T O O U R F R I E N D S A N D C L I E N T S

M e m o r a n d u m

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Considerations for Public Companies Weathering the Current Market Downturn

Over the past several months, the US and world financial markets have witnessed the collapse of longstanding financial institutions, the government conservatorship of Fannie Mae and Freddie Mac, record volatility in US stock markets and a virtual shutdown of access to credit markets. On October 3, 2008, the President signed the Emergency Economic Stabilization Act of 2008 (the "Act"), a comprehensive legislative package aimed at stabilizing the economy and financial systems. However, as various provisions of the Act are only beginning to take shape, public companies will be faced with numerous challenges resulting from these historically turbulent times. This memorandum offers several practical considerations for public companies weathering this storm, including the impact on:

- Disclosure for periodic reports and other public releases of information;
- Stock and debt repurchase programs;
- Continued listing requirements for NYSE and Nasdaq-listed companies;
- WKSI status and Forms S-3 and F-3 eligibility;
- Existing arrangements and obligations, such as risk management practices, contractual obligations and relationships with distressed businesses;
- Shareholder approval requirements for significant stock issuances; and
- Future financing needs.

A. Disclosure Considerations

1. Form 10-K and 10-Q Disclosure Requirements

In assessing the impact of current market conditions on their business, reporting companies need to consider the impact current market conditions have on their required disclosures, particularly in MD&A and risk factors. Companies should carefully review their existing disclosures from prior periods to

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determine what disclosures might be out of date or potentially misleading in light of changes in circumstances. Although disclosures are generally deemed made as of the date of the periodic report or other public dissemination and typically do not have to be updated, companies should consider updating out of date disclosures or disclosures about general issues to address specific facts or circumstances based on recent developments relevant to them. For example, companies that have disclosed that they have risks to large customers or counterparties may now need to consider disclosing specific facts related to these customers or counterparties. Also, in connection with Form 10-Q's for the quarter ended September 30, 2008, companies should consider the impact of October events on their business even though these events occurred later than the September 30, 2008, balance sheet date. For example, companies may want to consider adding disclosure regarding new funding needs for pension plans.

Management's Discussion and Analysis of Financial Condition and Results of Operations

In preparing upcoming MD&As, companies need to carefully consider recent events and determine whether they can ascertain any developing trends that could have a material impact on their results of operations, liquidity or capital resources. Disclosure will be reviewed in hindsight after some of these trends have become more clear. In particular, given recent events, companies may want to update any general overview sections they included in prior MD&As to address recent events and trends the company is facing or anticipates facing. Companies may be noticing recent trends that have not yet impacted historical financial results but are expected to impact the current quarter or future periods. Companies should also focus on the following and determine whether any additional disclosure in MD&A is appropriate:

- Liquidity and Capital Resources. Companies need to consider what, if any, material updates may be required in the discussion of liquidity and capital resources. For example, the following items may be material to discuss as a result of changing market conditions:

    - the impact of reduced capital and tightening liquidity on the company's sources of and uses for capital, capital commitments and capital expenditures;

    - the need and the ability to access public or private securities markets and short-and long-term credit markets and, for large companies, the need and the ability to issue commercial paper;

    - the ability to continue to comply with covenants under existing credit agreements;

    - significant and negative impacts on hedging arrangements;

    - the potential loss of liquidity where Lehman Brothers or other troubled financial institutions was a lender in a company's revolving credit facility;

- the company's ability to access or monetize certain of their investments (*e.g.*, auction rate securities or preferred stock) and whether such access may be limited by deterioration in market liquidity;

- the amount of debt the company is actually able to borrow based on covenants and financial tests versus theoretical thresholds under revolving credit facilities;

- the company's estimated timing needs for future financing, since, in the short-term, many financing sources may be unavailable; and

- the impact of volatile commodity prices (including oil prices) on the company's business and liquidity.

- Material Impairments. Under applicable accounting rules, companies are required to conduct impairment tests on their assets, including goodwill and any other intangible assets. Companies need to consider whether current market conditions have had a material negative effect on valuations. Any impairment discovered as a result of this analysis should be adequately disclosed, including by providing a description of the impairment analysis, the impaired assets and the impact of any asset write-downs. If an impairment is discovered other than in the course of preparing the financial statements to be included in a periodic report, the company may be required to file a Form 8-K disclosing such impairment and other material information regarding the impairment. *See* Section A.2 below. Some companies have also been filing "early warning" Form 8-Ks disclosing that they expect an impairment and are in the process of conducting an impairment analysis.

