

EMAGIN CORP  
Form S-3  
August 18, 2006

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As filed with the Securities and Exchange Commission on August 18, 2006

**Registration Number 333-**

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM S-3  
REGISTRATION STATEMENT  
UNDER  
THE SECURITIES ACT OF 1933**

**eMagin Corporation**

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation or organization)

13-3894575

(I.R.S. Employer Identification No.)

10500 N.E. 8<sup>th</sup> Street, Suite 1400  
Bellevue, WA 98004  
(425) 749-3600

(Address, including zip code, and telephone number, including area code of registrant's principal executive offices)

Gary W. Jones  
Chief Executive Officer  
eMagin Corporation  
10500 N.E. 8<sup>th</sup> Street, Suite 1400  
Bellevue, WA 98004  
(425) 749-3600

(Name, address, including zip code, and telephone number, including area code of agent for service)

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Approximate date of commencement of proposed sale to the public: From time to time after the effective date of this Registration Statement.

If the only securities being registered on this form are to be offered pursuant to dividend or interest reinvestment plans,  please check the following box.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box.

If this form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If delivery of the prospectus is expected to be made pursuant to Rule 434, please check the following box.

**CALCULATION OF REGISTRATION FEE**

Title of each class of securities to be registered	Amount to be registered (1)	Proposed maximum offering price per share (2)	Proposed maximum aggregate offering price	Amount of registration fee
Common stock, \$.001 par value, Issuable upon conversion of 6% Senior Secured Convertible Notes	23,038,454	\$0.27	\$6,220,382.58	\$665.58
Common Stock, \$.001 par value, issuable upon exercise of Warrants	18,049,991	\$0.27	\$4,873,497.30	\$521.46
<b>Total</b>	<b>41,088,445</b>		<b>\$11,093,879.88</b>	<b>\$1,187.04</b>

(1) Includes shares of our common stock, par value \$0.001 per share, which may be offered pursuant to this registration statement, which shares are issuable upon conversion of our 6% senior secured convertible notes or the exercise of warrants held by the selling stockholders. Pursuant to Rule 416 under the Securities Act of 1933, this registration statement also registers such additional shares of our common stock as may hereafter be offered or issued to prevent dilution resulting from stock splits, stock dividends or similar transactions.

(2) Estimated solely for purposes of calculating the registration fee in accordance with Rule 457(c) and Rule 457(g) under the Securities Act of 1933, using the average of the sale prices as reported on the American Stock Exchange on August 17, 2006, which was \$0.27 per share.

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**The registrant hereby amends this registration statement on such date or date(s) as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until the registration statement shall become effective on such date as the commission acting pursuant to said Section 8(a) may determine.**

**THE INFORMATION IN THIS PROSPECTUS IS NOT COMPLETE AND MAY BE CHANGED. THE SECURITIES MAY NOT BE SOLD UNTIL THE REGISTRATION STATEMENT FILED WITH THE SECURITIES AND EXCHANGE COMMISSION IS EFFECTIVE. THIS PROSPECTUS IS NOT AN OFFER TO SELL THESE SECURITIES AND IT IS NOT SOLICITING AN OFFER TO BUY THESE SECURITIES IN ANY STATE WHERE THE OFFER OR SALE IS NOT PERMITTED.**

**PRELIMINARY PROSPECTUS, SUBJECT TO COMPLETION, DATED AUGUST 18, 2006**

**Registration No. 333-**

**eMagin Corporation**

**41,088,445 SHARES OF  
COMMON STOCK**

This prospectus relates to the resale by the selling stockholders of up to 41,088,445 shares of our common stock, including up to 23,038,454 shares issuable upon conversion of our 6% senior secured convertible notes, and up to 18,049,991 issuable upon exercise of common stock purchase warrants that were sold in the July 2006 private placement of 6% senior secured convertible notes and common stock purchase warrants. With this prospectus, we are fulfilling our obligation to register these shares within the time period specified in the related Note Purchase Agreements.

We will pay the expenses of registering these shares. We will not receive any proceeds from the sale of shares of common stock in this offering. All of the net proceeds from the sale of our common stock by the selling stockholders will go to the selling stockholders. However, we will receive the exercise price upon exercise of the warrants by the selling stockholders, if such warrants are exercised on a cash basis. Such proceeds, if any, will be used by us for working capital or general business purposes.

Our common stock is registered under Section 12(g) of the Securities Exchange Act of 1934, as amended, and is listed on the American Stock Exchange under the symbol "EMA". The last reported sales price per share of our common stock as reported by the American Stock Exchange on August 17, 2006, was \$0.27 per share.

**The securities offered in this prospectus involve a high degree of risk. See "Risk Factors" beginning on page 8 of this prospectus to read about factors you should consider before buying shares of our common stock.**

The selling stockholders are offering these shares of common stock and may be deemed to be "underwriters" within the meaning of the Securities Act of 1933, as amended, of the shares of common stock, which they are offering. The selling stockholders may sell all or a portion of these shares from time to time in market transactions through any market on which our common stock is then traded, in negotiated transactions or otherwise, and at prices and on terms that may be determined by the then prevailing market price, at prices above or below the then prevailing market price, or at negotiated prices directly or through a broker or brokers, who may act as agent or as principal or by a combination of such methods of sale. The selling stockholders will receive all proceeds from the sale of the common stock. For additional information on the methods of sale, you should refer to the section entitled "Plan of Distribution."

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined whether this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The date of this Prospectus is August \_\_\_\_, 2006



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You may only rely on the information contained in this prospectus or that we have referred you to. We have not authorized anyone to provide you with different information. This prospectus does not constitute an offer to sell or a solicitation of an offer to buy any securities other than the common stock offered by this prospectus. This prospectus does not constitute an offer to sell or a solicitation of an offer to buy any common stock in any circumstances in which such offer or solicitation is unlawful. Neither the delivery of this prospectus nor any sale made in connection with this prospectus shall, under any circumstances, create any implication that there has been no change in our affairs since the date of this prospectus or that the information contained by reference to this prospectus is correct as of any time after its date.

## WHERE YOU CAN FIND MORE INFORMATION

We have filed a registration statement on Form S-3 under the Securities Act of 1933, as amended, relating to the shares of common stock being offered by this prospectus, and reference is made to such registration statement. This prospectus constitutes the prospectus of eMagin Corporation, filed as part of the registration statement, and it does not contain all information in the registration statement, as certain portions have been omitted in accordance with the rules and regulations of the Securities and Exchange Commission.

We are subject to the informational requirements of the Securities Exchange Act of 1934, as amended, that require us to file reports, proxy statements and other information with the Securities and Exchange Commission. Such reports, proxy statements and other information may be inspected at public reference facilities of the SEC at 100 F Street N.E. Washington, D.C. 20549. Copies of such material can be obtained from the Public Reference Section of the SEC at 100 F Street N.E. Washington, D.C. 20549 at prescribed rates. The public could obtain information on the operation of the public reference room by calling the Securities and Exchange Commission at 1-800-SEC-0330. Because we file documents electronically with the SEC, you may also obtain this information by visiting the SEC's Internet website at <http://www.sec.gov>.

## INCORPORATION OF DOCUMENTS BY REFERENCE

The SEC allows us to 'incorporate by reference' the information contained in documents that we file with them into this prospectus. This means that we can disclose important information to you by referring you to another document filed separately with the SEC. The information that we incorporate by reference is considered to be part of this prospectus. Because we are incorporating by reference our future filings with the SEC, this prospectus is continually updated and those future filings may modify or supersede some or all of the information included or incorporated in this prospectus. This means that you must look at all of the SEC filings that we incorporate by reference to determine if any of the statements in this prospectus or in any document previously incorporated by reference have been modified or superseded. This prospectus incorporates by reference the documents listed below and any future filings we will make with the SEC under Sections 13(a), 13(c), 14 or 15(d) of the Securities Exchange Act of 1934, as amended, until the selling stockholders sell all of our common stock registered under this prospectus.

- our annual report on Form 10-K for the fiscal year ended December 31, 2005 filed with the SEC on April 17, 2006;
- our quarterly reports on Form 10-Q for the fiscal quarters ended March 31, 2006 and June 30, 2006 filed with the SEC on May 15, 2006 and August 14, 2006, respectively;
- our current reports on Form 8-K filed on August 18, 2006, August 14, 2006, August 11, 2006, July 25, 2006, June 21, 2006, May 15, 2006, March 28, 2006, February 1, 2006, and January 27, 2006; and
- the description of our common stock contained in Item 1 of our Registration Statement on Form 8-A, dated March 16, 2000.

The information about us contained in this prospectus should be read together with the information in the documents incorporated by reference. You may request a copy of any or all of these filings, at no cost, by writing or telephoning us at eMagin Corporation, 10500 N.E. 8<sup>th</sup> Street, Suite 1400, Bellevue, WA 98004, Telephone: (425) 749-3600.

## SUMMARY

This summary highlights information contained elsewhere in this prospectus. You should read the entire prospectus carefully, including, the section entitled "Risk Factors" before deciding to invest in our common stock. eMagin Corporation is referred to throughout this prospectus as "eMagin," "we" or "us."

### **eMagin Corporation**

We design, develop, manufacture, and market virtual imaging products which utilize OLEDs, or organic light emitting diodes, OLED-on-silicon microdisplays and related information technology solutions. We integrate OLED technology with silicon chips to produce high-resolution microdisplays smaller than one-inch diagonally which, when viewed through a magnifier, create virtual images that appear comparable in size to that of a computer monitor or a large-screen television. Our products enable our original equipment manufacturer, or OEM, customers to develop and market improved or new electronic products. We believe that virtual imaging will become an important way for increasingly mobile people to have quick access to high-resolution data, work, and experience new more immersive forms of communications and entertainment.

Our first commercial product, the SVGA+ (Super Video Graphics Array of 800x600 plus 52 added columns of data) OLED microdisplay, was initially offered for sampling in 2001, and our first SVGA-3D (Super Video Graphics Array plus built-in stereovision capability) OLED microdisplay was shipped in early 2002. We are in the process of completing development of 2 additional OLED microdisplays, namely the SVGA 3DS (SVGA 3D shrink, a smaller format SVGA display with a new cell architecture with embedded features) and an SXGA (1280 x 1024).

In January 2005, we announced the world's first personal display system to combine OLED technology with head-tracking and 3D stereovision, the Z800 3DVisor(tm), which was first shipped in mid-2005. This product received a CES Design and Innovations Award for the electronic gaming category and also received the coveted Best of Innovation Awards for the entire display category. The product was also recognized as a Digital Living Class of 2005 Innovators.

We license our core OLED technology from Eastman Kodak and we have developed our own technology to create high performance OLED-on-silicon microdisplays and related optical systems. We believe our technology licensing agreement with Eastman Kodak, coupled with our own intellectual property portfolio, gives us a leadership position in OLED and OLED-on-silicon microdisplay technology. We believe we are the only company to sell full-color active matrix small molecule OLED-on-silicon microdisplays.

### **July 2006 Note Purchase Agreements**

On July 21, 2006, we entered into several Note Purchase Agreements (the "Purchase Agreements") to sell to certain qualified institutional buyers and accredited investors up to \$5,970,000 in principal amount 6% Senior Secured Convertible Notes Due 2007-2008, together with warrants to purchase 16,073,067 shares of our common stock, par value \$0.001 per share. In addition, \$20,000 of fees due to our investment banker was paid through participation in the notes transaction and convertible into 76,923 common shares with warrants to purchase 53,846 shares of our common stock.

50% of the aggregate principle amount of each Note matures 1 year after the date of issuance and the remaining 50% matures 18 months after the date of issuance. The Notes pay 6% interest quarterly, commencing on September 1, 2006, and are convertible into shares of common stock at a conversion price equal to \$0.26 per share (the "Conversion Price"). In addition, we have the right to redeem all of the outstanding principal and accrued and unpaid interest due under the Notes upon certain conditions, including, but not limited to, that no event of default has occurred or is continuing and that there is an effective registration statement registering the shares underlying the Notes and the



Warrants.

The Warrants are exercisable into shares of our common stock until July 21, 2011 at an exercise price of \$0.36 per share (the "Exercise Price"). The investors may exercise the Warrants on a cashless basis beginning one year after the date of issuance if the shares of common stock underlying the Warrants are not then registered pursuant to an effective registration statement or if an event of default, as defined in the Notes, has occurred and is continuing.

The Conversion Price and the Exercise Price are subject to adjustment for certain events, including the payment of dividends, distributions or split of our common stock, or in the event of our consolidation, merger or reorganization. In addition, the Conversion Price and the Exercise Price are also subject to adjustment in the event that our Chief Executive Officer, Chief Financial Officer or Chief Strategy Officer sells, transfers or disposes of shares of common stock or securities convertible into our common stock, other than 50,000 shares of common stock in any fiscal quarter which our Chief Financial Officer is permitted to sell on or after January 1, 2007. In such event the Conversion and Exercise Prices shall be reduced, if applicable, to a price equal to the average of the daily volume weighted average prices for each of the three trading days following the date such sale, transfer or disposition is reported, or required to be reported, on a Form 4 filing with the Securities and Exchange Commission (the "Commission"); provided, that, if such an adjustment would require us to seek stockholder approval of the transactions in accordance with Rule 713 of the American Stock Exchange Company Guide, then such adjustment shall not reduce the Conversion Price or Exercise Price to a price lower than the Conversion Price until such time as stockholder approval is obtained.

Our obligations under the Purchase Agreements and the Notes are secured by substantially all of our assets, and the assets of our wholly owned subsidiary, Virtual Vision, Inc., pursuant to a Pledge and Security Agreement and a Patent and Trademark Security Agreement, each dated as of July 21, 2006. In addition, we entered into a Lockbox Agreement in favor of the investors which provides that, in the event of a default of our obligations under the definitive agreements, we shall direct our accounts and contract debtors to pay funds owed to us to an interest bearing account to be held on behalf of the investors, and to be paid to the investors as set forth therein.

Under the Purchase Agreements, we are obligated to file a registration statement with the Commission registering the common stock issuable upon conversion of the Notes and exercise of the Warrants. We are obligated to use our best efforts to cause the registration statement to be filed no later than 30 days after the closing date and to insure that the registration statement remains in effect until all of the shares of common stock issuable upon conversion of the Notes and exercise of the Warrants have been sold. In the event of a default of our registration obligations under the Purchase Agreements, including our agreement to file the registration statement with the Commission no later than 30 days after the closing date, or if the registration statement is not declared effective within 90 days after the closing date (120 days if the registration statement is reviewed by the Commission), we are required to pay to the investors, as partial liquidated damages, for each month that the registration statement has not been filed or declared effective, as the case may be, a cash amount equal to 1% of the liquidated value of the Notes.

In addition, to further strengthen our management team we intend to add two new directors recommended by the new investors and to recruit additional senior management. Further, we agreed to form a management committee to oversee our business, with one member to be recommended by the investors. Our Chief Executive Officer and Chief Strategy Officer have agreed to defer 10% of their compensation until such time as we realize an EBITDA positive quarter or until the occurrence of certain other events. In addition, no later than 90 days after the closing date, we agreed to hold a meeting of our stockholders to seek the requisite vote to approve the private placement as well as a reverse stock split of our outstanding shares of common stock at a ratio of not less than one for each ten shares of common stock.

Paul Cronson, a Director, John Atherly, Chief Financial Officer, and Olivier Prache, Senior Vice President of Display Manufacturing and Development Operations of our company participated in the private placement through the purchase of an aggregate of \$270,000 in principal amount of Notes, together with Warrants to purchase an aggregate of 726,921 shares of common stock, each on the same terms and conditions as the other investors.

