Weil, Gotshal & Manges LLP

MEMORANDUM

October 1, 2004

To Our Clients and Friends:

Re: M&A Transactions in a Post-Sarbanes-Oxley Environment

There are many different, sometimes overlapping, requirements under the federal securities laws that you must evaluate when considering the acquisition of another company, including various new rules implementing the Sarbanes-Oxley Act ("SOXA"). Our memo is intended to help you navigate the numerous, often highly-complex requirements that should be considered in deal planning – many of which pre-date SOXA. The following outlines key considerations for M&A transactions in a post-SOXA environment:

- Buyers and sellers must comply with the SEC's communication rules regarding the particular deal, whether hostile or friendly. Specifically, all written communications relating to the deal must be filed with the SEC on the date of first use. *See Regulation M-A Communication Rules*.

- "Real-time" reporting may be required with respect to certain aspects of the M&A transaction, on a different and more accelerated timetable than that fixed by Regulation M-A. *See New 8-K Items*.

- Material, non-public information regarding the deal must not be selectively disclosed in cash tender offers and mergers, exempt stock mergers and exempt debt exchange offers; the key elements here are "duty" to make widespread public disclosure before or simultaneous with a selective disclosure of material, non-public information to an investor or analyst, and "materiality" from the perspective of holders of securities of the particular deal participant (*i.e.*, buyer or seller) engaging in the selective communication with an investor or analyst. *See Regulation FD*.

- Use of non-GAAP measures of performance in public communications regarding the deal is permitted, but must be carefully considered in light of stringent requirements governing disclosure of such measures in transactional documents. *See Use of Non-GAAP Financial Measures*.

- Repurchases by buyers of their stock, after the public announcement of a deal in which that stock will be used as currency, may be effected only in limited circumstances and subject to Regulation M's restricted periods. *See Stock*

Repurchases by the Buyer in a Stock-for-Stock Deal – Rule 10b-18 and Reg. M Considerations.

- Seller management may be signed up for the deal before filing the related deal documents with the SEC only under certain limited circumstances. *See Lock-Up Agreements*.

- Buyers must engage in heightened diligence, due in major part to the demands of their outside auditors. *See M&A Due Diligence in a Post-SOXA Environment*.

Regulation M-A Communication Rules

- **General Rule**: Written communications made in connection with or relating to a registered exchange offer or merger that are made public, or otherwise provided to persons who are not parties to the transaction, must:

  - be filed with the SEC in accordance with Rule 425 under the Securities Act of 1933, as amended ("1933 Act") on the date on which these communications are first used or distributed (remember, the SEC treats almost all forms of electronic communication – even audiocasts made available for replay on the web – as written); and

  - contain a prominent legend that, among other things, urges stockholders to read relevant SEC documents before making their tender or voting decisions.

- **Covered Persons**: In addition to the parties to the business combination or other extraordinary transaction, communications constraints affect agents of the parties (for example, dealer manager acting on behalf of the buyer).

- **Covered Communications**: For purposes of the relevant SEC rules, "written communications" include all information disseminated, other than information communicated orally (as discussed below), such as, among other things:

  - press releases and other public statements in writing;

  - scripts and slides used for analyst presentations, conferences and other, similar meetings;

  - "Q&As" and other deal-related materials, developed internally, but used to respond to questions from stockholders, employees or customers;

  - internal e-mail correspondence with employees;

  - statements in news bulletins;

- materials posted on the website (including links to news articles and web re-broadcasts of analyst and investor calls); and

- scripts used to create messages for information hotlines and similar "mass-communication" means of solicitation.

➢ **Excluded Communications**:

- Information that is communicated orally, on a one-time basis, and not otherwise made available in a manner that would cause the communication to become a "writing" and/or a "broadcast" (*e.g.,* via "replay" on the web), does not need to be reduced to writing and publicly filed. (We discuss below how the substance of such presentations must be documented and filed in the event of republication.)

    - However, oral as well as written communications are ALWAYS subject to applicable antifraud provisions under both the 1933 Act and the Securities Exchange Act of 1934, as amended ("1934 Act") and, if quoted or republished by third-parties, may be deemed written materials attributable to a deal participant that must be filed.

- In addition, these SEC rules do not apply to the release of business information that is purely factual in nature, relates solely to ordinary business matters and merely refers to the business combination in a completely non-substantive way.

    - For example, a written communication between the seller and a vendor/supplier that discusses their business dealings, and which merely mentions the business combination in the context of their business relationship, should not require a public filing or a legend.