- Pension Plan Assets. The market downturn likely has affected and will continue to affect a company's pension plan assets. In this regard, companies should analyze the impact of recent market volatility on pension plan assets. The Wall Street Journal reported on October 30, 2008, that at the end of 2007, the combined pension plan surplus of all the S&P 500 companies was $60 billion, but that by late September of this year it had become a $75 billion deficit. In particular, companies should:

  - review the assumptions used and discount rates applied in valuing pension plan assets to determine if such assumptions remain appropriate and reasonable;

  - determine if any changes in the asset allocation mix held in the applicable plans is warranted in light of market conditions; and

  - assess the short-term and long-term liquidity needs of the plan.

In addition, at year-end companies will have to make certain minimum funding contributions that may now be significantly greater than expected or previously disclosed. Companies may want to preview this issue in their upcoming earnings releases or Form 10-Q even though definitive amounts may not be available until year-end.

- Fair Value Determinations. Current market conditions can have a significant effect on "fair value" determinations. Statement of Financial Accounting Standards No. 157, *Fair Value Measurements* ("FAS 157"), defines fair value, provides a framework by which companies can measure the fair value of their assets and liabilities and requires that companies provide disclosure regarding these measurements. In March and September 2008, the SEC sent multiple public companies letters containing guidance regarding a number of disclosure issues related to valuations of assets to be considered in preparing MD&A.[1] The SEC advised in its September 2008 letters that companies should continue to evaluate whether they can provide "clearer and more transparent" disclosure regarding fair value measurements, in particular with respect to financial instruments that are not actively traded and whose impact could materially affect such company's financial condition and results of operations. Among the other items discussed in these letters, the SEC noted that companies should consider:

    - explaining how credit risk is incorporated into and considered in the valuation of assets or liabilities;
    - discussing which financial instruments are affected by the lack of market liquidity, how the lack of liquidity impacted the valuation techniques used and how illiquidity was factored into the fair value determination;
    - disclosing, if material, the gains and losses on financial instruments required to be carried at fair value, such as derivative instruments, and explaining how the company's credit risk and counterparty credit risk affect the valuation of these instruments; and
    - disclosing, if material, a discussion of how changes in the aggregate fair value of the company's assets and liabilities could affect its liquidity and capital resources.

In addition, in response to questions concerning the measurement of fair value under current market conditions, on September 30, 2008, the accounting staffs of the SEC and the Financial Accounting Standards Board (the "FASB") jointly issued guidance on determining the fair value of securities under FAS 157 and, on October 10, 2008, the FASB issued FASB Staff Position 157-3, *Determining the Fair*

[1] *See* Sample Letters Sent to Public Companies on MD&A Disclosure Regarding the Application of SFAS 157 (Fair Value Measurements), available at http://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0308.htm and http://www.sec.gov/divisions/corpfin/guidance/fairvalueltr0908.htm.

Value of a Financial Asset When the Market for That Asset Is Not Active ("FAS 157-3"), highlighting key considerations in applying FAS 157 when measuring the value of a financial asset when the market for that asset is not active. This guidance provides examples of factors to consider in estimating fair value when relevant market data may be unavailable.

Risk Factors

Companies may need to update their risk factors or include additional risk factors, as appropriate, in their upcoming periodic reports to address known or potential risks or uncertainties related to market conditions, including, for example, risks related to the ability to access credit markets, the impact on existing or future lending arrangements, asset impairment, the ability to comply with continued listing requirements and the impact of current conditions on customers and suppliers. Companies should consider updating generic risk factors with specific events that have occurred that could materially impact the company. Companies also need to examine their overall exposure to particular companies or industries that may be in financial distress.

As companies review existing risk factors for appropriate updates, it will be useful to also review the risk factors of competitors, customers or suppliers to see what new risks they are disclosing in light of market conditions. In addition, companies should consider having a broader group of individuals within the company review the risk factors for any risks known to them that the business is currently experiencing that may not be readily apparent to the company's disclosure committee.

