

NASDAQ Staff Interpretative Letters

January – December 2005

Note: These interpretations provide guidance based on the rules, policies and procedures in effect at the time of issuance. While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at 301.978.8008 if they have questions regarding transactions and the applicability of NASDAQ rules.

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Staff Interpretative Letter 2005-1

This is in response to your letter regarding Marketplace Rule 4200(a)(15)(B) and IM-4200 (collectively, the "Rule"). You asked whether the value of health-care benefits would be included for purposes of determining whether a director has accepted payments from the company for purposes of the Rule.

According to the information you provided, the company plans to offer health-care benefits, in the form of health insurance coverage, to its non-employee directors and their families (the "Benefits"). The directors will not have to become employees to receive the benefits, and their status as "non-employees" will not change. You stated that the Benefits are compensation for board service.

Following our review of the information you provided and based on your representation that the Benefits are for board service only, we have determined the company's board is not precluded from finding that non-employee directors who receive the Benefits are independent under the Rule even if the value of the Benefits exceeds \$60,000. Please note that we are not making a determination regarding the eligibility to qualify as an independent director under any other provision of Rule 4200(a)(15). In addition, pursuant to IM-4200, the company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors.

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Staff Interpretative Letter 2005-6

This is in response to your letters regarding the applicability of Marketplace Rule 4350(i)(1)(C)(ii) (the "Rule") to a proposed acquisition (the "Acquisition") by the company of "Target". Specifically, you asked whether the shares to be issued in the Acquisition would be aggregated with the shares issued in a prior private placement (the "PIPE") for purposes of the Rule.

According to the information you provided, the company issued in the PIPE less than 10% of the total number of shares outstanding prior to the transaction. According to the memorandum that was distributed to investors, the proceeds from the PIPE would be used for working capital purposes generally. In addition, the memorandum stated that the proceeds might be used to increase capital levels, to fund branch expansion, to acquire non-bank financial services companies, for new hires to expand the commercial lending business, and to make limited payments on specified indebtedness. You stated that the Board did not consider the Acquisition or any other bank acquisition specifically in deciding whether to consummate the PIPE.

About six weeks before the PIPE, preliminary conversations were held between the chief executive officers of the company and Target about the possibility of a business combination. However, the company's Board determined that it had no interest pursuing such a transaction, and discussions between the companies regarding a transaction ceased. At a subsequent Board meeting held after the PIPE shares were issued, the company's financial advisor identified several potential acquisition candidates including Target, and the company's CEO contacted Target's CEO to advise him the company wanted to re-commence merger discussions.

The company entered into an agreement to acquire Target for a combination of cash and stock. In addition, Target's stock options outstanding at the closing of the acquisition will be converted into company stock options, but the company will not assume Target's stock options plans, or the available shares thereunder. Instead, the plans will terminate upon the closing. While the number of shares to be issued in the acquisition, including those issuable in connection with the conversion of the stock options, is not yet known, it is expected they will equal approximately 10% of the pre-acquisition shares outstanding but in any event will be less than 20%.

You further stated that:

- There are no contingencies between the PIPE and the Acquisition;
- The PIPE and the Acquisition were approved by the Board at separate Board meetings;
- The company did not contemplate the Acquisition at the time the PIPE was approved by the Board;
- At the time of the closing of the PIPE, no definitive purchase agreement, letter of intent, or exclusive negotiation agreement had been executed with respect to the Acquisition;
- To the best of the company's knowledge, none of the investors in the PIPE owns any shares of the Target;
- None of the officers or directors of the company owns any shares of the Target; and
- No shareholder, nor any affiliated group of shareholders, will own as much as 20% of the company's outstanding shares of common stock or outstanding voting power as a result of the Acquisition.

Following our review of the information you provided, we have determined that the shares issued in the PIPE and the shares to be issued in the Acquisition will not be aggregated for purposes of the Rule because: (i) the PIPE was not conducted in order to raise funds to finance the Acquisition, (ii) the Acquisition was not contemplated at the time of the closing of the PIPE; (iii) there are no contingencies between the transactions; (iv) the transactions were approved at separate Board meetings; and (v) to the best of the company's knowledge, none of the investors in the PIPE owns any shares of Target.

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Staff Interpretative Letter 2005-9

This is in response to your letters regarding a proposed issuance of the company's securities. Specifically, you asked whether the transaction complies with the provisions of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule").

According to the information you provided, the company intends to issue convertible debentures and warrants exercisable to purchase the number of shares equal to 35% of the shares into which the debentures would convert (the "Transaction"). The company also has the option to issue additional shares of common stock, in lieu of cash, for the payment of interest on the debentures. The placement agent's fee will be payable in either cash or stock. The securities contain anti-dilution and other provisions which could result in an issuance of more than 20% of the pre-transaction outstanding shares at a price less than the greater of book and market value. Pursuant to the terms of the Transaction, however, the aggregate issuance of common stock prior to obtaining shareholder approval will be limited to 19.99% of the pre-transaction outstanding shares (the "Limitation"). The Limitation will include shares issued upon the conversion of debentures and the exercise of warrants (including the placement agent warrants) and shares issued as payment of interest.

You stated that the purchasers in the Transaction will not include any officers, directors, employees, or consultants of the company. In addition, you stated that none of the prospective purchasers with whom the company has had discussions has filed a Schedule 13D or Schedule 13G reflecting a greater than 5% ownership interest in the company's stock. Furthermore, you stated that the terms of the Transaction will not change in the event the shareholders do not vote to approve the removal of the Limitation.

Following our review of the information you provided, we have determined that the Transaction complies with the Rule because the issuance of common stock or voting power will be less than 20% of the pre-transaction shares and votes outstanding unless shareholders approve the removal of the Limitation. If shareholders do not approve the removal of the Limitation, the terms of the Transaction will not change.

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Staff Interpretative Letter 2005-12

This is in response to your letter wherein you requested an interpretation of the definition of the term "independent director" set forth in Marketplace Rule 4200(a)(15)(B). Specifically, you asked whether Mr. X (the "Director") would be considered "independent", notwithstanding the fact that his son, Mr. Y, received a payment from the company as described below.

Prior to the acquisition, Mr. Y and his wife owned 26% Target. The company acquired Target in a transaction structured such that the assets of Target were distributed to its shareholders and then sold to a subsidiary of the company in exchange for cash payments. Mr. Y received a payment in excess of \$60,000 from the company as part of this transaction.

Following our review of the information you provided, we have determined that the Director is not considered "independent" under the Rule because the payment to his son, Mr. Y, exceeds the threshold amount of \$60,000. As stated in the Rule, a director is not considered independent who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during any period of twelve consecutive months within the three years preceding the determination of independence.

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Staff Interpretative Letter 2005-13

This is in response to your letter regarding whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval of the company's proposed amendment (the "Amendment") to its Non-Employee Directors' Stock Option Plan (the "Plan").

According to the information you provided, the Plan authorizes the automatic granting of stock options to non-employee directors. Specifically, the Plan provides for: (i) an initial option to be granted on the date that an individual becomes a non-employee director (the "Initial Option"); and (ii) annual grants on the date of each annual meeting of the company's stockholders (the "Annual Option"). The company recently distributed a 100% stock dividend to its shareholders. Pursuant to the terms of the Plan, all of the outstanding stock options and the share reserves were automatically adjusted to reflect the dividend. The Initial Option and the Annual Option were not adjusted, however, because the Plan does not provide for such adjustments. Pursuant to the Amendment, the Initial Option and the Annual Option would be increased to an amount not greater than that which would have been provided had these awards been adjusted to take into account the stock dividend.

