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M E M O R A N D U M

TO: Our Clients and Colleagues

FROM: Samuel M. Krieger, Esq.
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DATE: November 2005

SUBJECT: **Securities Offering Reform and PIPE Transactions - Effective December 1, 2005**

The SEC recently adopted wide ranging changes to the public offering process (Securities Act Release 33-8591). http://sec.gov/rules/final/33-8591.pdf The Release is over 400 pages in length and many provisions will of necessity await fine tuning and SEC staff interpretations. Among other things, the rules greatly liberalize the use of shelf registration statements under Rule 415, allow "seasoned issuers" (generally defined as a reporting issuer eligible to use Form S-3 or F-3 for a primary registration) to benefit from shelf registration reforms, and create a new category of "well known seasoned issuers"(WKSI) that can take advantage of automatic shelf registration. Ineligible users of many of the new provisions include blank check companies, shell companies, penny stock issuers, mutual funds and certain other issuers that have violated the anti-fraud provisions of the Securities Laws during the past three years. Additionally, Exchange Act disclosure changes will require that all companies include risk factors in annual reports on Form 10-K.

Some highlights of changes applicable to PIPE and credit line transactions.

1. Rule 415 has been amended to allow "at the market" offerings of equity securities without the existing volume limitations and the requirements to identify underwriters. However, for issuers and other distribution participants, including selling shareholders in a PIPE transaction, the applicability of Regulation M if the issuer or the distribution participant is deemed to be "engaged in a distribution" must be carefully considered and coordinated in light of the restricted periods for trading under Regulation M. See FAQ about Regulation M at http://sec.gov/interps/legal/mrslb9.htm.

2. Rule 424 under the Securities Act has been amended to enable issuers to identify selling security holders after effectiveness of a Registration Statement by merely issuing and filing a prospectus supplement. However, issuers registering resale of securities sold in a private offering (including PIPE transactions) may not rely on this provision to identify, after effectiveness, selling security holders of securities acquired directly from the issuer, if the securities are not yet issued in the private offering, even when the investors are contractually bound to acquire the securities.

3. Of special interest to PIPE investors are liberalized prospectus delivery requirements for all issuers. Under current rules, a written prospectus or notice in respect of any prospectus sale is required. The SEC has adopted a theory of "Access Equals Delivery" for final prospectuses. The new rule is effective December 1st, and an issuer can satisfy its delivery requirement by filing or making a good faith and reasonable effort to file, a final prospectus with the SEC by the required Rule 424 prospectus filing date. The rules also provide the ability to cure an unintentional failure to file.

Securities Act Rule 153, and Securities Act Rule 174, which addresses delivery requirements, have similarly been modified to provide that prospectus delivery requirements have been satisfied if the final prospectus is on file with the SEC. As a practical matter, after December 1, the filing by an issuer involved in PIPE or similar transactions of its final Rule 424(b) prospectus would thus satisfy the prospectus delivery requirements. The revised prospectus delivery provisions do not apply to certain transactions, including business combinations, exchange offers and Form S-8 filings.

If you have any questions, please feel free to call us.

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