- Written communications that could not reasonably be viewed as an "offer to sell" or a "solicitation of an offer to buy" a security, and also could not reasonably be viewed as a communication that could result in the giving, withholding or revocation of a proxy or tender, need not be filed.

- Internal written communications provided solely to the parties to the business combination, or other persons who are authorized to act on behalf of the parties to the business combination, including legal counsel and financial and other advisors.

- Identical communications, if they are filed initially and used more than once.

- o For example, employees of the buyer or seller are free to redistribute the press release announcing the business combination (or any other written communication previously filed with the SEC) to whomever they choose.

- o Though the SEC has suggested that substantially similar communications may need to be re-filed if any information is added to or altered from an earlier communication, minimal changes (*e.g.* correction of minor typographical errors, an update regarding a contact person, stylistic changes including a change in format, type-size, letterhead, addressee, etc.) without any substantive change to the content of the information would not need to be re-filed.

  - * For example, if employees are given a previously filed written communication, under a new cover letter, that merely states "Dear Employee, you may be interested to read the attached letter about the business combination," the parties would not have to file the cover letter or re-file the attached communication. If, however, there is an employee Q&A sheet attached to the previously filed communication, which contains new information of a nature that requires filing, the Q&A sheet must be legended and publicly filed.

➢ **Regulatory Filings and Related, Written Materials**: These rules may apply to written communications that are submitted to governmental agencies or political bodies (for example, written communications submitted in connection with obtaining antitrust approval). The following guidelines should help you determine whether such written communications should be filed with the SEC and contain a legend:

- ▪ if written material is filed with or provided to any governmental agency (including administrative and regulatory agencies) as required pursuant to a governmental review or approval process, and under such review or approval process the filing will remain confidential, or there is no expectation that the filing will be made public, an SEC filing and legend should not be required (for example, materials submitted to the Department of Justice and/or the Federal Trade Commission in connection with seeking antitrust clearance under Hart-Scott-Rodino);

- ▪ if written material is provided to a political figure (as opposed to a recipient who is part of a governmental review or approval process), a public filing and legend will generally be required unless there is an understanding with the recipient of such written material that it will not be made public; and

- ▪ if written material is provided for publication or widespread distribution in any form, a public filing and legend will be required.

<u>New 8-K Items</u>

- The first public announcement of an M&A transaction that must be filed for Reg. M-A purposes, also will trigger filing obligations under the newly expanded and accelerated 8-K reporting scheme (*e.g.*, Rule 425 filings). The SEC has determined that the filing of an 8-K can satisfy any relevant M&A filing requirements, so long as the Form 8-K also satisfies the substantive requirements of ALL relevant rules – that is, the line-item requirements of Reg. M-A as well as 8-K. Companies using 8-K to satisfy these other filings obligations must check appropriate boxes on the cover page of the 8-K.

- Non-binding letters of intent need not be reported on an 8-K unless there are material binding provisions included. Examples of binding provisions that generally would not be considered material are confidentiality or exclusivity provisions; a standstill provision typically would be material and would trigger an 8-K filing.

- The new 8-K rules do not change the antifraud analysis with respect to disclosure of preliminary merger negotiations. That is, such merger negotiations only have to be disclosed if they are material (determined by balancing the magnitude and probability of the deal), and a duty to disclose otherwise arises. (*See* Basic Inc. v. Levinson, 485 US 224 (1988).)

- **Possible 8-K disclosure triggers in connection with an M&A transaction are:**

  - Signing of a material M&A agreement (**Item 1.01**). Note that the practice now in public acquisitions is to file the merger agreement as an exhibit to the 8-K announcing the transaction, rather than waiting as 1.01 permits until the filing of the next periodic report and/or the deal document, whichever is due first;

  - Unexpected/early termination of a material M&A agreement – operation of MAC's or MAE's (**Item 1.02**);

  - Completion of an acquisition or disposition of a "significant" amount of assets – note that securities transactions that incidentally involve significant asset acquisitions and dispositions will trigger this line-item (**Item 2.01**);

  - Assumed liability for off-balance sheet arrangements or direct financial obligations of the seller that are material to the buyer; material off-balance sheet or other financing arrangements relating to the proposed M&A transaction, such as a 144A debt offering (**Item 2.03**);

- Acceleration of a material direct financial obligation and/or material off-balance sheet arrangement of the buyer and/or seller triggered by the M&A transaction (**Item 2.04**);

