

Decisions of The NASDAQ Listing and Hearing Review Council: 2006

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Listing Council Decision 2006-1

- **Public interest - “Public Shell”**

Rule 4300: NASDAQ ... in addition to applying the enumerated criteria set forth in the Rule 4300 and 4400 Series, has broad discretionary authority over the ... continued inclusion of securities in NASDAQ in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. NASDAQ may use such discretion to ... apply additional or more stringent criteria for the ... continued inclusion of particular securities, or suspend or terminate the inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes ... continued inclusion of the securities in NASDAQ inadvisable or unwarranted in the opinion of NASDAQ, even though the securities meet all enumerated criteria for ... continued inclusion in NASDAQ. In all circumstances where the Listing Department (as defined in Rule 4801) exercises its authority under Rule 4300, the Listing Department shall issue a Staff Determination under Rule 4804, and in all circumstances where an Adjudicatory Body (as defined in Rule 4801) exercises such authority, the use of the authority shall be described in the written decision of the Adjudicatory Body.

Issue: The company disposed of its sole operating business in March 2005. After determining that the company was a “public shell” and allowing the company a reasonable period of time to reinvest the proceeds of the sale into another operating business, the Panel applied additional and more stringent criteria and delisted the company’s securities based on public interest concerns.

Determination: The company was properly delisted because at the time of the Panel’s decision, the company was a “public shell”.

In its Releases Nos. 33-8587; 34-52038; International Series Release No. 1293; and File No. S7-19-04, the Securities and Exchange Commission (“SEC”) defined a “shell company” as a registrant with no or nominal operations and either no or nominal assets, assets consisting solely of cash and cash equivalents, or assets consisting of any amount of cash and cash equivalents and nominal other assets. The SEC expressly declined to adopt a quantitative threshold to define a shell company, as doing so would, “present a serious potential problem, as [a quantitative threshold] would be more easily circumvented”.

Similarly, the Listing Council was reluctant to create a bright line, qualitative standard for the definition of a “public shell”. The Listing Council believes that it is not prudent to provide objective standards, such as the total number of employees, minimum revenue and/or income thresholds, or an assessment of the general prospects for the product in development, when determining if a company is a “public shell”. The Listing Council steadfastly believes that there should be a “facts and circumstances” analysis applied to each specific case.

In its efforts to determine whether a company has material tangible business operations, and thus should not be defined as a “public shell”, the Listing Council will look to a number of factors, including, but not limited to, the following: what percentage of the company’s assets are active vs. passive; whether the company generates revenues, and if so, what is the nature of the revenues, passive vs. active; are the expenses reasonably related to the revenues being generated; how many employees support the tangible business operations; what is management’s role in the company’s investments; how long has the company been without material tangible business operations; is the company subject to registration under the Investment Company Act of 1940; and, how has the company defined itself in its filings with regulators.

After reviewing the company’s publicly filed financial statements, the Listing Council notes that more than 90% of the company’s total assets were passive in nature, and the non-passive assets included accounts receivable and other assets. While the company generated nine month revenues of \$281,000, only \$114,000 of expenses had been matched to the revenues as costs of services. Alternatively, the company generated \$2,853,000 year to date in “selling, general and administrative expenses”, which include payroll and payroll related expenses, legal, accounting, rent, travel and other related expenses. The company disclosed in its December 31, 2004 Form 10-KSB that it disposed of a subsidiary “constituted all of the operating assets of the Company”. The fact that the company only had four employees, two of which were administrative, was additional indications that the company did not have tangible business operations.

The company's efforts to act as a "lead negotiator" in a subsidiary's expansion was not persuasive, given the company was still no more than a "passive" investor. The Listing Council further notes that the company appeared to have the attributes of an investment company, holding only investments and no significant operating business.

The Listing Council finds that the company had existed without an operating business since March 2005 when it disposed of its operating subsidiary. Further, the company was a "public shell" because it has failed to demonstrate that it has, or will in the near term acquire, an active operating business.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-2

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company's year ended December 31, 2004 Form 20-F was delinquent due to a change of independent auditors and internal accounting staff, the delayed receipt of financial information from a significant investment, and the delayed receipt of accounting information related to the company's other investments.

