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The Recent Evolution of Underwriter Lock-Up Agreements

Recent NYSE and NASD rulemaking created new prohibitions on publishing research reports and making certain public appearances near the expiration or waiver of lock-up agreements. These new rules requiring issuers and underwriters to reassess the structure of these agreements.

by Steven E. Bochner and Shawn J. Lindquist

Amendments to the rules of the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) (collectively, the SROs) adopted last year that prohibit the issuance of analyst reports and certain public appearances near the termination of underwriter lock-up agreements entered into in connection with public offerings are requiring both issuers and underwriters to reassess the ways in which lock-up provisions are structured in underwriting agreements, investor rights contracts and equity compensation arrangements. This article discusses the recent evolution of lock-up provisions in response to the SRO rules and provides recommendations for effectively dealing with the new restrictions.

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New Restrictions on Publishing Research Reports and Public Appearances

Following the various financial scandals that have plagued the markets in recent years, the independence of research analysts and the disclosure of their conflicts of interests have come under scrutiny by various regulatory bodies and have been the subject of increasing regulation. One area of concern has been positive research reports (sometimes referred to as "booster shot" reports) that could have the effect of facilitating stock sales by insiders in the period following the expiration or waiver of lock-up agreements. Lock-up agreements are contractual restrictions limiting the ability of shareholders to sell or otherwise transfer securities for a specified period of time following a public offering (typically 180 days in the case of an initial public offering).¹

On July 29, 2003, the US Securities and Exchange Commission (SEC) approved amendments to NYSE Rule 472 and NASD Conduct Rule 2711 (collectively, the SRO Rules)² which, among other things, impose new restricted periods on NYSE and NASD members with respect to the timing of research reports and public appearances.³ The SRO Rules were formulated to, among other things, prevent an NYSE/NASD member from publishing favorable research that could have the effect of driving up the price of a subject company's stock for the benefit of certain shareholders whose lock-ups are expiring.⁴

The SRO Rules ostensibly bring into conflict two items often viewed as critical to the success of public offerings: (1) research reports and (2) underwriter lock-up provisions. Both of these commonplace structures can

have a significant impact on the trading, stability and liquidity of an issuer's securities in the after-market of a public offering. Investment banking firms underwriting a public stock offering typically require the issuer's officers, directors and significant shareholders (and sometimes most or all other shareholders) to agree to lock-up restrictions to ensure an orderly and stable market in the delicate period following the offering. The investment banking firm is often engaged in stabilizing and market making transactions in the issuer's securities and the sale of large blocks of stock by insiders can create economic risk for the firm, as well as a negative public perception concerning the issue.

Ongoing research coverage is particularly critical for a recently public issuer when the only available coverage often comes from the investment banking firms involved in the offering, particularly in today's environment in which research analyst budgets at investment banks are shrinking and analysts are expected to cover more industries and companies. Any lapse in analyst coverage could reduce investor interest and be damaging to the market for the issuer's stock.

New Black-Out Period; Key Definitions

The SRO Rules prohibit a manager or co-manager of a securities offering from publishing or otherwise distributing a research report on a subject company within 15 days prior to or after the expiration, waiver or termination of a lock-up agreement that the managing or co-managing firm has entered into with a subject company or its shareholders.⁵ These restrictions apply only to a manager or co-manager of a securities offering and not to the other underwriters participating in the underwriting syndicate of the offering. These restrictions also do not apply to certain seasoned issuers with actively traded securities, subject to certain conditions, as described below.

For purposes of the SRO Rules, the term "research report" is broadly defined as a written or electronic communication that includes an analysis of equity securities of individual companies or industries, and provides information reasonably sufficient upon which to base an investment decision.⁶ Previously, the definition also required that the communication include an analyst's recommendation.⁷ That requirement was deleted to conform the SRO Rules to the definition of

"research report" contained in the Sarbanes-Oxley Act of 2002.⁸ Accordingly, there is no longer a requirement that the report include the analyst's actual recommendation regarding the subject company's securities. This means that the definition could encompass many types of communications that traditionally have not been classified as research reports, including reports by individuals within investment banking organizations who are not typically considered research analysts, and regardless of the means of distribution or whether the report is distributed within or outside the United States.⁹ In light of the breadth of this definition, compliance departments of investment banking firms should review any outside communications by their firms concerning the issuer that could occur during the restricted period.

