Cooley

October 8, 2010

Update to Cooley Alert dated October 6, 2010

On the afternoon of October 6, 2010, Nasdaq informed us that it had reversed certain aspects of its previously held position regarding retail marketing and allocation described in the *Cooley Alert* dated October 6, 2010 entitled "When is a Public Offering Not a 'Public Offering'—The Latest Word from Nasdaq." Based on our discussions with Nasdaq, we understand that Nasdaq's newly formed position on this aspect of the "public offering" analysis is as follows:

1. In the case where an investment bank does not market to retail investors due to FINRA suitability rules, the lack of retail marketing will not be considered a negative factor in Nasdaq's "public offering" analysis.
2. In the case where an investment bank does not market to retail investors due to internal guidelines or for reasons other than those based on FINRA suitability rules, Nasdaq has informed us that it is open to scrutinizing those situations on a case-by-case basis to determine if the lack of retail investor outreach was well grounded and appropriate in its view. Nasdaq has also informed us, however, that it knows of no other grounds that would justify a lack of retail marketing in the case of an equity offering. Therefore, it remains uncertain whether any grounds other than FINRA suitability limitations will support a determination by Nasdaq that an equity offering qualifies as a "public offering" without any retail marketing.
3. In all other cases, the prior Nasdaq position articulated in the October 6, 2010 *Cooley Alert* still stands (for equity offerings, retail marketing is required; retail allocation is a positive factor in the Nasdaq "public offering" analysis, although there are circumstances in which bona fide retail marketing followed by a lack of retail allocation will be acceptable).

Once again, the summary above reflects our current understanding of a complicated, nuanced and evolving area of practice. It is important to carefully analyze the related issues with your deal advisors before engaging in an offering that needs to qualify as a "public offering" for Nasdaq purposes, and it is also often prudent to discuss these issues with Nasdaq in advance, particularly if you determine that you may not be able to optimally satisfy some of the "public offering" factors described in this *Cooley Alert* and the October 6, 2010 *Cooley Alert.*

We intend to issue additional *Cooley Alerts* if there are further material developments in this area, including any additional interpretive guidance published by Nasdaq on this topic. In the meantime, if you would like to discuss these matters further, please feel free to call the Cooley partners identified in this *Cooley Alert* or others at Cooley with whom you work.

Key Contacts

Mischi a Marca San Francisco	gmamarca@cooley.com +1 415 693 2148
Charlie Kim San Diego	ckim@cooley.com +1 858 550 6049
Sonya Erickson Seattle	serickson@cooley.com +1 206 452 8753
Mark Weeks Palo Alto	mweeks@cooley.com +1 650 843 5011