In addition to the foregoing, on the same date, we entered into an additional Note Purchase Agreement with Stillwater LLC which provides for the purchase and sale of an additional Note in the principal amount of up to \$500,000 (the "Stillwater Note"), together with a warrant (the "Stillwater Warrant") to purchase 70% of the number of shares issuable upon conversion of the Stillwater Note, at our sole discretion by delivery of a notice to Stillwater on December 14, 2006 for the completion of the purchase and sale to occur on December 29, 2006 (the "Closing Date"). Our ability to require Stillwater to purchase and pay for the Stillwater Note and Stillwater Warrant shall be reduced by the sum of (i) the additional financing raised by us prior to the Closing Date, and (ii) the aggregate exercise price paid by Stillwater to us upon exercise of all or a portion of any of our common stock purchase warrants owned by Stillwater prior to the Closing Date, including a warrant to purchase 1,923,077 shares of our common stock which we issued to Stillwater on July 21, 2006 (the "July Warrant") on similar terms and conditions as the Warrants set forth above, with an exercise price of \$0.26. We are registering the shares of common stock underlying the July Warrant in this prospectus. The conversion price of the Stillwater Note shall be equal to 100% of the market price of the common stock on December 13, 2006 and the exercise price of the Stillwater Warrant will be equal to 100% of the market price of the common stock on December 13, 2006, plus \$0.10. Further, we are obligated to use our best efforts to register the shares underlying the Stillwater Note, and the Stillwater Warrant no later than 90 days after the Closing Date. In the event of a default of our registration obligations, including our agreement to file the registration statement with the Commission no later than 90 days after the closing date, or if the registration statement is not declared effective within 150 days after the closing date (180 days if the registration statement is reviewed by the Commission), we are required to pay to Stillwater, as partial liquidated damages, for each month that the registration statement has not been filed or

declared effective, as the case may be, a cash amount equal to 1% of the liquidated value of the Stillwater Note.

The aggregate commissions and expenses payable in connection with the private placement were approximately \$590,000, which includes an aggregate of \$399,000 in sales commissions. Of this \$20,000 was paid by us through the issuance of a \$20,000 principal amount of 6% senior secured convertible note, together with warrants to purchase 53,846 shares of our common stock at \$0.36 per share, the same terms as the notes' warrants.

We claim an exemption from the registration requirements of the Securities Act for the private placement of these securities pursuant to Section 4(2) of the Act and/or Regulation D promulgated there under since, among other things, the transaction did not involve a public offering, the investors are accredited investors and/or qualified institutional buyers, the investors had access to information about us and their investment, the investors took the securities for investment and not resale absent a registration statement covering their resale or pursuant to an exemption from registration, and we took appropriate measures to restrict the transfer of the securities.

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## **RISK FACTORS**

This investment has a high degree of risk. Before you invest you should carefully consider the risks and uncertainties described below and the other information in this prospectus. If any of the following risks actually occur, our business, operating results and financial condition could be harmed and the value of our stock could go down. This means you could lose all or a part of your investment.

### **RISKS RELATED TO OUR FINANCIAL RESULTS**

#### **WE HAVE A HISTORY OF LOSSES SINCE OUR INCEPTION AND MAY INCUR LOSSES FOR THE FORESEEABLE FUTURE.**

Accumulated losses excluding non-cash transactions as of June 30, 2006 were \$74 million and acquisition related non-cash transactions were \$102 million, which resulted in an accumulated net loss of \$176 million. We have not yet achieved profitability and we can give no assurances that we will achieve profitability within the foreseeable future as we fund operating and capital expenditures in areas such as establishment and expansion of markets, sales and marketing, operating equipment and research and development. We cannot assure investors that we will ever achieve or sustain profitability or that our operating losses will not increase in the future.

#### **WE MAY NOT BE ABLE TO EXECUTE OUR BUSINESS PLAN AND MAY NOT GENERATE CASH FROM OPERATIONS**

In the event that cash flow from operations is less than anticipated and we are unable to secure additional funding to cover our expenses, in order to preserve cash, we would be required to reduce expenditures and effect reductions in our corporate infrastructure, either of which could have a material adverse effect on our ability to continue our current level of operations. To the extent that operating expenses increase or we need additional funds to make acquisitions, develop new technologies or acquire strategic assets, the need for additional funding may be accelerated and there can be no assurances that any such additional funding can be obtained on terms acceptable to us, if at all. If we were not able to generate sufficient capital, either from operations or through additional debt or equity financing, to fund our current operations, we would be forced to significantly reduce or delay our plans for continued research and development and expansion. This could significantly reduce the value of our securities.

#### **OUR INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM HAS EXPRESSED DOUBT ABOUT OUR ABILITY TO CONTINUE AS A GOING CONCERN, WHICH MAY HINDER OUR ABILITY TO OBTAIN FUTURE FINANCING**

Our consolidated financial statements as of June 30, 2006 have been prepared under the assumption that we will continue as a going concern for the year ending December 31, 2006. Our independent registered public accounting firm have issued their report dated March 15, 2006 in connection with the audit of our financial statements as of December 31, 2005 and 2004 and for the three year period ended December 31, 2005, that included an explanatory paragraph expressing substantial doubt about our ability to continue as a going concern without additional capital becoming available. Our ability to continue as a going concern is dependent upon our ability to obtain additional equity or debt financing, attain further operating efficiencies and, ultimately, to achieve profitable operations. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

### **RISKS RELATED TO MANUFACTURING**

#### **THE MANUFACTURE OF OLED-ON-SILICON IS NEW AND OLED MICRODISPLAYS HAVE NOT BEEN PRODUCED IN SIGNIFICANT QUANTITIES.**

If we are unable to produce our products in sufficient quantity, we will be unable to maintain and attract new customers. In addition, we cannot assure you that once we commence volume production we will attain yields at high throughput that will result in profitable gross margins or that we will not experience manufacturing problems which could result in delays in delivery of orders or product introductions.

**WE ARE DEPENDENT ON A SINGLE MANUFACTURING LINE.**

We currently manufacture our products on a single manufacturing line. If we experience any significant disruption in the operation of our manufacturing facility or a serious failure of a critical piece of equipment, we may be unable to supply microdisplays to our customers. For this reason, some OEMs may also be reluctant to commit a broad line of products to our microdisplays without a second production facility in place. However, we try to maintain product inventory to fill the requirements under such circumstances. Interruptions in our manufacturing could be caused by manufacturing equipment problems, the introduction of new equipment into the manufacturing process or delays in the delivery of new manufacturing equipment. Lead-time for delivery of manufacturing equipment can be extensive. No assurance can be given that we will not lose potential sales or be unable to meet production orders due to production interruptions in our manufacturing line. In order to meet the requirements of certain OEMs for multiple manufacturing sites, we will have to expend capital to secure additional sites and may not be able to manage multiple sites successfully.

**WE COULD EXPERIENCE MANUFACTURING INTERRUPTIONS, DELAYS, OR INEFFICIENCIES IF WE ARE UNABLE TO TIMELY AND RELIABLY PROCURE COMPONENTS FROM SINGLE-SOURCED SUPPLIERS.**

We maintain several single-source supplier relationships, either because alternative sources are not available or the relationship is advantageous due to performance, quality, support, delivery, capacity, or price considerations. If the supply of a critical single-source material or component is delayed or curtailed, we may not be able to ship the related product in desired quantities and in a timely manner. Even where alternative sources of supply are available, qualification of the alternative suppliers and establishment of reliable supplies could result in delays and a possible loss of sales, which could harm operating results.

**WE EXPECT TO DEPEND ON SEMICONDUCTOR CONTRACT MANUFACTURERS TO SUPPLY OUR SILICON INTEGRATED CIRCUITS AND OTHER SUPPLIERS OF KEY COMPONENTS, MATERIALS AND SERVICES.**

We do not manufacture the silicon integrated circuits on which we incorporate our OLED technology. Instead, we expect to provide the design layouts to semiconductor contract manufacturers who will manufacture the integrated circuits on silicon wafers. We also expect to depend on suppliers of a variety of other components and services, including circuit boards, graphic integrated circuits, passive components, materials and chemicals, and equipment support. Our inability to obtain sufficient quantities of high quality silicon integrated circuits or other necessary components, materials or services on a timely basis could result in manufacturing delays, increased costs and ultimately in reduced or delayed sales or lost orders which could materially and adversely affect our operating results.

**RISKS RELATED TO OUR INTELLECTUAL PROPERTY**

**WE RELY ON OUR LICENSE AGREEMENT WITH EASTMAN KODAK FOR THE DEVELOPMENT OF OUR PRODUCTS.**

We rely on our license agreement with Eastman Kodak for the development of our products, and the termination of this license, Eastman Kodak's licensing of its OLED technology to others for microdisplay applications, or the sublicensing by Eastman Kodak of our OLED technology to third parties, could have a material adverse impact on our business.

Our principal products under development utilize OLED technology that we license from Eastman Kodak. We rely upon Eastman Kodak to protect and enforce key patents held by Eastman Kodak, relating to OLED display technology. Eastman Kodak's patents expire at various times in the future. Our license with Eastman Kodak could terminate if we fail to perform any material term or covenant under the license agreement. Since our license from Eastman Kodak is non-exclusive, Eastman Kodak could also elect to become a competitor itself or to license OLED technology for microdisplay applications to others who have the potential to compete with us. The occurrence of any of these events could have a material adverse impact on our business.

**WE MAY NOT BE SUCCESSFUL IN PROTECTING OUR INTELLECTUAL PROPERTY AND PROPRIETARY RIGHTS.**

We rely on a combination of patents, trade secret protection, licensing agreements and other arrangements to establish and protect our proprietary technologies. If we fail to successfully enforce our intellectual property rights, our competitive position could suffer, which could harm our operating results. Patents may not be issued for our current patent applications, third parties may challenge, invalidate or circumvent any patent issued to us, unauthorized parties could obtain and use information that we regard as proprietary despite our efforts to protect our proprietary rights, rights granted under patents issued to us may not afford us any competitive advantage, others may independently develop similar technology or design around our patents, our technology may be available to licensees of Eastman Kodak, and protection of our intellectual property rights may be limited in certain foreign countries. We may be required to expend significant resources to monitor and police our intellectual property rights. Any future infringement or other claims or prosecutions related to our intellectual property could have a material adverse effect on our business. Any such claims, with or without merit, could be time consuming to defend, result in costly litigation, divert management's attention and resources, or require us to enter into royalty or licensing agreements. Such royalty or licensing agreements, if required, may not be available on terms acceptable to us, if at all. Protection of intellectual property has historically been a large yearly expense for eMagin. We have not been in a financial position to properly protect all of our intellectual property, and may not be in a position to properly protect our position or stay ahead of competition in new research and the protecting of the resulting intellectual property.

**RISKS RELATED TO THE MICRODISPLAY INDUSTRY**

**THE COMMERCIAL SUCCESS OF THE MICRODISPLAY INDUSTRY DEPENDS ON THE WIDESPREAD MARKET ACCEPTANCE OF MICRODISPLAY SYSTEMS PRODUCTS.**

The market for microdisplays is emerging. Our success will depend on consumer acceptance of microdisplays as well as the success of the commercialization of the microdisplay market. As an OEM supplier, our customer's products must also be well accepted. At present, it is difficult to assess or predict with any assurance the potential size, timing and viability of market opportunities for our technology in this market. The viewfinder microdisplay market sector is well established with entrenched competitors with whom we must compete.

**THE MICRODISPLAY SYSTEMS BUSINESS IS INTENSELY COMPETITIVE.**

We do business in intensely competitive markets that are characterized by rapid technological change, changes in market requirements and competition from both other suppliers and our potential OEM customers. Such markets are typically characterized by price erosion. This intense competition could result in pricing pressures, lower sales, reduced margins, and lower market share. Our ability to compete successfully will depend on a number of factors, both within and outside our control. We expect these factors to include the following:

- our success in designing, manufacturing and delivering expected new products, including those implementing new technologies on a timely basis;
  - our ability to address the needs of our customers and the quality of our customer services;
    - the quality, performance, reliability, features, ease of use and pricing of our products;
      - successful expansion of our manufacturing capabilities;
    - our efficiency of production, and ability to manufacture and ship products on time;
- the rate at which original equipment manufacturing customers incorporate our product solutions into their own products;
  - the market acceptance of our customers' products; and
  - product or technology introductions by our competitors.

Our competitive position could be damaged if one or more potential OEM customers decide to manufacture their own microdisplays, using OLED or alternate technologies. In addition, our customers may be reluctant to rely on a relatively small company such as eMagin for a critical component. We cannot assure you that we will be able to compete successfully against current and future competition, and the failure to do so would have a materially adverse effect upon our business, operating results and financial condition.

#### **THE DISPLAY INDUSTRY IS CYCLICAL.**

The display industry is characterized by fabrication facilities that require large capital expenditures and long lead times for supplies and the subsequent processing time, leading to frequent mismatches between supply and demand. The OLED microdisplay sector may experience overcapacity if and when all of the facilities presently in the planning stage come on line leading to a difficult market in which to sell our products.

#### **COMPETING PRODUCTS MAY GET TO MARKET SOONER THAN OURS.**

Our competitors are investing substantial resources in the development and manufacture of microdisplay systems using alternative technologies such as reflective liquid crystal displays (LCDs), LCD-on-Silicon ("LCOS") microdisplays, active matrix electroluminescence and scanning image systems, and transmissive active matrix LCDs. Our competitive position could be damaged if one or more of our competitors' products get to the market sooner than our products. We cannot assure you that our product will get to market ahead of our competitors or that we will be able to compete successfully against current and future competition. The failure to do so would have a materially adverse effect upon our business, operating results and financial condition.

#### **OUR COMPETITORS HAVE MANY ADVANTAGES OVER US.**

As the microdisplay market develops, we expect to experience intense competition from numerous domestic and foreign companies including well-established corporations possessing worldwide manufacturing and production facilities, greater name recognition, larger retail bases and significantly greater financial, technical, and marketing resources than us, as well as from emerging companies attempting to obtain a share of the various markets in which our microdisplay products have the potential to compete. We cannot assure you that we will be able to compete successfully against current and future competition, and the failure to do so would have a materially adverse effect upon our business, operating results and financial condition.

#### **OUR PRODUCTS ARE SUBJECT TO LENGTHY OEM DEVELOPMENT PERIODS.**

We plan to sell most of our microdisplays to OEMs who will incorporate them into products they sell. OEMs determine during their product development phase whether they will incorporate our products. The time elapsed between initial sampling of our products by OEMs, the custom design of our products to meet specific OEM product requirements, and the ultimate incorporation of our products into OEM consumer products is significant. If our products fail to meet our OEM customers' cost, performance or technical requirements or if unexpected technical



challenges arise in the integration of our products into OEM consumer products, our operating results could be significantly and adversely affected. Long delays in achieving customer qualification and incorporation of our products could adversely affect our business.

**OUR PRODUCTS WILL LIKELY EXPERIENCE RAPIDLY DECLINING UNIT PRICES.**

In the markets in which we expect to compete, prices of established products tend to decline significantly over time. In order to maintain our profit margins over the long term, we believe that we will need to continuously develop product enhancements and new technologies that will either slow price declines of our products or reduce the cost of producing and delivering our products. While we anticipate many opportunities to reduce production costs over time, there can be no assurance that these cost reduction plans will be successful nor is there any assurance that our costs can be reduced as quickly as any reduction in unit prices. We may also attempt to offset the anticipated decrease in our average selling price by introducing new products, increasing our sales volumes or adjusting our product mix. If we fail to do so, our results of operations would be materially and adversely affected.

## **RISKS RELATED TO OUR BUSINESS**

### **OUR SUCCESS DEPENDS ON ATTRACTING AND RETAINING HIGHLY SKILLED AND QUALIFIED TECHNICAL AND CONSULTING PERSONNEL.**

We must hire highly skilled technical personnel as employees and as independent contractors in order to develop our products. The competition for skilled technical employees is intense and we may not be able to retain or recruit such personnel. We must compete with companies that possess greater financial and other resources than we do, and that may be more attractive to potential employees and contractors. To be competitive, we may have to increase the compensation, bonuses, stock options and other fringe benefits offered to employees in order to attract and retain such personnel. The costs of retaining or attracting new personnel may have a materially adverse affect on our business and our operating results. In addition, difficulties in hiring and retaining technical personnel could delay the implementation of our business plan.

### **OUR SUCCESS DEPENDS IN A LARGE PART ON THE CONTINUING SERVICE OF KEY PERSONNEL.**

Changes in management could have an adverse effect on our business. We are dependent upon the active participation of several key management personnel, including Gary W. Jones, our chief executive officer. We will also need to recruit additional management in order to expand according to our business plan. The failure to attract and retain additional management or personnel could have a material adverse effect on our operating results and financial performance.

### **OUR BUSINESS DEPENDS ON NEW PRODUCTS AND TECHNOLOGIES.**

The market for our products is characterized by rapid changes in product, design and manufacturing process technologies. Our success depends to a large extent on our ability to develop and manufacture new products and technologies to match the varying requirements of different customers in order to establish a competitive position and become profitable. Furthermore, we must adopt our products and processes to technological changes and emerging industry standards and practices on a cost-effective and timely basis. Our failure to accomplish any of the above could harm our business and operating results.

