



presents

A Roadmap to Emerging Financing Alternatives

Leveraging Opportunities in Rights Offerings, Registered Directs, and More

A Live 90-Minute Audio Conference with Interactive Q&A

Today's panel features:

Thomas J. Friedmann, Partner, **Dechert**, Washington, D.C.

Jeff Hartlin, Partner, **Paul Hastings**, San Francisco

Stuart Bressman, Partner, **Proskauer Rose**, New York

Thursday, June 18, 2009

The conference begins at:

1 pm Eastern


12 pm Central

11 am Mountain

10 am Pacific

The audio portion of this conference will be accessible by telephone only. Please refer to the dial in instructions emailed to registrants to access the audio portion of the conference.

CLICK ON EACH FILE IN THE LEFT HAND COLUMN TO SEE INDIVIDUAL PRESENTATIONS.

If no column is present: click **Bookmarks**  or **Pages**  on the left side of the window.

If no icons are present: Click **View**, select **Navigational Panels**, and chose either **Bookmarks** or **Pages**.

If you need assistance or to register for the audio portion, please call Strafford customer service at **800-926-7926 ext. 10**

A Roadmap to Emerging Financing Alternatives:

Recent Developments in Private Placements of Securities

June 18, 2009

Thomas J. Friedmann

Stafford Publications

Dechert
LLP

Table of Contents

Traditional PIPE Offering

Structured PIPE Offering

Over-the-Wall Offerings

Shareholder Approval Requirements

Capital Raising Environment

- Market improved from the Winter of Discontent
- Issuers face continuing pressure to develop their balance sheets
- Traditional Equity Capital Markets approaches (e.g., registered follow on offerings) remain difficult, and the market is highly selective

Traditional PIPE Offering

- Private placement of newly issued common stock or other publicly traded securities to small group of investors
- Warrants often included as part of private placement
- Generally priced at significant discount to market price (5 to 15%) as compared to traditional primary offering
- Issuance typically represents 10 to 15% of outstanding share capital - must stay below exchange thresholds or obtain shareholder approval
- Undertaking by issuer to ensure that securities become freely tradeable (*i.e.*, registered) shortly after closing

Traditional PIPE Offering (cont'd)

- Typical PIPE issuer has less than \$1 billion in market capitalization
- Micro-capitalization issuers have used PIPEs for capital raising more frequently than other issuers
- Communication of offering to investors must comply with Regulation FD and other securities laws

Traditional PIPE Offering (cont'd)

- No board or committee representation
- No veto rights
- No information rights
- No preemptive rights
- No standstill arrangements
- No voting agreements
- Securities offered are designed to be fungible with existing common stock

Traditional PIPE Offering (cont'd)

- Limited transfer restrictions
- No shareholder approval required
- Care is taken in developing size of placement, terms of warrants to avoid exchange approved requirements
- No anti-dilution adjustments
- Placement fees
- Closing conditions
 - None that is within the investors' control
 - MAC typical

Structured PIPE Offering

- Private placement of newly issued convertible securities to one or a small group of investors
- Newly issued securities not typically traded on national securities exchange
- Securities may be redeemable upon satisfaction of certain milestones by issuer
- Undertaking by issuer to ensure that securities become freely tradeable (subject to transfer restrictions) shortly after closing

Structured PIPE Offering (cont'd)

- Unlike traditional PIPE offering, issuers often have greater than \$1 billion in market capitalization
- Securities often convertible at option of the holders
 - Conversion based on fixed conversion rate
 - Customary anti-dilution adjustments (subject to below market issuance considerations)

Structured PIPE Offering (cont'd)

- Board and committee representation common, subject to ownership thresholds (NASDAQ Rule)
- Veto, information and preemptive rights pre-negotiated as part of purchase agreement
- Standstill arrangements common
- Voting agreements common

Structured PIPE Offering (cont'd)

- Transfer restrictions (range of one to three years)
- Generally structured to avoid shareholder approval
 - Alternative “Share Cap”: acquired ownership stake increases upon receipt of shareholder approval; downside protection through optional redemption right or dividend rate step-up (penalty)
- Placement fee may be negotiated as part of purchase agreement
- Closing conditions minimal and heavily negotiated
 - MAC clauses often heavily contested – Washington Mutual and Whole Foods do not include such conditions

