

**PRIVILEGED AND CONFIDENTIAL M E M O R A N D U M**

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To:

From: Ellenoff Grossman & Schole LLP

Re: Best Practices-- Private Placement In Public Equities (PIPEs)

Date: March 2007

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We have prepared this Memorandum in order to provide you with guidance as to “best practices and procedures” related to its corporate finance activities, namely raising capital in the form of privately-placed securities, commonly referred to as PIPEs, for existing publicly-traded issuers (pursuant to the rules and regulations of both the Securities Act of 1933 and the Exchange Act of 1934).

By their nature, these suggestions are intended to be broad guidelines and are not exhaustive of the various details that are required to effectuate any proposed financing engagement. Additionally, while most PIPE engagements have many similarities, we do recognize that there are also many differences (securities being offered, type of issuer as well as investor profiles), and consequently, while we would recommend that any NASD member firm consider all of these policies and procedures-- not all licensed firms currently conducting PIPE offerings (institutional in particular) strictly follow each of these suggestions.

**Part I. Policies and Procedures with Regard to Implementing a PIPE**

We have focused on two different types of PIPE offerings for purposes of this memorandum, which are generally referred to as the “Retail PIPE” and the “Institutional PIPE.” A Retail PIPE is a financing being marketed to both institutional and individual investors. An Institutional PIPE is a financing being marketed solely to institutional investors, and is usually initiated by a term sheet sent by the placement agent to potential investors.

Preparation of the documentation for the PIPE depends upon the type of PIPE. Usually in the Retail PIPE, the member firm's counsel and counsel to the issuer prepare all of the documents. In the Institutional PIPE, the member firm and its counsel prepare the engagement letter and term sheet. Often the investors may have their own counsel prepare the actual transaction documents. Notwithstanding that the lead investor in the Institutional PIPE often prepares the transaction documents, we recommend that member firms retain counsel in every Institutional PIPE to ensure that the disclosure documents contain proper disclosure regarding member firm compensation and other NASD required disclosures.

*Engagement Letter and Global Non-Disclosure Agreement:*

No engagement of a member firm should commence without an executed engagement agreement (including standard indemnification provisions) with the issuer. Additionally, the firm should have in place a Global Non-Disclosure Agreement ("NDA") with its PIPE investor client base and as new clients are obtained. This agreement must be executed prior to the release of any information regarding a specific PIPE. Otherwise, there may be violations of Regulation FD. When presented with any specific PIPE opportunity, the targeted investor should acknowledge its NDA obligations. We recommend this procedure because a Global NDA avoids timing delays associated with obtaining non-disclosure agreements for each PIPE. Attached as "Exhibit A" please find a sample Global NDA for your reference.

Without going into the details of the standard engagement agreement, we would also recommend adding provisions, which: (i) restrict directors, officers and placement agents (and their employees, etc.) from investing in the PIPE (conflicts of interest may arise, along with NASD concerns about allocations) as well as adding appropriate lock-up periods for such persons; (ii) obligations of the issuer to cooperate with the placement agent with respect to its 2710 NASD filing; and (iii) restrict the issuer's ability to go back to the PIPE investors for further financing without compensation to the firm (this provision is often hotly debated). Attached as "Exhibit B" please find a form of engagement letter for your reference.

*Form of Investor Documents:*

An Institutional PIPE is initiated by a term sheet sent by the placement agent to potential investors, along with reference to the 34 Act filings (sometimes referred to as a "10-K Wrap"). We would recommend that accompanying the term sheet should be a detailed executive summary as well as fulsome risk factors. Many placement agents market Institutional PIPEs with just a power point presentation—we would recommend including fulsome risk factors as well and limit this practice to only true institutional investors such as hedge funds, venture funds, and Qualified Institutional Buyers. The negotiation with regard to price is memorialized in a direct securities purchase agreement, a registration rights agreement and related documentation. This documentation is executed when funding occurs.

The Retail PIPE should include a detailed private placement memorandum, subscription documents and a set offering period. The placement agent will execute a placement agency agreement with the issuer which usually will contain representations and warranties and many covenants similar to an underwriting agreement.

We also recommend that a separate escrow account be utilized for the transaction. Although under NASD and SEC rules (SEC Rule 15c2-4) an attorney account or separate member firm account may be acceptable in certain circumstances, we recommend that a third party bank escrow agent be used. If the PIPE transaction has offering contingencies (such as a min/max deal, or closing is subject to completion of an acquisition), a separate escrow account is required and it may not be maintained by counsel to the issuer or the member firm.

*Due Diligence and the Virtual Data Room:*

The NASD believes that any member firm that engages in financing activity has an obligation to its investors to have conducted due diligence. The NASD has publicly stated that there is no difference in the type of due diligence required in Retail PIPES and Institutional PIPES. This obligation emanates from the member firm's "suitability" obligations. Suitability is a two part standard and requires the member firm to (a) know its customer and (b) have a basis to recommend the proposed investment to the customer. The level that we believe satisfies this admittedly vague standard is a review of all recent 34 Act filings (10-Qs, 8-Ks, Annual Reports and Proxies).

Certain PIPE investors will not want to partake in any due diligence related to the issuer other than publicly available information because they believe it preserves their ability to trade. We recommend that the member firm's banking staff be aware of, and advise its PIPE investor client base of the many recent actions initiated by the NASD and SEC against PIPE investors and placement agents, alleging trading on inside information. Both the SEC and NASD have taken the position that in most situations, the PIPE is a material non-public event and therefore anyone with knowledge of the PIPE who trades would be trading on the basis of material non-public information. See the discussion below under "Part II. Additional Regulatory Issues." Except for the knowledge of the PIPE itself, if the PIPE investor does not obtain any material non-public information, it should be able to trade in the securities of the issuer. This is why the NDA has become an important part of the PIPE structure.

For Institutional PIPES or financings associated with an acquisition (where no public information is available regarding the acquisition target), consideration should be given to establishing a virtual data room with regard to due diligence. This enables the issuer and placement agent to keep tabs on who views the data, when a particular entity or person views the data, or even prints the data. The fact that a firm can audit who views data may serve to highlight areas of interest regarding the particular transaction (which while not usually important in the financing portion of the transaction, has implications in the M&A world). Generally, the virtual data room increases the efficiency of a transaction as it allows authorized users to review due diligence documentation in real

time as it is posted. A customized due diligence request list should be submitted to the issuer in order to obtain and review documents in connection with the transaction. Depending upon the scope of the request, the virtual data room may provide the most manageable method to store, review, and maintain documents.

We believe that the parameters for due diligence should be specifically tailored depending upon the transaction. Attached as “Exhibit C” please find a sample request list for your reference.

Background checks should be obtained on all key operating personnel and “promoters.”

We strongly advise that the member firm’s banking staff visit the primary operating facilities of the issuer and conduct interviews of all of the key operating executives. Usually these steps are taken prior to engagement of the member firm while the terms of the engagement and the potential financing structure are being negotiated.

## **Part II. Current Issues of Concern in Implementing a PIPE**

Consideration should also be given to other issues, such as Shareholder Approval, Primary Underwriter Liability, Integration and Confidential Treatment Requests for purposes of gaining a better understanding of any complications that may arise from the proposed PIPE and its subsequent registration.

### *Shareholder Approval:*

Listed public companies (NASDAQ, AMEX and NYSE) are required to obtain shareholder approval prior to the issuance of PIPE securities if the amount of common stock issued (or the ultimate amount issuable as a result of any conversion) exceeds 20% of the issuer’s outstanding stock (not fully diluted), unless the stock is issued at a price that equals or exceeds the market value of the stock. Additionally, if officers or directors are buying shares in the transaction that is priced below market value, NASDAQ requires prior shareholder approval unless the offering doesn’t exceed the lesser of 1% of the outstanding stock or 25,000 shares. See NASDAQ Marketplace Rule 4350(i)(1)(D). Each of the listing authorities also maintains the right to review recent transactions prior to the listing application and has indicated that they will not permit listings where a financings of more than the 20% was concluded immediately prior to or contemporaneous with the listing request.

Therefore, we recommend that the member firm’s staff thoroughly analyze the issuer’s capitalization prior to negotiation of the initial term sheet, and certainly prior to execution of any definitive documents, to ascertain whether shareholder approval is going to be required.