### **WE GENERALLY DO NOT HAVE LONG-TERM CONTRACTS WITH OUR CUSTOMERS.**

Our business has primarily operated on the basis of short-term purchase orders. We are now receiving longer term purchase agreements and procurement contracts, but we cannot guarantee that we will continue to do so. Our current purchase agreements can be cancelled or revised without penalty, depending on the circumstances. We plan production on the basis of internally generated forecasts of demand. If we fail to accurately forecast demand for our products, operating results of our business may suffer and the value of your investment in our company may decline.

### **OUR BUSINESS STRATEGY MAY FAIL IF WE CANNOT CONTINUE TO FORM STRATEGIC RELATIONSHIPS WITH COMPANIES THAT MANUFACTURE AND USE PRODUCTS THAT COULD INCORPORATE OUR OLED-ON-SILICON TECHNOLOGY.**

Our prospects will be significantly affected by our ability to develop strategic alliances with OEMs for incorporation of our OLED-on-silicon technology into their products. While we intend to continue to establish strategic relationships with manufacturers of electronic consumer products, personal computers, chipmakers, lens makers, equipment makers, material suppliers and/or systems assemblers, there is no assurance that we will be able to continue to establish and maintain strategic relationships on commercially acceptable terms, or that the alliances we do enter in to will realize their objectives. Failure to do so would have a material adverse effect on our business.

**OUR BUSINESS DEPENDS TO SOME EXTENT ON INTERNATIONAL TRANSACTIONS.**

We purchase needed materials from companies located abroad and may be adversely affected by political and currency risk, as well as the additional costs of doing business with a foreign entity. Some customers in other countries have longer receivable periods or warranty periods. In addition, many of the OEMs that are the most likely long-term purchasers of our microdisplays are located abroad exposing us to additional political and currency risk. We may find it necessary to locate manufacturing facilities abroad to be closer to our customers which could expose us to various risks, including management of a multi-national organization, the complexities of complying with foreign laws and customs, political instability and the complexities of taxation in multiple jurisdictions.

**OUR BUSINESS MAY EXPOSE US TO PRODUCT LIABILITY CLAIMS.**

Our business may expose us to potential product liability claims. Although no such claims have been brought against us to date, and to our knowledge no such claim is threatened or likely, we may face liability to product users for damages resulting from the faulty design or manufacture of our products. While we plan to maintain product liability insurance coverage, there can be no assurance that product liability claims will not exceed coverage limits, fall outside the scope of such coverage, or that such insurance will continue to be available at commercially reasonable rates, if at all.

**OUR BUSINESS IS SUBJECT TO ENVIRONMENTAL REGULATIONS AND POSSIBLE LIABILITY ARISING FROM POTENTIAL EMPLOYEE CLAIMS OF EXPOSURE TO HARMFUL SUBSTANCES USED IN THE DEVELOPMENT AND MANUFACTURE OF OUR PRODUCTS.**

We are subject to various governmental regulations related to toxic, volatile, experimental and other hazardous chemicals used in our design and manufacturing process. Our failure to comply with these regulations could result in the imposition of fines or in the suspension or cessation of our operations. Compliance with these regulations could require us to acquire costly equipment or to incur other significant expenses. We develop, evaluate and utilize new chemical compounds in the manufacture of our products. While we attempt to ensure that our employees are protected from exposure to hazardous materials, we cannot assure you that potentially harmful exposure will not occur or that we will not be liable to employees as a result.

**RISKS RELATED TO OUR CURRENT FINANCING ARRANGEMENT**

**THERE ARE A LARGE NUMBER OF SHARES UNDERLYING OUR SECURED CONVERTIBLE NOTES AND WARRANTS THAT MAY BE AVAILABLE FOR FUTURE SALE AND THE SALE OF THESE SHARES MAY DEPRESS THE MARKET PRICE OF OUR COMMON STOCK.**

As of August 1, 2006, we had 100,522,492 shares of common stock issued and outstanding, senior secured convertible notes outstanding that may be converted into an estimated 23,038,454 shares of common stock and outstanding warrants to purchase 18,049,991 shares of common stock. In addition, as of August 1, 2006, we have outstanding (i) options to purchase 11,715,754 shares and (ii) warrants to purchase 19,354,471 shares of common stock. All of the shares issuable upon conversion of the secured convertible notes and upon exercise of our warrants and options, may be sold without restriction. Sales of significant amounts of common stock in the public market, or the perception that such sales may occur, could materially affect the market price of our common stock. These sales might also make it more difficult for us to sell equity or equity-related securities in the future at a time and price that we deem appropriate.

**THE ISSUANCE OF SHARES UPON CONVERSION OF THE SECURED CONVERTIBLE NOTES AND EXERCISE OF OUTSTANDING WARRANTS MAY CAUSE IMMEDIATE AND SUBSTANTIAL DILUTION TO OUR EXISTING STOCKHOLDERS.**

The issuance of shares upon conversion of the secured convertible notes and exercise of warrants may result in substantial dilution to the interests of other stockholders. Although certain of the selling stockholders may not convert their secured convertible notes and/or exercise their warrants if such conversion or exercise would cause such stockholder to own more than 9.99% of our outstanding common stock, this restriction does not prevent each of such selling stockholders from converting and/or exercising and selling some of its holdings and then converting the rest of its holdings. In this way, such selling stockholders could sell more than this limit while never holding more than this limit.

**IF WE ARE REQUIRED FOR ANY REASON TO REPAY OUR OUTSTANDING SECURED CONVERTIBLE NOTES, WE WOULD BE REQUIRED TO DEplete OUR WORKING CAPITAL, IF AVAILABLE, OR RAISE ADDITIONAL FUNDS. OUR FAILURE TO REPAY THE SECURED CONVERTIBLE NOTES, IF REQUIRED, COULD RESULT IN LEGAL ACTION AGAINST US, WHICH COULD REQUIRE THE SALE OF SUBSTANTIAL ASSETS.**

In July 2006, we entered into Note Purchase Agreements for the sale of an aggregate of \$5,970,000 principal amount of secured convertible notes. 50% of the aggregate principle amount of each secured convertible note matures 1 year after the date of issuance and the remaining 50% matures 18 months after the date of issuance, unless sooner converted into shares of our common stock. In addition, the secured convertible notes pay 6% interest per annum. Any event of default such as our failure to repay the principal or interest when due, our failure to issue shares of common

stock upon conversion by the holder, our failure to timely file a registration statement or have such registration statement declared effective, breach of any covenant, representation or warranty in the Note Purchase Agreements or related convertible note, the assignment or appointment of a receiver to control a substantial part of our property or business, the commencement of a bankruptcy, insolvency, reorganization or liquidation proceeding against our company and the delisting of our common stock could require the early repayment of the secured convertible notes, including a default interest rate of 12% on the outstanding principal balance of the notes if the default is not cured within the specified grace period. We anticipate that the full amount of the secured convertible notes will be converted into shares of our common stock, in accordance with the terms of the secured convertible notes. If we were required to repay the secured convertible notes, we would be required to use our limited working capital and raise additional funds. If we were unable to repay the notes when required, the note holders could commence legal action against us and foreclose on all of our assets to recover the amounts due. Any such action would require us to curtail or cease operations.

**IF AN EVENT OF DEFAULT OCCURS UNDER THE NOTE PURCHASE AGREEMENTS, SECURED CONVERTIBLE NOTES, WARRANTS, SECURITY AGREEMENT OR PATENT AND TRADEMARK SECURITY AGREEMENT, THE INVESTORS COULD TAKE POSSESSION OF ALL OUR GOODS, INVENTORY, CONTRACTUAL RIGHTS AND GENERAL INTANGIBLES, RECEIVABLES, DOCUMENTS, INSTRUMENTS, CHATTEL PAPER, AND INTELLECTUAL PROPERTY.**

In connection with the Note Purchase Agreements we entered into in July 2006, we executed a Security Agreement, a Patent and Trademark Security Agreement and a Lockbox Agreement, each in favor of the investors granting them a first priority security interest in all of our goods, inventory, contractual rights and general intangibles, receivables, documents, instruments, chattel paper, and intellectual property. The Security Agreement, Patent and Trademark Security Agreement and Lockbox Agreement state that if an event of default occurs under the Note Purchase Agreements, Secured Convertible Notes, Warrants, Security Agreement, Patent and Trademark Security Agreement or Lockbox Agreement, the investors have the right to take possession of the collateral, to operate our business using the collateral, and have the right to assign, sell, lease or otherwise dispose of and deliver all or any part of the collateral, at public or private sale or otherwise to satisfy our obligations under these agreements.

**RISKS RELATED TO OUR STOCK**

**WE HAVE A STAGGERED BOARD OF DIRECTORS AND OTHER ANTI-TAKEOVER PROVISIONS, WHICH COULD INHIBIT POTENTIAL INVESTORS OR DELAY OR PREVENT A CHANGE OF CONTROL THAT MAY FAVOR YOU.**

Our Board of Directors is divided into three classes and our Board members are elected for terms that are staggered. This could discourage the efforts by others to obtain control of the company. Some of the provisions of our certificate of incorporation, our bylaws and Delaware law could, together or separately, discourage potential acquisition proposals or delay or prevent a change in control. In particular, our board of directors is authorized to issue up to 10,000,000 shares of preferred stock (less any outstanding shares of preferred stock) with rights and privileges that might be senior to our common stock, without the consent of the holders of the common stock.

**FORWARD-LOOKING STATEMENTS**

We and our representatives may from time to time make written or oral statements that are "forward-looking," including statements contained in this prospectus and other filings with the Securities and Exchange Commission, reports to our stockholders and news releases. All statements that express expectations, estimates, forecasts or projections are forward-looking statements within the meaning of the Act. In addition, other written or oral statements which constitute forward-looking statements may be made by us or on our behalf. Words such as "expects," "anticipates," "intends," "plans," "believes," "seeks," "estimates," "projects," "forecasts," "may," "should," variations of such words and similar expressions are intended to identify such forward-looking statements. These statements are not guarantees of future performance and involve risks, uncertainties and assumptions which are difficult to predict. Therefore, actual outcomes and results may differ materially from what is expressed or forecasted in or suggested by such forward-looking statements. We undertake no obligation to update publicly any forward-looking statements, whether as a result of new information, future events or otherwise.

## USE OF PROCEEDS

This prospectus relates to shares of our common stock that may be offered and sold from time to time by the selling stockholders. We will not receive any proceeds from the sale of shares of common stock in this offering. Proceeds, if any, received on the exercise of currently outstanding warrants will be use for general working capital purposes.

## SELLING STOCKHOLDERS

The table below sets forth information concerning the resale of the shares of common stock by the selling stockholders. We will not receive any proceeds from the resale of the common stock by the selling stockholders. If the warrants are exercised by the payment of cash, however, we will receive proceeds from the exercise of the warrants. However, the warrants have a cashless exercise provision that allows the holder in certain circumstances to receive a reduced number of shares of our common stock, without paying the exercise price in cash. To the extent any of the warrants are exercised in this manner, we will not receive any additional proceeds from such exercise.

The following table also sets forth, as of the date of this prospectus, the name of each selling stockholder for whom we are registering shares of common stock for the future resale to the public pursuant to this prospectus, the number of shares of common stock beneficially owned by each selling stockholder, the number of shares of common stock that may be sold in this offering and the number of shares of common stock each selling stockholder will own after the offering, assuming they sell all of the shares offered.

Name	Shares Beneficially Owned Prior to the Offering		Total Shares Registered in this Prospectus	Shares Beneficially Owned After the Offering	
	Number**	Percent(1)		Number	Percent
Alexandra Global Master Fund Ltd. (2)	10,753,136	9.9%(17)	19,615,383	5,818,180	4.1%
Rainbow Gate Corporation (3)	8,048,212	7.60%	4,576,922	3,471,290	2.4%
Ginola Limited (4)	8,835,799	8.32%	5,230,769	3,605,030	2.5%
David Gottried (5)	3,426,714	3.34%(17)	1,634,614	1,792,100	1.3%
Iroquois Master Fund Ltd. (6)	1,307,691	1.28%(17)	1,307,691	- 0 -	0.0%
Nite Capital, LP (7)	1,580,418	1.55%(17)	1,307,691	272,727	*
HU Investments, LLC (8)	4,438,645	4.33%(17)	1,307,691	3,130,954	2.2%
Navacorp III, LLC (9)	1,815,348	1.77%(17)	1,307,691	507,657	*
	1,307,691	1.28%(17)	1,307,691	- 0 -	0.0%



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BTG Investments, LLC (10)					
David Kincade (11)	1,153,845	1.13%(17)	653,845	500,000	*
Thomas Wales (12)	1,284,921	1.22%(17)	326,921	958,000	1.0%
John Atherly (13)	564,575	*(17)	261,538	303,037	*
Olivier Prache (14)	434,467	*(17)	196,152	238,315	*
Stillwater LLC (15)	10,347,655	10.02%	1,923,077	8,424,579	5.91%
Roth Capital Partners, LLC (16)	130,769	*(17)	130,769	- 0 -	0.0%
	54,718,945	41.84%	41,088,445	23,203,689	15.3%

\* Less than 1%

\*\*The actual number of shares of common stock offered in this prospectus, and included in the registration statement of which this prospectus is a part, includes such additional number of shares of common stock as may be issued or issuable upon conversion of our senior secured convertible notes and the exercise of the warrants by reason of any stock split, stock dividend or similar transaction involving the common stock, in accordance with Rule 416 under the Securities Act of 1933, as amended. In addition, certain of the selling stockholders have contractually agreed to restrict their ability to convert their senior secured convertible notes and exercise their warrants and receive shares of our common stock such that the number of shares of common stock held by such selling stockholder in the aggregate and its affiliates after such conversion or exercise does not exceed 9.9% of the then issued and outstanding shares of common stock as determined in accordance with Section 13(d) of the Exchange Act. Accordingly, the number of shares of common stock set forth in the table for certain of the selling stockholders exceeds the number of shares of common stock that the selling stockholders could own beneficially at any given time through their ownership of the notes and warrants (see footnote (17) below). In that regard, the beneficial ownership of the common stock by the selling stockholder set forth in the table is not determined in accordance with Rule 13d-3 under the Securities Exchange Act of 1934, as amended.

(1) Based upon 100,522,492 shares of common stock issued and outstanding as of August 1, 2006 and does not assume the increase in the number of shares outstanding by reason of the conversion of notes or exercise of warrants pursuant to which the shares of common stock listed in this table may have been issued.

(2) Represents (i) 3,636,636 shares of common stock and 2,181,817 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 11,538,461 shares of common stock underlying a 6% senior secured convertible note and (iii) 8,076,922 shares of common stock issuable upon exercise of a common stock purchase warrant. Alexandra Investment Management, LLC, a Delaware limited liability company (“AIM”), serves as investment adviser to Alexandra Global Master Fund Ltd., a British Virgin Islands international business company (“Alexandra”). By reason of such relationship, AIM may be deemed to share dispositive power over the shares of common stock stated as beneficially owned by Alexandra. AIM disclaims beneficial ownership of such shares of common stock. Mr. Mikhail A. Filimonov is a managing member and the Chairman, Chief Executive Officer and Chief Investment Officer of AIM. By reason of such relationship, Filimonov may be deemed to share dispositive power over the shares of common stock stated as beneficially owned by Alexandra. Filimonov disclaims beneficial ownership of such shares of common stock. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(3) Represents (i) 2,628,417 shares of common stock and 842,873 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 2,692,307 shares of common stock underlying a 6% senior secured convertible note and (iii) 1,884,615 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Dr. Mortimer D. Sackler, the sole shareholder of the selling stockholder, may be deemed a control person, with voting and investment control, of the shares owned by the selling stockholder. Mortimer D.A. Sackler is the investment manager of Rainbow Gate and is the Sole Member, Manager and President of Stillwater LLC. Mortimer D.A. Sackler and Stillwater, LLC disclaim beneficial ownership of the shares owned by Rainbow Gate. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(4) Represents (i) 3,141,088 shares of common stock and 463,942 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 3,076,923 shares of common stock underlying a 6% senior secured convertible note and (iii) 2,153,846 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Jonathan G. White, Steven A. Meiklejohn and Joerg Fischer, each a Director of the selling stockholder, and Dr. Mortimer D. Sackler, the sole shareholder of the selling stockholder, may be deemed control persons, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(5) Represents (i) 1,342,100 shares of common stock and 450,000 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 961,538 shares of common stock underlying a 6% senior secured convertible note and (iii) 673,076 shares of common stock issuable upon exercise of a common stock purchase warrant. The selling stockholder has notified us that he is not a broker-dealer and/or affiliated with broker-dealers.

