold the security, not the number of beneficial owners that hold through one or more DTC participants. Given that most debt is held through the DTC or another clearing system, even companies with multi-billions of debt and preferred stock outstanding are unlikely to have 300 U.S. holders. See SEC Compliance and Disclosure Interpretation 152.01 (September 30, 2008)

(i) Equity securities, including convertible securities, of U.S. domestic companies, whether or not they are reporting companies

(ii) Debt of non-reporting U.S. domestic companies

The theory is that the "natural home" for these securities is the U.S. market so that most stringent procedures should apply to them.

Note also that debt and equity securities of a non-reporting foreign private issuer are likely to be eligible for Category 1 because of lack of SUSMI.

Restrictions under Regulation S

In order to qualify for any Regulation S safe harbor, there must be an "offshore transaction" (i.e., an offer cannot be made to a person in the United States and the buyer must be outside the United States or the seller must reasonably believe the buyer is outside the United States). Furthermore, neither the issuer nor any distributor (or any affiliate of either) may engage in any "directed selling efforts" (i.e., activities that may condition the United States market for the securities).

For Category 1 offerings there are no other conditions imposed on the transaction. (See Rule 903 of Regulation S.)

For Category 2 offerings:

a. "offering restrictions" must be implemented, which means that (x) each underwriter, dealer or other distributor must agree (i) to abide by the "distribution compliance period" restrictions set out below and, in the case of equity securities of U.S. domestic issuers" (ii) to hedge only in compliance with the Securities Act and (y) all offering materials must include specific legends and other information on the inside cover, in the underwriting section and in any advertising;

b. a "distribution compliance period" must be observed, which means in the case of Category 2 that

(i) offers and sales of allotments of the securities may not be made to U.S. persons (other than a distributor), except for sales pursuant to registration or another exemption (e.g., Rule 144A); and

(ii) during a 40-day "distribution compliance" period beginning when the securities are first offered to third parties, no offer or sale of the securities, including those acquired in the trading market, can be

made to U. S. persons (other than a distributor), except pursuant to registration or another exemption; and

c. During the distribution compliance period, each distributor selling securities to another distributor or a dealer or anyone receiving a selling concession must include a notice in the confirmation stating that the purchaser is subject to the same restrictions as the distributor.

For Category 3 offerings:

a. "offering restrictions" are implemented;

b. a "distribution compliance period" must be observed, which

(i) in the case of debt securities is 40 days; and

(ii) in the case of equity securities is either (i) six months (in the case of reporting issuers) or (ii) one year (in the case of non-reporting issuers); and

c. during the distribution compliance period, each distributor selling securities to another distributor or a dealer or anyone receiving a selling concession must include a notice in the confirmation stating that the purchaser is subject to the same restrictions as the distributor.

d. The following additional procedures apply:

(i) in the case of non-convertible debt or preferred stock, the securities are represented by a temporary global note during the 40 day distribution compliance period and are not exchangeable for permanent securities unless the holder certifies as to its non-U.S. status; and

(ii) in the case of equity securities, including convertible securities, during the six month or one year distribution compliance period:

(1) the purchaser (other than a distributor) certifies either (A) that it is not a U.S. person or (B) that is a U.S. Person that purchased in a transaction that did not require registration under the Securities Act;

(2) the purchaser agrees to resell the securities only in accordance with the provisions of Regulation S, a registration statement or another exemption and agrees that

any hedging transactions will be in compliance with the Securities Act;

(3) in the case of securities of a domestic U.S. issuer, the certificates bear a required legend; and

(4) the issuer is required by contract or a provision in its bylaws or other charter document to refuse to register any transfer of securities not made in compliance with Regulation S, a registration statement or another exemption; provided that in the case of bearer securities and where foreign law prevents the foregoing, other reasonable procedures are implemented.

Guaranteed Securities. In the case of non-convertible debt and preferred stock, that is fully and unconditionally guaranteed by a parent company, the offering only needs to comply with the rules applicable to the parent company guarantor. In the case of subsidiary guarantors, the interpretive guidance is less clear but many practitioners advise that the transaction should follow the rules applicable to the "primary credit" in the transaction, and rely on Rule 901.

Special rules apply for offerings of warrants (Rule 903(b)(5)) and for resales by affiliates and dealers (Rule 904(b)). Also Rule 905 states that equity securities of U.S. domestic issuers sold under Regulation S will be "restricted securities" for purposes of Rule 144. Also, there is special interpretive guidance relating to convertible securities.[9]

C. Resale of Restricted Securities and Sales of Securities by Control Persons.

1. An owner of "restricted securities" (e.g. securities acquired in a private placement) or a control person owning any securities of the issuer, (however they were acquired (often called "affiliate securities" or "control securities") can dispose of such securities in five ways:

a. in a registered offering;

[9] See Cravath, Swaine & Moore, SEC No-Action Letter (August 26, 1998) relating to the issuance by U.S. reporting companies of convertible securities held in global form. Also see SEC Interpretive Release No. 33-7516 (March 26, 1998) which contains guidance on when the posting of offering materials on an Internet site by a foreign issuer would not be considered to be an offering "in the United States".

b. in a further private placement (the so-called "§ 4(1)(½) exemption" (now §4(a)(1)(½)))--note that the § 4(a)(2) private placement exemption is by its terms available only to an issuer and not in connection with a resale;

c. to the public in a transaction not involving a "distribution", as defined by Rule 144;

d. in the case of certain securities that are not publicly traded, to "qualified institutional buyers" ("QIBs"), who purchase for their own account (or that of another QIB) pursuant to Rule 144A; or

e. in an offshore transaction under the resale provisions of Regulation S.

2. Restricted Securities.

The term "restricted securities" is defined in Rule 144(a)(3) to mean:

a. Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering under section 4(a)(2);

b. Securities acquired from the issuer that are subject to the resale limitations of Rule 502(d) under Regulation D or Rule 701(c) (which relates to certain unregistered employee benefit plans);

c. Securities acquired in a transaction or chain of transactions meeting the requirements of Rule 144A;

d. Securities acquired from the issuer in a transaction subject to the conditions of Rule 1001 under Regulation CE, which relates to certain California state law exemptions;

e. Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of Rule 901 or 903 under Regulation S;

f. Securities acquired in a transaction made under Rule 801 (which exempts certain rights offerings of foreign private issuers to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were, as of the record date for the rights offering, "restricted securities" within the meaning of Rule 144(a)(3);

g. Securities acquired in a transaction made under Rule 802 (which exempts certain exchange offers and business combinations of foreign private issuers) to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were "restricted securities" within the meaning of Rule 144(a)(3); and

h. Securities acquired from the issuer in a transaction subject to an exemption under section 4(a)(5) of the Securities Act.

Note that securities issued in a Section 3(a)(9) exchange retain the character (restricted or unrestricted) of the securities surrendered.

3. Rule 144. Rule 144 defines those circumstances under which an owner of restricted securities, or a person selling restricted or other securities for a control person, may offer and sell such securities to the public and avoid being deemed to be engaged in a "distribution" of such securities. Therefore that selling person will not be deemed to be an "underwriter".

Restricted securities that are sold into the public markets in reliance on Rule 144 are no longer restricted once held by a purchaser in the public market (assuming that person is not an affiliate).

The following chart outlines the applicable holding periods and resale restrictions:

	Affiliate or Person Selling on Behalf of an Affiliate	**Non-Affiliate (and Has Not Been an Affiliate During the Prior Three Months)**
Restricted Securities of Reporting Issuers and Affiliate or Control Securities	During six-month holding period - no resales of restricted securities under Rule 144 permitted. After six-month holding period (for restricted securities) and at any time (for affiliate or control securities) - may resell in accordance with all Rule 144 requirements including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144	During six-month holding period - no resales under Rule 144 permitted. After six-month holding period but before one year – unlimited public resales under Rule 144 except that the current public information requirement still applies. After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.
Restricted Securities of Non-Reporting Issuers	• During one-year holding period - no resales under Rule 144 permitted. • After one-year holding period - may resell in accordance with all Rule 144 requirements, including: • Current public information, • Volume limitations, • Manner of sale requirements for equity securities, and • Filing of Form 144.	During one-year holding period - no resales under Rule 144 permitted. After one-year holding period - unlimited public resales under Rule 144; need not comply with any other Rule 144 requirements.

Current Public Information means:

a. for a reporting issuer (1) it has been subject to reporting under Exchange Act Section 13(a) or 15(d) for at least 90 days and (2) it has filed all annual and quarterly reports required during the prior 12 months (or as long as public, if less than 12 months); or

b. for a non-reporting issuer, certain specified information is publicly available.

Volume Limitations means:

a. for equity or debt securities, within any three month period, the affiliate (subject to aggregation rules) can sell the higher of (1) 1% of the shares or units outstanding and (2) the average weekly trading volume during the four preceding weeks;

a. for debt securities, the rules provide an alternative test allowing for resales of up to 10% of a tranche of debt securities in any three-month period.

Manner of Sale Requirements means:

a. equity securities must be sold in a brokers' transaction, a transaction directly with a market maker, or a riskless principal transaction as defined in the rule (and the person selling the securities shall not solicit orders or make any payments in connection with the sale other than to the broker executing the order).

4. Rule 144A. Rule 144A provides a safe harbor for resales of privately placed securities and other unregistered securities (e.g., debt and foreign equity) to "qualified institutional buyers" ("QIBs") so long as the conditions discussed below are met. Rule 144A provides a tremendously important (and common) mechanism under the 1933 Act by which high-yield bonds are placed with institutional investors.

   a. Sold only to QIBs—the securities are sold to a QIB (or a person reasonably believed to be a QIB) who purchases for its own account (or the account of another QIB). The following qualify as QIBs:

      (1) any corporation, partnership or other entity (but not an individual) that owns and invests on a consolidated basis

$100 million in the aggregate in securities of non-affiliates (other than (x) bank deposits and loan participations, (y) repurchase agreements and securities subject thereto and (z) currency, interest rate and commodity swaps);

(2) registered dealers that own or invest $10 million of such non-affiliate securities or are engaged in "riskless principal transactions" on behalf of QIBs;

(3) any investment company that is part of a "family" that has the same investment adviser and together own $100 million of such non-affiliate securities; and

(4) any U.S. or foreign bank or savings and loan that owns and invests on a consolidated basis $100 million in such non-affiliate securities and has a net worth of at least $25 million.

In determining the status of a purchaser, a seller can rely on (x) published financial statements or (y) a certificate of an executive officer.

Note that as a result of a JOBS Act mandated rule change, Rule 144A securities may be offered to non-QIBs, so long as the actual purchasers meet the above requirements[10]

b. "Non-fungible securities"—debt or equity securities that, when issued, were not of the same class as securities listed on a national securities exchange or quoted through an automated interdealer quotation system ("Fungible Securities"). For this purpose securities that are immediately convertible into Fungible Securities at a conversion premium of less that 10% are also Fungible Securities. Securities of open-end investment companies, unit investment trusts and face-amount certificate companies registered under the 1940 Act are excluded.

c. Disclosure documents—if the issuer is not either (x) a reporting issuer under the Securities Exchange Act of 1934 (the "1934 Act") or (y) a foreign issuer exempt from reporting under Rule 12g3-2(b), the seller and the prospective purchaser must have the right to obtain from the issuer (and if requested, the

[10] See SEC Release No. 33-9415 (July 10, 2013)

purchaser must have actually obtained) a brief description of the issuer and the issuer's financial statements for the most recent period and the two preceding fiscal years.

d. Notice from seller—the seller in the Rule 144A transaction must notify each purchaser that Rule 144A reliance may be claimed.

e. Timing of sale—the resale under Rule 144A may occur at any time, e.g., immediately.

f. Other restrictions on purchaser—None. Rule 144A does not itself require resale restrictions, though a sale pursuant to Rule 144A does not "cleanse" a security of "restricted" status.

Note that a Rule 144A offering must always be preceded by a "good" private placement under §4(a)(2), which is how the seller (typically an investment bank) acquires the securities from the issuer before placing them with one or more institutional investors.

Rule 144A offerings are often followed by SEC-registered exchange offers (referred to as "AB exchange offers" or "Exxon Capital exchange offers") where the issuer (usually pursuant to a contractual commitment outlined in the Rule 144A offering documents) offers to holders of the Rule 144A securities to exchange the privately placed Rule 144A securities for similar securities that have been registered and, therefore, are freely resalable. This procedure is only available for non-convertible debt securities, certain non-convertible preferred stock and initial public offerings of common stock by foreign issuers. Participants in the exchange offer receive freely resalable securities only if they are not affiliated with the issuer, acquired the original securities in the ordinary course of business and do not have an arrangement with the issuer for the distribution of the exchange securities. See Exxon Capital Holding Corp., SEC No-Action Letter (May 13, 1988), Morgan Stanley & Co. Incorporated, SEC No-Action Letter (June 5, 1991), and their many progeny.

Note that many offerings under Rule 144A are for convertible debt. Here, the issuer often agrees to file a so-called resale shelf-registration statement in order to provide investors with freely tradable securities. This procedure is not as desirable as a registered exchange offer. Unlike an AB exchange offer, under a resale registration statement, the investors are selling shareholders and must assume liability as such. The investors may also be subject to blackout periods and as a result may not be able to sell at

the times they desire. And, issuers are required to keep an effective registration statement in place until the securities are freely tradable. Alternatively, in many convertible debt offerings, rather than filing a shelf registration statement, the issuer is obligated to pay penalty interest if unaffiliated holders are not eligible to resell the debt or underlying equity securities following the applicable holding period.

D. Public Announcements of Unregistered Offerings.

1. Rule 135c provides that a public announcement of a private placement or other unregistered offering (including a Rule 144A offering or Regulation S offering) will not in turn itself be deemed a prohibited "offer" under § 5 provided that the announcement is not for the purpose of conditioning the market in the United States for any of the securities offered and meets other conditions (including content limitations) stipulated by the rule. The Rule 135c safe harbor is available to issuers who are 1934 Act reporting companies and to foreign issuers exempt from 1934 Act reporting pursuant to Rule 12g3-2(b).

   Pursuant to a JOBS Act requirement, the SEC amended Rule 144A to permit a seller to "offer" securities to a non-qualified institutional buyer, including by means of general solicitation or general advertising. However, "sales" under Rule 144A still will be restricted to persons reasonably believed to be qualified institutional buyers.

   Notably, the JOBS Act did not require the SEC to extend this relief to "directed selling efforts" in the United States in connection with Regulation S transactions occurring offshore. As a result, in a "pure" Regulation S transaction or a transaction that has both a Rule 144A component and a Regulation S component, parties will need to consider whether their communications plan will satisfy the stricter limitations on communications in the United States contained in Regulation S.

   In addition, consideration has to be given to state securities registration laws if Federal preemption is not available under NSMIA. NSMIA provides that the offer and sale of "covered securities" are exempt from state registration requirements. Covered securities include, among other things, listed securities and securities of the same issuer if the unlisted securities are equal in rank or senior to the issued securities.

IV. **Private Placements Turned Into Public Offerings and Public Offerings Turned Into Private Placements.**

1. Overview

As many issuers seek rapid access to global public and private capital markets on the most favorable terms and on a near continuous basis, the traditional learning on separation of public and private offerings of securities--including that reflected in the "integration" and "general solicitation" doctrines--has become more difficult to apply. Two areas of concern are as follows:

a. How and when can securities that are initially being privately placed (in a transaction that may or may not have been consummated) be passed through the registration process so that such securities can be freely tradable in the future?

b. Once a registration statement for a public offering of securities is on file with the SEC, how and when can the same or similar securities be sold in private placements?

2. Development of Integration Doctrine

Integration Doctrine. Since adoption of the 1933 Act, an issue with respect to various exemptions thereunder--in particular, § 4(a)(2)--has been whether a private offering of securities should be viewed as part of (i.e., "integrated with") another past, present or future offering of securities by the same issuer, with the result that such private offering would be deemed to be part of a public offering.

Several safe harbors have developed:

a. Five Factors. In 1962, the SEC stated that, in determining whether to integrate apparently separate offerings, the following five factors are relevant to the question of integration:

"whether (1) the different offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, and (5) the offerings are made for the same general purpose".

SEC Release No. 33-4522 (November 6, 1962).

In 1982, in a note to § 502 of Regulation D, the SEC reiterated that the determination as to whether separate sales of securities are an "integrated" part of the same offering depends on the particular facts and circumstances, and the five factors were repeated in full.

Application of the five factors, which are largely subjective in nature, has provided little certainty. Not only do the factors overlap (e.g., what is the difference between two offerings being "part of a single plan of financing" and being "made for the same general purpose"?), but the SEC has provided little guidance as to how the individual factors are to be weighed and, indeed, it has stated that "any of the . . . factors can be determinative". SEC Release No. 33-4552 (November 6, 1962).

b. Six Months Rule. In order to provide some certainty, in 1982 the SEC provided Rule 502(a) of Regulation D which excludes from integration offerings more than six months before or after a Regulation D offering so long as there are not offers or sales of the same or similar type of security as that offered or sold in the Regulation D offering during the six month periods before and after the Regulation D offering.

c. Safe Harbor for Offshore Offerings. In the Regulation S adopting release (SEC Release 33-6863 (April 23, 1990)) and Preliminary Note 7 to Regulation D, the SEC adopted the position that offshore sales under Regulation S generally would not be integrated with offerings in the United States.

d. Rule 152. Rule 152, which has remained essentially unchanged since its adoption in 1935, provides as follows:

> "The phrase 'transactions by an issuer not involving any public offering' in Section 4(2) shall be deemed to apply to transactions not involving any public offering at the time of said transactions although subsequently thereto the issuer decides to make a public offering and/or files a registration statement."

SEC Release No. 33-305 (March 2, 1935).

The adopting release for Rule 152 stated that the "rule allows those who have contemplated or begun to undertake a private offering to register the securities without incurring any risk of liability as a

consequence of having first contemplated or begun to undertake a private offering." The apparent purpose of the rule was a limited one--to enable a failed private offering to be salvaged by a registered offering of the unsold securities. See L. Johnson and S. Patterson, "The Reincarnation of Rule 152; False Hope on the Integration Front", 46 Wash. & Lee L. Rev. 539 (1989).

Prior to a 1986 no-action letter, Rule 152 had not been applied to any specific situation by the SEC. In Verticom, Inc., SEC No-Action Letter (February 12, 1986), however, relying entirely on Rule 152, the SEC Staff concluded that, notwithstanding the issuer's contemplation, at the time of a previously completed private placement of convertible debt, of a registered public offering of common stock within three or four months, the private placement would not be integrated with the subsequent registered offering. The Staff specifically stated that it was not applying the five factor integration test.

Shortly thereafter this interpretation of Rule 152 was confirmed, when another issuer was advised (before either offering had taken place) that a proposed sale of common stock pursuant to Rule 506 of Regulation D would not be integrated with a planned subsequent registration of common stock which would not fit within Regulation D's six-month safe harbor. Vulture Petroleum Corporation, SEC No-Action Letter (February 2, 1987). Again, the five-factor integration test was not considered applicable. Numerous subsequent no-action letters have reached a similar result. See Quad City Holdings, Inc., SEC No-Action Letter (April 8, 1993).

Accordingly, it appears that Rule 152 stands as an exception to the integration doctrine (the Aircraft Carrier Release calls Rule 152 a "safe harbor"): if a good private placement is either completed (or abandoned), that transaction will not be integrated with a later public offering of additional securities (or with the abandoned offering). As a result of Rule 152 the two offerings will not be integrated and the five-factor integration test need not be applied.

e. Black Box and Squadron, Ellenoff No Action Letters. In Black Box Incorporated, SEC No-Action Letter (June 26, 1990) (collectively, with the Squadron, Ellenoff SEC No Action Letter (February 28, 1992) described below, *Black Box"* or the "*Black Box* letters"), the SEC Staff addressed both integration issues and

Rule 152. The *Black Box* letters involved a restructuring where the following transactions were to occur contemporaneously: (i) existing security holders were to receive new securities in a private placement in exchange for existing securities, (ii) new capital was to be raised in a private placement of convertible debentures and (iii) new capital was to be raised in an initial public offering of common stock. The following conclusions were reached by the SEC Staff:

(1) The private placement with existing securityholders need not be integrated with the later public offering of common stock. This conclusion relied on Rule 152 and the facts that (i) the existing securityholders would have entered into the recapitalization agreement prior to the filing of the registration statement for the public offering, and (ii) the private placement, although not consummated, would be "complete" prior to filing of the registration statement because the obligations of the existing securityholders to acquire the privately placed securities would be subject only to conditions that were not within their control.

(2) The private placement of the convertible debentures need not be integrated with the later public offering of common stock. This conclusion relied on Rule 152 and the fact that (i) the investors would have negotiated and executed definitive securities purchase agreements prior to filing of the registration statement for the public offering, and (ii) the private placement, although not consummated, would be "complete" prior to filing of the registration statement because the obligations of the investors to purchase the debentures would be subject only to satisfaction of specified conditions which would not be within the control of the investors.

(3) Alternatively, if the private placement of the convertible debentures was made only to QIBs and three or four accredited investors, for policy reasons, the private placement need not be integrated with the public offering of the common stock even if it would not be "completed" at the time the registration statement was filed. The SEC Staff explained that this exception was made for policy reasons, primarily in consideration of the nature and number of purchasers, and, accordingly, it is to be narrowly

construed. The position is described as a formal articulation of the previously informal position of the Staff that a simultaneous registered offering and an unregistered offering to a limited number of first-tier institutional investors in connection with a structured financing should not be integrated. This is often referred to as the "concurrent" or "parallel" offering branch of *Black Box*--i.e., both a public and a private offering (to appropriately limited investors) can be conducted at the same time, in parallel. The *Black Box* letters assume that the private offering is a "valid" private placement, "if viewed separately". Thus, the marketing efforts must be conducted so that there is no "general solicitation" with respect to the private offering.

(4) Alternatively, if the private placement of the debentures was terminated prior to completion and later there is a registered offering of the debentures based on Rule 152, the abandoned private placement would not be integrated with such public offering.

(5) The filing of a registration statement is deemed to be the commencement of the public offering.

Squadron, Ellenoff, Pleasant and Lehrer, SEC No-Action Letter (February 28, 1992), clarified the initial *Black Box* letter as follows:

(6) the initial *Black Box* letter's conclusions with respect to a simultaneous registered offering of common stock and an unregistered offering of convertible debentures were a policy position taken primarily in consideration of the nature and number of offerees, and not based on the financial condition of the issuer;

(7) the number of offerees and purchasers is a factor in evaluating the applicability of this policy position, and the policy position is limited to situations involving QIBs and "no more than two or three large institutional accredited investors" (reduced from "three or four" as stated in Black Box); and

(8) the conclusions in the *Black Box* letter would have been the same even if the offerings had both involved common stock.

3. In SEC Release 33-8828 (August 3, 2007), the Commission considered how a private placement can comply with the requirements of Section 4(a)(2) when it occurs during the pendency of a public offering. It provided the following guidance relating to Rule 152 and the Black Box letters.

The filing of a registration statement generally constitutes a general solicitation; however, it does not necessarily preclude an issuer from concluding a Section 4(a)(2) private placement. Instead the following factors must be considered:

a. Whether the investors in the private placement were solicited by the registration statement or though some other means; for example,

(1) Was there a substantive pre-existing relationship between the company and the investor (good);

(2) Was the investor solicited by the company or an agent through direct contact outside the registered offering process (good);

(3) Did the investor appear as a result of a reverse inquiry based on its review of the registration statement (bad), or where the source of its interest is unclear (probably bad);

b. While the nature and number of investors may be relevant, they need not be QIBs or accredited investors.

In addition, under Rule 506(c) (added September 23, 2013) issuers may engage in general solicitation and general advertising provided that the accredited investor status of all purchasers is verified generally with third-party sources or official documents.

4. Rule 155.

Rule 155 (SEC Release No. 33-7943 (January 26, 2001)) addresses two common integration problems.

(1) An issuer begins a private offering and (usually due to a high level of interest in the issuer's securities) abandons it without selling any securities and begins a registered public offering. In this situation, the issuer faces the integration problem that marketing activity in the private placement constitutes pre-filing offers, or "gun jumping", in violation of Section 5(c). Rule 155(b) allows the issuer to commence a public offering 30 days after abandoning the private offering, subject to certain conditions.

(2) An issuer is unable to complete a public offering and, prior to selling any securities, wishes to withdraw the registration statement and begin a private offering. In this situation the issuer faces the integration problem that the filing of the registration statement constitutes a general solicitation, in violation of the Section 4(a)(2), Section 4(a)(5) and Regulation D private placement exemptions (other than permitted general solicitation of accredited investors). Rule 155(c) allows the issuer to commence the private offering 30 days after withdrawing the registration statement, subject to certain conditions.

The Rule 155 safe harbor applies only to private placements pursuant to Section 4(a)(2), Section 4(a)(5) and Rule 506 of Regulation D. Rule 155 is only a safe harbor for integration. Issuers must still meet the conditions for a private placement exemption under Section 4(a)(2), Section 4(a)(5) or Rule 506 of Regulation D. Also, literal compliance with Rule 155 will not afford the issuer a safe harbor if it is part of a "plan or scheme" to evade registration.

a. Safe harbor for changing a private offering into a registered offering - Rule 155(b)

Rule 155(b) enables an issuer to abandon a private offering and commence a public offering under the following conditions:

(1) no securities are sold in the private offering;

(2) all offering activity is terminated prior to filing the registration statement;

(3) the prospectus for the public offering discloses certain information about the private offering including:

- the size and nature of the private offering,
- the date on which the issuer terminated all offering activity in the private offering,
- that all offers to buy or indications of interest were rejected by the issuer, and
- that the prospectus delivered in the registered offering supersedes any selling material used in the private offering; and

(4) the registration statement is not filed until at least 30 days after the termination of all offering activity, unless the private offering was made only to accredited or sophisticated investors, in which case the issuer may file immediately after terminating the private offering.

The Rule 155(b) safe harbor does not specify what steps are necessary to terminate offering activity. Clearly, the issuer must cease actively soliciting investors. In order to establish compliance, offerors probably should notify private offerees that the offer has been terminated and, possibly, ask for return of the private placement memo.

b. Safe harbor for abandoning a registered offering and conducting a private offering - Rule 155(c).

Rule 155(c) enables an issuer to abandon a registered offering and commence a private offering under the following conditions:

(1) no securities are sold in the registered offering;

(2) the issuer withdraws the registration statement;

(3) the private offering does not commence until 30 days after withdrawal of the registration statement;

(4) the issuer notifies the private offerees that:

- the offering is not registered under the Securities Act,

- the securities will be "restricted securities" as defined in Rule 144 and cannot be resold without registration unless an exemption is available,

- purchasers do not have the protection of Section 11 of the Securities Act, and

- a registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

(5) any private offering materials must disclose any material changes to the issuer's affairs since the filing of the registration statement that are "material to the investment decision in the private offering".

c. Rule 477.

Under Rule 477:

(1) a registration statement that has become effective may only be withdrawn if the Commission finds it to be consistent with the public interest and protection of investors.

(2) if a registration statement is not yet effective, its withdrawal is automatic upon request, unless the SEC objects within 15 calendar days. If applicable, the withdrawal application should state that the issuer may commence a private placement pursuant to the Rule 155(c) safe harbor. If the SEC does not object, the 30 day waiting period is measured from the date the request for withdrawal was filed. If the SEC does object, the 30 day waiting period is measured from the date the SEC finally approves the withdrawal under the standard noted above.

d. Note that Rule 155 did not repeal or supersede Rule 152 or the Black Box line of no-action letters. See SEC Release No. 33-7943 (January 26, 2001), nn. 11, 22.

5. Private Placements Turned Into Public Offerings

There has been pressure to combine the convenience and speed of the private placement process to institutional purchasers with the desire of such institutional purchasers to hold securities that have been registered

under the 1933 Act and thus can be freely resold. A number of approaches emerged for which the legal principles are well established:

a. provide registration rights to the private purchasers which are available either on demand or are "piggy-backed" on a future registration statement by the issuer;

b. at an appropriate interval after the closing of the private placement, provide a shelf registration for the secondary resale of the securities from time-to-time by the private purchasers (not optimal because holders will have selling shareholder liability and may be subject to blackout periods);

c. add a penalty to alternative (b) above by providing that the interest or dividend rate on the privately-placed securities will be increased if a shelf registration statement for the secondary resale of the securities is not effective by a certain future date (or, alternatively, start with a higher rate which steps down upon effectiveness);

d. if eligible, follow the AB (or Exxon Capital) exchange offer procedure and exchange the privately placed securities for identical registered securities in a registered exchange offer; or

e. follow Rule 144A resale procedures (although this approach provides substantial liquidity, it still restricts sales to QIBs and does not result in securities that can be freely resold to the public).

Since Rule 155 provides a safe harbor but does not replace any of the prior integration interpretations, the alternatives of the integration interpretations remain available. Going beyond these well-established approaches, consider the following questions (the answers are for illustrative purposes only--all the facts and circumstances need to be evaluated in any particular situation):

Question 1: First scenario. Assume a private placement of common stock is "completed" and is then followed by a public offering of common stock. Two separate offerings of different shares of common stock. Is this okay?

Answer: This scenario should be okay, assuming that the private placement was "completed" before the registration statement was filed.

This is classic Rule 152. In fact, as interpreted in the Verticom and subsequent no-action letters, even if both transactions were planned in advance, this is okay.

Question 2: Second scenario. Again, start with a "completed" private placement of the securities. Now, if this is followed by the registration of the resale of those same securities by the original buyers, that is clearly okay. However, what if the initial closing of the private placement is conditioned on the effectiveness of a registration statement for the resale of the privately-placed securities?

Answer: The Staff has said okay, if binding purchase commitments have been obtained from the private purchasers (subject only to conditions beyond their control) prior to filing of the registration statement. Since obtaining an effective resale registration statement is considered a condition beyond the control of the private purchasers, the private placement is "completed" prior to filing the registration statement. This is a so-called PIPE or "private investment, public equity" transaction. Other conditions considered to be beyond the control of the private purchasers might be regulatory approvals or a material adverse change (but not a due diligence out).

Note that the only transaction which can be registered in this scenario is the resale of the securities by the private purchasers. The Staff does not permit the registration of the initial sale to the private purchasers so that they can hold "registered" (rather than "restricted") securities. See Current Issues and Rulemaking Projects Quarterly Update, Division of Corporation Finance, SEC (March 31, 2001), topic VIII, Equity Line Financings.

Question 3: What if a private sale of common stock is never consummated, and a public sale of those same shares follows? The question is: can a proposed private sale somehow fail or be abandoned and then be followed by a direct primary, public sale of those same shares under a registration statement?

Answer: Regardless of whether the private placement is abandoned because it failed or because it resulted in great demand and there is a desire to do a public offering, the Rule 155(b) safe harbor is available. If the issuer has conducted a road show for the private placement that reached more than just accredited or sophisticated investors, then under Rule 155(b) the issuer must wait 30 days before filing the registration statement.

If the issuer does not want to comply with the 30-day or other requirements of Rule 155(b), it could attempt to use Rule 152 which should, in theory, cover this situation. There is likely to be reluctance, however, to operate outside Rule 155(b)'s safe harbor, unless other factors are present such as a different security being offered or some time having intervened.

Question 4: Assume the private placement phase consists of investment bankers talking to a few private buyers with the intention of "testing the waters" for a possible public offering? Is this gun jumping?

Answer: This is a difficult question. Rule 155 does not directly address the "testing the waters" issue, but the safe harbor requires that the issuer undertake a bona fide private offering. If the *only* purpose was to "test the waters" for a public offering, one could argue the private placement was not bona fide. Alternatively, presumably a conversation with a few institutions could be carefully scripted so that it did not constitute an offer.

Question 5: What if the private placement is marketed very broadly with a road show, an offering circular that looks like a prospectus, etc. and is then abandoned? Can you follow with a public offering in which the private offerees are the principal purchasers?

Answer: Yes. Under the Rule 155(b) safe harbor, the fact that the original private offerees are the principal investors in the registered offering is not relevant. If the issuer has conducted a road show for the private placement that reached more that just accredited or sophisticated investors, the issuer must wait 30 days before filing the registration statement. After this delay and with required prospectus disclosures, however, there is nothing to prevent the issuer from commencing a public offering in which the private offerees are purchasers.

Alternatively, under the integration interpretations, the manner of offering the private offering--as long as it does not violate the requirements for a private placement--should not affect the result. Thus, again, if the private placement truly failed, it should qualify under Rule 152; otherwise, there is a problem. If it qualifies under Rule 152, the public offering should be able to include sales to private offerees.

6. Public Offerings Turned Into Private Placements

Once a registration statement has been filed with the SEC, under what circumstances can the issuer engage in a private placement of the same or

similar securities? The first issue is whether the mere filing of a registration statement (without distribution of the prospectus, issuance of a press release or other marketing efforts) constitutes a general solicitation with respect to the securities to be privately placed? The Staff has expressed the view that the filing of a registration statement "is deemed to be the commencement of the public offering" and to constitute a general solicitation for purposes of Regulation D (and § 4(a)(2)). This is the so-called presumptive public offering doctrine (i.e., the filing of a non-shelf registration statement is deemed to commence the public offering). It is not clear, however, that the mere public availability of a registration statement (absent any distribution of the prospectus, issuance of a press release or other marketing or solicitation efforts) should be considered to constitute a general solicitation (and, if it does, presumably the securities deemed to be offered publicly should be narrowly construed both for purposes of applying the integration doctrine and in determining whether there has been a general solicitation).

Question 6: If the issuer has an effective shelf registration statement, is the issuer precluded from relying upon the Rule 155(c) safe harbor?

Answer: The SEC does not regard a generic shelf registration statement as constituting a general solicitation. See Current Issues and Rulemaking Projects, Division of Corporate Finance, SEC (November 14, 2000), topic VIII(A)(9). Thus, an issuer with a shelf in place should not have an integration problem. However, if the issuer has begun marketing a take-down by distributing a preliminary prospectus supplement, it has made a general solicitation. If the issuer pulls the offering and wishes to do a private offering, the Staff has advised that the Rule 155 safe harbor is not available unless the shelf registration statement is withdrawn. It is unclear whether the issuer would be required to withdraw the shelf registration statement if no prospectus supplement had been filed and only oral offers were made. Of course, under appropriate circumstances, the concurrent offering branch of *Black Box* and the five-factor test may be available.

Question 7: Does it make any difference under Rule 155(c) if the issuer has conducted a road show prior to withdrawing the registration statement?

Answer: This raises the question whether there has been a general solicitation. The Rule 155 adopting release provides that:

"At the time the private offering is made, in order to establish the availability of a private offering exemption, the issuer or any person acting

on its behalf must be able to demonstrate that the private offering does not involve a general solicitation or advertising."

Clearly, the "presumptive" general solicitation arising from filing the registration statement, which has been of concern in the past, will not disqualify use of the exemption. As a general matter, the various marketing activities, including road show meetings, in connection with the public offering should not disqualify use of the exemption. The 30 day waiting period under Rule 155(c) should address general solicitation concerns. Thus, in the normal circumstances where the private offering is made to investors previously known to the underwriter or the issuer (or to well-known institutional investors and strategic investors), and these same investors were actively marketed to in the public offering, general solicitation concerns should not arise. Presumably there are some circumstances, however, that could give rise to a problem; for example if private offers were made to retail investors with which neither the underwriter nor the issuer had a relationship prior to finding them in the public offering process, that would raise general solicitation concerns.

Question 8: If the issuer does not want to withdraw the registration statement or wants to commence the private placement immediately, can the issuer rely on the Rule 155(c) safe harbor?

Answer: No, in both cases. Rule 155(c) requires withdrawal of the registration statement even if it is only a silent filing. Rule 155(c) does not permit commencement of the private placement for 30 days, even to QIBs.

Issuers may be reluctant to withdraw the registration statement because they want to retain the ability to resume the public offering quickly should market conditions improve. Or, an issuer may need to commence the private placement sooner than 30 days because it needs the funds. While the Rule 155(c) safe harbor would be unavailable in these cases, an issuer could conduct a private placement under the concurrent offering branch of *Black Box* to QIBs and no more than two or three large institutional accredited investors immediately and without withdrawing the registration statement. The issuer must conclude that no general solicitation has occurred in connection with the private placement. Alternatively, an issuer could attempt a private placement meeting the five factor test.

Question 9: What if the issuer begins a private offering under the concurrent offering branch of *Black Box*, but later decides that it would like to expand the private offering to more than just QIBs and two or three

large institutional accredited investors. Is the Rule 155(c) safe harbor still available?

Answer: If the issuer withdraws the registration statement, but makes offers to QIBs and two or three large institutional accredited investors within 30 days under the concurrent offering branch of *Black Box* and later expands the offering, then reliance on the Rule 155(c) safe harbor is precluded. But, depending on the facts and circumstances, the issuer may be able to expand the offering and not face integration under the five-factor test. If the issuer does not withdraw the registration statement prior to commencing the concurrent *Black Box* offering, it should still be able to withdraw the registration statement at a later date and wait the requisite 30 days (without making offers to anyone during that period) and then avail itself of the Rule 155(c) safe harbor.

Question 10: Do the Rule 155 safe harbors apply to switches to or from offerings pursuant to Regulation S or Rule 144A?

Answer: Rule 155 does not specifically mention Rule 144A or Regulation S offerings. The Regulation S exemption does not require an integration analysis. Thus, issuers do not need the Rule 155 safe harbor for a Regulation S offering as long as there has been no directed selling efforts as defined in Regulation S in the U.S.

The Rule 144A exemption for resales of securities privately placed under Section 4(a)(2) should logically be covered by Rule 155. An issuer who wants to switch from a Rule 144A offering to a public offering, should be able to do so immediately, since the Rule 144A offering would have only been to QIBs. Likewise, an issuer who wants to switch from a public offering to a Rule 144A offering should be able to do so 30 days after withdrawing the registration statement. In either case, issuers should be able to go to the same investors after changing the form of their offering without being found to have engaged in a general solicitation.

Question 11: So, in review, what are an issuer's options if it must abandon a public offering, after a registration statement is filed, and proceed with a private placement?

Answer: There are six alternatives available:

1. Use Rule 155 if willing to withdraw the registration statement and wait 30 days.

2. Conduct the private offering in a manner so you can conclude that it should not be integrated with the abandoned public offering applying the five-factor integration test. This is a facts and circumstances analysis looking at, among other matters, the time that has elapsed since abandoning the public offering, whether the registration statement has been withdrawn, the nature of the security sold, the nature of the marketing effort for the public offering, and the status of the investors (are they QIB's or accredited investors, did they have a pre-existing relationship with the issuer, were they marketed to in the public offering?).

3. Limit the private placement to QIB's and "no more than two or three large institutional accredited investors" under the parallel or concurrent offering branch of the *Black Box* Letters. It must be concluded, under the facts and circumstances, that there has been no "general solicitation" with respect to the private offering.

4. Delay the private offering and rely on Regulation D's six-month safe harbor.

5. Continue with the registered offering, but amend the registration statement to reflect that the offering is being directed to a limited number of investors. Presumably this works as a practical matter only for issuers that are already 1934 Act reporting companies.

6. Proceed with an offering solely to foreign investors under Regulation S.

V. **Registered Offerings.**

A. U.S. Securities and Exchange Commission.

The Securities and Exchange Commission, or the SEC, was created by Section 4 of the 1934 Act as an independent agency of the federal government and is charged with enforcing and implementing the federal securities laws (including those that apply to securities offerings), promoting the stability, competitiveness, efficiency and fairness of the U.S. securities markets, and protecting the interests of investors. See the memo "An Introduction to the U.S. Securities and Exchange Commission" for a fuller (albeit still brief) description and discussion of the SEC.

B. Categories of Issuers.

Pursuant to rule, the SEC has divided all issuers into four categories for purposes of public securities offerings. The four categories of issuers are:

1. "Non-reporting issuers." Issuers that are not required to file reports pursuant to Section 13 or 15(d) of the 1934 Act, e.g., IPO issuers. Section 13 and 15(d) of the 1934 Act require companies with outstanding public securities to, among other things, provide regular periodic reports (annual reports on Form 10-K and quarterly reports on Form 10-Q for U.S. issuers and annual reports on Form 20-F for foreign private issuers) and current reports (Form 8-K).

2. "Unseasoned issuers." Issuers that are required to file reports pursuant to Section 13 or 15(d) of the 1934 Act, but do not satisfy the requirements of the SEC's Form S-3 or Form F-3 for primary offerings of securities pursuant to the 1933 Act.

3. "Seasoned issuers." Issuers that are eligible to use Form S-3 or Form F-3 to register primary offerings of securities.

4. "Well-known seasoned issuers," or WKSI's. Seasoned issuers that also either (i) have outstanding voting and non-voting common equity held by non-affiliates with a worldwide market value of $700 million or more, or (ii) have issued in the last three years at least $1 billion aggregate primary amount of non-convertible securities (whether or not investment grade), other than common equity, in primary offerings for cash, not exchange, registered under the 1933 Act. A company cannot be a WKSI if it is an "ineligible issuer" (as defined in Rule 405 under the 1933 Act) at the relevant determination date.

Unseasoned issuers, seasoned issuers, and WKSIs are all collectively known as "reporting issuers."

The Act creates a new category of issuers, called "emerging growth companies", or EGCs, which are companies that had total annual gross revenues of less than $1 billion during the most recently completed fiscal year (indexed for inflation every five years) that complete their first registered sale of common equity securities after December 8, 2011. An emerging growth company will retain this status until the earliest of (1) the last day of the fiscal year during which the company had total annual gross revenues of $1 billion or more (adjusted for inflation as mentioned above), (2) the last day of the fiscal year following the fifth anniversary of the company's first registered sale of common equity, (3) the date on which the company has, during the prior three-year period, issued more than $1 billion of non-convertible debt and (4) the date on which the company is deemed to be a large accelerated filer under the Exchange Act (generally a reporting issuer for 12 months that has filed at least one annual report, with at

least $700 million of common equity held by non-affiliates as of the last business day of the issuer's most recent second fiscal quarter).

According to guidance from the Division, a successor entity will not qualify as an emerging growth company if its predecessor had its first registered sale of common equity on or before December 8, 2011. Furthermore, neither asset backed securities issuers subject to the requirements of Regulation AB nor investment companies registered under the Investment Company Act of 1940 may qualify as emerging growth companies. However, business development companies may qualify.[11]

Foreign Issuers.

Note that U.S. and non-U.S. companies alike may be either reporting or non-reporting issuers. (Foreign governments are all non-reporting issuers regardless of how many times they have offered securities in the U.S. markets.) The SEC has further delineated the different types of foreign issuers. By rule, the SEC recognizes two special sub-categories of foreign issuers: foreign governments and foreign private issuers. Special rules and registration regimes apply to those issuers. Foreign issuers that do not qualify for either of those sub-categories must comply in full with the offering and registration rules applicable to U.S. issuers. Pursuant to Rule 405 under the 1933 Act and Rule 3b-4 under the 1934 Act, the relevant terms are defined as follows:

(1) The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

(2) The term foreign government means the government of any foreign country or of any political subdivision of a foreign country.

(3) The term foreign private issuer means any foreign issuer other than a foreign government except an issuer meeting the following conditions:

- More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; AND

- Any of the following:

[11] See "Jumpstart Our Business Startups Act: Frequently Asked Questions," available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

a) The majority of the executive officers or directors are United States citizens or residents;

b) More than 50 percent of the assets of the issuer are located in the United States; or

c) The business of the issuer is administered principally in the United States.

A company needs to confirm its status as a foreign private issuer only once per year, as of the last business day of its second fiscal quarter.

C. Registration Mechanics.

Registration of public securities offerings is done on "forms" prescribed by rule and filed with the SEC. Although a number of specialized forms are available, Forms S-1 and S-3, for U.S. issuers, and F-1 and F-3, for foreign private issuers, are the key forms for registered offerings.

1. Forms S-1 and F-1.

Forms S-1 and F-1 are so-called "long form" registrations statements pursuant to which companies must include essentially all of the business and financial information required under the SEC's integrated disclosure system for public companies' annual reports.

a. Non-reporting issuers must use these forms for their initial public offerings (whether equity or debt). Issuers then become obligated to file regular, ongoing reports with the SEC under Section 13 or 15(d) of the 1934 Act once they have publicly registered securities.

b. Unseasoned issuers (those issuers that do not meet the requirements to use Forms S-3 or F-3) must use Form S-1 or F-1 to register their offerings.

- once an issuer has filed at least one annual report on Form 10-K or 20-F, it may "incorporate by reference" the information in its previously filed 1934 Act reports into its registration statement on the S-1 or F-1.

