PERKINSCOIE

Going Public: Potential Liabilities of Directors and Officers

The purposes of this memorandum are:

(1) to describe the potential liabilities of directors and officers under the federal securities laws with respect to the registration statement to be prepared and filed by the Company with the Securities and Exchange Commission (the "SEC") for the initial public offering of common stock, and ways to mitigate the risk of such liabilities; and

(2) to describe the primary areas of increased potential liabilities arising from serving as a director or officer of a public company as compared to a private company.

POTENTIAL LIABILITIES OF DIRECTORS AND OFFICERS WITH RESPECT TO A REGISTRATION STATEMENT

The Securities Act of 1933, as amended (the "Securities Act"), imposes a high standard of care on the Company's directors and officers with respect to the accuracy of the disclosures in the Registration Statement. Even a future director who, "with his consent, is named in the Registration Statement as being or about to become a director" bears the same burdens as those serving as directors at the time the events in question occurred.

Directors and officers are liable for losses suffered by purchasers of securities in the contemplated offering if the Registration Statement contains material misstatements or omissions on the date it becomes effective. Such losses are generally the difference between the price at which the securities were issued and the price on the date the suit is filed, regardless of whether the price subsequently recovers. The threshold for liability for directors and officers for such losses is relatively low. The purchaser does not have to establish that a director or officer had an intent to deceive, manipulate or defraud; even innocent misstatements or omissions may be sufficient to establish liability.

As a result, the Company's directors and officers must take great care to ensure that the Registration Statement is accurate and contains all information relevant to making an investment decision. Information is material if there is a substantial likelihood that its disclosure would be viewed by a reasonable investor as having significantly altered the total mix of information made available and if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision.

A director or officer can defend against such liability only if he or she is able to prove (a) with respect to the financial statements, which are certified by an expert, that he or she did not believe, and had no reason to believe, that such financial statements were incomplete or misleading or (b) with respect to the balance of the Registration Statement, that, after a reasonable investigation, the director or officer had reasonable grounds to believe, and actually did believe, that the Registration Statement was not misleading in any way and contained all material information necessary for an informed investment decision.

"Reasonable investigation" and "reasonable grounds for belief" mean that the director or officer must act as if he or she were a prudent individual acting in the management of his or her own property. The extent of a director's

or officer's duty to investigate depends on the facts and circumstances of a particular situation (and sometimes the vagaries of a particular court). At a minimum, however, each director or signing officer must read carefully the Registration Statement for accuracy and completeness and question the Company's officers regarding any material matters that he or she believes may not be described accurately and fully. In addition, he or she must insist that any material misstatements or omissions be corrected.

Although a company's bylaws and state law provide for indemnification of directors and officers in certain circumstances, the SEC takes the position that it is a violation of public policy for an issuer to indemnify directors and officers against liabilities arising under the Securities Act. In Part II of the Registration Statement, the Company is required to undertake that, unless the director or officer successfully defends against any suit for which indemnification is sought, the Company will submit to an appropriate court the question of whether such indemnification is against public policy and will be governed by the final adjudication of such issue. Accordingly, directors and officers should not rely on the Company's indemnification provisions with respect to violations of federal securities laws.

ADDITIONAL POTENTIAL LIABILITIES OF A PUBLIC COMPANY DIRECTOR OR OFFICER

Directors of a private company are subject to liability for breaches of their duties of care, loyalty and candor, and this potential liability continues when a company goes public. Directors and officers of public companies also become subject to additional potential liabilities.

A. BENEFICIAL OWNERSHIP REPORTING

Directors, officers and greater than 10% beneficial shareholders of the Company ("insiders") have certain reporting obligations under Section 16(a) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Each insider must report his or her stock ownership to the SEC on Form 3 when the Company first becomes a public company or when the person first becomes an insider, on Form 4 by generally the end of the second business day following the person's reported beneficial ownership changes, and annually on Form 5 with respect to certain exempt transactions. The Company is required to disclose in its proxy statement the names of any insiders who have filed late, or failed to file, the required reports of beneficial ownership on Form 3, 4 or 5. The SEC can also issue "cease and desist" orders for violations of these reporting rules and can seek significant fines against violators in judicial actions.