## Primary Underwriter Liability

In recent months the SEC has been issuing, on a selective basis, comments to issuers during the PIPE resale registration process challenging the ability of the issuer to rely upon SEC Rule 415 for the proposed resale of the PIPE securities.

In essence the SEC has been questioning whether the proposed resale registration statement is not a secondary offering but actually a primary offering. Further, the SEC has requested that the PIPE investor(s) be named as an underwriter and that an offering price and a set offering period be set forth in the registration statement. It is important to note that the SEC staff has not issued any official statement in this regard; and in communications with our firm the SEC staff admits that it is internally undecided on an official stance at this time.

Due consideration must be given by the member firm, and communicated to the potential PIPE investors, of this new SEC area of focus. Based upon communications our firm has had with SEC staff, and with other PIPE marketplace participants, the following “facts” are relevant to whether the SEC will “challenge” or at least question, the resale registration statement:

- the percentage of shares being registered in the PIPE registration statement compared to the capitalization of the issuer (the potential for inquiry appears to increase if above 30%)
- the number of PIPE participants;
- whether the issuer has previously conducted an underwritten public offering or is the resale registration the first “public offering”;
- how long the PIPE selling security holder has held its securities; and
- whether the PIPE investor is in the business of underwriting.

### *Integration Analysis:*

In a PIPE, particular sensitivity must be paid to the “integration doctrine.” The integration doctrine provides an analytical framework for determining whether multiple securities transactions should be considered the same offering, resulting in the issuer violating the private placement rules. One of the biggest hindrances to pursuing a Retail PIPE is whether there is an “Open Registration” on file with the SEC. There are No-Action Letters (See “Black-Box” and “Squadron Ellenoff”) permitting some forms of Institutional PIPEs notwithstanding that there may be an Open Registration. Analysis must be conducted to determine whether registration is required under Section 5 of the Securities Act, or whether an exemption is available for the offering. There is a five-factored test to determine whether registration is required, as well the possibilities of falling within a “safe harbor.” Safe harbors include, but are not limited to: (1) the

Regulation D six month safe harbor; (2) the Regulation D preliminary note providing that Regulation S offerings will not be incorporated with contemporaneous domestic offerings; (3) the Rule 144A(e) resale exemption; (4) Rule 152 providing that a completed private placement will not be integrated with a subsequently commenced registered offering; and (5) Rule 155 providing issuers with safe harbors when switching from an abandoned private offering to a registered offering, or from an abandoned registered offering to a private placement. Therefore, although there are safe harbors, it is wise for counsel to the member firm to review the issuer's previous and proposed financing to determine whether the offerings will be integrated or whether there is an applicable safe harbor, as there are a number of eligibility qualifications.

*Confidential Treatment Request:*

During the due diligence process, a determination should be made as to whether the issuer has (or intends) to submit a confidential treatment request (CTR) with the SEC. Although the rules indicate that only a pending CTR with respect to an S-3 will delay the effectiveness of that registration until the SEC has either cleared or denied such CTR request, the SEC applies this rule to all registration statements. Consequently, any resale registration will be "held up" until the CTR is processed. The investor documentation should obtain a representation from the issuer that no CTRs are pending. If the CTR requested is pending at the time of the PIPE, the PIPE documents, especially the registration rights agreement, will have to reflect the potential delay of the effectiveness of the registration.

*EITF 00-19:*

EITF 00-19 "Accounting for Derivative Financial Instruments, Indexed to, and Potentially Settled in, a Company's Own Stock" issued by the Emerging Task Force of the Financial Accounting Standards Board, has a unique application to PIPE transactions. EITF 00-19 deals with the classification and measurement of warrants and well as other instruments with convertible features. PIPE transactions often include a convertible security component. Under EITF 00-19, warrants must be analyzed to determine whether they should be accounted for as a liability or as an equity instrument. Convertible debt and convertible preferred stock must also be analyzed to determine whether the conversion feature would be classified as a liability or as equity. Generally, EITF 00-19 requires that warrants and other convertible equity instruments be classified as liabilities in situations where the issuer's ability to settle the instrument in equity is not entirely within the issuer's control. For example, issuers do not have the power to control the conversion price of an instrument that does not have a floor. There are additional provisions within EITF 00-19 that impact PIPEs, such as whether the instruments waive cash settlement value in the event that the underlying securities do not become registered or the maintenance of the registration is compromised. In these situations, caps on liability may be a possible solution. We recommend that every PIPE contain a cap on possible damages for failure by the issuer to satisfy registration obligations.

### **Part III. Additional Regulatory Issues**

#### *Regulation FD:*

Regulation FD is generally an obligation of the issuer. However there are certain broker-dealer sensitivities with regard to Regulation FD that relate to PIPEs when the firm is acting as placement agent or selling agent. Regulation FD prohibits the selective disclosure of material non-public information by public companies. Under Regulation FD, a public company that intentionally discloses material non-public information must do so in a fashion designed to effect public dissemination of the information. In many situations, particularly small and micro cap companies undertaking a PIPE, the terms of the PIPE may well constitute material non-public information. As a result, companies engaging in such transactions should obtain either non-disclosure agreements (as discussed above) or refrain from providing any material non-public information to the investors. While we are reminding member firms that they have a due diligence obligation with respect to each issuer that they are undertaking, sensitivity to obtaining too much information must also be a concern for fear of gaining access to information that will not become public, and consequently, restrict the investors' trading. The objective in a PIPE is to ensure that an investor is not limited from trading once news of the financing has been announced, although there may still be other regulatory issues preventing immediate trading. If the financing is accompanying an acquisition, trading may be curtailed until the filing of the proxy materials or a later date.

The member firm should attempt to avoid being an indirect conduit for the selective dissemination of material information. The obtaining of the NDA is an important step in this direction. We also recommend that the member firm decline to process any trade in the PIPE issuer's securities for any client who has received information regarding the PIPE until public dissemination of the PIPE terms have been made by the issuer.

#### *Hedging:*

PIPE investors may want to hedge their investments by shorting the common stock in an amount equivalent to their purchase in the private placement, as the public announcement of a PIPE can cause a decline in the market price of the common stock. However, this practice is frowned upon by the regulators. Typically, the regulators will argue that such an investor has misused material non-public information if the investor engages in such hedging activity. In the event that no confidentiality agreement is executed, the regulators may argue that the investor violates the investment intent of the private placement by engaging in hedging, or might allege a fraud on the market theory. Additionally, regulators will look to whether the placement agent has acted in concert with the primary violator by (a) providing the information, and (b) executing the transaction. As stated above, we recommend that for "best practices" the member firm decline to process any trade in the PIPE issuer's securities for any client who has received information regarding the PIPE until public dissemination of the PIPE terms have been made by the issuer.

The securities bar and our firm, do not necessarily agree with the regulators' view, and believe that absent a contractual relationship or a fiduciary duty, the shorting activity is not a violation of the securities laws. However, this view has not been tested and may not prevail in litigation, and we strongly advise the adoption of an outright prohibition of such hedging activities.

*Research Reports and Research Analyst Participation:*

Member firms should consider postponing the issuance of research reports on the issuer, both immediately prior to the PIPE offering and during the PIPE offering, in order to prevent a claim that there has been general solicitation or advertisement in contravention of Section 4(2) or Regulation D. Additionally, there may be Regulation M implications with regard to issuance of research reports during restricted periods.

The member firm must adhere to the research analyst policies and rules implemented by the NASD to separate involvement of research staff from the investment banking process.

*Chinese Wall:*

A "solid" Chinese Wall should be maintained to contain information and prevent leaks of material non-public information outside of the corporate finance group. The Insider Trading and Securities Fraud Enforcement Act of 1988 ("Insider Trading Act") imposes an obligation to establish policies and procedures reasonably designed to prevent the misuse of material non-public information by broker-dealers, employees, and their proprietary accounts. There should be a separation between investment banking and retail. Investment banking transactions cannot be subject to review by, under supervision or control of the retail arm of the broker-dealer. With regard to retail, all communications and correspondence related to an issuer during a PIPE offering must be approved by compliance. Information related to the issuer or the PIPE should be communicated internally only on a "need-to-know" basis. Employees with access to such information should be advised of their obligation not to disclose such information to any person unless that person is required to know in performance of the firm's contracts and responsibilities. In the event an employee is required to cross the wall in the normal course of business, the compliance department should be notified and document the circumstances.