In light of the requirements for use of Forms S-3 and F-3 (discussed below), unseasoned issuers will most commonly be:

- all companies during the 12 months following their initial public offerings
- public companies that have registered only debt securities and therefore cannot meet the public float requirement, including when they make their “initial public offerings” of equity securities
- small public companies that, while having publicly registered equity, do not meet the $75 million test for Forms S-3 and F-3 (see below)
- any reporting company that has been late in a filing obligation under the 1934 Act (subject to the exceptions noted) during the past 12 months or has committed one of the noted dividend or debt defaults and has thus lost its eligibility to use Form S-3 or F-3 until those tests are met again.

2. Forms S-3 and F-3.

Issuers using forms S-3 and F-3 may incorporate by reference to their 1934 Act reports in order to provide large portions of the information required in their registration statements.

In order to qualify to use Form S-3 or F-3 for a primary equity offering, an issuer must be either a “seasoned issuer” or must meet certain other conditions. A seasoned issuer is one that:

a. has a public float of at least $75 million

b. has been subject to the reporting requirements under Section 13 or 15(d) of the 1934 Act for at least 12 months and has filed all required reports in a timely fashion during the past 12 months except for certain reports on Form 8-K

c. has paid all dividend or sinking fund installments on preferred stock and has not defaulted on any material installment on indebtedness or rental on one or more long-term leases, in each case since the end of its last fiscal year for which audited financial statements have been filed in a 1934 Act report.

An issuer that does not meet the $75 million public float test may still use Form S-3 or F-3 to register securities provided that

a. the registrant meets the other eligibility tests for use of the Form,

b. the registrant is not a shell company and has not been for at least 12 calendar months prior to filing the registration statement

c. the registrant has a class of common equity securities listed and registered on a national securities exchange, and

d. the registrant does not sell more then the equivalent of one-third of its public float in primary offerings pursuant to the new rules in any period of 12 calendar months.

Special EGC Procedures.

Prior to the date of the first sale of its common equity securities under an effective registration statement, an EGC may confidentially submit a draft registration statement to the SEC, provided that the initial confidential submission and all amendments thereto are publicly filed at least 21 days before the commencement of a road show related to the offering under the registration statement. Unlike the confidential submission procedures that were in place for all foreign private issuers prior to December 8, 2011 (and remain in place in a more limited set of circumstances), the JOBS Act requires "the initial confidential submission and all amendments" to be publicly filed. The Division of Corporation Finance has confirmed that, consistent with current practice, SEC staff comment letters and the issuer's responses will not be made public by the SEC until at least 20 business days after the effective date of the registration statement. When an issuer is required to file the confidential submissions, such submissions must be filed as exhibits to the first registration statement filed on EDGAR.

Confidential review is not available for Exchange Act-only registration statements, e.g., Form 10 and Form 20-F. Furthermore, submission of a draft registration statement for confidential review does not constitute a "filing" of a registration statement, and therefore no filing fee is due at the time of submission.

According to guidance issued by the Division, a foreign private issuer that qualifies as an emerging growth company may generally elect to use either the confidential submission process available to foreign private issuers prior to the enactment of the JOBS Act or the confidential review procedures available to EGCs under the JOBS Act. However, if such a company chooses to take advantage of any benefit available to emerging

growth companies, the foreign private issuer may only use the confidential submission procedure prescribed for EGCs.

Shelf Registration.

Rule 415 permits issuers to register securities that will be offered and sold on a "continuous or delayed basis in the future." Offerings under this rule are commonly called "shelf offerings" because the securities are registered (and the registration statement is declared effective by the SEC staff) at one point in time and then only subsequently "taken down" when actual sales are made. "Universal shelves" allow seasoned issuers to register different types of securities—debt and equity—on a single registration statement.

Under Rule 415(a)(5) most shelf registration statements expire three years after their effective date. Rule 415(a)(6) permits any unsold securities and any filing fees paid in connection with such securities to be carried forward to a new registration statement filed prior to the expiration of the three-year period. Alternatively, under Rule 457(p) the fee associated with any unsold securities under the expiring registration statement may be offset against a filing fee due for a new registration statement filed within five years.

Most shelf registrations utilize Form S-3 or F-3. These forms are ideally suited to this because an issuer may take advantage of "forward incorporation by reference," by which its registration statement incorporates 1934 Act reports that are filed after the registration statement is declared effective. Standard Forms S-3 and F-3 are subject to review, and must be declared effective, by the staff of the SEC.

Shelf registration statements are also used for medium-term note programs by some corporate issuers.

Automatic Shelf Registration.

Automatic shelf registration ("ASR") is available only to WKSI's and is a subset of Forms S-3 and F-3. Most significantly for a discussion of the registration process, an ASR goes effectively automatically and immediately, without any review or required action by the SEC staff.

ASR also offers numerous other mechanical and procedural advantages over "regular" S-3 or F-3 registration.[12]

VI. **Communications During the Registration Process.**

A. Summary.

Section 5 divides the registration process into three periods:

1. The Pre-filing Period.

   a. The period between the time there is an agreement or understanding to issue and sell securities and the filing of the registration statement.

   b. § 5(c)—cannot offer to sell or offer to buy, by means of a prospectus or otherwise, any security until a registration statement has been filed. Rule 163 exempts offers by WKSI's during the prefiling period from the prohibition of § 5(c), subject to compliance with the rule's conditions. This exemption applies only to the issuer, not to the underwriters in a WKSI offering.

2. The Waiting Period.

   a. The period between the filing of the registration statement and its being declared effective. WKSI's who are utilizing automatic shelf registration have no "waiting period".

   b. § 5(a)(1)—unless a registration statement is in effect as to a security, it is unlawful to "sell such security" by "any prospectus or otherwise"—but "offers" are not prohibited.

   c. § 5(b)(1)—during the waiting period, the prospectus that is used must meet the requirements of § 10—but is not required to satisfy § 10(a). A "free writing prospectus", as defined in Rule 405, meets the requirements of § 10—and therefore its use is

[12] Other benefits of the ASR include the ability to register an indeterminate amount of securities, the ability to pay filing fees as securities are sold (the so-called "pay as you go" mechanism), the ability to add securities and registrants (such as subsidiary guarantors) at any time by an automatically effective post-effective amendment, and the ability to provide the names and other information about any selling security holders by prospectus supplement rather than in the initial registration statement.

permissible during the waiting period—provided it is used in compliance with certain rules of the SEC (discussed below).

3. The Post-effective Period.

a. § 5(a)—after the registration statement is "in effect", securities may be sold.

b. § 5(b)(2)—provides that a security cannot be delivered unless accompanied or preceded by a prospectus that meets the requirements of § 10(a) (i.e., a final prospectus). (Free writing prospectuses do not meet the requirements of § 10(a), nor do base prospectuses in an effective shelf registration statement.)

Pursuant to Rule 172 under the 1933 Act, written confirmations of sale and notices of allocation, as well as sold securities themselves, may, however, be delivered to purchasers without being preceded or accompanied by a final prospectus so long as the final prospectus has been filed with the SEC (or will be so filed within the time period required by Rule 424), no stop orders have been issued and no proceedings or investigations are pending under § 8. This model is known as "access equals delivery" and applies only in the narrow circumstances described by Rule 172.

c. § 2(a)(10) provides that written communications other than the prospectus in the registration statement (the "statutory prospectus") may be used provided they are preceded or accompanied by the final statutory prospectus meeting the requirements of § 10(a). This allows confirms and notices of allocations to be sent to purchasers in the offering in that manner. Per Rule 405, other written offers will not be free writing prospectuses if accompanied or preceded by the final prospectus. The access equals delivery model in Rule 172 expressly applies to confirms and notices of allocation (so that the final prospectus does not need to be sent with those documents). It does not apply to any other written communications, which would therefore continue to be free writing prospectuses and subject to those rules unless preceded or accompanied by the final statutory prospectus.

B. Types of Communications: Graphic communications and electronic media.

1. Those interpreting the securities laws have struggled over the years with how to treat electronic media and how to fit them within the 1933 Act's

paradigm of "oral" versus "written" communications. The SEC has provided a clear answer to this dilemma through its definitions in Rule 405 of "written communications" and "graphic communications."

2. Written communication is defined per the rule as "any communication that is written, printed, a radio or television broadcast, or a graphic communication." Note that pursuant to § 2(a)(9) "the term "write" or "written" shall include printed, lithographed, or any means of graphic communication." The 1933 Act's definition of prospectus also includes the idea of a communication carried by television or radio broadcast.

3. Graphic communication includes "all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD ROM, electronic mail, Internet 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."

    a. Importantly: "Graphic communication shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means." Keep in mind for road shows.

4. Issuer websites. Information posted on an issuer's website may be either an offer (and thus a free writing prospectus as discussed in more detail below) or historical information that is not an offer.

    a. facts and circumstances analysis

    b. SEC has also provided an express safe harbor in Rule 433(e) by which historical information on an issuer's website will not be deemed an offer as long as it is (i) separately identified as historical information, and (ii) located in a separate section of the issuer's website containing historical information only.

C. The Pre-Filing Period.

Under § 5(c), it is unlawful "to offer to sell or offer to buy . . . any security, unless a registration statement has been filed as to such security . . .". What is an offer to sell? See generally, SEC Release Nos. 33-3844 (October 8, 1957), 33-4697 (May 28, 1964), 33-5009 (October 7, 1969) and 33-5180 (August 16, 1971). Generally the SEC has clarified that an "offer" for purposes of § 5(c)

encompasses a broad array of activities that would not fit within the definition of "offer" at common law. Specifically, during the prefiling period, a security cannot be offered (except by a WKSI) or sold, prospective purchasers cannot be contacted, a prospectus cannot be used (except by a WKSI), and prospective underwriters cannot be publicly identified. These prohibited activities are commonly referred to as "gun jumping."

Because WKSI's are allowed to make pre-filing offers and communications, they do not face the same risks of "gun jumping" as other issuers. Rule 163, which allows WKSIs to make pre-filing offers, contains several conditions with which WKSI's must comply in order to enjoy the rule's protections, however. If those conditions are not met, a WKSI would be subject to the same consequences for gun jumping as any other issuer.

1. Preliminary negotiations.

   Section 2(a)(3) provides that the terms "offer to sell" and similar terms and "offer to buy" do "not include preliminary negotiations or agreements between an issuer [or controlling person] . . . and any underwriter or among underwriters who are or are to be in privity of contract with an issuer [or controlling person] . . .".

   a. Letter of intent (allowed under § 2(a)(3))

      (1) identifies conditions that underwriters expect, e.g., earnings;

      (2) establishes who pays what; and

      (3) is not binding, except for any reimbursements if the underwriting is not effected.

   b. In practice, in most underwritings (other than initial public offerings), there are no letters of intent or preliminary negotiations or agreements among underwriters before filing, except understandings among managers.

   c. Negotiations and agreements between the issuer and/or underwriters and the selling group are prohibited. The "offer to buy" prohibition in § 5(c) was intended to apply to dealers.

   d. Negotiations with non-affiliate selling stockholders are not explicitly exempt.

(1) Selling stockholders who are not control persons cannot make a decision to sell without seeing the preliminary prospectus.

(2) Practical considerations frequently require mailing of notice of the offering to noncontrol person selling stockholders prior to filing.

2. Prefiling public announcement of an offering (Rule 135).

a. Rule 135 provides that a notice of a proposed offering (e.g., in the form of a press release or a written communication directed toward security holders or employees) is not deemed an "offer" if it states that the offering will be made only by prospectus and the notice contains no more than the following:

(1) Name of issuer.

(2) Title, amount and basic terms of the securities.

(3) Amount to be offered by any selling security holders.

(4) Anticipated timing of the offering.

(5) Brief statement of the manner and purpose of the offering without naming the underwriters. Naming the underwriters (at least in theory) would tell prospective purchasers whom to approach to purchase the security.

(6) In case of a rights offering or other special offerings, certain information to alert security holders.

b. Purpose for making a prefiling announcement under Rule 135.

(1) In the case of an offering where the issuer already has equity securities currently traded, the existence of the proposed offering will often be material information.

(2) In the case of an initial public offering, there is no legal need, but an announcement may end inquiries and conjecture and may facilitate internal communications and lining up selling stockholders.

(3) In the case of an offering of debt securities:

- sometimes existence of the offering is material information; and
- sometimes there is a desire to "notify" the marketplace in order to get "in line" on the debt offering "calendar".

(4) Underwriters generally prefer that announcements under Rule 135 not be made as they cannot be identified (or begin marketing efforts) and the announcement alerts their competitors to the deal being planned.

c. As a best practice, the Rule 135 announcement should be a stand-alone communication and should not be accompanied by an earnings or new product press release or any other announcement.

3. Communications more than 30-days before registration statement is filed (Rule 163A).

Rule 163A provides that communications (including those made through the media) that are made by an issuer (but not any other offering participant, such as an underwriter) more than 30 days before the filing of a registration statement will not be "offers" for purposes of § 5(c), subject to certain conditions. In order to rely on this safe harbor:

- communications cannot reference a securities offering that will be the subject of a registration statement (the rule contains no other content restrictions)
- the issuer must take reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement

The preliminary note to Rule 163A observes that the rule is a non-exclusive safe harbor and issuers may claim the availability of any other applicable exemption or exclusion.

4. Regular releases of factual business information (Rules 168 and 169).

If an issuer has previously released or disseminated factual business information in the ordinary course of its business, then SEC rules provide that it may continue to do so at all points during an offering (including during the pre-filing period) and those communications will not be considered "offers" for purposes of § 5(c). In order to rely on the safe

harbors provided by Rule 168 (for reporting issuers) and Rule 169 (for non-reporting issuers), the timing, manner, and form in which the information is released or disseminated must be consistent in material respects with the issuer's similar past releases of information. The key distinction between Rules 168 and 169 (aside from the categories of issuers to which they apply) is that Rule 168 permits reporting issuers to continue to release forward-looking information subject to the same general guidelines.

Rules 168 and 169 are not available for releases containing information about the offering or "disseminated as part of the offering activities".

5. "Testing the Waters" by EGCs.

Under section 5(d) of the Securities Act, which was added by the JOBS Act, EGCs and their representatives may engage in oral and written communications with potential investors that are qualified institutional buyers (as defined in Rule 144A under the Securities Act) or institutions that are accredited investors (as defined in Regulation D under the Securities Act) to determine whether those investors "might have an interest in a contemplated securities offering". These communications can occur prior to or following the filing of any registration statement. Market Practice under the "Testing the Waters" rules is evolving. To date they have been utilized on a limited basis, although the practice may expand.

While these activities are permitted at any time before and during the registration process, currently these activities generally occur after an IPO registration statement has been confidentially submitted to, and commented upon by, the SEC staff. The draft registration statement and limited supplemental materials derived therefrom are likely to be the only written materials typically used for purposes of "testing the waters". Financial projections and other financial information not included in the registration statement typically will not be provided to investors in connection with "testing the waters" activities. Generally, any materials shown to potential investors are collected at the end of each meeting. Still the SEC will, as a matter of routine, ask to see any Testing the Waters materials as part of the comment process.

Underwriters will likely wish to conduct due diligence on, and receive representations and warranties from issuers with respect to and an indemnity from issuers on, the contents of such materials.

6. Other publicity.

Other publicity matters, including free writing prospectuses, are discussed below. See generally, In the Matter of Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959) (where the SEC held in a pre-Rule 135 case "that publicity, prior to the filing of a registration statement by means of public media of communication, with respect to an issuer or its securities, emanating from broker-dealer firms who as underwriters or prospective underwriters have negotiated or are negotiating for a public offering of the securities of such issuer . . . involve[s] an offer to sell or a solicitation of an offer to buy such securities prohibited by Section 5(c)").

7. Short sales to be covered by securities acquired from underwriters or dealers from the offering are illegal during the pre-filing period.[13]

D. The Waiting Period.

Under § 5(c) offers to sell are permitted during the waiting period, but § 5(b)(1) prohibits transmitting any prospectus relating to a security with respect to which a registration statement has been filed unless the prospectus meets the requirements of § 10. As discussed in more depth below, free writing prospectuses meet the requirements of § 10 provided the SEC's conditions for their use are followed. Section 5(a) makes it unlawful to sell any security by a prospectus or to carry a security in interstate commerce for sale, unless a registration statement is in effect with respect to such security.

In other words, during the waiting period offers are permitted (orally or using a statutory or free writing prospectus), but sales are prohibited. Normally during this period so called "indications of interest" or nonbinding "circles" are obtained by the underwriters from prospective purchasers and this information with respect to possible purchasers is used in "pricing" the issue with the issuer.

1. What is a "prospectus"?

Section 2(a)(10) provides that "the term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security except . . .". (emphasis added)

a. "Free Writing Material". Section 2(a)(10) excepts the following from the definition of "prospectus":

[13] *See* Rule 105 under Regulation M.

> "a communication sent or given *after* the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10) shall not be deemed a prospectus if *it is proved that* prior to or at the same time which such communication a written prospectus meeting the requirements of subsection (a) of section 10 at the time of such communication was sent or given to the person to whom the communication was made"

This statutory exception for so-called "free writing material" pre-dates and is entirely distinct from a "free writing prospectus" discussed below. It covers, for example, a cover letter or other selling material that may accompany a final prospectus. Note that there is no requirement to file "free writing material".

b. Rule 134 provides that a "prospectus" does not include a notice that contains only items of information permitted by the Rule and contains the legends required by the rule. Types of allowable information include:

    (1) Factual identifying information about the issuer and a brief description of its business (generally this should not include a link or reference to the issuer's website);

    (2) Information about the security, other than price;

    (3) Brief description of the intended use of proceeds (provided that has been included in the filed registration statement);

    (4) Identities of participating underwriters, including their roles within the underwriting syndicate, and descriptions of the procedures they will use for the offering (including account-opening instructions);

    (5) Information about any directed share programs;

    (6) The anticipated schedule of the offering.

    In addition, the following information can be included if a price range is included in the registration statement where required by the relevant form or rule (i.e., an IPO)

    (1) the price of the security or estimate as to price range

(2) the final maturity and interest rate of a fixed income security

(3) the yield or probable yield range

Note that pursuant to a 2011 amendment, disclosure of ratings is no longer permitted.

A Rule 134 press release must include (i) a legend and (ii) the identity of a person from whom a prospectus can be obtained unless either (x) the release does no more than identify where a prospectus may be obtained (including a web address), the price of the security (where permitted) and the identity of the persons who can execute trades or (y) the release is accompanied or preceded by a §10 prospectus (including a price range where required).

"Tombstone" advertisements during the waiting period and the post effective period may be published pursuant to Rule 134. Tombstone advertisements over the radio or television which comply with the provisions of Rule 134 are permissible. See Merchants National Corp., SEC No-Action Letter (January 12, 1976).

Like Rule 135, as a best practice, an announcement under Rule 134 should be a stand-alone communication and should not be accompanied by an earnings or new product press release or any other announcement.

c. What does "offers any security for sale" mean?
Consider the learning from Diskin v. Lomasney & Co., 452 F.2d 871 (2d Cir. 1971). Lomasney was both (x) underwriting on a best efforts basis shares of Ski Park City West, S. I. covered by an effective registration statement and (y) proposing to underwrite shares of Continental Travel Ltd. as to which a registration statement had been filed but was not yet effective. Lomasney wrote to Diskin on September 17, 1968:

> am enclosing herewith, a copy of the Prospectus on SKI PARK CITY WEST. This letter will also assure you that if you take 1,000 shares of SKI PARK CITY WEST at the issue price, we will commit to you the sale at the public offering price when, as and if issued, 5,000 shares of CONTINENTAL TRAVEL, LTD."

When Continental's registration statement became effective on February 12, 1969, Lomasney sent a confirmation to Diskin. Lomasney sent a final prospectus to Diskin prior to February 28, 1969, when Diskin paid for the securities and received delivery.

Held: The letter was an illegal offer to sell because it did not meet the requirements of § 10 and rescission was permitted under what is now § 12(a)(1) even though Diskin received a final prospectus before payment.

> "The result here reached may appear to be harsh, since Diskin had an opportunity to read the final prospectus before he paid for the shares. But the 1954 Congress quite obviously meant to allow rescission or damages in the case of illegal offers as well as of illegal sales."

(4) Was the letter really an "offer"?

(5) Should Diskin have been entitled to rescind?

(6) Once an unlawful offer is made, when (if ever) and how can a lawful offer be made?

(7) Today, Lomasney's letter would be a free writing prospectus and it could meet the requirements of § 10 (and thus its use would not be a violation of § 5 and would not trigger rescission rights) if the conditions for use of a free writing prospectus were followed.

2. Oral communications.

Oral communications are permitted because they do not fall within the definition of a "prospectus" in § 2(a)(10)—e.g., a sales pitch by a securities salesperson, a live road show presentation (see below) or a presentation for securities analysts. When oral communications are reduced to writing, however, they can become a free writing prospectus. This can present a problem, for example, when a transcript of a presentation to securities analysts or other oral presentation is posted on an issuer's or underwriter's home page. The requirements for use of a free writing prospectus (see below) must be kept in mind as neglecting them will result in a § 5 violation.

3. Free writing prospectuses.

One of the most dramatic components of reforms adopted by the SEC in the summer of 2005 was the creation of a new concept of permissible "free writing prospectuses" which allows issuers and underwriters to make written offers, and otherwise communicate in writing about an offering with potential investors, outside of the statutory prospectus. Written materials used in "testing the waters" communications are not considered to be free writing prospectuses and do not need to be filed with the SEC. Although free writing prospectuses, and the corresponding expansion of how written communications may be used during the waiting period, may considerably reduce incidents of liability under § 12(a)(1) for a violation of § 5, it should be kept in mind that these communications are subject to liability under § 12(a)(2) which applies to material misstatements or omissions in prospectuses (or oral offering communications).

a. A free writing prospectus is defined in Rule 405 as any written communication used in the offer or sale of securities covered by a registration statement that constitutes an "offer" and is made by means other than a statutory prospectus. It may be in a traditional paper format or a graphic form (emails, Internet postings, blast voicemails, etc.).

b. New Rule 164 provides that a free writing prospectus that meets the conditions of Rule 433 will qualify as a § 10(b) prospectus and thus that its use after the filing of a registration statement will not violate § 5(b).

c. Except for a WKSI, the issuer must have a registration statement on file in order to use free writing prospectuses. See Rule 163 for pre-filing offers by WKSIs.

- In the case of an IPO, the registration statement must include a price range before free writing prospectuses can be used. This requirement severely reduces the amount of time in which free writing prospectuses are an available option for IPOs (generally, last two to three weeks before pricing—compared to the six weeks or longer portion of the IPO waiting period in which the registration statement did not contain a price range).

d. There are no content restrictions for free-writing prospectuses other than a required legend. Information in a free writing prospectus may go beyond—but may not "conflict with"—the

information in the prospectus that is part of the registration statement.

e. As a general rule, an issuer is required to "file" with the SEC any free writing prospectus that it has itself (as opposed to any other offering participant) prepared or used. Any issuer information in an underwriter free writing prospectuses must also be filed (but underwriters and other offering participants aside from the issuer generally do not have to file their free writing prospectuses unless they are distributing them broadly).

- When free writing prospectuses are required to be filed with the SEC, that filing must, as a general matter, occur by the date of their first use.
- Certain free writing prospectuses do not have to be filed, including most electronic road shows (see below) and preliminary terms sheets.
- Final terms sheets do not have to be filed until 2 days after all terms are finalized.
- If a WKSI uses a free writing prospectus prior to filing a registration statement, then that free writing prospectus must be filed at the time the registration statement is filed.

As explained in Rule 433(d)(1), the word "filed" as it applies to free writing prospectuses does not mean that the free writing prospectus will be part of the registration statement or otherwise subject to liability under § 11. It also does not mean that the free writing prospectus has been filed for purposes of Item 10(e) (non-GAAP financial information). Also per SEC rule, where information in a free writing prospectus has not been included in the registration statement, that omission will not, in and of itself, constitute a material omission for § 11 purposes.

f. A free writing prospectus must include a generic legend indicating that it relates to a registered offering and specifying where the related registration statement and statutory prospectus may be obtained.

- For seasoned issuers and WKSIs, the legend must include the URL (or a hyperlink) where the statutory prospectus

may be found on the SEC's website (unless the free writing prospectus is accompanied or preceded by a copy of the statutory prospectus).

- Unseasoned and non-reporting issuers (IPO's) must deliver a statutory prospectus to an investor (or provide an active hyperlink) prior to or with the first free writing prospectus which that investor receives.

- If a WKSI uses a free writing prospectus prior to filing the related registration statement, it must include a different legend (separately specified by the SEC in Rule 163).

g. Issuers and underwriters must retain any free writing prospectuses that were not filed with the SEC for three years from the initial bona fide offering of the securities to which the free writing prospectus pertains.

h. Rule 164 provides cure provisions for "immaterial or unintentional" failures to meet the requirements relating to filing, legending and retaining free writing prospectuses. These cure provisions all require that a "good faith and reasonable effort was made to comply" with the applicable requirement.

(1) In the case of a failure to comply with the filing requirement, Rule 164(b) also requires that the FWP in fact be filed "as soon as practicable" after the failure to file has been discovered.

(2) In the case of a failure to comply with the legending requirement, Rule 164(c) also requires that the FWP be amended "as soon as practicable" after the error is discovered, and that the amended FWP with the legend be retransmitted to anyone who received it without the legend.

"As soon as practicable" has not been further defined by the SEC or otherwise.

There is no corresponding cure provision for a good faith failure to "precede or accompany" the FWP with a statutory prospectus when that is required.

i. Common types of (possible) free writing prospectuses include:

- Those transmitting required information
  - terms sheets
  - recent developments
- Those involved in marketing the securities
  - summary sales documents or marketing points
  - electronic road shows (discussed below)
- Those being used to manage publicity (possibly inadvertent) that would otherwise be problematic
  - errant emails
  - media articles (could be used in marketing also)

4. Media free writing prospectuses.

   a. Articles in the news media that appear during offerings may be (or may be considered by the SEC to be) offers but if so, they are free writing prospectuses. They also receive special treatment even under the rules pertaining to FWP's more broadly.

      (1) As is the case for all free writing prospectuses (other than prefiling ones which may be used by WKSIs only), the registration statement must be on file.

      (2) Media free writing prospectus must be filed within 4 days of the issuer or underwriter becoming aware of the publication (rather than on date of first use, which might be unknown and out of the control of the issuer or any underwriters).

      (3) The legend does not have to be included until the media FWP is filed with the SEC.

      (4) There is no requirement that the statutory prospectus precede or accompany the media free writing prospectus (true even for non-reporting and unseasoned issuers).

(5) In the case of an IPO, there is no requirement that the registration statement include a price range before a media free writing prospectus is available for the offering (in contrast to when other types of free writing prospectuses may be used in an IPO).

b. The filing obligation may be met by filing the actual media article, a copy of the article with corrections and clarifications noted, or a copy of all written information provided to the media (if that is the case).

(1) Should issuers try to answer questions only in written format so that they can more easily meet their filing obligation (regardless of what else appears in the news story)?

(2) If opting to file a "corrected copy", can an issuer correct a media story in parts that are not about the issuer? Or not derived from information given by the issuer? Should an issuer even try to do that?

c. In order to qualify for the more relaxed rules, the media must be independent of, including not being paid by, the issuer or the underwriters. Special rules are available for issuers that are themselves in the media industry. See Rule 433(f).

d. It is important to remember that media free writing prospectuses are only a subset of media publications. Not all media reporting or stories, even those about the issuer or about the offering, are free writing prospectuses. The SEC made clear in its rulemaking release for the offering reforms it adopted in June of 2005 that a media publication based solely on information filed with the SEC or on other information the dissemination of which did not represent an offer by the issuer or other offering participant, where there is no involvement or participation by an offering participant, is neither an illegal prospectus nor a free writing prospectus.

5. Road shows (live and electronic).

Road shows, or investor presentations conducted by issuers and underwriters to market a securities offering, may fall into one of two

general categories under the SEC's new rules. They may be either "live" or "electronic."

a. Live road shows.

(1) Traditional "live" road show was one in which representatives of the issuer and any underwriters meet in person with prospective investors.

(2) Live road shows are oral and are permissible communications during the waiting period.

- Live road shows are not free writing prospectuses

(3) Key is that the road show be "live, in real time and to a live audience"

(4) As part of its offering reforms in June 2005, the SEC clarified that

- as long as visual aids such as slides or whiteboards are not made separately available to investors, they are also "oral" and may be used at a road show without turning it into a free writing prospectus
- handouts are permissible as long as they are collected at the end of the road show (attendees may not take the handouts with them)
- transmission to overflow rooms is okay as long as it is "live" (not recorded)
  - may be transmitted to other cities and more than one place at a time
  - may be transmitted by telephone or internet
  - may not be broadcast on radio or television (which are included within the definition of "written") if they are to retain their oral characterization

b. Electronic road shows.

A road show that does not meet the requirements of live, in real-time and to a live audience and that is graphically transmitted is an "electronic" road show and is a "graphic communication" and thus a free writing prospectus.

- May be produced in a studio and edited.
- Do not need to be recorded before a live audience or to include Q&As (as is customary with a live road show).
- Investors may download the electronic road show and replay it multiple times

(1) An electronic road show is a free writing prospectus and thus:

  - Unseasoned and non-reporting issuers must include an active hyperlink to the statutory prospectus contained in the filed registration statement in order to meet the requirement that the statutory prospectus precede or accompany any free writing prospectuses used by those categories of issuers.
  - Although electronic road shows are free writing prospectuses, they do not need to be filed with the SEC with one exception for equity IPOs (discussed below).
  - Any slides or "handouts" used during the electronic road show may not be made separately available or they will be considered free writing prospectuses in their own right and will have to be filed with the SEC.

(2) If the offering is an equity IPO by a non-reporting issuer, then an electronic road show must be filed unless a bona fide version is made broadly available to an unrestricted audience.

  - A "retail" electronic road show
  - Does not have to be the same electronic road show provided to institutional investors but must cover the "same general areas of information"

- Does not have to include the same management presenters or cover all the same subjects.
- Version available to a restricted audience (institutional or select investors) might include projections, for example, but the broadly available (retail) electronic road show would not need to have projections.
- "Retail" road show must be available by time any other version is first used.

6. Research reports by investment banks (underwriters).

Although research reports require evaluation under the various rules pertaining to communications during the offering period, it is important to keep in mind that these reports are not issuer communications but originate with and belong solely to the investment bank that disseminates them (and which may or may not be an underwriter in the offering in question).

a. A research report may be

(1) a "prospectus" in violation of § 5(b)(1) or § 5(b)(2),

(2) an offer during the prefiling period in violation of § 5(c) and/or

(3) a solicitation of an offer to buy or an inducement to purchase in violation of Regulation M.

Rules 137, 138 and 139 provide under limited circumstances that publication of information, opinions and recommendations with respect to securities to be offered and sold will not be deemed to constitute an offer to sell such securities or a prospectus for purposes of §§ 2(a)(10) and 5(c). The restrictions of Rule 101 of Regulation M are not applicable to research reports that comply with Rules 138 and 139.

b. Rule 137 permits publication of information, opinions or recommendations with respect to a security by a broker or dealer acting in the regular course of its business who does not propose to be a participant in the distribution (including in an IPO) and who does not receive any consideration in connection with the

publication of such information from the registrant or other persons interested in the distribution.

c. Rule 138 permits publication of information, opinions or recommendations by a broker or dealer in the regular course of its business with respect to non-convertible debt or non-convertible, non-participating preferred stock of a reporting issuer that is current with its 1934 Act periodic reports and which proposes to file or has filed a registration statement covering equity securities or securities convertible into equity (or vice versa), even though such broker or dealer is or will be a participant in the distribution of such securities. Rule 138 is also available for research concerning a non-reporting foreign private issuer that either has had its equity securities traded on a designated offshore market for at least 12 months or has a $700 million worldwide public float. It is a condition to the use of Rule 138 that the broker or dealer have previously published or distributed in the regular course of its business research reports on the types of securities that are the subject of the report for which the safe harbor is invoked.

d. Rule 139 permits a broker or dealer participating in a distribution of securities by a seasoned issuer or by certain non-reporting foreign private issuers to publish research concerning the issuer or any class of its securities, if that research is in a publication distributed in the normal course of its business. Rule 139 also provides a safe harbor for industry reports covering certain other reporting issuers, if the broker or dealer complies with restrictions on the nature of the publication and the opinion or recommendation expressed in that publication.

e. Rule 139 Issuer-Specific Reports.

(1) The broker or dealer must publish or distribute research reports in the regular course of its business and the research report in question must not represent the initiation (or re-initiation) of research about the particular issuer or its securities. The publication of just one prior report will satisfy this requirement.

(2) The issuer must qualify under one of the following two tests:

- The issuer meets the registrant requirements for use of Form S-3 or Form F-3 and the minimum float (i.e., $75 million aggregate market value of voting and non-voting common equity held by non-affiliates) or minimum public debt float provisions for use of the respective form and is current with its 1934 Act periodic reports; or

- The issuer is a foreign private issuer that meets all of the registrant requirements of Form F-3, other than the reporting history provision of that form, meets the minimum float or minimum public debt float provisions of that form, and had either (i) securities which have been traded for a period of at least 12 months on a designated offshore securities market, or (ii) a worldwide public equity float of $700 million or more. The SEC has made clear that Rule 139 is available for such issuers' initial public offerings in the United States. See SEC Release No. 33-7132, February 1, 1995.

f. Rule 139 Industry Reports.

(1) Rule 139 also permits issuer research in "industry reports"—that is, reports that include "similar information with respect to a substantial number of issuers in the issuer's industry or sub-industry, or contains a comprehensive list of securities currently recommended by the broker or dealer."

(2) In order to qualify for this safe harbor, the issuer must be either a reporting issuer or a foreign private issuer meeting the tests in paragraph (e)(ii) above regarding issuer-specific reports.

(3) The analysis regarding the issuer or its securities can be given no "materially greater space or prominence in the publication than that given to other securities or issuers."

(4) If sales or earnings projections are included for the issuer, they must have been previously published on a regular basis and similar projections covering the

same periods must also be included with respect to a substantial number of companies in the issuer's industry.

g. Research reports meeting the conditions of Rule 138 or Rule 139 will not constitute "offers" or "general solicitations or general advertising" in connection with Rule 144A offerings, nor will they be "directed selling efforts" or be inconsistent with the "offshore transaction" requirements in Regulation S offerings. (Note that these Rules 138 and 139 were not amended to account for the lifting of prohibitions on general solicitation in Rule 144A offerings.)

h. Under the JOBS Act, a broker or dealer is permitted to publish or distribute a research report about an EGC that is the subject of a proposed public of common equity, even if the broker or dealer participates in the offering. The JOBS Act also prohibits the SEC or any national securities association (currently this refers to the Financial Institution Regulatory Authority or "FINRA") from restricting research analysts from publishing or distributing any research report with respect to the securities of an emerging growth company for a period of time following the date of the first sale of common equity securities under an IPO registration statement or prior to the expiration of any "lock-up" period agreed to with the underwriters in an IPO. Any such report will not be a prospectus and therefore will not provide a basis for liability under section 12(a)(2) of the Securities Act. It could, however, provide a basis for Rule 10b-5 fraud liability under the Exchange Act or SEC enforcement action under section 17 of the Securities Act.

i. FINRA, created through the consolidation of the NASD and the regulatory arm of the NYSE in the summer of 2007, has detailed rules with which all brokers and dealers (as members of the SROs) must comply. These rules are largely intended to mitigate conflicts of interest that research analysts may face in the context of a subject company that is also an investment banking client. In addition to specific disclosure requirements and limitations on analyst compensation and involvement in offerings, the rules also impose "quiet periods" (except for EGCs, as stated above) during which firms involved in the offering may not publish research on the issuer or discuss the issuer during public appearances, such as on financial news programs. These "quiet periods" extend for

40 days following an initial public offering and 10 days after a follow-on offering and apply to managers and co-managers of the offering. Broker-dealers who participate as underwriters or dealers in an initial public offering are subject to a 25-day quiet period. Research by a manager or co-manager of an offering is also restricted in the 15 days prior to and after the expiration or waiver of any lock-up agreements that follow the completion of the offering. See FINRA Manual, NASD Rule 2711(f).

E. Statutory Prospectus Circulation.

1. Circulation of preliminary prospectus.

a. Under Rule 460, circulation of the preliminary prospectus may be a factor in granting acceleration.

b. Information as to distribution of a preliminary prospectus is usually requested by the SEC staff. Rule 418(a)(7) specifies that the registrant should be prepared to provide this information "promptly" when requested and issuers should expect to do so prior to the SEC staff declaring the registration statement effective.

c. Rule 15c2-8 under the 1934 Act requires, among other things, that in the case of a non-reporting company (i.e. an IPO) a preliminary prospectus be delivered "to any person who is expected to receive a confirmation of sale at least 48 hours prior to the sending of such confirmation".

2. Recirculation of an amended preliminary prospectus.

a. Liability under §12(a)(2) attaches based on the information that has been conveyed to the investor by the time of sale. Recirculating a preliminary prospectus would be one means of conveying (corrected) information but it is not the only possible method, and given the availability of using a free writing prospectus in most cases, recirculation is not a likely method.

b. Acceleration under Rule 460—the SEC may require recirculation as a condition of granting acceleration of effectiveness.

c. Rule 15c2-8 does not require recirculation but does require that the broker or dealer take reasonable steps to assure that a copy of the amended preliminary prospectus, promptly after the filing thereof,

be provided to each person soliciting customers' orders, and that any person furnishing a written request for a prospectus receive the latest preliminary prospectus on file.

F. Remedies for violations of the communications rules ("gun jumping" violations).

1. A failure to comply with any of the conditions of the rules pertaining to communications during the offering period could cause the communication to be a violation of § 5. Traditionally, several different reactions and possible remedies have been considered or imposed by the SEC staff and others, including:

- Delay effectiveness
- Rescission — buyer gets 1 year put
    - Including adding a so-called rescission risk factor to prospectus to alert investors to their "put"
- Add offending material to prospectus so issuer and underwriters take strict liability for its content
- Withdrawal from offering of any underwriter responsible for violations
- Do not sell to person receiving the improper offer

2. If "gun jumping" results in a widespread illegal offer, is delay enough in light of Diskin?

VII. **The Post-Effective Period.**

Sales are permitted only once the registration statement is "in effect".

A. "Access equals delivery".

1. Under § 5(b)(2) it is unlawful to use the mails or interstate commerce to carry a security for the purpose of sale or delivery after sale unless "accompanied or preceded by a prospectus that meets the requirements of" § 10(a).

2. The SEC has provided in Rule 172, however, that a final prospectus will be deemed to have been delivered to investors as long as it has been filed (or will be filed) with the SEC by the required filing date. Per the rule, securities as well as related confirmations and notices of allocations may

be sent to investors after effectiveness of the registration statement without needing to be preceded or accompanied by the final prospectus as long as the prospectus has been (or will be) filed by the applicable due date.

3. The SEC has not extended the "access equals delivery" model beyond the three areas covered by Rule 172 (delivery of securities, confirms and notices of allocations) and it only applies to final prospectuses.

B. Free writing after effectiveness.

1. The § 5(b)(1) prohibition against using a "prospectus" that does not meet the requirements of § 10 continues to apply during the post-effective period.

2. §2(a)(10) (exception (a)) provides that a communication sent or given after the effective date is deemed not to be a "prospectus" if a prospectus meeting the requirements of §10(a) is "sent or given" to the person to whom the communication is made prior to or at the same time as the communication. Sales materials and other written communications can thus be freely used in the post-effective period if accompanied or preceded by a statutory prospectus. If they are not preceded or accompanied by the final statutory prospectus, those writings will be free writing prospectuses and will have to fully comply with those rules.

3. As noted above "access equals delivery" is not available outside the limited circumstances covered by Rule 172.

Note that in the context of a shelf registration, it does not appear that a base prospectus is a sufficient §10(a) prospectus. See Rule 430A(c) and its cross-reference to §10 and exception (a) of §2(a)(10).

C. Prospectus Delivery Following an Initial Public Offering.

Delivery of a prospectus by a dealer (including an underwriter no longer acting as an underwriter with respect to the security involved in such transaction) during the 25 days after the effective date is required if the issuer was not previously a 1934 Act reporting company (90 days if the security is not listed on an exchange. With very limited exceptions (e.g., offerings by blank check companies), "access equals delivery" is available to dealers to meet these delivery obligations. (See §4(3) of the 1933 Act and Rule 174.)

1. Under what circumstances must the prospectus be updated?

2. Research reports not accompanied or preceded by a prospectus must comply with Rule 137, 138 or 139.

VIII. **Civil Liabilities.**

A. Section 11 Liability.

1. Covers misstatements or omissions in the registration statement at the time it became effective.

a. Information contained in a prospectus supplement (such as in a shelf takedown for an S-3 offering) is part of the registration statement for Section 11 purposes. Information in a prospectus supplement used in a shelf takedown will be deemed part of the registration statement as of the earlier of the date it is first used or the date of the first contract of sale of securities in the related offering.

b. Rule 430B establishes that the date a prospectus supplement is deemed part of the registration statement will also be a new effective date for the registration statement (including an automatic shelf registration statement) for § 11 purposes with regard to the issuer and any current underwriter. It will not be a new effective date with regard to any other possible defendants.

c. The date of an annual report on Form 10-K or 20-F is a new effective date for purposes of a registration statement on Form S-3 or F-3 (including an automatic shelf registration). This new effective date applies to all persons with potential liability under § 11.

2. Any person acquiring a security registered under the registration statement (this includes both initial purchasers and anyone who purchased the security later in the open market), who did not have knowledge of the misstatement or omission at the time of acquisition, can sue:

a. Every person who signed the registration statement (including the issuer).

b. Every director (at the time of filing of the registration statement) of the issuer (whether or not the director signed the registration statement).

c. Every person who, with his consent, is named in the registration statement as being or about to become a director.

d. Experts (e.g., accountants, engineers, appraisers) who consent to such status (but only with respect to those sections of the registration statement expertized by that defendant).

e. Underwriters.

3. Very broad liability provision:

a. No knowledge or intent to deceive or mislead is required.

b. No reliance on (or even awareness of) the misstatement is required.

4. If the security is acquired after an earnings statement for a 12-month period beginning after the effective date of the registration statement has been made generally available to security holders, then reliance by the plaintiff on the misleading statement is required.

a. Rule 158 provides that periodic 1934 Act reports satisfy the "generally available" standard.

b. Underwriting agreements typically require the issuer to satisfy this provision.

5. Limitations on liability:

a. The amount of recoverable damages is limited to the difference between the price paid (but not greater than the public offering price) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought, provided, that, defendants that are liable for damages for material misstatements or omissions in offering documents are permitted to reduce the rescission damages by proving that the market depreciation was due to factors other than the misstatements or omissions. §11(e).

b. "Knowledge" Defense. The issuer has an affirmative defense under Section 11(a) if it can prove that the plaintiff knew of the material misstatement or omission. The limited case law on this defense generally indicates that the issuer must prove actual knowledge of the error on the part of the purchaser, rather than "generalized" public knowledge. (See, e.g., *Federal Housing Finance Agency v. UBS Americas Inc. 2013 WL3284118, SDNY 2013).*

c. An underwriter's liability is limited to the total public offering price of the securities underwritten by such underwriter. §11(e). Accordingly, underwriting contracts are generally written so that the underwriters' obligations to purchase securities are several versus joint obligations.

d. Except as noted below, any person found liable can recover contribution from any person who, if sued, would have been liable. §11(f).

e. The Private Securities Litigation Reform Act of 1995 (the "Reform Act") requires the jury or court to determine the relative responsibility of each party named as a defendant and any other person claimed by any of the parties to have caused or contributed to the loss incurred by the plaintiff, including persons that have settled. Although a proportionate share of the damages is initially allocated to each defendant in accordance with the jury or court's determination of relative responsibility, defendants that "knowingly commit a violation of the securities laws" remain jointly and severally liable subject to right of contribution, whereas the liability of outside directors in actions under §11 that did not "knowingly commit a violation of the securities laws" is limited to their proportionate share, subject to certain exceptions.

> "[K]nowingly commits a violation of the securities laws" means (i) in the case of an action based upon a misstatement or omission, that the person had actual knowledge that the statement was false (including as a result of the omission) and that other persons are likely to reasonably rely on the misstatement or omission or (ii) with respect to any other action under the securities laws, the person had actual knowledge of the facts and circumstances that made the conduct a violation of the securities laws.

f. The above described limitation on the liability of non-knowing outside directors in actions under §11 is subject to two exceptions. First, if such claims are not collectible against knowing defendants, non-knowing defendants are jointly and severally liable for the uncollectible claims of plaintiffs who establish that (i) they are entitled to damages exceeding 10% of their net worth and (ii) their net worth is less than $200,000. Second, if the damages awarded to any plaintiff, other than the one described above, is uncollectible and such damages are not recoverable against knowing defendants, each of the non-knowing defendants must make an additional payment up to 50% of their own liability to make up the short fall in the plaintiff's recovery. For example, a non-knowing defendant liable for $10,000 of a $100,000 judgment would owe an additional $5,000 if the remaining $90,000 were uncollectible from other defendants. To the extent a non-knowing defendant makes a required additional payment, such defendant may recover such additional amounts from any defendants that have paid less than their proportionate share.

g. Any defendant who settles is released from any future claims arising out of the action from either the plaintiff or other defendants, and the court must reduce the final judgment by the greater of (i) an amount corresponding to the settling defendant's percentage of responsibility or (ii) the amount the settling defendant paid.

