Memorandum

Confidential
Attorney-Client Privilege

TO: Board Members and Senior Officers
[Company]

FROM: Bingham McCutchen LLP

RE: Proposed Initial Public Offering (IPO)
Prohibition of “Gun-Jumping”

The Securities Act of 1933, as amended (the “Securities Act”), prohibits the making of any “offers” to sell securities before a registration statement for the offering has been filed with the Securities and Exchange Commission (the “SEC”), and generally prohibits the making of any written “offers” after the filing of the registration statement but before it has been declared effective by the SEC, except by means of the “red herring” preliminary prospectus. The making of any “offers” during the period prior to the filing of a registration statement (the “pre-filing period”), or of written “offers” (other than the preliminary prospectus and certain “tombstone” materials satisfying narrow SEC requirements which we will summarize later) between the filing of a registration statement and its effective date (the “waiting period”) is often referred to as “gun-jumping.”

As discussed below, the Securities Act prohibition against gun-jumping has been broadly interpreted by the SEC to include not only express offers but also any publicity that may arouse public interest in a proposed offering, even publicity that does not mention any securities offering. Accordingly, care must be taken to avoid any press releases or other corporate communications that could be considered a prohibited “offer” under the Securities Act. However, as discussed herein, the Securities Act does not prohibit routine business communications not likely to arouse public interest in an upcoming offering.

Relevant Securities Act Provisions

Sections 5(c) and 2(a)(3) of the Securities Act prohibit the direct commencement of a public offering or a public sales campaign during the pre-filing period. The SEC, however, has long taken the position that any publicity that tends...
to arouse interest in the issuer or its securities, even though it may contain no express “offer” or indeed any reference to the issuer's securities or prospects, may constitute gun-jumping:

It follows from the express language and the legislative history of the Securities Act that an issuer, underwriter or dealer may not legally begin a public offering or initiate a public sales campaign prior to the filing of a registration statement. It apparently is not generally understood, however, that the publication of information and statements, and publicity efforts, generally, made in advance of a proposed financing, although not couched in terms of an express offer, may in fact contribute to conditioning the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises serious question whether the publicity is not in fact part of the selling effort.

S.E.C. Release No. 33-3844, October 8, 1957, 22 F.R. 8359

**Permissible and Impermissible Activities**

In several rules and interpretive releases, the SEC has indicated certain activities during the pre-filing and waiting periods that are not considered prohibited offers.

**Rule 163A 30-Day Bright Line Safe Harbor.** Rule 163A provides a safe harbor for communications made more than 30 days prior to filing a registration statement. Such communications may not reference the proposed offering, and must be made by or on behalf of [Company]. Underwriters and dealers may not use this safe harbor. If communications are released before the safe harbor period expires, [Company] must take reasonable steps within its control to avoid the distribution or publication of such communication within the 30 days immediately preceding the date of the filing of the registration statement. While the SEC has declined to specify what actions will constitute “reasonable steps within the issuer’s control” for purposes of Rule 163A, the SEC has indicated that, while it does not expect an issuer to be able to control the republication or accessing of previously published press coverage, it expects an issuer to be able to control its own involvement in any subsequent redistribution or publication. With respect to information posted on an issuer’s web site, the SEC has indicated that it does not expect that an issuer will necessarily remove such information from the web site and, provided that the information is appropriately dated, otherwise identified as historical material, and not referred to as part of the offering activities, it will not object to an issuer maintaining such information on the web site.
Rule 135 Notices. Rule 135 under the Securities Act permits an issuer to make a pre-filing press release containing certain very limited information about its intention to make a public offering (not including, for instance, the names of any proposed underwriters or the price). Whether to do such a press release should be coordinated with the company's underwriters; most underwriters do not favor such press releases and they are uncommon.

Rule 134 Notices. Rule 134 under the Securities Act permits what are often referred to as “tombstone” notices after filing the registration statement and during the waiting period. Rule 134 was amended to increase the range of information about the issuer and the offering that may be released. Under the amended Rule 134, the “tombstone” notice may include certain basic factual information about how to contact [Company], information about [Company]’s business, certain information about the securities being offered, names of the underwriters participating in the offering, the anticipated schedule for the offering, description of marketing events, names of selling securityholders, the exchange on which the securities will be listed, and the proposed ticker symbol for the company. Such notices must include a mandatory “boilerplate” legend indicating that a registration statement was filed but sales may not be made before the effective date. It is fairly common for an issuer to issue a press release upon the initial filing of its IPO registration statement, complying with and relying upon this Rule.

Rule 169 Routine Corporate Communications. In 2005, the SEC adopted Rule 169, which provides a safe harbor for certain routine corporate communications. Under this safe harbor, the following factual business information may be released by or on behalf of [Company] during the pre-filing and waiting periods provided that it is intended for use by an audience that is other than an investor audience:

1. factual information about [Company], its business or financial developments, or other aspects of its business; and

2. advertisements of, or other information about, the issuer’s products or services.

In order to avail itself of the safe harbor, [Company] must have (a) previously released or disseminated similar information in its ordinary course of business, (b) the timing, manner and form of the release must be materially consistent with past practices and (c) the information must be released by persons who have historically released such information and for intended use by persons in a capacity other than investors.