NASDAQ staff determined that the Amendment will not require shareholder approval under the Rule.

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Staff Interpretative Letter 2005-14

This is in response to your letter regarding the applicability of The NASDAQ Stock Market's shareholder approval and voting rights requirements to the company's proposed private placement (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D), 4351 (the "Rules") and IM-4350-2.

According to the information you provided, the company proposes to issue shares of non-voting exchangeable preferred stock in a private offering (the "Financing"). As described, the preferred stock would be exchangeable for ten shares of the company's common stock and will be non-voting, except as otherwise required by Delaware law and subject to a right of its holders to consent to any amendment of its terms. You stated that the preferred stock cannot be exchanged for common stock unless shareholder approval is obtained. If still outstanding, the preferred stock will become redeemable for cash on the later of the fourth anniversary of the Financing closing date and 30 business days after the company publicly announces the final results of its product liability trial. The Financing investors will have the right to appoint up to two members of the board of directors.

Following our review of the information provided, we have concluded that by structuring the Financing as you described, the company will comply with the Rules and IM-4350-2. No common shares or voting power (except as required by law) are issuable without prior shareholder approval. The delayed redemption feature of the preferred stock is similar to an alternative outcome as defined under IM-4350-2, but because no shares of common stock will be issued prior to obtaining shareholder approval, IM-4350-2 is not implicated. In addition, the transaction will comply with the voting rights provisions of Rule 4351 since the percentage of the board of directors that may be appointed by the Financing investors will not exceed their percentage economic contribution to the company.

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Staff Interpretative Letter 2005-15

This is in response to your letter regarding the applicability of certain provisions of Marketplace Rule 4350 to the Fund. The Fund is organized as an open-end investment company registered under the Investment Company Act of 1940 ("1940 Act"). The Fund is a State business trust that is governed by a declaration of trust (the "Declaration of Trust"). The Trust has a single board of trustees that oversees the operations of the Fund.

You asked that we address the applicability of the following provisions to the Fund.

Marketplace Rule 4350(b) – Distribution of Annual and Interim Reports

As noted in the company's correspondence, as an open-end investment company, the Fund will be required under Section 30 of the 1940 Act, and Rule 30e-1 under the Act, to provide its shareholders with annual and semi-annual reports. This will satisfy the requirement of 4350(b) provided that the annual reports are distributed a reasonable period of time prior to the Fund's annual meeting.

Rule 4350(c) - Independent Directors

Pursuant to Marketplace Rule 4350(a)(2), as a management investment company registered under the 1940 Act, the Fund is not subject to Rule 4350(c) relating to independent directors.

Rule 4350(d) Audit Committee

Pursuant to Rule 4350(d)(2), each issuer must have an audit committee of at least three members each of whom must be independent as defined under Rule 4200(a)(15). However, pursuant to Rule 4200(a)(15)(G), in the case of an investment company, in lieu of paragraphs 4200(a)(15)(A)–(F), a director who is an "interested person" as defined in Section 2(a)(19) of the 1940 Act, other than in his or her capacity as a member of the board of directors or any board committee, shall not be considered independent. In addition, Rule 4350(d)(2)(A) requires that audit committee members meet the criteria for independence set forth in Rule 10A-3(b)(1) under the 1934 Act. The Trust has an audit committee comprised of Trustees who are not "interested persons" that acts on behalf of the Fund and that complies with the audit committee requirements of Rule 10A-3. As such, the Fund complies with 4350(d).

Rule 4350(e) - Shareholder Meetings; and Rule 4350(g) - Solicitation of Proxies

The Fund, like other open-end investment companies, is not required by the 1940 Act to hold annual shareholder meetings; however, Rule 4350(e) requires each NASDAQ issuer to hold an annual meeting of shareholders and provide notice of such meeting to NASDAQ. Accordingly, under Rule 4350(e), the Fund is required to hold an annual meeting of shareholders.¹ Further, pursuant to Rule 4350(g), the Fund is required to solicit proxies for all such meetings.

Rule 4350(f) - Quorum

As noted in the company's submission, the Declaration of Trust specifies that a majority of shares entitled to vote in person or by proxy will be a quorum for the transaction of business at a shareholder's meeting, except that where any provision of law or of the Declaration of Trust permits or requires that holders of any series or class will vote as a series or class, then a majority of the aggregate number of shares of that series or class entitled to vote will be necessary to constitute a quorum for the transaction or business by that series or class. Rule 4350(f) applies to the Fund. Because of the Trust's organization as a series company in which each series may have a number of classes, Staff notes Rule 4350(f) will be applied to the Fund based on the relevant group of shareholders entitled to vote on a particular matter.

¹ Staff has determined that the Special Meeting of Shareholders held in November 2004 satisfies the requirement that the Fund hold a shareholder meeting for the 2003 fiscal year. As such, the next annual meeting must be held for the 2004 fiscal year and must be held by your fiscal year end (November 2005).

Rule 4350(h) - Conflicts of Interest

Rule 4350(h) requires issuers to conduct an appropriate review of related party transactions and that such transactions be approved by the company's audit committee or another independent body of the board of directors. For purposes of 4350(h), the term "related party transaction" refers to transactions required to be disclosed pursuant to SEC Regulation S-K, Item 404. Because it is registered under the 1940 Act, the Fund is not subject to the disclosure requirements of Regulation S-K. Thus, while the Fund is subject to Rule 4350(h), this rule will not be implicated because the Fund is not subject to the disclosure requirements of Regulation S-K. Nonetheless, as noted in company's submission, registered investment companies' conflicts of interest are comprehensively regulated by Section 17 of the 1940 Act. Section 17 of the 1940 Act prohibits or substantially restricts a variety of transactions between, or among, a registered investment company and its "affiliated persons" to seek to prevent the investment company and its shareholders from being subject to overreaching by persons in a position to benefit themselves at the expense of the company and its shareholders. In addition, Section 17 requires the Fund to seek exemptive relief from the SEC to engage in such transactions.

Rule 4350(i)(1) - Shareholder Approval

As stated in the Fund's submission, under the 1940 Act and the Declaration of Trust, the Fund is not permitted to establish a stock option or purchase plan or equity compensation arrangement as contemplated by Rule 4350(i)(1)(A). As such, Rule 4350(i)(1)(A), while applicable, would not be implicated by the Fund's actions.

As further stated in the Fund's submission, the Fund will engage in a continuous offering of its shares, which will be offered publicly and registered under the 1933 Act. It would not engage in a private placement of the type contemplated by Rule 4350(i)(1)(D). The Fund, as an investment company that is registered under the 1940 Act, will be subject to a comprehensive statutory framework that sets out the circumstances under which a shareholder vote is required. The 1940 Act closely regulates the manner in which an investment company can issue its shares, and provides that an open-end investment company can issue its shares only at a price equal to the current Net Asset Value (the "NAV") of the shares next computed after an order to purchase or request to redeem the shares. In addition, you stated that the only circumstance in which the Fund would acquire the stock or assets of another company would be if the Fund were to acquire the assets of another affiliated, registered investment company, and that any such transaction would require shareholder approval under 1940 Act Rule 17a-8. Accordingly, because the Fund will issue shares only in public offerings, and because the shares cannot be sold for less than the NAV, Rules 4350(i)(1)(B), (C), and (D), while applicable, are not implicated.