6. Due Diligence Defenses--§11(b)(3).

a. Available to all of the above persons who can be sued, except the issuer.

b. A defense, not an affirmative obligation.

(1) Nonexpertized Material. If the alleged misleading statement or omission was not made upon the authority of an expert, the defendant will not be liable if the burden of proof is sustained that the defendant "had, after reasonable investigation, reasonable ground to believe and did believe, at the time . . . the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . .".

(2) Expertized Material. As regards any expertized part of the registration statement, a nonexpert defendant will not be liable if the burden of proof is sustained that the defendant "had no reasonable ground to believe, and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert . . .". This standard is far easier to meet than the standard for non-expertized material, because a defendant bears no affirmative obligation to establish that it conducted an investigation.

(3) Material Expertized by Defendant. If the alleged misleading part of the registration statement was made upon defendant's authority as an expert, the defendant will not be liable if the burden of proof is sustained that the defendant "(i) had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert . . .".

- Note that auditors only expertize information that they have audited—interim reviews do not expertize financial disclosures; nor do comfort letter procedures. Issue most obviously comes up with pro forma financials. Query also for auditors' attestation reports on internal controls pursuant to SOX 404 and Auditing Standard No. 5.

(4) Standard in § 11(c). "In determining . . what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property."

(5) Rule 176 contains the SEC's view of certain relevant circumstances in determining what constitutes a reasonable

investigation (e.g., whether, in the case of an incorporated document, the defendant had any responsibility for such document at the time it was originally filed).

(6) Case Law. In Escott v. Barchris Construction Corp., 283 F. Supp. 643 (S.D.N.Y. 1968), the court held that the issuer's registration statement contained various material misstatements and omissions in violation of § 11 and found the directors and underwriters liable since they had not satisfied the burden of proof to sustain a due diligence defense. The court noted that the amount of diligence required to establish such a defense depended on the relationship of the defendant to the issuer and their access to information (i.e., an inside director has a greater burden than an outside director). With regard to the underwriters' due diligence defense, the court stated:

> "To effectuate [§ 11's] purpose, the phrase 'reasonable investigation' must be construed to require more effort on the part of the underwriters than the mere accurate reporting in the prospectus of 'data presented' to them by the company . . . . [T]he underwriters must make some reasonable attempt to verify the data submitted to them."

See Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y 1971) (where the court, in holding that the underwriters had established a due diligence defense to a § 11 claim, noted that reasonableness (for purposes of § 11(c)) varied with the degree of involvement of the defendant, their expertise and their access to pertinent information and data).

In In re Software Toolworks, Inc. Securities Litigation, 789 F. Supp. 1489 (N.D.Cal. 1992), the court held that the underwriters had sustained a due diligence defense, and granted their motion for summary judgment, since they had reasonably investigated the issuer and its business by taking the following steps: using experienced due diligence teams, meeting with management, customers and suppliers, reviewing the company's documents and industry information, physically inspecting the issuer's facilities and closely scrutinizing the financial statements

with the auditors. With regard to the financial results for the most recent quarter, the court held that they were allowed to rely on the representations of the issuer because these statements were not yet independently verifiable. The court stated that "[i]t is not unreasonable . . .to rely on management's representations with regard to information that is solely in the possession of the issuer and cannot be reasonably verified by third parties". See Weinberger v. Jackson, [1990-1991 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,693 (N.D.Cal. Oct. 11, 1990) (where the court granted summary judgment in favor of the underwriters on their due diligence defense for taking measures comparable to those taken by the underwriters in Software Toolworks).

The determination of the lower court in Software Toolworks was affirmed in part by the 9th Circuit. The court of appeals remanded for trial, however, on the issue of whether the underwriters had met their burden with respect to the most recent quarter's results. The court noted that the plaintiffs had put forth evidence demonstrating that the underwriters knew that the results for this quarter were anomalous and did not accurately reflect the financial status of the issuer's business. Therefore, they argued that the underwriters should have reasonably inferred that the issuer had fabricated these results to protect the offering. In the opinion of the court, under such circumstances, reliance on the representations of management would not sustain a due diligence defense. In re Software Toolworks Inc. Securities Litigation, 38 F.3d 1078 (9th Cir. 1994).

In Picard Chemical Inc. Profit Sharing Plan v. Perrigo Company, 1998 U.S. Dist. LEXIS 11921 (W.D. Mich. June 25, 1998), the Court granted summary judgment to the underwriters on their claim that they had conducted a reasonable investigation and established a due diligence defense under § 11 and § 12(a)(2). The underwriters' investigation included: a substantial base of knowledge about Perrigo's financial and operating condition acquired from work on prior offerings and other financing projects; a day-long "all hands" due diligence meeting at which management and the outside accountants were questioned; a bring-down due diligence call; review of the internal growth plan; contacting major customers;

inspection of facilities; obtaining a comfort letter; and receiving a legal opinion as well as written representations as to the absence of misstatements and opinions in the prospectus.

Interestingly, after the investment bankers testified in their depositions in Picard that they could not recall specific discussions and events that occurred during the due diligence investigation, plaintiffs asserted that this undercut the evidence supporting the due diligence defense and created an issue for the jury. The Court stated that it was not unusual that the investment bankers could not recall the details of lengthy meetings three or four years later and was satisfied with their testimony that all the questions on their due diligence outline had been covered. The Court thus concluded that the investment bankers' inability to recall every detail of their investigation did not preclude summary judgment.

The Southern District of New York took a comprehensive look at due diligence in In re WorldCom, Inc. Securities Litigation (12/15/2004), which arose in relation to two underwritten debt offerings by WorldCom—one for $5 billion in 2000 and another for $12 billion in 2001. Following the collapse of WorldCom stemming from its massive financial frauds, investors sued various parties to those offerings under § 11, including the underwriters. In refusing the underwriters summary judgment, the judge made several critical points about the contours of the due diligence defense. With regard to audited financial statements, although they are "expertized" by the auditors and the due diligence obligation of underwriters is therefore lesser with regard to those disclosures, "red flags" cannot be ignored and the underwriters should have gone further with their diligence efforts in light of the warnings that WorldCom's financials were (or should have been) suspicious. With regard to interim or unaudited financials, the case reminds readers that comfort letters do not expertize the financials to which they speak (nor do interim review reports) and a successful due diligence defense may require additional steps.

(7) Should the managing underwriter sustain a due diligence defense, all underwriters in the syndicate would escape liability. In re Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D.Cal. 1978).

B. Section 12 Liability.

1. § 12(a)(1) imposes liability on any person who offers or sells a security in violation of § 5.

2. § 12(a)(2) imposes liability on any person who offers or sells a security by means of a prospectus or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.

3. § 12(b) permits defendants that are liable for damages under § 12(a)(2) for material misstatements or omissions in offering documents to reduce the rescission damages specified under § 12 by proving that the market depreciation was due to factors other than the misstatements or omissions.

4. § 12 differs from § 11 in several respects:

a. Liability under § 12(a)(2) relates to an offer or sale by means of a prospectus or oral statement (not the mere status of the defendant as under § 11), although no reliance is required. Also, unlike Section 11, the purchaser must establish that he or she did not know of "the untruth or omission".

b. The Supreme Court has ruled the term "prospectus" for purposes of § 12(a)(2) has the same meaning as it does under § 10. Gustafson v. Alloyd Co., Inc., 115 S. Ct. 1061 (1995). Since the § 10 prospectus requirements are only triggered if an offering is required to be registered pursuant to § 5, it appears that transactions that are exempt from § 5 pursuant to § 4 of the Act are not subject to the liability provisions of § 12(a)(2). See id. at 1067-68. Therefore, private placements pursuant to § 4(a)(2) and Rule 144A offerings would not be subject to § 12(a)(2). In addition, § 12(a)(2) does not apply to resales of securities in secondary market transactions.

c. As a result of Gustafson, Section 12(a)(2) liability is limited to registered public offerings. While it is available to all purchasers from the underwriters in the initial distribution, there is a split of

authority on whether it extends to persons who purchase in the aftermarket from dealers who have a prospectus delivery requirement during the 25 days (or 90 days) following an IPO (see §4(3) and Rule 174). (See e.g. Feiner v. SS&C Technologies, 47 F. Supp. 2d 250 (D. Conn 1999) [Yes.]; In re Levi Strauss Securities Litigation, 527 F. Supp. 2d 965 (N.D. Cal 200) [No)].

d. Unlike Section 11, Section 12(a)(2) liability is not capped at the offering price. However, the practical significance of this difference is limited to IPOs where the price trades up during the 25-day prospectus delivery period, assuming that liability extends to purchasers from dealers with a prospectus delivery requirement.

e. § 12(a)(2) applies to exempt securities under § 3 (except securities exempt under § 3(a)(2)--government and bank securities). Gustafson, however, seems to suggest that all private offerings are exempt from § 12(a)(2). Therefore, it is not clear whether § 12(a)(2) would apply to a § 3 exempt offering which would otherwise qualify as a private offering under § 4.

f. Liability under § 12 may be imposed not only on the direct seller of the securities, but also on persons who solicit the purchase of the securities, where the person soliciting the purchase is motivated at least in part by a desire to serve his own financial interests or those of the securities owner. Pinter v. Dahl, 108 S. Ct. 2063 (1988).

(1) Rule 159A was adopted by the SEC in 2005 and provides that the issuer in a primary offering of securities is considered to offer or sell the securities to the investors in the initial distribution of the securities and is therefore a "seller" for purposes of § 12(a)(2) only. Judicial decisions have split in the past on when an issuer may be a seller for purposes of § 12(a)(2), especially in firm commitment offerings where the issuer sells the securities to the underwriters who then in turn sell them to investors.

(2) Rule 159A will not create liability under Section 12(a)(2) for the issuer with regard to communications made solely by other offering participants unless the offering participant is acting as an agent or representative of the issuer or the

issuer or its agent has previously authorized or approved the communication.

g. The § 12 remedy is rescission (or damages if the securities are no longer owned).

5. The SEC has provided by interpretation (in the 2005 adopting release for securities offering reform) and Rule 159 that liability under § 12(a)(2) attaches at the time of sale of the securities. For purposes of that liability analysis, information conveyed to the investor only after the time of sale (including a contract of sale) will not be taken into account.

a. The determination of what information had been conveyed to an investor at the time of sale is a case of facts and circumstances.

b. The "disclosure package" for § 12(a)(2) purposes may include items beyond the registration statement, including free writing prospectuses and oral communications.

c. Disclosure that is added or amended only in a final prospectus would not protect the issuer and underwriters under § 12(a)(2) if the sale is made before the investor receives the final prospectus.

d. What is the cure if a material misstatement or omission existed at the time of sale (since it cannot be cured by a subsequently provided disclosure)? can the contract be modified? terminated?

(1) In its final release for the June 2005 reforms, the SEC suggested a four part test for successfully terminating a contract of sale so as to avoid § 12(a)(2) liability.

6. § 12(a)(2) provides a due diligence defense—the defendant must show that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission".

a. Some judicial decisions have suggested that this "reasonable care" standard is the same as the § 11 "reasonable investigation" standard. See Sanders v. John Nuveen & Co., 619 F.2d 1222 (7th Cir. 1980), cert. denied, 450 U.S. 1005 (1981).

b. The SEC stated in the release adopting the June 2005 reforms that "We believe, however, as we have stated previously, that the standard of care under Section 12(a)(2) is less demanding than

that prescribed by Section 11 or, put another way, that Section 11 requires a more diligent investigation than Section 12(a)(2)."

c. SEC also stated in the final release that "we believe that any practices or factors that would be considered favorably under Section 11, including pursuant to Rule 176, also would be considered as favorably under the reasonable care standard of Section 12(a)(2)."

d. How does the timing of liability under § 12(a)(2) affect considerations for the timing of due diligence?

7. The Reform Act added a safe harbor for certain forward-looking statements that are identified and accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement by certain issuers and certain other persons acting on the basis of the issuer's statements. There are a number of exceptions to the availability of the safe harbor, including, among others, prospectuses for initial public offerings and financial statements prepared in accordance with GAAP.

C. Section 13—Statute of Limitations.

1. An action under § 11 or § 12(a)(2) must be brought within one year of discovery of the misleading statement or omission or after such discovery should have been made by the exercise of reasonable diligence (or, in the case of § 12(a)(1), one year of the violation of § 5).

2. No action under § 11 or § 12(a)(1) may be brought more than three years after the bona fide public offering of the security or, in the case of § 12(a)(2), three years after sale.

3. An action under Rule 10b-5 may be brought not later than the earlier of two years after the discovery of the facts constituting the violation or five years after such violation. See Section 804 of the Sarbanes-Oxley Act of 2002.

D. Civil Liability Problems.

1. The harsh remedy of rescission.

a. If the purchaser knows that there has been a technical violation of § 5, does the purchaser get a one year free ride, being able to exercise the rescission remedy if the security declines in price? In

Pinter v. Dahl, at 2073 and n. 13, the Supreme Court confirmed that, absent other factors, a sophisticated investor who is a knowing purchaser of unregistered securities may still recover under § 12(a)(1), since this result properly furthers § 12(a)(1)'s deterrent effect.

b. Once there has been an illegal offer or sale, as in Diskin, is there any way to avoid the one year right of rescission? The doctrines of mitigation of damages and laches apparently are not applicable to claims under §§ 11 and 12. The doctrine of estoppel might be applicable. Straley v. Universal Uranium & Milling Corp., 289 F.2d 370 (9th Cir. 1961). The in pari delicto defense is available to a § 12(a)(1) claim, but only where the plaintiff's role in an offering of unregistered securities is more as a promoter than as an investor. Pinter v. Dahl.

2. Liability for a preliminary prospectus.

a. Is there liability under Rule 10b-5 or § 12(a)(2) to persons trading in the market? If the issuer already has outstanding securities, is there liability even if the offering is abandoned?

b. Is there liability to a purchaser in the aftermarket who received the preliminary prospectus but was not required to be delivered a final prospectus?

NOTES

2

"JOBs Act 2.0" Amendments to the Securities Laws (December 14, 2015)

William P. Rogers, Jr.
William J. Whelan III
LizabethAnn R. Eisen
D. Scott Bennett

Cravath, Swaine & Moore LLP

Reprinted from the PLI Course Handbook, Securities Offerings 2016: A Public Offering: How It Is Done (Order #149609)

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

MEMORANDUM

"JOBS Act 2.0" Amendments to the Securities Laws

December 14, 2015

On December 4, 2015, Congress passed and the President signed into law a number of amendments to the Securities Act of 1933 (the "Securities Act") and Securities Exchange Act of 1934 (the "Exchange Act") that are designed to enhance and expand the provisions of the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") and thereby facilitate capital formation. Except as noted below, the amendments became effective immediately and do not require any implementing rulemaking by the Securities and Exchange Commission (the "SEC").

The changes to the Securities Act and Exchange Act include the following:

Amendments to JOBS Act EGC Provisions

- Public Filing Requirement. Section 6(e)(1) has been amended to reduce from 21 to 15 the number of days that must elapse after an emerging growth company ("EGC") publicly files the registration statement for its initial public offering ("IPO") before it may commence the road show for that IPO.

- Grace Period for EGC Status. Section 6(e)(1) has been amended to provide that, so long as an issuer qualified as an EGC when it first confidentially submitted, or publicly filed, its IPO registration statement, even if it would otherwise fail to retain its EGC status prior to the consummation of its IPO (e.g., in the interim it completes a fiscal year with over $1 billion in revenues), it will nonetheless retain its EGC status until the earlier of (i) the date it consummates its IPO and (ii) the one year anniversary of the date when it ceased to qualify as an EGC.

    - Note that the amendment by its terms only preserves EGC status for purposes of the confidential submission provision, although the Conference Committee explanation indicates that the grace period was intended to apply to all EGC relief provisions (such as, for example, "testing the waters" under Section 5(d) or the ability to omit certain financial information from its IPO registration statement under Section 7(a)(2)). The SEC may be asked to address this through interpretive relief.

- Omission of Certain Financial Information. An EGC may omit required financial statements from its confidential submission or public filing of a registration statement (or amendment), so long as (i) the omitted financial information relates

to a period that the EGC reasonably believes will not be required to be included at the time of the contemplated offering (i.e., at the time the registration statement becomes effective) and (ii) prior to distribution of a preliminary prospectus to investors, the EGC amends the registration statement to include all financial information required to be included in the registration statement and prospectus at the date of that amendment. Although the changes are automatically effective without the need for SEC action, the SEC is directed to amend the instructions to Forms S-1 and F-1 to conform to these changes.

- Under this provision, an EGC that makes its initial IPO submission or filing on or prior to February 14, 2016 would be permitted to exclude 2013 historical financial statements (although it must include 2014 financial statements), so long as full year 2015 financial statements are included in an amendment that is filed prior to the distribution of preliminary prospectuses.[1]
- Under an SEC Staff FAQ published on December 10, 2015, however, that same EGC must include interim nine-month 2015 financial statements (and comparable interim nine-month 2014 financial statements), because those financial statements include financial information that relates to annual financial statements that will be required at the time of the offering later in 2016.
- This provision also allows the omission from a submission or filing of acquired company financial statements under Rule S-X 3-05 and related pro forma financial information under Rules S-X 11-01 and 11-02 that the EGC reasonably expects won't be required at the time when the IPO is completed. (See SEC Staff FAQ published on December 10, 2015.)
- Although the provision is not effective by its terms until January 3, 2016 (30 days after enactment), the SEC stated in an announcement on its website that the staff will not object if EGC's apply the provision immediately.

Adoption of New Exception to Registration Requirement

The amendments add a new Section 4(a)(7) and related Section 4(d) to the Securities Act to codify, in modified form, the so-called "4(1-1/2) Exemption" (for resales of privately placed securities) that has developed over time based on case law and industry practice and has been recognized by the SEC. The new exception is intended to be limited to resales to accredited investors and, unlike Rule 144A, is not intended to be used by issuers to effect broad distributions immediately following a private placement to

[1] Section 72003 of the new law refers to the omission of financial statements otherwise required by Regulation S-X. In the case of Form F-1 the main source for financial statement requirements is Item 8 of Form 20-F, rather than Regulation S-X. However, we would expect the SEC staff to apply the analogous interpretation to Form F-1.

a financial intermediary. The new exception is not exclusive of other exemptions that may be available for a particular transaction, including the existing so-called "4-(1-1/2) Exemption".

Under Section 4(a)(7) and Section 4(d):

- Each purchaser must be an "accredited investor", as defined in Regulation D.
- Neither the seller nor any person acting on the seller's behalf may engage in general solicitation or general advertising to offer or sell the securities.
- If the transaction involves securities of a non-reporting issuer (a "reporting issuer" for this purpose includes a foreign private issuer that relies on Rule 12g3-2(b)), the seller must make available to the purchasers certain specified information, including:
    - The name of the issuer and address of its principal executive offices.
    - The title and class of the securities offered, including par or stated value.
    - The amount of securities outstanding of the class offered as of the end of the most recent fiscal year of the issuer.
    - The identity of the transfer agent or other person responsible for effecting transfers of record ownership.
    - A statement of the general nature of the issuer's business as of a date within 12 months of the transaction.
    - The names of the issuer's officers and directors.
    - The identity of any broker, dealer or agent that will be paid compensation for participation in the offer or sale of the securities.
    - The following financial information for such part of the 2 preceding years as the issuer has been in operation:
        - Most recent balance sheet.
        - Profit and loss statement and "similar statements".

      The financial statements must meet the following requirements:
        - The financial statements must be prepared in accordance with either US GAAP or IFRS issued by the IASB.
        - The balance sheet must be not older than 16 months prior to the transaction date.
        - The profit and loss statement must cover the 12 months preceding the balance sheet date.

      In addition, if the balance sheet is older than 6 months prior to the transaction date, then an interim profit and loss financial statement must

also be provided for a period ending within 6 months prior to the transaction date.

- If the seller is a control person with respect to the issuer, a statement covering the nature of the seller's relationship to the issuer and a certification, signed by the seller, that the seller has "no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations."

- Section 4(d) also contains the following requirements

  - The exception is not available to issuers or their direct or indirect subsidiaries. (Note that other affiliates are not excluded.)
  - The exception is not available in cases where the seller or any person that may receive compensation is a "bad actor" that would be disqualified from utilizing Regulation D or is disqualified under Section 3(a)(39) of the Exchange Act (which covers disqualification of banks and brokers from membership in FINRA and similar organizations).
  - The issuer must be engaged in business and not in an organizational stage or bankruptcy or receivership and cannot be a shell company or blank check company.
  - The securities cannot be sold as part of a redistribution or be part of an unsold allotment held by a broker or dealer as an underwriter of the security.
  - The class of securities must have been outstanding for at least 90 days.

- Securities sold in a Section 4(a)(7) transaction will be "restricted securities" under Rule 144 and will be deemed not to have been issued in a public offering and the transaction will not be deemed to involve a distribution for purposes of Section 2(a)(11), which defines the term "underwriter". The transaction will also be entitled to the federal preemption of state securities laws contained in Section 18 of the Securities Act.

There are several interpretive or practice questions arising under Sections 4(a)(7) and 4(d).

- In most cases, sellers eligible to use Rule 144 should be expected to prefer that exemption to a Section 4(a)(7) transaction, because the Rule 144 transaction will allow the purchaser to obtain freely transferable securities, rather than restricted securities, which would result from a Section 4(a)(7) transaction. However, in cases where the holding period for restricted securities prevents the use of Rule 144, or for cases involving affiliate securities where the volume and manner of sale restrictions may limit the utility of Rule 144, Section 4(a)(7) may be an attractive alternative to either registration or a transaction covered by the "4(1-1/2) Exemption".

- Note that the definition of "accredited investor" in Rule 501(a) includes persons that the issuer "reasonably believes" meet the substantive requirements of the definition. Presumably this means that the seller (or issuer) need only take the self-certification and other due diligence steps needed for a Rule 506(b) transaction, and not the higher level "verification" steps necessary for a Rule 506(c) transaction.

- Since the securities sold in a Section 4(a)(7) transaction will remain "restricted securities" under Rule 144, we believe that most issuers will consider it necessary to maintain restrictive legends, stop transfer restrictions and other "protective" steps typical in a Section 4(a)(2) or Regulation D private placement even after the securities are sold in a Section 4(a)(7) transaction.

Forward Incorporation by Reference for Small Companies

The SEC is directed to amend form S-1 (but not Form F-1), to allow "smaller reporting companies", which are defined as companies with less than $75 million of public float (or less than $50 million of annual revenues if they have no public float), to incorporate by reference reports filed under Section 13(a) of the Exchange Act after the effective date of the registration statement. This should facilitate the use of Form S-1 by these domestic U.S. companies for shelf registration statements.

Summary Page for Form 10-K

The SEC is directed to adopt regulations within 180 days to permit issuers to include a summary page in their Form 10-K annual reports so long as each item on the summary page is cross referenced to the detailed disclosure in the Form 10-K to which it relates.

Regulation S-K Improvement

The SEC is directed to revise Regulation S-K within 180 days to (i) reduce the disclosure burden on EGCs, accelerated filers and smaller reporting companies while still preserving all material information, and (ii) eliminate for all issuers duplicative, overlapping, outdated or unnecessary requirements.

The SEC is also directed to undertake a study of Regulation S-K to (i) determine how to modernize the regulation, (ii) allow relevant information to be disseminated without boilerplate language or static requirements and (iii) evaluate methods of information delivery and presentations and explore methods of discouraging repetition of disclosure of immaterial information. The SEC is required to produce a report to Congress within 360 days containing the findings of the study and proposing recommendations and rules.

William P. Rogers, Jr.
William J. Whelan, III
LizabethAnn R. Eisen
D. Scott Bennett

NOTES

NOTES

3

Underwriting Arrangements and Documents

David K. Boston

Willkie Farr & Gallagher LLP

Table of Contents

APPENDICES

A. Underwriting Agreement

B. Agreement Among Underwriters

C. Master Agreement Among Underwriters

D. Selected Dealer Agreement

I. BACKGROUND

A. Predominantly based upon an informal understanding, though sometimes within the framework of a letter of intent or an engagement letter, issuer and prospective managing underwriter have taken time-consuming and relatively expensive actions to prepare for the contemplated offering.

(1) Issuer has initiated various corporate actions, including reorganization and/or recapitalization of the company, has sought approvals from its directors and securityholders, has prepared and filed with the Securities and Exchange Commission (the "SEC") a registration statement and has printed a preliminary prospectus in order to be ready to consummate the offering.

(2) Managing underwriter has made arrangements with other underwriters to be part of the syndicate thus sharing in the risk of the distribution, has solicited (together with the proposed members of the syndicate) indications of interest from prospective purchasers, and, generally, has explored the marketplace to determine the extent of interest in the offering and to prepare the marketplace (within legal constraints) for the offering.

(3) Together, issuer and managing underwriter have prepared the registration statement (which contains a pre-effective prospectus (usually referred to as a preliminary prospectus or a prospectus subject to completion) that the managing underwriter has distributed to the financial community), have responded to the sometimes numerous inquiries from government regulators and generally have prepared the marketplace for the offering by "marketing" the security through "road show" presentations and contacts and meetings with prospective purchasers (both institutions and retail customers).

B. If all has gone well and the marketplace is sufficiently interested in the offering and the SEC has completed its review of the registration statement, it is time for all parties to the offering to formalize their relationships with contracts embodying the basic understandings under which they have been proceeding.

II. BASIC DOCUMENTS

Two, or sometimes three, basic documents are involved in the usual underwriting - an Underwriting Agreement ("UA"), an Agreement Among

Underwriters ("AAU") and, sometimes, a Selected Dealer Agreement ("SDA"), with each serving a distinct purpose.

With many managing underwriters now using a standard form or "master" AAU, the UA has become the document with which underwriters' counsel and issuer's counsel most often work.

Under certain circumstances, an issuer may prefer an at the market offering to an underwritten offering and would enter into an Equity Distribution Agreement ("EDA").

A. Underwriting Agreement

(1) The UA establishes the basic relationship between the issuer and the underwriters by setting forth the respective rights and obligations of the issuer and the underwriters and the terms and conditions upon which the issuer is required to sell and the underwriters are required to purchase the securities.

(2) This is the first time a binding commitment exists on the part of the underwriters to purchase the securities of the issuer.

(3) The UA is executed and delivered after the AAU has been executed and delivered. Under conventional practice, the UA is executed and delivered prior to, or substantially simultaneously with, effectiveness of the registration statement. However, if the procedures of Rule 430A are utilized, the UA is generally executed after effectiveness of the registration statement and at the time the offering is priced. The UA is executed and delivered on behalf of the underwriters by the managing underwriter pursuant to authority granted to it by the other participating underwriters in the AAU.

(4) A form of UA is attached as Appendix A.

B. Agreement Among Underwriters

(1) The underwriters enter into an agreement among themselves establishing the nature and terms of their relationship with each other and designating the managing underwriter to act on their behalf, particularly with respect to negotiating the UA, pricing the securities and generally managing the offering.

(2) The AAU is entered into early on the day of anticipated effectiveness of the registration statement, prior to effectiveness and prior to execution of the UA.

(3) A form of AAU is attached as Appendix B.

(4) The use of a master AAU, as an alternative to using a separate AAU in connection with each transaction, has facilitated the underwriting process by binding potential underwriters to basic provisions of the AAU if they expect to participate in future syndicates. Subsequently, an Invitation, outlining the principal terms of the offering and stating that the offering will be pursuant to the master AAU (or indicating variations therefrom), is sent to underwriters who have signed the master AAU.

(5) A form of master AAU is attached as Appendix C.

C. Selected Dealer Agreement

(1) The underwriters may not, by themselves, be able to locate for all of the securities they are underwriting. Additionally, to encourage broad interest in the issuer and the offering, they might wish to bring into the transaction various market professionals who can help effectively facilitate the distribution but who purchasers could not be or did not wish to be underwriters. As a result, the underwriting syndicate may sell a portion of the securities to selected dealers who do not participate as underwriters in the offering. These selected dealers purchase the securities for their own account or for resale either to retail customers or to other securities professionals.

(2) Selected dealers are not in privity of contract with the issuer. They are also not bound by or entitled to the benefits of the AAU.

(3) Selected dealers do not assume the risks and do not realize the benefits associated with being an underwriter.

(4) Selected dealers buy the securities from the underwriters at a portion of the discount at which the underwriters purchase the securities from the issuer, known as the reallowance. In turn, if these dealers resell the securities to other professionals they may do so at a stipulated discount from the public offering price; resales to the public, however, must be at the public offering price.

(5) SDAs are entered into by the managing underwriter on behalf of the underwriting syndicate only after effectiveness of the registration statement.

(6) Selected dealers are not always used in offerings, and, even when used, their arrangements with the underwriters are not necessarily memorialized by written agreements.

(7) A form of SDA is attached as Appendix D.

D. Equity Distribution Agreement for At the Market Offerings

(1) Under certain circumstances, issuers may wish to set up a program to "dribble out" shares into the market at prevailing market prices on a registered basis. This type of program is often referred to as an "at the market offering program" or an "equity distribution program."

(2) Instead of issuing shares in an underwritten offering, an issuer will engage one or more broker-dealers to act as agents under the program to sell shares on an agency basis. The EDA between the issuer and the agent sets forth this agency relationship and the terms and conditions upon which the agent is directed to sell shares into the market.

(3) The EDA and the UA have similar provisions and points of negotiation. The EDA, however, provides that the issuer determines the timing, amount, minimum price and duration of any issuance and sale of shares under the program. The issuer can also direct the agent to stop selling at any time.

III. UNDERWRITING AGREEMENT

A. Purpose and Mechanics of the UA

(1) The UA is executed and delivered on behalf of the underwriters by the managing underwriter pursuant to the authority granted to it by the other participating underwriters in the AAU. Under conventional practice, the UA is generally executed and delivered immediately prior to, or substantially simultaneously with, the effectiveness of the registration statement. If the procedures of Rule 430A are utilized, the UA is generally executed after effectiveness of the registration statement and at the time the offering is priced.

(2) The UA is the basic agreement between the issuer (and selling securityholders, if any) and the underwriters reflecting the issuer's obligations to sell and the underwriters' obligations to buy the securities and the terms and conditions applicable to the transaction. The UA will, among other things, reflect the nature of the security being sold (e.g., debt or equity), the type of transaction involved (primary, secondary or a combination) and the nature of the underwriters' commitment (firm or best efforts). Each underwriter's

obligation to purchase is several from that of the other underwriters in order to limit each underwriter's liability exposure.

B. Principal Points of Negotiation

Although the UA is executed and delivered substantially simultaneously with effectiveness of the registration statement, most underwriters prefer to negotiate the UA as early in the registration process as possible, ideally before the registration statement is filed. Otherwise, the underwriters risk the possibility of (i) a delay in the effectiveness of the registration statement and/or (ii) a confrontation with the issuer, at a time when the underwriters and issuer should be acting together to effect the sale of securities.

Underwriters have specific forms of UAs and underwriters' counsel will draft the UA based upon the managing underwriter's form. Underwriters strongly resist straying too far from their particular forms.

There are relatively few sections of the UA that are the subject of extensive negotiations. These sections include the issuer's representations and warranties, the opinion of issuer's counsel, the "comfort" letter and the provisions relating to indemnification and contribution of the underwriters.

(1) Issuer's Representations and Warranties

(a) The types of representations and warranties of the issuer found in the UA will vary with different underwriters and will depend on the business of the issuer, how often and to what extent the issuer has previously participated in the public offering process and the relative bargaining strengths of the issuer and underwriters.

(b) Very detailed representations were traditionally used but are currently somewhat less common, particularly in follow-on offerings by established issuers. They are still utilized when it may be desirable to ensure that the issuer and its counsel are focusing on matters of importance, especially if the issuer is not a seasoned or experienced issuer or if issuer's counsel is not experienced in securities matters. However, the choice of style generally is a policy decision by the managing underwriter and is not a reflection on the issuer, its management or its counsel.

(c) The review of the representations and warranties in the course of negotiating the UA can help the underwriters and their

counsel fulfill their due diligence obligation by bringing about discussions of relevant aspects of the issuer's business.

(d) However, underwriters and their counsel should be careful not to make unreasonable demands on issuers for the sake of strict adherence to their form of UA.

(e) Section III.C. contains typical representations and warranties that should be included and additional representations and warranties that may be requested when necessary.

(2) Opinion of Issuer's Counsel

The opinion of issuer's counsel is often subject to extensive negotiation that varies widely from offering to offering, driven by the expectations or requirements of underwriters and underwriters' counsel. A subject of discussion often is the "split" of opinions between the issuer's inside and outside counsel.

(3) "Comfort" Letter

The UA specifies that the issuer shall submit a "comfort" letter from its independent public accountants to the underwriters in a form satisfactory to the underwriters on the date of signing the UA and on the closing date. The most frequently negotiated aspect of what is covered in this letter is the verification of miscellaneous unaudited financial information appearing throughout the prospectus. A comfort letter is typically delivered concurrently with the execution of the UA, and an update of the comfort letter is delivered at the time of closing of the offering. Comfort letters can be the subject of considerable negotiation and difficult discussion between underwriters and the issuer's auditors.

(4) Indemnification Provisions

Historically, most underwriters have been reluctant to negotiate the indemnification and contribution section of the UA, driven largely by internal policy guidelines to maintain uniform provisions within this section.

C. Basic Provisions of the UA

(1) Representations and Warranties of the Issuer

(a) There are two basic approaches: detailed specific representations or a more general approach relying principally upon "10b-5 type" representations as to the accuracy of the registration statement and prospectus.

(b) Whichever approach is used, certain representations should be included in the UA, such as:

(i) compliance of the registration statement (and all amendments and supplements) with the Securities Act of 1933, as amended (the "1933 Act"), and applicable rules and regulations, including the use of the appropriate form (Form S-1 or Form S-3);

(ii) independence of the issuer's outside accountants;

(iii) absence of any stop order or order suspending the use of any prospectus;

(iv) accuracy in all material respects of the capitalization of the issuer and that the securities, upon issuance, will be duly authorized, validly issued, fully paid and nonassessable;

(v) accuracy in all material respects of the registration statement and the prospectus, as well as the preliminary prospectus, the "pricing disclosure package" of information that has been conveyed to investors as of the time of sale and any issuer free writing prospectuses;

(vi) due incorporation or other organization, valid existence and good standing of the issuer and qualification of the issuer to do business in such jurisdictions as necessary;

(vii) power and authority of the issuer to perform under the UA, including the issuance and sale of the securities, the absence of liens or encumbrances thereon and the conformity of the securities to the description in the registration statement, prospectus and the pricing disclosure package;

(viii) absence of conduct by the issuer, its officers, directors and affiliates which could be deemed to constitute stabilization or manipulation of the price of the securities;

(ix) absence of any material adverse change in the condition, financial or otherwise, business or operations of the issuer from that set forth in the pricing disclosure package or the prospectus; and

(x) fairness of the issuer's financial statements and the preparation thereof in accordance with generally accepted accounting principles.

(c) Additional representations might be requested with respect to matters deemed important by the underwriters and might include:

(i) absence of any undisclosed liabilities since the date of the financial statements included in or incorporated by reference into the registration statement;

(ii) maintenance of an adequate system of internal accounting controls;

(iii) maintenance of an adequate system of internal disclosure controls and compliance with provisions of the Sarbanes-Oxley Act of 2002, as amended;

(iv) maintenance of insurance generally deemed adequate for the issuer's business;

(v) absence of any violations of the Foreign Corrupt Practices Act of 1977, as amended;

(vi) absence of any sanctions administered or enforced by the U.S. government or specified foreign governments;

(vii) compliance with anti-money-laundering laws;

(viii) absence of violations by the issuer of the terms of its charter, by-laws, material agreements, applicable laws, regulations, orders and court decrees and similar instruments and documents binding upon the issuer;

(ix) good title to all assets that are significant to the conduct of the issuer's business and no liens thereon;

(x) absence of pending or threatened material litigation or proceedings;

(xi) absence of or waiver of registration rights in favor of any securityholder;

(xii) absence of any contracts required to be described in or filed as exhibits to the registration statement which are not so described or filed;

(xiii) possession by the issuer of all patents, licenses, trade-marks, etc., necessary to the performance of its business;

(xiv) absence of consents or approvals required by any court or governmental agency prior to consummation of the sale;

(xv) compliance with the Employee Retirement Income Security Act of 1974, as amended;

(xvi) timely filing of all tax returns, payment of all taxes that have become due and establishment of adequate reserves for future tax liabilities;

(xvii) in cases where following the offering the issuer will have substantial cash which will not be immediately utilized in the issuer's business, a representation that the issuer is not an "investment company" within the meaning of the Investment Company Act of 1940, as amended (the "1940 Act"), at the time of and following the offering;

(xviii) where applicable, compliance with the 1940 Act and the Investment Advisers Act of 1940, as amended, such as in an offering of shares in a closed-end or open-end mutual fund;

(xix) where applicable, a representation that the issuer meets the definition of an "emerging growth company" as defined in Section 2(a) of the 1933 Act; and

(xx) if the offering is being done in connection with a financial restructuring where the proceeds of the offering may be used to pay off the issuer's creditors, representations regarding an issuer's solvency. In certain circumstances, the underwriters may go so far as to require a "solvency opinion" from an outside financial adviser to the issuer.

(d) If the issuer has subsidiaries, the representations regarding the subsidiaries may be subject to negotiation. If the issuer is primarily a holding company, the underwriters may want extensive representations relating to subsidiaries; if the issuer is primarily an operating company, representations regarding

subsidiaries may not be particularly important; if the issuer has many subsidiaries, it may be willing to make representations only with respect to "important" subsidiaries, or it may wish to restrict the impact of the representations to the issuer and its subsidiaries taken as a whole.

(e) If the transaction involves a secondary offering, appropriate representations and warranties should be sought from each selling securityholder as to authority to act, title to the securities being sold and accuracy of the information contained in the prospectus with respect to the selling securityholder and that no stabilization or manipulative action has been taken. Depending upon the relationship between the issuer and the selling securityholder, it also may be appropriate to obtain representations from the selling securityholder regarding some or all of the matters concerning the issuer's business as to which the issuer is making representations.

(f) Representations should survive any investigation by the underwriters and the purchase of the securities by the underwriters.

(2) Closing

(a) The UA specifies the time, date and place of closing and provisions for delaying the closing.

(b) The UA also states that payment is to be made by wire transfer in federal or other "immediately available" funds to the account specified by the issuer.

(c) Pursuant to the Securities Exchange Act of 1934, as amended (the "1934 Act"), the closing date is required, with certain limited exceptions, to be the third business day after the trade date (T+3) or, if pricing occurs after 4:30 p.m. EST, the fourth business day after the trade date (T+4).

(d) The UA often requires the issuer to make the securities available to the underwriters for inspection prior to the closing.

(3) Covenants of the Issuer

(a) The issuer undertakes to perform certain specific actions, such as:

(i) to use its best efforts to cause the registration statement to become effective (if it has not already done so), to file

necessary amendments or supplements and, if appropriate, to comply with the provisions of and make requisite filings pursuant to Rule 430A, 430B or 430C;

(ii) to keep the underwriters advised of any action taken by the SEC or state authorities;

(iii) to refrain from using any issuer free writing prospectuses without the underwriters' prior written consent and to make all requisite filings of any permitted free writing prospectuses;

(iv) to deliver an "earning statement" as contemplated by Section 11(a) of the 1933 Act, and Rule 158 thereunder;

(v) to pay the expenses of the offering (except as specifically otherwise provided);

(vi) to cooperate in the qualification or registration of the securities for offer and sale under state securities or Blue Sky laws of any relevant jurisdiction;

(vii) to refrain from selling securities of the same class, or securities convertible into the same class, for a specified period of time (often 90 to 180 days, depending upon the type of company, market environment and other factors) without the consent of the underwriters. This period may be extended if the expiration of the lock-up would otherwise coincide with the issuer's earnings release, so as to comply with any applicable National Association of Securities Dealers ("NASD") Rules administered by the Financial Industry Regulatory Authority, Inc. ("FINRA") regarding publication of research reports by underwriters participating in a previous offering of the issuer. A similar covenant or "lock-up" agreement should be obtained from each significant stockholder, any selling stockholder and officers and directors of the issuer;

(viii) if an electronic offering is contemplated, to provide a copy of the prospectus to the underwriters in a form that may be downloaded from the Internet; and

(ix) to qualify the securities for listing on an exchange (such as the New York Stock Exchange or one of the various markets of The NASDAQ Stock Market).

(4) Conditions of the Underwriters' Obligations to Purchase the Securities

(a) The registration statement shall have become effective by a specified time (usually a specified time during the day on which the UA has been signed); all filings required by Rule 424 and, if appropriate, Rule 430A, 430B or 430C shall have been made, no stop orders shall have been issued prior to the closing date and no proceedings for such purpose shall be pending or threatened at the closing date; there shall have been no material adverse change in the business, financial condition or earnings of the issuer as of the closing date; the registration statement shall not have contained, as of the closing date, an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements made therein not misleading; the prospectus shall not have contained, as of the closing date, an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and the pricing disclosure package shall not have contained, as of the time of sale, an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.

(b) Underwriters shall have received opinions from the issuer's counsel covering specified matters, such as:

(i) due incorporation or other organization, valid existence and good standing of the issuer, and qualification of the issuer to do business in such jurisdictions as necessary;

(ii) accuracy in all material respects of the capitalization of the issuer and that the securities, upon issuance, will be duly authorized, validly issued, fully paid and nonassessable;

(iii) effectiveness under the 1933 Act of the registration statement and all post-effective amendments thereto and the absence of any stop orders in effect;

(iv) due authorization, execution and delivery of the UA by the issuer;

(v) compliance as to form in all material respects of the registration statement and prospectus (except as to the financial statements and schedules and other financial data contained therein) with the requirements of the 1933 Act;

(vi) absence of any consent or approval requirement for the execution of the UA and the sale of securities;

(vii) the execution of the UA and the sale of securities not violating any material contract, law, order or regulation to which the issuer is subject;

(viii) full corporate power and authority of the issuer to enter into the UA;

(ix) the issue and sale of the securities by the issuer as contemplated by the UA not conflicting with, or resulting in a breach of, or constituting a default under the charter or by-laws of the issuer; and

(x) depending on the specific business of the issuer, certain potential additional clauses with respect to matters related to intellectual property, franchises, regulatory approvals, material contracts, the operations and formation of the issuer's subsidiaries, etc., which opinions often require the retention of special regulatory, intellectual property and/or foreign counsel.

(c) In addition to the foregoing opinions, issuer's counsel is always asked to give a "10b-5 type" statement that declares that such counsel has no reason to believe that the registration statement or prospectus (except as to the financial statements and schedules, other financial data and, sometimes, accounting and statistical data, contained therein) at the time of effectiveness and at the closing contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading. This statement also addresses the "pricing disclosure package," which is defined as the most recently used preliminary prospectus together with any specified issuer free writing prospectuses and any term sheet setting out the pricing terms. If a pricing term sheet is not distributed to investors, this statement will cover instead, an agreed upon set of pricing information that is to be conveyed orally by the underwriters to investors prior to the time of sale.

(d) Underwriters shall have received opinions from selling securityholders' counsel if the offering includes secondary shares; underwriters shall have received opinions from other special counsel if appropriate.

(e) Underwriters shall have received certificates from officers of the issuer, usually senior executive and financial officers, covering such matters as the accuracy of the issuer's representations and warranties as of the closing date; the issuer having performed all its obligations under the UA; the registration statement, prospectus and pricing disclosure package being, in the opinion of such officers, materially correct; and no event having occurred since the effective date of the registration statement which would be required to be set forth in an amendment or supplement to the effective prospectus or final prospectus.

(f) Underwriters shall have received opinions from their counsel on such matters as the underwriters shall reasonably request, generally including, at least, the incorporation of the issuer, the validity of the securities offered, and the due authorization, execution and delivery of the UA by the issuer. In addition to the foregoing opinions, underwriters' counsel is always asked to give the same "10b-5 type" statement as given by issuer's counsel.

(g) Underwriters shall have received "comfort" letters from the issuer's independent registered public accounting firm, covering audited and unaudited financial statements as well as specified financial information and material set forth in the registration statement. The comfort letter is delivered at pricing. The UA also requires that the accounting firm deliver at closing a written update of their comfort letter that confirms the statements in the comfort letter as of the closing.

