COMMUNICATIONS DURING AN IPO

Under the securities laws, specific rules apply in each of three relevant time periods – (1) pre-filing, (2) the so-called "waiting period" after the initial filing, and (3) the post-effective period after the offering commences. Of course, false and misleading communications are prohibited at all times. Because statements about the Company made by an affiliate of the Company may be attributed to the Company, significant investors and board members of the Company should adhere to these restrictions in addition to management and other employees.

THE PRE-FILING PERIOD

Under Section 5 of the Securities Act of 1933, it is unlawful to make "offers" (either oral or written) to sell securities that will be registered before the registration statement for the offering has been filed with the Securities and Exchange Commission ("SEC"). "Offering" securities before filing a registration statement often is referred to as "gun jumping." Although the SEC has never defined when the "pre-filing period" begins, it is widely considered to start when the Company decides to proceed with an IPO, which is generally no later than when it selects its lead underwriter or underwriters for the IPO or when it, formally or informally, conducts an organizational meeting in connection with the IPO. From that point forward, the Company is considered to be "in registration."

Pre-Filing Period

- Period begins when managing underwriter is selected
- Company counsel should be consulted with respect to communications generally
  - All interviews, speeches, press releases, presentations, website content and advertising may be considered offers and can lead to potential "gun-jumping" concerns
  - Safe harbor may be available for communications more than 30 days prior to filing

During the pre-filing period, the Company should not make any public statements -- including through discussions with journalists -- about the proposed IPO or its financing plans in general. If a Company representative receives an unsolicited inquiry about the Company's financing plans, the representative should indicate that the Company does not comment on market speculation. In addition, no one at the Company should make an offer to anyone regarding shares that may or will be offered through the IPO. For example, representatives of the Company should not discuss a potential directed share program with employees or vendors or inform them that they can participate in the IPO. If anyone is offered unregistered shares privately (including employees), in advance of

the IPO, the private offering must be completed before the investor to whom the shares were offered privately may participate in the IPO. Further, depending on what information is provided to the private investor, such private investor may not be able to participate in the IPO at all. Alternatively, in cases where it is not practical for an investor to participate in the IPO directly (whether because the private placement cannot be completed in advance of the IPO or for any other reason), then the Company may decide to issue shares to such an investor in a concurrent private placement. Concurrent public and private offerings are permissible, but the Company and its underwriters, in consultation with counsel, will want to be very thoughtful about who participates in which offering process, how investors are solicited for each offering, the timing of offers and sales and what disclosures are provided.

The SEC broadly interprets the prohibition on gun jumping to capture not only express offers and sales but also publicity that may arouse public interest in a proposed IPO. Accordingly, care should be taken to avoid any press release, website posting, marketing campaign, conference presentation, television or radio appearance, or other corporate communication that might be viewed as "conditioning the market" for the IPO.

There are limited, but important, exceptions to this general rule. SEC Rule 163A generally provides that a communication that does not refer to the IPO and is made more than 30 days before the first public filing of the registration statement (not to be confused with any confidential submissions or draft registration statements made prior to the first public filing and which will not be publicly available until the first public filing of the registration statement) will not be an impermissible offer if the issuer takes reasonable steps to prevent its further distribution or publication. Rule 169 provides that the regular release of factual business information intended for use by persons, such as customers and suppliers, other than in their capacity as investors or potential investors also generally will not constitute an impermissible offer. The information that is released pursuant to Rule 169 must be consistent in timing, manner and form with information previously released in the ordinary course of business. Rule 135 permits the Company to issue a press release notifying the public of a proposed IPO, but with very limited additional information. In all cases, it is important to discuss any particular situation with counsel before relying on any of these exceptions.

In addition, under SEC Rule 163B, the Company and its authorized underwriters may engage in oral or written communications with potential investors who are either "qualified institutional buyers" as defined in Rule 144A (each, a "QIB") or institutions that are "accredited investors" as defined in Regulation D (each, an "IAI") to determine whether such investors might have an interest in the contemplated registered securities offering. Such "testing-the-waters" communications are permitted during both the pre-filing period and the waiting period, described below.