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Staff Interpretative Letter 2005-16

This is in response to your letter regarding your client, the company, whose common stock is listed on The NASDAQ National Market. You asked about the applicability of NASDAQ's shareholder approval requirements to a proposed transaction, and in particular, the application of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules").

According to the information you provided, the company intends to raise funds through the sale of common stock and warrants in a private placement to institutional investors (the "Transaction"). In the Transaction, the company will sell shares of common stock equal to more than 20% of its pre-transaction shares, and warrants exercisable for additional common shares (i.e., 10% warrant coverage).

The issuance price (the "Issuance Price") per share of the common stock will be the sum of: (i) the closing bid price of the common stock immediately preceding the execution of the definitive agreement (the "Agreement") and (ii) \$0.0125 to allow for the attribution of \$0.125 for each full warrant (i.e., 10% multiplied by \$0.125 equals \$0.0125). The warrants will be exercisable at a higher price than the Issuance Price. The warrants will expire five years after issuance, and contain anti-dilution protection for stock splits and similar events, but will not contain price adjustments or economic dilution adjustment features. No investor individually, or as part of a group, can beneficially own, or have the right to acquire, more than 19.99% of the company's outstanding common shares or the voting power of the company on a post-transaction basis.

Following our review of the information you submitted, we have concluded that shareholder approval is not required pursuant to the Rules. Although the issuance will exceed 20% of the pre-transaction outstanding shares, the Issuance Price and the exercise price of the warrants will not be less than the greater of book or market value. Accordingly, shareholder approval is not required pursuant to Rule 4350(i)(1)(D). Further, given the ownership restrictions described above, the Transaction will not result in a change of control and shareholder approval is not required pursuant to Rule 4350(i)(1)(B).

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Staff Interpretative Letter 2005-17

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval requirements to the company's proposed private placement (the "Transaction"). Specifically, you asked about the potential applicability of NASDAQ Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") and IM-4350-2.

According to the information you provided, in the Transaction the company will issue Convertible Senior Notes due 2011 (the "Notes"). The Notes are convertible into common stock initially at a price that is greater than the company's market and book value per share as of the execution date of the definitive agreement (the "Execution Date"). Based on the conversion price, the Notes would be convertible into shares of common stock equal to approximately 35% of the currently outstanding shares of common stock. The conversion price, although subject to certain adjustments, would not be reduced to a price less than the greater of book and market value as of the Execution Date without shareholder approval.

One of the purchasers in the Transaction (the "Shareholder") has beneficial ownership of more than 20% of the company's common stock and is the largest beneficial owner of the company's common stock. Following the Transaction, the Shareholder would still be the largest beneficial owner with over 30% of the common stock. Currently, no other shareholder owns as much as 10% of the company's common stock. If shareholder approval of the Transaction is required but not obtained, the company would have to pay a termination fee. No common shares are issuable, however, prior to obtaining shareholder approval if such approval is required.

Following our review of the information provided, we have concluded that by structuring the Transaction as you described, the company will comply with the Rules and IM-4350-2. The Transaction does not result in a change of control for purposes of Rule 4350(i)(1)(B), because the Shareholder will be the largest shareholder both before and after the Transaction. We note that with current ownership of over 30%, the Shareholder's holding significantly exceeds those of any other shareholder. The Transaction complies with Rule 4350(i)(1)(D) because the issuance will not be at a price less than the greater of book and market value without prior shareholder approval. The termination fee is similar to an alternative outcome as defined under IM-4350-2, but because no shares of common stock can be issued prior to obtaining shareholder approval if such approval is required, IM-4350-2 is not implicated.

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Staff Interpretative Letter 2005-18

This is in response to your letters regarding the applicability of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") to a proposed sale of securities by the company (the "Proposed Financing"). Specifically, you asked whether the Proposed Financing would be aggregated with the company's private placement completed in 2004 (the "Prior Financing") for purposes of the Rules.

According to the information you provided, in the Prior Financing the company issued approximately 17% of the then outstanding shares of common stock, to accredited investors (the "Prior Investors"), at a discount to the market price. In addition, the Investors in the Prior Financing received warrants (the "Prior Warrants") to purchase 8.5% of the outstanding shares of the company's common stock at a premium to the market price. The Prior Warrants are not exercisable until six months following their issuance at a price not less than the greater of book and market value as of the date of the definitive agreement. Shareholder approval was not required of the Prior Financing under 4350(i)(1)(D), because the issuance at less than market value was less than 20% of the pre-transaction outstanding shares; or under 4350(i)(1)(B), because no purchaser could reach a control position as a result of the transaction.

In the Proposed Financing, the company expects to issue convertible notes due between 2008 and 2010 (the "Notes"). The Notes will be issued with warrants to purchase common stock. The Notes will be convertible into common stock, at a conversion price that will be no less than the sum of: (i) the closing bid price immediately prior to the execution of the definitive agreement (the "Closing Bid") and (ii) an amount to allow for the attribution of \$0.125 for each full warrant. The exercise price of the warrants will be no less than the Closing Bid. Based on the recent market price, the resulting issuance would be up to 36% of the pre-transaction outstanding shares as a result of the conversion of the Notes and up to 22% as a result of the exercise of the Warrants.

Through a right of first refusal (the "Right"), investors in the Prior Financing have the right to participate in the Proposed Financing. You stated that by terms of the Right, approximately 82% of the Proposed Financing is available for purchase by investors other than the Prior Investors. You also stated that there are no contingencies between the Prior Financing and the Proposed Financing. There is a provision included in both the Notes and the Warrants that will prevent any holder of the Notes or warrants from converting any Note or exercising any Warrant if such conversion or exercise would result in acquisition of beneficial ownership of 9.9% of the company's common stock. You stated that this limitation may be amended only with the approval of the company's shareholders, and that if such approval is sought and not obtained, there would be no changes in the terms of the Proposed Financing.

Following our review of the information you provided, we have determined that the Proposed Financing will not be aggregated with the Prior Financing for purposes of Rule 4350(i)(1)(D) because the price will not be less than the greater of book or market value. Accordingly, because the price will not be at a discount, shareholder approval of the Proposed Financing will not be required pursuant to Rule 4350(i)(1)(D) provided that the terms remain as described in your submission. Further, given the ownership restrictions described above, the Proposed Financing will not result in a change of control, and shareholder approval is not required pursuant to Rule 4350(i)(1)(B).

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Staff Interpretative Letter 2005-19

This is in response to your letters regarding the company, whose common stock is listed on The NASDAQ SmallCap Market. You asked about the applicability of NASDAQ's shareholder approval requirements to a transaction (the "Proposed Offering"), which you described. Specifically, your question relates to Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") and whether the shares issued in the Proposed Offering would be aggregated with the company's 2004 private placement (the "Prior Financing").