Companies should also consider what, if any, updates to the forward-looking statements warnings contained in their press releases and other public communications are appropriate to reflect the changed economic conditions.

2. Form 8-K Disclosure Requirements

Companies need to pay special attention to whether any Form 8-K triggering events have occurred. Various items under Form 8-K may be triggered by recent market conditions, including the following:

- Item 2.04 (*Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement*)

Companies should carefully review and closely monitor their compliance with all applicable covenants and other provisions under existing credit arrangements. Recent market conditions could cause companies to fall out of compliance with provisions under existing credit agreements or other debt instruments. This failure could result in the acceleration of payments due under these credit agreements or debt instruments. Also, lenders may use technical defaults to seek to accelerate debt which is valued at a discount to principal amount. If the amounts due are accelerated, Item 2.04 of Form 8-K would be triggered. Under Item 2.04, reporting companies would be required to disclose (1) the date of the

triggering event, (2) a brief description of the triggering event, (3) the amount of the direct financial obligation and the terms of payment or acceleration that apply and (4) any other material obligations that may arise. Even if a default occurs that does not as of yet result in the acceleration of amounts due, thereby not triggering a Form 8-K filing, any such defaults would likely need to be discussed in MD&A.

- Item 2.06 (*Material Impairments*)

If a company concludes that a material charge for impairment of its assets, including its securities or goodwill, is required, the company must file a Form 8-K under Item 2.06. This disclosure should include (1) the date of the conclusion that a material charge is required, a description of the impaired assets and the facts leading to the conclusion that a charge for impairment is required, (2) the company's estimate of the amount or range of amounts of the impairment charge and (3) the company's estimate of the amount or range of amounts that will result in future cash expenditures. No Form 8-K filing is required under Item 2.06, however, if the impairment conclusion is made in connection with the preparation of financial statements required to be included in the company's next periodic report if the periodic report is filed on a timely basis.

- Item 8.01 *(Other Events)*

In addition, companies should consider whether any additional disclosure should be filed voluntarily on Form 8-K under Item 8.01. For example, in light of the bankruptcy of Lehman Brothers, several companies have filed Form 8-Ks under Item 8.01 disclosing various business relationships with Lehman Brothers and the impact of the bankruptcy on such companies.

3. Regulation FD

Companies need to remain mindful of disclosure obligations arising under Regulation FD. Regulation FD prohibits the selective disclosure of material, nonpublic information by public companies to certain market participants. Companies have been receiving and will likely continue to receive difficult questions from market participants and have been reassuring customers, shareholders and analysts with regard to current market conditions. Confirming guidance or other facts about a company's business or prospects (including exposure to a counterparty such as Lehman Brothers) without providing the information to the marketplace may be deemed to violate Regulation FD. In some cases, it may be better to furnish a Form 8-K under Item 7.01 disclosing information a company needs to, or chooses to, discuss with shareholders, analysts or the public generally.

4. Results of Operations and Earnings Guidance

In light of market conditions, companies should assess the impact of these conditions on the company's financial condition and results of operations. Companies should review guidance from prior periods to consider whether such guidance should be updated to account for the market downturn. In addition, if a company discusses or confirms earnings guidance with analysts, shareholders or other market participants, it may need to file a Form 8-K under Item 7.01 in order to comply with Regulation FD as discussed above. While there is no requirement to do so, in some instances where the company has concluded that its results of operations and financial condition may be significantly different than the market anticipates or if prior guidance is out of date, the company should consider filing an "early warning" Form 8-K under Item 2.02 disclosing such results or revised guidance.