Structured PIPE Offering (cont'd)

Terms of selected recent transactions

	Goldman Sachs	General Electric	Whole Foods
Investment Type	Preferred Stock with Warrants	Preferred Stock with Warrants	Convertible Preferred Stock
Investment Size	\$5.0 billion	\$3.0 billion	\$425 million
Dividend Rate	10.0%	10.0%	8.0%
Maturity	Perpetual	Perpetual	12 years
Call Price	110%	110%	104% declining ratably to par
Call Protection	None	3 years	5 years*

*Also, clean-up call based on secondary market price of common stock

Shareholder Approval Requirements

- Below-market issuance
 - Determination based on higher of book and market value (use conversion price for convertible)
 - Shareholder approval required only if issuance represents more than 20% of pre-transaction outstanding voting securities
- Above-market issuance
 - NYSE - No shareholder approval required if issuance represents less than 20% of pre-transaction outstanding voting securities
 - Nasdaq – Shareholder approval required only if change of control (single entity holds 20% of voting securities post-transaction); voting, conversion and anti-dilution caps may be implemented to ensure that issuance does not trigger change of control

Cross-Over Alternatives

- Due to economic uncertainty and secondary market volatility investors are highly selective (and skittish)
- Recent depressed market conditions have encouraged issuers and investment banks to try alternative approaches to capital raising
 - At-the-market (“ATM”) offering programs (“dribble programs” or “controlled equity offerings”)
 - Confidential pre-marketed offerings (a.k.a., “Over-the-Wall Offerings”)

Over-the-Wall Offerings

Key advantages:

- Confidential pre-marketing by issuers and underwriters prior to a public announcement permits market test
- Speed of execution

Over-the-Wall Offerings (cont'd)

- Confidential marketing prior to the public announcement to a select group of institutions, including:
 - Large shareholders, including mutual funds and hedge funds
 - Private equity investors
 - Sovereign wealth funds
- Confidential pre-marketing should *not* be done without an effective shelf registration statement in place if the offering is to be SEC registered

Over-the-Wall Offerings (cont'd)

Investors are brought “over the wall”

- Investors receiving material, non-public information (“MNPI”):
 - must agree to keep the MNPI confidential
 - must agree not to trade while in possession of the MNPI
- If possible, first contact with investor’s internal compliance officer or counsel
- The very fact of the offering, in itself, could be deemed MNPI (consider using underwriter for first contact)

Over-the-Wall Offerings (cont'd)

Non-disclosure Agreement (“NDA”)

- NDA need not be a formal written agreement
- Create “audit trail” showing the formation of a binding confidentiality agreement with offeree
- Use of E-mail Acceptable
 - one-way email to potential offeree stating or deeming confidentiality obligation (weak)
 - two-way e-mail seeking confirmation of acceptance of the confidentiality obligation by the potential offeree (stronger)

Over-the-Wall Offerings (cont'd)

Communications with Offerees

- Written information regarding the offering could be deemed to be an Issuer Free Writing Prospectus required to be filed with the SEC
 - Is the writing an “offer”?
 - Issuer FWP vs. Underwriter FWP
- Plan to convey deal-specific information orally

Over-the-Wall Offerings (cont'd)

- If successful, the deal is publicly launched through a press release
- Additional marketing may be used to upsize commitments. These offers are not made pursuant to NDAs, as the offering is then public
- Deal typically priced on day of announcement or next day

Over-the-Wall Offerings (cont'd)

Termination or expiration of the NDA

- NDA obligations/restrictions survive until MNPI is no longer “non-public” or “material”
 - Institutional investors insist on an expiration time before crossing the wall
 - Expiration time may be only a few days or weeks from signing of NDA
 - If issuer decides not to go forward with offering or if NDA otherwise expires, consider issuer’s obligation to disclose proposed offering
- One approach – publicly issue or file disclosure that “cleanses” the potential investors:
 - See PNC-National City final merger proxy statement dated 11/21/08 (bottom of p. 75)
 - See State Street Corp.’s Q4 earnings release dated 1/20/09

A Roadmap to Emerging Financing Alternatives

**Leveraging Opportunities in Rights
Offerings, Registered Directs, and
More**

At-the-market Offerings

- Many different titles, but the same concept
- A registered offering of a listed security directly into an existing trading market at other than a fixed price
 - Shares are “dribbled out” by the issuer into the market on a registered basis at intervals over an extended period of time
 - Issuer determines the timing, amount, floor price and duration of any issuance of shares
 - Offering generally can be terminated at any time

At-the-market Offerings (cont.)