According to the information you provided, pursuant to the Proposed Offering, the company intends to raise funds through the sale of units. Each unit is comprised of one share of newly designated convertible preferred stock (the "Preferred Stock") and one warrant to purchase shares of common stock. The Preferred Stock and warrants are convertible into and exercisable for shares equal to 21% of the company's pre-transaction outstanding common shares. The Preferred Stock and warrants are subject to anti-dilution protection such that the conversion and exercise prices could be reduced if the company issues securities in the future at a lower price. The Proposed Offering will consist of two closings. The First Closing is limited to 19.99% of the pre-transaction outstanding shares (the "Limitation"). The Second Closing, but not the First Closing, is subject to obtaining shareholder approval.

Pursuant to the Limitation, prior to seeking shareholder approval, no holder of the Preferred Stock may convert its Preferred Stock, and no person holding the warrants can exercise such warrants, such that the issuance of common shares would be more than 19.99% of the company's common stock on a pre-transaction basis or to the extent that such issuance would constitute a change of control under Marketplace Rule 4350(i)(1)(B). In addition, prior to shareholder approval, no one shareholder or affiliated group could own more than 20% of the shares or voting power or have the right to acquire more than 20% of the shares or voting power of the company. In the event the company does not receive shareholder approval, the terms of the transaction do not change. None of the purchasers in the Proposed Offering are officers, directors, consultants or employees of the company.

The Preferred Stock shares are voting shares; however, the Certificate of Designation prohibits holders of the Preferred Stock from voting such shares at a greater rate than as if converted at market value on the date of the First Closing. The Preferred stockholders cannot vote to approve the Proposed Offering.

You stated that the Proposed Offering and the Prior Financing are significantly different in the uses of proceeds. There were five investors who invested approximately 33% in the aggregate of the Prior Financing and who will invest approximately 36% in the aggregate of the Proposed Offering. There were a total of 14 investors in the Prior Financing and the company expects 22 investors to participate in the Proposed Offering.

Following our review of the information you provided, we have determined that the Proposed Offering will not be aggregated with the Prior Financing for purposes of Rule 4350(i)(1)(D). Although there is some commonality of investors, the transactions will be separated by over eight months and neither was contingent on the other. In addition, given the ownership restrictions described above, the Proposed Offering cannot result in a change of control prior to shareholder approval. Accordingly, the Proposed Offering as you described it complies with the Rules.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-20

This is in response to your letters regarding the applicability of Marketplace Rule 4350(i)(1)(D) (the "Rule") to a proposed private placement issuance of convertible securities. You asked whether the Proposed Transaction would be aggregated with the company's prior transactions (the "2004 Transaction" and the "2005 Transaction") for purposes of the Rule.

According to the information you provided, the company's Class A Common Stock has one vote per share and is listed on NASDAQ and its Class B has two votes per shares but is not listed. In the 2004 Transaction, the company issued Class A Common Stock, which was approximately 19.99% of the pre-transaction aggregate outstanding shares of common stock and 17.39% of the aggregate voting power, at a discount to the market price. In addition, the investors received warrants to purchase additional Class A shares, which was approximately 7.0% of the aggregate outstanding shares and 6.1% of the aggregate voting power. The warrants were not exercisable until six months following their issuance and not exercisable at a price less than the greater of book and market value as of the date of the definitive agreement. Proceeds from the 2004 Transaction were used for general corporate purposes and, at the time of closing, there was no agreement or understanding to conduct any further financing transactions. You stated that no officer, director, employee, or consultant of the company participated in the 2004 Transaction.

In the 2005 Transaction, the company issued: (i) promissory notes which were convertible into Class A Common Stock, and (ii) four tranches of warrants to acquire Class A shares. The investors in the 2005 Transaction included each of the 2004 Transaction investors as well as some new investors. The 2005 Transaction was approved by the company's shareholders. In connection with this transaction, the investors also provided the company with a Bridge Loan to be used for working capital purposes. The proceeds from the 2005 Transaction were also used for general corporate purposes and there was no agreement or understanding to conduct any further financing transactions.

The company has proposed to enter into a new private placement transaction, (the "Proposed Transaction") in which all of the 2005 Transaction Investors will participate. In the Proposed Transaction, the company will issue securities that are convertible into shares of Class A Common Stock equal to approximately 19% of the Class A Common Stock issued and outstanding (including any adjustments that may be made to the conversion price). There will not be any officer, director, employee or consultant participation. The proceeds from the transaction will be used to retire the Bridge Loan and for general corporate purposes. You stated that the securities will contain an ownership restriction that will prohibit the conversion of the security if the holder (together with its affiliates) would beneficially own in excess of 9.99% of the issued and outstanding Class A Common Stock following conversion.

Following our review of the information you provided, we have determined that the 2005 Transaction will not be aggregated with the 2004 Transaction or the Proposed Transaction for purposes of the Rule because shareholder approval was obtained for the 2005 Transaction. Further, the Proposed Transaction would not be aggregated with the 2004 Transaction because there are no contingencies between the two transactions and the transactions are separated by nine months.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-21

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval requirements to an issuance of securities in a private placement (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") to the Transaction.

According to the information you provided, in the Transaction, the company expects to issue to institutional investors shares of common stock (the "Shares") and warrants to purchase additional shares of common stock (the "Investor Warrants"). The Shares will equal approximately 19.6% of the pre-transaction outstanding shares of common stock, and the warrants, approximately 4.9%. In addition, the company will issue to the placement agent warrants to purchase shares of common stock (the "Placement Agent Warrants", and collectively with the Investor Warrants, the "Warrants"). The exercise price of the Warrants will not be less than the closing bid of the common stock immediately preceding the execution of the definitive agreement (the "Market Value"). The Warrants may not be exercised for 180 days following closing and will not be subject to any adjustment provision that could reduce the exercise price to less than Market Value. You stated that no officer, director, employee, or consultant of the company will participate in the Transaction. In addition, no investor individually, or as part of a group, can beneficially own, or have the right to acquire, more than 19.99% of the company's outstanding common shares or the voting power of the company on a post-transaction basis.

Following our review of the information you submitted, we have concluded that the Transaction as described in your correspondence does not require shareholder approval under the Rules. Specifically, the Transaction does not require shareholder approval under Rule 4350(i)(1)(D) because the issuance of the Shares, although at a price less than market value, will equal less than 20% of the common shares and voting power outstanding on a pre-transaction basis. The exercise price of the Warrants will be not be less than the greater of book and market value, and the Warrants may not be exercised until 180 days from the date of closing. Further, given the ownership restrictions described above, the Transaction will not result in a change of control and will not require shareholder approval under Rule 4350(i)(1)(B).

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-22

This is in response to your letter regarding the applicability of Marketplace Rule 4351 (the "Rule") and the Voting Rights Policy IM-4351 (the "Policy") to an issuance of securities in connection with the company's reincorporation from State X to State Y.

According to the information you provided, the company currently has the following three classes of stock authorized: Common Stock, Class B Common Stock, and Preferred Stock. There are no shares of Preferred Stock outstanding and only the Common Stock is listed on NASDAQ. Holders of the Common Stock are entitled to one vote for each share, and the holders of the Class B, ten votes for each share. Generally, the holders of the Common Stock and the Class B vote together on all matters.

Currently incorporated in State X, the company is proposing to reincorporate in State Y subject to the approval of its Board of Directors and shareholders. Following such reincorporation, the capital structure would be identical to the current structure. The company would issue, on a one-for-one basis, shares of its State Y Common Stock and State Y Class B Common Stock for all shares of the State X Common Stock and State X Class B Common Stock. You stated that the voting rights in the State Y corporate structure would be identical to those in the State X structure.