The SROs also made it clear that members should be aware that including a disclaimer in a communication with the public indicating that the communication does not contain information sufficient upon which to base an investment decision has no relevance as to whether the communication falls within the definition, and could, in certain circumstances, be misleading.¹⁰

The SRO rules also contain a prohibition on certain public appearances of research analysts. NYSE Rule 472(f)(5) prohibits a research analyst from "recommending or offering an opinion" on a subject company's securities in a public appearance within 15 days prior to or after the expiration, waiver or termination of a lock-up agreement that the member has entered into with a subject company or its shareholders.¹¹ NASD Rule 2711(f)(4) prohibits a member who has acted as a manager or co-manager of a securities offering from making a public appearance "concerning" a subject company within that same time period relating to the expiration, waiver or termination of a lock-up agreement that the member has entered into with a subject company or its shareholders.¹²

The SRO Rules also broadly define the term "public appearance," as "any participation by a research analyst in a seminar, forum (including an interactive electronic forum), radio, television or print media interview, or public speaking activity, or the writing of a print media article in which such research analyst makes a recommendation or offers an opinion concerning any equity securities."¹³ However, it is unclear from the rules and guidance from the SEC and the

SROs whether the rule would preclude an issuer from appearing or even presenting at an analyst conference. Presumably, such appearances would be permissible as long as research analysts subject to the SRO restriction refrain from commenting on the issuer.

The new restrictions appear to be triggered based on a lock-up agreement that a member firm has entered into with a subject company or its shareholders. In other words, the rule seems to require contractual privity between the underwriter and the subject company or its shareholders. Companies often will include lock-up agreements in their securities purchase and investor rights agreements with founders and investors and in stock option agreements with employees and consultants. The SRO Rules do not appear to restrict research reports or public appearances based on the expiration, waiver, or termination of those types of lock-up agreements (*i.e.*, when contractual privity is between the issuer and its securityholder rather than between an NYSE/NASD member and the securityholder). However, the underwriters could potentially be implicated in situations where a contractual agreement between the issuer and a securityholder is assigned for the benefit of an underwriter.

Exceptions

The SRO Rules provide for two limited exceptions to the restrictions discussed. First, they do not prevent a member from publishing a research report or making a public appearance during the restricted periods concerning the effects of significant news or a significant event that occurs during those periods, provided that member's legal or compliance personnel pre-authorize publication of the report.¹⁴ However, as a general matter, the SROs do not regard earnings announcements or a private placement of the subject company's securities to fall within the exception.¹⁵ A research report issued in reliance on this exception must be limited to discussing the effects of the news or event that triggered the exception.¹⁶ This kind of report may, however, contain or update price target, rating or recommendation concerning the subject company's securities.¹⁷

The SROs have made it clear that they will closely examine research that is issued or otherwise distributed around the time that a shareholder of an underwriting client of the NYSE/NASD member sells, or first becomes

eligible to sell, a significant volume of the subject company's stock to ensure compliance with the rules.¹⁸

Second, the SROs do not believe the black-out period surrounding the expiration of lock-up agreements is necessary for certain seasoned issuers and actively traded securities.¹⁹ Accordingly, the black-out restrictions do not apply to public appearances or research reports published pursuant to Rule 139 of the Securities Act of 1933 (Securities Act), regarding an issuer with actively traded securities, as defined in Rule 101(c)(1) of Regulation M of the Securities Exchange Act of 1934 (Exchange Act).²⁰

Directed Shares, Waivers and Prospectus Disclosure

In November 2003, the NASD proposed for comment to its members a number of additional amendments to proposed NASD Conduct Rule 2712²¹ relating to the initial public offering (IPO) allocation process.²² These amendments were designed to respond to certain recommendations made by the NYSE/NASD IPO Advisory Committee.²³ Two of the proposed amendments concern underwriter lock-ups.