- Notable recent deals
 - Delta Air Lines (December 2008): \$203 million
 - UAL Corporation (December 2008): \$200 million
 - PNC Financial Services Group (May 2009): \$600 million
 - DryShips Inc. (May 2009): \$475 million
- Securities Offering Reform removed 2 key limitations
 - Cap at 10% of public float
 - Identification of agent at time of registration statement effectiveness (before ASRs)

Process

- Effective Form S-3 registration statement
- Determine program mechanics
 - price, amount, timing and other material terms
 - importance of open trading windows – Rule 10b-5 under the Exchange Act
- Announcement/filings
 - Press release
 - Form 8-K
 - Prospectus supplement
 - Listing application

Process (cont.)

- Issuer places sales orders with agent
 - Total number of shares to be sold (min/max)
 - Daily min/max
 - Minimum price
 - Time period
- Agent executes orders
- Agent delivers sales reports to issuer
- Settlement

Issuer's Ongoing Disclosure Obligations

- Refer to agency agreement
- When?
 - Monthly/quarterly
 - Reach threshold level of sales
- Method
 - Form 8-Ks
 - Periodic reports
 - Prospectus supplements

Placement Agents

- Agency Agreement
 - Best efforts basis
 - Offering parameters
 - Paid a commission on sales
- Statutory underwriter liability (Section 11)

Diligence Procedures

- What?
 - Representations and warranties
 - Calls with management and auditors
 - Officers' certificates
 - Legal opinions
 - Negative assurance/Rule 10b-5 letters
 - Comfort letters
- When?
 - Execution of agency agreement
 - Placement of orders/closing of sales
 - Quarterly
 - Reach threshold level of sales
 - Amendments to Form S-3 registration statement (incorporation by reference)
 - Other material events

Benefits

- Highly flexible
 - Raise capital on an as-needed/as-desired basis
 - Benefit from rising stock price
- Program can be terminated at any time; sale instructions can be revoked prior to execution
- Fewer arbitrage opportunities
- Typically lower agency fee rates vs. alternative structures
- No marketing
- Typically no lock-up

Drawbacks

- May not provide sizeable cash infusion on an immediate basis
- Sales price based on fluctuating trading price creates some uncertainty for the issuer
- Stockholder approval *may* be required under national securities exchange rules
- SEC registration considerations
 - Must be *primary* Form S-3 eligible to conduct shelf offering
 - Potential SEC review unless using an ASR
 - Creates potential Section 11 liability
- Higher transaction costs vs. PIPEs and RDs (registration statement and due diligence)

Rights Offerings

- Issuer offers to sell securities to its existing securityholders at a fixed price for cash through the exercise of subscription rights granted to them
 - Rights typically granted in proportion to the amount of the issuer's securities held by the securityholders as of the record date for the offering

Rights Offerings (cont.)

- More common in Europe due to preemptive rights statutes
- Becoming more popular in the U.S.
 - Why?
 - Securities Offering Reform
 - “Cleansing” feature: supports a record of good faith and fair/equal treatment of securityholders
 - Post-bankruptcy option
 - Notable recent U.S. deals
 - Griffon Corp. (October 2008): \$246 million
 - Sealy Corp. (May 2009): \$177 million

Timing Considerations

- Effectiveness
- Record date and advance notices
- SEC filings
- Listing applications
- Distribution of rights
- Offer period
- Trading windows

Key Issues

- Registration
 - Underlying securities
 - Rights
 - No-sale theory
 - Rights transferable by affiliates
- Offer period
 - NYSE: minimum of 16 days (14 days in limited circumstances)
 - Nasdaq: currently no minimum
 - Typically 20-40 calendar days

Key Issues (Cont.)