© 2009 Bingham McCutchen LLP One Federal Street, Boston, MA 02110 Attorney Advertising

This communication is being circulated to Bingham McCutchen LLP’s clients and friends. This document does not constitute legal advice and it is not intended to provide legal advice addressed to a particular situation. The information has not been updated since last use and may be required to be updated and customized for particular facts and circumstances. Prior results do not guarantee a similar outcome.
Prior to the adoption of Rule 169, the SEC provided some guidance as to some of the activities issuers should be permitted to engage in, which include:

1. Continuing to advertise services and products (as opposed to the company itself).

2. Answering unsolicited telephone inquiries from stockholders, financial analysts, the press and others concerning factual information about the company’s operation of its business (as opposed to plans or prospects).*

3. Observing an “open door” policy in responding to unsolicited inquiries concerning factual matters from securities analysts, security holders, and participants in the communications field who have a legitimate interest in the company's affairs.*

4. Continuing to hold stockholder meetings as scheduled and to answer stockholders’ inquiries at stockholder meetings relating to factual matters.

5. Continuing to send out reports or statements to stockholders where the company has established a practice of doing so in the past.*

*S.E.C. Release No. 33-5180, August 16, 1971, 36 F.R. 16506. This SEC Release addressed public companies in general. Some of these examples may not be appropriate for a company undertaking an initial public offering, since there is not yet a trading market for its securities.

While Rule 169 provides a safe harbor for the dissemination of factual business information in the manner discussed above, it does not extend such safe harbor to forward-looking statements. As a result, [Company] should refrain from issuing any forecasts, projections, expectations or predictions relating to, but not limited to, revenues, income, earnings per share or the value of its common stock.

Rule 169 is relatively new (effective as of December 1, 2005). Accordingly, we recommend that it not be relied on without pre-clearing the proposed publicity with us.

Penalties for Violation of Section 5(c)

Gun-jumping violations could carry civil or even criminal penalties. Sections 12, 15, 20 and 24 of the Securities Act impose a variety of potential civil liability and
criminal sanctions on persons who violate the Securities Act, including the gun-jumping prohibition.

While the SEC would probably not commence a formal enforcement action except in an egregious case, a more significant concern is the SEC's policy of delaying the effectiveness of a registration statement if it suspects that gun-jumping has occurred. The intent of such a delay is to permit sufficient time for the market to “cool down.” This “cooling-down” delay period could be as long as several weeks. It is obvious that this remedy can have severe consequences, depending on market conditions, and could even jeopardize the proposed offering.

**Recommendations**

In light of the foregoing, [Company] should take steps to ensure that it does not engage during the pre-filing period\(^1\) in any activity that, with the benefit of hindsight, might be characterized as gun-jumping. Appropriate steps might include the following:

**Advertising.** [Company] can engage in normal advertising, consistent with its past practices. However, [Company] should not increase its advertising campaign or change the focus to emphasize the company or its prospects rather than particular products. Obviously, no advertising regarding [Company]’s securities or value should be made. Until the registration statement has been declared effective, it would be advisable to have any new advertising reviewed in advance by us.

**Marketing Materials.** [Company] should not distribute any brochures or other information packages describing [Company] (other than those used for advertising the company’s products or services, as described above).

**Investment Community and Press.** [Company] should not contact any analysts or potential purchasers (e.g., institutions) in the investment community. It would be prudent to decline even unsolicited discussions with analysts or the press until the offering is completed. (The SEC considers that even unsolicited news articles may be “offers” by the issuer if based on interviews with company

\(^1\) CSAV, Inc. should consider these recommendations notwithstanding the safe harbor period provided for in Rule 163A given the uncertainty of re-publication risk and for consistency of approach.
spokespersons, since the spokespersons should realize that their statements to reporters are likely to be publicized.) [Company] should decline any interview that might be released within 30 days prior to the filing of the registration statement.

Press Releases. Press releases should be kept to a minimum, and should be limited to historical information of the type referred to above. Drafts of all press releases should be cleared prior to their release by us (as well as by the underwriters and their counsel). Press releases relating to the closing of particular transactions should be reviewed by us and generally should be in a format similar to prior practice.

Speeches. Officers and other representatives of [Company] should avoid making any speeches (including, particularly, speeches at meetings of financial analysts). If any speech has already been scheduled for any time in the next three months, please let us know.

Web Site. No new information regarding [Company] or its securities should be added to the company’s web site, and no other changes to the site (other than ordinary-course changes and the like) should be made without our first having reviewed them. Additionally, an effort should be made to clean-up the site to remove any information that would be inappropriate or unwise and, as previously discussed, to appropriately date historical material and otherwise identify it as such. We will work with [Company] to clean up the web site.

Friends & Family Round. Basically, no information regarding any possible “friends & family” participation in an IPO should be discussed or communicated within or outside of [Company] without first obtaining clearance from a member of senior management and from counsel. We would be happy to advise you, if appropriate, with respect to the dissemination of any such information. This includes, in particular, information in the form of e-mails or any written other communications, which are forbidden in any form before the IPO filing.

If you have any questions concerning the foregoing, please contact us. In particular, if you have any questions whether any proposed press release or other communication could constitute prohibited gun-jumping, we urge you to contact us prior to the issuance of such communication. We will provide you with a short form memo which you may distribute to your employees to the extent you feel appropriate (and to the extent that company employees are, or will inevitably become, aware of the proposed IPO), describing the general restrictions during the quiet period.
The Securities Act also restricts for a period communications even after the effective date of a registration statement. We will provide you with guidance concerning these restrictions at a later time.