



U.S. Securities Laws Presentation

November 29, 2010
Horace Nash
hnash@fenwick.com

Fenwick
FENWICK & WEST LLP

Laws and Regulations

- Securities Act of 1933
 - Regulates sales of securities
- Securities Exchange Act of 1934
 - Regulates public companies
- State securities laws
- Stock exchanges

Securities Act of 1933

- Any offer and sale of a security must be registered, unless exempt from registration
- What is a “security?”
 - Notes, stock, bonds, debentures, investment contracts, options, etc. (broad definition)
- Major exemptions:
 - Private resales by stockholders
 - Private offering by Company (Regulation D)

Registration

- Every offer and sale of securities must be registered unless the transaction is exempt
- Registration statement provides information for SEC review, and is generally available to the public, registers the offer and sale of a security with the SEC
 - Contains prospectus that will be distributed to potential investors
- Purpose: to inform investors and to protect them from fraudulent sales of securities
 - Company has absolute liability for material misstatements in the S-1; underwriters and directors have absolute liability with a due diligence defense

Why (or Why Not) Go Public

- Why go public?
 - Raise \$\$\$
 - Liquidity for investors
 - Enhance credibility of Company
 - Publicly tradable stock useful as consideration for acquisitions
 - Improve access to capital markets
- Why not go public?
 - Company has SEC periodic reporting requirements
 - Short-term results and stock price become focus
 - Expensive to go public
 - Expensive to be public company
 - Increased liability of CEO/CFO
 - Disclosure of management compensation and related person transactions

IPO Players

- Company: Chief Executive Officer, Chief Financial Officer, Controller, Vice Presidents, General Counsel
- Underwriters: 4 or more investment banks
- Attorneys
 - for Company
 - for Underwriters
- Auditor
- Sometimes a “road show” coach

Initial Public Offering

- Company's first offering of its stock to the public
- Takes 3 – 5 months
 - Prepare and file S-1 ... wait 30 days for SEC comments
 - Respond to SEC comments ... wait for more SEC comments
 - Company "road show"
 - "Price" the offering
 - S-1 "goes effective" ... stock trades ... close offering
- "Quiet" filing for foreign private issuers

IPO Process – Selected Topics

- Drafting prospectus
- Due diligence
- Audited financials
- Underwriting agreement
- Lock-up agreements
- Selling shareholders
- SEC comments

Subsequent Public Offerings

- Equity, debt, convertible debt
- Prospectus typically shorter, due to incorporation by reference of information in periodic reports
- May use to register “resales” by existing stockholders who hold restricted stock
- Private company investors often have post-IPO registration rights

“Shelf” Registration Statement

- Registration statement goes effective; Company can “take down” from the shelf in the future
- Registration statement supplement provides specific details of the offering at time of take down
- Company registers amount that it reasonably thinks it can take down within 2 years
- Shelf registration statement gives Company flexibility to raise capital quickly under already effective registration statement (i.e., no additional SEC review)
- Large companies (WKSI) have immediately effective shelf registration statements

Form S-8 Registration Statements

- Registers securities issuable under employee benefit plans (options, restricted stock units, etc.)
- Very short
- Effective upon filing with the SEC
- Shares can easily be resold by employees, subject to Insider Trading Policy

1934 Act Reporting

- Securities Exchange Act of 1934
 - Requires periodic reporting and regulates certain trades in public securities
 - Objective is to ensure continuous availability of information about a publicly traded company
- Stock Exchanges
 - Requires Company to comply with the SEC periodic reporting
 - Corporate governance requirements
 - If not compliant, Company may be delisted from trading on the exchange

EDGAR

- SEC's "Electronic Data Gathering, Analysis and Retrieval" system
- Filings under the Exchange Act and the Securities Act must be made electronically on EDGAR
- Can be accessed on the SEC's web site at <http://www.sec.gov>
- Includes SEC correspondence
- Form F-1 quiet filings

Periodic Reports

- Annual Report on Form 10-K
 - Triggered by the end of each fiscal year
- Quarterly Report on Form 10-Q
 - Triggered the end of each quarter, except for 4th quarter
- Current Report on Form 8-K
 - Triggered by any one of many disclosure events in Form 8-K