- Transferability of rights
 - Non-transferable
 - Transferable: rights trade separately
 - Where traded
 - Ex-rights date

Key Issues (Cont.)

- Step-up privilege: rightsholders who exercise their subscription rights in full can subscribe for one additional full share in lieu of the fractional share that would have been granted (without furnishing any additional rights)
- Over-subscription privilege: rightsholders who exercise their subscription rights in full can subscribe for their pro rata portion of the securities underlying unexercised rights

Key Issues (Cont.)

- Standby/backstop commitment
 - Commitment to purchase any unsubscribed shares
 - Provides an issuer with certainty of execution
 - Backstop vs. standby purchaser
 - Fee structures

Stockholder Approval

- Public offering for cash exception
- If using backstop purchaser
 - Must participate in offering on same terms as other securityholders = cannot receive backstop fee
 - Additional NYSE limitations

Benefits

- Egalitarian: all securityholders may participate (on the same terms)
- Can employ features to encourage or guarantee full subscription
- *Typically* do not require shareholder approval under national securities exchange rules
 - Public offering for cash exception
 - Standby/backstop considerations
- Lower agency fee rates vs. traditional underwritten offerings
- No marketing

Drawbacks

- Trading price volatility during offer period will impact subscription rates
- Process may be confusing to retail stockholders
- There may be conditions to standby/backstop commitment: MAE and bring down of representations and warranties
- SEC registration considerations
- Longer lead-time (vs. RDs and ATMs)



PROSKAUER ROSE LLP

Overview of Registered Direct Offerings

Presented by:

Stuart Bressman
Partner

sbressman@proskauer.com

212.969.3470

Table of Contents

- What is a Registered Direct Offering?
- Benefits of Registered Direct Offerings
- Similarities to PIPEs
- Similarities to Underwritten Follow-on Offerings
- Dissimilarities to Underwritten Follow-on Offerings
- Process and Timeline for Registered Direct Offerings
- Registered Direct Documentation
- Special Legal Issues Regarding Registered Direct Offerings

What is a Registered Direct Offering?

- A Registered Direct Offering (“**RD**”) is an offering of a public issuer’s equity or equity-linked securities to a small group of institutional investors through a limited distribution.
- The securities offered have previously been registered by the issuer in a shelf registration on Form S-3 and pursuant to Rule 415 that has been declared effective by the SEC.
- Securities in RD offerings are marketed by a placement agent on a “best efforts” basis. Not underwriting – there is no firm commitment to buy.
- RD offerings can be completed quickly – as little as a few weeks – and relatively inexpensively.

What is a Registered Direct Offering?

(cont'd)

- RDs technically are public offerings with all the related considerations and requirements (*i.e.*, '33 and '34 Act liability and corresponding need for due diligence) – FINRA compliance and delivery of a final prospectus supplement, and with documentation and closing mechanics similar to a public offering.
- BUT, the RD offering process resembles that of a PIPE due to the limited and discrete offering and sale of securities to a small group of institutional investors.

Benefits of Registered Direct Offerings

- Confidential, targeted marketing process
- Pricing
- Best efforts as opposed to firm commitment
- Investors receive registered, freely tradable securities
- Combines many of the best features of underwritten follow-ons and PIPEs

Similarities to PIPEs

- Marketed confidentially on a targeted basis to a limited number of institutional investors over a short period of time
- Marketed off of publicly-available information
- Investors will include a mix of mutual funds, hedge funds and existing investors, both fundamental and technical
- Flexible sizing
- Usually subject to NYSE, Nasdaq or Amex 20% Rule, which applies to private placements

Similarities to Underwritten Follow-on Offerings

- From a legal standpoint, this is a follow-on offering, typically on a “best efforts” basis – Section 11 “underwriter” liability applies
- Investors overlap (primarily institutional investors), but can sell to anyone, because securities are registered; so there is an opportunity for greater diversity of investors
- Similar documentation, due diligence and closing deliveries
- Like a traditional underwritten follow-on offering, shares are immediately available for resale – there is no registration delay or risk as in a PIPE