Following our review of the information you provided, we have determined that the company's issuance of Common Stock and Class B Common Stock in connection with the company's reincorporation would not violate the Rule or the Policy because the issuance will not reduce or restrict the voting rights of existing shareholders.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-23

This is in response to your letter regarding the applicability of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to issuances of securities by the company in private placements. You asked whether the issuances would be aggregated for purposes of the Rule, even though the company was delisted from The NASDAQ National Market for failure to file its Quarterly Reports on Form 10-Q. You stated that the company hopes to complete the steps necessary for filing its Forms 10-Q and 10-K in the coming months. Currently, the company's common stock is quoted in the NQB Pink Sheets.

According to the information you submitted, the company issued warrants (the "New Warrants") to five security holders (the "First Transaction") in exchange for warrants previously issued to the security holders in 2001 (the "Original Warrants"). The company received no proceeds in the exchange.

The company subsequently sold shares of common stock to investors at a discount to the market price (the "Second Transaction"). None of the investors in the First Transaction participated in the Second Transaction. You stated that the proceeds were used for the manufacturing scale-up and process development of the company's vaccine candidate, to fulfill its obligations under a government contract with regard to the vaccine, to continue funding clinical trials for its existing products, and to complete the acquisition of the remaining interest in the company's local manufacturing facility.

Currently, the company is considering an additional financing within the next three months at a discount to the market price (the "Potential Transaction"). The proceeds would be used to fund a new clinical trial for the vaccine, to develop another vaccine, and potentially to acquire additional products. You stated that the Potential Transaction could include certain investors who participated in the Second Transaction.

You asked whether, for purposes of the Rule, the Second Transaction would be aggregated with either the First Transaction or the Potential Transaction.

Following our review of the information you submitted, we have determined that the Second Transaction will not be aggregated with the First Transaction for purposes of the Rule. There were no contingencies between the transactions, and no investor participated in both. In addition, there was no commonality as to the uses of proceeds. Until more information is available with respect to the Potential Transaction, however, we cannot reach a conclusion as to whether it would be aggregated with the earlier transactions. We note that you stated that the Potential Transaction could include certain investors who participated in the Second Transaction. Such commonality of investors could result in our concluding that the transactions would be aggregated.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-24

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval requirements to an issuance of securities in a private placement (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules").

According to the information you provided, in the Transaction the company would issue notes convertible into shares of the company's common stock at a price not less than the closing bid price immediately preceding the execution of the definitive agreement ("Market Value"). The conversion price will not be subject to any adjustment provision that could reduce it to less than Market Value. Based on the current bid price and assuming full conversion, the issuance of common stock would equal approximately 36% of the company's pre-transaction outstanding shares.

You stated that no investor individually, or as part of a group, can beneficially own, or have the right to acquire, more than 19.99% of the company's outstanding common shares or the voting power of the company on a post-transaction basis. The proceeds will be used for working capital purposes and to repay a loan.

Following our review of the information you submitted, we have concluded that the Transaction as described in your correspondence does not require shareholder approval under the Rules. Specifically, the Transaction does not require shareholder approval under Rule 4350(i)(1)(D) because the issuance of the Shares, although in excess of 20% of the pre-transaction outstanding shares, will be at a price that is not less than the greater of book or market value. Further, given the ownership restrictions described above, the Transaction will not result in a change of control and will not require shareholder approval under Rule 4350(i)(1)(B).

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-25

This is in response to your letters asking whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval of the company's proposed amendment (the "Amendment") to its Supplemental Retirement Savings Plan (the "Plan").

According to the information you submitted, pursuant to the provisions of the Plan, compensation that participants elect to defer, and matching amounts added by the company, are allocated to unfunded bookkeeping accounts in the participants' names. Each participant can request that his or her funds be deemed to be invested in various securities including the company's common stock. You stated that the company has established a trust which holds investments for the benefit of the participants that generally mirror the investments requested by the participants. Currently, all distributions from the Plan to the participants must be made only in cash.

Only one participant, the Chairman and Chief Executive Officer (the "Participant"), has requested an investment in company stock under the Plan. Accordingly, funds from his account were used to purchase shares of the company's common stock (the "Stock") at market value on the open market. Pursuant to the Amendment, the Participant would be entitled to make a one-time irrevocable election to receive a distribution of the Stock rather than cash otherwise owed to him.

Following our review of the information you provided, we have determined that shareholder approval of the Amendment is not required pursuant to the Rule. Pursuant to the Amendment, the Participant will be entitled to elect to receive shares of common stock purchased at market value in lieu of cash otherwise due. Under the Rule, shareholder approval is not required for plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market value.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-26

This is in response to your letters regarding the potential applicability of The NASDAQ Stock Market's shareholder approval requirements to a proposed issuance of securities in connection with a proposed Exchange Offer (the "Exchange Offer") involving the company's Convertible Notes due 2007 (the "Notes"). Specifically, your question relates to Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D)(ii) (the "Rules").

According to the information you provided, the Notes were initially issued in 2003 with each \$1,000 principal amount convertible into a fixed number of shares of common stock plus \$500 cash. In the Exchange Offer, for each \$1,000 principal amount, the company will offer the holders of the Notes the same number of shares of common stock, plus an amount of cash that is not less than \$500 and not more than the difference between the \$1,000 principal amount and the market value of the shares exchanged immediately prior to the expiration of the exchange offer. You stated that the total consideration to be paid by the company in the exchange will be less than the original principal amount of the notes tendered. As a result of the exchange, the company will not have the obligation to pay interest on the tendered notes and will retire the debt for less than the principal amount.

In addition, you stated that as a result of the Exchange Offer, no participant will own, or have the right to acquire, 20% or more of the outstanding common stock of the company on a post-transaction basis.

You stated that the offer is subject to the federal tender offer laws and that based on guidance the SEC has provided via No Action letters, the value of the shares issued in the Exchange Offer will be determined based on the closing bid price two business days prior to the expiration of the offer.

Following our review of the information you submitted, we have concluded that the issuance of securities in connection with the Exchange Offer does not require shareholder approval pursuant to the Rules. NASDAQ views the Exchange Offer to be a new transaction for purposes of the Rules because the company is receiving additional benefits by entering into the Exchange Offer. Specifically, the Notes will be retired for less than their principal amount and the company will save the interest otherwise payable on the notes. In addition, based on your representations regarding the applicability of the federal tender offer laws, it is not inappropriate to determine market value as the closing bid price two days prior to the expiration of the tender offer. As a result, shareholder approval is not required under Rule 4350(i)(1)(D)(ii) because the issuance of the common stock will be at market value.

Furthermore, shareholder approval is not required for the transaction pursuant to Rule 4350(i)(1)(B) because the transaction will not result in a change of control. This conclusion is based on your representation that the Exchange Offer will not result in any participant owning, or having the right to acquire, 20% or more of the outstanding common stock of the company on a post-transaction basis.

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Staff Interpretative Letter 2005-27

This is in response to your letters regarding whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval of the company's proposed amendment (the "Amendment") to its Stock Plan (the "Plan").