*Watch List/Restricted List:*

The member firm must implement a "watch list/ restricted list" policy. The member firm should place the issuer's security on the "watch list" at the time that the firm and the issuer have agreed upon the terms of the firm's engagement. Usually this is at the time the written engagement agreement for the PIPE is executed but it may be earlier. For example, the firm may be engaged by an issuer as an investment banking/financial advisor prior to a particular PIPE transaction being discussed. We

recommend that the firm place any such security on the “watch list” at this time because it is likely that investment banking staff will have material information related to the issuer and the member firm needs to monitor the flow of any such information.

A security must be placed on the “restricted list” when the firm has been engaged for a particular transaction. In the PIPE scenario, this is usually the time when the firm enters into a written engagement letter for a particular PIPE transaction.

We recommend that the investment banking staff which is engaged in discussions with an issuer be required to report to the firm’s compliance department on a periodic basis so that the compliance department can determine whether discussions have reached a stage to require that an issuer’s securities be placed upon the correct list.

*Compensation and NASD Rule 2710:*

NASD Rule 2710 requires any NASD member firm which “participates or is participating in an offering” to make a filing with the NASD Corporate Finance Department, so that the department can review the reasonableness of the compensation received by the member broker-dealer participating in the distribution, and issue an affirmative determination regarding the proposed compensation terms.

Many member firms are not aware of this filing obligation, innocently but falsely believing that the transaction in question is a private placement and not subject to Rule 2710. However, Rule 2710 also applies indirectly to PIPE offerings and similar transactions, because the PIPE is commonly followed by the filing of a registration statement to allow for the resale of the PIPE securities by the investors (and perhaps the member firm, if, for example the member firm receives securities as compensation in the PIPE). It is at the time of the filing of the resale registration that the member firm must file pursuant to NASD Rule 2710.

The member firm must decide whether it is going to be participating in the resale of the securities by the PIPE investors. The term “participating in an offering” is broadly defined by the NASD. This firm has been advised by the NASD Corporate Finance staff that a member firm acting as an agency broker for clients who are selling shareholders in a resale offering, are deemed to be “participating in an offering” and therefore must make a Rule 2710 filing. In addition, the NASD has advised that a member firm named as a selling shareholder is also deemed “participating in an offering” when it sells its shares. Without a determination from the NASD that the proposed terms of the financing compensation is fair, an NASD member may not participate in the offering. This means that the member firm cannot act as broker agent for the PIPE investor resales. For your reference, and a discussion in more detail, attached as “Exhibit D” please find a copy of our client memo regarding Rule 2710 filings and private placements.

Fair compensation looks only at the non-cash compensation the member firm received as part of the PIPE. Similar to an underwritten offering, non-cash compensation can include a valuation of warrants or other securities, rights of first refusal and board

seat rights. NASD will also include the commissions earned on the agency based sales from the shelf registration as part of their calculation. Generally, fair compensation is in the range of 8% of the resale offering.

*Regulation M:*

Compliance with Regulation M is essential. Generally, Regulation M precludes distribution participants, the issuer and affiliated purchasers, from bidding for or purchasing the security being distributed outside of the offering (except through appropriate stabilization transactions) or to induce others to purchase such securities in the secondary market while the distribution is in progress. Regulation M is aimed at the manipulative impact of bids and purchases by participants while a distribution is in progress but is prophylactic in operation and does not require proof that such transactions affected the market price of the security or were engaged in with manipulative intent.

A distribution includes two elements: "magnitude" and "special selling efforts and selling methods." Factors relevant to the magnitude element are: the number of shares to be registered for sale by the issuer, and the percentage of the outstanding shares, public float, and trading volume that those shares represent. *Exchange Act Release No. 33,924, 1994 SEC LEXIS 1302 at \*24*. The SEC has consistently held that "special selling efforts or selling methods may be indicated in a number of ways including the payment of compensation greater than that normally paid in connection with ordinary trading transactions." *Prohibitions Against Trading by Persons Interested in a Distribution, Exchange Act Release No. 34-196565, 1983 SEC LEXIS 2274, at \*12 n. 13 (March 4, 1983)*. With respect to PIPE offerings, there is likely magnitude and special selling efforts. Special selling efforts are present by the preparation of the private placement memorandum or term sheet, as well by participating in investor meetings and presentations.

A distribution may also occur during resales from the shelf registration and the sale of the placement agent warrants. Generally, during a distribution, the firm should not engage in any solicitation to buy or sell the issuer's common stock. The firm should also cease market-making activities.

*Blue Sky:*

We suggest that any PIPE undertaken by the member firm be conducted so as to comply with Regulation D. Although a significant amount of state review of private placements under Regulation D has been pre-empted by the National Securities Markets Improvement Act of 1996 ("NSMIA") provided that there is compliance with SEC Rules and Regulations, the individual states still maintain some right to review the offering, especially for general anti-fraud issues. Other than New York, PIPE offerings conducted under Regulation D usually require post sale filings; an offer (sending the documents) into a state does not trigger the filing obligation. It is extremely important for the member firm to understand that in any PIPE conducted with an offering contingency – such as a "minimum/maximum" – the state filing must be made when the money is first

received into escrow, which is often earlier, especially in Retail PIPEs, than the closing date. Prior to engaging in any offering of any security for sale in any state, a firm must review the relevant blue sky laws and take appropriate action to allow the offering to be made in that particular state. We strongly recommend that counsel to the member firm be charged with blue sky compliance to ensure that the member firm is protected by the proper and timely filing.

*Conclusion:*

Given the complexity of the rules (SEC, NASD and exchanges), the concept of "Best Practices" for NASD members engaged in corporate financing activities involving PIPEs is continually evolving. Consequently, we make these recommendations with the full knowledge that not all member firms approach PIPEs in a uniform manner. We also recognize that certain of our suggestions are more conservative than other practitioners might recommend, but we would emphasize that given the regulatory environment for this type of financing, we firmly believe that erring on the side of caution is prudent.

Ellenoff Grossman & Schole LLP would be pleased to discuss the policies and procedures set forth in this memorandum in further detail and our lawyers are, of course, available to consult with the member firm's staff on an ongoing basis. For more information, please feel free to contact:

Douglas S. Ellenoff	Ext 108
Martin R. Bring	Ext 131
Eden C. Rohrer	Ext 153
Brian C. Daughney	Ext 109

Exhibit A  
SAMPLE GLOBAL NDA

[Date]

[Prefix, Contact]

[Client]

[Street]

[City, State, Zip]

Dear \_\_\_\_\_:

From time to time, ABC Corp, Inc., a [Delaware] corporation, and its officers, employees, agents and representatives (collectively “ABC”) may approach you regarding a possible purchase by you of unregistered securities of a public company in a potential private placement transaction for which ABC has been engaged as a placement agent (a “**Proposed Transaction**”). This agreement (the “**Agreement**”) shall apply to all Confidential Information (as defined below) that ABC or the prospective issuer(s) (the “**Issuer**”) may provide to you regarding any Proposed Transaction, which Confidential Information shall include the fact ABC has approached you regarding, and the existence of, the Proposed Transaction.

*Please read this Agreement carefully and note that your receipt of Confidential Information may restrict your ability to trade in the securities of the Issuer.*

1. In connection with your evaluation of each Proposed Transaction, you may request and/or may be provided with, either orally, in writing or by electronic transmission (including e-mail): (i) the Issuer’s name, (ii) the type, amount and basic terms of the securities that may be offered in the Proposed Transaction, (iii) the timing and general purpose of the Proposed Transaction and (iv) any other confidential or material non-public information regarding the applicable Issuer. All such information, and any other information provided to you by ABC or an Issuer or any of our respective agents in connection with the Issuer or a Proposed Transaction or alternative transaction (collectively, the “**Confidential Information**”), constitutes and shall be deemed to be considered “material non-public information” within the meaning of Regulation FD promulgated by the Securities and Exchange Commission and other applicable federal and state securities laws rules and regulations. The following would generally not be considered Confidential Information: (a) information which was or becomes generally available to the public other than as a result of a disclosure by you or by your Representatives (as defined below) in violation of this Agreement, (b) information that was in your possession or available to you on a non-confidential basis prior to its disclosure by ABC or the Issuer or any of our respective agents to you or your Representatives and (c) information that becomes available to you on a non-confidential basis from a source that is not known to you to have a duty of confidentiality with regard to the Confidential Information. We will not provide you with Confidential Information without first receiving your consent, following which you acknowledge that you may be restricted in trading in the Issuer’s securities and will be restricted from disclosing such Confidential Information to third parties other than as permitted in this Agreement and under applicable securities laws.