One of the proposed amendments would require that any lock-up or restriction on the transfer of an IPO issuer's shares apply to shares purchased in a "directed shares" or "friends and family" program by officers and directors of the issuer.²⁴ The IPO Advisory Committee recommended this requirement to the SROs and the SEC based on its conclusion that when misused or overused, an issuer's directed shares program may compromise the IPO process.²⁵ The stated intent of this new restriction was to establish a reasonable parameter for the fair use of an issuer directed shares program.²⁶

A second proposed amendment would require underwriters to notify IPO issuers prior to granting waivers to lock-up provisions (specifically waivers of the lock-up on the sale of securities) and to announce any such exemptions through a national news service.²⁷ The IPO Advisory Committee concluded that lock-ups are an important part of the IPO marketing process and that investors should be made aware in a timely manner of any development that would counter the established expectation that the IPO issuer's directors,

officers and large shareholders who entered into lock-ups will be bound by them for the stated period.²⁸

The IPO Advisory Committee also stated that lock-up agreements are often disclosed in broad terms in the prospectus and are often highlighted during the IPO marketing process. The committee expressed its belief that the termination or waiver of previously disclosed lock-up agreements is at least as material to shareholders as the initial agreement itself.²⁹ Accordingly, the committee recommended that issuers and underwriters should be required to more fully disclose the terms of lock-up agreements, including any preexisting plans by the underwriter to exempt a director or officer from a lock-up agreement.³⁰

As a result of these new proposed rules, issuers and their underwriters have begun to provide enhanced disclosures regarding lock-up agreements in their IPO prospectuses, including whether securities purchased in directed shares programs will be subject to lock-up, whether underwriters expect to grant exceptions to the lock-up (and under what circumstances), or whether there is a present intention to release any securities subject to lock-up, and whether there are any agreements between the underwriters and any securityholders regarding exceptions or early release from lock-up.³¹

In addition, SEC Regulation FD (Fair Disclosure)³² would likely require issuers to publicly disclose any waiver or early termination of underwriter lock-up periods.

The Evolution of Lock-Up Agreements and Practical Implications

In the recent past, lock-up provisions used by underwriters in IPOs predominantly were structured to last 180 days. In response to the black-out restrictions imposed by the SRO Rules, some underwriters in IPO transactions have begun requiring lock-ups with periods longer or potentially longer than 180 days.

For example, in the Assurant, Inc. IPO, the Morgan Stanley & Co. Incorporated lock-up agreement provided for a customary 180-day lock-up period *plus* the following extension:

[I]n the event that either (1) during the last 17

days of the 180-day restricted period, we issue an earnings release or material news or a material event relating to us occurs or (2) prior to the expiration of the 180-day restricted period, we announce that we will release earnings results during the 16-day period beginning on the last day of the 180-day period, the "lock-up" restrictions...will...continue to apply until the expiration of the 18-day period beginning on the earnings release or the occurrence of the material news or material event.³³

Credit Suisse First Boston LLC and Morgan Stanley & Co. Incorporated were the first underwriters to use this approach,³⁴ but it has now become the most commonly used approach among those underwriters and issuers addressing the black-out risk posed by the SRO Rules in this fashion. This is the approach that the underwriters are using in the proposed Google Inc. IPO.³⁵

Other underwriters have employed variations on the theme. For example, in the Kinetic Concepts, Inc. IPO, the lock-up agreement simply provided that the 180-day period was subject to an extension of up to 18 days upon agreement of Merrill Lynch, Pierce, Fenner & Smith Incorporated and J.P. Morgan Securities Inc. and the issuer.³⁶ Also, in at least two proposed IPOs, UBS Securities LLC is using an extension period of up to 37 additional days.³⁷

Some underwriters have also agreed to include an exception to the extended lock-up period so that the extension will not apply if the issuer's shares are "actively traded securities," as defined in Regulation M.³⁸

In the proposed SSA Global Technologies IPO, Goldman, Sachs & Co. is using a slightly different approach to the structure of the lock-up period. The lock-up period is designed to begin on the date of the final prospectus and continue through the date that is no less than 180 days *and no more than 210 days* after the date of the prospectus.³⁹ This type of lock-up period structure has not, however, been widely used to date by any underwriter, including Goldman, Sachs & Co.