B. SHORT-SWING PROFITS

Under Section 16(b) of the Exchange Act, insiders are liable for any profits they receive upon the sale and purchase, or purchase and sale, of the Company's stock if matchable transactions occur within any given six-month period. In other words, if an insider both buys and sells stock within any six-month period, regardless of which transaction occurs first, the excess of the insider's sales price over the purchase price constitutes "prohibited profits." This is an arbitrary rule that operates whether or not a particular trade is based on inside information, and certain law firms specialize in identifying such trades and taking court action to recover such profits.

C. TRADING ON INSIDE INFORMATION

The antifraud provisions of the Exchange Act prohibit directors, officers, employees and others with inside information from trading in the Company's stock while they are aware of material information that has not been publicly disseminated. Disclosing material inside information to others who then trade based on that information is also a violation of the antifraud provisions, and both the person who discloses the information and the person who trades based on it are liable. These illegal activities are commonly referred to as "insider trading."

Potential penalties for insider trading violations include imprisonment for up to 20 years, civil fines of up to three times the profit gained or loss avoided by the trade and criminal fines of up to $5 million. In addition, the Company, as well as a director, officer or other Company manager, is subject to liability under federal securities laws if the Company or such person knew or recklessly disregarded the fact that a person directly or indirectly under the Company's or such person's control was likely to engage in insider trading and failed to take appropriate steps to prevent such an act before it occurred. The penalty for such inaction includes a civil fine of up to the greater of $1.425 million (as adjusted for inflation) or three times the profit gained or the loss avoided as a result of the insider trading violations and criminal fines of up to $25 million.

D. PERIODIC REPORTS

The antifraud provisions of the Exchange Act also prohibit any person from making a false or misleading statement or omitting a material fact in connection with the purchase or sale of a security, including such statements or omissions in SEC reports. A director or officer may not, recklessly or with fraudulent intent, sign a report containing such misrepresentations. Violators may face civil penalties, imprisonment and monetary liability in lawsuits brought by defrauded shareholders. Fraud liability of directors and officers generally depends on the extent of their knowledge of, or participation in, the fraud.

1. *CEO and CFO Certifications, Disclosure Practices and Internal Controls.*

Public company CEOs and CFOs will certify each annual report on Form 10-K and quarterly report on Form 10-Q. These certifications, which are referred to as the Sarbanes-Oxley Sections 302 and 906 certifications, are submitted as exhibits to each periodic report. The certifications cover two main areas: (1) the accuracy of the report, including the financial statements and related information and (2) the existence and adequacy of, and the responsibility of the CEO and CFO with respect to, the company's disclosure controls and procedures and internal control over financial reporting. To ensure that a disclosure system is in place and to backstop these certifications, each public company will maintain disclosure controls and procedures, or "DC&Ps," and internal control over financial reporting.

2. *Disclosure Controls and Procedures.*

DC&Ps are controls and procedures designed to ensure that the company records, processes, summarizes and discloses on a timely basis information required to be disclosed in Exchange Act filings. These are broad in scope and extend beyond financial matters to cover all controls and procedures relating to required disclosures. Most widely traded public companies have followed an SEC recommendation to establish a nonboard "Disclosure Practices Committee" of officers

and employees with responsibility to oversee the DC&Ps that support the CEO and CFO certifications.

3. *Internal Control Over Financial Reporting.*

Internal control over financial reporting includes policies and procedures that track transactions in assets, control receipts and expenditures and protect assets. The most costly and controversial aspect of Sarbanes-Oxley is the internal control requirement of Section 404. Section 404 and related SEC rules require each public company to include in its Form 10-K a management report on the effectiveness of the company's internal control over financial reporting. The company's independent auditor is then required, in a separate audit-like analysis, to attest to, and report on, management's