- Decision by the board or authorized officers to commit to the sale of one or more businesses (**Item 2.05**);

- Material charges generated by impairment of goodwill associated with an acquisition (**Item 2.06**);

- Delisting a class of securities as a result of the transaction (**Item 3.01**);

- Issuance of unregistered stock as consideration in a private acquisition; M&A-related Regulation S and other exempt equity financings (**Item 3.02**);

- Recapitalizations by the acquirer or seller (**Item 3.03**);

- Changes in control (**Item 5.01**);

- New appointments of principal officers or directors as a result of the transaction (**Item 5.02**); and

- Changes in the surviving company's articles of incorporation or bylaws if not proposed in a previously filed proxy or information statement or proxy/prospectus (**Item 5.03**).

Regulation FD

- **General Rule**: Public companies and persons acting on their behalf are prohibited from making selective disclosure of material, non-public information to securities professionals and investors.

- **Limited M&A Exemption**: There is a "carve-out," or exemption, for registered offerings made for capital-raising or M&A purposes. However, for cash and exempt deals (*e.g.*, issuer self-tenders for debt or stock exempt under 1933 Act Section 3(a)(9)), Regulation FD applies.

- **Overlap of Regulation M-A with Regulation FD**: When there is overlap in this setting between Regulation FD and Regulation M-A, the more restrictive rule generally will prevail:

  - **Oral Roadshow Disclosure**: While Regulation M-A permits company management and investment bankers to make selective oral disclosures in roadshows and one-on-one meetings relating to unregistered offerings or cash M&A deals, Regulation FD does not. Thus, traditional "closed" roadshows

attended by a few analysts and large investors are now effectively precluded in unregistered deals (i.e., all-cash or exempt securities deals) unless the company and its investment banker are careful not to disclose material information that has not previously been released to the markets at large, or the company makes FD-compliant disclosure of the information either prior to, or contemporaneously with, the roadshow's "selective" disclosures.

- As a practical matter, it is almost impossible to disclose only immaterial and/or already released material information in a deal-related roadshow context, given the SEC's position that virtually any projection or estimate of future financial or business performance is material, and must be disclosed to all if disclosed to a few.

- Note that both the buyer and seller, if public companies that are not otherwise affiliated with each other, and certainly the issuer in a self-tender situation, must consider Regulation FD in connection with communications with their own stock- or debt-holders and analysts. It is sometimes difficult, in a friendly two-party deal, to disentangle communications made by buyer and seller to analysts, particularly if made jointly and the information disclosed is arguably material to both.

- **Replays of Webcasts:** Posting replays transforms an oral webcast into a "writing" and/or "broadcast" from the SEC's perspective – even if the replay is only an audiocast. While Regulation FD does not require that material, non-public information communicated during the webcast be filed with the SEC (as long as the webcast was properly noticed and accessible to all investors), a filing would be necessary here because Regulation M-A requires almost all written communications to be filed. Transcripts must be filed in the case of video and/or audio-cast presentations.

- **Differences in Timing**: Filings made under Regulation M-A satisfy disclosure requirements under Regulation FD, but only if the requisite SEC EDGAR confirmation is received before any material, non-public information in written form is first used to solicit. In contrast, Regulation M-A would give the company until the end of the first day on which the selective written disclosure is made to file – which means that, absent the applicability of FD, the selective disclosure could precede filing.

Use of Non-GAAP Financial Measures

- All public disclosures (since March 28, 2003), whether made in SEC filings or otherwise, must be evaluated to determine whether the financial information is calculated and presented on a basis not in accordance with GAAP. If a company

uses a non-GAAP financial measure in public disclosure, it must also disclose the most directly comparable GAAP measure and include a reconciliation of the non-GAAP financial measure to this GAAP measure. If a non-GAAP financial measure is included in an SEC periodic report (or a registration statement under the 1933 Act, to list another example), stricter rules apply, prohibiting the use of certain non-GAAP financial measures entirely in the deal document (*e.g.*, non-GAAP liquidity measures, except for EBIT and EBITDA), and requiring disclosure of reasons for the use of the non-GAAP financial measure.

  - Note that what is "public" for Regulation G purposes involves a much smaller audience than what is "public" for Regulation FD purposes. The SEC Staff has suggested, however, that a "traditional" or closed, limited audience roadshow would not be "public" within the meaning of Regulation G.