Determination: The company was properly delisted because at the time of the Panel's decision, the company was not current in all required public filings. As of the date of the Listing Council's deliberations, the company had still not filed its delinquent December 31, 2004 Form 20-F. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. The Listing Council finds that investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. The Listing Council notes that in the absence of accurate and reliable financial statements, staff is unable to determine if the company was in compliance with all of the Capital Market continued listing requirements.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-3

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company was unable to timely file its Form 10-K for the year ended December 31, 2004, due to an audit committee investigation into the company’s internal controls relating to travel and entertainment expenses. At the time of the Panel’s decision, the company had filed its December 31, 2004 year-end Form 10-K and March 31, 2005 Form 10-Q, but had not filed its Forms 10-Q for the quarters ended June 30 and September 30, 2005. The Panel delisted the company’s securities based on a filing delinquency.

Determination: The company was properly delisted because at the time of the Panel’s decision, the company was not current in all required public filings. As of the date of the Listing Council’s consideration of this matter, the company had still not filed its Forms 10-Q for the quarters ended June 30 and September 30, 2005. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. Investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, investors did not have access to accurate financial information regarding the company, for over nine months, from April 1, 2005 through the date of the Listing Council’s deliberations. The Listing Council notes that in the absence of accurate and reliable financial statements, staff is unable to determine if the company was in compliance with all of the National Market continued listing requirements.

The Listing Council denies the company’s request for a 60-day exception to re-list its securities on the National Market upon becoming current with its periodic reporting obligation. The Listing Council finds that it is not appropriate in this instance, given that the company had not provided accurate financial information for over nine months, and it was unclear to the Listing Council whether the company met either the initial or continued listing requirements for the National Market.

The Listing Council also denies the company’s request that the company be allowed to re-list under the continued listing requirements on the National Market upon becoming current with its periodic reporting obligations. The Listing Council notes that Rule 4802(f)¹ provides, in part, that a security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion. As such, because the Panel appropriately delisted the company’s securities from the National Market, the initial listing requirements provide the correct standard for a review of the company’s listing qualifications. The Listing Council finds that the company will need to file a new listing application together with all applicable initial fees with Listing Qualifications, and the review of such application should be handled in the same manner as any new application to trade on The NASDAQ Stock Market.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

¹ Rule 4802(f) replaced former Rule 4430(e). See SR-NASD-2004-125, which became effective on August 26, 2005.

Listing Council Decision 2006-4

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company disclosed it would not timely file its March 31, 2005 Form 10-Q because it needed to restate all of its financial statements between the periods of January 1, 2003 through December 31, 2004, due to revisions in the valuation methodologies used in securitization transactions. The Panel delisted the company’s securities based on a filing delinquency.

Determination: The company was properly delisted because at the time of the Panel’s decision, the company was not current in all required public filings. As of the date of the Listing Council’s consideration of this matter, the company had still not filed its restated financial statements or Forms 10-Q for the quarters ended March 31, June 30, and September 30, 2005. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. Investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, however, investors did not have access to accurate financial information regarding the company from January 1, 2002 through the date of the Listing Council’s deliberations. Furthermore, in the absence of accurate and reliable financial statements, staff is unable to determine if the company was in compliance with all of the National Market continued listing requirements.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-5

- **Stockholders' Equity**
- **Bid Price**

Rule 4310(c)(2)(B): For continued inclusion on The NASDAQ Capital Market, the issuer shall maintain: (i) stockholders' equity of \$2,500,000; (ii) market value of listed securities of \$35,000,000; or (iii) net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

Issue: At the time of the Panel's decision, the company did not meet the minimum stockholders' equity requirement or its alternatives for continued listing on The NASDAQ Capital Market. The company's plan included an asset sale, which would allow it to demonstrate compliance. However, after the sale, the company was not able to publicly announce that the transaction had increased its stockholders' equity to \$2,500,000. The Panel delisted the company's securities.