In general, underwriters appear to be adopting the new extension approach to lock-up periods, particular-

ly firms such as Banc of America Securities LLC, Citigroup Global Markets Inc., Credit Suisse First Boston LLC, Goldman, Sachs & Co., Morgan Stanley & Co. Incorporated, and UBS Securities LLC.⁴⁰ However, this approach has not been used universally by any one underwriter yet.⁴¹

The extended lock-up approach enables an analyst from the managing or co-managing underwriter to publish a research report (or make a public appearance) concerning a subject company soon after an earnings or other important announcement made by the company that is within the 15-day period before or after the expiration of the customary 180-day lock-up period; the managing underwriter simply extends the lock-up period to enable the release of the report. Otherwise, if the company were to issue an earnings announcement within the black-out period mandated by the SRO Rules, the analyst would be required to wait for 15 days to publish his or her report. This kind of delay could be particularly harmful to a company that issues a mixed earnings announcement at or near the time of a lock-up expiration. Investors may have trouble understanding the impact of the news and at a time when a large number of shares are being sold into the market, and the analyst would not be able to issue a report explaining his or her analysis of the news.

One potential logistical issue with respect to an extension approach is how the underwriters give an issuer's securityholders effective notice of the extension. For example, if an issuer had 150 securityholders that signed up to the lock-up agreement and the extension is triggered, it would be a logistical nightmare for the managing underwriter of the offering to contact all 150 shareholders in a timely manner to provide effective notice of the triggering of the lock-up extension. Credit Suisse First Boston LLC has addressed this potential issue in a novel way by requiring securityholders to agree (in the lock-up agreement) that notice given to the issuer by the managing underwriter is deemed given to the securityholders.⁴² As a backstop, the notice provision also requires that prior to engaging in any transaction involving the issuer's securities, a securityholder must give notice to the issuer and agree not to consummate any such transaction unless and until the holder has received written confirmation from the issuer that the lock-up period (as may have been extended) has expired.⁴³

Unless obtained well in advance, it can be extremely difficult for an issuer to obtain a customary 180-day lock-up agreement from all of its securityholders in connection with an IPO. It is certainly not uncommon for one or two shareholders to refuse to sign the underwriter's form of lock-up agreement in connection with the issuer's IPO, regardless of the potential risk that the underwriters may be unwilling to market the offering without obtaining a sufficient percentage of signed lock-up agreements. For this reason, among others, practitioners have been advising their clients for years to include lock-up (also commonly referred to as "market standoff") provisions in securities purchase or other shareholder agreements (*e.g.*, stock purchase agreements, investor rights agreements, registration rights agreements, option agreements, convertible promissory notes, warrants and the like).

During the last decade, many privately held companies have heeded such advice. However, the typical lock-up provision contains language limiting the maximum length of time of the lock-up period to 180 days. Further, contractual privity is between the company and the securityholder—not between a future underwriter and such holder. Some companies creatively make a future underwriter, albeit unknown at the time of the agreement, an intended third party beneficiary with the right to enforce the lock-up agreement between the company and the holder of securities. Regardless of whether a company uses this type of approach, a managing underwriter generally requires securityholders to enter into the underwriter's particular form of lock-up agreement, which is sometimes more extensive and places the underwriter, not the issuer, in control of any future modification, waiver or early termination of the lock-up period.

If pursued, the new lock-up approach discussed above creates some potential challenges for issuers and underwriters because most lock-ups presently only contain the old form of lock-up period (*i.e.*, 180 days). The issuer will not only be required to obtain an underwriter lock-up agreement from each securityholder in connection with the IPO (or amend existing agreements), but also a form of agreement that contains a lock-up period that is longer or potentially longer than the one to which they had originally agreed. This may be particularly difficult in a situa-

tion where the issuer has a large number of shareholders that are not otherwise affiliated with the issuer and are not inclined to sign up to the underwriter's new lock-up term.

To address the restricted periods imposed by the SRO Rules, issuers and shareholders may seek to negotiate shorter lock-up periods. Another approach that companies may employ is restructuring lock-up provisions in their agreements to make them more general in terms of the actual lock-up period. For example, a company could omit any references to specific time periods. A company could require that its securityholders simply agree to be locked-up for the period specified by the representative of the company's underwriters at the time of an IPO. A company could also require securityholders to agree to execute and deliver the form of lock-up agreement as may be requested by the company or its underwriters in connection with an IPO. These approaches may be met with little resistance from the company's founders and optionholders, but outside investors (*e.g.*, venture capital firms) may not be as willing to agree to broad-based lock-ups and will likely desire to imbed certain time limitations.