(6) Represents (i) 769,230 shares of common stock underlying a 6% senior secured convertible note and (ii) 538,461 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Joshua Silverman may be deemed a control person, with voting and investment control, of the shares owned by such entity. Mr. Silverman disclaims beneficial ownership over the shares owned by such entity. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(7) Represents (i) 272,727 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 769,230 shares of common stock underlying a 6%

senior secured convertible note and (iii) 538,461 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Keith Goodman, the manager of the general partner of the selling stockholder, may be deemed a control person, with voting and investment control, of the shares owned by such entity. Keith Goodman disclaims beneficial ownership of the shares owned by the selling stockholder. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(8) Represents (i) 2,476,409 shares of common stock and 654,545 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus (ii) 769,230 shares of common stock underlying a 6% senior secured convertible note and (iii) 538,461 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Hank Uberoi may be deemed a control person, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(9) Represents (i) 507,657 shares of common stock underlying warrants owned by the managing member of the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 769,230 shares of common stock underlying a 6% senior secured convertible note and (iii) 538,461 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Paul Cronson may be deemed a control person, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are an affiliate of one or more broker-dealers. The broker-dealer that is an affiliate of Navacorp III, LLC was not involved in the purchase of the shares of the notes or warrants, and will not be involved in the sale of the shares being registered in this prospectus.

(10) Represents (i) 769,230 shares of common stock underlying a 6% senior secured convertible note and (ii) 538,461 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Biron Roth and Gordon Roth may be deemed control persons, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(11) Represents (i) 500,000 shares of common stock underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 384,615 shares of common stock underlying a 6% senior secured convertible note and (iii) 269,230 shares of common stock issuable upon exercise of a common stock purchase warrant. The selling stockholder has notified us that he is not a broker-dealer and/or affiliated with broker-dealers.

(12) Represents (i) 618,000 shares of common stock and 340,000 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 192,307 shares of common stock underlying a 6% senior secured convertible note and (iii) 134,614 shares of common stock issuable upon exercise of a common stock purchase warrant. The selling stockholder has notified us that he is not a broker-dealer and/or affiliated with broker-dealers.

(13) Represents (i) 303,037 shares of common stock owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 153,846 shares of common stock underlying a 6% senior secured convertible note and (iii) 107,692 shares of common stock issuable upon exercise of a common stock purchase warrant. The selling stockholder has notified us that he is not a broker-dealer and/or affiliated with broker-dealers.

(14) Represents (i) 1,000 shares of common stock and 237,315 shares underlying options owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, (ii) 115,384 shares of common stock underlying a 6% senior secured convertible note and (iii) 80,768 shares of common stock issuable upon exercise of a common stock purchase warrant. The selling stockholder has notified us that he is not a broker-dealer and/or affiliated with broker-dealers.

(15) Represents (i) 7,606,819 shares of common stock and 817,760 shares underlying warrants owned by the selling stockholder prior to the July 2006 private placement which are not being registered in this prospectus, and (ii) 1,923,077 shares of our common stock issuable upon exercise of a common stock purchase warrant at a price equal to \$.26 per share. In accordance with rule 13d-3 under the securities exchange act of 1934, Mortimer D.A. Sackler, the Sole Member, Manager and President, may be deemed a control person, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are not broker-dealers and/or affiliates of broker-dealers.

(16) Represents (i) 76,923 shares of common stock underlying a 6% senior secured convertible note and (ii) 53,846 shares of common stock issuable upon exercise of a common stock purchase warrant. In accordance with rule 13d-3 under the securities exchange act of 1934, Byron C. Roth, Chief Executive Officer and Gordon J. Roth, Chief Financial Officer, may be deemed control persons, with voting and investment control, of the shares owned by such entity. The selling stockholder has notified us that they are a broker-dealer and were involved in the sale of the shares being registered in this prospectus.

(17) This selling stockholder has contractually agreed not to convert notes or exercise warrants to the extent such conversion or exercise would cause this selling stockholder together with its affiliates, to have acquired a number of shares of common stock which would exceed 9.9% of the then-outstanding common stock, other than by virtue of the ownership of securities or rights to acquire securities that have limitations on the holders' right to convert, exercise or purchase similar to the limitation set forth in the notes and warrants.

**PLAN OF DISTRIBUTION**

Each selling stockholder of the common stock and any of their pledgees, assignees and successors-in-interest may, from time to time, sell any or all of their shares of common stock on the trading market or any other stock exchange, market or trading facility on which the shares are traded or in private transactions. These sales may be at fixed or negotiated prices. A selling stockholder may use any one or more of the following methods when selling shares:

- ordinary brokerage transactions and transactions in which the broker-dealer solicits purchasers;
- block trades in which the broker-dealer will attempt to sell the shares as agent but may position and resell a portion of the block as principal to facilitate the transaction;
  - purchases by a broker-dealer as principal and resale by the broker-dealer for its account;
  - an exchange distribution in accordance with the rules of the applicable exchange;
- privately negotiated transactions;

- settlement of short sales entered into after the effective date of the registration statement of which this prospectus is a part;
- broker-dealers may agree with the selling stockholders to sell a specified number of such shares at a stipulated price per share;
- through the writing or settlement of options or other hedging transactions, whether through an options exchange or otherwise;
  - any other method permitted pursuant to applicable law; or
  - a combination of any such methods of sale.

The selling stockholders may also sell shares under Rule 144 under the Securities Act of 1933, as amended, if available, rather than under this prospectus.

Broker-dealers engaged by the selling stockholders may arrange for other brokers-dealers to participate in sales. Broker-dealers may receive commissions or discounts from the selling stockholders (or, if any broker-dealer acts as agent for the purchaser of shares, from the purchaser) in amounts to be negotiated, but, except as set forth in a supplement to this Prospectus, in the case of an agency transaction not in excess of a customary brokerage commission in compliance with NASDR Rule 2440; and in the case of a principal transaction a markup or markdown in compliance with NASDR IM-2440.

In connection with the sale of the common stock or interests therein, the selling stockholders may enter into hedging transactions with broker-dealers or other financial institutions, which may in turn engage in short sales of the common stock in the course of hedging the positions they assume. The selling stockholders may also sell shares of the common stock short and deliver these securities to close out their short positions, or loan or pledge the common stock to broker-dealers that in turn may sell these securities. The selling stockholders may also enter into option or other transactions with broker-dealers or other financial institutions or the creation of one or more derivative securities which require the delivery to such broker-dealer or other financial institution of shares offered by this prospectus, which shares such broker-dealer or other financial institution may resell pursuant to this prospectus (as supplemented or amended to reflect such transaction).

The selling stockholders and any broker-dealers or agents that are involved in selling the shares may be deemed to be “underwriters” within the meaning of the Securities Act in connection with such sales. In such event, any commissions received by such broker-dealers or agents and any profit on the resale of the shares purchased by them may be deemed to be underwriting commissions or discounts under the Securities Act. Each selling stockholder has informed us that it does not have any written or oral agreement or understanding, directly or indirectly, with any person to distribute the common stock. In no event shall any broker-dealer receive fees, commissions and markups which, in the aggregate, would exceed eight percent (8%).

We are required to pay certain fees and expenses incurred by us incident to the registration of the shares. We have agreed to indemnify the selling stockholders against certain losses, claims, damages and liabilities, including liabilities under the Securities Act.

Because selling stockholders may be deemed to be “underwriters” within the meaning of the Securities Act, they will be subject to the prospectus delivery requirements of the Securities Act. In addition, any securities covered by this prospectus which qualify for sale pursuant to Rule 144 under the Securities Act may be sold under Rule 144 rather than under this prospectus. Each selling stockholder has advised us that they have not entered into any written or oral agreements, understandings or arrangements with any underwriter or broker-dealer regarding the sale of the resale shares. There is no underwriter or coordinating broker acting in connection with the proposed sale of the resale shares

by the selling stockholders.

We agreed to keep this prospectus effective until the earlier of (i) the date on which the shares may be resold by the selling stockholders without registration and without regard to any volume limitations by reason of Rule 144(e) under the Securities Act or any other rule of similar effect or (ii) all of the shares have been sold pursuant to the prospectus or Rule 144 under the Securities Act or any other rule of similar effect. The resale shares will be sold only through registered or licensed brokers or dealers if required under applicable state securities laws. In addition, in certain states, the resale shares may not be sold unless they have been registered or qualified for sale in the applicable state or an exemption from the registration or qualification requirement is available and is complied with.

Under applicable rules and regulations under the Exchange Act, any person engaged in the distribution of the resale shares may not simultaneously engage in market making activities with respect to the common stock for the applicable restricted period, as defined in Regulation M, prior to the commencement of the distribution. In addition, the selling stockholders will be subject to applicable provisions of the Exchange Act and the rules and regulations there under, including Regulation M, which may limit the timing of purchases and sales of shares of the common stock by the selling stockholders or any other person. We will make copies of this prospectus available to the selling stockholders and have informed them of the need to deliver a copy of this prospectus to each purchaser at or prior to the time of the sale.

## **DESCRIPTION OF SECURITIES BEING REGISTERED**

### **COMMON STOCK**

We are authorized to issue up to 200,000,000 shares of common stock, par value \$.001. As of August 1, 2006, there were 100,522,492 shares of common stock outstanding. Holders of the common stock are entitled to one vote per share on all matters to be voted upon by the stockholders. Holders of common stock are entitled to receive ratably such dividends, if any, as may be declared by the Board of Directors out of funds legally available therefore. Upon the liquidation, dissolution, or winding up of our company, the holders of common stock are entitled to share ratably in all of our assets which are legally available for distribution after payment of all debts and other liabilities and liquidation preferences of any outstanding preferred stock. Holders of common stock have no preemptive, subscription, redemption or conversion rights. The outstanding shares of common stock are validly issued, fully paid and nonassessable.

We have engaged Continental Stock Transfer & Trust Company of New York, as independent transfer agent and registrar.

### **PREFERRED STOCK**

We are authorized to issued up to 10,000,000 shares of preferred stock. The shares of preferred stock may be issued in series, and shall have such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions providing for the issuance of such stock adopted from time to time by the board of directors. The board of directors is expressly vested with the authority to determine and fix in the resolution or resolutions providing for the issuances of preferred stock the voting powers, designations, preferences and rights, and the qualifications, limitations or restrictions thereof, of each such series to the full extent now or hereafter permitted by the laws of the State of Delaware.

### **6% SENIOR SECURED CONVERTIBLE NOTES**

On July 21, 2006, we entered into several Note Purchase Agreements to sell to certain qualified institutional buyers and accredited investors up to \$5,970,000 in principal amount 6% Senior Secured Convertible Notes Due 2007-2008. 50% of the aggregate principle amount of each Note matures 1 year after the date of issuance and the remaining 50% matures 18 months after the date of issuance. The Notes pay 6% interest quarterly, commencing on September 1, 2006, and are convertible into shares of common stock at a conversion price equal to \$0.26 per share. In addition, we have the right to redeem all of the outstanding principal and accrued and unpaid interest due under the Notes upon certain conditions, including, but not limited to, that no event of default has occurred or is continuing and that there is an effective registration statement registering the shares underlying the Notes. In addition, \$20,000 of commissions payable in connection with the private placement were paid by us through the issuance of a \$20,000 principal amount of 6% senior secured convertible note, together with warrants to purchase 53,846 shares of our common stock.

### **WARRANTS**

On July 21, 2006, in connection with the Purchase Agreements, we sold and issued to the investors warrants to purchase 16,073,067 shares of our common stock. The Warrants are exercisable into shares of our common stock until July 21, 2011 at an exercise price of \$0.36 per share. In addition, on July 21, 2006 we issued a warrant to purchase 1,923,077 shares of our common stock at a price equal to \$.26 per share to Stillwater LLC as further described in this prospectus under the heading "July 2006 Note Purchase Agreements". The investors may exercise the Warrants on a



cashless basis beginning one year after the date of issuance if the shares of common stock underlying the Warrants are not then registered pursuant to an effective registration statement or if an event of default, as defined in the Notes, has occurred and is continuing.

This prospectus covers the resale by the investors of the above-referenced common stock underlying the secured convertible notes and common stock underlying the warrants.

### **LEGAL MATTERS**

Sichenzia Ross Friedman Ference LLP, New York, New York will issue an opinion with respect to the validity of the shares of common stock being offered hereby. In the past, a member of Sichenzia Ross Friedman Ference LLP, Richard Friedman, has received shares of common stock from us as consideration for legal services performed on our behalf. We are not registering any shares of common stock in this prospectus on behalf of Sichenzia Ross Friedman Ference LLP or Richard Friedman.

### **EXPERTS**

Eisner LLP, Independent Registered Public Accountants, have audited, as set forth in their report thereon incorporated by reference herein, our financial statements as of December 31, 2005 and 2004 and for each of the three years in the period ended December 31, 2005, which included an explanatory paragraph expressing substantial doubt in our ability to continue as a going concern. The financial statements referred to above are incorporated by reference in this prospectus with reliance upon the auditors' opinion based on their expertise in accounting and auditing.

**PART II****INFORMATION NOT REQUIRED IN THE PROSPECTUS****ITEM 14. OTHER EXPENSES OF ISSUANCE AND DISTRIBUTION**

The following table sets forth an itemization of all estimated expenses, all of which we will pay, in connection with the issuance and distribution of the securities being registered:

**NATURE OF EXPENSE AMOUNT**

SEC Registration fee	\$ 1,187.04
Accounting fees and expenses	15,000.00 *
Legal fees and expenses	131,000.00 *
Misc.	812.96
<b>Total</b>	<b>\$ 148,000.00 *</b>

\*Estimated

**ITEM 15. INDEMNIFICATION OF DIRECTORS AND OFFICERS**

Our Articles of Incorporation, as amended and restated, provide to the fullest extent permitted by Section 145 of the General Corporation Law of the State of Delaware, that our directors or officers shall not be personally liable to us or our shareholders for damages for breach of such director's or officer's fiduciary duty. The effect of this provision of our Articles of Incorporation, as amended and restated, is to eliminate our rights and our shareholders (through shareholders' derivative suits on behalf of our company) to recover damages against a director or officer for breach of the fiduciary duty of care as a director or officer (including breaches resulting from negligent or grossly negligent behavior), except under certain situations defined by statute. We believe that the iNT> year comprised of twelve 30-day months.

Each series of Exchange Notes will initially be evidenced by one or more global notes deposited with a custodian for, and registered in the name of, Cede & Co., as nominee of The Depository Trust Company ( DTC ). Except as described herein, beneficial interests in the global notes will be shown on, and transfers thereof will be effected only through, records maintained by DTC and its direct and indirect participants. We do not intend to list the Exchange Notes on any national securities exchange or include the Exchange Notes in any automated quotation systems.

Payments of principal of and interest on the Exchange Notes issued in book-entry form will be made as described below under Book-Entry Delivery and Form Depository Procedures. Payments of principal of and interest on the Exchange Notes issued in definitive form, if any, will be made as described below under Book-Entry Delivery and Form Payment and Paying Agents.

Interest payable on any interest payment date or the maturity date will be the amount of interest accrued from, and including, the next preceding interest payment date in respect of which interest has been paid or duly provided for (or from and including the most recent date on which interest has been paid on the corresponding series of Original Notes accepted in the Exchange Offers, if no interest has been paid or duly provided for with respect to the Exchange Notes) to, but not including, such interest payment date or maturity date, as the case may be. If an interest payment date or the maturity date falls on a day that is not a Business Day, the related payment of principal or interest will be made on the next succeeding Business Day as if made on the date the payment was due. No interest will accrue on such payment for the period from and after such interest payment date or the maturity date, as the case may be, to the date

of such payment on the next succeeding Business Day. The term Business Day means any day other than a Saturday, a Sunday or any other day on which banking institutions in New York, New York or the city where the corporate trust business of the Trustee with respect to the Indentures is principally administered at any particular time are required or authorized to close or be closed.

