CLIENT
MEMORANDUM

SEC ADOPTS NEW RULES TO CLARIFY INTEGRATION OF ABANDONED PUBLIC AND PRIVATE OFFERINGS

On January 30, 2001, the Securities and Exchange Commission ("SEC") issued a release announcing that it has adopted a new rule and amendments to current rules intended to enhance the ability of issuers to switch from a private offering to a registered offering or a registered offering to a private offering, without the two offerings being considered integrated.[1] The new rule and amendments are intended to allow issuers greater flexibility in responding to changes in the capital markets and will become effective March 7, 2001.

The new rule and amendments address four issues under the Securities Act of 1933, as amended (the "Securities Act"). First, new Rule 155 provides a safe harbor for issuers which either abandon a private offering and then engage in a registered offering or abandon a registered offering and then engage in a private offering. Second, Rule 477 is being amended to allow a registrant to withdraw a registration statement that has not become effective immediately upon filing an application for withdrawal. Third, the SEC is amending the rules regarding computation of filing fees to permit fees paid in connection with a withdrawn registration statement to be available for use with respect to a registrant's future registration. Fourth, in order to clarify prior confusion, the fee-offset procedures of Rule 429 are being moved to Rule 457 (which deals with computation of filing fees) and Rule 429 is being restated to make the rule clearer.

Section I below summarizes the provisions of new Rule 155. Section II below summarizes the amendments to Rule 477. Section III below summarizes the amendments to Rule 429 and Rule 457.

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[1] The concept of "integration" involves a situation where an issuer engages in two or more securities offerings which for various reasons, including proximity in time, should be "integrated" and viewed as one transaction. As a result, the transaction might be deemed ineligible for an exemption under the Securities Act.

I. Rule 155 - Integration of Abandoned Offerings

Compliance with Rule 155 provides "non-exclusive"[2] safe harbors from integration of private and registered offerings.

A. *Abandoned Private Offering Followed by a Registered Offering*

Rule 155(b) will allow an issuer to abandon a private offering before any securities have been sold and to thereafter file a registered offering, without the risk that the two offerings will be integrated. Specifically, the abandoned "private offering"[3] will not be considered part of the offering for which the issuer later files a registration statement if the following criteria are fully complied with:

1. No securities were sold in the private offering;
2. The issuer and any person(s) acting on its behalf terminate all offering activity in the private offering before the issuer files the registration statement;[4]
3. The final prospectus and any preliminary prospectus used in the registered offering discloses information about the abandoned private offering, including: (i) the size and nature of the private offering, (ii) the date on which the issuer abandoned the private offering, (iii) a statement that any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted and (iv) a statement that the prospectus

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[2] The SEC stated that "[r]egardless of whether an issuer is relying on Rule 155, the issuer also may look to the traditional five-factor test to determine whether integration is required." Adopting Release, Integration of Abandoned Offerings, p. 3. The SEC, through two interpretive releases, has identified five factors that must be considered in determining whether or not two offerings should be integrated. The five factors relevant to the question of integration include an analysis of whether (1) the different offerings are part of a single plan of financing; (2) the offerings involve issuance of the same class of security; (3) the offerings are made at or about the same time; (4) the same type of consideration is to be received; and (5) the offerings are made for the same general purpose. *See* Release No. 33-4434 (Dec. 6, 1961) and Release No. 33-4552 (Nov. 6, 1962).

[3] Rule 155(a) of the Securities Act provides that "[f]or purposes of [Rule 155] only, a private offering means an unregistered offering of securities that is exempt from registration under Section 4(2) or 4(6) of the [Securities] Act . . . or [Rule 506] of Regulation D."

[4] The SEC stated that it should be expected that its staff "may request supplemental information regarding termination of all offering activity in the private offering." Furthermore, the SEC stated that "in acting on requests for acceleration of the effective date of the registration statement," the SEC expects that its staff "will consider carefully whether the standards of the safe harbor are met." Adopting Release, Integration of Abandoned Offerings, p. 5.

delivered in the registered offering supersedes any offering materials used in the private offering;[5] and

4. The issuer cannot file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the securities were offered in the private offering only to persons who were (or who the issuer reasonably believed were) (i) accredited investors or (ii) sophisticated investors.