2. You agree that you will hold and use all Confidential Information in strictest confidence and in accordance with all applicable laws, rules and regulations and you agree to only use the Confidential Information for the limited purpose of your evaluation of a Proposed Transaction and not for any other purpose. You may disclose Confidential Information only to

your officers, directors, employees, consultants, contractors, agents and financial and legal advisors (collectively, the “**Representatives**”) who need to know such Confidential Information in order to assist you in evaluating the Proposed Transaction. The Confidential Information may not be disclosed by you or your Representatives to any other person or entity without our prior written consent or except as may be required by law or legal process. You also agree that you will inform your Representatives of the existence and nature of this Agreement and direct your Representatives not to disclose to any other person or entity the fact that you have received Confidential Information, that investigations, discussions or negotiations are taking place concerning a Proposed Transaction, or any of the terms, conditions or other facts with respect to the Issuer or a Proposed Transaction, including the status thereof. You are responsible, and agree to defend, indemnify and hold harmless ABC and the Issuer for any breach of this Agreement by any of your Representatives. You further agree to take all reasonable measures to restrain any third party with whom you have discussed the Confidential Information from prohibited or unauthorized use of the Confidential Information.

3. You hereby acknowledge that you and your Representatives are aware that the U.S. securities laws as well as the securities laws of other jurisdictions prohibit any person in possession of “material non-public information” about a company from purchasing or selling, directly or indirectly, securities of such company (including entering into short selling or hedge transactions involving such securities), or from communicating such information to any other person under circumstances in which it is reasonably foreseeable that such person is likely to purchase or sell such securities. You agree you will not use or permit any third party to use, and that you will use your reasonable best efforts to assure that none of your Representatives will use or permit any third party to use, any of the information we provide in contravention of the securities laws of the United States or any other jurisdiction and you will cease trading in the Issuer's securities as applicable.

4. This Agreement shall cease to apply to any Proposed Transaction or Confidential Information concerning such a Proposed Transaction (as applicable) upon the earliest to occur of: (i) the public disclosure of the Confidential Information, other than as a result of a breach of this Agreement, (ii) your entering into a definitive written agreement relating to such Proposed Transaction or Confidential Information which expressly supersedes this Agreement, or (iii) two (2) years from your receipt of the Confidential Information.

5. Other than with respect to the matters specifically addressed herein, this Agreement shall not create any legal obligation of any kind whatsoever between you and ABC or any Issuer. Without limiting the generality of the foregoing, ABC is not obligated to inform you of any Proposed Transaction in which ABC becomes or may become involved, and you are under no obligation to receive any information from us or to purchase any securities from any Issuer as a result of this Agreement. Neither this Agreement nor your receipt of any Confidential Information shall be deemed an offer to purchase or sell any securities.

6. This Agreement may be executed in counterparts, which counterparts may be delivered by facsimile or other electronic transmission.

7. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, without giving effect to the conflict of laws principles thereof. Each of the parties hereto: (i) agrees that any legal suit, action or proceeding arising out of or relating to this agreement and/or the transactions contemplated hereby shall be instituted exclusively in New York Supreme Court, County of New York, or in the United States District Court for the Southern District of New York, (ii) waives any objection which such party may

have or hereafter to the venue of any such suit, action or proceeding, and (iii) irrevocably and exclusively consents to the jurisdiction of the New York Supreme Court, County of New York, and the United States District Court for the Southern District of New York in any such suit, action or proceeding.

8. This Agreement shall be binding upon you and your Representatives and is for the benefit of ABC and any applicable Issuer and their respective successors and assigns.

9. You agree that that your obligations herein are necessary and reasonable in order to protect ABC, any applicable Issuer and their businesses, and you expressly agree that monetary damages would be inadequate to compensate ABC or any such Issuer for any breach by you or your Representatives of your covenants and agreements set forth herein. Accordingly, you agree that any such violation or threatened violation will cause irreparable injury to ABC or any such Issuer and that, in addition to any other remedies that may be available, in law, in equity or otherwise, ABC or any such Issuer (as applicable) shall be entitled to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach by you or your Representatives, without the necessity of proving actual damages and without the necessity of posting bond or other security.

10. You and ABC specifically acknowledge and agree that each Issuer shall be deemed a third party beneficiary of this Agreement for all purposes.

Please confirm that the foregoing is in accordance with your understanding of our agreement by signing and returning to us a copy of this Agreement in the business reply envelope that is enclosed for your convenience.

Very truly yours,

ABC CORP, INC.

By: \_\_\_\_\_

Name:

Title:

Agreed to and accepted as of the date first set forth above:

**[Name of Client]**

By: \_\_\_\_\_

(Signature)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Exhibit B  
ENGAGEMENT LETTER

**CONFIDENTIAL**

Dated as of September 28, 2006

[NAME]  
[TITLE]  
[COMPANY]  
[ADDRESS]

Dear \_\_\_\_\_,

This letter (the "Agreement") will confirm the engagement of ABC Corp., Inc., a [Delaware] corporation ("ABC"), by \_\_\_\_\_, Inc., a Delaware corporation (the "Company"), as financial adviser and exclusive placement agent in connection with the Company's proposed Private Placement of up to \$\_\_ million in equity or equity-linked securities ("Securities") to accredited investors (the "Offering").

1. Scope of ABC's Services. ABC will assist the Company in placing the Securities with terms substantially like those described in the Term Sheet (Exhibit A). To that extent, ABC will distribute Offering Materials (as hereinafter defined) to potential investors, report the status of the Offering to the Company, and assist in consummating the Offering, including, but not limited to:
  - a. familiarizing itself to the extent it deems appropriate and feasible with the business operations, properties, financial condition, and prospects of the Company,
  - b. assisting the Company in preparing Offering Materials for distribution by ABC to potential investors selected by ABC and the Company,
  - c. screening and contacting prospective investors,
  - d. assisting in negotiations with prospective investors, and
  - e. advising and assisting the Company in structuring and pricing the Offering.

The Offering will be conducted pursuant to the terms and conditions of a customary placement agent agreement acceptable to ABC, the Company and their respective counsel. The Company shall retain control of the Offering and shall have the right to determine (a) whether to close the sale of the Securities to a specific investor, (b) whether to close or terminate the Offering, and (c) the content of the Offering Materials. It is understood by both parties that ABC intends to solicit interest from a limited number of potential investors and on a "best-efforts" only basis. ABC will, in its sole discretion, determine the reasonableness of its efforts and is under no obligation to perform at any level other than what it deems reasonable.

2. Fees. In return for ABC's services in the placement of Securities, the Company will pay ABC the following fees:
- a. a retainer fee of \$25,000 in cash which is payable upon execution of this Agreement (the "Retainer Fee");
  - b. a cash fee equal to 7.0% of the gross proceeds of any Securities placed by ABC (consisting of a 2.0% advisory fee and 5.0% placement agent fee);
  - c. warrants to purchase a number of shares of common stock equal to 7% of the number of shares sold in the Offering. Such warrants shall have a five-year term, an exercise price equal to the price per share of the Securities sold in the Offering, cashless exercise provisions, customary anti-dilution provisions and the same other terms, conditions, rights and preferences as the Securities sold in the Offering; and
  - d. a cash fee equal to 7% of the exercise price of all Securities constituting warrants, options or other rights to purchase Securities (the "Warrant Securities"), which amount is deemed earned upon the closing of the offering and only payable to ABC upon exercise of, and at the time of, any of the Warrant Securities (whether during the term of this agreement or thereafter).