Determination: The company was properly delisted because at the time of the Panel's decision, the company was not able to demonstrate compliance with the minimum stockholders' equity requirement or its alternatives, and its plan to regain compliance was not sufficiently definitive. At the time of the Listing Council's deliberations, the company had been non-compliant for more than twelve months, had still not provided any public filing which demonstrated compliance with the rule, and had not provided any definitive documentation regarding potential increases of equity which could be accomplished in the short-term and would allow the company to achieve and sustain compliance.

* * *

Rule 4310(c)(4): For continued inclusion, the minimum bid price per share for common stock shall be \$1.

Issue: The bid price of the company's common stock was below \$1 for approximately nine months.

Determination: The company was properly delisted for failure to comply with the minimum bid price requirement. At the time of the Listing Council's deliberations, the company's bid price was still under \$1, and the company had not proffered a plan to remedy its deficiency.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-6

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company was unable to timely file its Form 10-Q for the quarter ended June 30, 2005, due to an audit committee investigation into inventory invoices that had not been properly accounted for on the company’s December 31, 2004 year-end financial statements. The Panel delisted the company’s securities based on a filing delinquency. Subsequent to its delisting, but before the Listing Council’s deliberations, the company became current in its periodic reporting obligations.

Determination: The company was properly delisted because at the time of the Panel’s decision, the company was not current in all required public filings. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. The Listing Council finds that investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, however, even though as of the date of the Listing Council’s consideration of this matter, the company was current in its periodic reports obligations with the SEC, investors did not have access to accurate financial information regarding the company from August 17, 2005 until February 3, 2006, or a period of approximately five and one-half months.

The Listing Council notes that the Panel provided the company with two extensions, in addition to its original extension of time, to become compliant with the filing requirement. The Listing Council observes that the Panel, in looking to provide the company with reasonable extensions, looked to the company for assistance in setting the prescribed deadlines. The Listing Council finds that the company was given every opportunity to regain compliance and notes that the company argued that it was on the “cusp of compliance” each time the Panel provided the company with an additional extension. While the Listing Council was sympathetic to the company’s argument that the timing of the filing was outside the company’s control, the Listing Council concurs with the Panel’s assessment that the company is solely responsible for compliance with the marketplace rules.

The Listing Council also denies the company’s request that the company be allowed to re-list under the continued listing requirements on the Capital Market upon becoming current with its periodic reporting obligation. The Listing Council notes that Rule 4802(f)¹ provides, in part, that a security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion. As such, because the Panel appropriately delisted the company’s securities from the Capital Market, the initial listing requirements provide the correct standard for a review of the company’s listing qualifications. The Listing Council finds that the company will need to file a new listing application together with all applicable initial fees with Listing Qualifications, and the review of such application should be handled in the same manner as any new application to trade on The NASDAQ Stock Market.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were

¹ Rule 4802(f) replaced former Rule 4430(e). See SR-NASD-2004-125, which became effective on August 26, 2005.

made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-7

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company was unable to timely file its Form 10-Q for the quarter ended September 30, 2005, due to the resignation of their auditors. Additionally, the company’s new auditors questioned the company’s accounting for tax expense and deferred tax assets for 2003 and 2004. At the time of the Panel’s decision, the company had still not filed its Forms 10-Q for the quarters ended September 30, 2005 and March 31, 2006 or Form 10-K for the year ended December 31, 2005. The Panel delisted the company’s securities based on a filing delinquency.

Determination: The company was properly delisted because at the time of the Panel’s decision, the company was not current in all required public filings. As of the date of the Listing Council’s consideration of this matter, the company had still not filed its delinquent periodic reports. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. Investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, investors did not have access to accurate financial information regarding the company, for over eleven months, from June 30, 2005 through the date of the Listing Council’s deliberations. The Listing Council notes that in the absence of accurate and reliable financial statements, staff is unable to determine if the company was in compliance with all of the Capital Market continued listing requirements.