(5) Indemnification and Contribution

(a) The issuer (and any selling securityholders) indemnifies the underwriters with respect to losses, claims, damages or liabilities arising out of or based upon untrue statements and omissions of material facts or alleged untrue statements or omissions of material facts contained or incorporated by reference in the registration statement, any prospectus, any preliminary

prospectus and any issuer free writing prospectus, or any amendment or supplement thereto.

(b) Each underwriter severally agrees to indemnify the issuer (and any selling securityholders) with respect to losses, claims, damages or liabilities arising out of or based upon untrue statements and omissions of material facts or alleged untrue statements or omissions of material facts contained or incorporated by reference in the registration statement, any prospectus, any preliminary prospectus and any issuer free writing prospectus, or any amendment or supplement thereto if (but only if) such statement or omission was made in reliance upon and in conformity with information furnished in writing by or on behalf of the underwriter.

(c) The information provided by underwriters is extremely limited and generally relates only to information about the underwriters themselves and the mechanics of the offering. A common means by which underwriters limit the information for which they acknowledge responsibility is the use of a provision in the UA delineating the specific paragraphs and/or sentences in the preliminary prospectus and the prospectus provided by the underwriters. The practice of delivering a letter limiting the information for which the underwriters acknowledge responsibility, often known as a "blood letter," is much less common today, but can also be used. Underwriters should not acknowledge responsibility for information in the registration statement and prospectus regarding the issuer and its business even if they were involved in drafting those documents.

(d) No party extends indemnification with respect to information furnished by other parties.

(e) Indemnification provisions should survive investigation by or on behalf of an indemnified party, delivery of and payment for the securities, any termination of the UA and the closing.

(f) The indemnification provisions should deal with the issue of separate counsel (as the issuer will often seek to limit its expense reimbursement obligation to one such separate counsel for the entire underwriting group), participation of indemnified parties in a defense conducted by an indemnifying party, authority to effectuate settlements and periodic payment of amounts owed.

(g) In secondary offerings, selling securityholders will be asked to indemnify the underwriters with respect to information provided by the selling securityholders. In addition, they may be asked to indemnify the underwriters with respect to information about the company's business depending upon their relationship to the issuer.

(h) If the issuer is a subsidiary corporation, the underwriters often require the parent company to extend the indemnification. Similarly, if the issuer is a holding company, the underwriters may also look to the operating subsidiary for indemnification.

(i) The SEC is of the view that indemnification for liabilities arising out of the federal securities laws is against public policy and, therefore, void. Some courts, in certain instances, have refused to enforce such provisions because they undermine the purpose of civil liability under the securities laws.

(j) Due, in part, to the possibility that indemnification provisions may be challenged, contribution provisions are generally included in the UA.

(i) Section 11(f) of the 1933 Act contemplates contribution arrangements but provides no specific method of calculation.

(ii) There are several possible contribution formulas: underwriters' liability is limited to the percentage that the underwriters' commission bears to the public offering price (net of underwriters' commission); contribution by parties is made in relation to relative benefits received; or contribution is made on the basis of relative fault and relative benefits.

(iii) An underwriter will generally not be required to contribute any amount greater than the total price of securities underwritten by it, less any damages such underwriter has already been required to pay.

(6) Substitution of Underwriters

(a) If one or more of the underwriters default in the purchase of securities and such defaults relate to no more than a specified percentage (usually 10%) of the aggregate amount intended to be purchased by the underwriters, the remaining underwriters

will usually agree to purchase their proportionate share of securities as to which there are defaults.

(b) If the defaults relate to an amount of securities in excess of the specified percentage, all non-defaulting underwriters are usually released if the managing underwriter (sometimes in consultation with the issuer) is unable to make satisfactory arrangements for the purchase of the defaulted securities during a prescribed time period (typically 48 hours). Notwithstanding such release, the issuer retains any claim it may have against the defaulting underwriters for such defaults.

(7) Execution and Effectiveness Utilizing Conventional Procedures

(a) Agreement on final pricing generally is reached after the close of the market on the day preceding the offering.

(b) Later that evening, the AAU (if a master AAU is not in effect) and then the UA are executed, and the final ("pricing") amendment to the registration statement is filed with the SEC.

(c) The UA provides that it is to become "effective" as an agreement at a specified time on the first full business day after the registration statement becomes effective, or at such earlier time after the effectiveness of the registration statement as the managing underwriter may authorize the sale of the securities to the public. Usually, each party retains the right to terminate the agreement at any time prior to the time the UA becomes "effective."

(8) Execution and Effectiveness Utilizing Procedures of Rule 430A

(a) An agreement between the managing underwriter and the issuer is reached to request acceleration of the effective date of the registration statement.

(b) The registration statement is declared effective with the prospectus contained in the registration statement at the time the registration statement becomes effective being complete in all respects, except that it omits the information permitted by Rule 430A (basically pricing-related information).

(c) Agreement on final pricing is reached, and the AAU and UA are executed. A term sheet may be circulated to investors immediately prior to the time of sale to convey the pricing terms of the offering, or the pricing terms may be conveyed orally by the underwriters to investors. If a pricing term sheet is used, it is filed pursuant to Rule 433 within two days after the later of the date the final terms have been established and the date of first use. A prospectus containing the information omitted when the registration statement became effective is filed pursuant to Rule 424 within fifteen business days after the effective date but in no event later than the second business day following the earlier of the date of determination of the offering price or the date that the prospectus is first used after effectiveness in connection with the public offering or sales, or transmitted by a means reasonably calculated to result in filing with the SEC by that date.

(d) If a prospectus containing the information omitted pursuant to Rule 430A is not filed under Rule 424 within fifteen business days after the effective date, a post-effective amendment to the registration statement, updated in all respects, that either restarts the pricing period or contains the Rule 430A pricing-related information must be filed, and the offering must be delayed until the post-effective amendment is declared effective.

(9) Execution and Effectiveness Utilizing Procedures of Rule 462

(a) When the pricing terms of an offering are finalized, it is not unusual for changes to be made in the offering size through adjustments to both price and volume. Where this process requires registration of additional securities, Rule 462 permits the filing of an abbreviated registration statement to register the additional amount of securities to be offered and sold.

(b) A registration statement and any post-effective amendment thereto shall become effective upon filing with the SEC if:

(i) the registration pertains to the same class of securities as was included in an earlier registration statement for the same offering and that earlier registration statement has been declared effective;

(ii) the new registration statement is filed prior to the time confirmations of trades are sent or given; and

(iii) the new registration statement registers additional securities in an amount and at a price that together represent no more than 20% of the maximum aggregate offering price contained in the earlier registration statement.

(10) Termination

(a) The UA is terminable by the underwriters if any conditions to the underwriters' obligations are not met.

(b) The underwriters also typically retain the right to terminate the UA in the event certain events occur before closing. These vary but usually include:

(i) suspension in trading of the issuer's securities;

(ii) general suspension or limitation of trading on designated stock exchanges (usually the New York Stock Exchange and the Nasdaq Stock Market);

(iii) declaration of a general banking moratorium by federal or state authorities;

(iv) a material disruption in securities settlement, payment or clearance services in the United States;

(v) any attack, outbreak or escalation of hostilities, declaration of war or act of terrorism involving the United States or any other national or international calamity or emergency which in the judgment of the managing underwriter makes it impractical or inadvisable to proceed with the offering;

(vi) the occurrence of any downgrade by a credit rating agency, or any pending review by a credit rating agency that might result in a downgrade, with respect to the issuer's securities; and

(vii) the determination by the underwriters, in their discretion, that financial, political or economic conditions have adversely affected the market for the securities (sometimes called the "market out" clause).

IV. AGREEMENT AMONG UNDERWRITERS

A. Purpose, Mechanics and Basic Provisions of the AAU

(1) The AAU grants to the managing underwriter the authority to negotiate the terms of and to execute and deliver the UA on behalf of the underwriters, and grants the managing underwriter the general authority to manage the offering. It specifies the managing underwriter's compensation (the "management fee"), for conducting the offering; this fee is paid to the managing underwriter by the other underwriters out of the total underwriters' commission, not by the issuer, to ensure that all underwriters are compensated equally by the issuer for purposes of Section 11(e) of the 1933 Act.

(2) The AAU grants to the managing underwriter authority to agree to the public offering price; to commence the offering; to modify the offering price, concessions, discounts and reallowance to dealers; to require the delivery of a term sheet or free writing prospectus; and to control all advertising.

(3) The AAU grants to the managing underwriter broad discretion with respect to the offering process, including the authority:

   (a) to reserve from each underwriter's allotment securities for sales to selected dealers and retail sales (including sales to institutions) and to effect such sales on behalf of all underwriters generally in a pro rata manner;

   (b) to repurchase from the underwriters (as well as selected dealers) any unsold securities;

   (c) to require each underwriter to repurchase from the managing underwriter (at the managing underwriter's cost) any securities sold by that underwriter and purchased by the managing underwriter as a result of stabilization activities or, alternatively, to sell such securities to a third party and credit any profit or charge any loss or expense to the underwriter's account or charge the underwriter's account with an amount not in excess of the selling concession;

   (d) to advance funds, to arrange loans and to pledge securities on behalf of each underwriter; and

   (e) to make requisite 1934 Act filings and filings under state securities or Blue Sky laws and make required filings with any governmental agency.

(4) The AAU permits the managing underwriter, in its discretion but at all times subject to legal constraints, to trade in the offered securities for the account of the underwriters for either long or short account, to cover any short position and to overallot in arranging for sales of the securities. This authority is generally limited to an amount equal to some percentage (15% to 20%) of an underwriter's underwriting obligation, and all transactions are made in proportion to each underwriter's underwriting obligation.

(5) Each underwriter agrees not to engage in transactions in the securities, particularly in the open market, until completion of the distribution, except under limited circumstances, such as unsolicited brokerage orders in the ordinary course of business.

(6) The AAU requires payment by the underwriter for the stock to be purchased by it at the public offering price less the selling concession (the difference between the underwriters' commission and the selling commission, which is generally split between the managing underwriter as a management fee and the syndicate as an underwriting fee out of which the underwriters' expenses, including the fees and expenses of counsel to the underwriters, in connection with the offering are reimbursed). The AAU requires the managing underwriter to remit to each underwriter the proceeds of securities sold by the managing underwriter for the account of such underwriter. Each underwriter is required to accept and pay for any securities initially retained or reserved by the managing underwriter for sales to retail customers or selected dealers but not so sold and thereafter tendered to such underwriter.

(7) Expenses are payable by each underwriter from the underwriting fee, proportionately to the securities committed to be purchased by it pursuant to the UA. The managing underwriter makes a binding allocation of expenses among the underwriters. To the extent that the portion of the underwriters' fee earmarked for expenses exceeds the actual amount of such expenses, the managing underwriter will pay each underwriter its allocated portion of such excess. Notwithstanding any settlement by the managing underwriter of amounts on hand, the underwriters remain liable for any future claims with respect to amounts owed by them.

(8) If any underwriter defaults in its underwriting obligation, the managing underwriter may proportionately increase by not more than a specified percentage (usually 10%) the underwriting obligations of all non-defaulting underwriters; if the amount involved

exceeds the specified percentage, the managing underwriter may but is not obligated to find substitute underwriters to purchase all or a portion of the securities that were allocated to such defaulting underwriter.

(9) The AAU terminates upon completion of the offering or after expiration of a specified period of time.

(10) Each underwriter agrees to indemnify each other underwriter to the extent that information provided by it for use in the registration statement is found to be materially incorrect.

B. Standard Form of Master AAU

(1) The mechanics of the underwriting process have been further facilitated by many underwriters through the use of a standard form or "master" AAU agreement.

(2) Managing underwriters rarely change basic provisions of their AAU and often work with the same syndicate members.

(3) To expedite the formation of syndicates, these managing underwriters circulate a standard form AAU or "master AAU" to potential members of future underwriting syndicates.

(4) The potential underwriter signs a form acknowledging willingness to be bound by terms of the master AAU if it participates in a future syndicate.

(5) Subsequently, the managing underwriter invites underwriters who have signed the master AAU to join a particular syndicate.

(6) The invitation contains the principal terms of the offering, including quantity of securities to be underwritten by the invitee, date of offering, closing date, public offering price of the securities, underwriters' commission (as well as allocation thereof among the management fee, underwriting fee and selling concession) and, if applicable, interest rate, maturity date, etc. and states that the offering will be pursuant to the terms of the master AAU or indicates variations therefrom.

(7) The invitee may accept the terms and will, by its prior action, be bound by the master AAU. In an alternative structure, the failure of an invitee to expressly decline an invitation to participate indicates agreement to participate.

C. Miscellaneous Documents Related to the AAU

(1) Underwriters' Questionnaire

(a) As part of the process of preparing the registration statement and establishing the syndicate, the managing underwriter will distribute a questionnaire to all prospective underwriters and will seek a power of attorney from each.

(b) The Underwriters' Questionnaire is distributed by the managing underwriter to each prospective underwriter soon after the registration statement is filed, together with relevant documents including the registration statement and current drafts of the underwriting documents.

(c) The Underwriters' Questionnaire must be completed and returned to the managing underwriter prior to commencement of the offering.

(d) The Underwriters' Questionnaire is intended to solicit certain specific information from each prospective underwriter, such as:

(i) "material" relationships, if any, between the prospective underwriter and the issuer;

(ii) knowledge of arrangements, if any, to limit or restrict the sale of or to stabilize the market price of the securities or to grant discounts or pay commissions or other consideration;

(iii) beneficial ownership by the prospective underwriter of more than five percent of the issuer's voting securities;

(iv) compliance by the prospective underwriter with applicable net capital rules (Rule 15c3-1 under the 1934 Act) after giving effect to the contemplated transaction;

(v) knowledge of any management or similar report relating to the broad aspects of the business, operations or products of the issuer prepared by or for the prospective underwriter within the past twelve months and any reports or memoranda prepared by the prospective underwriter for external use in connection with the offering;

(vi) dealings, if any, with the issuer within the twelve months preceding the filing of the registration statement for the offering such as are required to be disclosed under the FINRA Rules and purchases, if any, of the issuer's

securities within the twelve months preceding the filing of the registration statement for the offering;

(vii) whether the underwriter or its affiliates beneficially own 5% or more of a class of the issuer's securities; and

(viii) if a debt security is being issued, relationships, if any, with the trustee.

V. SELECTED DEALER AGREEMENT

A. Purpose and Mechanics of the SDA

(1) The SDA is a contract by which selected dealers agree to buy from the underwriting syndicate a portion of the securities which are the subject of the public offering.

(2) Since the underwriters may not be able to locate purchasers for all the securities, they turn to selected dealers to encourage a broad interest in the issuer and distribution of the securities.

(3) The selected dealers are not underwriters and are not in privity with the issuer.

(4) SDAs are entered into after effectiveness of the registration statement by the managing underwriter on behalf of the syndicate.

B. Basic Provisions of the SDA

(1) The sales to selected dealers are at the public offering price less a specified concession. The selected dealers, in turn, may resell to other qualified selected dealers at a price equal to the public offering price less a portion of that concession.

(2) However, the selected dealer concession with respect to any shares purchased by the selected dealer, subsequently resold by the selected dealer and then reacquired by the managing underwriter through stabilization activities in connection with the offering must be repaid to the syndicate. This results in the sale price to the selected dealer being equal to the public offering price.

(3) To the extent that a selected dealer has, at any time, not sold any of the securities bought by it, the managing underwriter retains the right to repurchase those shares, at not less than the selected dealer's cost, for purposes of meeting the syndicate's obligations to purchasers.

(4) The selected dealer is not authorized to act as an agent of the underwriters and is not authorized to disseminate any information not specified in the prospectus.

(5) The selected dealer must agree to comply with the FINRA Rules, the NASD Rules administered by FINRA and all other applicable rules and provisions administered by FINRA, as well as applicable provisions of the 1933 Act and 1934 Act.

(6) Termination of the SDA occurs upon the earlier of the termination of the public offering or a specified number of days after the date of the SDA.

VI. SIMULTANEOUS UNDERWRITTEN AND BEST EFFORTS OFFERINGS

A. As a response to institutional investors' resistance to paying standard levels of underwriting commissions, underwriters have occasionally agreed with issuers to simultaneously make an underwritten offering to the general public and a "best efforts" or "reasonable efforts" offering aimed at the institutional investors.

B. While "reasonable efforts" offerings were historically used for offerings by less desirable issuers, in this instance the simultaneous underwritten and reasonable efforts offering is used to broaden the marketing appeal of the securities being sold. For example, if the underwritten offering to the general public is priced at $15.00 per share, investors willing to purchase in excess of $100,000 of the issuer's securities may be able to purchase shares sold by the underwriters on a reasonable efforts basis at $14.50 per share. Typically the proceeds to the issuer are the same, with the difference being made up by a lower commission for the underwriter/agent.

C. Shares sold on a reasonable efforts basis may never be "owned" by the underwriters, since the best efforts shares will not be a part of the securities sold pursuant to the UA. Instead, an agency agreement will be signed, often just with the managers of the offering, in which the "agents" will agree to use their reasonable efforts to solicit purchasers. The agency agreement will typically contain the same representations and warranties, covenants and indemnification obligations as are in the UA that is signed at the same time but without any obligation by the agents to purchase any securities in the event that no purchasers are found.

VII. ALTERNATIVE ARRANGEMENTS

A. At the Market Offerings

(1) Recently, an alternative method of raising capital, the "at the market offering," has been used by many issuers. For this type of offering, an issuer sets up a program to "dribble out" shares into the market at prevailing market prices on a registered basis.

(2) Instead of issuing shares in an underwritten offering, an issuer will engage one or more broker-dealers to act as agents under the program to sell shares on an agency basis. At the market offerings are typically conducted over an extended period of time but generally have a maximum aggregate offering price to be sold over time.

(3) The EDA sets forth this agency relationship and the terms and conditions upon which the agent is directed to sell shares into the market. Neither the issuer nor the agent is obligated to sell any shares until the issuer notifies the agent that it intends to sell and the agent accepts this notice.

(4) The EDA looks very similar to a UA, in part because the agent may have statutory underwriter liability.

B. Basic Provisions of the EDA

(1) The EDA and the UA have similar provisions and points of negotiation, including representations and warranties of the issuer, covenants of the issuer, conditions of the agent's obligations, opinion of issuer's counsel, comfort letter, indemnification and contribution and termination. The agent typically requires the customary diligence protections given to underwriters in firm commitment registered offerings, including legal opinions and comfort letters.

(2) The procedures by which the program is set up and maintained are described in the EDA.

   (a) An issuer must have a shelf registration statement for a primary offering already effective in order to conduct an at the market offering.

   (b) To set up the at the market offering program, the issuer files a prospectus supplement that names the agent and describes the general terms of the EDA, the EDA is signed and the agent receives a signed legal opinion and "10b-5 type" statement

from issuer's counsel, a signed legal opinion and "10b-5 type" statement from agent's counsel and a comfort letter from the issuer's auditors. In addition, a current report on Form 8-K that includes the EDA as an exhibit is filed.

(c) The EDA sets forth the continuing obligations of the parties under the program.

(i) Programs generally require quarterly delivery of opinions and "10b-5 type" statements, comfort letters and certificates, and ongoing "bring down" due diligence is likely. Some recent EDAs include share or dollar thresholds that are tied to specific periods of time (e.g., if $X is sold within Y months after an opinion and comfort letter were delivered to the agent, a new opinion and a new comfort letter would be required before any additional selling could take place).

(ii) Programs will also differ with respect to the frequency of ongoing prospectus supplement filings disclosing the number of shares issued and aggregate proceeds raised under the program. Some EDAs call for quarterly filings of prospectus supplements, while others require disclosure of information about the program in the issuer's 1934 Act periodic reports.

(3) The procedures for actual sales are described in the EDA. Much is left to the discretion of the issuer, including the timing, amount, minimum price and duration of any issuance and sale of shares under the program. Also, the issuer can suspend the offering of shares by notice to the agent.

(a) The agent is usually required to provide written information to the issuer following the close of trading each day shares are sold, including the amount of shares sold, the net proceeds to the issuer and the compensation payable to the agent with respect to such sales.

(b) At each settlement date (usually the third business day following the date a sale is made), the issuer is deemed to have affirmed each of its representations and warranties.

(4) The issuer also agrees to provide additional opinions, comfort letters and certificates if a sale would constitute a "block" sale under Rule 10b-18(a)(4) under the 1934 Act or a "distribution"

within the meaning of Rule 100 of Regulation M under the 1934 Act or if the agent believes it may be deemed an "underwriter" under the 1933 Act in a transaction that is not an at the market offering.

VIII. UNDERWRITING COMPENSATION

A. The principal compensation to underwriters is a commission paid by the issuer (and/or any selling securityholder) by way of a reduction from the public offering price. It is determined as a percentage of the public offering price of the securities, although in equity offerings it is generally expressed in the prospectus in terms of dollars and cents and in debt offerings in terms of a percent of the principal amount of the securities offered.

B. Commissions vary widely and depend upon the nature of the issuer and the underwriter and the size and type of financing and existing market conditions and standards applicable to comparable offerings.

C. The underwriters' commission (frequently referred to as the "gross spread") is generally divided into three pieces. Although each transaction will have a slightly different breakdown, the following is fairly typical:

(1) 20% of the gross spread is paid to the managing underwriter as a management fee to compensate it for originating and processing the transaction; if there is more than one managing underwriter, the management fee will be divided among them on a negotiated basis.

(2) 20% of the gross spread is designated as the underwriting fee (or the "syndicate account"); it is allocated to the underwriters on the basis of their underwriting commitment (as distinguished from the amount of securities they actually sell or are allocated for sale) to compensate them for the risk they have assumed by underwriting a portion of the offering. Before the underwriting fee is distributed to the underwriters, however, all of the underwriters' expenses in connection with the offering (including counsel and experts' fees, travel, advertising, stabilization expenses and "short sale" losses) are deducted.

(3) The balance, approximately 60%, of the gross spread is designated the selling concession (or the "sales commission") and is allocated to the underwriters on the basis of the amount of

securities actually sold by each underwriter (as distinguished from each underwriter's underwriting commitment or its allocation). The selling concession received by each underwriter is used to compensate its brokers in accordance with its internal arrangements and policies.

D. Underwriters frequently realize little if any of their allocable portion of a gross underwriting fee since the expenses of an offering frequently equal or exceed that fee. Underwriters participate in syndications for the prestige involved, in order to obtain selling concessions for the securities they actually sell, to ensure that they will be invited to participate in other syndications in which they might have a greater share of the profits and to ensure that when they are managing an offering, the other firms will "return the favor" and participate in those syndicates.

E. Depending upon the nature of a particular offering, the underwriters (or at least the managing underwriter) may receive additional compensation, such as warrants to purchase stock of the issuer.

IX. FINRA REVIEW OF UNDERWRITING ARRANGEMENTS

A. As members of FINRA, underwriters are subject to the FINRA Rules and to the NASD Rules administered by FINRA when participating in any underwritten public offering.

B. The FINRA Rules and the NASD Rules administered by FINRA prohibit FINRA members from participating in any public offering if any of the underwriting terms are unfair or unreasonable.

C. In most offerings, the managing underwriter (typically through underwriters' counsel) is responsible for filing copies of the underwriting documents, including the UA, AAU and SDA, with FINRA for review. Although offerings by some seasoned issuers are exempt from filing, most public offerings made through FINRA member firms require a filing. The filing, which is required within one business day of filing with the SEC, is made electronically and requires the underwriters to provide information and make representations concerning relationships with the issuer, ownership of the issuer's securities, items of compensation and use of offering proceeds. FINRA reviews the fairness of the underwriting terms including:

(1) the amount of compensation the underwriters will receive in the offering, including any additional compensation, such as warrants;

(2) the fairness of any provision in the UA permitting the underwriters to terminate the UA, particularly provisions such as the general "market out"; and

(3) any material relationships between the issuer and the underwriters that might call into question the reasonableness of the underwriting arrangements, including the underwriters' commissions, ownership of the issuer's securities, rights of first refusal for upcoming offerings or, particularly in an initial public offering, the offering price.

D. Prior to declaring the registration statement effective, the SEC will typically require confirmation from FINRA that it has "no objections" with respect to the fairness and reasonableness of the underwriting terms as presented in the underwriting documents.

NOTES

NOTES

4

Appendix A: Underwriting Agreement

David K. Boston
Willkie Farr & Gallagher LLP

[Primary Offering of Equity (non-shelf); Over-Allotment Option]

[NAME OF CORPORATION]
_____ Shares of Common Stock
($____ par value)

UNDERWRITING AGREEMENT

_____, 201_

[Name of Managing Underwriter][*]
As Representative of the
Several Underwriters
named in Schedule I hereto
[Address of Managing Underwriter]

Ladies and Gentlemen:

[Name of corporation], a _____ corporation (the "Company"), proposes to issue and sell to the several Underwriters named in Schedule I hereto (the "Underwriters") _____ shares (the "[Firm] Shares") of common stock, $___ par value (the "Common Stock"), of the Company. [In addition, for the sole purpose of covering over-allotments in connection with the sale of the Firm Shares, the Company proposes to grant to the Underwriters an option to purchase up to an additional _____ shares (the "Option Shares") of Common Stock. The Firm Shares and any Option Shares purchased pursuant to this Underwriting Agreement are herein referred to as the "Shares."][**]

This is to confirm the agreement concerning the purchase of the Shares from the Company by the Underwriters.

---

[*] If Managing Underwriter is a Co-Representative:
[Name of Co-Representatives]
As Representatives of the
Several Underwriters named
in Schedule I hereto,
c/o [Name of Managing Underwriter]
[Address of Managing Underwriter]

[**] Delete bracketed language if over-allotment option is not granted.

1. **Representations and Warranties**. The Company represents and warrants to, and agrees with, each Underwriter that:

(a) A registration statement on Form S-___ (File No. 333-_____) with respect to the Shares has been prepared by the Company in conformity with the requirements of the Securities Act of 1933, as amended (the "Securities Act"), and the rules and regulations of the Securities and Exchange Commission (the "Commission") thereunder and has been filed with the Commission. Copies of such registration statement and any amendments, and all forms of the related prospectuses contained therein, have been delivered to you. Such registration statement, including the prospectus, Part II, any documents incorporated by reference therein and all financial schedules and exhibits thereto, as amended at the time when it shall become effective, is herein referred to as the "Registration Statement," and the prospectus included as part of the Registration Statement on file with the Commission when it shall become effective or, if the procedure in Rule 430A of the Rules and Regulations (as defined below) is followed, the prospectus that discloses all the information that was omitted from the prospectus on the effective date pursuant to such Rule 430A, and in either case, together with any changes contained in any prospectus filed with the Commission by the Company with your consent after the effective date of the Registration Statement, is herein referred to as the "Final Prospectus." If the procedure in Rule 430A is followed, the prospectus included as part of the Registration Statement on the date when the Registration Statement became effective is referred to herein as the "Effective Prospectus." Any prospectus included in the Registration Statement of the Company and in any amendments thereto prior to the effective date of the Registration Statement is referred to herein as a "Pre-Effective Prospectus." If the Company has filed an abbreviated registration statement to register additional Shares pursuant to Rule 462(b) under the Securities Act (including the exhibits thereto, the "Rule 462 Registration Statement"), then any reference herein to the Registration Statement shall also be deemed to include such Rule 462 Registration Statement. [<u>If Form S-3, insert</u>: Reference made herein to any Pre-Effective Prospectus, Effective Prospectus or to the Final Prospectus, shall include all documents and information incorporated by reference therein prior to its respective

date, and reference made herein to any Pre-Effective Prospectus, Effective Prospectus or to the Final Prospectus, as amended or supplemented, shall be deemed to refer to and include any documents filed after the date of such Pre-Effective Prospectus, Effective Prospectus or Final Prospectus, as the case may be, and so incorporated by reference, under the Securities Exchange Act of 1934, as amended (the "Exchange Act")]. For purposes of this Agreement, the term "Rules and Regulations" means the rules and regulations adopted by the Commission under either the Securities Act or the Exchange Act [If Form S-1, define Exchange Act here], as applicable.

(b) No order preventing or suspending the use of any Pre-Effective Prospectus or any Issuer Free Writing Prospectus (as defined below) has been issued by the Commission and each Pre-Effective Prospectus, at the time of filing thereof, did not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; except that the foregoing shall not apply to statements in or omissions from any Pre-Effective Prospectus in reliance upon, and in conformity with, written information furnished to the Company by you, or by any Underwriter through you, specifically for use in the preparation thereof.

(c) As of the Applicable Time (as defined below) [each] Issuer Free Writing Prospectus(es) issued at or prior to the Applicable Time and listed on Schedule II hereto, [and][,] the Pricing Prospectus (as defined below) [and the information included on Schedule III hereto], all considered together (collectively, the "Pricing Disclosure Package") did not include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading; except that the foregoing shall not apply to statements in or omissions from any Issuer Free Writing Prospectus in reliance upon, and in conformity with, written information furnished to the Company by you, or by any Underwriter through you, specifically for use in the preparation thereof. Each Issuer Free Writing Prospectus, as of its issue date and at all subsequent times through the completion of the public

offer and sale of the Shares, did not, does not and will not include any information that conflicted, conflicts or will conflict with the information contained in the Registration Statement or the Final Prospectus[If Form S-3, insert:, including any document incorporated by reference therein that has not been superseded or modified]. As used in this Agreement:

"Applicable Time" means _____ [a/p]m (New York time) on the date of this Agreement or such other time as agreed to by the Company and you.

"Pricing Prospectus" as of any time means the Pre-Effective Prospectus relating to the Shares that is included in the Registration Statement immediately prior to that time [If Form S-3, insert:, including any document incorporated by reference therein].

"Issuer Free Writing Prospectus" means any "issuer free writing prospectus," as defined in Rule 433(h) under the Securities Act, relating to the Shares in the form filed or required to be filed with the Commission or, if not required to be filed, in the form retained in the Company's records pursuant to Rule 433(g) under the Securities Act.

(d) When the Registration Statement becomes effective and as of [each] [the] Closing Date (as defined in Section 3), the Registration Statement, any post-effective amendment thereto and the Effective Prospectus and the Final Prospectus as amended or supplemented shall conform in all material respects to the requirements of the Securities Act and the Rules and Regulations. At the time the Registration Statement becomes effective, the Registration Statement will not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. The Effective Prospectus, at the time the Registration Statement becomes effective, and the Final Prospectus, at the time the Registration Statement becomes effective and as of [each] [the] Closing Date (unless the term "Final Prospectus" refers to a prospectus which has been provided to the Underwriters for use in connection with the offering of the Shares which differs from the prospectus on file at the Commission at the time the Registration Statement becomes effective, in which case at the time it is first provided to the Underwriters for such use), will not contain

any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading. The representations, warranties and agreements in this paragraph shall not apply to statements in, or omissions from, any such document in reliance upon, and in conformity with, written information furnished to the Company by you, or by any Underwriter through you, specifically for use in the preparation thereof. There is no contract or document required to be described in the Registration Statement or Pricing Disclosure Package, Effective Prospectus or Final Prospectus or to be filed as an exhibit to the Registration Statement which is not described or filed as required.

(e) [If Form S-3, insert: The documents which are incorporated by reference in the Pricing Disclosure Package, the Effective Prospectus or Final Prospectus or from which information is so incorporated by reference, when they became effective or were filed with the Commission, as the case may be, complied in all material respects with the requirements of the Securities Act or the Exchange Act, as applicable, and the Rules and Regulations, and any documents so filed and incorporated by reference subsequent to the effective date of the Registration Statement shall, when they are filed with the Commission, conform in all material respects with the requirements of the Securities Act and the Exchange Act, as applicable, and the Rules and Regulations]. No such documents when they were filed (or, if amendments with respect to such documents were filed, when such amendments were filed), contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading.

(f) [If Emerging Growth Company, insert: From the time of initial confidential submission of the Registration Statement to the Commission (or, if earlier, the first date on which the Company engaged directly or through any person authorized to act on its behalf in any Testing-the-Waters Communication) through the date hereof, the Company has been and is an "emerging growth company," as defined in Section 2(a) of the

Securities Act (an "Emerging Growth Company"). "Testing-the-Waters Communication" means any oral or written communication with potential investors undertaken in reliance on Section 5(d) of the Securities Act.]

(g) The interactive data in eXtensible Business Reporting Language ("XBRL") included or incorporated by reference in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus fairly present the information called for in all material respects and is prepared in accordance with the Commission's rules and guidelines applicable thereto.

(h) _____, whose report appears in the Effective Prospectus and the Final Prospectus, is an independent registered public accounting firm with respect to the Company as required by the Securities Act and the Rules and Regulations. The financial statements and schedules (including the related notes) included [If S-3, insert: or incorporated by reference] in the Registration Statement, any Pre-Effective Prospectus or the Effective Prospectus or Final Prospectus, present fairly the financial condition, the results of the operations and changes in financial condition of the entities purported to be shown thereby at the dates or for the periods indicated and have been prepared in accordance with generally accepted accounting principles applied on a consistent basis throughout the periods indicated. All adjustments necessary for a fair presentation of results for such periods have been made. The selected financial, operating and statistical data set forth in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus under the captions "Prospectus Summary," "Selected Consolidated Financial Data" and "Management's Discussion and Analysis of Financial Condition and Results of Operations" fairly present, when read in conjunction with the Company's financial statements and the related notes and schedules and on the basis stated in the Registration Statement, the information set forth therein.

(i) Each of the Company and its Subsidiaries (as defined in Section 14 hereof) has been duly organized and is validly existing as a corporation in good standing under the laws of the jurisdiction of its organization, with full power and authority (corporate and other) to own or lease its properties and conduct its business as described in the Pricing Disclosure

Package, Effective Prospectus and Final Prospectus, and is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which the character of the business conducted by it or the location of the properties owned or leased by it makes such qualification necessary; each of the Company and its Subsidiaries is in possession of and operating in compliance with all franchises, grants, authorizations, licenses, permits, easements, consents, certificates and orders required for the conduct of its business, all of which are valid and in full force and effect (except where any failure to do so would not result in a material adverse change in the condition (financial or otherwise), business, prospects, properties or results of operations of the Company and its Subsidiaries considered as a whole); and neither the Company nor any of its Subsidiaries has received any notice of proceedings relating to the revocation or modification of any such franchise, grant, authorization, license, permit, easement, consent, certificate or order which, individually or in the aggregate, if the subject of an unfavorable decision, would result in a material adverse change in the condition (financial or otherwise), business, prospects, properties or results of operations of the Company and its Subsidiaries considered as a whole.

(j) The capitalization of the Company as of , 201_ is as set forth under the caption "Capitalization" in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus, and the Common Stock conforms to the description thereof contained under the caption "Description of Common Stock" in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus; the outstanding shares of Common Stock have been, and the Shares, upon issuance and delivery and payment therefor in the manner herein described, will be, duly authorized, validly issued, fully paid and nonassessable. There are no preemptive rights or other rights to subscribe for or to purchase, or any restriction upon the voting or transfer of, any shares of Common Stock pursuant to the Company's [certificate] [articles] of incorporation, by-laws or other governing documents or any agreement or other instrument to which the Company or any of its Subsidiaries is a party or by which any of them may be bound. Neither the filing of the Registration Statement nor the offering or sale of the Shares as contemplated by this Agreement gives rise to any rights, other than

those which have been waived or satisfied, for or relating to the registration of any shares of Common Stock. All of the outstanding shares of capital stock of each Subsidiary of the Company have been duly authorized and validly issued, are fully paid and nonassessable and are owned directly or indirectly by the Company, free and clear of any claim, lien, encumbrance or security interest.

(k) Subsequent to the respective dates as of which information is given in the Pricing Disclosure Package, Effective Prospectus and the Final Prospectus, and except as described or contemplated in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus: neither the Company nor any of its Subsidiaries has incurred any liabilities or obligations, direct or contingent, nor entered into any transactions not in the ordinary course of business, which in either case are material to the Company or such Subsidiary, as the case may be; there has not been any material adverse change in the condition (financial or otherwise), or any adverse development which materially affects, the business, prospects, properties, condition (financial or otherwise) or results of operations of the Company and its Subsidiaries considered as a whole; and there has been no dividend or distribution of any kind declared, paid or made by the Company on any class of its capital stock.

Neither the Company nor any of its Subsidiaries is, or with the giving of notice or lapse of time or both would be, in violation of or in default under, nor will the execution or delivery hereof or consummation of the transactions contemplated hereby result in a violation of, or constitute a default under, the [certificate] [articles] of incorporation, by-laws or other governing documents of the Company or any of its Subsidiaries, or any agreement, contract, mortgage, deed of trust, loan agreement, note, lease, indenture or other instrument, to which the Company or any of its Subsidiaries is a party or by which any of them is bound, or to which any of their properties is subject, nor will the performance by the Company of its obligations hereunder violate any law, rule, administrative regulation or decree of any court, or any governmental agency or body having jurisdiction over the Company, its Subsidiaries or any of their properties, or result in the creation or imposition of any lien, charge, claim or encumbrance upon any

property or asset of the Company or any of its Subsidiaries. Except for permits and similar authorizations required under the Securities Act and the securities or "Blue Sky" laws of certain jurisdictions and for such permits and authorizations which have been obtained, no consent, approval, authorization or order of any court, governmental agency or body or financial institution is required in connection with the consummation of the transactions contemplated by this Agreement.

(l) This Agreement has been duly authorized, executed and delivered by the Company and constitutes a legal, valid and binding obligation of the Company and is enforceable against the Company in accordance with its terms.

(m) The Company and its Subsidiaries have good and marketable title in fee simple to all items of real property and good and marketable title to all personal property owned by them, in each case clear of all liens, encumbrances and defects except such as are described or referred to in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus or such as do not materially affect the value of such property and do not interfere with the use made or proposed to be made of such property by the Company or such Subsidiaries; and any real property and buildings held under lease by the Company and its Subsidiaries are held by them under valid, existing and enforceable leases with such exceptions as are not material and do not interfere with the use made or proposed to be made of such property and buildings by the Company or such Subsidiaries.

(n) Except as described in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus, there is no litigation or governmental proceeding to which the Company or any of its Subsidiaries is a party or to which any property of the Company or any of its Subsidiaries is subject or which is pending or, to the knowledge of the Company, threatened against the Company which individually or in the aggregate might result in any material adverse change in the condition (financial or otherwise), of the Company or materially affect the business, prospects, properties, condition (financial or otherwise) or results of operations of the Company and its Subsidiaries taken as a whole, which would materially and adversely affect the consummation of this Underwriting Agreement or the

transactions contemplated hereby or which is required to be disclosed in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus.

(o) Neither the Company nor any Subsidiary is in violation of any law, ordinance, governmental rule or regulation or court decree to which it may be subject which violation might have a material adverse effect on the condition (financial or otherwise), business, prospects, properties, results of operations or net worth of the Company and its Subsidiaries taken as a whole.

(p) The Company [, and to the Company's knowledge, any of its officers, directors or affiliates] has not taken and may not take, directly or indirectly, any action designed to cause or result in, or which has constituted or which might reasonably be expected to constitute, the stabilization or manipulation of the price of the shares of Common Stock to facilitate the sale or resale of the Shares.

(q) The Company and its Subsidiaries have filed all necessary federal, state and foreign income and franchise tax returns, and all such tax returns are complete and correct in all material respects, and the Company and its Subsidiaries have not failed to pay any taxes which were payable pursuant to said returns or any assessments with respect thereto. The Company has no knowledge of any tax deficiency which has been or is likely to be threatened or asserted against the Company or its Subsidiaries.

(r) The Company and its Subsidiaries maintain a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorizations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets, (iii) access to assets is permitted only in accordance with management's general or specific authorization, (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences and (v) interactive data in XBRL included or incorporated by reference in the Pricing Disclosure Package, Effective Prospectus and Final Prospectus fairly present the information called for in all material

respects and is prepared in accordance with the Commission's rules and guidelines applicable thereto.

(s) The Company and its Subsidiaries maintain "disclosure controls and procedures" (as defined in Rule 13a-14(i) under the Exchange Act) and the Company and its Subsidiaries are in compliance with all applicable effective provisions of the Sarbanes-Oxley Act of 2002, as amended, and the rules and regulations issued thereunder.

(t) The Company and its Subsidiaries maintain insurance of the types and in the amounts generally deemed adequate for its business, including, but not limited to, directors' and officers' insurance, insurance covering real and personal property owned or leased by the Company and its Subsidiaries against theft, damage, destruction, acts of vandalism and all other risks customarily insured against, all of which insurance is in full force and effect. The Company has not been refused any insurance coverage sought or applied for, and the Company has no reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business at a cost that would not materially adversely affect the business, business prospects, properties, condition (financial or otherwise) or results of operations of the Company or its Subsidiaries.

(u) Neither the Company nor any of its Subsidiaries nor, to the best of the Company's knowledge, any of its employees or agents has at any time during the last five years (i) made any unlawful contribution to any candidate for foreign office, or failed to disclose fully any contribution in violation of law, or (ii) made any payment to any foreign, federal or state governmental officer or official or other person charged with similar public or quasi-public duties, other than payments required or permitted by the laws of the United States or any jurisdiction thereof.

(v) None of the Company, any director, officer, agent, employee or affiliate of the Company or any of its Subsidiaries is currently subject to any sanctions administered or enforced by the U.S. government (including, without limitation, the Office of Foreign Assets Control of the U.S. Department of the Treasury or the U.S. Department of State and including,

without limitation, the designation as a "specially designated national" or "blocked person"), the United Nations Security Council, the European Union, Her Majesty's Treasury, or other relevant sanctions authority (collectively, "Sanctions"); and the Company will not use the proceeds of the offering of the Shares hereunder, or lend, contribute or otherwise make available such proceeds to any Subsidiary, joint venture partner or other person or entity, for the purpose of financing the activities of any person currently subject to any Sanctions.

(w) The operations of the Company and its Subsidiaries are and have been conducted at all times in compliance with applicable financial recordkeeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, the applicable money laundering statutes of all jurisdictions where the Company or any of its Subsidiaries conduct business, the rules and regulations thereunder and any related or similar rules, regulations or guidelines, issued, administered or enforced by any domestic or foreign governmental agency (collectively, the "Money Laundering Laws") and no action, suit or proceeding by or before any domestic or foreign court or governmental agency, authority or body or any arbitrator involving the Company or any of its Subsidiaries with respect to the Money Laundering Laws is pending or, to the knowledge of the Company, threatened.

(x) The Company is not an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(y) [For use in the case of a registration statement on Form S-3: The conditions for use of Form S-3, set forth in the General Instructions thereto, have been satisfied.]

[Where appropriate, include additional representations and warranties with respect to important matters such as material contracts, environmental matters, ERISA patents, trademarks, copyrights, inventions, trade names, franchises, specific litigation, regulatory approvals, etc.]

2. **Purchase of the Shares by the Underwriters.**

(a) Subject to the terms and conditions and upon the basis of the representations, warranties and agreements herein set forth, the Company agrees to issue and sell to the Underwriters, and each of the Underwriters agrees, severally and not jointly, to

purchase at a price of $ per Share, the number of [Firm] Shares set forth opposite such Underwriter's name in Schedule I hereto, subject to adjustment in accordance with Section 7 hereof. The Underwriters agree to offer the [Firm] Shares to the public as set forth in the Final Prospectus.

(b) The Company hereby grants to the Underwriters an option to purchase from the Company, solely for the purpose of covering over-allotments in connection with the distribution and sale of the Firm Shares, all or any portion of the Option Shares for a period of thirty (30) days from the date hereof at the purchase price per Share set forth above [If Preferred Stock insert: , plus, if the purchase and sale of Option Shares takes place after the First Closing Date (as hereinafter defined) an amount equal to dividends accrued on the Option Shares from the First Closing Date to the Option Closing Date (as hereinafter defined)]. Option Shares shall be purchased from the Company, severally and not jointly, for the accounts of the several Underwriters in proportion to the number of Firm Shares set forth opposite such Underwriter's name in Schedule I hereto, except that the respective purchase obligations of each Underwriter shall be adjusted by you so that no Underwriter shall be obligated to purchase fractional Option Shares. No Option Shares shall be sold and delivered unless the Firm Shares previously have been, or simultaneously are, sold and delivered.]

3. **Delivery of and Payment for Shares**. Delivery of certificates for the [Firm] Shares [and certificates for the Option Shares, if the option to purchase the same is exercised on or before the third Business Day (as defined in Section 14 hereof) prior to the First Closing Date,] to be purchased by the Underwriters from the Company and payments therefor shall be made at the offices of [Name of Managing Underwriter] (or such other place as mutually may be agreed upon), on the third full Business Day following the date hereof or, if the pricing of the [Firm] Shares occurs after 4:30 p.m., New York City time, on the fourth full Business Day thereafter, or at such other date as shall be determined by you and the Company (the "[First] Closing Date").