We may, without notice to or consent of the holders or beneficial owners of the Exchange Notes, issue additional notes of a particular series having the same ranking, interest rate, maturity and/or other terms as a series of Exchange Notes offered hereby (except for the offering price, date of issuance and, if applicable, the initial interest payment date); provided, that if such additional notes are not fungible with such Exchange Notes for U.S. federal income tax purposes, the additional notes will have a separate CUSIP number. Any such additional notes issued will be considered part of the same series of Notes under the Indentures as the applicable Exchange Notes offered hereby.

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The Indentures do not contain any provisions that would limit our ability to incur additional unsecured indebtedness or require the maintenance of financial ratios or specified levels of net worth or liquidity.

**Optional Redemption**

***General***

At any time and from time to time, the Notes of each series are redeemable, in whole or in part, at our option, at a redemption price equal to the greater of:

100% of the principal amount of the Notes to be redeemed; and

as determined by the Quotation Agent (as defined below), the sum of the present values of the remaining scheduled payments of interest and principal thereon (exclusive of interest accrued and unpaid to, but not including, the date of redemption) discounted to the date of redemption on a semiannual basis, assuming a 360-day year consisting of twelve 30-day months, at the Treasury Rate (as defined below) plus 50 basis points with respect to the 2019 Notes, 30 basis points with respect to the 2022 Notes, 25 basis points with respect to the 2025 Notes, 25 basis points with respect to the 2026 Notes and 35 basis points with respect to the 2045 Notes,

plus, in either case, accrued and unpaid interest to, but not including, the date of redemption.

Notwithstanding the foregoing, if (i) the 2022 Notes are redeemed on or after October 15, 2021 (the date that is three months prior to their maturity date), the 2022 Notes will be redeemed at a redemption price equal to 100% of the principal amount of the 2022 Notes to be redeemed plus accrued and unpaid interest to, but not including, the date of redemption, (ii) the 2025 Notes are redeemed on or after November 1, 2024 (the date that is three months prior to their maturity date), the 2025 Notes will be redeemed at a redemption price equal to 100% of the principal amount of the 2025 Notes to be redeemed plus accrued and unpaid interest to, but not including, the date of redemption, (iii) the 2026 Notes are redeemed on or after October 15, 2025 (the date that is three months prior to their maturity date), the 2026 Notes will be redeemed at a redemption price equal to 100% of the principal amount of the 2026 Notes to be redeemed plus accrued and unpaid interest to, but not including, the date of redemption and (iv) the 2045 Notes are redeemed on or after August 1, 2044 (the date that is six months prior to their maturity date), the 2045 Notes will be redeemed at a redemption price equal to 100% of the principal amount of the 2045 Notes to be redeemed plus accrued and unpaid interest to, but not including, the date of redemption. The Indentures provide that, with respect to any redemption, we will notify the Trustee of the redemption price promptly after the calculation and that the Trustee will not be responsible for such calculation.

For purposes of determining the redemption price, the following definitions will apply:

*Comparable Treasury Issue* means the United States Treasury security or securities selected by the Quotation Agent as having an actual or interpolated maturity comparable to the remaining term of the Notes to be redeemed that would be utilized, at the time of selection and in accordance with customary financial practice, in pricing new issues of corporate debt securities of a comparable maturity to the remaining term of such Notes.

*Comparable Treasury Price* means, with respect to any redemption date, (A) the arithmetic average of the four Reference Treasury Dealer Quotations for such redemption date, after excluding the highest and lowest such

Reference Treasury Dealer Quotations, or (B) if the Quotation Agent obtains fewer than four such Reference Treasury Dealer Quotations, the arithmetic average of all such quotations for such redemption date.

*Primary Treasury Dealer* means a primary U.S. Government securities dealer in The City of New York.

*Quotation Agent* means one of the Reference Treasury Dealers appointed by us; provided, however, that if such Reference Treasury Dealer ceases to be a Primary Treasury Dealer, we will substitute another Primary Treasury Dealer.

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*Reference Treasury Dealer* means each of (i) Citigroup Global Markets Inc. and Wells Fargo Securities, LLC or their respective affiliates that are Primary Treasury Dealers, and, in each case, their respective successors; and (ii) two other Primary Treasury Dealers selected by us; provided, however, that if any of the foregoing or their affiliates shall cease to be a Primary Treasury Dealer, we will substitute therefor another Primary Treasury Dealer.

*Reference Treasury Dealer Quotations* means, with respect to each Reference Treasury Dealer and any redemption date, the arithmetic average, as determined by the Quotation Agent, of the bid and asked prices for the applicable Comparable Treasury Issue (expressed in each case as a percentage of its principal amount) quoted in writing to the Quotation Agent by such Reference Treasury Dealer at 3:30 p.m. New York City time on the third Business Day preceding such redemption date.

*Treasury Rate* means, with respect to any redemption date, the rate per annum equal to: (1) the yield, under the heading that represents the average for the immediately preceding week, appearing in the most recently published statistical release designated H.15 or any successor publication that is published weekly by the Board of Governors of the Federal Reserve System and that establishes yields on actively traded United States Treasury securities adjusted to constant maturity under the caption Treasury Constant Maturities, for the maturity corresponding to the Comparable Treasury Issue; provided that, if no maturity is within three months before or after the remaining term of the notes to be redeemed, yields for the two published maturities most closely corresponding to the Comparable Treasury Issue shall be determined and the Treasury Rate shall be interpolated or extrapolated from those yields on a straight-line basis, rounding to the nearest month; or (2) if such release (or any successor release) is not published during the week preceding the calculation date or does not contain such yields, the rate per annum equal to the semiannual equivalent yield to maturity or interpolated (on a day count basis) of the applicable Comparable Treasury Issue, assuming a price for such Comparable Treasury Issue (expressed as a percentage of its principal amount) equal to the Comparable Treasury Price for such redemption date. The Treasury Rate shall be calculated on the third Business Day preceding the redemption date.

***Selection and Notice of Redemption***

The notice of redemption will state the amount of Notes to be redeemed. In the event that we choose to redeem less than all of the applicable Notes, selection of the Notes for redemption will be made in accordance with DTC's procedures.

No Notes of a principal amount of \$2,000 or less shall be redeemed in part. Notice of redemption will be sent electronically or mailed by first-class mail at least 30 but not more than 60 days before the redemption date to each holder of Notes to be redeemed at its registered address (with written notice to the Trustee no less than 15 days (or such shorter period as agreed by the Trustee) prior to the sending of such redemption notice). Once notice of redemption is sent, the Notes called for redemption will become irrevocably due and payable on the redemption date at the redemption price. A notice of redemption may not be conditional.

On and after the redemption date, interest will cease to accrue on Notes or portions thereof called for redemption as long as we have deposited with the paying agent funds in satisfaction of the applicable redemption price. Additionally, at any time, we may repurchase Notes in the open market and may hold such Notes or surrender such Notes to the Trustee for cancellation in accordance with its applicable procedures.

**Purchase of Notes upon a Change of Control Triggering Event**

If a Change of Control Triggering Event (as defined below) occurs with respect to a series of Notes, unless we have exercised our option to redeem the Notes of such series as described above by giving notice of such redemption to the

holders thereof, we will be required to make an offer (the Change of Control Offer ) to each such holder to repurchase all or any part (equal to \$2,000 or any integral multiple of \$1,000 in excess thereof) of that holder's Notes of such series on the terms set forth in such Notes. In the Change of Control Offer, we will be

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required to offer payment in cash equal to 101% of the principal amount of the Notes of the applicable series repurchased, plus accrued and unpaid interest, if any, on the Notes repurchased up to, but not including, the date of repurchase (the Change of Control Payment ). Within 30 days following any Change of Control Triggering Event with respect to a series of Notes or, at our option, prior to any Change of Control (as defined below), but after public announcement of the transaction that constitutes or may constitute the Change of Control, a notice will be mailed to holders of the Notes of the applicable series with a copy to the Trustee describing the transaction that constitutes or may constitute the Change of Control Triggering Event and offering to repurchase the Notes of the applicable series on the date specified in the notice, which date will be no earlier than 30 days and no later than 60 days from the date such notice is mailed (or with respect to global notes, to the extent permitted or required by applicable DTC procedures or regulations, sent electronically) or, if the notice is mailed or sent prior to the Change of Control, no earlier than 30 days and no later than 60 days from the date on which the Change of Control Triggering Event occurs (the Change of Control Payment Date ). The notice will, if mailed or sent prior to the date of consummation of the Change of Control, state that the offer to purchase is conditioned on the Change of Control Triggering Event occurring on or prior to the Change of Control Payment Date.

On the Change of Control Payment Date, we will, to the extent lawful:

accept for payment all Notes or portions of Notes properly tendered pursuant to the Change of Control Offer;

deposit with the paying agent (or, if we are acting as our own paying agent, segregate and hold in trust) by 10:00 a.m. Eastern Time an amount equal to the Change of Control Payment in respect of all Notes or portions of Notes properly tendered; and

deliver or cause to be delivered to the Trustee the Notes properly accepted together with an officer's certificate stating the aggregate principal amount of Notes or portions of Notes being repurchased.

We will publicly announce the results of the Change of Control Offer on or as soon as possible after the date of purchase. Neither the Trustee nor any paying agent shall be responsible for monitoring our rating status, making any request upon any of the Rating Agencies (as defined below) or any Substitute Rating Agency (as defined below), or determining whether any Rating Event has occurred.

Except as described above, the Indentures do not contain provisions that permit holders to require us to purchase or redeem the Notes in the event of a takeover, recapitalization or similar transaction.

Our ability to pay cash to the holders of Notes following the occurrence of a Change of Control Triggering Event may be limited by our then-existing financial resources. Therefore, sufficient funds may not be available when necessary to make any required repurchases.

The definition of Change of Control includes a phrase relating to the direct or indirect sale, lease, transfer, conveyance or other disposition of all or substantially all of our and our subsidiaries' assets taken as a whole. Although there is a limited body of case law interpreting the phrase substantially all, there is no precise established definition of the phrase under applicable law. Accordingly, the ability of a holder of Notes to require us to repurchase such holder's Notes as a result of a sale, lease, transfer, conveyance or other disposition of less than all of our and our subsidiaries' assets taken as a whole to another person or group may be uncertain.



We will not be required to make a Change of Control Offer upon the occurrence of a Change of Control Triggering Event if a third party makes such an offer in the manner, at the time and otherwise in compliance with the requirements for an offer made by us and the third party purchases all Notes properly tendered and not withdrawn under its offer. In addition, we will not repurchase any Notes if there has occurred and is continuing on the Change of Control Payment Date an Event of Default under the Indentures, other than a default in the payment of the Change of Control Payment upon a Change of Control Triggering Event.

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We will comply in all material respects with the requirements of Rule 14e-1 under the Exchange Act and any other securities laws and regulations thereunder to the extent those laws and regulations are applicable in connection with the repurchase of the Notes as a result of a Change of Control Triggering Event. To the extent that the provisions of any such securities laws or regulations conflict with the Change of Control Offer provisions of the Notes, we will comply with those securities laws and regulations and will not be deemed to have breached our obligations under the Change of Control Offer provisions of the Notes by virtue of any such conflict.

For purposes of the Change of Control Offer provisions of the Notes, the following terms will be applicable:

*Change of Control* means the occurrence of any of the following:

- (a) the consummation of any transaction (including, without limitation, any merger or consolidation) the result of which is that any person (as that term is used in Section 13(d) of the Exchange Act) (other than us or one of our subsidiaries) becomes the beneficial owner (as defined in Rules 13d-3 and 13d-5 under the Exchange Act), directly or indirectly, of more than 50% of our Voting Stock (as defined below) or other Voting Stock into which our Voting Stock is reclassified, consolidated, exchanged or changed, measured by voting power rather than number of shares;
- (b) the direct or indirect sale, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or a series of related transactions, of all or substantially all of our assets and the assets of our subsidiaries, taken as a whole, to one or more persons (as that term is used in Section 13(d)(3) of the Exchange Act) (other than to us or one of our subsidiaries);
- (c) we consolidate with, or merge with or into, any person (as that term is used in Section 13(d) of the Exchange Act) or any such person consolidates with, or merges with or into, us, in either case, pursuant to a transaction in which any of our outstanding Voting Stock or the Voting Stock of such other person is converted into or exchanged for cash, securities or other property, other than pursuant to a transaction in which shares of our Voting Stock outstanding immediately prior to the transaction constitute, or are converted into or exchanged for, a majority of the Voting Stock of the surviving person immediately after giving effect to such transaction;
- (d) the adoption of a plan relating to our liquidation or dissolution; or
- (e) the first day on which a majority of the members of our board of directors are not Continuing Directors (as defined below).

Notwithstanding the foregoing, a transaction will not be deemed to involve a Change of Control if (i) we become a direct or indirect wholly owned subsidiary of a holding company and (ii) the direct or indirect holders of the Voting Stock of such holding company immediately following that transaction are substantially the same as the holders of our Voting Stock immediately prior to that transaction.

*Change of Control Triggering Event*, with respect to a series of Notes, means the occurrence of both (1) a Change of Control and (2) a Rating Event (as defined below) with respect to such series.

*Continuing Director* means, as of any date of determination, any member of our board of directors who (1) was a member of such board of directors on the Issue Date, (2) was nominated for election to such board of directors with the approval of a committee of the board of directors consisting of a majority of independent Continuing Directors or (3) was nominated for election, elected or appointed to such board of directors with the approval of a majority of the Continuing Directors who were members of such board of directors at the time of such nomination, election or appointment (either by a specific vote or by approval of our proxy statement in which such member was named as a nominee for election as a director, without objection to such nomination).

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*Investment Grade Rating* means a rating equal to or higher than Baa3 (or the equivalent) by Moody's and BBB- (or the equivalent) by S&P, or, if applicable, the equivalent investment grade credit rating from any Substitute Rating Agency (as defined below) selected by us.

*Moody's* means Moody's Investors Service, Inc., or any successor thereto.

*Rating Agencies* means (1) each of Moody's and S&P and (2) if any of Moody's and S&P ceases to rate the Notes or fails to make a rating of the Notes publicly available for reasons outside of our control, a Substitute Rating Agency in lieu thereof.

*Rating Event*, with respect to a series of Notes, means the rating on the Notes of such series is lowered by each of the Rating Agencies and the Notes of such series are rated below an Investment Grade Rating by each of the Rating Agencies on any day during the period commencing on the earlier of (i) the occurrence of the Change of Control and (ii) the first public announcement by us of any Change of Control and ending 60 days following consummation of such Change of Control (which period will be extended so long as the rating of the Notes of such series is under publicly announced consideration for a possible downgrade by any of the Rating Agencies); provided that a Rating Event will not be deemed to have occurred in respect of a particular Change of Control (and thus will not be deemed a Rating Event for purposes of the definition of Change of Control Triggering Event) if each Rating Agency making the reduction in rating does not publicly announce or confirm or inform the Trustee in writing at our request that the reduction was the result, in whole or in part, of any event or circumstance comprised of or arising as a result of, or in respect of, the Change of Control (whether or not the applicable Change of Control has occurred at the time of the Rating Event).

*S&P* means Standard & Poor's Financial Services, LLC, a subsidiary of S&P Global Inc., or any successor thereto.

*Substitute Rating Agency* means a nationally recognized statistical rating organization within the meaning of Section 3(a)(62) under the Exchange Act selected by us (as certified by a resolution of our board of directors).

*Voting Stock* means, with respect to any specified person (as that term is used in Section 13(d) of the Exchange Act) as of any date, the capital stock of such person that is at the time entitled to vote generally in the election of the board of directors of such person.

Our credit agreements provide, and future credit agreements or other agreements relating to any debt to which we become a party may provide, that certain events relating to a change in the control of the Company would constitute a default thereunder, either directly or as a result of a breach of a covenant. If we experience such a change of control event that triggers a default under our credit agreements or such other agreements, we could seek a waiver of such default or seek to refinance our credit agreements or the indebtedness under such other agreements. In the event we do not obtain such a waiver or refinance our credit agreements or the indebtedness under such other agreements, such default could result in amounts outstanding under our credit agreements or such other agreements being declared due and payable, which could have a material adverse effect on us.