The Listing Council denies the company’s request for a 60-day exception to re-list its securities on the Capital Market upon becoming current with its periodic reporting obligations. The Listing Council finds that it is not appropriate in this instance, given that the company was a recent repeat offender of the filing requirement, had not provided accurate financial information for over eleven months, and it was unclear to the Listing Council whether the company met either the initial or continued listing requirements for the Capital Market.

The Listing Council also denies the company’s request that it be allowed to re-list under the continued listing requirements on the Capital Market upon becoming current with its periodic reporting obligations. The Listing Council notes that Rule 4802(f)¹ provides, in part, that a security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion. As such, because the Panel appropriately delisted the company’s securities from the Capital Market, the initial listing requirements provide the correct standard for a review of the company’s listing qualifications. The Listing Council finds that the company will need to file a new listing application together with all applicable initial fees with Listing Qualifications, and the review of such application should be handled in the same manner as any new application to trade on The NASDAQ Stock Market.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

¹ Rule 4802(f) replaced former Rule 4430(e). See SR-NASD-2004-125, which became effective on August 26, 2005.

Listing Council Decision 2006-8

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company was unable to timely file its Form 10-K for the fiscal year ended September 30, 2005, due to accounting issues identified after the company moved its corporate headquarters and changed auditors. Thereafter, the company failed to timely file Forms 10-Q for the quarters ended December 31, 2005 and March 31, 2006. Additionally, the company determined that its previously filed financial statements from September 2002 forward should not be relied upon. The Panel delisted the company’s securities based on a filing delinquency.

Determination: The company was properly delisted because at the time of the Panel’s decision the company was not current in all required public filings. As of the date of the Listing Council’s consideration of this matter, the company had still not filed its Form 10-K for the fiscal year ended September 30, 2005, Forms 10-Q for the quarters ended December 31, 2005 and March 31, 2006, or any prior period restatements. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. The Listing Council finds that investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, however, investors have not had access to accurate financial information regarding the company from July 1, 2005 through the present, a period of over 12 months. At the time of the Panel’s decision, the company was not current in all required public filings. Furthermore, in the absence of accurate and reliable financial statements, staff is unable to determine if the company is in compliance with all of the National Market continued listing requirements.

The company also requested that the Listing Council grant the company an expedited re-listing on upon becoming current with its periodic reporting obligation. The Listing Council denies this request and believes that the exception is not appropriate in this instance. The Listing Council notes that the independent investigation began in December 2005; however, it was not until mid-May 2006, a period of over five months, before the Panel was provided with any indication that the company was also dealing with signs of earnings management, possible CEO involvement, or tone at the top issues. The Listing Council views the Panel’s behavior as sympathetic to the company’s situation; particularly, after the company’s previous independent auditors advised the company’s management and the Audit Committee of a material weakness related to insufficient personnel resources and the technical accounting expertise within the company’s accounting function, and thereafter when concerns regarding the accuracy of the work of the company’s independent consultant further delayed the company meeting its deadlines.

While the Listing Council finds that the Panel was generous, it does not find fault with the Panel’s judgment, in affording the company the multiple extensions and opportunities to achieve the company-proffered and, subsequently missed, designated milestones. The Panel appeared to provide the company with every opportunity to cure its “accounting issues”; however, the results of the Audit Committee investigation clearly indicated there were other than accounting issues that plagued the company. The Listing Council also recognizes that it was not until late May 2006, five months after the company attended a Panel Hearing and disclosed the ongoing investigation, before the company was finally delisted.

The Listing Council notes that Rule 4802(f)¹ provides, in part, that a security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion. As such, because the Panel appropriately delisted the company’s securities from the National Market, the initial listing requirements provide the correct standard for a review of the company’s listing qualifications. The Listing

¹ Rule 4802(f) replaced former Rule 4430(e). See SR-NASD-2004-125, which was effective August 26, 2005.

Council finds that the company will need to file a new listing application together with all applicable initial fees with the Listing Qualifications Department, and the review of such application should be handled in the same manner as any new application to trade.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-9

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company was unable to timely file its Form 10-K for the year ended December 31, 2005, because management required additional time to complete its assessment of the effectiveness of its internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act of 2002. The Panel delisted the company's securities based on a filing delinquency.