[The option to purchase Option Shares granted in Section 2 hereof may be exercised during the term thereof by written notice to the Company from you. Such notice shall set forth the aggregate

number of Option Shares as to which the option is being exercised and the time and date, not earlier than either the [First] Closing Date or the second Business Day after the date on which the option shall have been exercised nor later than the fifth Business Day after the date of such exercise, as determined by you, when the Option Shares are to be delivered (the "Option Closing Date"). Delivery and payment for such Option Shares is to be at the offices set forth above for delivery and payment of the Firm Shares. (The First Closing Date and the Option Closing Date are herein individually referred to as the "Closing Date" and collectively referred to as the "Closing Dates.")]

Delivery of certificates for the Shares shall be made by or on behalf of the Company to you, for the respective accounts of the Underwriters, against payment by you, for the several accounts of the Underwriters, of the purchase price therefor by wire transfer in Federal or other funds immediately available funds to the account(s) specified by the Company. The certificates for the Shares shall be registered in such names and denominations as you shall have requested at least two full Business Days prior to the [applicable] Closing Date, and shall be made available for checking and packaging at a location in New York, New York as may be designated by you at least one full Business Day prior to such Closing Date. Time shall be of the essence and delivery at the time and place specified in this Agreement is a further condition to the obligations of each Underwriter.

4. **Covenants**. The Company covenants and agrees with each Underwriter that:

(a) The Company shall use its best efforts to cause the Registration Statement to become effective under the Securities Act and, if the procedure in Rule 430A of the Rules and Regulations is followed, comply with the provisions of and make all requisite filings with the Commission pursuant to such Rule and to notify you promptly (in writing, if requested) of all such filings. The Company shall notify you promptly of any request by the Commission for any amendment of or supplement to the Registration Statement or the Pricing Disclosure Package, Effective Prospectus or the Final Prospectus or for additional information; the Company shall prepare and file with the Commission, promptly upon your request, any amendments of or supplements to the Registration Statement

or Pricing Disclosure Package, Effective Prospectus or the Final Prospectus which, in your opinion, may be necessary or advisable in connection with the distribution of the Shares, provided that the preparation of such amendments or supplements shall be at your expense if such a request is given nine months or more after the effective date of the Registration Statement; and the Company may not file any amendment of or supplement to the Registration Statement or the Pricing Disclosure Package, Effective Prospectus or the Final Prospectus, [If Form S-3, insert: or file any document under the Exchange Act before the termination of the offering of the Shares by the Underwriters if such document would be deemed to be incorporated by reference into the Effective Prospectus or the Final Prospectus,] which is not approved by you after reasonable notice thereof, provided that such approval may not be unreasonably withheld or delayed. The Company shall advise you promptly of the issuance by the Commission or any state or other regulatory body of any stop order or other order suspending the effectiveness of the Registration Statement, suspending or preventing the use of any Pre-Effective Prospectus, the Pricing Disclosure Package, or the Effective Prospectus or Final Prospectus or suspending the qualification of the Shares for offering or sale in any jurisdiction, or of the institution of any proceedings for any such purpose; and the Company shall use its best efforts to prevent the issuance of any stop order or other such order and, should a stop order or other such order be issued, to obtain as soon as possible the lifting thereof.

(b) The Company shall (i) not make any offer relating to the Shares that would constitute a "free writing prospectus" (as defined in Rule 405 under the Securities Act) required to be filed by the Company with the Commission under Rule 433 under the Securities Act unless you approve its use in writing prior to first use; provided that your prior written consent shall be deemed to have been given in respect of the Issuer Free Writing Prospectus(es) included in Schedule II hereto, (ii) comply with the requirements of Rules 164 and 433 under the Securities Act applicable to any issuer free writing prospectus, including the requirements relating to timely filing with the Commission, legending and record keeping and (iii) not take any action that would result in an Underwriter or the Company

being required to file with the Commission pursuant to Rule 433(d) under the Securities Act a free writing prospectus prepared by or on behalf of such Underwriter that such Underwriter otherwise would not have been required to file thereunder.

(c) The Company agrees that if at any time following issuance of an Issuer Free Writing Prospectus any event occurred or occurs as a result of which such Issuer Free Writing Prospectus would conflict with the information in the Registration Statement, the Pricing Prospectus or the Prospectus or would include an untrue statement of a material fact or omit to state any material fact necessary in order to make the statements therein, in the light of the circumstances then prevailing, not misleading, the Company will give prompt notice thereof to Underwriters and, if requested by the Underwriters, will prepare and furnish without charge to the Underwriters an Issuer Free Writing Prospectus or other document which will correct such conflict, statement or omission; *provided*, *however*, that this representation and warranty shall not apply to any statements or omissions in an Issuer Free Writing Prospectus made in reliance upon and in conformity with information furnished in writing to the Company by the Underwriter expressly for use therein.

(d) [If a term sheet is used, insert: The Company shall prepare a final term sheet (the "Final Term Sheet") reflecting the final terms of the Shares, in form and substance satisfactory to you, and shall file such Final Term Sheet as an issuer free writing prospectus pursuant to Rule 433 under the Securities Act prior to the close of business two Business Days after the date hereof; provided that the Company shall provide you with copies of any such Final Term Sheet a reasonable amount of time prior to such proposed filing and shall not use or file any such document to which you or counsel to the Underwriters shall reasonably object.]

(e) [If Emerging Growth Company, insert: The Company will promptly notify the Underwriters if the Company ceases to be an Emerging Growth Company at any time prior to the later of (i) completion of the distribution of the Shares within the meaning of the Securities Act and (ii) completion of the 180-day restricted period referred to in Section 4(j) hereof.]

(f) The Company shall furnish to the Underwriters, from time to time and without charge, ___[***] copies of the Registration Statement of which _____ shall be signed and shall include exhibits and all amendments and supplements to any of such Registration Statement [If Form S-3, insert: (including any document filed under the Exchange Act and deemed to be incorporated by reference into the Effective Prospectus or the Final Prospectus)], in each case as soon as available and in such quantities as you may from time to time reasonably request.

(g) Within the time during which a Final Prospectus relating to the Shares is required to be delivered under the Securities Act (or, in lieu thereof, the notice referred to in Rule 173(a) under the Securities Act), the Company shall comply with all requirements imposed upon it by the Securities Act, as now and hereafter amended, and by the Rules and Regulations, as from time to time in force, so far as is necessary to permit the continuance of sales of or dealings in the Shares as contemplated by the provisions hereof and the Final Prospectus. If during such period any event occurs as a result of which the Final Prospectus as then amended or supplemented would include an untrue statement of a material fact or omit to state a material fact necessary to make the statements therein, in the light of the circumstances then existing, not misleading, or if during such period it is necessary to amend the Registration Statement or supplement the Final Prospectus to comply with the Securities Act [If Form S-3, insert: or to file under the Exchange Act any document which would be deemed to be incorporated by reference in the Final Prospectus in order to comply with the Securities Act or the Exchange Act], the Company shall promptly notify you and shall amend the Registration Statement or supplement the Final Prospectus [If Form S-3, insert: or file such document] (at the expense of the Company) so as to correct such statement or omission or effect such compliance; provided, however, that the expense of the preparation and delivery of any prospectus required for use nine months or more after the effective date of the

[***] One for each Representative and one for counsel to the Underwriters.

Registration Statement shall be borne by the Underwriters required to deliver such prospectus.

(h) The Company shall take or cause to be taken all necessary action and furnish to whomever you may direct such information as may be required in qualifying the Shares for sale under the laws of such jurisdictions which you shall designate and to continue such qualifications in effect for as long as may be necessary for the distribution of the Shares; except that in no event shall the Company be obligated in connection therewith to qualify as a foreign corporation, or to execute a general consent for service of process.

(i) The Company shall make generally available to its securityholders, in the manner contemplated by Rule 158(b) under the Securities Act, as soon as practicable but in any event not later than 60 days after the end of its fiscal quarter in which the first anniversary date of the effective date of the Registration Statement occurs, an earning statement which will comply with Section 11(a) of the Securities Act covering a period of at least 12 consecutive months beginning after the effective date of the Registration Statement.

(j) The Company will not, during the 180 days following the effective date of the Registration Statement, except with your prior written consent, offer for sale, contract to sell, sell, issue, distribute, grant any option, right or warrant to purchase or otherwise dispose of, directly or indirectly, any shares of Common Stock or any securities convertible into, or exercisable or exchangeable for, shares of Common Stock or register for sale under the Securities Act any shares of Common Stock otherwise than in accordance with this Agreement or as contemplated in the Final Prospectus; provided, however, that the Company may issue, or grant options to purchase, shares of Common Stock pursuant to any option plan existing on the date hereof. The Company further agrees that, notwithstanding the foregoing, if [if Emerging Growth Company, insert: the Company ceases to be an Emerging Growth Company at any time prior to the completion of the 180-day restricted period referred to in this Section 4(j) and] (1) during the last 17 days of the 180-day restricted period described in the preceding sentence, the Company issues a earnings release or material news or a material event relating to the Company

occurs, or (2) prior to the expiration of such 180-day restricted period, the Company announces that it will release earnings results during the 16-day period beginning on the last day of the 180-day period, then the restrictions set forth in the preceding paragraph shall continue to apply until the expiration of the 18-day period beginning on the issuance of the earnings release or the occurrence of the material news or material event.

(k) The Company shall cause each officer and director of the Company and each holder of [1%] [5%] of shares of Common Stock or any securities convertible into, or exercisable or exchangeable for, shares of Common Stock, to furnish to you, on or prior to the date of this Agreement, a letter or letters, in form and substance satisfactory to counsel for the Underwriters, pursuant to which each such person shall agree not to offer for sale, contract to sell, sell, distribute, grant any option, right or warrant to purchase, pledge, hypothecate or otherwise dispose of, directly or indirectly, any shares of Common Stock or any securities convertible into, or exercisable or exchangeable for, shares of Common Stock during the 180 days following the effective date of the Registration Statement, except with your prior written consent.

(l) The Company shall apply the net proceeds of the sale of the Shares in the manner specified in the Prospectus under the heading "Use of Proceeds" [If an initial public offering, insert: and shall file such reports with the Commission with respect to the sale of the Shares and the application of the proceeds therefrom as may be required in accordance with Rule 463 under the Securities Act].

(m) The Company will furnish to its securityholders annual reports containing financial statements audited by independent public accountants and quarterly reports containing financial statements and financial information which may be unaudited. During the period of five years from the date hereof, the Company will deliver to you and, upon request, to each of the other Underwriters, copies of each annual report of the Company and each other report furnished by the Company to its securityholders and will deliver to you, as soon as they are available, copies of any other reports (financial or otherwise) which the Company shall publish or otherwise make available

to any of its securityholders as such, and as soon as they are available, copies of any reports and financial statements furnished to or filed with the Commission.

(n) [If application is to be made to have the Shares listed on a securities exchange, insert: The Company will use its best efforts to have the Shares listed on the _____ Exchange.]

(o) [If the Company elects to rely on Rule 462(b), the Company shall both file a Rule 462(b) Registration Statement with the Commission in compliance with Rule 462(b) and pay the applicable fees in accordance with Rule 111 of the Securities Act by the earlier of (i) 10:00 p.m., New York City time, on the date of this Agreement, and (ii) the time that confirmations are given or sent, as specified by Rule 462(b)(2).]

(p) Whether or not this Agreement becomes effective or is terminated or the sale of the Shares to the Underwriters is consummated, the Company shall pay or cause to be paid (A) all expenses (including stock transfer taxes) incurred in connection with the delivery to the several Underwriters of the Shares, (B) all fees and expenses (including, without limitation, fees and expenses of the Company's accountants and counsel, but excluding fees and expenses of counsel for the Underwriters) in connection with the preparation, printing, filing, delivery and shipping of the Registration Statement (including the financial statements therein and all amendments and exhibits thereto), each Pre-Effective Prospectus, Issuer Free Writing Prospectus, the Effective Prospectus and the Final Prospectus as amended or supplemented and the printing, delivery and shipping of this Agreement and other underwriting documents, including Underwriters' Questionnaires, Underwriters' Powers of Attorney, Blue Sky Memoranda, the Agreement Among Underwriters and Selected Dealer Agreements, (C) all filing fees and fees and disbursements of counsel to the Underwriters incurred in connection with the qualification of the Shares for sale under state securities laws as provided in Section 4(g) hereof, (D) the filing fee of the Financial Industry Regulatory Authority, Inc. ("FINRA") and any applicable expenses of counsel for the Underwriters in connection with a review of the offering by FINRA, [If application is to be made to have the Shares listed on a securities exchange, insert: (E) any applicable listing fees,] (F) the cost

of printing certificates representing the Shares, (G) the cost and charges of any transfer agent or registrar and (H) all other costs and expenses incident to the performance of its obligations hereunder which are not otherwise provided for in this Section. It is understood, however, that, except as provided in this Section, Section 6 and Section 8 hereof, the Underwriters shall pay all of their own costs and expenses, including the fees of their counsel, stock transfer taxes on resale of any of the Shares by them and any advertising expenses connected with any offers they may make. If the sale of the Shares provided for herein is not consummated by reason of acts of the Company pursuant to Section 8(a) hereof which prevent this Agreement from becoming effective, or by reason of any failure, refusal or inability on the part of the Company to perform any agreement on its part to be performed or because any other condition of the Underwriters' obligations hereunder is not fulfilled, unless the failure to perform the agreement or fulfill the condition is due to the default or omission of any Underwriter, the Company shall reimburse the several Underwriters for all reasonable out-of-pocket disbursements (including fees and disbursements of counsel) incurred by the Underwriters in connection with their investigation, preparing to market and marketing the Shares or in contemplation of performing their obligations hereunder. The Company shall not in any event be liable to any of the Underwriters for loss of anticipated profits from the transactions covered by this Agreement.

(q) [If an electronic offering is going to be made, insert: The Company shall cause to be prepared and delivered, at its expense, within one Business Day from the effective date of this Agreement, to you an "electronic prospectus" to be used [by the Underwriters] in connection with the offering and sale of the Shares. As used herein, the term "electronic prospectus" means a form of prospectus, and any amendment or supplement thereto, that meets each of the following conditions: (i) it shall be encoded in an electronic format, satisfactory to you, that may be transmitted electronically by you [and the other Underwriters] to offerees and purchasers of the Shares for at least the period during which a prospectus relating to the Shares is required to be delivered under the Securities Act; (ii) it shall disclose the same information as the paper prospectus and prospectus filed pursuant to EDGAR, except to

the extent that graphic and image material cannot be disseminated electronically, in which case such graphic and image material shall be replaced in the electronic prospectus with a fair and accurate narrative description or tabular representation of such material, as appropriate; and (iii) it shall be in or convertible into a paper format or an electronic format, satisfactory to you, that will allow investors to store and have continuously ready access to the prospectus at any future time, without charge to investors (other than any fee charged for subscription to the Internet as a whole and for on-line time). The Company hereby confirms that it has included or will include in the prospectus filed pursuant to EDGAR or otherwise with the Commission and in the Registration Statement at the time it was declared effective an undertaking that, upon receipt of a request by an investor or his or her representative within the period when a prospectus relating to the Shares is required to be delivered under the Securities Act, the Company shall transmit or cause to be transmitted promptly, without charge, a paper copy of the prospectus.]

5. **Conditions of Underwriters' Obligations**. The respective obligations of the several Underwriters hereunder are subject to the accuracy, at and as of the date hereof and [each] [the] Closing Date (as if made at [such] [the] Closing Date), of the representations and warranties of the Company contained herein, to the performance by the Company of its obligations hereunder and to the following additional conditions:

   (a) The Registration Statement and all post-effective amendments thereto shall have become effective not later than ___ p.m., New York time, on the date hereof, or, with your consent, at a later time and date, not later, however, than _____ p.m., New York time, on the first Business Day following the date hereof, or at such later date and time as may be approved by a majority in interest of the Underwriters; if the Company has elected to rely on Rule 462(b), the Rule 462(b) Registration Statement shall have become effective not later than the earlier of (x) 10:00 p.m., New York City time, on the date hereof, or (y) at such later date and time as may be approved by a majority in interest of the Underwriters; all filings required by Rule 424, Rule 430A and Rule 433 of the Rules and Regulations have been timely made; no stop order suspending the

effectiveness of the Registration Statement or any amendment or supplement thereto shall have been issued; no proceedings for the issuance of such an order shall have been initiated or, to the knowledge of the Company, threatened; and any request of the Commission for additional information (to be included in the Registration Statement or the Final Prospectus or otherwise) shall have been disclosed to you and complied with to your satisfaction.

(b) No Underwriter shall have advised the Company that (i) the Pricing Disclosure Package, Effective Prospectus or Final Prospectus, or any supplement thereto, contains an untrue statement of fact which, in your opinion, is material, or omits to state a fact which, in your opinion, is material and is required to be stated therein or is necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading, or (ii) that the Registration Statement, or any amendment thereto, contains an untrue statement of fact which, in your opinion, is material, or omits to state a fact which, in your opinion is material and is required to be stated therein or is necessary to make the statements therein not misleading.

(c) On or prior to [each] [the] Closing Date, you shall have received from _____, counsel for the Underwriters, such opinion or opinions with respect to the organization of the Company, the validity of the Shares, the Registration Statement, the Pricing Disclosure Package, Effective Prospectus and the Final Prospectus, the validity of the Underwriting Agreement and other related matters as you reasonably may request and such counsel shall have received such papers and information from the Company as they request to enable them to pass upon such matters. [If appropriate, insert: In rendering such opinion, such counsel shall be entitled to rely on the opinion delivered pursuant to Section 5(d) as to all matters governed by the law of the State of _____.]

(d) On [each] [the] Closing Date there shall have been furnished to you the opinion (addressed to the Underwriters) of _____, counsel for the Company, dated [such] [the] Closing Date and in form and substance satisfactory to counsel for the Underwriters [If appropriate insert: and stating that it may be relied upon by counsel for the Underwriters in giving their opinion], to the effect that:

(i) Each of the Company and its Subsidiaries has been duly organized and is validly existing as a corporation in good standing under the laws of the jurisdiction of its organization, with full corporate power and authority to own or lease its properties and conduct its business as described in the Pricing Disclosure Package and the Final Prospectus, and is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which the character of the business conducted by it or the location of the properties owned or leased by it makes such qualification necessary.

(ii) The authorized, issued and outstanding Common Stock of the Company as of _____, 201_ is as set forth under the caption "Capitalization" in the Pricing Disclosure Package and the Final Prospectus, and the Common Stock conforms to the description thereof contained under the caption "Description of Common Stock" in the Pricing Disclosure Package and the Final Prospectus. The outstanding shares of Common Stock have been, and the Shares, upon issuance and delivery and payment therefor in the manner herein described, will be, duly authorized, validly issued, fully paid and nonassessable. There are no preemptive or other rights to subscribe for or to purchase, or any restriction upon the voting or transfer of, any shares of Common Stock pursuant to the Company's [certificate] [articles] of incorporation, by-laws, other governing documents or any agreement or other instrument known to such counsel to which the Company or any of its Subsidiaries is a party or by which any of them is bound; and to the best of such counsel's knowledge, neither the filing of the Registration Statement nor the offering or sale of the Shares as contemplated by this Agreement gives rise to any rights, other than those which have been waived or satisfied, for or relating to the registration of any shares of Common Stock. All of the outstanding shares of capital stock of each Subsidiary of the Company have been duly authorized and validly issued, are fully paid and nonassessable and are owned directly or indirectly by the Company, free and clear of any claim, lien, encumbrance or security interest.

(iii) Neither the Company nor any of its Subsidiaries is, or with the giving of notice or lapse of time or both would be, in violation of or in default under, nor will the execution or delivery hereof or consummation of the transactions contemplated hereby result in a violation of, or constitute a default under, the [certificate] [articles] of incorporation, by-laws or other governing documents of the Company or any of its Subsidiaries, or any agreement, contract, mortgage, deed of trust, loan agreement, note, lease, indenture or other instrument known to such counsel, to which the Company or any of its Subsidiaries is a party or by which any of them is bound, or to which any of their properties is subject, nor will the performance by the Company of its obligations hereunder violate any law, rule, administrative regulation or decree of any court or any governmental agency or body having jurisdiction over the Company, its Subsidiaries or their properties, or result in the creation or imposition of any lien, charge, claim or encumbrance upon any property or asset of the Company or any of its Subsidiaries. Except for permits and similar authorizations required under the Securities Act and the securities or "Blue Sky" laws of certain jurisdictions and for such permits and authorizations which have been obtained, no consent, approval, authorization or order of any court, governmental agency or body or financial institution is required in connection with the consummation of the transactions contemplated by this Agreement.

(iv) This Agreement has been duly authorized, executed and delivered by the Company and, assuming capacity, due authorization, execution and delivery by the other parties hereto, constitutes the legal, valid and binding obligation of the Company and is enforceable against the Company in accordance with its terms, except as rights to indemnity may be limited by Federal or state securities laws and except as (i) may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting creditors' rights generally and (ii) is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).

(v) The Registration Statement and all post-effective amendments thereto and the Rule 462(b) Registration Statement, if any, have become effective under the Securities Act and, to the best of such counsel's knowledge, no stop order suspending the effectiveness of the Registration Statement has been issued and no proceedings for that purpose have been instituted or are pending before or contemplated by the Commission and any and all filings required by Rule 424 and Rule 430A of the Rules and Regulations have been made; the Registration Statement and the Effective Prospectus and the Final Prospectus and any amendment or supplement thereto [If Form S-3, insert: (including any document incorporated by reference into the Effective Prospectus and the Final Prospectus)], as of their respective effective dates and as of [each] [the] Closing Date, complied in all material respects with the requirements of the Securities Act and the Rules and Regulations (except that counsel need express no opinion with respect to the financial statements and supporting notes and schedules and other financial [, accounting and statistical] data); [the conditions for use of Form S-3, set forth in the General Instructions thereto, have been satisfied;] and such counsel has no reason to believe that (A) the Registration Statement or any amendment thereto at the time it became effective contained any untrue statement of a material fact or omitted to state any material fact required to be stated therein or necessary to make the statements therein not misleading, (B) on the date of this agreement or on [such] [the] Closing Date, the Effective Prospectus and the Final Prospectus or any amendment or supplement thereto [If Form S-3, insert: (including any document filed under the Exchange Act and deemed to be incorporated by reference into the Effective Prospectus and the Final Prospectus)] (unless the term "Final Prospectus" refers to a prospectus which has been provided to the Underwriters by the Company for use in connection with the offering of the Shares which differs from the prospectus on file at the Commission at the time the Registration Statement became effective, in which case at the time it was first provided to the Underwriters

for such use) contained or contain any untrue statement of a material fact or omitted or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, or (C) at the Applicable Time, the Pricing Disclosure Package contained any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, except that counsel need not express a belief as to the financial statements and supporting notes and schedules and other financial [, accounting and statistical] data.

(vi) All descriptions in the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus of statutes, regulations, legal or governmental proceedings, contracts and other documents are accurate and fairly present the information required to be shown under the Securities Act; and such counsel does not know of any contracts or documents of a character required to be summarized or described therein [If Form S-3, insert: (or required to be filed under the Exchange Act if upon such filing they would be incorporated, in whole or in part, by reference therein)] or to be filed as exhibits thereto which are not so summarized, described or filed, nor does such counsel know of any pending or threatened litigation or any governmental proceeding, statute or regulation required to be described in Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus which is not so described.

[Consideration should be given to the inclusion of additional clauses with respect to important matters such as environmental matters, patents, trademarks, copyrights, inventions, trade names, franchises, specific litigation, regulatory approvals, material contracts, etc.]

In rendering their opinion as aforesaid, such counsel may rely as to matters of fact upon certificates of officers of the Company and written communications from the Commission, FINRA and state officials.

(e) There shall have been furnished to you a certificate of the Company, dated [such] [the] Closing Date and addressed to you, signed by the Chief Executive Officer and by the Chief Financial Officer of the Company to the effect that:

(i) The representations and warranties of the Company in this Agreement are true and correct, as if made at and as of [such] [the] Closing Date, and the Company has complied with all the agreements and satisfied all the conditions on its part to be performed or satisfied at or prior to [such] [the] Closing Date;

(ii) No stop order suspending the effectiveness of the Registration Statement has been issued, and no proceedings for that purpose have been initiated or are pending or, to their knowledge, contemplated;

(iii) Any and all filings required by Rule 424 and Rule 430A of the Rules and Regulations have been timely made;

(iv) The signers of said certificate have carefully examined the Registration Statement, the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus, and any amendments or supplements thereto [If Form S-3, insert: (including any documents filed under the Exchange Act and deemed to be incorporated by reference into the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus)], and such documents contain all statements and information required to be included therein; the Registration Statement or any amendment thereto does not include any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading; the Pricing Disclosure Package or any supplements thereto did not as of the Applicable Time include any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and the Effective Prospectus and the Final Prospectus or any supplements thereto do not include any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in

the light of the circumstances under which they were made, not misleading; and

(v) Since the effective date of the Registration Statement, there has occurred no event required to be set forth in an amendment or supplement to the Registration Statement or the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus which has not been so set forth [If Form S-3, insert:, and there has been no document required to be filed under the Exchange Act and the Rules and Regulations that upon such filing would be deemed to be incorporated by reference into the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus that has not been so filed].

(vi) Since the effective date of the Registration Statement, neither the Company nor any of its Subsidiaries shall have sustained any loss by strike, fire, flood, accident or other calamity (whether or not insured), or shall have become a party to or the subject of any litigation, which is material to the Company or its Subsidiaries taken as a whole, nor shall there have been a material adverse change in the general affairs, business, key personnel, capitalization, financial position, earnings or net worth of the Company and its Subsidiaries, whether or not arising in the ordinary course of business, which loss, litigation or change, in your judgment, shall render it inadvisable to proceed with the delivery of the Shares.

(f) On the date of this Agreement and on [each] [the] Closing Date you shall have received a letter of _____, dated the date hereof or [such] [the] Closing Date, as applicable, and addressed to you, in form and substance previously approved by you, confirming that they are an independent registered public accounting firm with respect to the Company and its Subsidiaries within the meaning of the Securities Act and the Rules and Regulations, and stating, as of the date of such letter (or, with respect to matters involving changes or developments since the respective dates as of which specified financial information is given or incorporated in the Pricing Disclosure Package, the Effective Prospectus and the Final Prospectus, as of a date not more than five days prior to the date of such letter), the conclusions and findings of such firm

with respect to the financial information and other matters covered by its letter delivered to you concurrently with the execution of this Agreement, and confirming the conclusions and findings set forth in such prior letter.

(g) You shall have been furnished such additional documents and certificates as you may reasonably request.

(h) [If application is to be made to have the Shares listed on a securities exchange, insert: The Shares shall have been duly authorized for listing on the _____ Exchange.]

All such opinions, certificates, letters and documents shall be in compliance with the provisions hereof only if they are satisfactory in form and substance to you and to counsel for the Underwriters. The Company shall furnish you with such conformed copies of such opinions, certificates, letters and other documents as you shall reasonably request. If any of the conditions specified in this Section 5 shall not have been fulfilled when and as required by this Agreement, this Agreement and all obligations of the Underwriters hereunder may be canceled at, or at any time prior to, [each] [the] Closing Date, by you[; provided, however, that any failure to satisfy any of the conditions to be satisfied as of the Option Closing Date shall not affect the purchase and sale of the Firm Shares as of the First Closing Date]. Any such cancellation shall be without liability of the Underwriters to the Company. Notice of such cancellation shall be given to the Company in writing, or by telephone and confirmed in writing.

6. **Indemnification and Contribution.**

(a) The Company shall indemnify and hold harmless each Underwriter against any loss, claim, damage or liability, joint or several, as incurred, to which such Underwriter may become subject, under the Securities Act or otherwise, insofar as such loss, claim, damage or liability (or action in respect thereof) arises out of or is based upon (i) any untrue statement or alleged untrue statement made by the Company in Section 1 hereof, or (ii) any untrue statement or alleged untrue statement of a material fact contained (A) in the Registration Statement, any Pre-Effective Prospectus, the Effective Prospectus, the Final Prospectus or any Issuer Free Writing Prospectus [or any electronic prospectus] or any amendment or supplement

thereto, or (B) in any blue sky application or other document executed by the Company specifically for that purpose or based upon written information furnished by the Company filed in any state or other jurisdiction in order to qualify any or all of the Shares under the securities laws thereof (any such application, documents or information being hereinafter called a "Blue Sky Application"), or (iii) the omission or alleged omission to state in the Registration Statement or any amendment thereto a material fact required to be stated therein or necessary to make the statements therein not misleading, or the omission or alleged omission to state in any Pre-Effective Prospectus, the Effective Prospectus, the Final Prospectus or any Issuer Free Writing Prospectus [or any electronic prospectus] or any supplement thereto or in any Blue Sky Application a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; and shall reimburse each Underwriter for any legal or other reasonable expenses as incurred by such Underwriter in connection with investigating or defending against or appearing as a third-party witness in connection with any such loss, claim, damage, liability or action, notwithstanding the possibility that payments for such expenses might later be held to be improper, in which case the person receiving them shall promptly refund them; except that the Company shall not be liable in any such case to the extent, but only to the extent, that any such loss, claim, damage or liability arises out of or is based upon an untrue statement or alleged untrue statement or omission or alleged omission made in reliance upon and in conformity with written information furnished to the Company through you by or on behalf of any Underwriter specifically for use in the preparation of the Registration Statement, any Pre-Effective Prospectus, the Effective Prospectus, the Final Prospectus or any Issuer Free Writing Prospectus [or any electronic prospectus] or any amendment or supplement thereto, or any Blue Sky Application.

(b) Each Underwriter severally, but not jointly, shall indemnify and hold harmless the Company against any loss, claim, damage or liability, joint or several, as incurred, to which the Company may become subject, under the Securities Act or otherwise, insofar as such loss, claim, damage or liability (or action in

respect thereof) arises out of or is based upon (i) any untrue statement or alleged untrue statement of a material fact contained (A) in the Registration Statement, any Pre-Effective Prospectus, the Effective Prospectus, the Final Prospectus or any Issuer Free Writing Prospectus [or any electronic prospectus] or any amendment or supplement thereto, or (B) in any Blue Sky Application, or (ii) the omission or alleged omission to state in the Registration Statement or any amendment thereto a material fact required to be stated therein or necessary to make the statements therein not misleading, or the omission or alleged omission to state in any Pre-Effective Prospectus, the Effective Prospectus, Final Prospectus or any Issuer Free Writing Prospectus [or any electronic prospectus] or any supplement thereto or in any Blue Sky Application a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading; except that such indemnification shall be available in each such case to the extent, but only to the extent, that such untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with written information furnished to the Company through you by or on behalf of such Underwriter specifically for use in the preparation thereof; and shall reimburse any legal or other expenses reasonably incurred by the Company in connection with investigation or defending against any such loss, claim, damage, liability or action.

(c) Promptly after receipt by an indemnified party under subsection (a) or (b) above of notice of any claim or the commencement of any action, the indemnified party shall, if a claim in respect thereof is to be made against the indemnifying party under such subsection, notify the indemnifying party in writing of the claim or the commencement of that action; the failure to notify the indemnifying party shall not relieve it from any liability which it may have to an indemnified party otherwise than under such subsection. If any such claim or action shall be brought against an indemnified party, and it shall notify the indemnifying party thereof, the indemnifying party shall be entitled to participate therein and, to the extent that it wishes, jointly with any other similarly notified indemnifying party, to assume the defense thereof with counsel reasonably

satisfactory to the indemnified party. After notice from the indemnifying party to the indemnified party of its election to assume the defense of such claim or action, the indemnifying party shall not be liable to the indemnified party under such subsection for any legal or other expenses subsequently incurred by the indemnified party in connection with the defense thereof other than reasonable costs of investigation; except that you shall have the right to employ counsel to represent you and those other Underwriters who may be subject to liability arising out of any claim in respect of which indemnity may be sought by the Underwriters against the Company under such subsection if, in your reasonable judgment, based upon the advice of counsel, it is advisable for you and those Underwriters to be represented by separate counsel, and in that event the fees and expenses of such separate counsel shall be paid by the Company.

(d) If the indemnification provided for in this Section 6 is unavailable or insufficient to hold harmless an indemnified party under subsection (a) or (b) above, then each indemnifying party shall contribute to the amount paid or payable by such indemnified party as a result of the losses, claims, damages or liabilities referred to in subsection (a) or (b) above (i) in such proportion as is appropriate to reflect the relative benefits received by the Company on the one hand and the Underwriters on the other from the offering of the Shares or (ii) if the allocation provided by clause (i) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Company on the one hand and the Underwriters on the other in connection with the statements or omissions that resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative benefits received by the Company on the one hand and the Underwriters on the other shall be deemed to be in the same proportion as the total net proceeds from the offering of the Shares (before deducting expenses) received by the Company bear to the total underwriting discounts and commissions received by the Underwriters, in each case as set forth in the table on the cover page of the Final Prospectus. Relative fault shall be determined by reference to, among other things, whether the untrue or alleged

untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by the Company or the Underwriters and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such untrue statement or omission. The Company and the Underwriters agree that it would not be just and equitable if contributions pursuant to this subsection (d) were to be determined by pro rata allocation (even if the Underwriters were treated as one entity for such purpose) or by any other method of allocation which does not take into account the equitable considerations referred to in the first sentence of this subsection (d). The amount paid or payable by an indemnified party as a result of the losses, claims, damages or liabilities referred to in the first sentence of this subsection (d) shall be deemed to include any legal or other expenses reasonably incurred by such indemnified party in connection with investigating or defending against any action or claim which is the subject of this subsection (d). Notwithstanding the provisions of this subsection (d), no Underwriter shall be required to contribute any amount in excess of the amount by which the total price at which the Shares underwritten by it and distributed to the public were offered to the public exceeds the amount of any damages that such Underwriter has otherwise been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The Underwriters' obligations in this subsection (d) to contribute are several in proportion to their respective underwriting obligations and not joint. Each party entitled to contribution agrees that upon the service of a summons or other initial legal process upon it in any action instituted against it in respect of which contribution may be sought, it shall promptly give written notice of such service to the party or parties from whom contribution may be sought, but the omission so to notify such party or parties of any such service shall not relieve the party from whom contribution may be sought from any obligation it may have hereunder or otherwise (except as specifically provided in subsection (c) hereof).

(e) The obligations of the Company under this Section 6 shall be in addition to any liability which the Company may otherwise have, and shall extend, upon the same terms and conditions, to each officer and director of each Underwriter and to each person, if any, who controls any Underwriter within the meaning of the Securities Act; and the obligations of the Underwriters under this Section 6 shall be in addition to any liability that the respective Underwriters may otherwise have, and shall extend, upon the same terms and conditions, to each director of the Company (including any person who, with his consent, is named in the Registration Statement as about to become a director of the Company), to each officer of the Company who has signed the Registration Statement and to each person, if any, who controls the Company within the meaning of the Securities Act, in either case, whether or not such person is a party to any action or proceeding.

7. **Substitution of Underwriters**. If any Underwriter defaults in its obligation to purchase the number of Shares which it has agreed to purchase under this Agreement, the non-defaulting Underwriters shall be obligated to purchase (in the respective proportions which the number of Shares set forth opposite the name of each non-defaulting Underwriter in Schedule I hereto bears to the total number of Shares set forth opposite the names of all the non-defaulting Underwriters in Schedule I hereto) the Shares which the defaulting Underwriter agreed but failed to purchase; except that the non-defaulting Underwriters shall not be obligated to purchase any of the Shares if the total number of Shares which the defaulting Underwriter or Underwriters agreed but failed to purchase exceeds 10% of the total number of [Firm] Shares, and any non-defaulting Underwriter shall not be obligated to purchase more than 110% of the number of Shares set forth opposite its name in Schedule I hereto [plus the total number of Option Shares,] purchasable by it pursuant to the terms of Section 2. If the foregoing maximums are exceeded, (i) the non-defaulting Underwriters, and any other underwriters satisfactory to you who so agree, shall have the right, but shall not be obligated, to purchase (in such proportions as may be agreed upon among them) all the Shares. If the non-defaulting Underwriters or the other underwriters satisfactory to you do not elect to purchase the Shares which the defaulting Underwriter or Underwriters agreed but failed to purchase, this Agreement shall terminate without liability on the part of any non-defaulting Underwriter or the Company

except for the payment of expenses to be borne by the Company and the Underwriters as provided in Section (4)(p) and the indemnity and contribution agreements of the Company and the Underwriters contained in Section 6 hereof.

Nothing contained herein shall relieve a defaulting Underwriter of any liability it may have for damages caused by its default. If the other underwriters satisfactory to you are obligated or agree to purchase the Shares of a defaulting Underwriter, either you or the Company may postpone the [First] Closing Date for up to five full Business Days in order to effect any changes that may be necessary in the Registration Statement, the Pricing Disclosure Package, the Effective Prospectus or the Final Prospectus or in any other document or agreement, and to file promptly any amendments or any supplements to the Registration Statement, the Pricing Disclosure Package, the Effective Prospectus or the Final Prospectus which in your opinion may thereby be made necessary.

8. **Effective Date and Termination.**

(a) This Agreement shall become effective at ____ a.m., New York City time, on the first full Business Day following the earlier of (i) the date hereof, or (ii) the day on which you release the initial public offering of the [Firm] Shares for sale to the public. You shall notify the Company immediately after you have taken any action which causes this Agreement to become effective. Until this Agreement is effective, it may be terminated by the Company or by you by giving notice as hereinafter provided to you or by you by giving notice as hereinafter provided to the Company, except that the provisions of Section 4(p) and Section 6 shall at all times be effective. For purposes of this Agreement, the release of the initial public offering of the [Firm] Shares for sale to the public shall be deemed to have been made when you release, by telegram or otherwise, firm offers of the [Firm] Shares to securities dealers or release for publication a newspaper advertisement relating to the [Firm] Shares, whichever occurs first.

(b) Until the [First] Closing Date, this Agreement may be terminated by you by giving notice as hereinafter provided to the Company, if (i) the Company shall have failed, refused or been unable, at or prior to the [First] Closing Date, to perform any agreement on its part to be performed hereunder unless the failure to perform any agreement is due to the default or

omission by any Underwriter, (ii) any other condition of the obligations of the Underwriters hereunder is not fulfilled, (iii) trading in securities generally on the New York Stock Exchange or the American Stock Exchange or the over-the-counter market shall have been suspended or minimum or maximum prices shall have been established on either of such exchanges or such market by the Commission or by such exchange or other regulatory body or governmental authority having jurisdiction, (iv) trading or quotation in any of the Company's securities shall have been suspended or limited by the Commission or by such exchange or other regulatory body or governmental authority having jurisdiction, (v) a general banking moratorium shall have been declared by Federal or state authorities, (vi) a material disruption in securities settlement, payment or clearance services in the United States shall have occurred, (vii) there shall have been any downgrading or any notice of intended or potential downgrading in the rating accorded any securities of the Company or its Subsidiaries by any "nationally recognized statistical rating organization" as such term is defined for purposes of Rule 436(g)(2) under the Securities Act, (viii) there shall have been any material adverse change in general economic, political or financial conditions or if the effect of international conditions on the financial markets in the United States shall be such as, in your judgment, makes it inadvisable to proceed with the delivery of the Shares, or (ix) any attack on, outbreak or escalation of hostilities, declaration of war or act of terrorism involving the United States or any other national or international calamity or emergency if, in your judgment, the effect of any such attack, outbreak, escalation, declaration, act, calamity or emergency makes it impractical or inadvisable to proceed with the completion of the public offering or the delivery of the Shares. Any termination of this Agreement pursuant to this Section 8 shall be without liability on the part of the Company or any Underwriter, except as otherwise provided in Sections 4(p) and 6 hereof.

Any notice referred to above may be given at the address specified in Section 10 hereof in writing or by telegraph or telephone, and if by telegraph or telephone, shall be immediately confirmed in writing.

(c) This Agreement may also be terminated as provided in Section 7 hereof.

9. **Survival of Indemnities, Contribution, Warranties and Representations**. The indemnity and contribution agreements contained in Section 6 and the representations, warranties and agreements of the Company in Sections 1 and 4(a), (b), (f), (g), (h), (i), (j), (k) and (n) shall survive the delivery of the Shares to the Underwriters hereunder and shall remain in full force and effect, regardless of any termination or cancellation of this Agreement or any investigation made by or on behalf of any indemnified party.

10. **Notices**. Except as otherwise provided in this Agreement, (a) whenever notice is required by the provisions of this Agreement to be given to the Company, such notice shall be in writing addressed and mailed or delivered to the Company at _____, Attention: _____; and (b) whenever notice is required by the provisions of this Agreement to be given to the several Underwriters, such notice shall be in writing addressed and mailed or delivered to [If Co-Representative(s) insert: you in care of] [Name and Address of Managing Underwriter].

11. **Information Furnished by Underwriters**. The statements set forth in the last paragraph on the cover page [refer to paragraph containing stabilization language, if appropriate] and under the caption "Underwriting" in any Pre-Effective Prospectus and in the Effective Prospectus and the Final Prospectus, [except for the statements made in the paragraph under the caption "Underwriting" in the Effective Prospectus and the Final Prospectus relating to sales or dispositions by the Company] constitute the only written information furnished by or on behalf of any Underwriter referred to in paragraphs (b) and (d) of Section 1 hereof and in paragraphs (a) and (b) of Section 6 hereof.

12. **Parties**. This Agreement is made solely for the benefit of the several Underwriters, the Company, any officer, director or controlling person referred to in Section 6 hereof, and their respective successors and assigns, and no other person shall acquire or have any right by virtue of this Agreement. The term "successors and assigns," as used in this Agreement, shall not include any purchaser of any of the Shares from any of the Underwriters merely by reason of such purchase.

13. **No Fiduciary Relationship**. The Company acknowledges and agrees that each Underwriter in providing underwriting services to

the Company in connection with the offering of the Shares, including in acting pursuant to the terms of this Agreement, has acted and is acting as an independent contractor on an arm's length basis and not as a fiduciary and the Company does not intend such Underwriter to act in any capacity other than as an independent contractor, including as a fiduciary or in any other position of higher trust. The Company shall be responsible for making its own independent investigation and appraisal of the transactions contemplated by this Agreement and the Underwriters shall have no responsibility or liability with respect thereto.

14. **Definition of "Business Day" and "Subsidiary"**. For purposes of this Agreement, (a) "Business Day" means any day on which the New York Stock Exchange, Inc. is open for trading, and (b) "Subsidiary" has the meaning set forth in Rule 405 under the Securities Act.

15. **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without giving effect to the choice of law or conflict of laws principles thereof.

16. **Counterparts**. This Agreement may be signed in one or more counterparts, each of which shall constitute an original and all of which together shall constitute one and the same agreement.

Please confirm, by signing and returning to us ____ [two copies for each Representative] counterparts of this Agreement, that you are acting on behalf of yourselves and the several Underwriters and that the foregoing correctly sets forth the agreement among the Company and the several Underwriters.

Very truly yours,

[Name of Corporation]

By: _____
Name:
Title:

Confirmed and accepted as of the date first above mentioned:

[If Managing Underwriter is the sole Representative, insert:

[Name of Managing Underwriter]
As Representative of the Several Underwriters named in Schedule I hereto

By: _____
Authorized Signatory]

[If Managing Underwriter is not the sole Representative, insert:

[Name of Managing Underwriter]

[Name(s) of other co-representatives]
As Representatives of the Several Underwriters named in Schedule I hereto

By: [Name of Managing Underwriter]

By: _____
Authorized Signatory]

SCHEDULE I

Underwriting Agreement dated _____, 201_

Underwriter	**Number of Firm Shares to be Purchased**
Total	

SCHEDULE II

Underwriting Agreement dated _____, 201_

Issuer Free Writing Prospectuses included in the Pricing Disclosure Package

SCHEDULE III

Underwriting Agreement dated _____, 201_

Information that is part of the Pricing Disclosure Package but not included in Schedule II

NOTES

5

Appendix B: Agreement Among Underwriters

David K. Boston
Willkie Farr & Gallagher LLP

[NAME OF CORPORATION]

Shares of Common Stock

($_____par value)

AGREEMENT AMONG UNDERWRITERS

_____, 201_

[Name of Managing Underwriter]
As Representative of the several
Underwriters named in Schedule I
to Exhibit A annexed hereto
[Address of Managing Underwriter]

Ladies and Gentlemen:

We understand that [name of corporation], a _____ corporation (the "Company"), desires to enter into an agreement, substantially in the form of Exhibit A hereto (the "Underwriting Agreement"). The Underwriting Agreement provides for the sale by the Company to you and the other prospective Underwriters named in Schedule I to the Underwriting Agreement, severally and not jointly, of an aggregate of _____ shares (the "Firm Shares") of common stock, $_____ par value, of the Company (such class of stock being herein called "Common Stock"). [If over-allotment option, insert: In addition, the Company, pursuant to the Underwriting Agreement, will grant to the Underwriters an option to purchase up to an additional _____ shares (the "Option Shares") of Common Stock solely for the purpose of covering over-allotments in connection with the sale of the Firm Shares.] The Firm Shares [and any Option Shares] purchased pursuant to the Underwriting Agreement are herein called the "Stock".

