MEMORANDUM

TO: The Officers and Directors of the Company

FROM: Fenwick & West LLP

DATE: December 15, 2011

RE: Publicity Before and After Filing an IPO Registration Statement

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United States federal securities laws require that a company preparing for its initial public offering ("IPO") carefully monitor and control its communications throughout the public offering process, as well as once it is public. This memorandum provides guidelines for the company's publicity during this preparation period.

Executive Summary

Federal securities laws place significant restrictions on the types of publicity and communications that a company may issue while it is "in registration" in connection with its IPO. Failure to comply with these restrictions could **delay or prevent** the IPO and could result in civil and criminal penalties. The Securities and Exchange Commission (the "SEC") considers a company to be "in registration" from at least the time it reaches an understanding with its managing underwriter (generally before the time of the initial organizational meeting)[1] through 25 days[2] after the SEC declares the IPO registration

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[1] However, as discussed more fully below, Rule 163A permits communications to be made by or on behalf of a company more than 30 days before the filing of its IPO registration statement if certain conditions are met.

[2] Note that, if a company is not listing its securities on a registered national securities exchange or including them in an electronic inter-dealer quotation system, the 25-day post-effective period is extended to the 90-day statutory period. See SEC Rule 174.

statement effective. This period is often referred to as the "quiet period," and violations of the SEC's restrictions on communications during this period are often referred to as "gun-jumping" or "conditioning the market."

At all stages of the quiet period, a company may continue to make most public communications in the normal course of its business. That is, a company generally may continue to issue press releases with respect to factual business developments, continue to discuss products or potential products and continue to send stockholder communications, provided that:

- the disclosures are consistent with prior practice;
- the disclosures are in customary form; and
- the disclosures do not contain projections, forecasts, predictions, opinions or valuations.

Press releases concerning significant new contracts, personnel changes or the opening of a new facility are permissible if consistent with past practice, and general advertising of products and services, consistent with prior practice, is allowed.

Communications during the quiet period **should not include opinions about the value of the company and should not mention the proposed public offering.** The risk is that publicity regarding the company or its securities before or after the filing of the registration statement with the SEC could be viewed as an attempt to raise public interest in the company and its stock in violation of federal securities laws. Predictions of increased earnings, market share or expected industry growth should be strictly avoided.

Any planned press releases, advertising campaigns, news articles, interviews, speeches, industry conferences, financial conferences, public statements, and contacts with the general and financial press should be monitored and should be reviewed with us and with the managing underwriters and their

legal counsel prior to release, delivery or attendance. These types of communications, containing the comments of a director or employee of the company, mentioning the offering, or discussing the company's business prospects, could be interpreted as an attempt to condition the market for the IPO. Even completely accurate communications may violate the SEC's gun-jumping restrictions.

Analysis

Pre-Filing Period. The "pre-filing period" refers to the period from "at least" the time when the company reaches an understanding with its managing underwriter(s) to pursue a public offering (generally before the time of the initial "all-hands" organizational meeting to discuss the proposed public offering) to the time when the company files the registration statement for its IPO with the SEC.

During the pre-filing period, the company is prohibited from making any oral or written "offer to sell" its securities, whether using a prospectus or any other form of communication. The phrase "offer to sell" is broadly defined, and may include publicity efforts in advance of a proposed offering that have the effect of arousing public interest in the company or conditioning the market for the sale of its securities. These restrictions were designed to make the statutorily mandated prospectus the primary means by which investors obtain information regarding a registered securities offering.

Clearly, companies cannot afford to cease all advertising and product announcements or to fail to answer customer or vendor inquiries unrelated to their public offering. Thus, the SEC has historically allowed companies to continue to issue press releases with respect to factual business developments, continue to discuss products or potential products and continue to send stockholder communications, provided that:

- the disclosures are consistent with prior practice;
- the disclosures are in customary form;
- the disclosures do not contain projections, forecasts, predictions, opinions or valuations; and
- the content, timing and distribution of the disclosures do not otherwise suggest that a selling effort is under way.