It is also plausible that a company could end up with one or more securityholders that are subject to a customary 180 day (or less) lock-up provision and others that are subject to a lock-up provision providing for a longer or potentially longer lock-up period. This scenario could result in two different lock-up expirations and potentially two black-out periods.

Recognizing that some investors may not be amenable to the use of a broad-based approach, another alternative could be to continue using the customary 180-day lock-up provision but add a proviso containing language similar to the language that certain underwriters are currently using for extension in the event of an earnings release or other material news or material event.

Recommendations

In order to maintain maximum flexibility in light of the SRO Rules and evolving lock-up practices among underwriters, companies should consider the following recommendations:

- Continue to seek from investors (and other securityholders, such as option and warrant holders) a lock-up provision in securities purchase and other shareholder agreements that contains a comprehensive prohibition on offers, sales, or any other securities transactions or transfers of the holder's securities in connection with a future public offering and grants the company the ability to impose stop-transfer instructions to prevent transactions in violation of the lock-up agreement.
- Consider, early in the process, the timing of the public offering, the expiration of the proposed lock-up period and the timing of future earnings announcements to determine whether the restrictions of the SRO Rules will impact analyst research reports and appearances, and plan accordingly.
- Consider requiring a lock-up provision in future securities purchase and other shareholder agreements that would provide for more flexibility to address the SRO Rules (*e.g.*, require securityholders to agree to enter into the underwriter's form of lock-up agreement at the time of a public offering, which may include for the possibility of an extension of the lock-up period). Also, in connection with subsequent rounds of financing, consider incorporating amendment provisions in investor rights contracts that provide for a simple majority consent to amend lock-up and other provisions so that issuers will not be required to obtain the consent of every shareholder should a different lock-up be required by the issuer's underwriters in a future public offering.

NOTES

1. In June 2001, the SEC issued an investor alert urging investors not to rely solely on analyst recommendations when engaging in securities transactions. One of the areas of SEC concern was research reports issued at the expiration of lock-up agreements. The SEC cautioned investors considering whether to invest in a company that has recently conducted its IPO to check to see whether a lock-up agreement is in effect and when it expires, or if the underwriter waived any lock-up restrictions, because a company's stock price may be affected by the prospect of lock-up shares being sold into the market when the lock-up ends. The SEC believes that it is also a data point to consider when assessing research reports issued just before a lock-up period expires.
2. See Release 34-48252, 68 FR 45875 (July 29, 2003) (also available at <http://www.sec.gov/rules/sro/34-48252.htm>).
3. See NYSE Rule 472(f)(4) and NASD Rule 2711(f)(4).
4. See NASD Notice to Members 04-18 (March 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>); see also source cited *supra* note 2.