- There is an exclusion from the above rules for certain communications relating to business combinations that are subject to Rules 425 (1933 Act), 14a-12 (proxy rules) and 14d-2(b) (tender offer rules). The exemption does not extend beyond communications that are subject to those rules. Accordingly, if the same non-GAAP financial measure that was included in a communication filed under one of those rules, or orally communicated in a presentation ("live" or simulcast not available for replay), also is disclosed in a 1933 Act registration statement or a 1934 Act proxy statement or tender offer statement, the exemption would be inapplicable to that disclosure.

- There also is an exemption from Regulation G and Item 10(e) of Regulation S-K for disclosure of non-GAAP financial measures made in any report or opinion subject to Item 1015 of Regulation M-A (Reports, Opinions, Appraisals from Outside Parties). The exemption for disclosure of non-GAAP financial measures subject to Item 1015 is not limited to pre-commencement communications and, accordingly, also would be available for Item 1015 disclosure – relating, for example, to investment banker "fairness" opinions – found in registration statements, proxy statements and tender offer statements.

- Where reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a "pro forma" number prepared and presented in accordance with Article 11 of Regulation S-X, companies may use that measure for reconciliation purposes, in lieu of a GAAP financial measure.

Stock Repurchases by the Buyer in a Stock-for-Stock Deal – Rule 10b-18 and Reg. M Considerations

- Many buyers have a stock repurchase program designed to fit within the anti-manipulation safe harbor codified in 1934 Act Rule 10b-18. Under this safe

harbor, an issuer will not be deemed to have violated the anti-manipulation provisions of the 1934 Act (Sections 9(a)(2) and 10(b) and Rule 10b-5), *solely* by reason of the manner, timing, price, or volume of its repurchases, if the issuer repurchases its common stock in the market in accordance with the conditions of the rule. The SEC acted in late 2003 to add provisions to Rule 10b-18 – subject to limited exceptions, discussed below – that foreclose repurchases by the buyer and its affiliates during the period beginning at the time of first public announcement of a merger, acquisition, or similar transaction involving a recapitalization, and ending upon the earlier of the completion of the transaction or the completion of a vote by the seller's shareholders (including during any post-vote or –tender period where the market price of a security will be a factor in determining the consideration to be paid pursuant to a merger, acquisition, or similar stock-based transaction).

- It should be noted that this new "merger exclusion" from the safe harbor begins at the time of "public announcement" of a merger, much earlier than the beginning of the restricted period under Regulation M (which generally begins, for example, in a stock-for-stock transaction by a large public company on the day the proxy statement/prospectus is first mailed to the seller's shareholders). For a company involved in multiple acquisitions, this exclusion could preclude reliance on the safe harbor for an extended period of time.

- Recognizing that companies with an acquisition strategy should not be compelled to shut their buyback programs down in all situations once a deal is first announced, the 2003 amendments to 10b-18 allow such companies – in two alternate circumstances – to continue to rely on the anti-manipulation safe harbor when making ordinary repurchases following the initial public announcement of a transaction. First, issuers may rely on the safe harbor when the transaction consideration is solely cash and there is no valuation period. Second, they may rely on the safe harbor when the repurchase meets certain additional restrictions:

  - the purchases made on any single day do not exceed the <u>lesser</u> of (x) 25% of the security's average daily trading volume, or "ADTV." (ADTV is defined as the "average daily trading volume reported for the security during the four <u>calendar</u> weeks preceding the week in which the Rule 10b-18 purchase is to be effected".) Note that this definition differs from the definition of "ADTV" in Regulation M); or (y) the issuer's average daily Rule 10b-18 purchases effected during the three full calendar months preceding the date of the announcement of the transaction;

  - the issuer's block purchases effected pursuant to the new weekly block purchase exception (described below) do not exceed the average size and frequency of the issuer's block purchases effected pursuant to this exception during the three full calendar months preceding the date of the announcement; <u>and</u>

- the repurchases are not otherwise restricted or prohibited (for example, pursuant to Regulation M).

- Accordingly, if an issuer has not made any Rule 10b-18 purchases during the three-month period prior to the announcement of a transaction, it would not be permitted to make any Rule 10b-18-exempt purchases in the post-announcement period. Therefore, in preparing for a merger, acquisition, or similar transaction, issuers should carefully consider the impact of the amendments to Rule 10b-18 on their ordinary repurchases of common stock. Moreover, in stock-based deals, the 10b-18 safe harbor will not protect repurchases made by the buyer once it mails offering documents to seller shareholders because of the applicability of Regulation M.