This last element has typically presented the most difficult issues, and often caused companies to act fairly conservatively. Each statement or activity must be examined in light of the circumstances under which it is made or undertaken and must not be shaded to emphasize favorable rather than adverse information. In making any announcement during the pre-filing period, the company must analyze the nature and content of the information, as well as the length of time between the date of the statement and the filing and distribution of the registration statement, all in the context of the company's past practice and potential presumed motives for making the statement.

These guidelines apply equally to interviews and speeches by management or members of the board of directors since the relevant statute, rules and interpretations apply both to written and to oral "offers." Speeches and interviews must be analyzed to determine if they might fall into the category of conditioning the market for the offering. In general, the timing of an interview or speech (and the oftentimes much delayed article that may result) in relation to the decision to file the registration statement and its actual filing date will be important factors.

The SEC routinely reviews a filer's web site and its press releases and does Internet searches for articles and other publicity. The SEC also pays attention to advertising since it has the potential to condition the market for the IPO. The SEC does not suggest that companies must cease advertising while

they are in registration. However, the advertising must avoid statements regarding the offering, the company's value and its financial performance. In addition, the SEC is typically suspicious of material changes in the quantity of advertising or changes in the media used around the time of an offering (e.g., a shift from trade publications to financial newspapers or publications). Naturally, this can create an issue for a rapidly growing company.

Two SEC "safe harbor" rules adopted in late 2005 were designed to provide some clarity to and liberalization of historical interpretations contained in SEC rules and releases. Neither is "exclusive;" thus companies may also rely on any other exemption or exclusion afforded by the Securities Act of 1933, as amended (the "Securities Act") or the SEC's previous pronouncements and interpretive guidance.[3]

SEC Rule 169 codifies to some extent the SEC's historical views regarding a company's ability to continue customary communications. It provides a safe harbor for the regular release or dissemination by or on behalf of a company[4] of communications containing "factual business information"[5] if:

- the company has previously released or disseminated information of this type in the ordinary course of its business;
- the timing, manner and form in which the information is released or disseminated is consistent

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3 For example, SEC Releases 33-3844, 33-4697, 33-5009 and 33-5180.

4 The release or dissemination of a communication is by or on behalf of a company if the company or an agent or representative of the company, other than an offering participant that is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

5 "Factual business information" is limited to (i) factual information about the company, its business or financial developments or other aspects of its business and (ii) advertisements of, or other information about, the company's products or services. It explicitly does not include forward-looking information.

in material respects with similar past releases or disseminations;

- the information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the company's securities, by the company's employees or agents who historically have provided such information; and

- the communication does not contain information about the IPO[6] and is not released or disseminated as part of the offering activities for the IPO.

This rule applies throughout the quiet period, not just the prefiling period.

SEC Rule 163A covers communications that occur well before an offering and that fail or might fail to fit within the Rule 169 safe harbor for regularly released factual business information. Rule 163A exempts any communication made by or on behalf of a company[7] more than 30 days before the filing of its IPO registration statement if the communication does not reference the IPO and the company takes reasonable steps[8] within its control to prevent further distribution or publication of the communication during the 30-day period prior to filing.

It is important for the company to understand the limits of these exemptions since, from time to time when improper disclosure or conditioning of the market has occurred, the SEC has imposed delays in the effectiveness of an IPO registration statement. This "cooling off" period can have a significant

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6 Publication of information about a registered offering other than through the registration statement or a prospectus is limited to statements allowed under other exemptions or exclusions, including Rule 135 (applicable during the pre-filing period) and Rule 134 (applicable after the registration statement has been filed).

7 See footnote 4.

8 See Question 9 in the FAQs attached to this memorandum.

adverse effect on an offering where a company faces an unstable market or a crowded calendar of offerings. In addition, civil and criminal penalties may be imposed in egregious cases.

Waiting Period. The "waiting period" refers to the period between the filing of the IPO registration statement and the time when the SEC completes its review of the content of the registration statement and clears a company to sell securities pursuant to the registration statement.