5. See NYSE Rule 472(f)(4) and NASD Rule 2711(f)(4).
6. NYSE Rule 472.10(2); NASD Rule 2711(a)(8).
7. NASD Notice to Members 04-18 (March 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>). See SEC Release 34-48252 (July 29, 2003).
8. See *id.* See also Section 501(a) of the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204, Title V, § 501(a), 116 Stat. 745, July 30, 2002).
9. See NASD Notice to Members 02-39 (July 2002) (available at <http://www.nasdr.com/pdf-text/0239ntm.pdf>). The SROs have stated that the issue of whether a communication falls within the definition of "research report" will depend on the particular facts and circumstances surrounding the communication. However, the SROs generally will not consider communications such as reports discussing broad-based indices that do not recommend or rate individual securities, statistical summaries of multiple companies' financial data that do not include any narrative discussion or analysis of individual companies' data, and reports that recommend increasing or decreasing holdings in particular industries or sectors but that do not contain recommendations or ratings for individual securities, among others, to fall within the definition. *Id.* See also NASD Notice to Members 04-18 (Mar. 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>).
10. See NASD Notice to Members 04-18 (Mar. 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>).
11. NYSE Rule 472(f)(4).
12. NASD Rule 2711(f)(4).
13. NYSE Rule 472.50 and NASD Rule 2711(a)(4). In March 2004, the SROs issued interpretative guidance on the definition of "public appearance" in a joint memorandum, as some members had inquired whether password-protected conference calls or Web casts in which an analyst provides his or her opinion on a subject company or securities constitute public appearances for purposes of the rules. NASD Notice to Members 04-18 (Mar. 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>). The memorandum stated that "consistent with SEC Regulation AC, an analysis of individual securities or companies prepared for a specific person or a limited group of fewer than 15 persons is not considered to be a 'research report.'" *Id.* (See also SEC Release Nos. 33-8193, 34-47384 (Feb. 20, 2003), 65 Fed. Reg. 9489, 9485. The memorandum makes clear that the NYSE and the NASD believe a similar standard is appropriate to apply to public appearances. See *id.*
14. NYSE Rule 472(f)(5) and NASD Rule 2711(f)(4). In its joint memorandum issued in March 2004, the SROs explained that the significant news or events exception was designed to allow for coverage in public appearances or reports of news or events that have a material impact on, or cause a material change to, a company's operations, earnings or financial condition, and that generally would trigger the filing requirements of SEC Form 8-K. See source cited *supra* n.10.
15. See NASD Notice to Members 04-18 (Mar. 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>).
16. NASD Notice to Members 04-18 (Mar. 2004) (available at <http://www.nasdr.com/pdf-text/0418ntm.pdf>).
17. *Id.*
18. *Id.*
19. See Securities Exchange Act Release 34-48252, 68 FR 45875 (July 29, 2003) (available at <http://www.sec.gov/rules/sro/34-48252.htm>).
20. NYSE Rule 472(f)(4) and NASD Rule 2711(f)(4). See 17 C.F.R. § 242.101(c)(1), 17 C.F.R. § 242.100(b).
21. In September 2003, the NASD submitted for approval to the SEC proposed new Rule 2712 to prohibit certain abuses in the allocation and distribution of shares in IPOs. See SEC File No. SR-NASD-2003-140 (Sept. 15, 2003).
22. See NASD Notice to Members 03-72 (Nov. 2003) (available at <http://www.nasdr.com/pdf-text/0372ntm.pdf>).
23. *Id.* See Report and Recommendations of a committee convened by the New York Stock Exchange, Inc. and NASD at the request of the SEC (NYSE/NASD IPO Advisory Committee May 2003) (available at <http://www.nyse.com/pdfs/iporeport.pdf> and at http://www.nasdr.com/pdf-text/ipo_report.pdf). See also Suzanne Rothwell, "Increased Regulation of IPO Practices: The NYSE/NASD IPO Advisory Committee Report," *Insights*, Vol. 17, No. 8, Aug. 2003.
24. See NASD Notice to Members 03-72 (Nov. 2003) (available at <http://www.nasdr.com/pdf-text/0372ntm.pdf>).
25. Report and Recommendations of a committee convened by the New York Stock Exchange, Inc. and NASD at the request of the SEC (NYSE / NASD IPO Advisory Committee, May 2003) (available at <http://www.nyse.com/pdfs/iporeport.pdf> and at http://www.nasdr.com/pdf-text/ipo_report.pdf).
26. *Id.* The IPO Advisory Committee also recommended that the SEC and the SROs impose a 5 percent maximum size for an issuer's directed share program. *Id.*
27. See NASD Notice to Members 03-72 (Nov. 2003) (available at <http://www.nasdr.com/pdf-text/0372ntm.pdf>).
28. See *supra* n.25.
29. *Id.*
30. *Id.*
31. ACADIA Pharmaceuticals Inc. prospectus as filed with the SEC on May 27, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-113137); Global Signal prospectus as filed with the SEC on June 3, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-112839); Educate, Inc. Registration Statement on Form S-1 as filed with the SEC on May 14, 2004 (SEC File No. 333-115496); PowerDsine Ltd. prospectus as filed with the SEC on June 10, 2004, pursuant to Rule 424(b)(2) of the Securities Act (SEC File No. 333-115777); Metabasis Therapeutics, Inc. prospectus as filed with the SEC on June 16, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-112437); Sybari Software, Inc. Registration Statement on Form S-1 as filed with the SEC on May 14, 2004 (SEC File No. 333-115522); Google Inc. Amendment No. 2 to Registration Statement on Form S-1 as filed with the SEC on June 21, 2004 (SEC File No. 333-114984); CallWave, Inc. Registration Statement on Form S-1 as filed with the SEC on May 13, 2004 (SEC File No. 333-115438); IntraLase Corp. Registration Statement on Form S-1 as filed with the SEC on May 28, 2004 (SEC File No. 333-116016).
32. 17 C.F.R. § 243.100-243.103; see also Securities Act Release 33-7881, 2000 WL 1197687 (Aug. 15, 2000) (also available at <http://www.sec.gov/rules/final/33-7881.htm>).
33. Assurant, Inc. prospectus as filed with the SEC on February 5, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-109984). This form of extended lock-up provision was first used by Credit Suisse First Boston LLC and Morgan Stanley & Co. Incorporated in late 2003, but it was not until 2004 that this new form became more widely used by IPO underwriters. Among the other underwriters that have used this type of lock-up extension in either IPO or follow-on public offering transactions (or proposed pending transactions) include: Banc of America Securities LLC; Bear, Stearns & Co. Inc.; Citigroup Global Markets Inc.; Lazard Frères & Co. LLC; Lehman Brothers Inc.; Thomas Weisel Partners LLC; UBS Securities LLC; and Wachovia Capital Markets, LLC.
34. Overnite Corporation prospectus as filed with the SEC on October 31, 2003, pursuant to Rule 424(b)(4) of the Securities Act (333-107614).
35. Google Inc. Amendment No. 2 to Registration Statement on Form S-1 as filed with the SEC on June 21, 2004 (SEC File No. 333-114984).
36. Kinetic Concepts, Inc. prospectus as filed with the SEC on February 5, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-111677).
37. ZipRealty, Inc. Registration Statement on Form S-1 as filed with the SEC on May 20, 2004 (SEC File No. 333-115657); New River Pharmaceuticals Inc. Amendment No. 1 to Registration Statement on Form S-1 as filed with the SEC on June 11, 2004 (SEC File No. 333-115207).
38. 17 C.F.R. § 242.101(c)(1). New River Pharmaceuticals Inc. Amendment No. 1 to Registration Statement on Form S-1 as filed with the SEC on June 11, 2004 (SEC File No. 333-115207). This approach was also used in the recent Merix Corporation follow-on offering of common stock. See Merix