B. Stock and Debt Repurchase Programs

Stock Repurchase Programs

Many companies are considering whether a stock repurchase program should be implemented given the declines in their stock price. In prior periods where the stock market has experienced significant volatility, companies have implemented stock repurchase programs as a means to build investor confidence and boost the company's earnings per share. If a stock repurchase program is desired, certain mechanics for such program must be followed, including:

- Confirming the authority to repurchase the stock under the company's charter and bylaws;
- Obtaining authorization for the repurchase program from the company's board of directors;
- Ensuring that the purchases qualify for the safe harbor for certain types of market manipulation claims under Rule 10b-18 of the Exchange Act;
- Confirming that the repurchase program does not violate insider trading prohibitions under Rule 10b-5 of the Exchange Act, which would prohibit a company from repurchasing securities while aware of material, nonpublic information;
- Confirming that the company is not in a restricted period under Regulation M under the Exchange Act, which is designed to prevent a company from manipulating the price of its securities when the company is about to commence a securities offering;
- Determining whether the repurchase is permissible under applicable corporate law (for example, Section 160 of the Delaware General Corporate Law prohibits companies from repurchasing shares (1) when the corporation's capital is impaired or (2) when the purchase would impair the corporation's capital);

- Reviewing what effects the repurchase program could have on the company and any reissuances of the company's shares (for example, the impact on WKSI and Form S-3 or F-3 eligibility or continued listing criteria for the applicable exchange);

- Ensuring that the purchases do not constitute a tender offer by structuring the stock repurchase program so as to not inadvertently trigger the tender offer rules[2] – issuer tender offers must comply with Rule 13e-4 and going-private transactions must comply with Rule 13e-3;

- Confirming that the repurchase program is permissible under all applicable credit arrangements (many financing instruments contain covenants that limit repurchases of equity); and

- Determining what disclosure may be required or prudent, including tabular disclosures in quarterly and annual reports (as well as MD&A discussion), press releases regarding the authorization of the stock repurchase program, any related Form 8-Ks and the impact on Sections 13(d) and 13(g) and Section 16 filing obligations.

Debt Repurchase Programs

In light of the recent turbulence of credit markets, many companies are also considering whether to repurchase some or all of their outstanding debt securities, which may now be trading at steep discounts to par.[3] Companies may also consider repurchasing at a discount loans borrowed under their credit agreements.[4] These types of debt repurchases raise a number of issues that should be carefully considered before any purchase is made.

These types of debt repurchases generally have significant tax implications. In particular, if the company repurchases debt (*i.e.*, bonds or loans) at a discount, the company recognizes "cancellation of

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[2] The following eight factors are generally used to determine if a tender offer exists: (i) whether there is an active and widespread solicitation of stockholders; (ii) whether the solicitation is made for a substantial percentage of the company's stock; (iii) whether the offer is made at a premium over the prevailing market price; (iv) whether the terms of the offer are firm rather than negotiable; (v) whether the offer is contingent upon the tender of a fixed minimum number of shares and/or is subject to a ceiling of a fixed maximum number of shares to be repurchased; (vi) whether the offer is open for only a limited time; (vii) whether the offerees are subjected to pressure to sell; and (viii) whether public announcements of a purchase program precede or accompany a rapid accumulation of large amounts of the company's stock.

[3] If the debt securities to be repurchased are convertible into equity, additional considerations arise because of the equity feature embedded in the convertible securities, including some of the factors discussed above under "Stock Repurchase Programs." Under certain circumstances, repurchases of convertible debt securities (*e.g.*, mandatory redemptions) could be deemed a forced conversion and, therefore, a "distribution" of the underlying equity security for purposes of Regulation M.

[4] Majority shareholders of companies (such as equity sponsors) may also be interested in repurchasing debt of their portfolio companies. Equity sponsors should carefully consider their own internal fund documents and any applicable stockholder or other agreements to make sure there are no restrictions or limitations on the purchase of debt of their portfolio companies. Equity sponsors should also consider any required public disclosure related to such purchases as well as assess any potential conflicts of interests that may arise vis-à-vis affiliated or related funds of such sponsor. In addition, equity sponsors face potential risks of equitable subordination in the event of bankruptcy of the portfolio company. That is, sponsors purchasing debt face the risk that in bankruptcy the debt acquired by them could be "equitably subordinated" to the claims of third party creditors. Sponsors should also understand the limitations on resale that they may encounter as affiliates of the company. Most notably, during any three-month period, no more than 10% of the principal amount of the tranche attributable to the securities sold may be resold by such affiliate and a Form 144 will be required if the amount sold in any three-month period has an aggregate sale price in excess of $50,000.