- Thus, the issuer must be cognizant of Regulation M's restricted period where it is using its own stock as deal currency. This restricted period begins on the day the proxy/prospectus (in a non-exempt stock deal) or exchange offer solicitation materials are first disseminated to shareholders, and ends upon the completion of the distribution (*i.e.*, the time of the shareholder vote or the expiration of the exchange offer), and includes any post-vote valuation or election period.

- Moreover, if the transaction is structured as an exchange offer, Rule 14e-5 prohibits purchases or arrangements to purchase securities that are the subject of an exchange offer, or a security immediately convertible into or exchangeable for those securities, from the time of public announcement until the expiration of the exchange offer.

Lock-Up Agreements

- The SEC staff has articulated, in the Current Issues Outline posted on the SEC's website (*see* http://www.sec.gov/worddocs/cfcr112k.doc), its position that it will not generally object to the use of "lock-up agreements" in stock-based, non-exempt business combination transactions notwithstanding the fact that the "offer" is made before the filing of a registration statement and the agreements themselves otherwise might be deemed to constitute pre-effective (and/or pre-filing, as the case may be) binding "sales." Even in the registered deal context, however, lock-up agreements still may raise issues under the 1933 Act, as well as the proxy and tender-offer rules, as applicable, where an overwhelming majority of the seller's shares are locked up, or the "lock-up" is expanded to include non-traditional "members" such as middle management and/or more than a few large institutional holders. Moreover, the staff has emphasized that irrevocable proxies and tenders may not be accepted in the pre-filing period. And in all situations, a buyer that already owns seller stock must remain mindful of Section 13(d) beneficial ownership reporting requirements that might be triggered by formation of a "group" comprised of the buyer and seller shareholders.

- In certain situations, compensatory arrangements between buyer and seller (which often are, but need not be, part of a pre-deal lock-up) that are designed to entice seller insiders to tender their shares into the offer may raise serious questions under 1934 Act Section 14(d)(7) and Rule 14d-10, the SEC's "Best-Price, All-Holders" rule. For example, members of a seller's senior management may agree – prior to announcement of an impending "friendly" tender offer – to tender their shares into that offer once it commences, in exchange for generous severance benefits and/or retention bonuses that might be deemed additional consideration violative of the Best-Price, All-Holders rule. *See, e.g.,* Katt v. Titan Acquisitions, Ltd., 133 F. Supp. 632 (M.D.Tenn. 2000)(denying motion to dismiss of buyer and seller's insiders who were also shareholders of seller, because these incentives in the aggregate constituted additional consideration for tenders that was not offered to other seller shareholders). There currently is a split in the federal courts with respect to whether these "insider" compensatory arrangements should be analyzed under a "Bright-Line" temporal test analogous to Rule 14e-5, or a broader, "facts-and-circumstances" test that focuses on whether such arrangements – regardless of when made – are an "Integral Part" of the tender offer. *See* In re: Digital Island Securities Litigation, 357 F.3d 322 (3d Cir. 2004) (contrasting the "Bright-Line" test of the Seventh Circuit with the "Integral Part" test of the Ninth Circuit, and adopting the former). Senior SEC staff members have indicated that the agency would like to resolve this problem, perhaps via rulemaking.

M&A Due Diligence in a Post-SOXA Environment

- SOXA and the SEC rules promulgated thereunder have profoundly affected important aspects of M&A practice in a number of ways, including the nature and scope of the due-diligence process and the terms and conditions under which the transaction is effected. In conducting due diligence and in crafting appropriate representations and warranties in deal documents – particularly with respect to closing conditions and material adverse effect or change ("MAE" or MAC") clauses – public company buyers must consider the following SOXA-related items:
    - Does the seller maintain effective disclosure controls and procedures?
        - Have the disclosure controls and procedures been followed consistently in crafting the seller's public disclosures?
        - Does the seller have a Disclosure Committee and, if so, what function has it played in reviewing the seller's public disclosures? What is the role of the General Counsel? What is the outside auditor's role in the process? Some buyers will insist on having their outside auditors evaluate the seller's financial statements and communicate with the seller's outside auditors, without seller management present.

- * Access to the seller's outside auditors will be a critical part of the diligence process.

- o Does the Audit Committee, or other independent committee of the board of directors, oversee the effective operation of the seller's disclosure controls and procedures? What do the minutes of the relevant committee meetings reflect, if anything, in this regard?