## **Certain Covenants**

The Indentures contain the following covenants:

### ***Limitation on Liens***

We will not, and will not permit any of our Restricted Subsidiaries to, issue, incur, create, assume, guarantee or permit to exist any Indebtedness secured by a Lien on any Principal Property, or shares of capital stock of any Restricted Subsidiary, whether owned on the Issue Date or thereafter acquired, unless we contemporaneously

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secure the Notes equally and ratably with (or prior to) such Indebtedness; provided that any Lien created for the benefit of the holders of the Notes pursuant to this provision shall be automatically and unconditionally released and discharged upon release and discharge of the Lien that resulted in such provision becoming applicable.

Notwithstanding the foregoing, we are not required to secure the Notes if the Lien consists of either: (a) Permitted Liens; or (b) Liens other than Permitted Liens, provided that the aggregate amount of all Indebtedness secured by Liens other than Permitted Liens does not exceed 20% of Consolidated Net Tangible Assets calculated as of the date of the creation or incurrence of such Lien.

***Limitation on Sale and Lease-Back Transactions***

We and our Restricted Subsidiaries shall not enter into any Sale/Leaseback Transaction with respect to any Principal Property unless (a) we or such Restricted Subsidiary would be entitled to create a Lien on such Principal Property securing Indebtedness in an amount equal to the Attributable Indebtedness with respect to such Sale/Leaseback Transaction without securing the Notes then outstanding pursuant to the provisions described above under **Limitation on Liens** or (b) we, within six months from the effective date of such Sale/Leaseback Transaction, apply an amount equal to the Attributable Indebtedness with respect to such Sale/Leaseback Transaction to the voluntary defeasance or retirement of the Notes or other Indebtedness ranking *pari passu* with the Notes (excluding retirements as a result of conversions or pursuant to mandatory sinking fund or mandatory prepayment provisions or by payment at maturity); provided that the foregoing will not prevent us or any Restricted Subsidiary from (x) entering into any Sale/Leaseback Transaction involving a lease with a term of less than three years or (y) entering into any Sale/Leaseback Transaction between a Restricted Subsidiary and us or between Restricted Subsidiaries.

***SEC Reports***

We will file with the Trustee, within 15 days after we are required to file the same with the SEC, after giving effect to any grace period provided by Rule 12b-25 under the Exchange Act, copies of the annual reports and of the information, documents and other reports (or copies of such portions of any of the foregoing as the SEC may prescribe) that we may be required to file with the SEC pursuant to Section 13 or Section 15(d) of the Exchange Act. If we are not required to file information, documents or reports pursuant to either of those sections, then we will file with the Trustee and the SEC, in accordance with rules and regulations prescribed from time to time by the SEC and within 15 days after such information, documents or reports are due with respect to a non-accelerated filer and after giving effect to any grace period provided by Rule 12b-25 under the Exchange Act, such information, documents or reports that may be required pursuant to Section 13 of the Exchange Act in respect of a security listed and registered on a national securities exchange as may be prescribed from time to time in such rules and regulations.

Notwithstanding the foregoing, (a) we will be deemed to have furnished such information, documents or reports referred to above to the Trustee if we have filed such information, documents or reports with the SEC via the EDGAR filing system (or any successor system) or, if at any time we are no longer subject to reporting under Section 13 or 15(d) of the Exchange Act and are not permitted to file such information, documents or reports with the SEC, if we post such information, documents or reports on our publicly available website and (b) if at any time we are no longer subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act, we will not be deemed to have failed to comply with any of our obligations under this covenant until 30 days after the date any information, document or report hereunder is required to be filed with the Trustee. The Trustee shall not be obligated to monitor or confirm, on a continuing basis or otherwise, our compliance with the covenants or with respect to any reports or other documents filed with the SEC or EDGAR or any website under the Indentures.



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***Limitation on Mergers and Other Transactions***

Except as otherwise set forth in the Indentures, we may not merge or consolidate with or into any other person, in a transaction in which we are not the surviving corporation, or sell, convey, transfer, lease or otherwise dispose of all or substantially all of the properties and assets of us and our subsidiaries, taken as a whole, to any person, unless:

the successor or transferee is a U.S. corporation, limited liability company, partnership, trust or other entity;

the successor or transferee assumes our obligations on the Notes and under the Indentures pursuant to a supplemental indenture in form reasonably satisfactory to the Trustee;

immediately after giving effect to the transaction and treating our obligations in connection with or as a result of such transaction as having been incurred as of the time of such transaction, no default or event of default under the Indentures shall have occurred and be continuing; and

an officer's certificate and an opinion of counsel have been delivered to the Trustee in connection with the foregoing.

In the event of the above transaction, if there is a successor or transferee, then the successor or transferee will expressly assume all of our obligations under the Indentures and automatically be substituted for us in the Indentures and as issuer of the Notes and may exercise every right and power of ours under the Indentures with the same effect as if such successor or transferee had been named in our place in the Indentures; provided, however, that the predecessor company will not be relieved of the obligation to pay principal and interest on the Notes except in the case of a sale of all of the assets of us and our subsidiaries.

***Certain Definitions***

*Attributable Indebtedness* in respect of a Sale/Leaseback Transaction means, as of the time of determination, (a) if the obligation in respect of such Sale/Leaseback Transaction is a Capital Lease Obligation, the amount of such obligation determined in accordance with GAAP and included in the financial statements of the lessee or (b) if the obligation in respect of such Sale/Leaseback Transaction is not a Capital Lease Obligation, the total net amount of rent required to be paid by the lessee under such lease during the remaining term thereof (including any period for which the lease has been extended), discounted from the respective due dates thereof to such determination date at the rate per annum borne by the weighted average interest rate per annum borne by the Notes then outstanding under the Indentures compounded semiannually.

*Capital Lease Obligation* means, at the time any determination is to be made, the amount of the liability in respect of a capital lease that would at that time be required to be capitalized on a balance sheet prepared in accordance with GAAP.

*Consolidated Net Tangible Assets* means, as of any date of determination, the sum of the amounts that would appear on our consolidated balance sheet for the total assets (less accumulated depletion, depreciation or amortization, allowances for doubtful receivables, other applicable reserves and other properly deductible items) of us and our subsidiaries, determined on a consolidated basis in accordance with GAAP, after giving effect to purchase accounting



and after deducting therefrom, to the extent included in total assets, in each case as determined on a consolidated basis in accordance with GAAP (without duplication): (i) the aggregate amount of liabilities of us and our subsidiaries which may properly be classified as current liabilities (including taxes accrued as estimated); (ii) current Indebtedness and current maturities of long-term Indebtedness; (iii) minority interests in our subsidiaries held by persons other than us or one of our wholly owned subsidiaries; and (iv) unamortized debt discount and expenses and other unamortized deferred charges, goodwill, patents, trademarks, service marks, trade names, copyrights, licenses, organization or developmental expenses and other intangible items.

*GAAP* means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other entity as have been approved by a significant segment of the accounting profession, which are in effect from time to time.

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*Hedging Obligations* means, with respect to any person, the obligations of such person under: (1) interest rate swap agreements (whether from fixed to floating or from floating to fixed), interest rate cap agreements and interest rate collar agreements; (2) other agreements or arrangements designed to manage interest rates or interest rate risk; and (3) other agreements or arrangements designed to protect such person against fluctuations in currency exchange rates or commodity prices.

*Indebtedness* means, with respect to any person, any indebtedness of such person, whether or not contingent (without duplication):

- (a) in respect of borrowed money;
- (b) evidenced by bonds, notes, debentures or similar instruments;
- (c) in respect of letters of credit, banker's acceptances or other similar instruments or credit transactions (including reimbursement obligations with respect thereto), other than obligations with respect of letters of credit securing obligations (other than obligations described in clauses (a)-(b), (d) or (e)) entered into in the ordinary course of business to the extent such letters of credit are not drawn upon or, if and to the extent such letters of credit are drawn upon, such drawing is reimbursed no later than the third business day following receipt of a demand for reimbursement following payment on the letter of credit;
- (d) representing Capital Lease Obligations;
- (e) representing the balance deferred and unpaid of the purchase price of any property, except any such balance that constitutes an accrued expense or trade payable; or
- (f) representing any Hedging Obligations, if and to the extent any of the preceding items, other than letters of credit and Hedging Obligations, would appear as a liability upon a balance sheet of such person prepared in accordance with GAAP. In addition, the term *Indebtedness* includes all *Indebtedness* of others secured by a Lien on any asset of such person, whether or not such *Indebtedness* is assumed by such person, and, to the extent not otherwise included, the guarantee by such person of any *Indebtedness* of any other person or any liability of any person, whether or not contingent and whether or not it appears on the balance sheet of such person. Notwithstanding anything to the contrary in the foregoing, the term *Indebtedness* excludes (x) any indebtedness of the Company or any subsidiary of the Company to the Company or another subsidiary of the Company and (y) any guarantee by the Company or any subsidiary of the Company of indebtedness of the Company or any subsidiary of the Company.

*Issue Date* means the date on which the Original Notes were issued, or June 2, 2017.

*Lien* means, with respect to any asset, any mortgage, lien, pledge, charge, security interest or encumbrance of any kind in respect of such asset, whether or not filed, recorded or otherwise perfected under applicable law, including any

conditional sale or other title retention agreement, any lease in the nature thereof, any option or other agreement to sell or give a security interest in, and any filing of or agreement to give any financing statement under, the Uniform Commercial Code (or equivalent statutes) of any jurisdiction; provided that in no event shall an operating lease be deemed to constitute a Lien.

*Permitted Lien* means, with respect to any person,

- (a) pledges or deposits by such person under workers' compensation laws, unemployment insurance laws or similar legislation, or good faith deposits in connection with bids, tenders, contracts (including government contracts, but excluding contracts for the payment of Indebtedness) or leases to which such person is a party, or deposits to secure public or statutory obligations of such person or deposits of cash or United States government bonds to secure performance, surety or appeal bonds to which such person is a party or which are otherwise required of such person, or deposits as security for contested taxes or import duties or for the payment of rent or other obligations of like nature, in each case incurred in the ordinary course of business;

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- (b) Liens imposed by law, such as carriers , warehousemen s, laborers , materialmen s, landlords , vendors , workmen s, operators , producers and mechanics Liens, in each case for sums not yet due or being contested in good faith by appropriate proceedings;
- (c) Liens for property taxes, assessments and other governmental charges or levies not yet delinquent or that are being contested in good faith by appropriate proceedings;
- (d) survey exceptions, encumbrances, easements, defects, irregularities or deficiencies in title to easements, or reservations of or with respect to, or rights of others for or with respect to, licenses, rights-of-way, sewers, electric and other utility lines and usages, telegraph and telephone lines, pipelines, surface use, operation of equipment, permits, servitudes and other similar matters, or zoning or other restrictions as to the use of real property or Liens incidental to the conduct of the business of such person or to the ownership of its properties that, in all such cases, were not incurred in connection with Indebtedness and that do not in the aggregate materially adversely affect the value of said properties or materially impair their use in the operation of the business of such person;
- (e) Liens existing on or provided for under the terms of agreements existing on February 1, 1996;
- (f) Liens on property at the time we or any of our subsidiaries acquired the property or the entity owning such property, including any acquisition by means of a merger or consolidation with or into us; provided, however, that any such Lien may not extend to any other property owned by us or any of our subsidiaries;
- (g) Liens securing Hedging Obligations so long as such Hedging Obligations are of the type customarily entered into in connection with, and are entered into for the purpose of, limiting risk;
- (h) Liens on accounts receivable or inventory to secure working capital or revolving credit Indebtedness incurred in the ordinary course of business;
- (i) Purchase Money Liens;
- (j) Liens securing only Indebtedness of one of our wholly owned subsidiaries to us or one or more other wholly owned subsidiaries;
- (k) Liens on property or shares of stock of another person at the time such other person becomes one of our subsidiaries; provided, however, that such Liens are not created, incurred or assumed in connection with, or in contemplation of, such other person becoming such a subsidiary;

- (l) Liens created, assumed or existing in connection with a tax-free financing;
- (m) Liens resulting from the deposit of funds or evidences of Indebtedness in trust for the purpose of defeasing our Indebtedness or that of our subsidiaries;
- (n) legal or equitable encumbrances deemed to exist by reason of negative pledges or the existence of any litigation or other legal proceeding and any related *lis pendens* filing (excluding any attachment prior to judgment, judgment Lien or attachment Lien in aid of execution on a judgment);
- (o) rights of a common owner of any interest in property held by such person;
- (p) Liens placed upon any real property now owned or hereafter acquired by us or any of our subsidiaries securing Indebtedness in an amount up to 80% of the fair market value of such real property; and
- (q) Liens to secure any refinancing, refunding, extension, renewal or replacement (or successive refinancings, refundings, extensions, renewals or replacements), as a whole, or in part, of any Indebtedness secured by any Lien referred to in the foregoing clauses (e) through (l) and (p); provided, however, that (i) such new Lien shall be limited to all or part of the same property that

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secured the original Lien (plus improvements on such property) and (ii) the Indebtedness secured by such Lien at such time is not increased to any amount greater than the sum of (A) the outstanding principal amount or, if greater, committed amount of the Indebtedness described under clauses (e) through (l) and (p) at the time the original Lien became a Permitted Lien under the Indentures and (B) an amount necessary to pay any fees and expenses, including premiums, related to such refinancing, refunding, extension, renewal or replacement.

*Principal Property* means any manufacturing plant or manufacturing facility, located within the United States of America (other than its territories and possessions), owned or leased by us or any of our Restricted Subsidiaries, unless, in the opinion of our board of directors, such plant, facility or property is not of material importance to the total business conducted by us and our Restricted Subsidiaries as an entirety.

*Purchase Money Lien* means a Lien on property securing Indebtedness incurred by the Company or any of its subsidiaries to provide funds for all or any portion of the cost of acquiring, constructing, altering, expanding, improving or repairing such property or assets used in connection with such property.

*Restricted Subsidiary* means, at any time, any of our subsidiaries (a) substantially all the property of which is located, or substantially all of the business of which is carried on, within the United States of America (other than its territories or possessions) and (b) that owns or leases a Principal Property or that, in the event of a Sale/Leaseback Transaction, will own or lease a Principal Property.

*Sale/Leaseback Transaction* means an arrangement relating to Principal Property owned on the Issue Date or thereafter acquired whereby we or any of our Restricted Subsidiaries transfers such Principal Property to a person and we or any of our Restricted Subsidiaries leases it from such person.

**Events of Default**

Event of Default means, with respect to any series of Notes, any of the following:

default in the payment of any interest on any Notes of that series when it becomes due and payable, and continuance of that default for a period of 30 days;

default in the payment of principal of, or premium on, any Notes of that series when due and payable;

failure on our part to comply with the covenant described under Limitation on Mergers and Other Transactions ;

default in the performance or breach of any other covenant or warranty by us in the Indentures or any supplemental indenture with respect to such series (other than a covenant or warranty that has been included in the Indentures solely for the benefit of a series of debt securities other than that series), which default continues uncured for a period of 90 days after (1) we receive written notice from the Trustee or (2) we and the Trustee receive written notice from the holders of not less than 25% in aggregate principal amount of the outstanding Notes of that series as provided in the Indentures;

certain events of bankruptcy, insolvency or reorganization of our company or our significant subsidiaries;

failure to make the required payment in connection with a Change of Control Triggering Event when due and payable in accordance with the terms of the Indentures; and

default in the performance or breach by us of any of the covenants described under Certain Covenants Limitation on Liens, Certain Covenants Limitation on Sale and Lease-Back Transactions and Certain Covenants SEC Reports, which default continues uncured for a period of 90 days after (1) we receive written notice from the Trustee or (2) we and the Trustee receive written notice from the holders of not less than 25% in aggregate principal amount of the outstanding Notes of that series as provided in the Indentures.

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We will promptly deliver to the Trustee written notice of any event that, with the giving of notice and the lapse of time, would become a covenant Event of Default, along with a description of the status and what action we are taking or propose to take with respect to such Event of Default.

No Event of Default with respect to a particular series of Notes (except as to certain events of bankruptcy, insolvency or reorganization) necessarily constitutes an Event of Default with respect to any other series of Notes. The occurrence of an Event of Default may constitute an event of default under our bank credit agreements in existence from time to time. In addition, the occurrence of certain Events of Default or an acceleration under the Indentures may constitute an event of default under certain of our other indebtedness outstanding from time to time.