Dissimilarities to Underwritten Follow-on Offerings

- “Best efforts” versus “firm commitments” basis
- Generally, no public announcement until commitments are in place to close offering, so no extensive Road Show
- Marketed quickly and discreetly with targeted investors
- No need to prepare a Preliminary Prospectus Supplement for marketing purposes
- Offering terms not filed before marketing
- More limited distribution to a handful of investors
- Considered a “private placement” for purposes of the “20% Rule”

Process and Timeline for Registered Direct Offerings

- Organizational Meeting/Management Presentation
- Business and legal due diligence
- Obtain regulatory approvals as needed
- Prepare and negotiate transaction documents
- Negotiate Comfort Letter
- Consider Use of Preliminary Prospectus Supplement and/or Free Writing Prospectus
- Prepare Prospectus Supplement
- Prepare Form 8-K and Press Release to announce offering

Process and Timeline for Registered Direct Offerings (cont'd)

- Importance of maintaining confidentiality
- Typically market on only public information
- Consider use of non-disclosure agreements
- Negotiate with Investors and the Company's Pricing Committee and finalize pricing terms
- Investor notified of the final pricing terms
- Execute transaction documents
- Obtain Comfort Letter from Auditors

Process and Timeline for Registered Direct Offerings (cont'd)

- Next Day
 - Issue Press Release and File Form 8-K before market opens
 - File Prospectus Supplement
- Close and Fund:
 - T+3 settlement, exchange funds and securities
- Company Delivers Closing Documents:
 - Legal Opinion and 10b-5 Negative Assurance
 - Officers' and Secretary's Certificates
 - Bring-Down Comfort Letter

Registered Direct Documentation

- Placement Agent Agreement: between issuer and placement agent
- Subscription Agreement: between issuer and investors
- Prospectus Supplement: filed with SEC
- Escrow Agreement (if applicable)
- Legal Opinions, including 10b-5 statement, comfort letters and other closing documents as in a traditional public offering
- Issuer needs to do additional listing application with the appropriate exchange for the shares to be sold

Special Legal Issues Regarding Registered Directs

- Variations in practices among different law firms
- Nasdaq and NYSE “20% Rule”
- FINRA
- Free Writing Prospectus Rules



PROSKAUER ROSE LLP

Overview of Registered Direct Offerings

Presented by:

Stuart Bressman
Partner

sbressman@proskauer.com

212.969.3470

Client Alert

A report
for clients
and friends
of the Firm January 2009

Registered Direct Securities Offerings – An Effective Financing Alternative for a Turbulent Market

Given the turbulence in today's capital markets and the generally depressed United States and global economies, many public company issuers have been searching for viable capital-raising methods after finding that both traditional public offerings and private investment in public equity (PIPE) offerings currently may not be feasible. For many issuers, a Registered Direct securities offering can be an effective alternative to raise capital. Registered Direct offerings can benefit public companies by allowing them to quickly raise capital from a select group of investors, while avoiding the significant downward pricing pressure that typically accompanies a traditional underwritten offering. At the same time, Registered Direct offerings provide investors with registered stock that is immediately tradable and, therefore, more liquid than in PIPE offerings.

The purpose of this Client Alert is to generally describe the Registered Direct offering process and to summarize the advantages of Registered Direct offerings that issuers and their investment bankers and financial advisers should consider in analyzing their capital-raising alternatives.

Overview and Advantages of a Registered Direct Offering

A Registered Direct offering is a negotiated sale by an issuer to one or more investors of securities that have been registered pursuant to an effective shelf registration statement on Form S-3 under Rule 415 of the Securities Act of 1933, as amended. Rule 415

permits an issuer to register a specific dollar or share amount of securities without specifying the amount of any particular class or type of security or the timing or method of the offering. The issuer may then sell any or all of the registered securities directly to investors at a later date or dates of its choosing. Unlike a typical firm commitment underwritten offering, a Registered Direct offering is structured as a "best efforts" offering. Accordingly, it involves a "placement agent" as opposed to an "underwriter" who places the securities directly with investors, rather than directly purchasing the securities itself and then reselling them to investors. However, similar to an underwritten offering, the issuer in a Registered Direct offering sells registered securities that generally have no restrictions on resale. Registered Direct offerings typically are for common stock, although issuers may sell other types of securities (e.g., convertible notes or warrants), and often do in combination with each other.

