AUDITED FINANCIAL STATEMENTS: RESPONDING TO THE GOING CONCERN REVIEW

February 3, 2009

To Our Clients and Friends:

With their fiscal year now closed, many companies are now dealing with the ensuing year-end audit. In light of current economic conditions, auditors will likely be even more focused on the audit process and their audit opinions, particularly the evaluation of a company's ability to continue as a going concern. Management must be prepared for heightened scrutiny.

AUDIT OPINION REQUIREMENT

Most bond indentures require issuers to deliver SEC reports within the time periods[1] and in the form specified by the SEC, but generally do not expressly require the delivery of a "clean" audit opinion – that is, an opinion without a "going concern" or similar qualification.

Credit agreements, however, generally impose more specific delivery requirements with respect to the borrower's annual financial statements, including that the accompanying auditor's opinion be without a "going concern" or similar qualification or exception, or any qualification or exception as to the scope of the audit. Thus, even if a borrower is in compliance with its financing agreements at year end and does not have immediate liquidity issues, it must still satisfy its auditor that it can continue as a going concern in order to be able to deliver a "clean" audit opinion to its lenders. Failure to do so will result in a default under the credit agreement.

THE GOING CONCERN REVIEW

As part of its review of a company's financial statements, the auditor must determine whether there is substantial doubt about the company's ability to continue as a going concern for a reasonable period of time. This look-forward period will be at least one year beyond the date of the financial statements being audited. However, there is no hard and fast rule, and auditors may look for support for a favorable conclusion over a longer period, in some cases up to six fiscal quarters.

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1 *Reports on Form 10-K must be filed within 60 days after fiscal year end by large accelerated filers, 75 days after fiscal year end for accelerated filers and 90 days after fiscal year end for all other filers.*

RESPONDING TO INFORMATION REQUESTS

In the audit, the auditor will consider factors that, taken together, indicate that there could be substantial doubt about the company's ability to continue as a going concern during the look-forward period. For example, even if a company has ample liquidity to make payments as they come due, the auditor will look for comfort that the company will be able to comply with any applicable financial covenants and avoid a default during the look-forward period that could result in debt being accelerated. Management should engage proactively with the auditor and be prepared to respond promptly with detailed information relating to any negative trends, possible financing difficulties or other business concerns, as well as information supporting the reasonableness of the company's plans to address any issues, and its ability to comply with its financing agreements and meet debt service requirements over the look-forward period.

Given the time constraints imposed by the SEC and most credit agreements and the likely heightened focus of auditors in this difficult market, a proactive dialogue and prompt response to auditor information requests will help smooth the way to a successful audit season.

Please feel free to contact us if you have any questions.

This memorandum was not intended or written to be used, and it cannot be used by any taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under U.S. federal tax law.

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