If an Event of Default (other than an Event of Default resulting from certain events of bankruptcy, insolvency or reorganization of our company) with respect to Notes of any series at the time outstanding occurs and is continuing, then the Trustee or the holders of not less than 25% in aggregate principal amount of the outstanding Notes of that series may, by a notice in writing to us (and to the Trustee if given by the holders), declare to be due and payable immediately the principal (or, if the Notes of that series are discount securities, that portion of the principal amount as may be specified in the terms of that series) of, and accrued and unpaid interest, if any, on all Notes of that series. In the case of an Event of Default resulting from certain events of bankruptcy, insolvency or reorganization of our company, the principal (or such specified amount) of and accrued and unpaid interest, if any, on all outstanding Notes will become and be immediately due and payable without any declaration or other act on the part of the Trustee or any holder of outstanding Notes. At any time after a declaration of acceleration with respect to Notes of any series has been made, the holders of a majority in aggregate principal amount of the outstanding Notes of that series may rescind and annul the acceleration if the rescission and annulment would not conflict with any judgment or decree already rendered and if all Events of Default with respect to that series, other than the non-payment of principal and interest, if any, with respect to Notes of that series that has become due and payable solely because of the acceleration, have been cured or waived and all sums paid or advanced by the Trustee and the reasonable compensation expenses and disbursements of the Trustee and its agents and counsel have been paid as provided in the Indentures.

The Indentures provide that the Trustee will be under no obligation to exercise any of its rights or powers under the Indentures at the request of any holder of outstanding Notes, unless the Trustee receives security or indemnity satisfactory to it against any loss, liability or expense. Subject to certain rights of the Trustee, the holders of a majority in principal amount of the outstanding Notes of any series will have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee with respect to the debt securities of that series.

No holder of any Notes of any series will have any right to institute any proceeding, judicial or otherwise, with respect to the Indentures or for the appointment of a receiver or trustee, or for any remedy under the applicable Indenture, unless:

that holder has previously given to the Trustee written notice of a continuing Event of Default with respect to Notes of that series; and

the holders of at least 25% in aggregate principal amount of the outstanding Notes of that series have made written request, and offered security or indemnity satisfactory to the Trustee, to institute the proceeding as trustee, and the Trustee has not received from the holders of a majority in aggregate principal amount of the outstanding Notes of that series a direction inconsistent with that request and has failed to institute the



proceeding within 60 days.

Notwithstanding the foregoing, the holder of any Notes will have an absolute and unconditional right to receive payment of the principal of, and premium and any interest on, such Notes on or after the due dates expressed in such Notes and to institute suit for the enforcement of such payment.

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The Indentures require us, within 120 days after the end of our fiscal year, to furnish to the Trustee a statement as to compliance with the Indentures. The Indentures provide that the Trustee may withhold notice to the holders of debt securities of any series of any default or Event of Default (except in payment on any debt securities of that series) with respect to Notes of that series if it in good faith determines that withholding notice is in the interest of the holders of those Notes.

**Modification and Waiver**

We may amend or modify the Indentures without the consent of any holder of Notes of the series affected by the modifications or amendments in order to:

cure any ambiguity, defect or inconsistency;

conform the text of the Indentures, including any supplemental indenture, or the Notes to any corresponding provision of this Description of the Notes ;

provide for the issuance of additional Notes;

provide for the assumption of our obligations in the case of a merger or consolidation and our discharge upon such assumption provided that the provision under Limitation on Mergers and Other Transactions of the Indentures is complied with;

add covenants or make any change that would provide any additional rights or benefits to the holders of the Notes;

add guarantees with respect to the Notes;

provide for uncertificated Notes in addition to or in place of certificated Notes;

secure the Notes;

add or appoint a successor or separate trustee;

make any change that does not adversely affect the rights of any holder of Notes in any material respect, as evidenced by an officer's certificate; or

obtain or maintain the qualification of the Indentures under the Trust Indenture Act.

Other amendments and modifications of the Indentures or the Notes issued may be made with the consent of the holders of at least a majority of the aggregate principal amount of the outstanding Notes of the affected series, and our compliance with any provision of the Indentures with respect to the Notes may be waived by written notice to the Trustee by the holders of a majority of the aggregate principal amount of the outstanding Notes of the affected series. However, no modification or amendment may, without the consent of the holder of each outstanding Notes of the affected series:

reduce the principal amount, any premium or change the stated maturity of any Notes or alter or waive any of the provisions with respect to the redemption or repurchase of the Notes;

change the place of payment or currency in which principal, any premium or interest is paid;

impair the right to institute suit for the enforcement of any payment on the Notes;

waive a payment default with respect to the Notes;

reduce the interest rate or extend the time for payment of interest on the Notes;

make any change to the amendment and modification provisions in the Indentures; or

reduce the percentage in principal amount outstanding of Notes, the consent of the holders of which is required for any of the foregoing modifications or otherwise necessary to modify, supplement or amend the applicable Indenture or to waive any past default.

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Except for certain specified provisions, the holders of at least a majority in principal amount of the outstanding Notes of an affected series may, on behalf of the holders of all Notes of such series, waive our compliance with provisions of the Indentures. Prior to the acceleration of the maturity of the Notes of any series pursuant to the terms of the Indentures, the holders of a majority in aggregate principal amount of the outstanding Notes of such series may, on behalf of the holders of all the Notes of such series, waive any past default under the Indentures with respect to such Notes and its consequences, except (i) a default with respect to such series in the payment of the principal of, or premium or any interest on, the Notes of such series or (ii) a default or Event of Default in respect of a covenant or provision that cannot be modified or amended without the consent of all of the holders of the outstanding Notes of the affected series.

**Defeasance of Debt Securities and Certain Covenants in Certain Circumstances**

*Legal Defeasance.* The Indentures provide that, in certain circumstances, we may be discharged from any and all obligations in respect of the Notes of any series (except for certain obligations to register the transfer or exchange of Notes, to replace stolen, lost or mutilated Notes, and to maintain paying agencies and certain provisions relating to the treatment of funds held by paying agents). We will be so discharged upon the deposit with the Trustee, in trust, of money and/or U.S. government obligations that, through the payment of interest and principal in accordance with their terms, will provide money in an amount sufficient in the written opinion of a nationally recognized firm of independent public accountants, a nationally recognized investment bank or a nationally recognized appraisal firm to pay and discharge each installment of principal, premium and interest in accordance with the terms of the Indenture and the Notes of that series.

This discharge may occur only if, among other things, we have delivered to the Trustee an opinion of counsel stating that we have received from, or there has been published by, the United States Internal Revenue Service a ruling or, since the date of execution of the Indentures, there has been a change in the applicable United States federal income tax law, in either case to the effect that, and based thereon such opinion shall confirm that, the beneficial owners of the Notes of the applicable series will not recognize income, gain or loss for U.S. federal income tax purposes as a result of the deposit, defeasance and discharge and will be subject to U.S. federal income tax on the same amounts and in the same manner and at the same times as would have been the case if the deposit, defeasance and discharge had not occurred.

*Defeasance of Certain Covenants.* The Indentures provide that, upon compliance with certain conditions, we may be released from our obligation to comply with certain covenants set forth in the Indentures and any supplemental indenture, and any failure to comply with those covenants will not constitute a default or an Event of Default with respect to the Notes of the applicable series, or Covenant Defeasance. If we exercise our Covenant Defeasance option with respect to a series of Notes, payment of such Notes may not be accelerated because of an Event of Default related to certain events of bankruptcy, insolvency or reorganization of our significant subsidiaries.

The conditions include:

depositing with the Trustee money and/or U.S. government obligations that, through the payment of interest and principal in accordance with their terms, will provide money in an amount sufficient, in the written opinion of a nationally recognized firm of independent public accountants, a nationally recognized investment bank or a nationally recognized appraisal firm, to pay and discharge each installment of principal, premium and interest in accordance with the terms of the Indenture and the Notes of the applicable series; and

delivering to the Trustee an opinion of counsel to the effect that the beneficial owners of the Notes of the applicable series will not recognize income, gain or loss for U.S. federal income tax purposes as a result of the deposit and related Covenant Defeasance and will be subject to U.S. federal income tax on the same amounts and in the same manner and at the same times as would have been the case if the deposit and related Covenant Defeasance had not occurred.

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**Book-Entry Delivery and Form**

***General***

The Original Notes of each series were issued in registered, global form in minimum denominations of \$2,000 and integral multiples of \$1,000 in excess thereof except for the Original 2019 Notes, which were issued in minimum denominations of \$1,000 and integral multiples of \$1,000 in excess thereof. The Original Notes of each series are currently represented by one or more permanent global certificates (the Original Global Notes ) in definitive, fully registered form without interest coupons.

The Original Global Notes were deposited upon issuance with the Trustee as custodian for DTC and registered in the name of Cede & Co. (DTC's partnership nominee) or another DTC nominee for credit to an account of a direct or indirect participant in DTC.

The Exchange Notes issued in exchange for the Original Notes of the corresponding series will be represented by one or more permanent global certificates (the New Global Notes ) in definitive, fully registered form without interest coupons and will be deposited upon issuance with the Trustee as custodian for DTC and registered in the name of Cede & Co. (DTC's partnership nominee) for credit to an account of a direct or indirect participant in DTC, as described below under Depository Procedures.

Except as set forth below, the New Global Notes may be transferred, in whole and not in part, only to another nominee of DTC or to a successor of DTC or its nominee. Beneficial interests in the New Global Notes may not be exchanged for notes in certificated form except in the limited circumstances described below under Exchange of Book-Entry Notes for Certificated Notes.

Transfers of beneficial interests in the New Global Notes will be subject to the applicable rules and procedures of DTC and its direct or indirect participants (including, if applicable, those of Euroclear System ( Euroclear ) and Clearstream Banking S.A. ( Clearstream )), which may change from time to time.

***Depository Procedures***

The following description of the operations and procedures of DTC, Euroclear and Clearstream is provided solely as a matter of convenience. These operations and procedures are solely within the control of DTC and are subject to changes by it. We and the Trustee do not take any responsibility for these operations and procedures and urge investors to contact DTC or its participants directly to discuss these matters.

DTC has advised us that it is a limited-purpose trust company created to hold securities for its participating organizations, referred to as participants, and to facilitate the clearance and settlement of transactions in those securities among DTC's participants through electronic book-entry changes in accounts of its participants, thereby eliminating the need for physical movement of securities certificates. DTC's participants include securities brokers and dealers, banks, trust companies, clearing corporations and certain other organizations some of whom (and/or their representatives) own DTC. Access to DTC's system is also available to other entities such as banks, brokers, dealers, trust companies and clearing corporations that clear through or maintain a custodial relationship with a DTC participant, either directly or indirectly, which entities are referred to as indirect participants. Persons who are not DTC participants may beneficially own securities held by or on behalf of DTC only through participants or indirect participants. DTC has no knowledge of the identity of beneficial owners of securities held by or on behalf of DTC. DTC's records reflect only the identity of its participants to whose accounts securities are credited. The ownership interests and transfer of ownership interests of each beneficial owner of each security held by or on behalf of DTC are

recorded on the records of DTC's participants and indirect participants through the procedures established by DTC:

upon deposit of the New Global Notes, DTC will credit the accounts of its participants designated by the dealer managers with portions of the principal amount of the New Global Notes; and

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ownership of such interests in the New Global Notes will be shown on, and the transfer of ownership of these interests will be effected only through, records maintained by DTC (with respect to the participants) or by the participants and the indirect participants (with respect to other owners of beneficial interests in the New Global Notes).

Investors in the New Global Notes who are participants in DTC's system may hold their interests therein directly through DTC. Investors in the New Global Notes who are not participants may hold their interests therein indirectly through organizations which are participants in such system. Euroclear and Clearstream may hold interests in the New Global Notes on behalf of their participants through customers' securities accounts in their respective names on the books of their respective depositories, which are Morgan Guaranty Trust Company of New York, Brussels office, as operator of Euroclear, and Citibank, N.A., as operator of Clearstream. All interests in the New Global Notes, including those held through Euroclear or Clearstream, will be subject to the procedures and requirements of DTC. Those interests held through Euroclear or Clearstream may also be subject to the procedures and requirements of such systems. The laws of some states require that certain persons take physical delivery of certificates evidencing securities they own. Consequently, the ability to transfer beneficial interests in the New Global Notes to such persons will be limited to that extent. Because DTC can act only on behalf of its participants, which in turn act on behalf of indirect participants, the ability of beneficial owners of interests in the New Global Notes to pledge such interests to persons or entities that do not participate in the DTC system, or otherwise take actions in respect of such interests, may be affected by the lack of a physical certificate evidencing such interests.

Except as described below, owners of interests in the New Global Notes will not have notes registered in their names, will not receive physical delivery of notes in certificated form and will not be considered the registered owners or holders thereof under the Indentures for any purpose.

Payments in respect of the principal of, and interest and premium, if any, on, a New Global Note registered in the name of DTC or its nominee will be payable to DTC in its capacity as the registered holder under the Indentures. Under the terms of the Indentures, we and the Trustee will treat the persons in whose names the Exchange Notes, including the New Global Notes, are registered as the owners thereof for the purpose of receiving such payments and for any and all other purposes.

Consequently, neither we nor the Trustee nor any of our respective agents has or will have any responsibility or liability for:

any aspect of DTC's records or any participant's or indirect participant's records relating to or payments made on account of beneficial ownership interests in the New Global Notes, or for maintaining, supervising or reviewing any of DTC's records or any participant's or indirect participant's records relating to the beneficial ownership interests in the New Global Notes; or

any other matter relating to the actions and practices of DTC or any of its participants or indirect participants.

DTC has advised us that its current practice, upon receipt of any payment in respect of securities such as the Exchange Notes (including principal and interest), is to credit the accounts of the relevant participants with the payment on the payment date unless DTC has reason to believe it will not receive payment on such payment date. The account of each relevant participant is credited with an amount proportionate to the amount of its interest in the principal amount of the New Global Notes as shown on the records of DTC. Payments by the participants and the indirect participants to the beneficial owners of the Exchange Notes will be governed by standing instructions and customary practices, and



will be the responsibility of the participants or the indirect participants and will not be the responsibility of DTC, the Trustee or us. Neither we nor the Trustee will be liable for any delay by DTC or any of its participants in identifying the beneficial owners of the Exchange Notes, and we and the Trustee may conclusively rely on and will be protected in relying on instructions from DTC or its nominee for all purposes.

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Transfers between participants in DTC will be effected in accordance with DTC's procedures, and will be settled in same-day funds. Transfers between participants in Euroclear and Clearstream will be effected in accordance with their respective rules and operating procedures. Cross-market transfers between the participants in DTC, on the one hand, and Euroclear or Clearstream participants, on the other hand, will be effected through DTC in accordance with DTC's rules on behalf of Euroclear or Clearstream, as the case may be, by its respective depository; however, such cross-market transactions will require delivery of instructions to Euroclear or Clearstream, as the case may be, by the counterparty in such system in accordance with the rules and procedures and within the established deadlines (Brussels time) of such system. Euroclear or Clearstream, as the case may be, will, if the transaction meets its settlement requirements, deliver instructions to its respective depository to take action to effect final settlement on its behalf by delivering or receiving interests in the relevant Global Note in DTC, and making or receiving payment in accordance with normal procedures for same-day funds settlement applicable to DTC. Euroclear participants and Clearstream participants may not deliver instructions directly to the depositories for Euroclear or Clearstream.

DTC has advised us that it will take any action permitted to be taken by a holder of notes only at the direction of one or more participants to whose account DTC has credited the interests in the Global Notes and only in respect of such portion of the aggregate principal amount of the Exchange Notes as to which such participant or participants has or have given such direction.

Although DTC, Euroclear and Clearstream have agreed to the procedures described above to facilitate transfers of interests in the Global Notes among participants in DTC, Euroclear and Clearstream, they are under no obligation to perform or to continue to perform those procedures, and those procedures may be discontinued or changed at any time. Neither we nor the Trustee will have any responsibility for the performance by DTC, Euroclear or Clearstream or their respective participants or indirect participants of their respective obligations under the rules and procedures governing their operations.

***Exchange of Book-Entry Notes for Certificated Notes***

The New Global Notes are exchangeable for certificated notes in definitive, fully registered form without interest coupons only in the following limited circumstances:

DTC (1) notifies us that it is unwilling or unable to continue as depository for the New Global Notes and we fail to appoint a successor depository within 90 days or (2) has ceased to be a clearing agency registered under the Exchange Act;

we notify the Trustee in writing that we have elected to cause the issuance of certificated notes under the Indentures; or

an Event of Default with respect to the Exchange Notes represented by such New Global Note shall have occurred and be continuing.