Determination: The company was properly delisted because at the time of the Panel's decision the company was not current in all required public filings. As of the date of the Listing Council's consideration of this matter, the company had filed its delinquent 10-K for the year ended December 31, 2005; however, the company had not filed its Form 10-Q for the quarter ended March 31, 2006.

The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. The Listing Council finds that investors in securities listed on The NASDAQ Stock Market are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, however, even though as of the date of the Listing Council's deliberations, the company had filed its delinquent Form 10-K for the year ended December 31, 2005, it has still not filed its delinquent Form 10-Q for the quarter ended March 31, 2006. As such, investors did not have access to accurate financial information regarding the company from October 1, 2005 until July 7, 2006, or a period of approximately nine months, and still do not have complete accurate financial information. At the time of the Panel's decision, the company was not current in all required public filings. Furthermore, in the absence of accurate and reliable financial statements, staff is unable to determine if the company is in compliance with all of the National Market continued listing requirements.

The Listing Council also denies the company's request for a 60-day exception to re-list its securities upon becoming current with its periodic reporting obligation. While the Listing Council has the requisite discretionary authority under Rule 4802(b) to entertain such request, the Listing Council finds that it was not appropriate in this instance, given that: (i) the company is a recent repeat offender of the filing requirement. The company's late filings were the third and fourth consecutive late filings for the company in the past year; (ii) the company has not provided current accurate financial information, and it is unclear to the Listing Council whether the company currently meets either the initial or continued listing requirements for the National Market, (iii) the company's current filing delinquencies are directly related to many of the issues resulting in its prior delinquency and appearance before a Panel in November 2005, and (iv) the Listing Council's concurrence with the Panel's assessment that “multiple deadlines set by the company itself were unmet.” In fact, the Listing Council noted that the company filed its December 31, 2005 Form 10-K on July 7, 2006, one month after the June 5, 2006 extension date it had assured the Panel it could file by, and one week after the June 30, 2006 date it promised in its submission to the Listing Council.

The Listing Council notes that Rule 4802(f)¹ provides, in part, that a security that has been delisted shall be required, prior to re-inclusion, to comply with the requirements for initial inclusion. As such, because the Panel appropriately delisted the company's securities from the National Market, the initial listing requirements provide the correct standard for a review of the company's listing qualifications. The Listing

¹ Rule 4802(f) replaced former Rule 4430(e). See SR-NASD-2004-125, which was effective August 26, 2005.

Council finds that the company will need to file a new listing application together with all applicable initial fees with the Listing Qualifications Department, and the review of such application should be handled in the same manner as any new application to trade.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-10

- **Filing**

Rule 4310(c)(14): The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission (“Commission”). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

Issue: The company stated that its filing of the Form 10-K for the fiscal year ended December 31, 2005 would be delayed to allow for the completion of an ongoing internal investigation, by a Special Committee of its Board of Directors, of company practices related to stock option grants to officers and directors, and related matters. The Panel delisted the company’s securities based on a filing delinquency.

Determination: The Listing Council has considered that the Panel discretion under Rule 4802(b) is limited to 90 days from the date of the Panel’s original decision, not to exceed 180 days from the date of the staff’s determination, and that such limit of discretion, did not allow this Panel the ability to provide the company with additional relief. Accordingly, the Listing Council finds that the Panel’s determination to delist the company’s securities from The NASDAQ Stock Market, for failure to comply with the filing requirement of Rule 4310(c)(14), was appropriate at the time of the decision.

However, after a review of the record in this matter, the Listing Council has determined to exercise its discretionary authority, under Rule 4802(b)¹, to: (i) remove the suspension of trading, and (ii) grant the company a 60 day exception period to demonstrate compliance with all of the Global Market continued listing requirements.

In reaching its determination, the Listing Council applied a facts and circumstances analysis, and found that based on its analysis, that this company should be given additional time to become compliant with NASDAQ’s filing requirement.