Any fee contemplated in the above sentence herein will be referred to as the "Financing Fees". No Financing Fees shall be due to ABC in connection with sales of Securities in the Offering (i) to existing investors in the Company or its securities (jointly and severally, "\_\_\_\_Investors") to the extent that such sales, in the aggregate, do not exceed ten percent (10%) of the aggregate Offering amount, it being understood and agreed, however, that ABC shall be entitled to receive Financing Fees for aggregate sales to \_\_\_\_\_ only if and only to the extent that such sales actually exceed ten percent (10%) of the aggregate Offering amount. For example, if the aggregate Offering amount is \$15,000,000, no Financing Fees shall be due to ABC in connection with sales to \_\_\_\_\_ if sales to \_\_\_\_\_ are \$1,500,000 or less. If, however, sales to \_\_\_\_\_ in connection with such Offering are \$2,000,000, ABC would receive Financing Fees in connection with \$500,000 of such sales (i.e. that portion in excess of ten percent (10%) of the aggregate Offering amount) but would not be entitled to receive any Financing Fees whatsoever in connection with \$1,500,000 of such sales (i.e., that portion not in excess of ten percent (10%) of the aggregate Offering amount); or (ii) to investors directed to ABC by the Company in writing expressly for such purpose. Any Financing Fees payable to ABC will be due at the closing date of the Offering and shall be payable to ABC by the Company, with the exception of the fees associated with paragraph d. above, which fees shall be payable at the time of the exercise of the associated Warrant Securities. The Company shall also pay ABC a Financing Fee if securities are sold by the Company through a private placement during the Residual Period to investors contacted by ABC regarding the Offering (other than

\_\_\_\_\_ or investors directed to ABC by the Company in writing expressly for such purpose).

During the term of this Agreement, or prior to its termination if earlier, the Company shall be permitted to offer and sell securities under its stock purchase agreements with \_\_\_\_\_, pursuant to an existing or future employee benefit plan (as defined in Rule 405 promulgated under the Securities Act of 1933, as amended), and to strategic investors such as business partners, customers, suppliers, or joint venture partners, and no Financing Fees whatsoever shall be due to ABC in connection with any of the foregoing sales of securities.

3. Expenses. In addition to the foregoing, the Company will, upon request, reimburse ABC for all reasonable out of pocket costs and expenses incurred by ABC in performing its obligations under this Agreement, which costs and expenses shall include, but not be limited to, travel expenses, expenses incurred in performing due diligence in connection with transactions, legal expenses, and all other expenses reasonably incurred by ABC in performing its obligations under this Agreement; provided, however, that ABC shall obtain the prior approval of the Company for any single expenditure in excess of \$10,000. In seeking reimbursement for expenses, ABC shall provide to the Company a written statement or statements detailing expenses for which reimbursement is sought and, upon request by the Company, shall provide copies of invoices and other documentation supporting such expenses. Reimbursable expenses shall be payable by the Company within 10 days of receipt by the Company of such written statement or, if requested by the Company, copies of supporting documentation. In addition, the Company shall be responsible for (i) the costs and fees associated with the filing of the offering materials with the NASD (including all required COBRADesk fees) and (ii) legal fees incurred by ABC in connection with the COBRADesk filings. Such amounts shall come from the proceeds received in the Offering and shall be paid at the initial closing of the Offering.
4. Term. The term of this Agreement shall begin on the date hereof and shall terminate four (4) months thereafter. A “Residual Period” shall extend for twelve (12) months from the date of termination or expiration of this Agreement. ABC or the Company each reserves the right to terminate this engagement on 30 days notice in writing to the other.
5. Company Information. The Company will furnish ABC such information concerning the Company as ABC reasonable determines to be appropriate with respect to the Offering (“Information”). The Company shall afford ABC and its counsel and representatives full and complete access to its books and records and will use commercially reasonable efforts to afford ABC will full and complete cooperation of management to gather the Information. The Company recognizes and confirms that ABC (a) will use and rely on the Information in performing the services contemplated by this Agreement, without independently verifying the accuracy and completeness of the same, (b) does not assume responsibility for the accuracy or completeness of the

Information, and (c) will not make an appraisal of any assets or liability of the Company.

The Company hereby represents to ABC that all solicitation materials prepared by the Company and used in connection with the Offering (the "Offering Materials") will not, as of the date of any offer or sale in connection with the Offering, contain any untrue statement of a material fact or omit a material fact necessary to make the statements contained therein, not misleading, in light of the circumstances under which they were made. If at any time an event occurs as a result of which the Offering Materials, as then amended or supplemented, would include an untrue statement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they were made when such Offering Materials are delivered to a prospective purchaser pursuant hereto, not misleading, the Company will promptly notify ABC to suspend solicitation of prospective purchasers in connection with the Offering; and if the Company decides to amend or supplement the Offering Materials, it will promptly advise ABC by telephone (with confirmation in writing) and will promptly prepare an amendment or supplement that will correct such statement or omission.

ABC will not violate, or cause the Company to violate, any applicable securities laws in connection with the Offering, and each will comply with all of the requirements of Rule 506 of Regulation D promulgated under the Securities Act of 1933, as amended.

6. Confidentiality. In connection with this engagement, it is contemplated that ABC will receive from the Company certain information (including certain business planning, product, marketing, technical, financial, and other information and materials) the Company considers confidential. ABC shall use this confidential information solely for the purpose of providing services to the Company and will not disclose to any party (other than ABC's officers, directors, employees, affiliates, and counsel who have a need to know such information, herein "Representatives") any such confidential information, except with the prior written approval of the Company; provided, however, that the foregoing restrictions shall not apply to any information that: (a) is included in the Offering Materials and disclosed pursuant to the distribution of the Offering Materials as permitted by the Company, (b) the Company consents to having disclosed in connection with the Offering, (c) is publicly available when provided or thereafter becomes publicly available other than through disclosure by ABC or its Representatives, or (d) is required to be disclosed by ABC by judicial or administrative process in connection with any action, suit, proceeding, or investigation; and provided, further, however, that ABC shall give the Company notice of any such requirement immediately upon the becoming aware of same and shall not disclose such information except only to the extent required after the maximum time permitted. Information shall be deemed "publicly available" if it becomes a matter of public knowledge or is contained in materials available to the public or is obtained by ABC from any source other than the Company or its representatives, provided that such source was not to ABC's actual knowledge subject to a confidentiality agreement with the Company. ABC will take reasonable steps to

assure that the Offering Materials are not distributed to any persons not permitted to receive them pursuant to the terms hereof.

7. Indemnification. The Company acknowledges that ABC will be acting on behalf of the Company and will require indemnification by the Company. The Company further acknowledges that ABC's indemnification provisions attached hereto as Exhibit B are incorporated by reference herein or are made a part hereof for all purposes as though set forth entirely herein.
8. Miscellaneous. The Offering will be completed in accordance with Regulation D, Rule 506, the safe harbor exemption from registration under the federal Securities Act of 1933, as amended, and applicable state or other jurisdictional securities laws (i.e. "blue sky" laws). All investors in the Transaction will be persons who qualify as accredited investors under all applicable local securities laws.

The parties agree that their relationship under this Agreement is an advisory relationship only, and nothing herein shall cause ABC to be partners, agents or fiduciaries of, or joint venture partners with, the Company or with each other.

The Company agrees that, following the closing of the Offering, ABC shall have the right to place advertisements in financial and other newspapers and journals at its own expense describing its services to the Company hereunder, provided that ABC will submit a copy of any such advertisement to the Company for its approval, which approval shall not be unreasonably withheld or delayed.

This Agreement may not be amended or modified except in writing and shall be governed by, and construed in accordance with the laws of the State of New York.

If this Agreement reflects our mutual understanding, please execute two copies in the space indicated below and return one to us.

Very truly yours,

ABC CORP INC.

*By:* \_\_\_\_\_

*Name:*

*Title:*

***Accepted and agreed***  
***to as of \_\_\_\_\_, 2006:***  
***\_\_\_\_\_, Inc.***

By: \_\_\_\_\_

*Name:*

*Title:*

Exhibit A

<b>Issuer</b>	_____, Inc. (the “Company”).
<b>Use of Proceeds</b>	General corporate purposes and potential acquisitions of similar companies in the United States.
<b>Amount</b>	Up to \$[_____]
<b>Securities</b>	[_,____,___] shares of common stock of the Company (the “Securities”), which will be unregistered upon issuance but will be subsequently registered by the Company.
<b>Purchase Price</b>	The purchase price per share the Securities will be \$_.__.
<b>Funding / Registration</b>	Upon execution of purchase agreements and related documentation, the Investors will fund into escrow pending the closing of a minimum offering amount equal to \$[____] million. Share certificates will be subsequently delivered to the Investors, however the Securities would not yet be registered. The Company will commit to register the Securities with the SEC within [60] days of the closing.
<b>Exclusive Placement Agent</b>	ABC Corp., Inc. (“ABC”).
<b>Plan of Distribution</b>	ABC will market the Securities into both the institutional investment community as well as high net-worth accredited investors. In addition, ABC will market the Securities within its own managed investment management operations.