In all cases, certificated notes delivered in exchange for any New Global Notes or beneficial interests therein will be registered in the names, and issued in any approved denominations, requested by or on behalf of DTC (in accordance with its customary procedures).

***Payment and Paying Agents***

Payments on the New Global Notes will be made in U.S. dollars by wire transfer. If we issue definitive notes, the holders of definitive notes will be able to receive payments of principal of and interest on their notes at the office of our paying agent. Payment of principal of a definitive note may be made only against surrender of the note to our paying agent. We have the option, however, of making payments of interest by wire transfer or by mailing checks to the address of the holder appearing in the register of note holders maintained by the registrar.

We will make any required interest payments to the person in whose name a note is registered at the close of business on the record date for the interest payment.

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The Trustee will be designated as our paying agent for payments on the Exchange Notes. We may at any time designate additional paying agents, rescind the designation of any paying agent or approve a change in the office through which any paying agent acts.

## ***Notices***

Any notices required to be given to the holders of the Exchange Notes will be given to DTC, as the registered holder of the New Global Notes. In the event that the New Global Notes are exchanged for notes in definitive form, notices to holders of the Exchange Notes will be sent electronically or mailed by first-class mail, postage prepaid, to the addresses that appear on the register of noteholders maintained by the registrar.

## **The Trustee**

The Trustee assumes no responsibility for the accuracy or completeness of the information concerning Sherwin-Williams or its affiliates or any other party contained in this document or the related documents or for any failure by Sherwin-Williams or any other party to disclose events that may have occurred and may affect the significance or accuracy of such information. An affiliate of the Trustee is acting as joint lead arranger and joint bookrunner under one of Sherwin-Williams credit facilities. The Trustee is also a lender under the Term Loan Credit Agreement.

The Indentures provide that, except during the continuance of an Event of Default, the Trustee will perform only such duties as are specifically set forth in the Indentures. During the existence of an Event of Default, the Trustee must exercise such rights and powers vested in it by the Indentures as a prudent person would exercise under the circumstances in the conduct of such person's own affairs.

The Indentures and provisions of the Trust Indenture Act incorporated by reference in the Indentures contain limitations on the rights of the Trustee, should it become our creditor, to obtain payment of claims in certain cases or to liquidate certain property received by it in respect of any such claim as security or otherwise. The Trustee is permitted to engage in other transactions with us or any of our affiliates. If the Trustee acquires any conflicting interest (as defined in the Indentures or in the Trust Indenture Act), it must eliminate that conflict, apply to the SEC for permission to continue as trustee, or resign.

## **Governing Law**

The Indentures are, and the Exchange Notes will be, governed by and construed in accordance with the laws of the State of New York, without regard to conflicts of laws principles thereof.

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**CERTAIN U.S. FEDERAL INCOME TAX CONSIDERATIONS**

*The following is a summary of certain U.S. federal income tax considerations relating to the exchange of unregistered Original Notes for registered Exchange Notes pursuant to the Exchange Offers, but does not purport to be a complete analysis of all the potential tax considerations relating to the Exchange Offers. This summary is based upon the provisions of the Code, Treasury regulations promulgated thereunder, administrative rulings and pronouncements, and judicial decisions, all as in effect on the date of this prospectus and all of which are subject to change, possibly with retroactive effect, or to different interpretations.*

This discussion does not address all of the U.S. federal income tax considerations that may be relevant to a holder in light of such holder's particular circumstances or to holders subject to special rules, such as banks or other financial institutions, entities or arrangements classified as partnerships or other pass-through entities for U.S. federal income tax purposes or investors in such entities, regulated investment companies, real estate investment trusts, expatriates or former U.S. citizens or U.S. residents, insurance companies, brokers or dealers in securities or commodities, holders that use a mark-to-market method of accounting for their securities holdings, U.S. holders whose functional currency is not the U.S. dollar, holders subject to the alternative minimum tax, tax-exempt organizations, controlled foreign corporations (within the meaning of the Code), passive foreign investment companies (within the meaning of the Code), persons deemed to sell the Notes under the constructive sale provisions of the Code, persons holding the Notes in tax-deferred accounts, or persons holding the Notes as part of a straddle, hedge, conversion transaction, integrated security transaction or other risk reduction transaction. In addition, this discussion is limited to persons that hold the Notes as capital assets within the meaning of the Code (generally, property held for investment). This discussion does not address U.S. federal tax laws other than those pertaining to the U.S. federal income tax (such as the gift tax, the estate tax and the Medicare tax) or the effect of any applicable state, local or non-U.S. tax laws. This summary is not binding on the Internal Revenue Service, or IRS. We have not sought and will not seek any rulings from the IRS with respect to the statements made in this summary, and there can be no assurance that the IRS will not take a position contrary to these statements or that a contrary position taken by the IRS would not be sustained by a court.

The exchange of an Original Note for an Exchange Note pursuant to the Exchange Offers will not constitute a taxable exchange of the Original Note for U.S. federal income tax purposes. Rather, the Exchange Note a holder receives will be treated as a continuation of the holder's investment in the corresponding Original Note surrendered in the exchange. Consequently, a holder will not recognize any taxable income, gain or loss upon the receipt of an Exchange Note pursuant to the Exchange Offers, the holder's holding period for an Exchange Note will include the holding period for the Original Note exchanged pursuant to the Exchange Offers, and the holder's tax basis in an Exchange Note will be the same as the adjusted tax basis in the Original Note immediately before such exchange.

**THIS SUMMARY OF CERTAIN U.S. FEDERAL INCOME TAX CONSIDERATIONS IS FOR GENERAL INFORMATION ONLY AND IS NOT TAX ADVICE. HOLDERS ARE URGED TO CONSULT THEIR OWN TAX ADVISOR WITH RESPECT TO THE APPLICATION OF THE U.S. FEDERAL INCOME TAX LAWS TO THEIR PARTICULAR SITUATION, AS WELL AS ANY TAX CONSIDERATIONS ARISING UNDER OTHER U.S. FEDERAL TAX LAWS, THE LAWS OF ANY STATE, LOCAL OR NON-U.S. TAXING JURISDICTION OR ANY APPLICABLE INCOME TAX TREATY.**

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**Table of Contents****CERTAIN ERISA CONSIDERATIONS**

*The following summary regarding certain aspects of ERISA and the Code is based on ERISA and the Code, judicial decisions and United States Department of Labor and IRS regulations and rulings that are in existence on the date of this prospectus. This summary is general in nature and does not address every issue pertaining to ERISA or the Code that may be applicable to us, the Exchange Notes or a particular investor. Accordingly, each prospective investor should consult with his, her or its own counsel in order to understand the issues relating to ERISA and the Code that affect or may affect the investor with respect to this investment.*

ERISA and the Code impose certain requirements on employee benefit plans that are subject to Title I of ERISA and plans subject to Section 4975 of the Code (each such employee benefit plan or plan, a Plan ), on entities whose underlying assets include plan assets by reason of a Plan's investment in such entities and on those persons who are fiduciaries as defined in Section 3(21) of ERISA and Section 4975 of the Code with respect to Plans. In considering an investment of the assets of a Plan subject to Part 4 of Subtitle B of Title I of ERISA in the Exchange Notes, a fiduciary must, among other things, discharge its duties solely in the interest of the participants of such Plan and their beneficiaries and for the exclusive purpose of providing benefits to such participants and beneficiaries and defraying reasonable expenses of administering the Plan. A fiduciary must act prudently and must diversify the investments of a Plan subject to Part 4 of Subtitle B of Title I of ERISA so as to minimize the risk of large losses, as well as discharge its duties in accordance with the documents and instruments governing such Plan. In addition, ERISA generally requires fiduciaries to hold all assets of a Plan subject to Part 4 of Subtitle B of Title I of ERISA in trust and to maintain the indicia of ownership of such assets within the jurisdiction of the district courts of the United States. A fiduciary of a Plan subject to Part 4 of Subtitle B of Title I of ERISA should consider whether an investment in the Exchange Notes satisfies these requirements.

An investor who is considering acquiring the Exchange Notes with the assets of a Plan must consider whether the acquisition and holding of the Exchange Notes will constitute or result in a non-exempt prohibited transaction. Section 406(a) of ERISA and Sections 4975(c)(1)(A), (B), (C) and (D) of the Code prohibit certain transactions that involve a Plan and a party in interest as defined in Section 3(14) of ERISA or a disqualified person as defined in Section 4975(e)(2) of the Code with respect to such Plan. Examples of such prohibited transactions include, but are not limited to, sales or exchanges of property (such as the Exchange Notes) or extensions of credit between a Plan and a party in interest or disqualified person. Section 406(b) of ERISA and Sections 4975(c)(1)(E) and (F) of the Code generally prohibit a fiduciary with respect to a Plan from dealing with the assets of the Plan for its own benefit (for example, when a fiduciary of a Plan uses its position to cause the Plan to make investments in connection with which the fiduciary (or a party related to the fiduciary) receives a fee or other consideration).

ERISA and the Code contain certain exemptions from the prohibited transactions described above, and the Department of Labor has issued several exemptions, although certain exemptions do not provide relief from the prohibitions on self-dealing contained in Section 406(b) of ERISA and Sections 4975(c)(1)(E) and (F) of the Code. Exemptions include Section 408(b)(17) of ERISA and Section 4975(d)(20) of the Code pertaining to certain transactions with non-fiduciary service providers; Department of Labor Prohibited Transaction Class Exemption (PTCE) 95-60, applicable to transactions involving insurance company general accounts; PTCE 90-1, regarding investments by insurance company pooled separate accounts; PTCE 91-38, regarding investments by bank collective investment funds; PTCE 84-14, regarding investments effected by a qualified professional asset manager; and PTCE 96-23, regarding investments effected by an in-house asset manager. There can be no assurance that any of these exemptions will be available with respect to the acquisition of the Exchange Notes. Under Section 4975 of the Code, excise taxes are imposed on disqualified persons who participate in non-exempt prohibited transactions (other than a fiduciary acting only as such) and such transactions may have to be rescinded.

As a general rule, a governmental plan, as defined in Section 3(32) of ERISA (each, a Governmental Plan ), a church plan, as defined in Section 3(33) of ERISA, that has not made an election under Section 410(d)

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of the Code (each, a Church Plan ) and a plan maintained outside the United States primarily for the benefit of persons substantially all of whom are nonresident aliens (each, a non-U.S. Plan ) are not subject to Title I of ERISA or Section 4975 of the Code. Accordingly, assets of such plans may be invested without regard to the fiduciary and prohibited transaction considerations described above. Although a Governmental Plan, a Church Plan or a non-U.S. Plan is not subject to Title I of ERISA or Section 4975 of the Code, it may be subject to other United States federal, state or local laws or non-U.S. laws that regulate its investments (a Similar Law ). A fiduciary of a Government Plan, a Church Plan or a non-U.S. Plan should consider whether investing in the Exchange Notes satisfies the requirements, if any, under any applicable Similar Law.

The Exchange Notes may be acquired by a Plan, a Governmental Plan, a Church Plan, a non-U.S. Plan or an entity whose underlying assets include the assets of a Plan, but only if the acquisition will not result in a non-exempt prohibited transaction under ERISA or Section 4975 of the Code or a violation of Similar Law. Therefore, any investor in the Exchange Notes will be deemed to represent and warrant to us and the Trustee that (1) (a) it is not (i) a Plan, (ii) a Governmental Plan, (iii) a Church Plan, (iv) a non-U.S. Plan or (v) an entity whose underlying assets include the assets of a Plan, (b) it is a Plan or an entity whose underlying assets include the assets of a Plan and the acquisition and holding of the Exchange Notes will not result in a non-exempt prohibited transaction under Section 406 of ERISA or Section 4975 of the Code or (c) it is a Governmental Plan, a Church Plan or a non-U.S. Plan that is not subject to (i) ERISA, (ii) Section 4975 of the Code or (iii) any Similar Law that prohibits or imposes excise or penalty taxes on the acquisition or holding of the Exchange Notes; and (2) it will notify us and the Trustee immediately if, at any time, it is no longer able to make the representations contained in clause (1) above. Any purported transfer of the Exchange Notes to a transferee that does not comply with the foregoing requirements shall be null and void *ab initio*.

**These offers are not a representation by us that an acquisition of the Exchange Notes meets any or all legal requirements applicable to investments by Plans, Governmental Plans, Church Plans, non-U.S. Plans or entities whose underlying assets include the assets of a Plan or that such an investment is appropriate for any particular Plan, Governmental Plan, Church Plan, non-U.S. Plan or entity whose underlying assets include the assets of a Plan.**



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**PLAN OF DISTRIBUTION**

Any broker-dealer that holds Original Notes that were acquired for its own account as a result of market-making activities or other trading activities (other than Original Notes acquired directly from us) may exchange such Original Notes pursuant to the Exchange Offers. Any such broker-dealer, however, may be deemed to be an underwriter within the meaning of the Securities Act and must, therefore, deliver a prospectus meeting the requirements of the Securities Act in connection with any resales of Exchange Notes received by such broker-dealer in the Exchange Offers. Such prospectus delivery requirement may be satisfied by the delivery by such broker-dealer of this prospectus. We have agreed to make this prospectus, as amended or supplemented, available to any broker-dealer for use in connection with such resales.

We will not receive any proceeds from any sale of Exchange Notes by broker-dealers. Exchange Notes received by broker-dealers for their own account in the Exchange Offers may be sold from time to time in one or more transactions in the over-the-counter market, in negotiated transactions, through the writing of options on the Exchange Notes or a combination of such methods of resale, at market prices prevailing at the time of resale, at prices related to such prevailing market prices or negotiated prices. Any of these resales may be made directly to purchasers or to or through brokers or dealers who may receive compensation in the form of commissions or concessions from these broker-dealers and/or the purchasers of Exchange Notes. Any broker-dealer that resells Exchange Notes that were received by it for its own account in the Exchange Offers and any broker-dealer that participates in a distribution of the Exchange Notes may be deemed to be an underwriter within the meaning of the Securities Act and any profit on any such resale of Exchange Notes and any commission or concessions received by any such person may be deemed to be underwriting compensation under the Securities Act. The accompanying letter of transmittal states that, by acknowledging that it will deliver and by delivering a prospectus, a broker-dealer will not be deemed to admit that it is an underwriter within the meaning of the Securities Act.

We have agreed to pay all expenses incident to the Exchange Offers, including the expenses of one counsel for the holders of the Original Notes and will indemnify the holders of the Original Notes against certain liabilities, including liabilities under the Securities Act.

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**LEGAL MATTERS**

Jones Day will pass upon the validity of the Exchange Notes.

**EXPERTS**

The consolidated financial statements of The Sherwin-Williams Company incorporated by reference in The Sherwin-Williams Company's Annual Report (Form 10-K) for the year ended December 31, 2016 (including the schedule appearing therein), and the effectiveness of The Sherwin-Williams Company's internal control over financial reporting as of December 31, 2016 have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their reports thereon, incorporated by reference therein, and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such reports given on the authority of such firm as experts in accounting and auditing.

The consolidated financial statements of The Valspar Corporation appearing in The Valspar Corporation's Annual Report (Form 10-K) for the year ended October 28, 2016, and the effectiveness of The Valspar Corporation's internal control over financial reporting as of October 28, 2016, have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their reports thereon, included therein, and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such reports given on the authority of such firm as experts in accounting and auditing.

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**THE SHERWIN-WILLIAMS COMPANY**

**PROSPECTUS**

**Offers to Exchange**

**All of the Outstanding Restricted 7.25% Senior Notes Due 2019 Issued on June 2, 2017**

**for Newly Issued and Registered 7.25% Senior Notes Due 2019**

**All of the Outstanding Restricted 4.20% Senior Notes Due 2022 Issued on June 2, 2017**

**for Newly Issued and Registered 4.20% Senior Notes Due 2022**

**All of the Outstanding Restricted 3.30% Senior Notes Due 2025 Issued on June 2, 2017**

**for Newly Issued and Registered 3.30% Senior Notes Due 2025**

**All of the Outstanding Restricted 3.95% Senior Notes Due 2026 Issued on June 2, 2017**

**for Newly Issued and Registered 3.95% Senior Notes Due 2026**

**All of the Outstanding Restricted 4.40% Senior Notes Due 2045 Issued on June 2, 2017**

**for Newly Issued and Registered 4.40% Senior Notes Due 2045**