B. ***Abandoned Registered Offering Followed by a Private Offering***

Rule 155(c) will allow an issuer to abandon a registered offering before any securities have been sold and to thereafter complete a private offering, without the risk that the two offerings will be integrated. Specifically, the abandoned registered offering will not be considered part of the private offering if the following criteria are fully complied with:[6]

1. No securities were sold in the registered offering;[7]
2. The issuer withdraws the registration statement under Rule 477;[8]
3. Neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement under Rule 477;[9]
4. The issuer notifies each offeree in the private offering that (i) the offering is not registered under the Securities Act, (ii) the securities will be "restricted securities" and may not be resold unless they are registered

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[5] The SEC stated that although a prospectus delivered in the registered offering supersedes offering materials used in the private offering, issuers still may be liable for any material misstatements or omissions in the private offering under the antifraud provisions of the federal securities laws. *See* Adopting Release, Integration of Abandoned Offerings, p. 5.

[6] The SEC stated that use of this provision to "generate publicity for the purpose of soliciting purchasers for the private offering would be considered a plan or scheme to evade the registration requirements of the Securities Act." Adopting Release, Integration of Abandoned Offerings, p. 6.

[7] This requirement will not be satisfied "if the issuer, or any person acting on its behalf, received any money or other offering consideration for the securities. Placing funds in escrow will not avoid this prohibition." Adopting Release, Integration of Abandoned Offerings, p. 6.

[8] The amendments to Rule 477 are discussed in Section II herein.

[9] The SEC stated that "if the issuer (or any person acting on its behalf) first offers the securities privately within 30 days following withdrawal of the registration statement, the safe harbor will not be available. Instead, traditional integration analysis, including the five-factor test, would determine whether the registered offering and the private offering should be integrated." Adopting Release, Integration of Abandoned Offerings, p. 6.

under the Securities Act or an exemption from registration is available, (iii) purchasers in the private offering do not have the protection of Section 11 of the Securities Act and (iv) a registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

5. Any disclosure document used in the private offering must disclose any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that would be material to the investment decision in the private offering.

II. Rule 477 - Withdrawal of a Registration Statement

Prior to these proposed amendments, absent limited exceptions, Rule 477 required a registrant that sought to withdraw a registration statement to make an application to the SEC, upon which the SEC would grant the application for withdrawal only if the SEC determined that such withdrawal was consistent with the public interest and the protection of investors. In order to expedite the withdrawal process, Rule 477 is being amended so that when a registrant makes an application for withdrawal of "an entire registration statement . . . before the effective date" such application will be deemed granted at the time the application is filed with the SEC unless, within 15 calendar days after the registrant files the application, the SEC notifies the registrant that the application for withdrawal will not be granted.[10] Rule 477 is also being amended to require that (i) the registrant make a statement in the application for withdrawal that "no securities were sold in connection with the offering," and (ii) if the registrant applies for withdrawal in reliance on Rule155(c), the registrant must, "without discussing any terms of the private offering, state in the application that the registrant may undertake a subsequent private offering in reliance on Rule 155(c)." Furthermore, Rule 477 is being amended to provide that the withdrawn registration statement and the related request for withdrawal will remain in the SEC's public files.

III. Offset of Filing Fees and Other Amendments

To reduce the financial risk of an abandoned registered offering, the SEC is making certain amendments to its rules regarding filing fees. These amendments permit fees paid in connection with a withdrawn registration statement to be available for use with a registrant's future registration.[11] The subsequent registration statement must be filed within five years of the initial filing date of the earlier registration statement. These

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[10] *See* Rule 477(b) (emphasis added). Absent limited exceptions, the SEC will still require its consent in situations where the withdrawal does not involve "an entire registration statement" or where withdrawal is sought after the effective date of the registration statement.

[11] The SEC stated that a registrant may take advantage of these filing-fee offsets regardless of whether the class of securities registered is the same as or different than the withdrawn class of securities. *See* Adopting Release, Integration of Abandoned Offerings, p. 2.

filing-fee offsets may be utilized by the registrant, a majority-owned subsidiary of the registrant, or a parent that owns more than 50 percent of the registrant's outstanding voting securities.

In conjunction with the new rule and amendments discussed above, the SEC is making certain other amendments, including:

- The SEC is codifying its previous interpretations stating that (i) if a filing fee is paid for the registration of an offering and the same registration statement also covers the resale of the securities, no additional filing fee is required to be paid for the resale and (ii) payment of a fee is not required for the registration of an indeterminate amount of securities to be offered solely for market-making purposes by an affiliate of the registrant.
- To clarify previous confusion, the fee offset procedures of Rule 429 are being moved to Rule 457 and Rule 429 is being restated to make the rule clearer.

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We would be pleased to work with you in evaluating the impact of the new rule and amendments on your business and securities offerings. If you wish to obtain additional information regarding the impact of these rules, please contact the corporate partner who regularly works with you, or John S. D'Alimonte at (212) 728-8212 or Steven J. Gartner at (212) 728-8222.

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