## Exhibit B

### Indemnification

\_\_\_\_\_, Inc., a [Delaware] corporation (the “Company”) and its subsidiaries, agrees to indemnify and hold harmless ABC Corp., Inc., a New York corporation (“ABC”), together with its affiliates, directors, officers, agents, and employees (ABC and each such entity or person, an “Indemnified Person”), from and against any and all losses, claims, damages, judgments, and liabilities, expenses, or costs (and all actions in respect thereof and any legal or other expenses in giving testimony or furnishing documents in response to a subpoena or otherwise), including the cost of investigating, preparing for, or defending any such action or claim, whether or not in connection with litigation in which an Indemnified Person is a party, as and when incurred, directly or indirectly caused by, relating to, based upon, or arising out of ABC’s performance of its engagement by the Company under the letter agreement dated as of September 28, 2006, as it may be amended from time to time (the “Agreement”), or otherwise arising out of or in connection with advice or services provided or to be provided by Indemnified Persons pursuant to the Agreement, the transactions contemplated thereby, or any Indemnified Person’s actions or inactions in connection with any such advice, services, or transactions, including any indemnified person’s sole or contributory negligence, if such activities were performed (i) in good faith and (ii) in such manner reasonably believed by such Indemnified Person to be within the scope of the authority conferred by the Agreement or by law and to be on behalf of the Company or in furtherance of the performance of ABC’s services under the Agreement; provided, however, such indemnity agreement shall not apply to any such loss, claim, damage, liability, or cost incurred by any Indemnified Person to the extent it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from the gross negligence or willful misconduct or bad faith of such Indemnified Person. The Company also agrees that no Indemnified Person shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company for or in connection with the any advice or services provided by any Indemnified Persons in connection with the Agreement, the transactions contemplated by the Agreement, or any Indemnified Persons’ actions or inactions in connection with any such advice, services, or transactions except for any such liability for losses, claims, damages, liabilities, or costs found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from such Indemnified Person’s gross negligence or willful misconduct or bad faith in connection with such advice, actions, inactions, or services.

These Indemnification Provisions shall be in addition to any liability that the Company may otherwise have to any Indemnified Person and shall extend to the following: ABC, its affiliated entities, directors, officers, employees, agents, legal counsel and controlling persons of ABC within the meaning of the federal securities laws, and the respective

successors, assigns, heirs, beneficiaries, and legal representatives of each of the foregoing indemnified persons or entities. All references to ABC or Indemnified Persons in these Indemnification Provisions shall be understood to include any and all of the foregoing indemnified persons or entities.

If any action, proceeding, or investigation is commenced, as to which an Indemnified Person proposes to demand such indemnification, it will notify the Company with reasonable promptness; provided, however, that any failure by an Indemnified Person to notify the Company will not relieve the Company from its obligations hereunder except if and only to the extent that the Company's defense of such action, proceeding or investigation is actually prejudiced by the Indemnified Person's failure so to notify the Company. ABC will have the right to retain counsel of its own choice to represent it; however, such firm shall be acceptable to the Company, which acceptance shall not be unreasonably withheld, and unless the Company assumes ABC's defense as provided below, the Company will pay the reasonable fees and expenses of such counsel, and such counsel shall to the fullest extent consistent with its professional responsibilities cooperate with the Company and any counsel designated by it. The Company will be entitled to participate at its own expense in the defense, or if it so elects, to assume and control the defense of any action, proceeding, or investigation, but, if the Company elects to assume the defense, such defense shall be conducted by counsel reasonably acceptable to ABC. Any Indemnified Person may retain additional counsel of its own choice to represent it but shall bear the fees and expenses of such counsel unless the Company shall have specifically authorized the retaining of such counsel. The Company will not be liable for any settlement of any claim against an Indemnified Person made without its written consent.

In order to provide for just and equitable contribution, if a claim for indemnification pursuant to these Indemnification Provisions is made but it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) that such indemnification may not be enforced in such case, even though the express provisions hereof provide for indemnification in such case, then the Company, on the one hand, and any Indemnified Person, on the other hand, shall contribute to the losses, claims, damages, liabilities, or costs to which the Indemnified Persons may be subject in accordance with the relative benefits received by the Company, on the one hand, and ABC, on the other hand, and also the relative fault of the Company, on the one hand, and ABC, on the other hand, in connection with the statements, acts or omissions that resulted in such losses, claims, damages, liabilities, or costs, and the relevant equitable considerations shall also be considered. No person found liable for a fraudulent misrepresentation shall be entitled to contribution from any person who is not also found liable for such misrepresentation. Notwithstanding the foregoing, ABC shall not be obligated to contribute any amount hereunder that exceeds the amount of fees received by ABC pursuant to the Agreement.

Neither termination nor completion of the engagement of ABC or any Indemnified Person under the Agreement shall affect the provisions of these Indemnification Provisions, which shall then remain operative and in full force and effect.

If any provision contained in this Exhibit B is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable, or against its regulatory policy, the remainder of the provisions contained in this Exhibit B shall remain in full force and effect and shall in no way be affected, impaired, or invalidated. These Indemnification Provisions may not be amended or modified in any way, except by subsequent agreement executed in writing.

Exhibit C

SAMPLE DUE DILIGENCE REQUEST

**DUE DILIGENCE REQUEST**  
**FOR**  
**THE "COMPANY"**

This purpose of this Request is to obtain documents and information that \_\_\_\_\_ (the ["Placement Agent/Investors"]) would like to review in connection with its proposed purchase of securities of the Company. To the extent the Company has subsidiaries or predecessor companies, your response should include all subsidiaries and predecessor companies. You should make available for our review originals or copies of the documents listed below. Where not otherwise indicated, documents requested should be made available for the preceding 5 years.

**Instructions for completing this request form:** Each and every request and/or item should be answered in the space below the request and/or item. Your response can include copies of requested documents and other materials as an attachment to this Questionnaire; provided, you clearly reference the attachments to the request and/or item you are responding to. If the answer to a request is "none" or "not applicable," please so indicate on this Questionnaire in the space directly below the request.

**Corporate Records**

1. Articles and Bylaws. The Company's Articles of Incorporation and By-Laws, as amended to date.
2. Certified Copies of Articles and Bylaws. Please provide copies of Articles of Incorporation certified by secretary of state, a copy of bylaws certified by a duly authorized officer, and a certificate of good status.
3. Corporate Minutes. Minutes books of the Company, including unanimous consents, resolutions and minutes of any meetings of the stockholders, Board of Directors, committees of the Board of Directors.
4. Subsidiaries. List of all subsidiaries and affiliates, if any, and items 1 and 2 for each such subsidiary. Any requested document or information about the Company shall also include all such documents and information for each subsidiary, if any.
5. Licenses. Lists of all licenses, permits, consents, approvals, authorizations, registrations, and filings from, with, or to any federal, state or local governmental authority (including, without limitation, the Interstate Commerce Commission, equal employment agencies, federal, state or local environmental protection agencies, labor relations agencies, and trade practice agencies) relating to the Company.

**Capital Stock**

1. Stockholder Ownership List. A current list of all stockholders, including names, addresses, share holdings, ownership percentage, restricted and free trading shares, etc.
2. Registered Stockholder Listing. Provide transfer agent records for the last three years including a registered stockholder listing (in excel format) as of a recent date showing

names and addresses, restricted and free trading share ownership, shares held by affiliates, restrictive legend detail, etc.

3. Nobo Stockholder Listing. Provide the most recent "nobo" listing of stockholders that show the names, addresses and share ownership of non-objecting beneficial owners for stock held in street name.

4. Obo Stockholder Listing. If available, provide the most recent "obo" listing of stockholders that show the names, addresses and share ownership of objecting beneficial owners for stock held in street name.

5. Beneficial Ownership Supporting Detail. Provide the supporting schedules for the beneficial ownership information contained in the Company's most recent Form 10-K.

6. Stockholder and Voting Agreements. All stockholder agreements or other agreements among the stockholders of the Company, and all voting trusts and other agreements relating to the voting, acquisition or disposition of the capital stock.