According to the information you provided, the Plan is due to expire prior to the time that the company would normally hold its annual meeting of stockholders. Pursuant to the Amendment, the company would extend the term of the Plan until the date of its next annual meeting (the "Extension Period"). You further stated that during the Extension Period, awards under the Plan would be made only as inducements material to individuals entering into employment with the company as permitted under Rule 4350(i)(1)(A)(iv) ("Inducement Awards"). The Plan would not otherwise be changed, and the shares available for issuance under the Plan would not be increased. Furthermore, the Amendment would not change the terms of, or have any effect on, any awards previously granted under the Plan.

Following our review of the information you provided, we have determined that the Amendment will not require shareholder approval under the Rule provided that all awards during the Extension Period qualify as Inducement Awards. We have reached this conclusion because, under the Rule, Inducement Awards do not require shareholder approval. Please note that pursuant to Rule 4350(i)(1)(A)(iv), Inducement Awards must be approved by either the issuer's independent compensation committee or a majority of the issuer's independent directors, and promptly following an issuance of any Inducement Awards, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

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Staff Interpretative Letter 2005-28

This is in response to your letter, relating to the applicability of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") to the assumption of equity compensation plans in connection with a merger (the "Merger") of the company and another NASDAQ listed company (the "Target"). Your letter relates to the provision of IM-4350-5 that provides that shares available under plans acquired in acquisitions may be used for post-transaction awards either under the pre-existing plan or arrangement or another plan or arrangement subject to the following limitations: (i) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and (ii) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated (the "Limitations").

According to the information you provided, in the Merger the company and Target will merge into wholly-owned subsidiaries of a new holding company ("NewCo") formed to effect the Merger. Thereafter, the subsidiary into which the company is merged will be merged upstream with and into NewCo. Holders of the company's common stock and of Target's common stock will receive shares of NewCo common stock in exchange for their existing shares. Upon the closing of the Merger, NewCo will be renamed and, subject to NASDAQ's approval, its common stock will be listed on NASDAQ. The company's and Target's common stock will cease to be listed on NASDAQ.

You stated that pursuant to the terms of the Merger, the company should be deemed to be the "acquiring company" in the merger for the following reasons: (i) the company's equity owners will represent a majority of NewCo's equity ownership based on the GAAP treasury method; (ii) the company's directors will constitute a majority of NewCo's board of directors; (iii) management of NewCo will be comprised primarily of the company's management employees; (iv) the company's current headquarters will be the headquarters of the combined entity; and (v) under Generally Accepted Accounting Principles ("GAAP"), the company will be considered to be the "accounting acquirer".

In connection with the Merger, NewCo will assume all of the outstanding stock options of the company and the Target, and the number of shares for which such options are exercisable, and the price at which such options may be exercised, will be adjusted in proportion to the applicable exchange ratios. NewCo will assume the company's (i) Stock Incentive Plan ("Stock Plan"); (ii) Employee Stock Purchase Plan ("ESPP"); and (iii) Equity Incentive Plan (collectively "the Company's Plans"). The Stock Plan and ESPP include evergreen share refresher provisions that expire ten years after the original adoption (the "Refresher Provisions"). Additionally, NewCo will assume the Target's shareholder-approved Stock Option/Stock Issuance Plan (the "Target Plan").

Following our review of the information you provided, we agree with your view that for purposes of the applicability of the Rule, the company should be considered to be the acquirer in the merger, particularly based on your representation that the company would be treated as such under GAAP. Accordingly, pursuant to the Rule, NewCo may assume the company's Plans without future awards under such plans being subject to the Limitations. The Refresher Provisions will remain subject to the provision of IM-4350-5 which requires that a plan that has a formula for automatic increases in the shares available cannot have a term in excess of 10 years unless shareholder approval is obtained every 10 years. You stated that the Refresher Provisions will expire ten years after the original adoption. With respect to the assumed Target Plan, NewCo may assume such plan without further shareholder approval, and may make future awards subject to the Limitations, because the company is considered to be the "acquirer" and Target is considered to be the "acquired company". Be advised that pursuant to IM-4350-5, any additional shares available for issuance under a plan or arrangement acquired in a connection with a merger or acquisition would be counted by NASDAQ in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 4350(i)(1)(C).

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Staff Interpretative Letter 2005-29

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval requirements to issuances of securities contemplated by the company. Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D)(ii) (the "Rules").

According to the information you provided, the company will issue secured promissory notes (the "Series B Notes") to two Purchasers. The proceeds from the Series B Notes are expected to be used for working capital purposes and for potential future acquisitions. No shares of common stock are issuable unless shareholder approval is obtained.

The company intends to seek shareholder approval of the conversion of the Series B Notes into Series B Convertible Preferred Stock (the "Series B Preferred") and warrants exercisable for 25% of the number of shares of common stock issuable upon conversion of the Series B Preferred (collectively, the "Conversion"). The Series B Preferred will be convertible into shares of common stock at a discount to the market value, although the voting rights will be contractually limited to ensure that the votes that may be cast by the holders of the Series B Preferred do not exceed the number of votes equal to the principal plus interest of the Series B Notes converted into the Series B Preferred, divided by the closing bid price of the shares of common stock immediately preceding the issuance of the Series B Notes. If shareholder approval is not obtained for the Conversion, no shares of common stock will be issuable.

The issuance of the securities in the Conversion could result in one of the Purchasers becoming the largest shareholder in the company, with an ownership position of greater than 20%.

Previously, in a private placement, the company sold to the Purchasers shares of Series A Convertible Preferred Stock (the "Series A Preferred") and warrants to purchase shares of common stock (the "Prior Transaction"). Although the Series A Preferred contains anti-dilution price adjustment provisions, the aggregate issuance upon conversion is limited to 19.9% of the pre-transaction outstanding shares. The Series A Warrants are exercisable for no less than market value immediately preceding the execution of the definitive agreement, and they were not exercisable until six months after issuance. No officer, director, employee, or consultant was a purchaser in the Series A transaction. The company was not required to obtain, and did not seek, shareholder approval of the Series A financing.

You stated that the Series A and Series B financings were not contingent on each other and that the Series B financing was not contemplated at the time of the Series A financing.

Further, you stated that the proxy statement relating to the approval of the conversion feature of the Series B Notes would include: (i) a description of the Series B Notes and the proposed conversion feature, including the use of a portion of the proceeds to fund working capital and potential future acquisitions; (ii) a statement that approval of the Series B conversion feature would also constitute approval of any change of control deemed to occur in connection with the Series B financing; and (iii) a statement that shareholder approval of the Series B conversion feature would constitute approval of an issuance of more than 20% of the pre-transaction outstanding shares or voting power for less than the greater of book or market value.

The issues you raised in your correspondence relate to: (i) whether the issuance of securities in the Series A financing would be aggregated with the Series B financing for purposes of Rule 4350(i)(1)(D); and (ii) whether the holders of the securities issued in the Series A financing may vote to approve the Conversion.

Following our review of the information you submitted, we have concluded that the Series A financing and the Series B financing will not be aggregated for purposes of Rule 4350(i)(1)(D) because: (i) over 11 months time passed between the two financings; (ii) neither was contingent on the other, and (iii) the Series B financing was not contemplated at the time of the Series A financing. Therefore, the Rule will not prohibit the holders of any voting securities issued in the Series A transaction from voting those securities in the vote to approve the Conversion. With regard to Rule 4350(i)(1)(B), you stated that the proxy proposal will include a statement that the approval of the Series B conversion feature would also constitute approval of

any change in control deemed to occur in connection with Series B financing. Accordingly, the company will have complied with the requirements of Rule 4350(i)(1)(B).