We understand that changes may be made in those who are to be Underwriters and in the respective number of shares of Stock to be purchased by them, but that the number of shares of Stock to be purchased by us as set forth in said Schedule I will not be changed without our consent except as provided herein or in the Underwriting Agreement. The parties on whose behalf you execute the Underwriting Agreement are herein called the "Underwriters".

We desire to confirm the agreement among you, the undersigned and the other Underwriters with respect to the purchase of the Stock by the Underwriters, severally and not jointly, from the Company. The aggregate

number of shares of Stock which any Underwriter will be obligated to purchase from the Company pursuant to the terms of the Underwriting Agreement is herein called the "Underwriting Obligation" of that Underwriter.

1. AUTHORITY AND COMPENSATION OF REPRESENTATIVE

We hereby authorize you, as our representative (the "Representative") and on our behalf, (a) to negotiate the terms of and to enter into an agreement with the Company, in substantially the form attached hereto as Exhibit A, but with such changes therein as in your judgment will not be materially adverse to the Underwriters, providing for the purchase by us, severally and not jointly, from the Company, at the purchase price per share determined as set forth in such Exhibit A, of the number of Firm Shares set forth opposite our name in Schedule I to such Exhibit A, [and our proportionate share of the Option Shares which you determine to be purchased,] (b) to exercise all the authority and discretion vested in the Underwriters and in you by the provisions of the Underwriting Agreement, (c) to take all such action as you in your discretion may deem necessary or advisable in order to carry out the provisions of the Underwriting Agreement and of this Agreement, and the sale and distribution of the Stock, (d) to require that a final term sheet or other "free writing prospectus" (as defined in Rule 405 under the 1933 Act (as defined below) (a "Free Writing Prospectus")) be delivered in connection with the public offering, and (e) to determine all matters relating to the public advertisement of the Stock.

As our share of the compensation for your services hereunder, we will pay to you, and we authorize you to charge to our account on the First Closing Date [and on the Option Closing Date] referred to in the Underwriting Agreement, $_____ per share in respect of the aggregate number of Firm Shares [and Option Shares, respectively,] which we shall agree to purchase pursuant to the Underwriting Agreement.

2. PUBLIC OFFERING OF STOCK

The sale of the Stock to the public is to be made, as herein provided, as soon after the registration statement relating to the Stock becomes effective as in your judgment is advisable. The purchase price to be paid by the Underwriters for the Stock and the initial public offering price are to be determined by agreement between you and the Company. The Stock shall be first offered to the public at the initial public offering price as so

determined (the "Initial Public Offering Price"). You will advise us by telegraph or telephone when the Stock shall be released for offering, when the registration statement relating to the Stock shall become effective and the price at which the Stock is initially to be offered. We agree not to sell any of the Stock until the later of (a) your release of it for that purpose and (b) to the extent a final term sheet or other Free Writing Prospectus is required by you to be delivered in connection with the public offering, the time of such delivery to the purchasers. We authorize you, after the initial public offering, to change the public offering price, the concession and the reallowance if, in your sole discretion, such action becomes desirable by reason of changes in general market conditions or otherwise. As used herein, the terms "Registration Statement", "Pre-Effective Prospectus" and "Final Prospectus" shall have the meanings ascribed to such terms in the Underwriting Agreement. The public offering price at the time in effect is herein called the "Offering Price". After notice from you that the Stock is released for public sale, we will offer to the public in conformity with the provisions hereof and with the terms of offering set forth in the Final Prospectus such shares of our Stock as you advise us are not reserved. [For non-reporting companies, insert: We agree not to offer or sell any of the Stock to persons over whose accounts we exercise investment discretion without their specific advance consent.]

3. OFFERING TO DEALERS AND RETAIL SALES

We authorize you to reserve for offering and sale, and on our behalf to sell, to retail purchasers (such sales being herein called "Retail Sales") and to dealers selected by you (such dealers, among whom any Underwriter may be included, being herein called "Selected Dealers") all or any part of our Stock as you, in your sole discretion, shall determine. Such sales, if any, shall be made (a) in the case of Retail Sales, at the Offering Price, and (b) in the case of sales to Selected Dealers, at the Offering Price less such concession or concessions as you, in your sole discretion, shall determine. Except for such sales as are designated by a purchaser to be for the account of a particular Underwriter or Selected Dealer, any sales to Selected Dealers made for our account shall be as nearly as practicable in the ratio that the Stock reserved for our account for offering to Selected Dealers bears to the aggregate of all Stock of all Underwriters so reserved.

You agree to notify us promptly on the date of the public offering as to the number of shares, if any, of the Stock which we may retain for direct sale by us. Prior to the termination of the provisions referred to in

Section 13 hereof, you may reserve for offering and sale as hereinbefore provided any Stock theretofore retained by us remaining unsold and we may, with your consent, retain any Stock theretofore reserved by you remaining unsold.

We agree that, from time to time prior to the termination of the provisions referred to in Section 13 hereof, we shall furnish to you such information as you may request in order to determine the number of shares of Stock purchased by us under the Underwriting Agreement which then remain unsold, and we shall upon your request sell to you for the account of any Underwriter as many of such unsold shares of Stock as you may designate at the Offering Price, less all or any part of the concession to Selected Dealers as you, in your sole discretion, shall determine. The provisions of Section 4 hereof shall not be applicable in respect of any such sale.

We authorize you to determine the form and manner of any communications or agreements with Selected Dealers. In the event that there shall be any agreements with Selected Dealers, you are authorized to act as manager thereunder and we agree, in such event, to be governed by the terms and conditions of such agreements. The form of Selected Dealer Agreement attached hereto as Exhibit B is satisfactory to us.

It is understood that any Selected Dealer to whom an offer may be made as hereinbefore provided shall be actually engaged in the investment banking or securities business and shall be either (i) a member in good standing of the Financial Industry Regulatory Authority, Inc. ("FINRA") or (ii) a dealer with its principal place of business located outside the United States, its territories and its possessions and not registered as a broker or dealer under the Securities Exchange Act of 1934, as amended (the "1934 Act"), who agrees not to make any sales of Stock within the United States, its territories or its possessions or to persons who are nationals thereof or residents therein. Each Selected Dealer shall agree to comply with all applicable rules administered by FINRA, including FINRA Rule 5141, and each foreign Selected Dealer who is not a member of FINRA also shall agree to comply with FINRA Rules 5130 and 5131, to comply, as though it were a member of FINRA, with FINRA Rule 5141, and to comply with FINRA Rule 2040 as that Rule applies to a non-member foreign dealer. The several Underwriters may allow, and the Selected Dealers, if any, re-allow, such concession or concessions as you may determine from time to time on sales of Stock to any qualified dealer, all subject to FINRA Rules.

You, and any of the several Underwriters with your prior consent, may make purchases or sales of the Stock from or to any of the other

Underwriters, at the Offering Price less all or any part of the gross spread, and from or to any of the Selected Dealers at the Offering Price less all or any part of the concession to Selected Dealers.

Upon your request, we will advise you of the identity of any dealer to whom we allow such a discount and any Underwriter or Selected Dealer from whom we receive such a discount.

4. REPURCHASES IN THE OPEN MARKET

Any shares of Stock sold by us (otherwise than through you) which shall be contracted for or purchased in the open market by you on behalf of any Underwriter or Underwriters shall be repurchased by us on demand at a price equal to the cost of such purchase plus any broker's commissions and transfer taxes on redelivery. Any shares of Stock delivered on such repurchase need not be the identical shares originally sold by us. In lieu of delivery of such shares to us, you may sell such shares in any manner for our account and charge us with the amount of any loss or expense or credit us with the amount of any profit, less any expense, resulting from such sale, or charge our account with an amount not in excess of the concession to Selected Dealers.

5. PAYMENT AND DELIVERY

On the First Closing Date, we shall deliver to you payment for the Firm Shares to be purchased by us under the Underwriting Agreement in an amount equal to either (a) the Initial Public Offering Price for such Firm Shares less the concession to Selected Dealers or (b) the Initial Public Offering Price for such Firm Shares as shall have been retained by or released to us for direct sale, less the concession to Selected Dealers, as you shall direct. [On the Second Closing Date, we shall make a similar payment as you may direct for any Option Shares to be purchased by us.] Such payment[s] shall be made in such form and at such time and place as may be specified in such request, and we authorize you to make payment for such Stock against delivery thereof for our account hereunder. Unless we promptly give you instructions otherwise, if we are a member of or clear through a member of The Depository Trust Company ("DTC"), you may, in your discretion, deliver our Stock through facilities of DTC.

You shall remit to us, as promptly as practicable, the amounts received by you from Selected Dealers and retail purchasers as payment in respect of Stock sold by you for our account pursuant to Section 3 hereof for which payment has been received. Stock purchased by us under the

Underwriting Agreement and not reserved or sold by you for our account pursuant to Section 3 hereof shall be delivered to us as promptly as practicable after receipt by you. Any Stock purchased by us and so reserved which remains unsold at any time prior to the settlement of accounts hereunder may, in your discretion, and shall, upon your request, be delivered to us, but, until termination of the first three paragraphs of Section 7 of the Selected Dealer Agreements pursuant to Section 8 thereof and of other selling arrangements, such delivery shall be for carrying purposes only. In case any Stock reserved for sale in Retail Sales or to Selected Dealers shall not be purchased and paid for in due course as contemplated hereby, we agree (a) to accept delivery when tendered by you of any shares of Stock so reserved for our account and not so purchased and paid for, and (b) in case we shall have received payment from you in respect of any such shares of Stock, to reimburse you on demand for the full amount which you shall have paid us in respect of such shares of Stock.

In the event of our failure to tender payment for shares of Stock as provided in the Underwriting Agreement, you shall have the right under the provisions thereof to arrange for other persons, who may include you and any other Underwriter, to purchase such shares of Stock which we had agreed to purchase, but without relieving us from liability for our default, provided that if the aggregate amount of reserved but unsold Stock upon termination of the provisions referred to in Section 13 does not exceed 10% of the total amount of Stock, you may in your discretion sell such reserved but unsold Stock for the accounts of the several Underwriters as soon as practicable after such termination, at such prices and in such manner as you determine.

6. AUTHORITY TO BORROW

We authorize you to advance your funds for our account (charging current interest rates) and to arrange loans for our account or the account of the Underwriters for the purpose of carrying out this Agreement, and in connection therewith to execute and deliver any notes or other instruments and to hold or pledge as security therefor all or any part of our Stock and shares of Common Stock purchased hereunder for our account. Any lender is hereby authorized to accept your instructions in all matters relating to such loans. Any part of our Stock and shares of Common Stock so held by you may be delivered to us for carrying purposes and, if so delivered, will be redelivered to you upon demand.

7. ALLOCATION OF EXPENSES AND LIABILITY

We authorize you to charge our account with and we agree to pay (a)all transfer taxes on sales made by you for our account, except as herein otherwise provided, and (b)our proportionate share (based on our Underwriting Obligation) of all expenses incurred by you in connection with the purchase, carrying, sale and distribution of the Stock and all other expenses arising under the terms of the Underwriting Agreement or this Agreement. Your determination of all such expenses and your allocation thereof shall be final and conclusive. You may at any time make partial distributions of credit balances or call for payment of debit balances. Funds for our account at any time in your hands may be held in your general funds without accountability for interest. As soon as practicable after the termination of this Agreement, the net credit or debit balance in our account, after proper charge and credit for all interim payments and receipts, shall be paid to or paid by us, provided that you may establish such reserves as you, in your sole discretion, shall deem advisable to cover possible additional expenses chargeable to the several Underwriters. Notwithstanding any settlement, we will remain liable for any taxes on transfers for our account and for our proportionate share (based on our Underwriting Obligation) of all expenses and liabilities that may be incurred for the accounts of the Underwriters.

8. LIABILITY FOR FUTURE CLAIMS

Neither any statement by you of any credit or debit balance in our account nor any reservation from distribution to cover possible additional expenses relating to the Stock shall constitute any representation by you as to the existence or non-existence of possible unforeseen expenses or liabilities of or charges against the several Underwriters. Notwithstanding the distribution of any net credit balance to us or the termination of this Agreement or both, we shall be and remain liable for, and will pay on demand, (a) our proportionate share (based on our Underwriting Obligation) of all expenses and liabilities which may be incurred by or for the accounts of the Underwriters, or any of them, including any liability which may be incurred by or for the accounts of the Underwriters, or any of them, based on the claim that the Underwriters constitute an association, unincorporated business, partnership or any separate entity, and (b) any transfer taxes paid after such settlement on account of any sale or transfer for our account.

9. STABILIZATION AND OVER-ALLOTMENT

We authorize you in your discretion (a) to make purchases and sales of Common Stock and any other securities of the Company which you may designate in the open market or otherwise, for long or short account, and on such terms and at such prices as you, in your sole discretion, shall deem advisable, (b) in arranging for sales of the Stock, to over-allot, and (c) either before or after the termination of this Agreement, to cover any short position or liquidate any long position incurred pursuant to this Section 9, subject, however, to the applicable rules and regulations of the Securities and Exchange Commission (the "Commission") under the 1934 Act. All such purchases and sales and over-allotments shall be made for the respective accounts of the several Underwriters as nearly as practicable in proportion to their respective Underwriting Obligations; provided, however, that our net position resulting from such purchases and sales and over-allotments shall not at the time of each such purchase or sale or over-allotment exceed, for either long or short account, 15% of the aggregate amount which we shall become obligated to pay in respect of the total number of Firm Shares [and Option Shares] purchased for our account. We agree to take up at cost on demand any shares of Common Stock purchased for our account pursuant to this Section 9 and to deliver on demand any of such shares so sold or any shares of Stock over-allotted for our account pursuant to this Section 9.

We understand that the existence of this provision is no assurance that the price of the Stock will be stabilized or that stabilizing, if commenced, may not be discontinued at any time. If you effect any stabilizing purchase pursuant to this Section 9, you will promptly notify us of the date and time when the first stabilizing purchase was effected and the date and time when stabilizing was terminated. You will retain such information as is required to be retained by you "as manager" pursuant to Rule 17a-2 under the 1934 Act. We will furnish to you not later than three business days following the date on which stabilizing was commenced such information as is required by Rule 17a-2(d) and notify you of the date and time when stabilizing was terminated.

10. OPEN MARKET TRANSACTIONS

We agree that we will not make bids or offers, or make or induce purchases or sales for our own account or the accounts of customers, in the open market or otherwise, either before or after the purchase of the Stock and for either long or short account, of any shares of Common Stock or

any security of the same class and series, or any right to purchase any such security except (i) as provided in this Agreement, the Underwriting Agreement and the Selected Dealer Agreements or otherwise approved by you, (ii) in brokerage transactions not involving solicitation of the customer's order and (iii) in connection with option and option-related transactions that are consistent with Regulation M under the 1934 Act. We further agree that we will not lend, either before or after the purchase of the Stock, to any customer, Underwriter, Selected Dealer or to any other securities broker of dealer any shares of Common Stock. We represent that we have at all times complied with and will at all times comply with the provisions of Regulation M under the 1934 Act applicable to this offering.

11. BLUE SKY

Prior to the initial offering by the Underwriters, you will inform us as to the states and other jurisdictions under the respective securities or blue sky laws of which it is believed that the Stock has been qualified for sale or is exempt from such qualification, but you do not assume any responsibility or obligation as to the accuracy of such information or as to the right of any Underwriter or dealer to offer or sell the Stock in any state or other jurisdiction. You agree to file or cause to be filed, on behalf of the Underwriters, a Further State Notice in respect of the Stock pursuant to Article 23-A of the General Business Law of the State of New York, if necessary.

12. DEFAULT BY UNDERWRITERS

Default by one or more Underwriters in respect of their obligations under the Underwriting Agreement shall not release us from any of our obligations or in any way affect the liability of any defaulting Underwriter to the other Underwriters for damages resulting from such default. In the event of such default by one or more Underwriters, you are authorized to increase, pro rata with the other non-defaulting Underwriters, the amount of Stock which we shall be obligated to purchase from the Company; provided, however, that the aggregate amount of all such increases for all non-defaulting Underwriters shall not exceed 10% of the Stock and, if the aggregate amount of the Stock not taken up by such defaulting Underwriters exceeds such 10%, you are further authorized, but shall not be obligated, to arrange for the purchase by other persons, who may include you and other non-defaulting Underwriters, of all or a portion of

the Stock not taken up by such Underwriters. In the event that such increases or arrangements are made, the respective amounts of the Stock to be purchased by the non-defaulting Underwriters and by any such other person or persons shall be taken as the basis for the Underwriters' obligations under this Agreement, but this shall not in any way affect the liability of any defaulting Underwriter to the other Underwriters for damages resulting from such default.

13. TERMINATION

Section 2, the second paragraph and the first sentence of the third paragraph of Section 3, Section 4, the first sentence of Section 9 (other than clause (c) thereof) and Section 10 hereof will terminate at the close of business on the 30th calendar day after the effective date of the Registration Statement, unless extended or sooner terminated as hereinafter provided. You may extend such provisions, or any of them, for a period not to exceed 30 additional calendar days by notice to us to such effect. You may terminate any of such provisions at any time by notice to us, and you may terminate all such provisions at any time by notice to us to the effect that the offering provisions of this Agreement are terminated.

14. GENERAL POSITION OF THE REPRESENTATIVE

In taking action under this Agreement, you shall act only as agent of the several Underwriters. Your authority shall include the taking of such action as you may deem advisable in respect of all matters pertaining to any and all offers and sales of the Stock, including the fight to make any modifications which you consider necessary or desirable in the arrangements with Selected Dealers or others. You shall be under no liability for or in respect of the value of the Stock or the validity or the form thereof, the Registration Statement, the Final Prospectus, or any amendment or supplement to any of them, or agreements or other instruments executed by or on behalf of the Company or others; or for the validity or the form of the Underwriting Agreement or this Agreement; or for or in respect of the delivery of the Stock; or for the performance by the Company or others of any agreement on its or their part; nor shall you as Representative or otherwise be liable under any of the provisions hereof or for any matters connected herewith, except for lack of good faith, except for any liability arising under the Securities Act of 1933, as amended (the "1933 Act"), and except for obligations expressly assumed by you in this Agreement; and no obligations on your part will be implied or inferred

from confirmation or acceptance of this Agreement. In representing the Underwriters hereunder, you shall act as the Representative of each of them respectively. Nothing herein contained shall constitute the several Underwriters partners with you or with each other, or render any Underwriter liable for the commitments of any other Underwriter, except as otherwise provided in Section 12 hereof and Section 7 of the Underwriting Agreement. If the Underwriters shall be deemed to constitute a partnership for Federal income tax purposes, it is the intent of each Underwriter to be excluded from the application of Subchapter K, Chapter 1, Subtitle A, of the Internal Revenue Code of 1986, as amended. Each Underwriter elects to be so excluded and agrees not to take any position inconsistent with such election. Each Underwriter authorizes you, in your discretion, to execute and file on behalf of the Underwriters such evidence of election as may be required by the Internal Revenue Service. The commitments and liabilities of each of the several Underwriters are several in accordance with their respective Underwriting Obligations and are not joint.

15. ACKNOWLEDGEMENT OF RECEIPT OF REGISTRATION STATEMENT, ETC.

We hereby confirm that we have examined the Registration Statement relating to the Stock as heretofore filed by the Company with the Commission and each amendment thereto, if any, filed through the date hereof, including any documents filed under the 1934 Act through the date hereof and incorporated by reference into the Final Prospectus, and any Supplemental Offering Materials (as defined below), that we are familiar with the terms of the securities to be offered and the other terms of the offering, that we are willing to be named as an underwriter in any Pre-Effective Prospectus and the Final Prospectus and to accept the responsibilities under the 1933 Act of an underwriter thereunder, and that we are willing to proceed with the underwriting of the Stock in the manner contemplated in the Underwriting Agreement and described in the Final Prospectus. We further confirm that we have authorized you to advise the Company on our behalf (a) as to the statements to be included in any Pre-Effective Prospectus, in the Effective Prospectus and in the Final Prospectus under the heading “Underwriting” insofar as they relate to us, and (b) that such statements do not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading. We understand

that the aforementioned documents are subject to further change and that we will be supplied with copies of any further amendments or supplements to the Registration Statement, of any document filed under the 1934 Act after the effective date of the Registration Statement and before termination of the offering of the Stock by the Underwriters if such document is deemed to be incorporated by reference into the Final Prospectus and of any amended or supplemented Prospectus promptly, if and when received by you, but the making of such changes, amendments and supplements shall not release us or affect our obligations hereunder or under the Underwriting Agreement.

16.

(a) Indemnification

We agree to indemnify and hold harmless each other Underwriter, its respective officers and directors and any person who controls any such Underwriter within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act, to the extent that, and upon the terms on which, we agree to indemnify and hold harmless the Company and other specified persons as set forth in the Underwriting Agreement. Any Underwriter that uses any Supplemental Offering Material in connection with the public offering without your consent or that otherwise breaches Section 19 further agrees to indemnify and hold harmless each other Underwriter, its respective officers and directors and any person who controls any such Underwriter within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act, from and against any and all losses, claims, damages or liabilities related to, arising out of or in connection with the use of such Supplemental Offering Material.

(b) Contribution

Each Underwriter (including you) will pay, upon your request, as contribution, its proportionate share, based upon its Underwriting Obligation, of any loss, claim, damage or liability, joint or several, paid or incurred by any Underwriter (including you) to any person other than an Underwriter, arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement, the Effective Prospectus, the Final Prospectus, any amendment or supplement thereto or any Pre-Effective Prospectus or any Supplemental Offering Materials approved by you

for use by the Underwriters in connection with the sale of the Stock, or the omission or alleged omission to state in the Registration Statement or any amendment thereto a material fact required to be stated therein or necessary to make the statements therein not misleading, or the omission or alleged omission to state in any of the other foregoing a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading (other than an untrue statement or alleged untrue statement or omission or alleged omission made in reliance upon and in conformity with written information furnished to the Company through you by or on behalf of an Underwriter expressly for use therein) or relating to any transaction contemplated by this Agreement; and will pay such proportionate share of any legal or other expense reasonably incurred by you or with your consent in connection with investigating or defending against any such loss, claim, damage or liability, or any action or proceeding in respect thereof. In determining the amount of our obligation under this paragraph, appropriate adjustment may be made by you to reflect any amounts received by any one or more Underwriters in respect of such claim from the Company pursuant to Section 6 of the Underwriting Agreement or otherwise. There shall be credited against any amount paid or payable by us pursuant to this paragraph any loss, claim, damage, liability or expense which is incurred by us as a result of any such claim asserted against us, and if such loss, claim, damage, liability or expense is incurred by us subsequent to any payment by us pursuant to this paragraph, appropriate provision shall be made to effect such credit, by refund or otherwise. If any such claim is asserted, you may take such action in connection therewith as you deem necessary or desirable, including retention of counsel for the Underwriters, and in your discretion separate counsel for any particular Underwriter or group of Underwriters, and the fees and disbursements of any counsel so retained by you shall be included in the amounts payable pursuant to this paragraph. In determining amounts payable pursuant to this paragraph, any loss, claim, damage, liability or expense incurred by any person who controls any Underwriter within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act which has been incurred by reason of such control relationship shall be deemed to have been incurred by such Underwriter. Any Underwriter may elect to retain, as its own expense, its own counsel. You may settle or consent to the settlement of any such claim on advice of counsel retained by you. Whenever you receive notice of the assertion of any

claim to which the provisions of this paragraph would be applicable, you will give prompt notice thereof to each Underwriter. You will also furnish each Underwriter with periodic reports, at such times as you deem appropriate, as to the status of such claim and the action taken by you in connection therewith. If any Underwriter or Underwriters defaults in its or their obligation to make any payments under this paragraph, each non-defaulting Underwriter shall be obligated to pay its proportionate share of all defaulted payments, based upon the proportion such non-defaulting Underwriter's Underwriting Obligation bears to the Underwriting Obligations of all non-defaulting Underwriters. Nothing herein shall relieve a defaulting Underwriter from liability for its default. No person guilty of fraudulent misrepresentation (within the meaning of Section 1l(f) of the 1933 Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. Notwithstanding anything in this Section 16 to the contrary, any losses, claims, damages or liabilities, joint or several, paid or incurred by any Underwriter, arising out of or based upon an Underwriter Free Writing Prospectus (as defined below) that was permitted by you and that does not breach Section 19, shall be paid by the Underwriters that used such Underwriter Free Writing Prospectus (the "Contributing Underwriters") and the amount to be paid by each Contributing Underwriter shall be determined pro rata among the Contributing Underwriters based on their Underwriting Obligations.

(c) Survival of Indemnity and Contribution

The indemnification and contribution agreements of each Underwriter contained in this Section 16 shall remain in full force and effect regardless of any investigation made by or on behalf of such other Underwriter, officer, director or controlling person and shall survive the delivery of any payment for the Stock and the termination of this Agreement and the similar agreements entered into with the other Underwriters. Any successor of any Underwriter, any underwriter acting as such by substitution in accordance with Section 7 of the Underwriting Agreement, or its officers, directors or controlling persons, if any, shall be entitled to the benefits contained in subsections (a) and (b) of this Section.

17. CAPITAL REQUIREMENTS

We confirm that the incurrence by us of our obligations under this Agreement and under the Underwriting Agreement will not place us in

violation of the net capital requirements of Rule 15c3-1 under the 1934 Act or of any applicable rules relating to capital requirements of any securities of any securities exchange to which we are subject.

18. DISTRIBUTION OF MATERIALS

We confirm that we will comply with the applicable distribution requirements of Rule 15c2-8 under the 1934 Act. We will keep an accurate record of the distribution (including dates, number of copies and persons to whom sent) by us of the Registration Statement, and amendments thereto, any related Prospectus, any Supplemental Offering Materials and amendments and supplements thereto, and also agree upon your request, to furnish promptly to the persons who received copies of the above, copies of any subsequent amendment to the Registration Statement or any revised prospectus or any revised prospectus supplement or any memorandum furnished to us outlining changes in any such document.

19. SUPPLEMENTAL OFFERING MATERIALS

We will not, in connection with the offer and sale of the Stock, without your consent, give to any prospective purchaser of the Stock or other person not in our employ any written communication (as defined in Rule 405 under the 1933 Act) (excluding any Pre-Effective Prospectus or Final Prospectus, written confirmations and notices of allocation delivered to our customers in accordance with Rule 172 under the 1933 Act and written communications delivered to our customers based on the exemption provided by Rule 134 under the 1933 Act) concerning the public offering or the Company ("Supplemental Offering Materials"), other than any free writing prospectus or computational materials or other offering materials prepared by or with your consent for use by the Underwriters in connection with the public offering and filed with the Commission or FINRA, as applicable, to the extent required by any applicable rules or regulations.

If you permit the use of a Free Writing Prospectus which has been prepared by or on behalf of or used by an Underwriter in connection with the public offering (an "Underwriter Free Writing Prospectus"), we will (except as provided below) not take any action that would result in us or the Company being required to file with the Commission under Rule 433(d) under the 1933 Act an Underwriter Free Writing Prospectus that otherwise would not be required to be filed by the Company thereunder, but for our action. Without limiting the foregoing, we agree that any Underwriter Free Writing Prospectus that we use or refer to will not

be distributed by us or on our behalf in a manner reasonably designed to lead to its broad unrestricted dissemination, and will not include Issuer Information (as defined in Rule 433(h) under the 1933 Act) unless the Issuer Information has been included in an Issuer Free Writing Prospectus (as defined in Rule 433(h) under the 1933 Act), Pre-Effective Prospectus or Final Prospectus previously filed with the Commission. We will comply in all material respect with the applicable requirements of the 1933 Act and the rules and regulations thereunder in connection with our use of any Underwriter Free Writing Prospectus.

20. MISCELLANEOUS

Any notice hereunder from you to us or from us to you shall be deemed to have been duly given if sent by registered mail, telegram or hand delivered, to us at our address as set forth in our Underwriters' Questionnaire previously delivered to you, or to you at _____.

We understand that you are a member in good standing of FINRA. We hereby confirm that we are actually engaged in the investment banking or securities business and are either (i) a member in good standing of FINRA or (ii) a dealer with its principal place of business located outside the United States, its territories and its possessions and not registered as a broker or dealer under the 1934 Act who agrees not to make any sales within the United States, its territories or its possessions or to persons who are nationals thereof or residents therein (except that we may participate in sales to Selected Dealers and others under Section 3 of this Agreement). We hereby agree to comply with all applicable rules administered by FINRA, including, without limitation, FINRA Rule 5141, and if we are a foreign dealer and not a member of FINRA, we hereby agree to comply with FINRA Rules 5130 and 5131, to comply, as though we were a member of FINRA, with the provisions of FINRA Rule 5141, and to comply with FINRA Rule 2040 as that Rule applies to a non-member foreign dealer. In connection with sales and offers to sell Stock made by us outside the United States, its territories and possessions (i) we will either furnish to each person to whom any such sale or offer is made a copy of the then current Pre-Effective Prospectus or the Final Prospectus, as the case may be, or inform such person that such Pre-Effective Prospectus or Final Prospectus will be available upon request, and (ii) we will furnish to each person to whom any such sale or offer is made such prospectus, advertisement or other offering document containing information relating to the Stock or the Company as may be required under the law of the jurisdiction in which such sale or offer is

made. Any prospectus, advertisement or other offering document furnished by us to any person in accordance with the preceding sentence and any such additional offering material as we may furnish to any person (x) shall comply in all respects with the law of the jurisdiction in which it is so furnished, (y) shall be prepared and so furnished at our sole risk and expense and (z) shall not contain information relating to the Stock or the Company which is inconsistent in any respect with the information contained in the then current Pre-Effective Prospectus or in the Final Prospectus, as the case may be.

This instrument may be signed by or on behalf of the Underwriters in one or more counterparts each of which shall constitute an original and all of which together shall constitute one and the same agreement among all the Underwriters and shall become effective at such time as all the Underwriters shall have signed or have had signed on their behalf such counterparts and you shall have confirmed all such counterparts. You may confirm such counterparts by facsimile signature.

This Agreement shall be governed by and construed in accordance with the laws of the State of New York without giving effect to the choice of law or conflicts of laws principles thereof.

This Agreement shall inure to the benefit of and be binding upon the successors, assigns, executors and administrators of the parties thereto.

Please confirm that the foregoing correctly states the understanding between us by signing and returning to us a counterpart hereof.

Very truly yours,

As Attorney-in-Fact for each of the several Underwriters named in Schedule I to the Underwriting Agreement.

Confirmed as of the date
first above written:

[Name of Managing Underwriter]
As Representative

By: _____
Name:
Title:

EXHIBIT A

UNDERWRITING AGREEMENT

(SEE APPENDIX A)

EXHIBIT B

SELECTED DEALER AGREEMENT

(SEE APPENDIX D)

NOTES

6

Appendix C: Master Agreement Among Underwriters

David K. Boston

Willkie Farr & Gallagher LLP

MASTER AGREEMENT AMONG UNDERWRITERS

_____, 201_
[Name and Address of
Managing Underwriter]

Ladies and Gentlemen:

1. GENERAL

We understand that [name of managing underwriter] is entering into this Agreement in counterparts with us and other firms who may be underwriters for issues of securities for which [name of managing underwriter] is acting as Representative or one of the Representatives of the several underwriters. This Agreement shall apply to any offering of securities after the date hereof in which we elect to act as an underwriter after receipt of a telegram, telex, graphic scanning communication or other form of written communication ("Written Communication") from [name of managing underwriter] stating, to the extent applicable and then determined, the principal terms of the securities to be offered, including, without limitation, the identity of the issuer and, if different from the issuer, the seller or sellers of such securities, the securities proposed to be offered, whether the underwriters are afforded an option to purchase additional securities to cover over-allotments, the price to underwriters (including the breakdown of the management fee, underwriting fee and selling concession), the dealers' reallowance, public offering price and expected offering date, interest or dividend rate, if any, and other variables, the amount of our proposed participation and the names of the other Representatives, if any, and that our participation as an underwriter in the proposed offering shall be subject to the provisions of this Agreement. Upon our telegraphic acceptance of such Written Communication, we shall become one of the underwriters of such issue for the amount specified in the Written Communication, and this Agreement shall become binding upon us and the Representatives with respect to such offering. The obligations of each underwriter shall be several and not joint. The issuer of the securities offered in any offering of securities made pursuant to this Agreement is hereinafter referred to as the "Company", and such securities are hereinafter called the "Securities". The seller or sellers of the Securities (including, if applicable, the Company) are hereinafter referred to collectively as the "Seller". All references herein to "you" or the "Representatives" shall include [name of managing underwriter] and the other firms, if any, which are named as Representatives in the Written Communication. The Securities to be offered

in any offering may but need not be registered in a shelf registration pursuant to Rule 415 under the Securities Act of 1933, as amended (the "Securities Act"). The following provisions of this Agreement shall apply separately to each individual offering of Securities.

2. UNDERWRITING ARRANGEMENTS

The Representatives shall determine which signatories to this Agreement will be invited to become underwriters for the Securities. Changes may be made by the Representatives in those who are to be underwriters and in the respective amounts of Securities to be purchased by them, but the amount of Securities to be purchased by us as set forth in the Written Communication to us will not be changed without our consent except as provided herein or in the underwriting agreement (the "Underwriting Agreement") with the Seller covering the Securities. We authorize you on our behalf to negotiate the terms of and to execute and deliver the Underwriting Agreement in such form as you determine and to take such action as you deem advisable in connection with the performance of the Underwriting Agreement and this Agreement and the purchase, carrying, sale and distribution of the Securities, including the election to exercise any option to purchase additional Securities to cover over-allotments, if so provided. The parties on whose behalf you execute the Underwriting Agreement are hereinafter called the "Underwriters". You may waive performance or satisfaction by the Seller of certain of its obligations or conditions included in the Underwriting Agreement, if in your judgment such waiver will not have a material adverse effect upon the interests of the Underwriters. It is understood that, if so specified in the Written Communication for the issue, arrangements may be made for the sale of Securities by the Seller pursuant to delayed delivery contracts. Such Securities are hereinafter referred to as "Delayed Delivery Securities", and such contracts as "Delayed Delivery Contracts". References herein to delayed delivery and Delayed Delivery Contracts apply only to offerings in which delayed delivery is authorized. The term "underwriting obligation", as used in this Agreement with respect to any Underwriter, shall refer to the principal amount or number of shares of the Securities which such Underwriter is obligated to purchase pursuant to the provisions of the Underwriting Agreement, without regard to any reduction in such obligation as a result of Delayed Delivery Contracts which are entered into by the Seller.

As compensation for your services, we will pay a management fee as specified in the Written Communication for the issue (without deduction in respect of Delayed Delivery Securities), and you may charge our account

therefor. If there is more than one Representative, such compensation will be divided among the Representatives in such proportions as they determine.

3. PROSPECTUS AND REGISTRATION STATEMENT

You will furnish to us as soon as possible copies of the prospectus or supplemented prospectus to be used in connection with the offering of the Securities. As used herein "Prospectus" means the form of prospectus (including any supplements thereto) authorized for use in connection with such offering, and "Registration Statement" means the registration statement, as amended, filed under the Securities Act pursuant to which the Securities are registered with the Securities and Exchange Commission. We consent to being named in the Prospectus as one of the Underwriters of the Securities.

4. PUBLIC OFFERING

(a) In connection with the public offering of the Securities, we authorize you, in your discretion:

(i) to determine the time of the initial public offering, to change the public offering price and the concessions and discounts to dealers after the initial public offering, to furnish the Company with the information to be included in the Registration Statement or Prospectus with respect to the terms of offering, and to determine all matters relating to advertising and communications with dealers or others;

(ii) to reserve for sale to dealers selected by you ("Selected Dealers") and to others, and to reserve for sale pursuant to Delayed Delivery Contracts including Delayed Delivery Contracts arranged by you through Selected Dealers), all or any part of our Securities, which reservations for sales to others and for sales pursuant to Delayed Delivery Contracts not arranged through Selected Dealers are to be as nearly as practicable in proportion to the respective underwriting obligations of the Underwriters, unless you agree to a smaller proportion at the request of any Underwriter, and such other reservations to be in such proportions as you determine, and, from time to time, to add to the reserved Securities any Securities retained by us remaining unsold and to release to us any of our Securities reserved but not sold;

(iii) to sell reserved Securities, as nearly as practicable in proportion to the respective reservations, to Selected Dealers at the public offering price less the Selected Dealers' concession and to others at the public offering price;

(iv) to buy Securities for our account from Selected Dealers at the public offering price less such amount not in excess of the Selected Dealers' concession as you determine;

(v) to require that a final term sheet or other "free writing prospectus" (as defined under Rule 405 of the Securities Act (a "Free Writing Prospectus")) be delivered in connection with the public offering; and

(vi) to determine all matters relating to the public advertisement of the Securities.

If, in accordance with the terms of offering set forth in the Prospectus, the offering of the Securities is not at a fixed price but at varying prices set by individual Underwriters based on market prices or at negotiated prices, the provisions of clause (i) above relating to your right to change the public offering price and concessions and discounts to dealers shall not apply, and other references in this Section and elsewhere in this Agreement to the public offering price or Selected Dealers' concession shall be deemed to mean the prices and concessions determined by you from time to time in your discretion.

Sales of Securities between Underwriters may be made with your prior consent, or as you deem advisable for Blue Sky or state securities laws' purposes.

After the later of advice from you that the Securities are released for public offering and, to the extent a final term sheet or other Free Writing Prospectus is required by you to be delivered in connection with the public offering, the time of such delivery to the purchasers, we will offer to the public in conformity with the terms of offering set forth in the Prospectus such of our Securities as you advise us are not reserved.

Any Securities sold by us (otherwise than through you) which shall be contracted for or purchased in the open market by you on behalf of any Underwriter will be repurchased by us on demand at a price equal to the total cost of such purchase plus any transfer taxes on redelivery, broker's commissions, accrued interest and dividends. Securities delivered on such repurchase need not be the identical shares originally sold by us. In lieu of delivery of such shares to us,

you may sell such shares so purchased in any manner for our account and charge us with the amount of any loss or expense or credit us with the amount of any profit, less any expense, resulting from such sale, or charge our account with an amount not in excess of the Selected Dealers' concession.

(b) We authorize you to act on our behalf in making all arrangements for the solicitation of offers to purchase Delayed Delivery Securities from the Seller pursuant to Delayed Delivery Contracts and we agree that all such arrangements will be made only through you, directly or through Selected Dealers (including Underwriters acting as Selected Dealers) to whom you may pay a commission as provided in the Prospectus and herein.

The obligation of each of the Underwriters to purchase and pay for Securities as set forth in the Underwriting Agreement shall be reduced in the proportion provided for therein, except that (i) as to any Delayed Delivery Contract determined by you, in your discretion, to have been directed and allocated by a purchaser to a particular Underwriter, such obligation of such Underwriter shall be reduced by the amount of Delayed Delivery Securities covered thereby, (ii) as to any Delayed Delivery Contracts for which arrangements are made through Selected Dealers, such obligation of each Underwriter shall be reduced as nearly as practicable in the proportion determined by you that the amount of Securities of such Underwriter reserved and sold pursuant to Delayed Delivery Contracts arranged through Selected Dealers bears to the total Securities so reserved and sold and (iii) such reductions shall be rounded, as you shall determine, to the nearest $1,000 principal amount of whole share of the Securities.

The fee payable to each Underwriter with respect to Delayed Delivery Securities pursuant to the Underwriting Agreement shall be credited to the account of such Underwriter based upon the amount by which such Underwriter's underwriting obligation is reduced as specified in the preceding paragraph.

If the amount of Delayed Delivery Securities applied to reduce an Underwriter's underwriting obligation and the amount of Securities sold by or for the account of such Underwriter exceeds such Underwriter's underwriting obligation, there shall be credited to such Underwriter in connection with such excess amount of Securities only the amount of the Selected Dealers' concession with respect thereto.

The commissions payable to Selected Dealers in respect of Delayed Delivery Contracts arranged through them shall be charged

to each Underwriter in the proportion which the amount of Securities of such Underwriter reserved and sold pursuant to Delayed Delivery Contracts arranged through Selected Dealers bears to the total Securities so reserved and sold.

5. PAYMENT AND DELIVERY

We authorize you to make payment on our behalf to the Seller of the purchase price of our Securities, to take delivery of our Securities, registered as you may direct in order to facilitate deliveries, and to deliver our reserved Securities against sales. At your request we will pay you, as you direct, (i) an amount equal to the public offering price, less the selling concession, of either our Securities or our unreserved Securities or (ii) the amount set forth or indicated in the Written Communication with respect to the Securities, and such payment will be credited to our account and applied to the payment of the purchase price. After you receive payment for reserved Securities sold for our account, you will remit to us the purchase price (if any) paid by us for such Securities and credit or debit our account with the difference between the sale prices and the purchase price thereof. You will deliver to us our unreserved Securities promptly, and our reserved but unsold Securities, against payment of the purchase price therefor (except in the case of Securities for which payment has previously been made), as soon as practicable after the termination of the provisions referred to in Section 9, except that if the aggregate amount of reserved but unsold Securities upon such termination does not exceed 10% of the total amount of the Securities, you may in your discretion sell such reserved but unsold Securities for the accounts of the several Underwriters as soon as practicable after such termination, at such prices and in such manner as you determine. Unless we promptly give you written instructions otherwise, if transactions in the Securities may be settled through the facilities of The Depository Trust Company, payment for and delivery of securities purchased by us will be made through such facilities, if we are a member, or if we are not a member, settlement may be made through our ordinary correspondent who is a member.

6. AUTHORITY TO BORROW

In connection with the purchase or carrying of our Securities or other securities purchased for our account, we authorize you, in your discretion, to advance your funds for our account, charging current interest rates, to arrange loans for our account, and in connection therewith to execute and

deliver any notes or other instruments and hold or pledge as security therefor all or any part of our Securities or such other securities. Any lender is hereby authorized to accept your instructions in all matters relating to any such loan. Any Securities or such other securities held by you for our account may be delivered to us for carrying purposes, and if so delivered will be redelivered to you upon demand.

7. STABILIZATION AND OVER-ALLOTMENT

We authorize you, in your discretion, (a) to make purchases and sales of Securities, any other securities of the Company of the same class and series and any other securities of the Company which you may designate in the open market or otherwise, for long or short account, and on such terms and at such prices as you, in your sole discretion, deem advisable, (b) in arranging sales, to over-allot and cover any such over-allotment by purchasing Securities, exercising the over-allotment option, if any, indicated in the Written Communication, or both and (c) to cover any short position or liquidate any long position incurred pursuant to this Section 7, subject, however, to the rules and regulations of the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Such purchases and sales and over-allotments will be made for the respective accounts of the Underwriters as nearly as practicable in proportion to their respective underwriting obligations. It is understood that you may have made purchases of securities of the Company for stabilizing purposes prior to the time when we become one of the Underwriters, and we agree that any securities so purchased shall be treated as having been purchased for the respective accounts of the Underwriters pursuant to the foregoing authorization. At no time will our net commitment under the foregoing provisions of this Section exceed 15% (or such other amount as may be specified in the Written Communication) of our underwriting obligation, which shall include any Securities which we are obligated to purchase by virtue of the exercise of an over-allotment option. We agree to take up at cost on demand any securities so purchased for our account pursuant to this Section 7 and to deliver any of such securities so sold or over-allotted for our account pursuant to this Section 7, and, if any other Underwriter defaults in its corresponding obligation, we will assume our proportionate share of such obligation without relieving the defaulting Underwriter from liability. Upon request, we will advise you of the Securities retained by us and unsold and will sell to you for the account of one or more of the Underwriters such of our unsold Securities and at such price, not less than the net price to Selected Dealers nor more

than the public offering price, as you determine. We understand that the existence of this provision is no assurance that the price of the Securities will be stabilized or that stabilizing, if commenced, may not be discontinued at any time.

8. OPEN MARKET TRANSACTIONS

We agree that we will not make bids or offers, or make or induce purchases or sales for our own account or the accounts of customers, in the open market or otherwise, of any Securities, any other securities of the Company of the same class and series and any other securities of the Company which you may designate, except as brokers pursuant to unsolicited orders, as otherwise provided in this Agreement, the Underwriting Agreement and the Selected Dealer Agreements and as otherwise approved by you. If the Securities are common stock or securities convertible into common stock, we and you also agree not to effect, or attempt to induce others to effect, directly or indirectly, any transactions in or relating to put or call options on any stock of the Company, except to the extent permitted by Regulation M under the Exchange Act. We further agree that we will not lend any shares of common stock, either before or after the purchase of the Securities, to any customer, Underwriter, Selected Dealer or any other securities broker or dealer. We represent that we have at all times complied with and will at all times comply with the provisions of Regulation M under the Exchange Act applicable to any offering of Securities.