Corporation prospectus as filed with the SEC on January 29, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-111740).

39. SSA Global Technologies, Inc. Registration Statement on Form S-1 as filed with the SEC on June 4, 2004 (SEC File No. 333-116156).

40. Based on a review of the IPO registration statements filed in May 2004 alone, underwriters are using some form of extended lock-up approach in approximately 40 percent of the IPOs.

41. *See, e.g.,* McCormick & Schmick's Seafood Restaurants, Inc. Amendment No. 1 to Registration Statement on Form S-1 as filed with the SEC on June 3, 2004 (SEC File No. 333-114977) (Banc of America Securities); Taleo Corporation Amendment No. 1 to Registration Statement on Form S-1 as filed with the SEC on May 13, 2004 (SEC File No. 333-114093); (Citigroup Global Markets); Symbion, Inc. prospectus as filed with the SEC on February 6, 2004, pursuant to 424(b)(4) of the Securities

Act (SEC File No. 333-110555) (Credit Suisse First Boston); Leadis Technology, Inc. prospectus as filed with the SEC on June 16, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-113880) (Goldman, Sachs & Co.); Salesforce.com, Inc. Amendment No. 7 to Registration Statement on Form S-1 as filed with the SEC on June 22, 2004 (SEC File No. 333-111289) (Morgan Stanley led IPO); Memory Pharmaceuticals Corp. prospectus as filed with the SEC on April 6, 2004, pursuant to Rule 424(b)(4) of the Securities Act (SEC File No. 333-111474) (UBS Securities led IPO).

42. *See* Exhibit 4.3 to the Universal Technical Institute, Inc. Amendment No. 2 to Registration Statement on Form S-1 as filed with the SEC on December 1, 2003 (SEC File No. 109430).

43. *Id.*

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