(footnote continued)

indebtedness income" generally equal to the difference between (i) the principal amount of the debt (or the adjusted issue price of the debt, in the case of debt originally issued at a discount) and (ii) the repurchase price.[5] Likewise, if the debt is purchased at a discount by a person "related"[6] to the company at the time of the purchase, then the company recognizes cancellation of indebtedness income as if the company repurchased the debt at the related person's purchase price for the debt. Moreover, if a related person purchases the debt, the debt is treated as retired and reissued to the related person as "new" debt that has an issue price equal to the related person's purchase price. Accordingly, the new debt has original issue discount ("OID") generally equal to the difference between its principal amount and the related person's purchase price. OID is deducted by the company[7] and is included in income (as interest income) by the related person over the remaining term of the debt in advance of cash payments attributable to the discount.[8] However, the company's OID deductions may be deferred or disallowed under the rules relating to "applicable high yield discount obligations" and rules that apply if the related person is a non-US person. These limitations will have to be considered on a case-by-case basis. In addition, because the new debt is treated as issued with OID, it may not be fungible for tax purposes with other outstanding debt of the same class, which could affect ability to trade the new debt.

Similar to the repurchase of equity securities described above, companies should:

- make sure that their debt repurchase program does not constitute a tender offer;
- be mindful of the risks associated with repurchasing debt securities while aware of material, nonpublic information; and

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[5] If the company has net operating losses, it can use them to shelter the cancellation of indebtedness income and, in some cases, the company can avoid the cancellation of indebtedness income (with a corresponding write-down of the tax basis of its assets), including under the "insolvency" exception.

[6] The following are examples of situations where a purchaser is treated as "related" to a company that is a corporation:

- Another corporation, if it owns (directly or indirectly) more than 50% (by vote or value) of the stock of the company (parent-subsidiary).
- Another corporation, if the same persons own more than 50% (by vote or value) of each (brother-sister).
- A partnership, if the same persons own more than 50% (by value) of the stock of the company and more than 50% of the capital or profits interests in the partnership.

Complex ownership attribution rules apply to determine whether a person is "related" to the company. For example, all of the stock owned by an investment fund that is a partnership may be attributed to each partner that is an individual.

The above rules also apply if a person purchases debt in anticipation of becoming "related" to the company that issued the debt. A person is treated as having purchased the debt in anticipation of becoming related to the company if the person purchases the debt less than 6 months before the person becomes related to the company. In other cases, this determination is made based on all relevant facts and circumstances.

[7] The company's OID deductions may mitigate the tax cost of the cancellation of indebtedness income, although there are generally adverse timing consequences.

[8] By contrast, if an unrelated person purchases the debt in the secondary market at a discount, the discount (referred to as "market discount") generally is not required to be included in the unrelated person's income on a current basis unless the unrelated person elects to do so; thus, from the related person's perspective, these deemed reissuance rules result in the conversion of market discount into OID.

- evaluate any limitations in their outstanding indentures and credit agreements (in particular, high yield indentures will limit the amount of subordinated debt that may be purchased, and credit agreements may prohibit it altogether or may prohibit the repurchase of senior debt securities secured on a second lien basis).[9]

Many credit agreements expressly prohibit lenders from assigning loans to the company or any of its affiliates. Even if they do not contain such restriction, many credit agreements require that all prepayments of loans be made *pro rata* to all lenders. Therefore, if the company repurchases its loans, there is a risk that the other lenders (whose loans were not repurchased) could claim that the company has effectively repaid loans in favor of one or more lenders. This may not be an issue for purchases of loans by a parent entity or an equity sponsor, but the credit agreement should be carefully reviewed.

Companies engaging in stock or debt repurchase programs should also consult with their tax consultants and public accountants to determine whether any additional tax or accounting-related matters should be considered prior to engaging in the repurchase program.

C. NYSE and Nasdaq Continued Listing Considerations

The NASDAQ Stock Market LLC ("Nasdaq") and the New York Stock Exchange ("NYSE") require listed companies to comply with various continued listing requirements, and the failure to do so could result in delisting. Among these continued listing requirements, listed companies must satisfy minimum bid price and market value thresholds. Companies need to continually monitor their minimum bid price and market values. Both the NYSE and Nasdaq require that companies have a minimum bid price of $1.00 per share to satisfy continued listing requirements. In addition, both exchanges set forth minimum market value requirements ranging from $1,000,000 to $25,000,000 depending on the type of security traded and the market on which the company is listed.