9. TERMINATION AS TO AN OFFERING

The provisions of the last two paragraphs of Section 4(a), the first sentence of Section 7 (other than clause (c) thereof), and Section 8, and all limitations in this Agreement on the price at which Securities may be sold, will terminate at the close of business on the thirtieth calendar day after the effective date of the Registration Statement, unless extended or sooner terminated as hereinafter provided. You may extend such provisions, or any of them, for a period not to exceed 30 additional calendar days by notice to us to such effect. You may terminate any of such provisions at any time by notice to us, and you may terminate all such provisions as to such offering at any time by notice to us to the effect that the offering provisions of this Agreement as to such offering are terminated.

10. EXPENSES AND SETTLEMENT

You may charge our account with any transfer taxes on sales made by you of Securities purchased by us under the Underwriting Agreement and with our proportionate share (based upon our underwriting obligation) of all other expenses incurred by you under this Agreement or in connection with the purchase, carrying, sale or distribution of the Securities. The accounts hereunder will be settled as promptly as practicable after the termination of the provisions referred to in Section 9, but you may reserve such amount as you deem advisable for additional expenses. Your determination of the amount to be paid to or by us will be conclusive. You may at any time make partial distributions of credit balances or call for payment of debit balances. Any of our funds in your hands may be held with your general funds without accountability for interest. Notwithstanding any settlement, we will remain liable for any taxes on transfers for our account, and for our proportionate share (based upon our underwriting obligation) of all expenses and liabilities which may be incurred by or for the accounts of the Underwriters.

11. DEFAULT BY UNDERWRITERS

Default by one or more Underwriters hereunder or under the Underwriting Agreement will not release the other Underwriters from their obligations or affect the liability of any defaulting Underwriter to the other Underwriters for damages resulting from such default. If one or more Underwriters default under the Underwriting Agreement, you may arrange for the purchase by others, including non-defaulting Underwriters, of Securities not taken up by the defaulting Underwriter or Underwriters. In the event any such increases or arrangements are made, the amount of the Securities to be purchased pursuant to this provision by each non-defaulting Underwriter shall be increased pro rata with the other non-defaulting Underwriters.

12. GENERAL POSITION OF REPRESENTATIVES

In taking action under this Agreement, you shall act only as agent of the several Underwriters. Your authority shall include the taking of such action as you may deem advisable in respect of all matters pertaining to any and all offers and sales of the Securities, including the right to make any modifications which you consider necessary or desirable in the arrangements with Selected Dealers or others. You shall be under no liability for or in respect of the value of the Securities or the validity or the form thereof,

the Registration Statement, the Prospectus, or any amendment or supplement to any of them, or agreements or other instruments executed by or on behalf of the Company or others; or for the validity or the form of the Underwriting Agreement or this Agreement; or for or in respect of the delivery of the Securities; or for the performance by the Company or others of any agreement on its or their part; nor shall you be liable under any of the provisions hereof or for any matters connected herewith, except for lack of good faith, except for any liability arising under the Securities Act and except for obligations expressly assumed by you herein; and no obligation on your part will be implied or inferred herefrom. [If more than one Representative, insert: Your authority hereunder and under the Underwriting Agreement may be exercised by you jointly or by [name of managing underwriter].] The commitments and liabilities of the Underwriters are several in accordance with their respective underwriting obligations and not joint, and nothing will constitute the Underwriters a partnership, association or separate entity.

If for Federal income tax purposes the Underwriters should be deemed to constitute a partnership, then each Underwriter elects to be excluded from the application of Subchapter K, Chapter 1, Subtitle A, of the Internal Revenue Code of 1986, as amended. You, as Representative of the several Underwriters, are authorized, in your discretion, to execute and file on behalf of the Underwriters such evidence of such election as may be required by the Internal Revenue Service.

13. INDEMNIFICATION

We will indemnify and hold harmless each other Underwriter, its respective officers and directors and each person, if any, who controls such Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act to the extent and upon the terms upon which each Underwriter agrees to indemnify the Company and any other Seller in the Underwriting Agreement. This indemnity agreement shall remain in full force and effect, regardless of any investigation made by or on behalf of such other Underwriter, officer, director, or controlling person and shall survive the delivery of and payment for the Securities and the termination of this Agreement. Any successor of any Underwriter acting by substitution in accordance with the Underwriting Agreement, or its officers, directors or controlling persons, if any, shall be entitled to the benefits of this Section.

Any Underwriter that uses any Supplemental Offering Materials (as defined below) in connection with the public offering without your consent or that otherwise breaches Section 16(e) further agrees to indemnify and

hold harmless each other Underwriter, its respective officers and directors and each person, if any, who controls any such Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act, from and against any and all losses, claims, damages or liabilities related to, arising out of or in connection with the use of such Supplemental Offering Materials.

14. CONTRIBUTION

Each Underwriter (including you) will pay upon your request, as contribution, its proportionate share, based upon its underwriting obligation, of any loss, claim, damage or liability, joint or several, paid or incurred by any Underwriter (including you) to any person other than an Underwriter, arising out of or based upon (a) any untrue statement or alleged untrue statement of any material fact contained in the Registration Statement, the Prospectus, any amendment or supplement thereto or any related preliminary prospectus or any Supplemental Offering Materials, or (b) (i) the omission or alleged omission to state in the Registration Statement or any amendment thereto a material fact required to be stated therein or necessary to make the statements therein not misleading or (ii) the omission or alleged omission to state in the Prospectus, any supplement thereto or any preliminary prospectus or any Supplemental Offering Materials, a material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading (other than an untrue statement or alleged untrue statement or omission or alleged omission made in reliance upon and in conformity with written information furnished to the Company through you by or on behalf of an Underwriter specifically for use therein); and will pay such proportionate share of any legal or other expenses reasonably incurred by you or with your consent in connection with investigating or defending against any such loss, claim, damage or liability, or any action or proceeding (including any action or proceeding brought by a governmental or regulatory body) in respect thereof. In determining the amount of any Underwriter's obligation under this Section, appropriate adjustment may be made by you to reflect any amounts received by any one or more Underwriters in respect of such claim from the Company or any other Seller pursuant to the Underwriting Agreement or otherwise. There shall be credited against any amount paid or payable by us pursuant to this Section any loss, damage, liability or expense which is incurred by us as a result of any such claim asserted against us, and if such loss, claim, damage, liability or expense is incurred by us subsequent to any payment by us

pursuant to this Section, appropriate provision shall be made to effect such credit, by refund or otherwise. If any such claim is asserted, you may take such action in connection therewith as you deem necessary or desirable, including retention of counsel for the Underwriters, and in your discretion separate counsel for any particular Underwriter or group of Underwriters, and the fees and disbursements of any counsel so retained by you shall be included in the amounts payable pursuant to this Section. In determining amounts payable pursuant to this Section, any loss, claim, damage, liability or expense incurred by any person controlling any Underwriter within the meaning of Section 15 of the Securities Act or Section 20 of the Exchange Act which has been incurred by reason of such control relationship shall be deemed to have been incurred by such Underwriter. Any Underwriter may elect to retain at its own expense its own counsel. You may settle or consent to the settlement of any such claim, on advice of counsel retained by you. Whenever you receive notice of the assertion of any claim to which the provisions of this Section would be applicable, you will give prompt notice thereof to each Underwriter. You will also furnish each Underwriter with periodic reports, at such times as you deem appropriate, as to the status of such claim and the action taken by you in connection therewith. If any Underwriter or Underwriters default in its or their obligation to make any payments under this Section, each non-defaulting Underwriter shall be obligated to pay its proportionate share of all defaulted payments, based upon the proportion such non-defaulting Underwriter's underwriting obligation bears to the underwriting obligations of all non-defaulting Underwriters. Nothing herein shall relieve a defaulting Underwriter from liability for its default. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. Notwithstanding anything in this Section 14 to the contrary, any losses, claims, damages or liabilities, joint or several, paid or incurred by any Underwriter, arising out of or based upon an Underwriter Free Writing Prospectus (as defined below) that was permitted by you and that does not breach Section 16(e), shall be paid by the Underwriters that used such Underwriter Free Writing Prospectus (the "Contributing Underwriters") and the amount to be paid by each Contributing Underwriter shall be determined pro rata among the Contributing Underwriters based on their underwriting obligations. This contribution agreement shall remain in full force and effect, regardless of any investigation made by or on behalf of such other Underwriter, officer, director, or controlling person and shall survive the delivery of and payment for the Securities and the termination of this Agreement. Any successor of

any Underwriter acting by substitution in accordance with the Underwriting Agreement, or its officers, directors or controlling persons, if any, shall be entitled to the benefits of this Section.

15. REPORTS AND BLUE SKY MATTERS

We authorize you to file with the Securities and Exchange Commission and any other governmental agency any reports required in connection with any transactions effected by you for our account pursuant to this Agreement, and we will furnish any information needed for such reports. If you effect stabilizing purchases pursuant to Section 7, you will notify us promptly of the time and date of initiation and termination thereof. You will retain such information as is required to be retained by you "as manager" pursuant to Rule 17a-2 under the Exchange Act. If stabilization is effected we will file with you, c/o [name of managing underwriter], no later than three business days following the date on which stabilizing was commenced, any report required to be filed pursuant to Rule 17a-2(d) under the Exchange Act and notify you of the date and time when stabilizing was terminated. You will not have any responsibility with respect to the right of any Underwriter or other person to sell the Securities in any jurisdiction, notwithstanding any information you may furnish in that connection.

16. REPRESENTATIONS AND AGREEMENT

(a) You represent that you are a member in good standing of the Financial Industry Regulatory Authority, Inc. ("FINRA"), and we represent that we are actually engaged in the investment banking or securities business and are either (i) a member in good standing of FINRA or (ii) a dealer with its principal place of business located outside of the United States, its territories and its possessions not eligible for membership. If we are such a member we agree that in making sales of the Securities we will comply with all applicable rules administered by FINRA, including, without limitation, FINRA Rule 5141. If we are such a foreign dealer and not a member of FINRA, we agree not to offer or sell any Securities in the United States, its territories or its possessions or to persons who are nationals thereof or residents therein except through you and in making sales of Securities outside the United States, its territories or its possessions we agree to comply with FINRA Rules 5130, 5131 and 5141, as though

we were a member of FINRA, and with FINRA Rule 2040 as it applies to a non-member foreign broker or dealer.

(b) We understand that it is our responsibility to examine the Registration Statement, the Prospectus, any amendment or supplement thereto relating to the offering of the Securities, any preliminary prospectus, the material, if any, incorporated by reference therein, and any Supplemental Offering Materials and we will familiarize ourselves with the terms of the Securities and the other terms of the offering thereof which are to be reflected in the Prospectus and the Written Communication with respect thereto. You are authorized, with the approval of counsel for the Underwriters, to approve on our behalf any amendments or supplements to the Registration Statement or the Prospectus.

(c) We confirm that the information that we have given or are deemed to have given in response to the Master Underwriters' Questionnaire attached as Exhibit A hereto (which information has been furnished to the Company for use in the Registration Statement or the Prospectus) is correct. We will notify you immediately of any development before the termination of this Agreement under Section 9 as to the offering of the Securities which makes untrue or incomplete any information that we have given or are deemed to have given in response to the Master Underwriters' Questionnaire.

(d) Unless we have promptly notified you in writing otherwise, our name as it should appear in the Prospectus and our address are set forth on the signature page hereof.

(e) We will not, in connection with the offer and sale of the Securities in the public offering, without your consent, give to any prospective purchaser of the Securities or other person not in our employ any written communication (as defined in Rule 405 under the Securities Act) (excluding any Prospectus, written confirmations and notices of allocation delivered to our customers in accordance with Rule 172 under the Securities Act and written communications delivered to our customers based on the exemption provided by Rule 134 under the Securities Act) concerning the public offering, the Company or Seller ("Supplemental Offering Materials"), other than any free writing prospectus or other offering materials prepared by or with your consent for use by the Underwriters in connection with the public offering and filed with the Securities and Exchange Commission or FINRA, as applicable, to the extent required by any applicable rules or regulations. If you permit the use of a Free Writing Prospectus which has been prepared by or on behalf of or used by an Underwriter

in connection with the public offering (an "Underwriter Free Writing Prospectus"), we will (except as provided below) not take any action that would result in us or the Company being required to file with the Commission under Rule 433(d) under the Securities Act an Underwriter Free Writing Prospectus that otherwise would not be required to be filed by the Company thereunder, but for our action. Without limiting the foregoing, we agree that any Underwriter Free Writing Prospectus that we use or refer to will not be distributed by us or on our behalf in a manner reasonably designed to lead to its broad unrestricted dissemination, and will not include Issuer Information (as defined in Rule 433(h) under the Securities Act) unless the Issuer Information has been included in an Issuer Free Writing Prospectus (as defined in Rule 433(h) under the Securities Act), or Prospectus previously filed with the Commission. We will comply in all material respect with the applicable requirements of the Securities Act and the rules and regulations thereunder in connection with our use of any Underwriter Free Writing Prospectus.

(f) We represent that we are familiar with Rule 15c2-8 under the Exchange Act relating to the distribution of preliminary and final prospectuses and agree that we will comply therewith. We agree to keep an accurate record of the distribution (including dates, number of copies and persons to whom sent) by us of copies of the Registration Statement, the Prospectus or any preliminary prospectus (or any amendment or supplement to any thereof), and promptly upon request by you, to bring all subsequent changes to the attention of anyone to whom such material shall have been distributed.

(g) We agree that if we are advised by you that the Company was not, immediately prior to the filing of the Registration Statement, subject to the requirements of Section 13(a) or 15(d) of the Exchange Act, we will not sell any of the Securities to persons over whose accounts we exercise discretionary authority without their specific advance consent.

17. MISCELLANEOUS

(a) This Agreement may be terminated by either party hereto upon five business days' written notice to the other party; provided that with respect to any offering of Securities for which a Written Communication was sent by you and accepted by us prior to such notice, this Agreement shall remain in full force and effect as to such offering

and shall terminate with respect to such offering in accordance with the provisions of Section 9. This Agreement may be supplemented or amended by you by written notice thereof to us, and any such supplement or amendment to this Agreement shall be effective with respect to any offering of securities to which this Agreement applies after the date of such supplement or amendment. Each reference to "this Agreement" herein shall, as appropriate, be to this Agreement as so amended and supplemented.

(b) This Agreement and the terms and conditions set forth herein with respect to any offering of Securities together with such supplementary terms and conditions with respect to such offering as may be contained in any Written Communication from you to us in connection therewith shall be governed by, and construed in accordance with, the laws of the State of New York.

Very truly yours,

(Name of Firm)

By: _____
Authorized Signatory

Confirmed, as of the date
first above written:

[Name of Managing Underwriter]

By:_____
[Title]

EXHIBIT A

[NAME OF MANAGING UNDERWRITER]

Master Underwriters' Questionnaire

The terms used herein and not otherwise defined shall have the meanings assigned thereto in the Master Agreement Among Underwriters dated _____, 201__between you and [name of managing underwriter]. Reference will be made to this Master Underwriters' Questionnaire in each Written Communication described in Section 1 of the Master Agreement Among Underwriters received by you from [name of managing underwriter] in connection with offerings of securities in which [name of managing underwriter] is acting as Representative or the manager of the Representatives of the several Underwriters. Your telegraphic acceptance of any such Written Communication should respond to this Master Underwriters' Questionnaire.

Except as indicated in your telegraphic acceptance of our Written Communication with respect to the Securities:

1. Neither you nor any of your directors, officers, partners or branch managers, individually or as part of a "group" (as that term is used in Section 13(d)(3) of the Securities Exchange Act of 1934 (the "1934 Act"), now have (nor have you or they had within the last three years) a material relationship (as "material" is defined in Regulation C under the Securities Act of 1933, as amended (the "1933 Act")), with the Company, any of its subsidiaries, its parent (if any) or any of its directors or officers, or any person who, to your knowledge, now owns or owned on the day prior to the date of filing of the Registration Statement, of record or beneficially, more than 5% of any class of securities of the Company;

2. Neither you nor any of your directors, officers or partners are (or were at any time during the past three years) an officer or director of the Company or any of its subsidiaries, or an associate (as "associate" is defined in Regulation C) of any director or officer of the Company, any of its subsidiaries, or of any person who, to your knowledge, now owns, or owned on the day prior to the date of filing of the Registration Statement, of record or beneficially, more than 5% of the outstanding shares of Common Stock of the Company;

3. Neither you nor any of your partners, officers, directors or branch managers, separately or as a "group" (as that term is defined in Section 13(d)(3) of the 1934 Act), now owns or owned as of the

day prior to the date of filing of the Registration Statement, either of record or beneficially (determined in accordance with Rule 13d-3 under the 1934 Act), more than 5% of the outstanding shares of any class of securities of the Company or its parent (if any);

4. Other than as is set forth in the Registration Statement, you have no knowledge that more than 5% of the outstanding shares of any class of voting securities of the Company is held or is to be held subject to any voting trust or other similar agreement;

5. If the Securities are to be issued under an indenture to be qualified under the Trust Indenture Act of 1939:

   (a) Neither you nor any of your directors, officers or partners is an affiliate (as defined in Rule 0-2 under the Trust Indenture Act of 1939) of the Trustee, or its parent (if any) and neither the Trustee nor its parent (if any) nor any of their directors or executive officers is a director, officer, partner, employee, appointee or representative of yours;

   (b) Neither you nor any of your directors, partners or executive officers, separately or as group, owns beneficially 1% or more of any class of voting securities of the Trustee or its parent (if any); and

   (c) If you are a corporation, you do not have outstanding nor have you assumed or guaranteed any securities otherwise than in your corporate name, and neither the Trustee nor its parent (if any) is a holder of such securities;

6. Other than as is, or is to be, stated in the Registration Statement, the [name of managing underwriter] Master Agreement Among Underwriters, the [name of managing underwriter] Master Selected Dealer Agreement, or the Underwriting Agreement relating to the proposed offering, you do not know of or have reason to believe that (a) there are any discounts or commissions to be allowed or paid to underwriters or any other items that would be deemed by FINRA to constitute underwriting compensation for the purposes of the National Association of Securities Dealers Rules administered by FINRA or the FINRA Rules, (b) there are any discounts or commissions to be allowed or paid to dealers, or any cash, securities, contracts, or other considerations to be received by any dealer in connection with the sale of the Securities, (c) there is an intention to over-allot or (d) the price of any security may be stabilized to facilitate the offering of the Securities;

7. Your proposed commitment to purchase Securities will not result in a violation of the financial responsibility requirements of Section 15 (c)(3) of the Exchange Act or the rules and regulations thereunder, including Rule 15c3-1, or any provision of the applicable rules administered by FINRA or of any securities exchange to which you are subject or any restrictions imposed upon you by FINRA or any such exchange;

8. Neither you nor any of your directors, officers, partners or "person associated with" you (as defined, in the By-Laws of FINRA) nor, to your knowledge, any "related person" (defined by FINRA to include counsel, financial consultants and advisers, finders, members of the selling or distribution group and any other FINRA member participating in the public offering, including those furnishing customer and/or broker lists for solicitation, or acting in an advisory or consulting capacity to the Company or to its affiliates related to the offering and any other persons associated with or related to and members of the immediate family of any of the foregoing) or any other broker-dealer have (a) entered into any arrangement which provides for the receipt of any item of value (including, but not limited to, cash payments or reimbursements) and/or the purchase of warrants, options or other securities of the Company, or any parent or subsidiary thereof, within the period beginning 12 months prior to the filing of the registration statement for the offering, (b) had any other dealings with the Company or any "affiliate" of the Company (as "affiliate" is defined in Regulation C of the 1933 Act) (other than relating to the proposed forms of the Underwriting Agreement, the [name of managing underwriter] Master Agreement Among Underwriters and the [name of managing underwriter] Master Selected Dealer Agreement and other than as referred to in the Registration Statement as initially filed) within the period beginning 12 months prior to the filing of the registration statement for the offering as to which documents or other information are required to be filed with or furnished to FINRA, and (c) within the period beginning 12 months prior to the filing of the registration statement for the offering purchased in private transactions, or intend before, at or within six months after the commencement of the public offering to purchase in private transactions, any securities of the Company or any parent or subsidiary thereof;

9. You have not prepared nor had prepared for you any report or memorandum for external use in connection with the proposed offering of the Securities, and if the Registration Statement is on Form S-1,

you have not prepared any engineering, management or similar reports or memoranda relating to broad aspects of the business, operations or products of the Company within the past 12 months (except for reports solely comprised of recommendations to buy, sell or hold the securities of the Company, unless such recommendations have changed within the past six months). (If any such report or memorandum has been prepared, furnish to [name of managing underwriter] (a) four copies thereof and (b) a statement as to the actual or proposed use, identifying (i) each class of persons (institutional mailing lists, retail clients, etc.) who have received or will receive the report or memorandum, (ii) the number of copies distributed to each such class and (iii) the period of distribution); and

10. You have no knowledge of any untrue statement of a material fact contained in the Registration Statement or any omission to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

(State exceptions, if any, and give details, or state "None." If exceptions are made to subparagraph (9) above, please furnish four copies of any such report or memorandum with a statement as to the actual or proposed use and distribution of each such document, including the dates of distribution, and identifying each class of persons (institutional mailing lists, retail clients, etc.) which has received or will receive the report or memorandum and stating the number of copies distributed to each class. Such documents and statements may be furnished to the Securities and Exchange Commission pursuant to request by the Securities and Exchange Commission.)

You agree to notify the Company promptly in the event of any development which makes untrue or incomplete any of the foregoing information. This undertaking shall extend until such time as delivery of a final Prospectus is no longer required by dealers in connection with transactions in the Securities, pursuant to Section 4(3) of the 1933 Act.

In the event of a summary or cursory review by the Securities and Exchange Commission in accordance with Release No. 4934 under the 1933 Act, you hereby authorize us on your behalf to acknowledge your awareness thereof and of your statutory responsibilities under the 1933 Act and to furnish such information and make such representations as are requested by the Securities and Exchange Commission in connection with the acceleration of effectiveness of the Registration Statement.

NOTES

NOTES

7

Appendix D: Selected Dealer Agreement

David K. Boston
Willkie Farr & Gallagher LLP

[NAME OF CORPORATION]

Shares of Common Stock

($_ par value)

SELECTED DEALER AGREEMENT

_____, 201_

Ladies and Gentlemen:

1. We and the other Underwriters named in the Prospectus relating to the above shares (the "Underwriters"), acting through us as Representative, are severally offering for sale an aggregate of _____ shares (the "Firm Shares") of Common Stock of [name of corporation] (the "Company"), which we have agreed to purchase from the Company. [If over-allotment option, insert: In addition, the several Underwriters have been granted an option to purchase from the Company up to an additional shares (the "Option Shares") of Common Stock to cover over-allotments in connection with the sale of the Firm Shares.] The Firm Shares [and any Option Shares] purchased are herein called the "Stock". The Stock and the terms under which it is to be offered for sale by the several Underwriters are more particularly described in the Prospectus.

2. The Stock is to be offered to the public by the several Underwriters at the price per share set forth on the cover page of the Prospectus (the "Public Offering Price"), in accordance with the terms of offering thereof set forth in the Prospectus.

3. Some or all of the several Underwriters are severally offering, subject to the terms and conditions hereof, a portion of the Stock for sale to certain dealers who are actually engaged in the investment banking or securities business and who are either (i) members in good standing of the Financial Industry Regulatory Authority, Inc. ("FINRA") or (ii) dealers with their principal places of business located outside the United States, its territories and its possessions and not registered as brokers or dealers under the Securities Exchange Act of 1934, as amended (the "1934 Act"), who have agreed not to make any sales of Stock within the United States, its territories or its possessions or to persons who are nationals thereof or residents therein (such dealers who shall agree to purchase shares of the Stock hereunder being herein called "Selected Dealers"), at the Public Offering

Price, less a selling concession of not in excess of $___ per share payable as hereinafter provided, out of which concession an amount not exceeding $___ per share may be reallowed by Selected Dealers to members of FINRA or foreign dealers qualified as aforesaid. The Selected Dealers have agreed to comply with all applicable rules administered by FINRA, including FINRA Rule 5141, and, if any such dealer is a foreign dealer and not a member of FINRA, such Selected Dealer also has agreed to comply with FINRA Rules 5130 and 5131, to comply, as though it were a member of FINRA, with the provisions of FINRA Rule 5141, and to comply with FINRA Rule 2040 as that Rule applies to non-member foreign dealers. Some of or all the Underwriters may be included among the Selected Dealers. Each of the Underwriters has agreed that, during the term of this Agreement, it will be governed by the terms and conditions hereof whether or not such Underwriter is included among the Selected Dealers.

4. On behalf of the Underwriters, we shall act as Representative under this Agreement and shall have full authority to take such action as we may deem advisable in respect of all matters pertaining to the public offering of the Stock.

5. If you desire to purchase any of the Stock, your application should reach us promptly by telephone or telegraph at our office at ___. We reserve the right to reject subscriptions in whole or in part, to make allotments and to close the subscription books at any time without notice. The Stock allotted to you will be confirmed, subject to the terms and conditions of this Agreement.

6. The privilege of subscribing for the Stock is extended to you only on behalf of such of the Underwriters, if any, as may lawfully sell the Stock to dealers in your state or other jurisdiction.

7. Any shares of the Stock purchased by you under the terms of this Agreement may be immediately reoffered to the public in accordance with the terms of offering thereof set forth herein and in the Prospectus, subject to the securities or Blue Sky laws of the various states or other jurisdictions.

   You agree to pay us on demand for the accounts of the several Underwriters an amount equal to the Selected Dealer concession as to any shares of Stock purchased by you hereunder which, prior to the termination of this paragraph, we may purchase or contract to purchase for the account of any Underwriter and, in addition, we

may charge you with any broker's commission and transfer tax paid in connection with such purchase or contract to purchase. Any shares of Stock delivered on such repurchases need not be the identical shares originally purchased.

You agree to advise us from time to time, upon request, of the number of shares of the Stock purchased by you hereunder and remaining unsold at the time of such request, and, if in our opinion any such shares shall be needed to make delivery of the Stock sold or over-allotted for the account of one or more of the Underwriters, you will, forthwith upon our request, grant to us for the account or accounts of such Underwriter or Underwriters the right, exercisable promptly after receipt of notice from you that such right has been granted, to purchase, at the Public Offering Price less the selling concession or such part thereof as we shall determine, such number of shares of said Stock owned by you as shall have been specified in our request.

No expenses shall be charged to Selected Dealers. A single transfer tax, if payable, upon the sale of the shares of Stock by the respective Underwriters to you will be paid when such shares of Stock are delivered to you. However, you shall pay any transfer tax on sales of shares of Stock by you and you shall pay your proportionate share of any transfer tax (other than the single transfer tax described above) in the event that any such tax shall from time to time be assessed against you and other Selected Dealers as a group or otherwise.

Neither you nor any other person is or has been authorized to give any information or to make any representation in connection with the sale of the Stock other than as contained in the Prospectus.

8. The first three paragraphs of Section 7 hereof will terminate when we shall have determined that the public offering of the Stock has been completed and upon telegraphic notice to you of such termination, but, if not theretofore terminated, they will terminate at the close of business on the 30th calendar day after the date hereof; provided, however, that we shall have the right to extend such provisions for a further period or periods, not exceeding 30 calendar days in the aggregate, upon telegraphic notice to you.

9. For the purpose of stabilizing the market in the Stock, we have been authorized (a) to make purchases and sales of the Common Stock and any other securities of the Company in the open market or otherwise, for long or short account, (b) in arranging for sales of the

Stock, to over-allot and (c) to cover any short position or liquidate any long position incurred in connection with such stabilization. Except as permitted by us, you will not, at any time prior to the completion of distribution of the Stock pursuant to this Agreement, bid for, purchase, sell or attempt to induce others to purchase or sell, directly or indirectly, any Common Stock of the Company or any security of the same class and series, or any right to purchase any such security other than (i) as provided for in this Agreement, the Agreement Among Underwriters or the Underwriting Agreement relating to the Stock or (ii) purchases or sales by you of any Common Stock as broker on unsolicited orders for the account of others.

You further agree at all times to comply with the provisions of Regulation M of the Securities and Exchange Commission applicable to this offering.

10. On becoming a Selected Dealer, and in offering and selling the Stock, you agree to comply with all the applicable requirements of the Securities Act of 1933, as amended (the "1933 Act"), and the 1934 Act. You confirm that you are familiar with Rule 15c2-8 under the 1934 Act relating to the distribution of preliminary and final prospectuses for securities of an issuer (whether or not the issuer is subject to the reporting requirements of Section 13 or 15(d) of the 1934 Act) and confirm that you have complied and will comply therewith. [For non-reporting companies, insert: You confirm also that you are familiar with Release No. 4968 of the Securities and Exchange Commission under the 1933 Act and that you have complied and will comply with the requirements therein relating to the distribution of copies of the Preliminary Prospectus relating to the Stock.]

    We hereby confirm that we will make available to you such number of copies of the Prospectus (as amended or supplemented) as you may reasonably request for the purposes contemplated by the 1933 Act or the 1934 Act, or the rules and regulations thereunder.

11. Upon request, you will be informed as to the states and other jurisdictions under the respective securities or blue sky laws of which we have been advised that the Stock is qualified for sale or is exempt from such qualification, but neither we nor any of the Underwriters assume any obligation or responsibility as to the right of any Selected Dealer to sell the Stock in any state or other jurisdiction or as to the eligibility of the Stock for sale therein. We will file

a Further State Notice in respect of the Stock pursuant to Article 23-A of the General Business Law of the State of New York.

12. No Selected Dealer is authorized to act as our agent or as agent for the Underwriters, or otherwise to act on our behalf or on behalf of the Underwriters, in offering or selling the Stock to the public or otherwise or to furnish any information or make any representation except as contained in the Prospectus.

13. Nothing will constitute the Selected Dealers an association or other separate entity or partners with the Underwriters, with us, or with each other, but you will be responsible for your share of any liability or expense based on any claim to the contrary. We and the several Underwriters shall not be under any liability for or in respect of the value of the Stock or the validity or form thereof, or for or in respect of the delivery of the Stock, or for the performance by anyone of any agreement on its part, or for the qualification of the Stock for sale under the laws of any jurisdiction or its exemption from such qualification, or for or in respect of any other matter relating to this Agreement, except for lack of good faith and for obligations expressly assumed by us or by the Underwriters in this Agreement; and no obligation on our part shall be implied herefrom. The foregoing provisions shall not be deemed a waiver of any liability imposed under the 1933 Act.

14. Payment for the Stock sold to you hereunder is to be made at the Public Offering Price less the above-mentioned selling concession at such time and on such date as we may advise, by wire transfer in Federal or other funds immediately available funds to the account(s) specified by the Representative, against delivery of the Stock. If you are a member of, or clear through a member of, The Depository Trust Company ("DTC"), we may, in our discretion, deliver your Stock through the facilities of DTC.

15. Notices to us should be addressed and mailed or delivered to us at the office of [name and address of managing underwriter]. Notices to you shall be deemed to have been duly given if telegraphed, mailed or delivered to you at the address indicated in this letter.

16. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without giving effect to the choice of law or conflicts of laws principles thereof.

17. If you desire to purchase any shares of the Stock, please confirm your application by completing, signing and returning to us the subscription letter enclosed herewith, even though you may have previously advised us thereof by telephone or telegraph. Our signature hereon may be by facsimile.

Very truly yours,

[Name of Managing Underwriter]
As Representative of the
Several Underwriters

By: _____
Authorized Signatory

[Name and Address of Managing Underwriter]

We hereby subscribe for _____ shares of Common Stock of [name of corporation] in accordance with the terms and conditions stated in the foregoing letter. We hereby acknowledge receipt of the Prospectus referred to in the first paragraph thereof relating to such Common Stock. We further state that in purchasing the Common Stock we have relied upon such Prospectus and upon no other statement whatsoever, whether written or oral. We confirm that we are a dealer actually engaged in the investment banking or securities business and that we are either (i) a member in good standing of the Financial Industry Regulatory Authority, Inc. ("FINRA") or (ii) a dealer with its principal place of business located outside the United States, its territories and its possessions and not registered as a broker or dealer under the Securities Exchange Act of 1934, who hereby agrees not to make any sales within the United States, its territories or its possessions or to persons who are nationals thereof or residents therein. We hereby agree to comply with the provisions of FINRA Rule 5141, and if we are a foreign dealer and not a member of FINRA, we also agree to comply with FINRA Rules 5130 and 5131, to comply, as though we were a member of FINRA, with the provisions of FINRA Rule 5141, and to comply with FINRA Rule 2040 as that Rule applies to non-member foreign dealers.

Very truly yours,

By: _____
Authorized Signatory

Dated: _____, 201_

Address:

NOTES

8

Lawyers as Gatekeepers in the Underwriting Process (March 2017)

Sophia Hudson

Davis Polk & Wardwell LLP

The author expresses her gratitude to Sarah Beshar for permission to use and expand upon an earlier version of this article that was authored by Ms. Beshar.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.

INTRODUCTION

Gatekeepers are private parties, such as lawyers and accountants, who are alleged to have a professional and ethical responsibility not only to refrain from but also to prevent corporate misconduct. The Securities and Exchange Commission ("SEC") has continually emphasized that gatekeepers play a critical role in maintaining capital markets of high caliber and integrity and serve investors by preparing, verifying or assessing the disclosures that they receive. While, as outgoing SEC chair Mary Jo White explained in 2013, the agency's aim is not "to charge a gatekeeper that did her job by asking the hard questions, demanding answers, looking for red flags and raising her hand," over the last decade, the SEC has steadily brought enforcement actions against lawyers, particularly in circumstances in which it believes that lawyers have not properly fulfilled their roles as gatekeepers by withholding their cooperation from wrongdoers.

In connection with an enforcement action alleging insider trading by outside counsel, Robert Khuzami, former SEC Enforcement Director, emphasized the special role of lawyers as gatekeepers, noting that "gatekeepers serve a critical role advising participants in the capital markets . . . [w]hen lawyers who have access to nonpublic information betray client confidences, it both tarnishes the profession and undermines investor faith in the marketplace." Reid Muoio, an SEC Deputy Enforcement Chief, expressed a similar sentiment in connection with an investigation of structured products, remarking "Tens of billions of toxic assets were marketed on term sheets and pitch books on trading desks. Where were the lawyers?"

Commentators have, however, observed that lawyers' duties to act as gatekeepers may conflict with the role of lawyers as confidential advisors, thus raising complex questions about the appropriate professional and ethical duties of lawyers. This paper sets forth some considerations for corporate lawyers acting as gatekeepers in light of the SEC's focus on this role and these inherent conflicts. The first section of this paper describes some high-visibility enforcement actions brought by the SEC against lawyers for failing to adequately perform their SEC–conceived role as gatekeepers. This is followed by an outline of the attorney conduct rules codifying the "up-the-ladder" reporting requirements as adopted by the SEC in 2003 pursuant to the Sarbanes-Oxley Act ("SOX"). The next section summarizes the recommendations issued by the New York City Bar Association's Task Force on the Lawyer's Role in Corporate Governance in November 2006, which place a greater emphasis on the role

of the lawyer as a confidential advisor. (The executive summary of the report of the New York City Bar Association's Task Force is reproduced in Appendix A.) Next is a brief discussion of the whistleblower provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). As discussed later in this article, the Dodd-Frank whistleblower provisions add yet another wrinkle to the lawyer's potentially conflicting roles as a confidential advisor and gatekeeper especially in light of the SEC's recent actions in rewarding whistleblowers. Lastly, I discuss the US Supreme Court decision in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) ("*Stoneridge"*), which prevents plaintiffs from recharacterizing aiding and abetting claims as "participation in a scheme to defraud" in an attempt to hold lawyers or other professionals liable for private damage claims.

SEC ENFORCEMENT ACTIONS AGAINST LAWYERS AS GATEKEEPERS

While many enforcement actions by the SEC against lawyers stem from a lawyer's direct participation in an alleged corporate fraud (such as recent high-profile insider trading and microcap stock cases involving lawyers), the SEC has also brought actions against lawyers in cases involving more subtle or indirect involvement of the lawyers concerned. Generally, the latter types of actions can be classified into three principal categories.

Failure to advise the board

The SEC has brought actions against lawyers for failing to provide to the board "important information," such as legal advice or legal strategies necessary for the board to make informed decisions.

Tenet Healthcare Corporation

The SEC brought an action against Christi Sulzbach, the former General Counsel of Tenet Healthcare Corporation. The SEC alleged that Sulzbach knew that Tenet's strong earnings growth was due to its exploitation of a loophole in the Medicare reimbursement system related to "outlier payments;" yet she failed to disclose this to the disclosure committee or in any of the company's SEC filings. According to the SEC, Tenet employees and the internal audit department had raised concerns to Sulzbach about the legality of Tenet's outlier payment practices and she had obtained several

reports, which she marked as attorney-client privileged, that documented the unusual levels of payments. Sulzbach was involved in the preparation and review of Tenet's SEC filings and wrote notes in some of the draft filings about the outlier payments. She did not, however, disclose the manipulation of the payments during any of the disclosure committee meetings that she attended or in any of the final filings. She also signed sub-certifications verifying the accuracy of Tenet's SEC filings although she knew that they did not discuss the payment scheme. As a result, in its complaint the SEC alleged that Sulzbach, along with others, was responsible for the company's misleading filings. A district court ultimately ordered Sulzbach to pay $1 in disgorgement and a $120,000 civil penalty and permanently enjoined her from future violations of relevant securities laws. The SEC's settlement with Sulzbach resulted in her suspension from appearing or practicing before the SEC.

Google

In an action against David C. Drummond, the general counsel of Google, Inc., the SEC alleged that Drummond, in consultation with outside counsel, determined that certain exemptions permitted Google to issue employee stock options without providing certain disclosures or registering the securities under the federal securities laws. According to the SEC, Drummond did not report this legal determination and its risks when he proceeded to advise the board to issue the options. The SEC's position was that Drummond's legal determination was incorrect and that the grants did not qualify for exemption and were not accompanied by the required disclosures. The SEC concluded that, by advising the board to issue the options without also advising the board of the risks that certain financial disclosures might have been required or that certain exemptions from registration might not apply, Drummond "caused" Google to violate certain registration provisions of the federal securities laws. The SEC's settlement with Drummond included disgorgement and interest exceeding $500,000.

Electro Scientific Industries, Inc.

In an action against John E. Isselmann Jr., the former general counsel of Electro Scientific Industries, Inc. ("ESI"), the SEC alleged, among other things, that after ESI's CFO and controller informed the board of their unilateral decision to eliminate certain retirement

benefits for ESI's Asian employees, Isselmann received written legal advice that the law prohibited the action. According to the SEC, Isselmann tried to raise the issue with the company's disclosure committee and outside auditors in meetings regarding ESI's quarterly report but the CFO objected and, as a result, Isselmann did not provide the legal advice at that time. Although Isselmann provided the legal advice to the CFO after those meetings, and later to the audit committee, the SEC asserted that by failing to provide it to the board prior to the filing of the quarterly report, he "allowed" the CFO and controller to disguise a fraud that enabled ESI to report a profit in the quarterly report. The SEC acknowledged that Isselmann "was not involved, present or consulted" when the alleged fraudulent activity took place, but concluded that his failure to fulfill his gatekeeper role was a "cause" of ESI's reporting materially false financial results. The SEC's settlement with Isselmann included a $50,000 civil penalty and a cease and desist order.

The report of the New York City Bar Association's Task Force notes that the cases against Drummond and Isselmann "may suggest a willingness by the SEC to proceed against attorneys who, though not active participants in the corporate misconduct, are deemed to have been insufficiently proactive upon learning of the wrongdoing." The report goes on to cite a quote from Giovanni Prezioso, then-SEC General Counsel, that seems to support this theory. According to Prezioso, the decisions against Drummond and Isselmann "do not impose sanctions for lawyers for the *advice* that they gave—but for their *actions* in situations where they in fact *failed to advise* their clients and became participants in the prohibited conduct." Remarks Before the Spring Meeting of the Ass'n of General Counsel, April 28, 2005, available at www.sec.gov/news/speech/spch042805gpp.htm ("Presiozo ABC Remarks") emphasis in original.

Preparation and approval of misleading or false documents

The second category involves allegations of lawyers preparing or approving SEC filings, public statements or other documents (such as contracts, management representation letters to auditors or legal opinions) that they knew, or should have known, were false or misleading.

Enron Corp.

Jordan Mintz, a former Vice President and General Counsel of Enron's Global Finance Group, and Rex Rogers, a former Enron Vice President and Associate General Counsel each settled SEC enforcement actions against them for relatively minor monetary penalties (although each was also suspended from appearing or practicing before the SEC for a period of two years). The SEC had alleged that Mintz and Rogers were responsible for disclosures in Enron's SEC filings and knew, or were reckless in not knowing, that certain related party transactions between Enron and an entity controlled by Enron's then CFO, Andrew Fastow, had not been properly disclosed in the company's proxy statement and Form 10-Qs. The transactions involved the sale of an interest in a special purpose entity to, and repurchase by Enron from, an entity controlled by Fastow. The transactions were allegedly accompanied by a secret oral side-agreement pursuant to which Enron agreed that the Fastow-controlled entity would not lose money on the transaction. The SEC had alleged that Mintz knew, or was reckless in not knowing, of the existence of the oral side-agreement and directed the documentation, closing and reporting of the transaction despite the fact that the existence of the oral side-agreement meant that the transaction was not properly accounted for or disclosed. The SEC also alleged that Rogers was responsible for certain omissions in former Enron CEO Kenneth Lay's beneficial ownership reports.

Refco Inc.

Joseph P. Collins, a former partner in an international law firm, settled an SEC enforcement action in connection with his representation of Refco Inc. The SEC alleged that Collins, as Refco's longstanding outside counsel, knew that Refco's then CEO owed Refco hundreds of millions of dollars and that Refco was conducting certain roundtrip transactions to smooth its period-end financial statements. Although Collins had allegedly participated in the drafting of documents related to these roundtrip and related party transactions, Refco did not disclose the transactions in connection with the sale of a stake in Refco to a private-equity firm or in two securities offerings. The SEC alleged that by drafting or participating in the drafting of the sale documents and the offering documents that omitted the required disclosure related to these

transactions, Collins aided and abetted Refco's fraud. Mr. Collins was also convicted of criminal fraud charges relating to his representation of Refco and sentenced to seven years in prison. Although the conviction was subsequently overturned and a new trial ordered. Mr. Collins was again convicted of criminal conspiracy and fraud charges, and for filing false statements with the SEC and sentenced to one year and one day in prison. He was also suspended from appearing or practicing before the SEC.

Stock Option Backdating Cases

The SEC sued at least eight former general counsels of publicly traded companies for stock option abuses. In each of these cases, the SEC asserted that the relevant company's stock options were improperly accounted for as a result of counsel's backdating of grant dates, resulting in misstated financial statements and misleading SEC filings (proxy statements, beneficial ownership reports, quarterly and annual reports). The SEC also asserted that in-house counsel altered or fabricated company records, such as grant documents and committee minutes, evidencing the improper dates and made false representations to the company's auditors, thereby advancing or concealing the fraud.

The Warnaco Group, Inc.

The SEC brought an action against Stanley P. Silverstein, former general counsel of The Warnaco Group, Inc., in connection with Warnaco's annual report, which the SEC alleged misleadingly described the restatement of its financial statements. According to the SEC, Silverstein was present at meetings where Warnaco's auditors informed management that the restatement was necessary because Warnaco's cost-accounting systems had caused its inventory to be overstated in prior years and that the overstatement could not be attributed to a change in accounting method and written off as start-up costs. In Warnaco's annual report, however, the restatement was attributed to the write-off of start-up costs. According to the SEC, Silverstein knew or should have known that the disclosures contained in the annual report mischaracterized the cause of the restatement. The SEC concluded that because Silverstein approved the misleading annual report, he "caused the company's reporting violation." The SEC required that Silverstein cease and desist certain securities law violations, censured him pursuant to

its Rules of Practice and ordered payment of $165,772 in disgorgement and prejudgment interest.

Computer Associates International, Inc.

In an action against Steven Woghin, former general counsel at Computer Associates International, Inc. ("CA"), the SEC alleged that, among other things, Woghin knew, or was reckless in not knowing, that attorneys in the legal department "worked long hours in the days after each quarter-end to approve backdated contracts that CA improperly recorded in the prior years." In addition, the SEC asserted that Woghin signed filings with the SEC while knowing, or recklessly disregarding the fact that, those filings contained materially false and misleading information as a result of improperly recording revenue from the backdated contracts. A district court permanently enjoined Woghin, with his consent, from violations of certain securities laws, among other consequences. The SEC later accepted Woghin's offer of settlement, suspending him from appearing or practicing before the SEC.

Retrophin, Inc.