Form 10-K

COVER PAGE

PART I

1. Business
- 1A. Risk Factors
- 1B. Unresolved Staff Comments
2. Properties
3. Legal Proceedings

PART II

5. Market for Registrant's Common Equity and Related Stockholder Matters and Issuer Purchases of Equity Securities
6. Selected Financial Data
7. Management's Discussion and Analysis of Financial Condition and Results of Operations
- 7A. Quantitative and Qualitative Disclosures About Market Risk
8. Financial Statements and Supplementary Data
9. Changes in and Disagreements With Accountants on Accounting and Financial Disclosure
- 9A. Controls and Procedures
- 9B. Other Information

PART III

10. Directors, Executive Officers and Corporate Governance
11. Executive Compensation
12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters
13. Certain Relationships and Related Transactions, and Director Independence
14. Principal Accounting Fees and Services

PART IV

15. Exhibits, Financial Statement Schedules

SIGNATURES

CERTIFICATIONS

Form 10-Q Snapshot

COVER PAGE

PART I

1. Financial Statements
2. Management's Discussion and Analysis of Financial Condition and Results of Operations
3. Quantitative and Qualitative Disclosures About Market Risk
4. Controls and Procedures

PART II

1. Legal Proceedings
 - 1A. Risk Factors
2. Unregistered Sales of Equity Securities and Use of Proceeds
3. Defaults Upon Senior Securities
4. (Removed and Reserved)
5. Other Information
6. Exhibits

SIGNATURES

CERTIFICATIONS

Form 8-K Snapshot

- **Section 1 – Registrant’s Business and Operations**
 - Item 1.01 Entry into a Material Definitive Agreement
 - Item 1.02 Termination of a Material Definitive Agreement
 - Item 1.03 Bankruptcy or Receivership
- **Section 2 – Financial Information**
 - Item 2.01 Completion of Acquisition or Disposition of Assets
 - Item 2.02 Results of Operation and Financial Condition
 - Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant
 - Item 2.04 Triggering Events that Accelerate or Increase a Direct Financial Obligation Under an Off-Balance Sheet Arrangement
 - Item 2.05 Costs Associated With Exit or Disposal Activities
 - Item 2.06 Material Impairments
- **Section 3 – Securities And Trading Markets**
 - Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing
 - Item 3.02 Unregistered Sales of Equity Securities
 - Item 3.03 Material Modifications to Rights of Security Holders
- **Section 4 – Matters Related to Accountants and Related Financial Statements**
 - Item 4.01 Changes in Registrant’s Certifying Accountant
 - Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review

Form 8-K Snapshot (cont'd)

- **Section 5 – Corporate Governance and Management**
 - Item 5.01 Changes in Control of Registrant
 - Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers; Compensatory Arrangements of Certain Officers
 - Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year
 - Item 5.04 Temporary Suspension of Trading under Registrant's Employee Benefit Plans
 - Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics
 - Item 5.06 Change in Shell Company Status
 - Item 5.07 Submission of Matters to a Vote of Security Holders
- **Section 6 – Asset-backed securities**
 - Item 6.01 ABS Informational and Computational Material
 - Item 6.02 Change of Servicer or Trustee
 - Item 6.03 Change in Credit Enhancement or Other External Support
 - Item 6.04 Failure to Make a Required Distribution
 - Item 6.05 Securities Act Updating Disclosure
- **Section 7 – Regulation FD**
 - Item 7.01 Regulation FD Disclosure
- **Section 8 – Other Events**
 - Item 8.01 Other Events
- **Section 9 – Financial Statements and Exhibits**
 - Item 9.01 Financial Statements and Exhibits

Proxy Statement and Annual Report to Stockholders

- Voting material for annual or special meetings of stockholders
- Proxy statement must be sent to stockholders prior to meeting and it must be accompanied by an annual report (similar but not identical to a Form 10-K) for items to be voted on by the stockholders:
 - Election of directors
 - Election, approval or ratification of accountants
 - Approval of a shareholder proposal
 - Approval, amendment or ratification of a compensation plan
 - These are all “routine matters”
- For “non-routine” matters, company has to file a “preliminary proxy” at least 10 calendar days prior to filing the “Definitive Proxy”

Section 16 Filings

- All directors, executive officers and greater-than-10% beneficial owners (voting or investment power) must report all transactions in Company securities
- These insiders can't sell and purchase, or purchase and sell, Company stock within any six-month period less than 6 months
- Penalty: Pay all profit on this "short-swing" trade to Company
- Insiders disclose transactions in Company securities on Forms 3, 4 and 5

Emerging Corporate Governance Issues

- Independence of Board members
- Committee responsibilities
- Shareholder “Say on Pay”
- Proxy access – contested director elections