The Listing Council considered many factors, including, but not limited to, the following:

- The company reacted quickly and took appropriate steps once the potential stock option problem was identified. The company informed its Audit Committee, who, in turn, immediately began an internal investigation, with the help of outside consultants, to determine the depth and breadth of the problem.
- The company promptly notified regulatory authorities and the investing public of its internal investigation. Once the preliminary results of the Special Committee were discussed with the Board, the company removed and replaced its Chairman of the Board and CFO.
- After the investigation was concluded, the company adopted all remedial measures recommended by the Audit Committee. Upon the conclusion of the internal investigation, the company promptly notified the investing public of its need to restate its financial statement and cautioned investors not to rely on previously filed financial information.

The Listing Council also considered that the company was not in any other distress and that, but for the options issue, the company was ready to remedy its filing delinquency and, based upon historical financial information, appeared to have the financial strength to continue to meet the maintenance standards of the Global Market. The Listing Council understood that the restatement process had been slowed by the perceived lack of guidance, but that the SEC’s Office of Chief Accountant had recently provided interpretive guidance on the matter. The company has already provided the SEC’s Office of Chief Accountant with an

¹ Rule 4802(b) allows the Listing Council to grant exceptions for a period not to exceed 60 days from the date of the Listing Council Decision or 180 days from the date of the Panel Decision with respect to the deficiency for which the exception is granted, in each case where it deems appropriate.

opportunity to preview its analysis and disclosure for stock options, before the company will issue its restatements.

The Listing Council was also particularly cognizant, and considered, that the Panel had exhausted its ability to provide the company with an additional extension of time, and would have provided the company more time if available under the rules.

While the Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information, the Listing Council balanced its analysis with the extraordinary circumstances in which many companies find themselves. The Listing Council is sympathetic to the company in that it is not the only company that is currently ensnared in the thorny issues surrounding the potential restatement of financial statements as a result of the accounting for stock option grants. The Listing Council has considered the extraordinary circumstances that many companies find themselves in and will undertake a facts and circumstances analysis in each case to determine if additional remedies are appropriate.

Based upon the record, the Listing Council recognized that the company has been pro-active in trying to regain its status as a good corporate citizen, and believed that such diligence should be rewarded with an extension of time to demonstrate compliance. As such, pursuant Rule 4802(b), the Listing Council finds that it is appropriate in this instance to exercise its discretionary authority and provide the company with a short extension of time to demonstrate compliance with Rule 4310(c)(14).

If staff determines that there are no public interest concerns that would preclude the company from rejoining the Global Market, the Listing Council finds that the company should be immediately re-instated to trading and shall be provided with a 60 day extension, to become current in its periodic reporting obligation pursuant to Rule 4310(c)(14).

If by the end of the exception period, the company has not complied with Rule 4310(c)(14), the company's securities will be re-suspended at the opening of business the following day, and a Form 25, notification of removal from listing, will then be filed with the SEC as required by SEC Rule 19d-1.

If, at any time during the exception period, the company becomes deficient in a continued listing requirement of the Global Market, other than the filing requirement, the company will not be given an opportunity to be heard, its securities will be re-suspended, and a Form 25 will be filed with the SEC.

This decision provides guidance based on the rules in effect at the time of issuance. Effective April 13, 2009, NASDAQ restructured and renumbered its listing rules. A table that maps the location of the old rules to where they now reside is available. To view the table, please click [here](#). No substantive changes were made to the rules by this restructuring. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this decision was issued.

Listing Council Decision 2006-11

- Shareholder Approval
- Bid Price

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval or prior to the issuance of securities...in connection with a transaction other than a public offering involving...(ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Issue: The company failed to obtain shareholder approval before issuing Series E preferred stock that was convertible into the common stock. The company had previously completed two series of similar financings. After analysis, staff determined to aggregate the three financings. As such, when aggregated with the prior financings, the Series E preferred stock transaction required shareholder approval because it was issued at a discount to market value and its issuance could potentially exceed greater than 20% of the company's pre-transaction total shares outstanding. The Panel delisted the company's securities based on a violation of the shareholder approval rules.