In December 2015, the SEC brought an action against former CEO of Retrophin, Inc. ("Retrophin") Martin Shkreli alleging, among other things, that Shkreli fraudulently induced Retrophin to fund settlements, through agreements that purported to be for consulting services, with individuals who had claims against Shkreli arising out of their investments in hedge funds managed by Shkreli. The SEC also sued Evan Greebel, a partner at a national law firm and outside counsel and corporate secretary of Retrophin for aiding and abetting Shkreli in the scheme. The SEC alleged that Greebel knew or recklessly disregarded the true purpose of the consulting agreements, knew or recklessly disregarded the fact that other members of Retrophin's board had not been informed of the true purpose of the these agreements and failed to disclose to the board this true purpose. The SEC also alleged that Greebel had drafted at least three of the consulting agreements. According to Andrew M. Calamari, Director of the SEC's New York Regional Office, Greebel "not only crossed legal boundaries but also grossly violated both his professional and ethical obligations."

RPM International Inc.

In September 2016, the SEC filed a complaint against RPM International Inc. ("RPM") and its General Counsel and Chief Compliance Officer, Edward Moore, in connection with RPM's failure to timely disclose a Department of Justice ("DOJ") investigation into overcharges by a subsidiary under government contracts and associated contingencies, among other matters. While RPM had known about the DOJ investigation in March 2011, its CEO and independent auditors became aware of the investigation in April 2011 and RPM made a settlement offer two days after filing its Form 10-Q in January 2013, RPM's disclosures did not reveal the DOJ investigation (and loss accrual) until an April 2013 8-K reporting RPM's third quarter results. The complaint placed a heavy onus on Moore, who was responsible for "keep[ing] RPM's CEO, CFO, and Audit Committee reasonably informed . . . . [and] for updating the [independent] Audit Firm on the status of the DOJ investigation." According to the SEC, Moore did not appropriately inform the independent auditors that the DOJ had filed a complaint and that RPM had sent a $11.4 million overcharge estimate to the DOJ. From the SEC's perspective, RPM made false and misleading filings "[a]s a result of Moore's misstatements and his failure to disclose key facts regarding the DOJ investigation."

Obstruction of internal investigations

The SEC has also focused on the obstruction of an internal investigation as an allegation against lawyers, finding that, in some instances, lawyers may have conducted investigations in such a manner as to help conceal ongoing fraud, or may have taken actions to actively obstruct such investigations.

Computer Associates International, Inc.

For example, in the action against Woghin described above, the SEC alleged that Woghin met with CA's employees prior to their being interviewed by investigating parties and instructed them regarding the manner in which they should answer questions when they were interviewed. The SEC asserted that Woghin's actions were intended to, and did, "cause" the employees to conceal the existence of improper accounting practices.

In many of the cases described above, the lawyers against whom the enforcement actions were brought entered into consent

orders enjoining them from future violations of securities laws. These enforcement actions—none of which was brought pursuant to the SOX "up-the-ladder" reporting requirements—demonstrate that in the current environment, even putting aside the SOX "up-the-ladder" reporting requirements, there exists a regulatory dynamic that reinforces the need for lawyers to carefully consider their involvement in corporate activities and to keep in mind the role of "gatekeeper" that has come to be expected of them. Cases of the type described in the second and third categories may not be all that surprising. But situations of the type described in the first category (where corporate actions are to be taken based on or in disregard of a lawyer's advice) may be especially challenging, since lawyers in those situations are called upon to give advice necessitating difficult judgments often involving a balancing of various legal and business issues and objectives.

SARBANES-OXLEY ACT'S "UP-THE-LADDER" REPORTING REQUIREMENTS

Section 307 of SOX requires the SEC to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the SEC in any way in the representation of issuers, including rules requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer "up-the-ladder" within the company. The SEC's lawyer conduct rules, adopted as Part 205 in 2003 (17 C.F.R. § 205), respond to this directive and are intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct.

Attorneys subject to rules

The rules apply to both internal and outside counsel appearing and practicing before the SEC in the representation of an issuer. "Appearing and practicing" before the SEC includes: (i) transacting any business with the SEC, including communications in any form, (ii) representing an issuer in an SEC administrative proceeding or investigation, (iii) providing advice in respect of the US securities laws or the SEC's rules or regulations, or (iv) advising an issuer as to whether information or a statement, opinion or other writing is required to be filed with or submitted to the SEC.

Attorneys' duties

The SEC explicitly clarifies that an attorney representing an issuer owes his or her professional and ethical duties to the issuer as an organization, and not to the issuer's individual officers, directors or employees.

Duty to report "up-the-ladder."

The rules impose an up-the-ladder reporting requirement when an attorney becomes aware of credible evidence of a material violation by the issuer or any officer, director, employee or agent of the issuer of US securities laws or fiduciary duties or any similar violation of US federal or state law. An attorney must report such evidence to the issuer's chief legal officer ("CLO") or to both the CLO and the CEO. The standard is an objective one: a duty to report exists if it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

Unless the CLO reasonably believes that there is no violation, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to stop, prevent or rectify any violation.

The CLO or CEO must also provide an appropriate response to the reporting attorney. An "appropriate response" is one as a result of which the reporting attorney reasonably believes that there is no violation, that the issuer has adopted appropriate remedial measures to stop, prevent or rectify any violation, or that outside counsel has been appropriately retained by the issuer and the issuer has either substantially implemented any remedial recommendations made by such counsel or has been advised that such counsel may assert a colorable defense with respect to the suspected violation.

The rule further requires the reporting attorney to take certain steps if the CLO or CEO does not provide an appropriate response to a report of evidence of a violation. These steps include reporting the evidence up-the-ladder to the audit committee, another committee consisting solely of independent directors if there is no audit committee, or to the board if there is no such committee. If the attorney believes that the issuer has not made an appropriate response to the report, the attorney must explain the reasons for his or her belief to the CEO, CLO or directors to whom the report was made.

Qualified Legal Compliance Committee ("QLCC")

The attorney may, as an alternative to the reporting requirements set out above, report evidence of a material violation to a QLCC, if the issuer has previously formed such a committee.

If an attorney other than a CLO reports the evidence to a QLCC, he or she need not take any further action under the rules. The QLCC must have written procedures for the receipt, retention and consideration of reports of material violations and must be authorized and responsible to notify the CLO and CEO of the report, determine whether an investigation is necessary and, if so, notify the audit committee or the board. The QLCC may also initiate an investigation to be conducted by the CLO or outside attorneys, and retain any necessary expert personnel. At the conclusion of the investigation, the QLCC may recommend that the issuer adopt appropriate remedial measures and/or impose sanctions, and notify the CLO, CEO, and board of the results of the inquiry and appropriate remedial measures to be adopted. Where the QLCC decides, by a majority vote, that the issuer has failed to take any remedial measure that the QLCC has directed the issuer to take, the QLCC has the authority to notify the SEC. A CLO may also refer a report of evidence of a material violation to a QLCC, which then would have responsibility for taking the steps required by the rule.

A CLO may refer a report of evidence of a material violation to a previously formed QLCC in lieu of causing an inquiry to be conducted. In this case, the CLO shall inform the reporting attorney that the report has been referred to a QLCC, who will thereafter be responsible for responding to the evidence.

Supervisory attorneys

An attorney supervising or directing another attorney is responsible to make reasonable efforts to ensure that subordinate attorneys comply with the reporting requirements. A supervisory attorney must further comply with the reporting requirements if a subordinate attorney reports evidence of a material violation.

Subordinate attorneys

A subordinate attorney complies with the rule if he or she reports evidence of a material violation to his or her supervisory attorney (who is then responsible for complying with the rule's requirements). A subordinate attorney may also take the other steps described in the rule if the supervisor fails to comply.

Noisy withdrawal

In the original SOX proposing release, the SEC suggested that, under certain circumstances, counsel would be required to withdraw from an assignment and inform the SEC of such withdrawal and the reasons therefor (a "reporting-out" obligation as well as a "reporting-up" obligation). This received significant negative comment and the SEC ultimately eliminated this requirement from the final rules. At least one SEC staff member has commented, however, that the mere existence of the proposal has had a positive effect on attorney conduct.

While the SEC has not brought any enforcement actions to date pursuant to the attorney conduct rules of Part 205, the prophylactic effect of these rules may have contributed to at least two enforcement cases. In January 2005, the SEC brought charges against TV Azteca and three officers and directors. The SEC alleged that TV Azteca and these officers and directors failed to disclose the chairman's dealings with a company subsidiary. Akin Gump had resigned from representing the company in December 2003, citing the SOX Section 307 reporting-up provisions, after the company refused to disclose the transactions. The SEC entered into a settlement with the defendants in 2006, involving deregistration and disgorgement and penalties exceeding $8.5 million. In 2009, outside counsel for Robert Allen Stanford's financial companies resigned and notified the SEC that he and his law firm were disaffirming all prior and oral representations regarding Stanford Financial Group and its affiliates. A week later, the SEC charged Stanford and his companies with allegedly conducting a massive investment fraud. In April 2010, the SEC announced that approximately $14.2 million had been recovered for victims of the alleged fraud through cooperation of the SEC, regulatory authorities in various jurisdictions and a court-appointed receiver in the SEC's enforcement action.

RECOMMENDATIONS OF THE NEW YORK CITY BAR ASSOCIATION'S TASK FORCE

In November 2006, the New York City Bar Association's Task Force on the Lawyer's Role in Corporate Governance issued its report which examined the role of counsel, both in-house and outside, with respect to counseling about corporate conduct in light of the publicized alleged failures by lawyers to perform that role effectively. The task force addressed itself generally to the question of how lawyers can be more effective in helping public companies avoid problematic conduct.

Lawyer as confidential advisor

The task force concluded that lawyers, either in-house or outside, appear to have been strategically positioned with respect to a number of corporate scandals, suggesting that lawyers are potential whistle-blowers or gatekeepers and raising the question of whether lawyers should be required to act as such. The task force did not recommend, however, that lawyers generally be required to play a gatekeeper or whistleblower role, which the task force regarded as so contrary to lawyers' traditional role as confidential advisors to their client as to be counterproductive. For example, the task force regarded such a rule as likely to result in a chilling of client-lawyer communications, the exclusion of lawyers from some strategic meetings and general degradation of the ability of lawyers to render well-informed advice to their corporate clients, as well as potentially leading to defensive advising on the part of lawyers concerned about the possibility of their own liability.

Lawyer's duty to report

The task force recommended that New York adopt the proposed 2003 amendments to the ABA Model Rules of Professional Conduct which would, inter alia, require a lawyer to report matters that would cause substantial injury to a corporation up through the corporate hierarchy, including to the board, if necessary, and would permit the lawyer to report such matters outside of the corporation if necessary to prevent substantial injury to the corporate client or to prevent or rectify crimes or fraud when the lawyer's services were used. To date, the reporting requirements and permissions under Rules 1.6 and 1.13 of the New York rules remain narrower than these proposed 2003 amendments.

Outside counsel

With respect to the role of outside counsel, the task force noted that it had evolved in recent decades from a general counseling role to one more focused on specific transactions and on projects that require special expertise. The task force felt that this narrowing of the role of outside counsel may create the risk of outside counsel rendering services without a full understanding of the context in which the services are requested or to be used.

When in the course of representation outside counsel becomes seriously concerned about the legality of the issuer's actual or intended

conduct, the task force recommended that outside counsel should make a reasonable inquiry, regardless of whether the concern rises to the level requiring a report under the SEC's lawyer conduct rules. If such inquiries do not allay the concern, counsel should seriously consider withdrawing from the representation. The task force further recommended that, in the rare situation when an issuer's board declines to consider or take action in response to counsel's report of a material violation, counsel should seriously consider reporting such violation to the appropriate regulatory or governmental authorities (as permitted, under specified circumstances, by the SEC's attorney conduct rules and ABA Model Rules). The case for "reporting-out" will be especially compelling if a substantial reason exists to doubt the independence of the company's directors.

Outside counsel should also ensure that the audit committee is made aware of all unasserted claims and assessments and any advice by such outside counsel regarding whether or not to disclose these claims.

General counsel

The task force also examined the role of the general counsel, whom it regards as central to an effective system of corporate governance of a public company. The task force offered a series of recommendations to strengthen and facilitate the general counsel's role. Recommendations include sufficient direct access by general counsel to senior management, opportunities for general counsel to meet with the board separate of management on a regular basis and the general counsel's meeting at least annually with any outside law firm performing substantial work for the corporation.

Due diligence

An issuer's in-house and external counsel should advise the issuer's board or audit committee and management on the extent of due diligence performed in connection with the issuer's public disclosure documents and its material corporate transactions. Oversight of issuer due diligence practices by audit committees and other independent directors is, in the view of the task force, part of sound corporate governance.

The task force noted that despite expectations that continuous due diligence programs would be undertaken as a result of the adoption of various securities offering reforms, the number of companies today

using such programs appears not to be extensive and opinions vary on their effectiveness. The report suggests that new due diligence techniques should be developed.

The task force finally rejected suggestions that lawyers should be required to certify the accuracy of their clients' SEC filings as inconsistent with the traditional and valued role of lawyers as counselors and not cost-effective. The task force also stated it believes the consideration of legislation reestablishing aiding and abetting liability in civil litigation under the securities laws to be premature. One of the reasons the task force cited for this assessment, however, was the need for the courts to resolve the uncertainty surrounding scheme liability. As discussed below, the Supreme Court's 2008 decision in *Stoneridge* resolved this issue.

DODD-FRANK WHISTLEBLOWER PROVISIONS

Dodd-Frank and the SEC rules implementing the Dodd-Frank whistleblower provisions provide that any eligible whistleblower who voluntarily provides the SEC with original information that leads to the successful enforcement of an action brought by the SEC under the securities laws must receive an award of between 10 and 30 percent of the total monetary sanctions collected if the sanctions exceed $1,000,000. One of the concerns expressed about these provisions is that they could create a significant financial incentive for those persons in a position to learn of potential wrongdoing, such as attorneys and compliance personnel, to report the information directly to the SEC in order to collect a bounty, potentially in violation of professional responsibilities to the source of the information. Particularly with respect to attorneys, the Dodd-Frank whistleblower incentive provisions have exacerbated the inherent tension between Sarbanes-Oxley rule 205.3(d)(2), which enables an issuer's counsel to reveal confidential information to the SEC without the issuer's consent and state ethics laws, which require utmost confidentiality when dealing with client information. In October of 2013, the New York County Lawyers' Association's committee on professional ethics concluded that New York attorneys that receive bounties under Dodd-Frank by being whistleblowers against their clients are in violation of state ethics rules. Citing this general conclusion, a Second Circuit judge in 2013 affirmed a lower court decision that found a former general counsel violated ethics rules through filing his *qui tam* action against his former employer and dismissed the action. Another significant concern is that the whistleblower provisions create a strong financial incentive for employees to

bypass internal compliance and legal processes and instead report suspected wrongdoing directly to the SEC.

The SEC rules that implement the Dodd-Frank whistleblower provisions attempt to address the concerns highlighted above by making certain information, such as information obtained through compliance or legal processes or by persons in those roles, ineligible for whistleblower awards, subject to certain exceptions. The rules also provide incentives for employees to report through internal compliance systems.

Since the inception of the SEC's whistleblower program in August of 2011 through September 2016, the SEC had granted more than $111 million in awards to 34 whistleblowers. In the SEC's fiscal year 2016 alone (ending September 30, 2016), the SEC paid more than $57 million in awards, including six of the top ten highest awards in the program's history. The size of these whistleblower awards has varied, reaching as a high as $30 million for a single whistleblower. Awards have proven to be a strong financial incentive as evidenced by the fact that the SEC reported a total of 18,334 whistleblower tips through September 2016, with over 4,200 of them coming in fiscal year 2016, a greater than 40% increase from fiscal year 2012. In April of 2015, the SEC announced an award of more than one million dollars to a compliance professional that provided information resulting in enforcement action against the whistleblower's company and noted that this was the second award made to a compliance professional under the whistleblowing program. Because the identity of whistleblowers is protected by law, it is unclear how many (if any) of these whistleblower awards were granted to lawyers that provided information about their clients. What is clear, however, is that the Dodd-Frank whistleblower provisions, and the SEC's implementation of them, add yet another wrinkle to a lawyer's complex role of confidential advisor and gatekeeper.

As part of a continued effort to encourage whistleblowing activity, the SEC has taken steps to enhance protections for whistleblowers. In 2016, the SEC initiated multiple actions against employers for violations of Rule 21F-17 under the Securities and Exchange Act of 1934, as amended, which prohibits issuers from taking any action to impede whistleblowers from reporting possible securities violations to the SEC. Several actions for violations of Rule 21F-17(a) involved allegations that employers improperly restricted former employees through severance agreements, such as agreements with financial penalties for disclosure or waivers of rights to potential awards. In August 2015, the SEC issued interpretative guidance clarifying that, in addition to protecting individuals that report potential securities law violations to the SEC, Dodd-Frank's employment-retaliation

protections also apply to individuals that report such violations internally at public companies. The SEC guidance was prompted, at least in part, by a Fifth Circuit ruling in 2013, which had held that Dodd-Frank protects only those individuals that report securities law violations to the SEC. In September of 2015, the Second Circuit held that the relevant Dodd-Frank provisions were sufficiently ambiguous to warrant deference to SEC's interpretation of the rules.

STONERIDGE DECISION

Although much of this paper is focused on the SEC's enforcement actions against lawyers for their role in corporate frauds, it also seems appropriate to mention the 2008 Supreme Court decision in *Stoneridge* which bears on whether a lawyer may be subject to civil liability for such actions. The *Stoneridge* decision resolved a circuit-split as to whether there can be private civil liability under Section 10(b) of the Securities Exchange Act of 1934 for actors who do not themselves make misstatements or omissions or engage in manipulative securities transactions, but instead are alleged to have participated in a "scheme" to defraud in which another actor has made misleading statements to investors. In a 5-3 decision (with Justice Breyer recusing himself), the Supreme Court answered this question in the negative, holding that there is no private civil liability for a secondary actor who did not speak to the market, and whose allegedly deceptive conduct is not disclosed to the market, because the reliance element of a Section 10(b) claim cannot be satisfied.

In *Stoneridge*, Charter Communications ("Charter"), a cable company, allegedly entered into fraudulent transactions with the respondents, two suppliers of set-top boxes, to inflate Charter's reported revenues in 2000. According to the complaint, the respondents essentially agreed to overcharge Charter for set-top boxes, on the understanding that they would then buy an equivalent amount of advertising from Charter at inflated rates. Charter capitalized the costs of the set-top boxes and recognized the advertising amounts as revenue. It was alleged that as part of this arrangement, the respondents prepared false documents to hide the relationship between the inflated hardware sales prices and the inflated advertising purchases. It was further alleged that the respondents knew or recklessly disregarded that Charter intended to use the transactions to inflate revenues and knew that the resulting financials would be relied upon by analysts and investors. The respondents, however, were not alleged to have made any false statements to the market themselves, and the public was not aware that the respondents played any role in these transactions.

The petitioners claimed that respondents' conduct constituted part of a "scheme" to misrepresent Charter's revenue for which the respondents could be liable under Section 10(b). The Supreme Court rejected this argument, however, on the basis that the arrangement, although "unconventional," was not disclosed to the investing public and was "too remote" to establish the reliance element under Section 10(b). According to the Supreme Court, "it was Charter, not the respondents that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." The Supreme Court suggested that the respondents may have aided and abetted Charter's misstatement but made it clear that there is no private cause of action for aiding and abetting under Section 10(b).

If the Supreme Court had recognized the concept of scheme liability for secondary actors under Section 10(b) in *Stoneridge*, this theory of liability might have also been extended to lawyers or other professionals participating in securities offerings. To date, the decision in *Stoneridge* has, however, insulated lawyers from exposure to private securities litigation for merely aiding and abetting an issuer that makes misstatements to investors. In *Pacific Investment Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010), the Second Circuit Court of Appeals relied upon *Stoneridge* to dismiss private fraud charges against a law firm that had allegedly drafted misleading transaction documents which were not attributed to the law firm or its attorneys when made. Similarly, in *Affco Investments et al v. Proskauer Rose*, 625 F.3d 185 (5th Cir. 2010), the Fifth Circuit Court of Appeals relied on *Stoneridge* to dismiss a plaintiff's claim against a law firm that had provided opinions in connection with a proposed tax transaction because, while the transaction's marketing materials touted opinions from "national law firms," the plaintiffs were not specifically aware of the defendant law firm's role when making an investment decision.

The *Stoneridge* decision does not negate the SEC's ability to bring enforcement actions based on aiding and abetting claims against lawyers or other secondary actors, and in fact may encourage it to do so. In addition, plaintiffs may still bring claims against lawyers as "primary violators" under Section 10(b) if they are able to satisfy this higher standard.

CONCLUSION

The responsibilities of lawyers as gatekeepers may conflict with the traditional obligations of loyalty that attorneys owe to their clients. The practical effects of trying to balance the attorney's traditional obligation to represent a client zealously and their alleged gatekeeper duties that presumably run in favor of the investors or public interest more generally do not lend themselves to easy answers and are likely to be the subject of mutual accommodation on both sides of the debate in the future.

Executive Summary

REPORT

NEW YORK CITY BAR ASSOCIATION

TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE

In March 2005, Bettina Plevan, then President of the New York City Bar Association (the "Association"), appointed this Task Force with the following charge:

> The Task Force will examine the role of counsel, both in-house and outside, with respect to counseling about corporate conduct. The Task Force will examine all aspects of the role of individual lawyers and law firms by examining recent failures to perform that role effectively as alleged by government agencies, Congress and the courts. The Task Force will also consider the interplay between ethical rules, privileges and the evolving enforcement climate. It will include within its focus an examination of decision-making within law firms, and the possible need for enhanced procedures to strengthen the oversight by law firms of the conduct of their attorneys.

The full 190 page report of the Task Force (hereafter the "Report") is posted elsewhere on this website. What follows is an Executive Summary of the Report.

RECOMMENDATIONS

A lawyer's legal duties: confidential advisor to clients

The subject of the lawyers' role in advising public companies has been an active subject of debate for many decades (see Report pp. 30-40). It has received heightened focus as a result of the spate of recent major corporate scandals, which have again raised the oft-asked question, "where were the lawyers"?, *i.e.*, why were such scandals not averted by either inside or outside lawyers? The Task Force reviewed the available public record concerning nine recent scandals in an attempt to answer this question on an empirical basis.

Our conclusion, necessarily a tentative one absent definitive fact-finding, is that lawyers, either in-house or outside, appear to have been strategically positioned with respect to a significant number of these scandals. Though not necessarily culpable in any actual wrongdoing, a matter for determination by courts or other tribunals, lawyers

often were sufficiently familiar with aspects of client conduct later alleged to have been fraudulent to have asked questions about that conduct. They appear to have done so in certain instances. Where questions were not asked or pressed, it is reasonable to believe that more assertive action might have avoided or mitigated wrongdoing in some of these situations. (*see* Report pp. 21-30, and Appendix D).

This conclusion suggests that lawyers are potential "whistle-blowers" or "gatekeepers" with respect to incipient or past client wrong-doing, thus posing the question of whether they should be duty-bound to play that role for the protection of the investing public. The Task Force does not recommend that lawyers be required to play such a role. (See Report pp. 57- 64). To the contrary, we believe that to impose general whistle-blowing or gatekeeping duties on lawyers, so contrary to their traditional role as confidential advisors to their clients, would be counterproductive. It probably would result in a chilling of client-lawyer communications, the exclusion of lawyers from some strategic meetings, and generally degrade the ability of lawyers to render well-informed advice to their corporate clients.[2] It might also lead to a defensive advising on the part of lawyers concerned about the possibility of their own liability.

The traditional limitation of the lawyer's duties of loyalty to his or her client, and the correlative obligation to preserve client confidences, is in the public interest as facilitating the rendition of well-informed legal advice to public companies. By rendering well-informed legal advice, even in the face of client or employer pressures to the contrary, lawyers can play their most productive role in avoiding future corporate scandals. The forthright rendition of such advice is every lawyer's duty. The professional courage necessary to press such advice, sometimes at the risk of losing a client or a job, is indispensable to a lawyer's ability to play an effective role in corporate governance (see Report pp. 95-96).

Thus we do not recommend a fundamental change in a lawyer's responsibilities, such as by recognizing a general legal (or ethical) duty to the investing public.[3] However, because the lawyer's public

2. We recognize that the SEC's mandatory reporting up rules under SOX, and permissive reporting out rules, which we support, also may produce these impacts to some degree. *See* Report n. 68 and pp. 70-72, 86-91).
3. Of course lawyers, in common with all other participants and advisers involved in the offering of securities by public companies, do have legal duties to the public to the extent prescribed by regulations and statutes, such as the SEC's Rule 10b-5.

company client has clear legal duties to the investing public, including its shareholders, the effect of corporate action on the investing public must be a matter of active concern for the lawyer in advising the client (see Report pp. 65-67).

Nor should a lawyer restrict his or her advice to narrow questions of legal compliance. Much conduct that may not violate the law nonetheless may harm the client, or appear to the lawyer to be unfair or unjust. The lawyer's role properly includes advice on such broader questions (*see* Report pp. 67-70).

Changes in the ethical rules

Notwithstanding the central importance to the lawyer's role of preserving client confidences, limited exceptions to that duty have always existed that recognize other important values. The prevention and mitigation of corporate fraud, particularly in instances where a client has used a lawyer's services in the wrongdoing, is one such value.[4] In this context we recommend that New York's proposed Rules of Professional Conduct, currently under consideration by the House of Delegates of the New York State Bar Association ("NYSBA"), include a series of 2003 amendments to the ABA Model Rules of Professional Conduct ("Model Rules").[5] Specifically, we recommend that New York adopt the 2003 amendments to:

> ABA Model Rule 1.13(b), requiring, presumptively, a lawyer for a corporate client who learns of an ongoing impending violation of law likely to cause substantial injury to the client to report the matter up through the corporate hierarchy, including to the Board of Directors if necessary;
>
> ABA Model Rule 1.13(c), permitting a lawyer, if the Board insists upon or fails to address a clear violation of law, to make limited disclosures of

---

For example, a lawyer cannot, any more than a corporate officer, make materially misleading representations to the public in connection with a client's offering of securities.

4. In this and in several other respects we follow and second the recommendations in the thoughtful report issued in 2003 by the ABA's Task Force on Corporate Responsibility, 59 Bus. Law. 145 (2003).
5. The proposed New York rules have been put before the NYSBA House of Delegates by the Committee on Standards of Attorney Conduct ("COSAC") in a two volume Report and Recommendations dated September 30, 2005 ("COSAC Report"). Contrary to the views of this Task Force, the COSAC Report does not recommend that New York adopt the "reporting out" features of the ABA 2003 amendments to Model Rules 1.13(c) and 1.6(b)(2) and (3).

client confidences (such as to regulatory bodies) to the extent necessary to prevent substantial injury to the corporate client;

ABA Model Rule 1.13(e), requiring a lawyer who believes he has been discharged for reporting up pursuant to Rule 1.13(b), or who withdraws for related reasons, to insure that the Board is informed of this fact;

ABA Model Rules 1.6(b)(2) and (3), permitting a lawyer to make limited disclosures of client confidences (such as to regulatory bodies) to prevent, or to rectify or mitigate, crimes or frauds in which the lawyer's services have been used (see Report pp. 71-95).

Best practices

Most of our recommendations consist of "best practices": suggestions concerning the preferred way for lawyers to act, within the framework of law and ethical rules but usually beyond the minimum obligations they impose, to enhance their role in corporate governance and better secure their clients' compliance with the law. Because of the wide variation in the size and other characteristics of America's over 9,400 active public companies, and of the law firms and in-house legal staffs that advise them, very few of these recommendations should be seen as having universal applicability: one size generally does not fit all.

i) the role of General Counsel

The role of the General Counsel of a public company is central to an effective system of corporate governance. We offer a series of suggestions to strengthen and facilitate the General Counsel's role, involving as it does the difficult challenge of reconciling service as a member of a company's senior management with the task of securing management's compliance with the law and the company's articulated ethical standards (see Report pp. 96-112).

To strengthen the General Counsel's ability to discharge her compliance responsibilities, the Board of Directors should review the tenure and terms of compensation of the General Counsel. Specifically, the Board should approve the hiring and compensation of the General Counsel, articulate its expectations as to General Counsel's role and approve any decision to discharge the General Counsel.

The General Counsel's role should be clearly defined by the Board to include alerting it and other appropriate decision-makers to potential significant law violations and potential damage to the company.

Structures, processes, and procedures should be put into place to emphasize the importance of the General Counsel's function in promoting compliance with the law and ethical standards, and to ensure that the General Counsel has the resources and authority necessary to perform this role.

The General Counsel, to be effective, must be seen as a senior, influential, and respected officer of the corporation and member of the company's senior management, recognized as having strong qualities of independence, judgment and discretion. His or her reporting relationships, access to management and the Board, and compensation all need to be consistent with senior status in the company.

The General Counsel must have sufficient direct access to senior management and to the Board so that problems can be elevated and dealt with at the appropriate level. The General Counsel should report to one of the highest ranked company executives, typically the CEO. He or she should have ready access, as well, to any other executives or directors responsible for compliance, governance or ethics issues, and to any company ombudsman.

The General Counsel should have opportunities to meet with the independent (non-management) members of the Board separately from management, on a regular basis, as distinguished from only ad hoc meetings initiated by the General Counsel when a special need for consultation arises. The regularity of such meetings would facilitate the raising and discussion of important issues.

In most if not all companies, the General Counsel should regularly attend meetings of the full Board, the Audit Committee, and any legal compliance committee.

When internal lawyers are assigned to subsidiaries or discrete business units, and have their direct reporting relationship to a business manager, they should have at least a "dotted line" reporting relationship to the General Counsel, who should have a significant voice in their hiring, firing and compensation.

Processes and procedures should be put into place to ensure that internal lawyers of appropriate seniority are involved in decisions on matters involving disclosure or other legal risk. For example, a company should insure that internal lawyers are present at appropriate meetings or are members of relevant committees.

A company should clearly inform employees to whom within the internal legal department they can bring concerns. It should also establish employee hotlines, and ensure that lawyers are involved in resolving any legal issues presented through that medium.

Junior lawyers should have training specific to their position and have access to sufficiently senior and experienced internal lawyers – if necessary including the General Counsel – to obtain support and to discuss and elevate issues where required.

The compensation of internal lawyers should not be determined in a manner that undermines the independence of their legal advice, and deters them from raising and appropriately dealing with issues. Such a situation might be presented, for example, were the compensation of a lawyer to be determined solely by a business manager to whom she reported. The Board, as stated above, should review the compensation of the General Counsel, and the General Counsel should have a substantial role in reviewing the compensation of other internal lawyers.

The General Counsel should have ultimate authority with respect to the selection of the principal external lawyers retained by the company and should clearly define their roles. The General Counsel's expectations of outside counsel, including to "report up" any apparent wrongdoing by corporate agents, must be clearly understood by outside firms. The General Counsel (or his/her designee) should consider meeting regularly, at least once a year if not more often, with any outside firm performing substantial ongoing work for the company.

ii) the role of outside counsel

The role of outside counsel has evolved in recent decades from a general counseling role to one more focused on specific transactions and on projects that require special expertise. This narrowing of the role of each outside counsel creates the risk that such counsel may render certain services without a full understanding of the context in which the services are requested or to be used.

Another change in the profession over this period has been its evolution toward a more competitive, bottom line orientation, with client relationships often in play and critical to the compensation of partners. This environment creates pressures on law firms and lawyers to acquiesce in questionable client conduct rather than place the client relationship at risk by pressing unwelcome advice. Consequently, it is important for the profession to adhere to professional standards that support the rendition of forthright advice and the rejection of clearly improper client conduct (see pp. Report 112-18).

Outside counsel, through dialogue with the company's General Counsel or management, should endeavor to be aware of the context in which and the purpose for which her services are being requested and used. Counsel cannot guarantee that her services will not be put to some improper purpose, but she can reduce this risk through appropriate inquiries when circumstances suggest some reason for concern.

When in the course of the representation outside counsel becomes seriously concerned about the legality of the company's actual or intended conduct, counsel should make reasonable inquiry of the company, regardless of whether the concern rises to the level of requiring a report under the SEC's lawyer conduct rules (17 C.F.R. § 205) promulgated under Section 307 of the Sarbanes-Oxley Act ("SOX"), Public Law 107-204, 15 U.S.C. § 7245, or comparable state ethical rules. If such inquiries and subsequent counseling do not allay the concern, counsel should seriously consider withdrawing from the representation.

In the rare situation when a company's Board of Directors declines to consider or take action in response to counsel's report of a threatened or ongoing clear and material violation of law by the company, counsel should seriously consider reporting such violation to the appropriate regulatory or governmental authorities (as permitted, under specified circumstances, by the SEC's lawyer conduct rules, ABA Model Rules 1.6(b) and 1.13(c) and the ethics rules of most states). The case for reporting out will be especially compelling if a substantial reason exists to doubt the independence of the company's directors.

When a company asks a law firm or lawyer to succeed other counsel in connection with corporate advice or a transaction, and the circumstances suggest that the predecessor firm's withdrawal or discharge may have involved an issue concerning the client's conduct, before accepting the engagement successor counsel should request that the company permit it to discuss with prior counsel the reasons for its withdrawal or discharge. A refusal by the company so to permit should usually disincline successor counsel from accepting the engagement.

iii) the role of law firms

The responsibility of law firms as institutions has recently received increased attention in discussions of the ethical responsibilities of the profession. The SEC's lawyer conduct "reporting

up" rules appear to have stimulated a heightened focus by firms on their responsibilities to provide ethical guidance to their attorneys in the rendition of legal services. We offer several suggestions for law firms in this area (see Report pp. 121-27).

Every firm with significant public company representations should adopt written procedures for implementing the "up-the-ladder" obligations imposed by applicable ethical rules and the SEC's lawyer conduct rules.

Firm procedures should include, among other things: mechanisms within the firm to report possible violations; clear assurance that lawyers – especially junior attorneys – will be protected against any retaliatory action by reason of reporting up a perceived problem; education and training sessions; and the establishment of designated senior lawyers or committees to facilitate compliance. (One example of such procedures is set forth in Appendix F to the Report).

Because a law firm's culture has a significant impact on how ethics rules are interpreted and enforced within a firm, firms should also adopt for the guidance of their attorneys a statement of best practices in advising public companies. (One example of such a statement is set forth in Appendix G to the Report).

Firms are encouraged to designate a partner (or other senior lawyer), committee or outside counsel as an ethics adviser available to consult with all firm attorneys and otherwise to advance the firm's promotion of high ethical standards.

The attorney-client privilege should be applied to protect consultations between lawyers and their law firm's in-house ethics counsel (or specially retained outside counsel) on matters of professional conduct, including issues pertaining to clients. This protection will facilitate compliance with applicable rules and statutes, and enable the firm to enforce its ethical standards internally, thereby strengthening the lawyer's role in corporate governance. We recommend that the courts review such privilege issues in light of this strong public interest.

iv) the lawyer-auditor relationship and financial disclosures

Almost all of the recent high-profile corporate scandals have involved financial frauds, typically focused on accounting manipulations. This lends urgency to the need to examine the role of lawyers with respect to client financial disclosures, including the manner in which lawyers and auditors work together, or fail to do

so, as they render their respective services to a common client (see Report pp. 127-35).

The distinctly different roles of auditors and lawyers, the former independent of the client and owing direct duties to the investing public, and the latter confidential advisors owing their sole duties to their clients, precludes any facile notion of collaboration between the two. Each relationship necessarily must be controlled by the client. The present climate surrounding the auditing of public companies, with the risk of litigation or regulatory action ever present, likely means, regrettably, a continuation of the traditional arm's-length relationship between auditors and lawyers.

Nonetheless, lawyers do have a role to play in connection with a client's financial disclosures. Because accounting concepts are so frequently central to disclosure issues and other matters on which companies require legal advice, a basic familiarity with the relevant accounting concepts is essential for a lawyer advising a public company on financial disclosure and financial structuring. Law firms (and companies) should provide adequate training programs for their attorneys in these areas.

Lawyers should be actively consulted on matters of financial disclosure, as many accounting issues have taken on legal overtones. Processes and procedures should be set up (for example, the now frequently utilized "disclosure committee" format) to insure that disclosure issues are properly vetted among all who have relevant input, including lawyers.

In designing internal controls and procedures, pursuant to Section 404 of SOX, companies should require that the relevant internal and/or external counsel be consulted in connection with preparation of the company's financial statements to insure that information possessed by counsel relevant to the accuracy of those statements is adequately communicated to the financial personnel responsible for their preparation.

The process a company develops to support the CEO and CFO certifications of financial statements mandated by SOX Section 302 also should include input from the company's lawyers as to matters on which they have been engaged that are material to the financial statements.

The 1975 ABA-AICPA "Treaty," providing guidance as to how lawyers should respond to auditors' inquiries concerning asserted and unasserted claims (loss contingencies), need not be modified in light of such recent developments as adoption of the

SEC's lawyer conduct rules and the 2003 amendments to the ABA Model Rules. Those new rules, however, can impact lawyer conduct consistent with the Treaty, such as by requiring a report up if management resists the lawyer's advice that a clearly material unasserted claim be disclosed to its auditors and in its financial statements.

As recommended in the Treaty, outside counsel confirm in their responses to auditors' letters that their practice is to consult with clients when they learn of unasserted claims that may require financial statement disclosure. These consultations typically occur only with company management. This practice should be modified in one respect, consistent with the spirit if not the literal requirements of the SEC's lawyer conduct rules: counsel should insure that the Audit Committee is also made aware of such unasserted claims, and of any advice, if rendered to management, that such claims should be disclosed.

Due diligence with respect to financial (and other) disclosures, including in public offerings of securities, is also an important concern that may not be receiving sufficient attention from issuers, underwriters, their respective lawyers and the SEC (see Report pp. 135-42). Lawyers play an essential role in due diligence programs for both issuers and underwriters. Law firms should review the adequacy of their due diligence training programs and practices, including the need to assign qualified personnel to lead due diligence teams. Issuer's inside counsel and (where involved) outside counsel should advise the client's Board or Audit Committee and management on the extent of due diligence work done in connection with the client's public disclosure documents and its material corporate transactions. Oversight of issuer due diligence practices by Audit Committees and other independent directors is part of sound corporate governance.

The SEC's accelerated securities offering procedures, available since the early 1980s for many frequent (or "well seasoned") issuers, leave little time for traditional due diligence by underwriters. This creates a risk that whatever diligence is performed with respect to such issuers, even if sufficient to sustain the underwriters' due diligence defense to claims under § 11 of the Securities Act of 1933, may not adequately protect the issuers from absolute liability, or purchasers in the offering from harm, as a result of inaccurate or incomplete disclosure. The SEC has provided no meaningful

guidance on this subject since adoption of its Rule 176, promulgated 24 years ago.

When the SEC authorized these accelerated procedures, it expected that many eligible issuers, in collaboration with their chosen underwriters and their lawyers, would adopt "continuous" due diligence programs. However, the number of companies today using such continuous due diligence programs appears not to be extensive, and opinions vary on their effectiveness.

Lawyers and their public company and underwriter clients should focus on the development of new techniques, better suited than traditional due diligence to the current realities of the marketplace, which could serve as a sound basis for SEC rulemaking in the future.

v) the role of lawyers conducting internal investigations

The frequency with which inside counsel and law firms are called on to conduct internal investigations for public companies, either at the company's initiative or the initiative of the SEC, some other regulatory agency, or the company's auditors, has sharply increased in recent years. The ethical parameters of such investigative assignments have not yet been clearly delineated. However, the perceived failure of a number of such investigations has highlighted some important basic ground rules (see Report pp. 143-79).

Before undertaking any investigation, outside counsel should consider, and discuss with the company, the following:

> Any prior or current relationships of counsel (or counsel's firm) with the company, or with any of its officers, directors, or principal employees, and whether those relationships, including any role of counsel or counsel's firm as the company's regular outside counsel, will undermine the fact or appearance of counsel's independence and thus adversely affect how the investigation will be viewed by regulators and others;
>
> To whom counsel should report in connection with the investigation, and whether the reporting relationship will undermine the fact or appearance of counsel's independence or otherwise affect the investigation;
>
> The scope of the investigation, including any limitations on the scope;
>
> To whom and the manner in which the results of the investigation will be disclosed.

While the scope of an investigation is a client decision, and can be limited by a number of valid considerations, counsel must be alert to any restriction motivated by factors contrary to law or the company's interest, such as an attempt to cover up apparent

wrongdoing. Any such concerns need to be elevated within the company.

Counsel should be authorized to communicate to regulators the scope of the investigation, whether any limitations have been placed on the scope, and to whom counsel is reporting in the company.

Counsel should continually reassess whether the company has a reporting obligation to the regulators, or the markets, or others, and discuss with the company the pros and cons of voluntary self-reporting. Counsel should exercise independent judgment in determining whether improper conduct has occurred and should be cognizant of pressures that might cause counsel to "under charge" (*i.e.*, be too lenient in judging corporate conduct) or "over charge" (*i.e.*, be too quick to find a violation).

In giving its advice, counsel should always consider the fiduciary duties of the company's officers and directors to safeguard the best interests of the company and should offer advice consistent with those interests, as opposed to any differing interests of individual officers and directors, or counsel's own interest in his or her reputation or career.

The extent of the General Counsel's involvement in internal investigations must depend upon the facts (including the existence of conflicts) and the capabilities of the relevant in-house department. The General Counsel and/or internal lawyers can and often should be involved in many internal investigations. However, the Board might well decide that certain investigations, such as those involving a material allegation concerning the CEO or other senior management, should be conducted by independent external counsel engaged by the Board, given the position of General Counsel and the inherent conflicts such an investigation would present. The advantages and disadvantages of involving the General Counsel in such investigations should be discussed with the Board.

The corporation should also take into account conflicts (or the appearance of conflicts) in determining whether an internal lawyer should be in charge of an investigation of a peer, or of another officer with whom counsel conducts significant business, or of a matter on which the internal lawyer rendered significant legal advice. Where an apparent conflict could compromise an investigation, the investigation should be handled by an outside counsel or another internal lawyer who would not be similarly conflicted.

OTHER ISSUES

We have reviewed a number of other suggestions that have been made with respect to the lawyer's role in corporate governance, but for various reasons do not recommend them. In this category are proposals that lawyers should be required to certify the accuracy of their clients' SEC filings or other public disclosures, a concept that we think would not be cost-effective and would be inconsistent with the traditional and valued role of lawyers as counselors (see Report pp. 118-19).

We also considered whether New York should enact a statute protecting lawyers (and others) from retaliatory discharge as a result of the reporting of client wrongdoing. This is an issue we recommend be further considered by this Association, including by reviewing of the experience of other states that do provide such protections (see Report pp. 180-83).

Finally, we reflected on whether aiding and abetting liability in civil litigation under the securities laws should be reestablished by Congress, reversing the impact of the Supreme Court's decision eliminating such liability in Central Bank of Denver N.A. v. First Interstate Bank of Denver N.A., 511 U.S. 164 (1994). We believe that consideration of such legislation at this time would be premature (*see* Report pp. 183-88). It is important, first, to assess the impact on lawyer conduct of the SEC's interpretation and enforcement of its lawyer conduct rules. In addition, the courts need to resolve the present uncertainty concerning the extent to which lawyers (and other "secondary actors") may be held as primary violators of the securities laws for conduct previously thought to constitute aiding and abetting (*see* Report pp. 42-45).

CONCLUSION

The subject of the lawyer's role in corporate governance is a complex matter. The "right answers" are not susceptible to empirical proof. No one can speak with confidence, at any level of generality, concerning the involvement (or non-involvement) of lawyers with the recent prominent corporate frauds. The shroud surrounding attorney-client dealings, a product of the attorney-client privilege and confidentiality, obscures such facts with respect to many alleged frauds. Nor is it possible to muster empirical proof to demonstrate that preserving confidentiality is essential to the optimal functioning of the attorney-client relationship.

Relying as we must on our own experience, the observations of practitioners, regulators and commentators we respect, and common sense, we do believe that any "reform" undermining the confidential nature of a

lawyer's relationship with his or her client would represent an over-reaction to the recent scandals and a cure worse than the disease.

Nonetheless, there ought to be a new determination by the corporate bar to play its proper role as confidential advisor counseling compliance with the law — and conduct exceeding its minimum requirements — in a clear and forthright manner. We believe our recommendations of best practices should be helpful in facilitating the effective performance of this role. Clear advice, including escalating a problem up the corporate hierarchy when necessary, should obviate almost all serious potential violations of law coming to a lawyer's attention.

No lawyer should knowingly acquiesce in client conduct clearly violating the securities laws, whether or not the lawyer's services are directly implicated in the wrongdoing. Reporting up often will be obligatory in such an instance under the SEC lawyer conduct rules and the ABA's Model Rules. Those rules also permit withdrawal and, depending on the circumstances, may also permit reporting out if reporting up fails to end the wrongdoing. A lawyer should not shrink from those actions, if confronted with the rare circumstances that warrant them.

November, 2006

NOTES

NOTES

Index