If the Company intends to engage in any "testing-the-waters" communications it should do so only following discussion with counsel and its lead underwriters and should document that the potential investors with whom it communicates are, or it reasonably believes are, QIBs or IAIs (for example, by requiring a signed confidentiality agreement that contains appropriate representations prior to such communications). Because any

such communications remain subject to liability for material misstatements under federal securities laws, oral and written communications should be carefully vetted and should generally be consistent with the disclosure in any filed registration statement. Any written materials that are used with potential investors should be collected at the end of any presentations and "leave behinds" should be avoided. In addition, because underwriters will typically seek representations or other evidence of compliance with the "testing-the-waters" rules, the Company should maintain documentation identifying the dates and persons who received any communications under this exception.

THE WAITING PERIOD

From the date on which a registration statement is first publicly filed until the date on which the SEC declares it effective, (1) the prohibition against oral offers no longer applies and (2) written offers are permitted but only if made by means of a qualifying preliminary prospectus. Sales of any securities are not permitted until the registration statement is effective. Although oral offers are permitted during the waiting period, the underwriters and counsel should be consulted when communicating with investors or engaging in any "testing-the-waters" communications.

Waiting Period

- Period between the public filing of the registration statement and the declaration that the registration statement is effective
- Communication should be limited to information contained in the registration statement
- Companies may engage in "testing-the-waters" communications following the public filing of the registration statement provided that no written materials are provided to potential investors
- Company counsel should be consulted with respect to communications generally

During the waiting period, in response to requests for information about the IPO, the Company generally should not provide any written material other than a qualifying preliminary prospectus. Furthermore, the Company should not include any written material with a preliminary prospectus unless such material has been pre-screened by its underwriters and counsel.

The SEC takes the position that a preliminary IPO prospectus that omits a price range is not a qualifying prospectus and, therefore, should not be distributed to investors. Accordingly, even though the initial registration statement filing (and each amendment thereto) will be publicly available on the SEC's EDGAR website, the Company should not distribute it or send a link to it until it meets all of the SEC's requirements and the road show is ready to begin.

The SEC also takes the position that e-mails and recorded oral presentations constitute writings. Consequently, an e-mail to an employee about a directed share program, an e-mail to a potential investor, or a link on the Company's website to the IPO registration statement or an archived recording of an investor conference presentation each could constitute an illegal prospectus. Given the very broad definition of what constitutes an "offer," and the severe penalties that may apply if even a seemingly innocuous email or other "writing" is deemed to be an offer (which penalties may include not only rescission rights for recipients of the writing who buy in the IPO, but also

substantial delay of the IPO, exclusion from the IPO of potential investors who received the e-mail or other writing and forced disclosure of the entire situation in the prospectus, as discussed below), the Company and all of its officers and directors need to exercise caution with e-mails, handouts, recorded presentations, and any other "writings."

There are limited exceptions to these rules as well. During the waiting period, Rule 134 permits press releases and other written communications containing specific, limited information. If the Company wants to distribute a letter, issue a press release announcing the filing or the launch of the road show, its underwriters and counsel should be consulted, but such communications may be permitted pursuant to Rule 134.

In addition, Rule 169, which, as discussed above, generally provides that the regular release of factual business information will not constitute an impermissible offer, also provides that, as a general matter, a writing containing regularly released factual business information will not represent an illegal prospectus. Because the safe harbor contains specific restrictions, the Company's underwriters and counsel should be consulted about taking advantage of this rule.

During the waiting period, the Company and the underwriters will market the IPO through road show presentations. The Company and the underwriters, however, may only solicit "indications of interest" and may not accept orders or enter into contracts to sell the shares before the registration statement is declared effective.

The SEC rules provide that if the Company produces an electronic IPO road show, it must file a *bona fide* version with the SEC or make one available electronically to an unrestricted audience. Many IPO underwriters advocate using an electronic road show and posting it on netroadshow or a similar website.

The SEC rules also permit the use of "free writing prospectuses" ("FWP"). These are written offers that do not contain all the information required in a statutory prospectus. Use of an FWP in an IPO is conditioned on (1) providing a statutory prospectus – a preliminary prospectus with pricing information -- before or concurrently with the FWP, (2) filing the FWP with the SEC, and (3) including a legend directing investors to the registration statement. Because of the requirement to deliver a statutory prospectus, FWPs have not been used extensively to market IPOs and, as with the other exceptions, the underwriters and counsel should be consulted before any use of an FWP is considered.