7. Stock Offering Materials. All agreements, memoranda, registration statements, prospectuses or offering circulars relating to sales of securities of the Company (in private placements or public offerings), copies of correspondence and subscription agreements with investors, and copies of any written proposals for the acquisition of the Company's securities.

8. Listing of Private Placement Investors. With respect to private placements, provide a listing of investors for each placement showing name and address of investor, number of securities purchased, price paid, commissions paid, warrants received, conversion rights, etc.

9. Pre-emptive and Registration Rights. Documents relating to or granting any rights to holders of the capital stock, including pre-emptive rights, registration rights, piggyback registration rights and other such rights. .

10. Listing of Registration Rights Holders. Provide a listing of holders of any registration rights including name and address of holder, securities to which the rights attached, type of rights, etc.

11. Non-Employee Options and Warrants. All options, warrants, and other rights held by non-employees that are exercisable to acquire any shares of the capital stock of the Company.

12. Listing of Non-Employee Option and Warrant Holders. Provide a listing of all outstanding options, warrants or rights granted to any party (other than under Employee Stock Plans) which contains the critical terms (by holder) under such options, warrants or rights including, without limitation, name and address of option, warrant or rights holder, number of options, warrants or rights granted, exercise price, vesting and forfeiture provisions, expiry date, registration rights, etc.

13. Convertible Securities. Any securities convertible into shares of the capital stock of the Company, and any other rights exchangeable for such capital stock.

14. Listing of Convertible Securities. Provide a listing of all of the Company's convertible securities which contains the critical terms of each such security including, without limitation, such as holder name and address, maturity date, principal or stated amount, accrued (but unpaid) interest or dividends, interest rate, collateral, warrants, conversion rates, prepayment rights or penalties, registration rights, etc.

15. Stockholder Reports. All proxy statements and reports to stockholders during the preceding five years, and any proposals, demands or requests by stockholders to include proposals in the Company's proxy statements or to nominate one or more directors.

### **Financial Statements; SEC Filings; Taxes**

1. Financial Statements. All annual and quarterly (or other periodic) financial statements for the Company, including footnotes thereto, for the last five fiscal years and for any interim period, and all work papers and other documents and materials of the Company and its accountants relating to such financial statements or upon which such financial statements are based.

2. SEC Filings. All reports and other documents filed by the Company with the SEC for the past five years, including all Forms 10-K, 10-Q, 8-K, proxy material and annual reports to stockholders; all filings under the Securities Act of 1933 made by the Company during such period, including any exhibit volumes relating to such filings; and any SEC comments received on any of the foregoing filings.

3. Tax Returns. All federal and state income, state franchise, property and sales tax returns, and a list of all other tax returns, statements, waivers, elections or similar documents filed with the IRS for the preceding five years.

4. Tax Disputes. All material documents regarding any tax audits or investigations of the Company, any correspondence with the IRS or any other taxing authority, any ongoing tax disputes, or any pending federal, state, provincial or similar tax proceedings. None.

5. Debt Obligations. All debt instruments, including loan agreements, revolving credit agreements, capital or finance leases, debentures, convertible securities, indentures, mortgages, deeds of trust, security or pledge agreements, guarantees, promissory notes, and other documents involving the Company as borrower, or guarantor. None.

6. Listing of Debt Holders. Provide a listing of all of the Company's debt obligations which contains the critical terms of each such obligation including, without limitation, such as name and address of lender/holder, maturity date, original and outstanding principal amounts, accrued (but unpaid) interest, interest rate, collateral, warrants, conversion rates, prepayment rights or penalties, registration rights, penalties, etc.

7. Attorney Letters. Letters of counsel relating to litigation and other contingent liabilities of the Company to the Company's accountants delivered in connection with the latest audits of financial statements.

8. Audit Letters. Reports (“management letters” and “audit letter”) of the Company’s auditors (or any other independent auditors employed by the Company) relating to management and accounting procedures for the Company.

9. Accounts Payable and Accrued Expense Detail. Detailed listing of accounts payable and accrued expenses by vendor, as of a recent date, which vendor name, amount owed, aging information, type of vendor or expense, etc.

10. Internal Financial Reports and Ledgers. Copies of trial balances, the general ledger and the general journal from the Company's internal accounting and reporting system covering the last two fiscal years. Please include chart of accounts.

### Contracts and Commitments

1. Contracts. List, describe and provide copies of all material contracts and agreements to which the Company, any officer, director or significant shareholder, and any person or entity affiliated with any of the foregoing is a party or is subject to including, but not limited to, the following:

- a. agency or commission agreements;
- b. sales, marketing and advertising agreements;
- c. insurance contracts;
- d. general and limited partnership agreements;
- e. LLC operating agreements;
- f. joint venture agreements;
- g. franchise agreements;
- h. licensing and royalty agreements;
- i. purchase and supply agreements;
- j. consignment agreements;
- k. distribution agreements;
- l. collective bargaining or other labor agreements;
- m. acquisition, sale or merger agreements (whether relating to assets or stock);
- n. leaseback or installment purchase agreements;
- o. management agreements; and
- p. financing, service and other agreements;
- q. agreements entered into outside the normal course of business;
- r. indemnity agreements (including those with officers and directors);and
- s. agreements with affiliates.

2. Insurance Policies. All insurance policies, including key-man life, product liability, casualty, general liability, title, directors and officers, employment practices, fidelity or bond, and workers’ compensation insurance of the Company, or insurance summaries thereof. Provide a listing of the foregoing policies identifying the insurer, type and amount of coverage, past or pending claims, reservations of rights and denials of coverage received from any insurance carrier relating to pending claims, etc.

3. Consulting and Service Agreements. All independent contractor, consulting, and service (e.g. data service agreements, merchant services agreements and credit card company agreements).

4. Financial Advisory Agreements. All contracts and agreements for financial services including, without limitation, investment banking, finder, broker, securities placement, underwriting, corporate finance, financial advisory, M&A, market-making, financial or investment relations, stock promotion, etc. (including agreements that have been terminated or expired during last three years).

5. Other Contracts. All other material contracts or commitments not otherwise described herein (including guarantees, agreements with competitors, confidentiality agreements and any agreements containing termination or other provisions triggered by a change in control).

### **Litigation**

1. Litigation Schedule. A schedule of all pending or threatened litigation, arbitration, administrative or governmental proceedings, and disputes (including labor, employee relations, and environmental) to which the Company is a party, providing a brief description of the following information:

- a. parties;
- b. nature of the proceeding;
- c. date and method commenced; and
- d. amount of damages or other relief sought.

2. Litigation Materials. All pleadings and correspondences relating to all pending or threatened litigation claims involving the Company as plaintiff or defendant. Any file concerning pending or threatened litigation or administrative proceedings, inquiries, or investigations involving the Company or its agents, including copies of notices, pleadings, briefs, depositions, correspondence, etc.

3. Consent Decrees; Orders. All consent decrees, judgments, injunctions, other decrees, orders, settlement agreements, other agreements, arbitrations and arbitration findings of any court or governmental body to which the Company is subject or by which it is bound or that prohibit or require future activities.

### **Employees, Compensation and Benefits**

1. Employee Headcount. Provide a listing of current employees and those employees terminated within the last 18 months.

2. Employment Agreements. All written employment contracts or agreements and a description of all oral agreements or arrangements relating to employment matters for the Company. Please also provide documentation with respect to the termination of any employment agreement.

3. Bonus or Profit Sharing Plans. All bonus, savings, stock purchase, stock ownership, pension, profit sharing, 401(k) deferred compensation and other similar plans currently in effect or in effect during the last five years and drafts of any similar proposed plans.

4. Executive Benefits. Employee or management compensation and incentive plans (including any management "perks").

5. Employee Stock Plans. Stock option, stock appreciation rights or stock purchase plans relating to the Company's capital stock currently in effect ("Employee Stock Plans").
6. Listing of Employee Option Holders. Provide a listing of all outstanding options or rights granted under the Employee Stock Plans which contains the critical terms (by employee) under such options or rights including, without limitation, name of option or rights holder, number of options or rights granted, exercise price, vesting and forfeiture provisions, expiry date, registration rights, repurchase rights, etc.
7. Health and Welfare Plans. Life, health and disability insurance plans whether insured or self-funded, including insurance policies and administration contracts. Please include listing of all participants in such plans (whether current or former employees).
8. Severance Benefits. All contracts, agreements, understandings, arrangements and plans that provide for any payments or other benefits that may be payable to or otherwise due to any person upon termination of employment or other such relationship, including any and all severance or retention plans and agreements.