On October 16, 2008, in response to current market conditions, Nasdaq temporarily suspended its continued listing requirements regarding the minimum bid price and market value of publicly held shares until January 16, 2009. Unlike Nasdaq, the NYSE has not yet proposed to suspend the minimum bid price and market value requirements for NYSE-listed companies. Companies with securities listed on the NYSE must continue to comply with these listing requirements. Companies that may be unable to comply with these requirements may wish to consider a reverse stock split which would increase their share price while similarly reducing the number of outstanding shares. Reverse splits often require shareholder approval, and timing considerations for such approval should be taken into account.

[9] Most indentures provide that any notes held by the company or its affiliates will not be deemed to be "outstanding" for purposes of voting, consents, etc., which will prevent the company and/or its affiliates from voting notes acquired by them in any consent solicitation. This will give the remaining noteholders, particularly larger holders, a greater blocking position in any future consent solicitation. With respect to repurchases of loans, the credit agreement should be reviewed to confirm that the company and its affiliates will not be prevented from voting the bank debt.

D. WKSI Status and Forms S-3 and F-3 Eligibility Considerations

A company's market capitalization can impact its ability to use certain short form shelf registration statements. Eligibility determinations for well-known seasoned issuers ("WKSIs") is affected by a company's public float, thereby impacting the ability to use automatic shelf registration statements. In addition, a company's public float can impact the amount of securities it can sell off of a Form S-3 or F-3.

1. Well-Known Seasoned Issuers

WKSIs should consider whether they continue to meet the eligibility requirements to maintain their WKSI status.[10] WKSIs can register securities on an automatic shelf registration statement ("ASR"), which is immediately effective upon filing, without review or any other action by the SEC. Companies that do not currently have an ASR on file and are approaching or have fallen below the $700 million public float requirement to qualify as a WKSI, may want to promptly consider filing an ASR.

WKSI status eligibility, which requires satisfaction of certain conditions, is generally determined during the 60-day period preceding the latest of the company's filing of its shelf registration statement, or amendment, and most recent annual report. Because of the 60-day window period used in determining eligibility, a company that has recently fallen below the $700 million public float threshold may still be eligible to file an ASR. Therefore, companies may wish to consider filing an automatic shelf registration statement if they do not currently have one on file, but are otherwise eligible to file as a WKSI. Such registration statement would then be usable until at least the company's next filing of its annual report, when WKSI status would be retested.

A company failing to meet the eligibility requirements of a WKSI, however, at the time it files its annual report, may no longer use the ASR and must amend its existing ASR onto a form that it is eligible to use at that time or file a new registration statement (*e.g.*, Form S-3). Either of these options may result in SEC review and comment, thereby delaying the use of the registration statement until it is declared effective.

2. Forms S-3 and F-3 Filers

Current market conditions may also impact a company's eligibility to use Form S-3 or Form F-3. In order to be eligible to file a Form S-3 or Form F-3, certain registrant requirements must be satisfied.[11]

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[10] A company is deemed to be a WKSI if: (i) it is required to file reports pursuant to Section 13(a) or Section 15(d); (ii) it is eligible to use Form S-3 or Form F-3; (iii) as of a date within 60 days of its eligibility determination date, it either (a) has a public float of voting and non-voting common equity held by non-affiliates of $700 million or more, or (b) has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities other than common equity in primary offerings for cash; and (iv) it is not otherwise deemed an "ineligible issuer" as defined under Rule 405 of the Securities Act.

[11] The registrant requirements include, among others, having a class of securities registered pursuant to the Exchange Act or being required to file reports pursuant to the Exchange Act, and having filed all required Exchange Act reports in a timely manner for a period of at least twelve calendar months.

Companies must also meet at least one transaction requirement, which includes the following:

- A primary or secondary offering for cash provided that the company has a public float of voting and non-voting common equity held by non-affiliates of at least $75 million;

- A primary offering of securities for cash if the company (i) has a public float of less than $75 million, (ii) sells no more than one-third of its public float during the period of 12 calendar months, (iii) is not a shell company and has not been for at least 12 calendar months and (iv) has at least one class of common equity securities listed and registered on a national securities exchange; or

- A purely secondary offering of securities.