Rule 433(f) includes certain accommodations where an FWP is prepared and published or broadcast by unaffiliated and uncompensated media. The accommodations of this so-called media FWP are available in an IPO. As a result, if during the registration process, a representative of the issuer participates in an interview with unaffiliated and uncompensated members of the media that is published or broadcast, and the interview constitutes an offer, it will be considered a media FWP. If the substance of the information in the interview is contained in the registration statement, generally an FWP does not need to be filed with the SEC. If not, an FWP will need to be filed with the SEC and the registration statement may need to be amended to include the substance of the

information from the interview. Despite these rules, interviews with the media should be curtailed during registration and counsel should be advised prior to speaking with any member of the media.

THE POST-EFFECTIVE PERIOD

Post-Effective Period

- Period begins when the SEC declares the registration statement effective and ends when the prospectus delivery requirement ends (25 days)
- Communications remain restricted

After the registration statement becomes effective (1) sales are permitted, (2) oral offers may be made, and (3) written communications, other than the final prospectus, may be used to offer securities if accompanied or preceded by the final prospectus. The SEC takes the position that the Company remains "in registration" while dealers are obligated to deliver a prospectus to a purchaser. If the Company's common stock is listed on a national securities exchange, such as the NYSE or the Nasdaq Stock Market, this period will last 25 calendar days beyond the date the registration statement became effective. During this period, determinations regarding potential written communications and television, internet and radio appearances must factor in (1) the Company's public company status, (2) the "stickiness" of the IPO, and (3) whether the proposed disclosure is consistent with the disclosure in the final prospectus.

PENALTIES FOR VIOLATION OF SECTION 5

Gun jumping and the use of an illegal prospectus can result in both civil and criminal penalties. While the SEC would likely only commence a formal enforcement action in an egregious case, a more significant concern is the SEC's policy of delaying the effectiveness of a registration statement if it suspects that gun jumping has occurred. The SEC sometimes does this, in order to allow the impact of premature publicity to fade. This remedy can have severe consequences depending on timing and market conditions because it can disrupt the underwriters' marketing plans. If an underwriter is involved in the violation, the SEC (or the rest of the syndicate in consultation with counsel) may also require that this underwriter be excluded from the underwriting syndicate. In addition, the SEC could issue an order to cease and desist from further violations of the Securities Act.

The SEC also could require the issuer to file or summarize in the registration statement the content of a news article or other publicity, e-mail, recorded presentation, or other writing, exposing the issuer to potential prospectus liability if the material is incorrect, misleading, or incomplete. Alternatively, the SEC could require the issuer to disclaim such material in the final prospectus and explain that the statements could be misleading and were not authorized by the issuer or the underwriters. In addition, the SEC could require the issuer to indicate that its disclosure activities may provide investors who received the illegal offers with rescission rights. This type of disclosure could be embarrassing and could damage the marketing and selling effort.

After the IPO, private plaintiffs could seek substantial damages based upon claims that the IPO violated the Securities Act. ***It is important to understand that gun jumping***

or the use of an e-mail, recorded presentation or other writing in violation of Section 5 by itself gives some or all investors buying in the IPO the right to demand their money back, regardless of whether the offending materials contained any misstatement or omission, or were relied on in any way by the investor. This is a draconian remedy, designed to force strict compliance with the prospectus disclosure requirements. As a result, in addition to the Company and its significant investors, officers and directors, underwriters and their counsel take these situations very seriously and, if a violation or potential violation has occurred, may insist on delaying the IPO or excluding from the IPO (if feasible) any potential investors who may have directly or indirectly received or been aware of the potentially impermissible offer.

RECOMMENDATIONS

Investment Community

Prior to initially publicly filing the registration statement, (1) the Company should not contact analysts or potential investors, other than analysts at the investment banks who may underwrite the IPO, and (2) the Company should decline or delay unsolicited discussions with analysts and potential investors. After the registration statement is filed, the Company should coordinate investor contacts through the lead investment bank(s).