▪ Does the seller maintain effective internal control over financial reporting?

- o Many companies will have to include a management report on internal control for the first time in their 2004 10-Ks in accordance with SOXA Section 404 and the SEC's implementing rules – hence the question has arisen whether the report of buyer's management must encompass the seller's internal control, even if the seller's operations may not be fully integrated into those of the buyer. The SEC staff has acknowledged that it might not always be possible to conduct an assessment of a seller's internal control over financial reporting within the period between the consummation of the merger and the date the buyer's management must make its own internal-control assessment of the combined company. Question 3 of the SEC staff's June 2004 FAQs on internal control (available on the SEC's website at http://www.sec.gov/info/accountants/controlfaq0604.htm), allows buyer's management to defer reporting on the seller's internal control, but only if the buyer's management refers in its 404 report to a discussion in its Form 10-K explaining the basis for the limited scope of management's assessment – that is, why the 404 report excludes the seller's business. Additionally, the staff indicates in this FAQ that the period in which management may omit an assessment of an acquired business's internal control over financial reporting from its own internal-control assessment <u>may not</u> extend beyond one year from the date of acquisition. Nor may such assessment be omitted from more than one annual management report on internal control over financial reporting.

- o Notwithstanding the accommodation from the SEC staff, can seller's management give a "clean" internal control assessment? This must be determined during the diligence process, and provided for in the seller's representations and warranties.

- o If the seller is a public company, is it likely to receive a "clean" audit from its independent auditor on the seller's internal control over financial reporting? (As noted, this assessment will be required, for the 2004 fiscal year, from many companies' management under Section 404 of SOXA). Companies that report on a calendar-year basis to the SEC, and their

outside auditors, already should be assessing the effectiveness of existing financial reporting controls with a view toward remediation where necessary or appropriate to assure compliance by the end of the 2004 fiscal year (the evaluation date for management's report). We understand that the Big Four accounting firms have been signaling to audit clients that they may have material control weaknesses that could preclude the auditor from issuing a "clean" report as of the close of the December 31 fiscal year-end. (Nor could management conclude that the company's internal control was effective, in the event of a material weakness).

- If the seller has any internal control problems, how will they be corrected and, even if corrected, is there sufficient potential liability exposure on the part of the buyer to warrant abandonment of the deal? What sort of disclosure will be made, at a minimum, in the seller's pre-closing 10-Q's and 10-K's regarding possible control deficiencies identified during the due diligence process?

- Have the CEO and CFO of public sellers provided the required SEC certifications under Sections 302 (relating to both disclosure controls and procedures and internal control over financial reporting) and 906 of SOXA?

  * Are there any issues relating to the seller's financial statements that are significant enough to interfere with the ability of the buyer's CEO and CFO to certify SEC reports in the future?

- Have there been any recent waivers of or amendments to the seller's code of ethics under Section 406 of SOXA (applicable to the seller's CEO, CFO and other senior financial officers)? If the seller's stock is listed on a national stock exchange or quoted in Nasdaq, has the seller established the broad-based ethics code called for by the exchange or Nasdaq under SOXA-induced revisions to SRO governance listing standards? Is there any evidence that either or both codes are not being enforced?

- Have there been any concerns or allegations regarding auditor independence; for example, have activist institutions withheld votes from audit committee members because of a perception of excessive non-audit fees paid to the outside auditor?

- Has the seller's audit committee fulfilled its enhanced oversight rule under SOXA? Note likely requests from buyers for access to audit committee meeting minutes, whistleblower procedures and documentation of complaints, and pre-approval policies.

* Have there been any recent whistleblower complaints received by the audit committee and, if so, how were they handled and by whom? The buyer may request access to logs and other documentation relating to treatment of such complaints, at least where they pertain to accounting and auditing matters and/or possible CEO/CFO ethics code breaches.

- If the seller's stock is listed on the NYSE, AMEX or Nasdaq, are the seller's corporate governance practices sufficient under the enhanced governance listing standards adopted by these markets under SOXA?

- If any of the seller's directors will serve on the buyer's board, are there any independence issues from the buyer's perspective?

- Are there any loans or extensions of credit to the seller's executive officers and directors in violation of Section 402 of SOXA?

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Please do not hesitate to get in touch with your contact at Weil, Gotshal & Manges, LLP if you have any questions regarding this memo, or if we can be of further assistance to you.