For companies that file a Form S-3 or Form F-3 in reliance upon the public float requirements noted above, recent market conditions could impact such company's ability to satisfy these requirements. Depending on the time in which a company conducts a shelf takedown, its market capitalization, if below $75 million, could determine the permissible size and timing of offerings using Form S-3 or F-3.[12] If a company's market capitalization is less than $75 million as of the time of filing its Form S-3 (or Form F-3) or annual report, it is subject to the limitations on the amount of securities that can be sold noted above. Once the company's public float meets or exceeds the $75 million threshold, the one-third cap for sales of securities no longer applies and the company is only limited by the amount of securities it registers (unless it is a WKSI, in which case it will not be required to register a set dollar or amount of securities). If a company believes that it may fall below the $75 million public float threshold, it should consider promptly filing a registration statement on Form S-3 or F-3.[13]

E. Other

1. Risk Management

Companies should assess where there may be overlapping risks within the same organization that may not be apparent. For example, the subprime crisis affected companies in multiple areas, including direct credit risk, counterparty credit risk and covenant compliance risk. These companies may want to consider including a new risk factor that covers multiple areas related to the same risk.

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[12] Companies with a public float of at least $75 million calculate their public float based on the common equity price as of a date within 60 days prior to the date of filing or subsequent update. Companies with a public float below $75 million calculate their public float based on the common equity price as of a date within 60 days prior to the date of sale.

[13] Companies should also note that Form S-3 or Form F-3 shelf registration statements that were declared effective prior to December 1, 2005, will expire on December 1, 2008. Accordingly, companies should consider whether they should file a new shelf registration statement now in any event. *See* Securities Offering Reform Transition Questions and Answers, available at http://www.sec.gov/divisions/corpfin/transitionfaq.htm.

2. Contractual Obligations

Companies need to closely monitor all applicable covenants and other provisions contained in credit agreements or other material agreements for compliance in light of recent market conditions and should assess whether they are approaching covenant compliance levels. As discussed in Section A above, various disclosure obligations may be impacted by the failure to comply with any conditions or covenants under such agreements.

3. Relationships with Distressed Businesses

Companies should consider the types of relationships it has with, and any disclosure needed related to, businesses that have recently declared bankruptcy or been taken over by the federal government or have otherwise shown significant signs of trouble, such as various financial services institutions. In particular, companies should consider whether they have any material direct or indirect exposure to these types of distressed businesses and the potential impact, if any, resulting from these business relationships. Some key factors to consider include:

- any potential reduction in available capacity under existing credit facilities, to the extent that the distressed business is one of the company's lenders, and whether such reduction, if any, will have a material impact on the company's available liquidity;
- any significant losses resulting from investments in these distressed businesses; and
- the potential impact of bankruptcies or financial difficulty on key suppliers or customers or other significant business relationships.

4. Shareholder Approval for Significant Stock Issuances

A company that wishes to issue common stock or securities convertible into common stock listed on the NYSE or Nasdaq as a means of raising capital should be mindful of the shareholder approval requirements under NYSE and Nasdaq rules. Under these rules, shareholder approval is generally required, subject to other conditions, prior to the private issuance of stock at a price less than the greater of book or market value which represents 20% or more of the class of outstanding shares or voting power. At currently reduced stock prices and the current limits on availability of credit, many companies that need to get financing are running into the 20% limit. Requirements for shareholder approval may also exist for sales to officers, directors and significant shareholders. In instances where companies desire to raise capital quickly, this shareholder approval requirement could delay the offering until such approval is obtained. However, both the NYSE and Nasdaq provide an exception for distressed companies that companies can rely on if the delay in securing shareholder approval would seriously put the company's financial viability at risk.

5. Future Financing Implications

In light of the tightening credit markets, companies need to evaluate now their future financing needs. Many companies, in advance of funding requirements and in some cases in light of concerns about the availability of the commercial paper market, are currently drawing down on, or seeking to obtain, “rainy day” financing and increasing the size of existing revolving credit facilities. As a result, companies are paying the upfront costs and commitment fees associated with the revolving credit facility now in order to ensure sufficient liquidity in the future.

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If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact, or any of the attorneys listed below.

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