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Staff Interpretative Letter 2005-30

This is in response to your letters regarding the applicability of Marketplace Rule 4351 (the "Rule") and the Voting Rights Policy (the "Policy") set forth in IM-4351 to actions under consideration by the company. Currently, the company has a single class of common stock which has one vote per share and is traded on The NASDAQ National Market.

According to the information you provided, the company intends to seek shareholder approval of an amendment (the "Amendment") to its Certificate of Incorporation which would create a dual class common stock structure by: (i) increasing the authorized number of shares of all classes of capital stock; (ii) authorizing a new class of common stock designated as Class A common stock, which would have one-twentieth of a vote per share; (iii) reclassifying the company's existing common stock as Class B common stock, which would have one vote per share; and (iv) effecting a one-for-four reverse split of the Class B common stock. Promptly after the effectiveness of the Amendment, the company will distribute as a stock dividend seven shares of Class A common stock for each outstanding share of Class B common stock. The Amendment and the dividend will not change the relative voting power of any stockholder of the company and will not disparately reduce or restrict the voting rights of any stockholder. The heavier voting Class B common stock will not be convertible into the lighter voting Class A common stock, nor will the Class A common stock be convertible into Class B common stock.

The company expects to issue Class B common stock in the future upon the exercise of currently outstanding options ("Outstanding Options"). Other than through the exercise of these options, the company does not expect any other future issuances of the Class B common stock.

You stated that the Amendment will contain a provision that will require any person who acquires more than 10% of the outstanding shares of the Class B after the completion of the recapitalization to commence a public tender offer to acquire a corresponding proportion of the shares of the Class A except that such provision will not be triggered for certain specified acquisitions of Class B shares, including acquisitions by gift.

The owner of over 60% of the company's outstanding shares of common stock has advised the company that after the recapitalization he intends to transfer by gift (the "Transfer") to one or more members of the company's management, such number of his Class B shares as would be necessary to give them up to 45% of the aggregate voting power. Because the Transfer may be accounted for as a compensatory issuance from the company under Generally Accepted Accounting Principles, the company will seek shareholder approval of the Transfer. In the proxy proposal seeking such approval, the company will state that it expects to record a compensation expense as a result of the Transfer.

Following our review of the information you provided, we have determined that the company's dual class structure as described above would be in compliance with both the Rule and the Policy provided that, following the reclassification and the issuance of the stock dividend, no additional shares of Class B stock may be issued without the prior approval of NASDAQ. This restriction on future issuances of Class B stock does not apply to shares issuable upon the exercise of the Outstanding Options as described above but would apply to future grants of options on Class B shares after the effectiveness of the Amendment. The Amendment will not result in any current shareholder being disenfranchised, as their voting rights will remain the same. Further, both the Rule and Policy, and the SEC's former Rule 19c-4 upon which the Rule and Policy are based, permit the creation of a lower voting class of shares because such shares do not disenfranchise the existing holders. Nonetheless, the restriction on future issuances of the heavier voting Class B stock is an appropriate safeguard against potential shareholder disenfranchisement as a result of the new structure.

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Staff Interpretative Letter 2005-31

This is in response to your letters regarding a proposed private placement of shares of the company's common stock (the "2005 Offering"). Specifically, your question relates to whether the shares to be issued in the 2005 Offering would be aggregated with the shares issued in the acquisition of Target consummated in May 2005 (the "Acquisition") or with the shares issued by the company in a private placement (the "2004 Offering") for purposes of Marketplace Rule 4350(i)(1)(C)(ii) or Marketplace Rule 4350(i)(1)(D) (the "Rules"). In a previous letter, the company asked whether the Acquisition and the 2004 Offering would be aggregated. In our response, we stated that the 2004 Offering and the Acquisition would not be aggregated.

According to the information you provided, in the 2004 Offering, the company issued common stock equal to 9.85% of the total number of shares outstanding prior to the transaction. You stated that according to the memorandum that was distributed to investors, the proceeds from the 2004 Offering were to be used for working capital purposes generally, to increase capital levels, to fund branch expansion, to acquire non-bank financial services companies, for new hires to expand the commercial lending business, and to make limited payments on specified indebtedness.

In December 2004, the company entered into an agreement to acquire Target for a combination of cash and stock (the "Merger Agreement"). The Acquisition was consummated in May 2005. Under the terms of the Merger Agreement, half of the Target's outstanding shares were converted into cash and half were converted into shares of the company's common stock.

You stated that prior to the consummation of the acquisition, the Board of Directors reviewed the company's long-term strategic plan and concluded that in order to grow over the next three to five years, the company would have to expand its capital base. Accordingly, the Board authorized management to engage a placement agent in connection with an offering of the company's common stock. You stated that it is anticipated that the proceeds from this 2005 Offering will be used to expand the company's capital position in order to support future asset growth, to fund bank and non-bank acquisitions, and to supply capital at the holding company level. No officer, director, employee, or consultant of the company will be permitted to purchase shares in the 2005 Offering. The number of shares to be issued in the 2005 Offering will equal less than 20% of the pre-transaction outstanding shares.

You further stated that:

- There are no contingencies between or among the 2004 Offering, the Acquisition, and 2005 Offering;
- The board of directors did not focus on the likelihood of further equity offerings when the company was considering the 2004 Offering or the Acquisition;
- No investor solicited in connection with the 2004 Offering was advised that there would be a follow-on investment in 2005;
- At least 75% of the 2005 Offering will be sold to purchasers who did not participate in the 2004 Offering;
- Any correlation between the investors in the 2005 Offering and the former shareholders of the Target would be merely coincidental; and
- No shareholder will own, or have the right to acquire, 10% or more of the company's outstanding shares of common stock or outstanding voting power as a result of the 2005 Offering.

Following our review of the information you provided, we have determined that the shares to be issued in the 2005 Offering will not be aggregated with the shares issued in either the 2004 Offering or the Acquisition for purposes of the Rules. Regarding the 2005 Offering and the 2004 Offering, we have reached this conclusion because: (i) the 2005 Offering was not contemplated at the time of the 2004 Offering; (ii) there were no contingencies between them; (iii) of the passage of time between them (approximately nine months); and (iv) at least 75% of the 2005 Offering will be sold to purchasers who did not participate in the 2004 Offering. Regarding the 2005 Offering and the Acquisition, we have reached this conclusion because: (i) the proceeds from the 2005 Offering will not be used to finance the Acquisition; (ii) there were no contingencies between them; and (iii) of your representation that any correlation between the purchasers in the 2005 Offering and the former shareholders of the Target would be merely coincidental.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-32

This is in response to your letters regarding a proposed private placement of shares of the company's common stock expected to be consummated in July 2005 (the "July Offering"). Specifically, you asked: (i) whether the shares to be issued in the July Offering would be aggregated with the shares issued in a private placement in January 2005 (the "January Offering") for purposes of Marketplace Rule 4350(i)(1)(D) (the "Rule"); and (ii) whether the July Offering will require shareholder approval under the Rule. Your question relates also to the applicability of Rule 4350(i)(1)(B).