Determination: The company was properly suspended because it had violated the shareholder approval requirements, as set forth in Rule 4350(i)(1)(D)(ii).

NASDAQ shareholder approval requirements are designed to provide shareholders with a meaningful voice in significant transactions and in transactions where they may face significant dilution, such as in the current case before the Listing Council. The Listing Council believes that this voice, mandated by NASDAQ rules, is a basic tenet of the NASDAQ corporate governance rules. The NASDAQ shareholder approval requirements are also designed to provide shareholders with notice prior to the consummation of the transaction so that they have the opportunity to sell their shares. In this case, there was no shareholder vote or advance notice of the consummation of this transaction.

The Listing Council agrees with the Panel's assessment that because the Series E documents do not by their terms preclude an issuance without shareholder approval; there exists a theoretical possibility that the company could be compelled to issue the securities. The Listing Council also considered the company's argument that it would either restructure the transaction with investors unrelated to the Series C, D, and E transactions in an effort to craft a re-financing plan that would allow the company to unwind the Series E transaction, or move forward with a shareholder vote for approval of the Series E transaction. To date the company has done neither. As such, the company is still in violation of the shareholder approval rules. At the time of its deliberations, the Listing Council noted that: (i) there have been no Form 8-K filings with announcements regarding a re-financing plan that would allow the company to unwind the Series E transaction, (ii) the company's recently filed definitive proxy statement for its annual meeting of stockholders and did not include any proposals to obtain shareholder approval of the Series E transaction, and (iii) the company did not provide an update as to the status of its previously filed amended proxy statement and notice of a special meeting of shareholders, in which the company was seeking shareholder approval for the Series E financing.

The Listing Council does not disagree with the company's assessment that its imperfect efforts to file completed Listing of Additional Shares Notifications should be the cause of its delisting. However, the Listing Council notes that the company was effectively put on notice by staff's letter, regarding its, first of three, Listing of Additional Shares Notification violations. The Listing of Additional Shares program is used by NASDAQ to monitor compliance with listing rules governing shareholder approval, public interest concerns, reverse mergers, and voting rights. As such, the Listing Council views compliance with the Listing of Additional Shares program as essential in order to protect investors in securities listed on The NASDAQ Stock Market.

The Listing Council is aware that the company is a repeat offender of both the filing of Listing of Additional Shares Notifications and the shareholder approval requirements. If the company was a first time offender, the Listing Council may have been more sympathetic, such is not the case here. In its deliberations, the Listing Council considered that: (i) there is a large amount of easily accessible information on the NASDAQ Legal and Compliance website regarding staff's views as to when shareholder approval for transactions is required and when a Listing of Additional Shares Notification must be filed; (ii) staff stands ready to offer informal guidance to assist issuers in structuring transactions so that there will not be violations of the

Marketplace Rules; and (iii) there is a process pursuant to Rule 4550, which requires the payment of a fee, for formal guidance regarding shareholder approval interpretations. As such, the company's argument that once its senior management and Board learned of the repeated Listing of Additional Shares violations they acted promptly and decisively to ensure that no similar violations would occur in the future, was not persuasive. Management should have been on notice with the staff's warning letter to become more actively engaged and should have taken proactive steps at that time in an effort to prevent future violations.

Based on the foregoing, the Listing Council affirms the Panel's decision to delist the company's securities from The NASDAQ Stock Market.

* * *

Rule 4310(c)(4): For continued inclusion, the minimum bid price per share for common stock shall be \$1.

Issue: At the time of the Listing Council's deliberations, the bid price of the company's common stock was below \$1.

Determination: As an additional and separate ground for its decision, the Listing Council finds that the company fails to comply with the \$1.00 minimum bid price requirement contained in Rule 4310(c)(4). The Listing Council notes that although the company was provided an opportunity to address its non-compliance with this rule, the company declined to do so. Given that at the time of the Listing Council's deliberations the company's bid price as quoted on the OTC Bulletin Board was \$0.57, the Listing Council finds this violation of Rule 4310(c)(4) as a separate and additional basis for affirming the company's suspension and delisting from The NASDAQ Stock Market.

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