The majority of Registered Direct offerings involve the use of a placement agent. A placement agent experienced in Registered Direct offerings typically has longstanding relationships with a number of institutional investors, along with knowledge of what industry(ies) or niche(s) a particular investor prefers to invest in and its investment criteria. Therefore, rather than marketing securities to a large group of potential investors, an experienced placement agent is able to target a small number of investors that are particularly well suited for a specific issuer and offering. Targeted investors often will include an issuer's existing institutional shareholders, other institutional shareholders of the issuer's comparable group of companies and/or traditional institutional investors who regularly purchase securities in Registered Direct offerings. Also, by interposing a placement agent between the issuer and investors, the identity of the issuer can be kept confidential until an investor is brought "over-the-wall" and informed that the offering is confidential, so that the investor is restricted from trading in the issuer's securities until the offering is completed or terminated.

The mechanics of a Registered Direct offering may present issuers and investors with important advantages over other forms of financings. For example, Registered Direct offerings typically are marketed confidentially, without any prior public announcement of the offering. This allows an issuer and its placement agent to gauge the market's interest in a financing without the downside pricing pressure that often accompanies an announced public offering. Registered Direct offerings typically are marketed based only upon an issuer's existing public disclosure. Accordingly, the issuer and placement agent, and their respective counsel, do not have to spend hours or days crafting a preliminary prospectus supplement as a selling document.

Unlike PIPE offerings, the securities purchased in Registered Direct offerings are registered, which provides immediate liquidity (subject to market conditions) that, in today's market, is of utmost importance to many investors. This advantage also runs to the issuer insofar as offering registered securities allows the issuer to offer its equity without the steep discounts to market price that often accompany PIPE offerings in the current market. Accordingly, the Registered Direct offering process provides eligible issuers with a fast, confidential and efficient financing alternative, while providing investors a managed transaction and a liquid security.

Registered Direct Offerings Are Available to a Broad Range of Public Companies

Registered Direct offerings may be conducted by small- and mid-cap public companies, as well as large-cap and Well-Known Seasoned Issuers¹, or *WKSI*s; *provided, however*, that the issuer is eligible to use Form S-3. Form S-3 (and its analogous Form F-3 for foreign issuers) is the most simplified registration form. It may only be used, however, by an issuer that has been required to report under the Securities Exchange Act of 1934, as amended, for a minimum of 12 months, and has met the filing and other requirements set forth in Form S-3's general instructions.

The use of Form S-3 confers significant advantages over other registration forms.² For example, Form S-3 permits the registration of securities prior to planning any specific offering and, once the registration statement is effective, issuers utilizing Form S-3 may offer securities in one or more tranches without awaiting further SEC action. In addition, Form S-3 is an "evergreen" form of registration statement – that is, it permits an issuer to incorporate by reference its reports filed with the SEC subsequent to its initial filing.

Without this ability, an issuer would have to file a new registration statement or post-effective amendment to its registration statement to prevent information contained therein from becoming outdated, each of which carries the potential for SEC review and the resulting delay.

Prior to January 28, 2008, issuers seeking to utilize Form S-3 were required to have a minimum non-affiliate public float of at least \$75 million for primary offerings. However, on December 19, 2007,³ the SEC amended the eligibility requirements for the use of Form S-3 (and Form F-3) as part of its initiatives to increase access to the capital markets by smaller public companies. The amended Form S-3/F-3 eligibility rules provide many smaller public companies increased flexibility to conduct limited public offerings of their securities at times and under conditions that are best suited for them, with fewer regulatory requirements; *provided, however*, that an issuer with a public float under \$75 million may not sell more than 33.33% (one-third) of its public float in primary offerings over any period of 12 calendar months. The amended rules provide additional flexibility to smaller business issuers, so that they may sell registered securities under an effective shelf registration pursuant to Rule 415 when market conditions permit, and make it easier for smaller business issuers to raise money in a Registered Direct offering. With this added flexibility, there may not be a need to conduct a PIPE offering to raise capital, which, under current market conditions, may be priced at a substantial discount to the issuer's market price due to liquidity risks.