During the waiting period, the prohibition on oral offers to sell securities is lifted. This permits, among other things, the "road show" process,[9] where offers are made but no sales may be completed. During the waiting period, however, the securities laws prohibit distribution of a "prospectus" unless that document meets the requirements of the Securities Act (historically the preliminary prospectus contained in the registration statement). The term "prospectus" is defined broadly to include any written communication, or any communication by radio or television, that offers any security for sale. Please note that the SEC considers emails and the Internet, and essentially any communications that are not oral, to be "written communications."[10]

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[9] A note to SEC Rule 433 makes clear that a communication (such as a slide show or PowerPoint presentation) that is provided or transmitted simultaneously with a live road show and is provided or transmitted in a manner designed to make the communication available only as a part of the road show and not separately will be deemed part of the road show (i.e., an oral communication). SEC rules adopted in late 2005 have also replaced all of the SEC's historical interpretations and no-action letters on electronic road shows.

[10] SEC Rule 405 defines a "written communication" as any communication that is written, printed, a radio or television broadcast (regardless of the means of transmission of the broadcast) or a graphic communication, including all forms of electronic media such as audiotapes, videotapes, facsimiles, CD-ROMs, email, Internet web sites, "blast" voicemail messages, computers, computer networks and other forms of computer data compilation. Any communication not defined to be a written communication would be an "oral communication," including direct oral communications and live telephone calls (even if transmitted over the

Some limited written communications made pursuant to Rule 134 and thus restricted to specified types of information,[11] such as press releases announcing the filing of a registration statement, have historically been excluded from the definition of "prospectus." Thus, these Rule 134 communications are permissible after the filing of the IPO registration statement. In late 2005, the SEC adopted amendments to Rule 134 that expand the permissible scope of communications permitted under this rule. As amended, the rule:

- permits increased information about the company and its business;
- expands the scope of permissible factual information about the offering itself, including underwriter information, more details about the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule of the offering, and a description of marketing events like road shows, including date, time, location and procedures for attending or otherwise accessing them;
- allows more factual information about procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;
- permits more factual information regarding procedures for directed share plans and

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Internet or recorded by the recipient), as well as communications that, at the time of the communication, originated live, in real-time, to a live audience and did not originate in recorded form or otherwise as a graphic communication.

[11] Prior to the late 2005 amendments, permitted information was limited to the company's name, the amount and type of security being offered, a brief description of the company's business, the names of the managing underwriters and the approximate date of proposed sale. The communication had to include the name and address of the person(s) from whom the preliminary prospectus could be obtained.

participation in offerings by directors, officers and employees;

- allows a brief description of the intended use of proceeds disclosed in the registration statement if the registration statement on file with the SEC contains an estimated price range for the IPO; and

- permits identifying selling stockholders if they are disclosed in the registration statement.

SEC Rules 164 and 433 permit additional types of written offers (including electronic communications), subject to enumerated conditions. These written offers, termed "free writing prospectuses," are permissible only after the registration statement is filed with the SEC. They are permitted to take any form. They are not required to meet the informational requirements for statutory preliminary and final prospectuses[12] and may include information the substance of which is not included in the filed registration statement.

Rule 433 conditions the use of a free writing prospectus as follows:

- the free writing prospectus must be accompanied or preceded by the most recent statutory prospectus[13] (i.e., the most recent

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[12] However, the liability provisions of the Securities Act prohibit material misstatements in or material omissions from information in free writing prospectuses.

[13] For a private company doing an IPO, the most recent statutory prospectus must actually be provided to anyone who might receive the free writing prospectus and must include an estimated price range (typically not included in the initial registration statement filings with the SEC). Referring to its availability is not sufficient. Thus, the use of broadly disseminated free writing prospectuses by companies and offering participants in IPOs may not be economically feasible unless they are in electronic form and contain an active hyperlink to the most recent statutory prospectus. However, once the required statutory prospectus has been provided to an investor, a company need not provide it again to that same investor with subsequent free writing prospectuses unless the company's

preliminary prospectus until the offering goes effective and the final prospectus is available and thereafter the final prospectus) where the free writing prospectus is prepared by the company or another offering participant (e.g., an underwriter, dealer or selling stockholder) and in certain other circumstances;

- the free writing prospectus may not contain information that conflicts with information in the filed registration statement;
- the free writing prospectus must contain a prescribed legend;
- in most cases, the company must file the free writing prospectus with the SEC no later than the date of first use if it prepares the free writing prospectus or the free writing prospectus contains any material non-public information provided by it to another offering participant who prepares the free writing prospectus; and
- where the company has not filed the free writing prospectus, it must retain a copy for three years.