Employees, Customers, Suppliers and Partners

Communications with employees, customers, suppliers and partners should be limited to ordinary course operational matters consistent with historical communications and should not include any description or discussion of the potential IPO. Drafts of written communications or prepared remarks should generally be reviewed and approved in advance by counsel and underwriters.

Press Releases

Press releases should be limited to factual historical information that the Company has a record of announcing. Drafts should be reviewed by its underwriters and counsel.

Earnings Calls and Other Communications with Bond Investors

If the Company has a practice of holding quarterly earnings calls, that practice may continue (and the Company can continue to make disclosures to bond investors consistent with past practice), but Company representatives should not discuss the IPO on the call and the call should not include a Q&A portion (and other disclosures specific to bond investors, if any, should not reference the IPO). The Company also should not archive the call on its website, even if that had been the Company's historical practice.

Website

The Company and its counsel should review and "scrub" the Company's website. Links to all Company investor presentations and to any third party's analysis of the Company or any third party's archived copy of any Company investor presentation should

be removed. The SEC staff is likely to review the Company's website. The website should be monitored throughout the IPO process and thereafter.

Brochures

While in registration, the Company should not distribute "investor packets."

Speeches and Conference Presentations

The Company should discuss scheduled (and requests to participate in future) conferences, forums and other similar events with its underwriters and counsel. The risks tend to be reduced if an event was planned in advance of the commencement of the IPO or if a Company representative has regularly presented at that event in the past. In addition, industry conferences present less risk than presentations to investor groups. The Company should not distribute any written materials at any such events, unless the materials have been approved for such distribution by its underwriters and counsel. In particular, written copies of investor conference presentation slides or other background materials should not be distributed. In addition, counsel should be consulted if the conference will be webcast. Unless counsel otherwise specifically advises, the Company should assure that its presentation is not recorded and is not made available for later viewing over the conference's website or otherwise, which could cause the presentation to be treated as an impermissible written offer. In addition, the Company should discuss participation in any "1-on-1" or "fireside chats" at any such conference, forum or similar event with the underwriters and counsel. The Company and its counsel should review all existing Company investor presentations maintained on any third-party website and seek to have these removed where possible.

Interviews, Articles and Social Media Campaigns

As a general rule, the Company should avoid any statements that can be attributed to the Company or any of its employees, directors or significant investors that mention the IPO, financing plans generally, the Company's valuation, the size of the market in which the Company operates or other similar statements that could be construed as targeting the investor community, as opposed to customers, suppliers, distributors and other industry professionals. Press coverage in industry publications with non-executive officers tend to raise fewer concerns provided they are consistent with past practice in timing, manner and form. All articles and interviews involving senior management should be reviewed by counsel, as should any articles or requests for interviews from publications widely disseminated to the general population or widely read by the investor community (e.g., Forbes, Fortune, The Wall Street Journal, New York Times, USA Today, TV coverage, etc.). In commenting for the press regarding developments that are properly disclosable, the Company and its senior management should carefully avoid general statements about the Company's prospects, value, financing plans, and overall future, particularly statements quantifying market size, value and future prospects. News stories with a long timeline prior to publication can be particularly troubling if publication occurs during the IPO process and, since these types of stories often focus more generally on the Company and its prospects, they generally should be avoided.

Publicity by Affiliates/Stockholders

The SEC may attribute to the Company statements made by an affiliate of the Company. Accordingly, when describing the Company in their promotional materials or investor presentations, significant investors should be encouraged to adhere to the restrictions described in this memorandum.

Testing-the-Waters Communications

Coordinate any such communications with the lead underwriters and keep track of the dates and persons who received any such communications. Such communications should be limited to oral communications.

Directed Share Program

The Company should not discuss any potential directed share program or the IPO in general with employees, partners or other possible participants without first seeking the advice of counsel. It is important that no e-mails or other written communications (other than a preliminary prospectus containing a price range and other writings specifically authorized by counsel and the underwriters) be sent to possible participants in a directed share program at any time.

For more information, please contact your usual Ropes & Gray attorney or reach out to a member of our capital markets team below.

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