Advantages in Registered Direct Offerings for Well-Known Seasoned Issuers

Special advantages are available in Registered Direct offerings for *WKSI*s, as only they can take advantage of the streamlined shelf registration process, which provides automatic effectiveness of the registration statement upon filing. These include (i) no SEC review of a *WKSI*'s shelf registration statement, (ii) the option to pay registration fees upon only the amount of securities offered (a pay-as-you-go methodology, as opposed to payment on an entire shelf), and (iii) generally not being subject to the gun-jumping rules to which other issuers are subject. Thus, *WKSI*s have the unique advantage of being able to conduct a Registered Direct offering in the most confidential manner possible today. Further, if an issuer qualifies as a *WKSI*, it is possible to file a registration statement, market and price an offering in the same day under the appropriate circumstances.

¹ A Well-Known Seasoned Issuer is defined as a company that has timely filed its Securities Exchange Act of 1934 filings for the previous 12 months and either has a (i) worldwide public common equity float of at least \$700 million (i.e., by non-affiliates) or (ii) registered and issued at least \$1 billion in debt or non-convertible securities for cash (not exchange) within the prior 3 years.

² The advantages conferred by Form S-3 also are applicable to foreign issuers via the use of Form F-3.

³ The SEC amendment became effective on January 28, 2008.

Registered Direct Offerings are Specialized Offerings

While Registered Direct offerings provide numerous advantages for public companies over other forms of capital-raising structures, they do involve a number of important business and legal issues not encountered in PIPE offerings or traditional firm commitment underwritings. Although Registered Direct offerings are not underwritten and may be marketed similarly to PIPE offerings, they are still considered public offerings under the Securities Act, and the placement agent has underwriter's liability under Section 11 of the Securities Act.⁴ Accordingly, the placement agent(s) in Registered Direct offerings should conduct customary due diligence, use a placement agency and subscription agreement that includes representations, warranties and indemnities, and require delivery of a comfort letter, legal opinion, 10b-5 statement and other customary closing documents. Since all of these actions must be completed on an extremely expedited basis and the documents must be specifically tailored for a Registered Direct offering, as opposed to a traditional underwritten offering, it is important for issuers and placement agents in Registered Direct offerings to be well prepared going into the process.

⁴ Section 11 of the Securities Act of 1933 imposes civil liability for misstatements or omissions of material facts in a securities offering registration statement. Potential Section 11 defendants include the issuer, directors, underwriters and accountants.

Proskauer Rose LLP is one of the leading law firms in the area of Registered Direct offerings, as well as other forms of alternative capital market transactions, and has extensive experience in matters relating to structuring Registered Direct offerings, disclosure issues, marketing issues, closing mechanics, the relevant FINRA rules and regulations, rules relating to placement agent compensation, shareholder approval, the structuring and valuation of warrants in combination with other equity securities and the use of free writing prospectuses, as well as the analysis of NASDAQ, NYSE and AMEX rules, regulations and staff interpretations.

For the year ended 2008, in the category of "Placement Agent Counsel," Proskauer was nationally ranked 1st by "Placement Tracker" for the aggregate dollar amount placed, and 2nd by both "Placement Tracker" and "PrivateRaise" for the number of offerings represented. Proskauer was also tied for 4th place in 2008 in "Placement Tracker's" national rankings in the representation of investors for the number of PIPE offerings.

For further information, please feel free to contact the partners listed below or your usual contact at Proskauer.

**BOCA RATON • BOSTON • CHICAGO • HONG KONG
LONDON • LOS ANGELES • NEWARK • NEW ORLEANS
NEW YORK • PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

Proskauer's Capital Markets Group has extensive experience in all types of capital markets transactions, including both registered and exempt transactions. We represent domestic and foreign private issuers and underwriters in registered transactions and exempt Rule 144A, Regulation S and Regulation D transactions. We provide the full range of services required by our domestic and international clients to facilitate initial public offerings, follow-on offerings, investment-grade, convertible and high-yield debt offerings and real estate securities transactions.

For more information, please contact:

Julie M. Allen
212.969.3155 – jallen@proskauer.com

Stuart Bressman
212.969.3470 – sbressman@proskauer.com

Allen R. Williams
212.969.3220 – awilliams@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

© 2009 PROSKAUER ROSE LLP All rights reserved. Attorney Advertising.

You can also visit our Website at www.proskauer.com