While the statutory prohibition against oral offers does not apply during the waiting period, the guidelines discussed above concerning publicity, press releases and advertising in the pre-filing period do still apply to written communications. Of course, oral statements in interviews or conferences that result in written articles or other publication of the statements will be viewed as written communications, not permissible oral offers,

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most recent preliminary prospectus filed with the SEC has a material change from the originally provided prospectus or the final prospectus is available. There is a significant exception to the "accompanied or preceded" condition for free writing prospectuses prepared by unaffiliated and uncompensated media but with participation by the company or other offering participants (see Question 12 in the FAQs attached to this memorandum).

and oral statements that are broadcast over radio or television will also be viewed as written communications. However, the company may rely, where applicable, on the safe harbor found in Rule 169 and also on the SEC's historical interpretations providing for the regular release or dissemination of "factual business information." Where neither the conditions of Rule 169 nor the conditions of 134 can be met, a company may choose to make a written offer using a free writing prospectus by meeting the requirements of Rule 164 and the conditions of Rule 433. Such a free writing prospectus, however, would expose the company to potential liability for material misstatements in or omissions from the information that it contains.

Post-Effective Period. The "post-effective period" refers to the period after the SEC has declared the registration statement effective. Sales, confirmations of sales and delivery of a company's securities can first begin in this period but must be preceded or accompanied by a copy of the final prospectus,[14] which is part of the registration statement that is declared effective. After delivery of the final prospectus, supplemental sales literature (i.e., materials accompanied or preceded by a final prospectus) may be used, provided that it is not false or misleading. For the first 25 days[15] of this post-effective period, the company still may not make written offers, other than by means of the final prospectus, to anyone who has not received a prospectus. Thus, during this period, a company must still monitor its interviews, press releases and other written communications as fully as it did during the "waiting period."

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[14] SEC Rule 172 provides that a final prospectus will be deemed to precede or accompany the carrying or delivery of a security and that written confirmations and notices of allocations can be sent after effectiveness of the registration statement if, in each case, the final prospectus has been filed with the SEC or the company will make a good faith and reasonable effort to file the final prospectus within the time frame required by SEC Rule 424.

[15] See footnote 2.

Under the SEC rules, "dealers" in an IPO must continue to "distribute"[16] a final prospectus for the first 25 days of trading after the effective date of the registration statement. This imposes an additional obligation on the company to keep the prospectus current during this time period. Any material change in the disclosures during this period requires that an updated prospectus be provided, which could be done either by providing a supplement to the prospectus or a new amended prospectus.

One of the most frequent causes for incurring the expense of a post-effective update to the prospectus is the dissemination of information that materially changes the information contained in a final prospectus. Most companies, therefore, try to avoid material developments shortly after their IPO and do not resume issuing financially related press releases until more than 25 days after the IPO. The company may make required government filings, such as quarterly or annual financial statements.

Conclusion and Guidelines. The important thing to realize is that the SEC may view publicity regarding the company or its securities during the process of distributing those securities as an offer to sell, or a solicitation of an offer to buy, securities or as the distribution of an unlawful "prospectus" in violation of the Securities Act.

Management should be aware of the content, form and frequency of public statements. Publicity in the normal course of business should not violate the securities laws, and a company should not hesitate to answer questions about its business unrelated to its IPO that may be posed by prospective customers or suppliers or other non-investors in the normal course of business. For more information on what is permissible and what is not during this period, please refer to

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[16] SEC Rule 174 provides that a dealer's obligation to deliver a final prospectus may be met as set forth in footnote 14.

"Frequently Asked Questions: Publicity During the IPO Process," which is attached to this memo.

Management should also be particularly careful to avoid any predictions of future financial performance or any statements about the company's value. Prior to filing the registration statement, news of the offering should be restricted to those people who have a "need to know," and they should be asked to keep the information strictly confidential.

Given the potential delay that might be imposed in the event of improper publicity, the company should alert us to any interviews that have already taken place or are scheduled and should review in advance, with us and the underwriters and their legal counsel:

- any articles that are expected to be published by trade journals or other news media concerning the company or its products; and
- any speeches or other public statements or appearances planned by company personnel.

We also recommend that the company appoint a single person to be responsible for all public communications during this process.