#### **Property and Facilities**

1. Owned Real Property. All deeds and title information and other documentation and a list and brief description of all owned real property and the improvements thereon.
2. Owned Personal Property. A schedule of machinery, equipment, furniture and fixtures and other personal property owned by the Company.
3. Leased Property. All operating leases including amendments and supplements thereto. Provide a list and brief discussion of all leased real and personal property, including monthly lease amounts, name and address of lessor, lease term, etc. With respect to any such leases which have been assigned, provide any landlord's consent to such assignment.
4. Intellectual Property. Listing and description of any patents, patent application, trade secrets, intellectual property, technology, trademarks, service marks, trade names, fictitious business names, brands, copyrights, and other similar proprietary rights issued to, licensed by, owned by, or used by the Company or any of the employees or affiliates of the Company, including copies of all licenses, leases, and transfers relating to the foregoing.
5. Environmental Claims or Reports. All environmental claims, notices, reports and/or studies related to property owned or leased by the Company that resulted in or may result in any environmental action.

**Professional Contact Information**

Provide the name, address, telephone number, fax number, e-mail address and other contact information for the following:

- a. All legal counsel used by the Company for the last five years;
- b. All accountants used by the Company for the last five years;
- c. All transfer agents used by the Company for the last five years; and
- d. The current registered agent used by the Company;

Exhibit D

NASD RULE 2710 MEMO

## **MEMORANDUM**

**To:** NASD Member Firm Clients  
**From:** Ellenoff Grossman & Schole LLP  
**Subject:** Client Alert -- Recent Regulatory Activity re: NASD Rule 2710  
**Date:** January 2006

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We are writing to inform our NASD-member broker-dealer clients of recent regulatory activity regarding NASD Rule 2710 (the Corporate Financing Rule). In addition to further emphasizing the advice that we have been giving over the past two years on this subject, we wanted to share with you the contents of an NASD inquiry letter received by one of our clients on this topic, which we believe may signal increased regulatory scrutiny and perhaps enforcement action under Rule 2710 in the area of PIPEs and similar transactions and subsequent public resale registrations.

### **Background**

In a context of a public underwritten offering (such as an initial public offering), Rule 2710 requires the lead underwriter to make a filing with the NASD Corporate Finance Department<sup>1</sup> so that such department can review the reasonableness of the compensation to be received by the underwriting group.

However, over the past few years, we have seen the NASD take a more expansive position (although not explicitly put forth any Notice to Members or similar announcement) that **NASD Rule 2710 requires that all NASD member firms who are “participating in a public offering” comply with Rule 2710. Therefore many PIPE offerings<sup>2</sup>, at the time of the subsequent public resale, can subject the NASD member firm to the rule and compensation review.**

### **Rule 2710 - “Participating in a Public Offering”**

Under NASD rules, the phrase “participating in a public offering” is broadly defined to include “participation in the distribution of the offering on an underwritten, non-

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<sup>1</sup> Such filing is made via the NASD’s web-based COBRADesk system.

<sup>2</sup> “Private Investment in Public Equity.” These offerings are comprised of private placements into publicly-traded companies. Our firm has significant experience with PIPE offerings.

underwritten or any other basis....” In our discussions with the NASD Corporate Finance Staff, we have been advised that a member firm acting *even as an agency broker* for its clients who are selling shareholders in a resale offering may be deemed to be “participating in a public offering” and thus may be required to make a Rule 2710 filing (or confirm whether another member firm has made such a filing, at which time the member firm can “link in” to the prior filing).

Technically speaking, the NASD Staff has told us that Rule 2710 requires that a member firm selling even *one share* of the resale offering (and even if they did not participate in the private offering which generated the public resale offering) has a Rule 2710 filing responsibility.<sup>3</sup>

From a practical perspective, however, the position taken by NASD Corporate Finance means that a member firm which acts as a placement agent<sup>4</sup> in a PIPE or other private offering which is then followed by a registration statement to allow investors to resell their securities in the public market (the typical structure of a PIPE transaction) must, if those investors are going to sell their securities through their accounts at the broker firm, make a filing for compensation review under Rule 2710. Assuming there is no exemption from filing, the filing must be made at the same time as the resale registration statement is filed by the issuer with the SEC and, under Rule 2710, the NASD will review all compensation received by the member firm in the 180 day period *prior to the filing date of the registration statement*. Taken to its logical conclusion, the position of NASD Corporate Finance in effect imposes a level of regulation upon the compensation received by members firms in private placement offerings.<sup>5</sup>

### **2710 and Private Placements -- NASD Members Need to Comply**

We are aware that many NASD member firms have not made 2710 review filings in the public resale registration context, in part because: (a) it is not historical industry standard practice to do so; (b) the NASD has not frequently enforced the rule in this context; and (c) the NASD has not made any explicit announcements about their position.<sup>6</sup> As a result, many member firms do not consider these transactions to be subject to Rule 2710 filing requirements. Typically, from the member firm’s point of view, since the NASD has never

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<sup>3</sup> The NASD Staff has acknowledged to us, however, that this “one share” rule is not typically followed by NASD members. Regardless, NASD members should be aware that it is a technical requirement.

<sup>4</sup> Although the NASD’s position is presently unclear, we believe that the NASD’s position may also be applied to selected dealers acting in PIPEs as well as placement agents. The NASD staff has informed us that it is the responsibility of each member firm to inquire, when presented with a selling shareholder resale prospectus, whether a 2710 filing was made previously and approval obtained.

<sup>5</sup> However, the private placement compensation which is included in the compensation for the subsequent public resale consists only of **non-cash** compensation received in such 180 day period. This non-cash compensation (usually shares or warrants of the issuer and rights of first refusal) is combined with the standard brokerage commission on the resale to equal the total compensation for the resale offering.

<sup>6</sup> In fact, when we began making COBRADesk filings for these types of offerings, the COBRADesk system was not set up to receive required information, and we worked with the NASD staff to remedy this.

governed the compensation payable in private placements, once the registration statement is effective, the member firm is merely receiving its normal brokerage commission from the selling shareholder, no other compensation is being received and no special efforts are being made which would lead for the member firm to believe a filing is required.

**However, based on our experience over the last 2 years with this issue, including many conversations with the NASD Staff, we believe there may be a “change in the wind” regarding the NASD’s regulatory stance on this matter.** We have engaged in over a dozen resale registration 2710 filings on behalf of member firms and have worked with the NASD Staff to successfully clear compensation review.<sup>7</sup>

**Potential Enforcement Scrutiny**

**Moreover, we believe that the regulatory risks of non-compliance with Rule 2710 in this context are rising.** An NASD member client of ours recently received an inquiry letter which specifically requested information about all resale registrations and private placements by the member firm within the last two years (a redacted copy of such letter accompanies this memorandum). This inquiry indicates to us that the matter of compensation review in the resale registration context has moved from a regulatory matter within the NASD Corporate Finance Department to a very real potential NASD enforcement issue for our member clients. We think that this could come in the form of a targeted inquiry or may arise in the context of an annual NASD audit of a firm’s compliance procedures. **In short, are advising our member clients that the risk of non-compliance with the rule far outweighs the inconvenience of actually making the 2710 filing.**

We would be happy to discuss with you Rule 2710 and its impact upon your firm. Please contact Brian C. Daughney (Corporate/Securities Group), [bdaughney@egsllp.com](mailto:bdaughney@egsllp.com), or Eden L. Rohrer (Broker-Dealer Regulation Group), [erohrer@egsllp.com](mailto:erohrer@egsllp.com), for additional information.

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*This memorandum is published solely for the interest of friends and clients of Ellenoff Grossman & Schole LLP and should in no way be relied upon or construed as legal advice. For specific information on particular factual situations, an opinion of legal counsel should be sought.*

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<sup>7</sup> In our experience, the NASD is permitting compensation of up to 8% of the value of the NASD member’s participation in the resale registration (with such participation being determined with reference to the percentage of selling shareholders in the offering who are either clients of the member or officers, employees or affiliates of the member).