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### Final ESPP Regulations Issued

The Internal Revenue Service (“IRS”) recently issued final regulations that govern the terms of employee stock purchase plans (“ESPPs”) under Section 423 of the Internal Revenue Code. These final regulations will be effective January 1, 2010 and apply to statutory options granted before that date. The final regulations retain most of the rules in the proposed regulations as well as provide new guidance and clarification in some areas. The regulations clarify that the plan document requirements (under which the written plan document must contain certain information) may be satisfied by the terms of the plan document or of the offering under the plan.

One of the major issues that the final regulations clarified is the determination of the “grant date” of an ESPP “option,” which was of particular interest because of the one-year and two-year holding period issues. While ideally the “grant date” would be the first day of the offering period, it can only be the first day of the offering period if the plan or offering under the plan designates a maximum number of shares that may be purchased during the offering period or uses a specific formula to determine, on the first day of the offering period, the maximum shares that employees may purchase. If the maximum is not “fixed or determinable,” the “grant date” will be the purchase date.

The regulations also addressed the “fixed or determinable” purchase price issue. Setting the purchase price as a percentage of the stock’s value at the end of the offering period or a lower price at the beginning will not be deemed “fixed or determinable” unless the plan limits the number of shares that can be purchased during the offering period. Additionally, the \$25,000 per year limit imposed by Section 423 will not sufficiently satisfy the “fixed or determinable” requirement.

The IRS also provided guidance on a plan’s ability to make multiple offerings. The regulations clarify that not only can multiple offerings be made, but they can be consecutive or overlap. Additionally, the terms of the offerings do not have to be identical.

If you have any questions regarding the ESPP final regulations, please contact Dana Thrasher (205-226-5464), Dave Pearson (813-222-1367), Bob Ellerbrock (205-226-5462), or Jay Turner (205-226-5468).

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