According to the information you provided, in the January Offering, the company issued shares of common stock equal to 19.99% of the total number of shares outstanding prior to the transaction. The proceeds from the January Offering were used for working capital purposes.

You stated that in the July Offering, the number of shares of common stock (the "Common Shares") issued will equal less than 20% of the pre-transaction outstanding shares, and the price will be less than market value. In addition, the July Offering may include warrants (the "Warrants"). The shares of common stock issuable upon the exercise of the Warrants, together with the Common Shares, could result in an issuance equal to greater than 20% of the pre-transaction outstanding shares. The Warrants (i) will not be exercisable for less than the greater of book or market value; (ii) will not be exercisable prior to six months after the closing of the July Offering; and (iii) will contain no anti-dilution or price protection provisions. The company plans to use the proceeds from the July Offering for clinical studies.

You stated that since the completion of the January Offering, there have been changes in the company's circumstances, which led to the planning of the July Offering. These changes included delays in the receipt of certain regulatory approvals for a drug product and in the establishment of a collaboration agreement and resulted in increased expenses and the lack of expected additional funding. The company's management first presented the prospect of the July Offering to the Board of Directors in May 2005.

No officer, director, employee, consultant of the company will be permitted to purchase shares in the July Offering, and none of the investors who participated in the January Offering will participate in the July Offering. No purchaser will own, or have the right to acquire, 20% or more of the company's outstanding shares of common stock or outstanding voting power as a result of the July Offering. For the July Offering, the company will use a placement agent different from the one used for the January Offering. You further stated that there are no contingencies between the January Offering and the July Offering and that the July Offering was not contemplated at the time the company completed the January Offering. Prior to the January Offering, the company's most recent issuance of common shares in a financing had been in March 2004.

Following our review of the information you provided, we have determined that the shares to be issued in the July Offering will not be aggregated with the shares issued in the January Offering for purposes of the Rule because: (i) the July Offering was not contemplated at the time of the January Offering; (ii) there were no contingencies between the two transactions; (iii) none of the investors who participated in the January Offering will participate in the July Offering; and (iv) approximately six months time passed between the two transactions. In addition, based on your representations regarding the July Offering, shareholder approval is not required for the July Offering under Rule 4350(i)(1)(D) because the issuance of the common shares, although at a price less than market value, will equal less than 20% of the common shares and voting power outstanding on a pre-transaction basis. Because the exercise price of the Warrants will not be less than the greater of book and market value, and the warrants may not be exercised until six months after the date of closing, the Warrants do not require shareholder approval. Further, given the ownership restrictions described above, the July Offering will not result in a change of control and will not require shareholder approval under Rule 4350(i)(1)(B).

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Staff Interpretative Letter 2005-33

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval requirements to an issuance of securities in a private placement (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rule 4350(i)(1)(B) (the "Rule").

According to the information you provided, in the Transaction the company expects to issue to institutional investors shares (the "Shares") equal to approximately 12.5% to 15.7% of the pre-transaction outstanding shares of common stock, at a discount to the market value. No officer, director, employee, or consultant of the company will participate in the Transaction. Among the investors who may participate is "Fund", which currently owns approximately 21% of the company's outstanding common stock. The Fund acquired its holdings by participating in private placements and by open market purchases. Currently, no other stockholder or group of affiliated stockholders, including the company's officers and directors as a group, has a larger beneficial ownership interest in the company's common stock than the Fund, and according to the company's last proxy statement, no other investor holds a position as large as 5% of the company's common stock. Depending on its level of participation, the Fund's holdings in the company may go up or down, or even remain constant, as a result of the Transaction. No other stockholder or group of stockholders will have a larger interest in the company than the Fund following the Transaction.

Following our review of the information you submitted, we have concluded that the Transaction, as described in your correspondence, does not require shareholder approval under the Rule because it will not result in a change of control. The Fund, the largest current shareholder, will remain the largest shareholder upon the completion of the Transaction, and there is no other significant shareholder. Further, at the time the Fund made the open market purchases that resulted in its ownership increasing from approximately 18% to approximately 21%, the company had not had any discussions with the Fund regarding the Transaction or other equity financing.

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Staff Interpretative Letter 2005-34

This is in response to your letters regarding changes that the company is considering to its Stock Option Plan (the "Plan") and a stand-alone stock option (the "Option"), issued pursuant to an agreement with a former employee (the "Agreement"). Specifically, you asked whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval to provide for the adjustment of the exercise prices of outstanding stock options to reflect an anticipated non-recurring extraordinary cash dividend ("Special Dividend").

According to the information you provided, the Plan was originally adopted by Company X and approved by Company X's shareholders and was assumed by the company following its acquisition of Company X in 2002. Company X also granted the Option before it was acquired and under the rules in effect at the time, shareholder approval was not required nor obtained for the Option. As a result of the acquisition, the Option became exercisable for shares of the company's common stock.

In June 2005, the company announced the proposed acquisition of Target (the "Acquisition"). In connection with the Acquisition, the company has agreed to pay a special cash dividend (the "Special Dividend") to its shareholders. You stated that the terms of the Plan and the Agreement provide for the adjustment of outstanding stock options in the event of certain corporate events, such as mergers, consolidations, reorganizations, recapitalizations, stock splits, dividends payable in shares or any other change in the number or kind of outstanding shares of stock subject to outstanding stock options. Neither the Plan nor the Agreement specifically provides for adjustments to the exercise prices of outstanding options for extraordinary dividends.

You stated that the company proposes to amend the Plan and the Agreement in order to provide that all outstanding stock options will be adjusted such that the intrinsic value of the stock options will be preserved after the payment of the Special Dividend (the "Amendment").

Following our review of the information you provided, we have determined that the Amendment does not require shareholder approval under the Rule. In that regard, we note that the Amendment does not provide a material increase in benefits to participants, but rather seeks to preserve the existing intrinsic value of outstanding options following the Special Dividend. Thus, the Amendment is consistent with the provisions of the Plan and the Agreement that already permit adjustments in the event of changes in the company's capital structure. We also note that the Amendment does not result in an increase in the number of shares to be issued under the plan, an expansion of the class of eligible participants, or an expansion in the available types of options or awards.

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Staff Interpretative Letter 2005-35

This is in response to your letters regarding Marketplace Rules 4200(a)(15)(B) and 4200(a)(15)(D) (the "Rules"). You asked whether Mr. X (the "Proposed Director") would be eligible to serve as an independent director on the company's Board of Directors (the "Board") pursuant to the definition set forth in the Rules.

According to the information you provided, the Proposed Director is the Chief Executive Officer and controlling stockholder of the Firm, which was retained by the company in 2004 to assist the Board in formulating and implementing an executive succession plan (the "Project"). You stated that the Firm reported to the company's Board of Directors in connection with the Project. The Proposed Director owns 80% of the Firm, and the balance is held by other executives and consultants of the Firm, none of whom is a family member or affiliate of the Proposed Director. You stated that while the number of employees can vary according to the requirements of specific projects, the Firm currently has 15 employees.

The Project was completed, and all of the consulting fees paid, in 2004. During the fiscal year ended December 31, 2004, the company paid less than \$20,000 to the Firm including amounts for the reimbursement of expenses and amounts the Firm paid to a subcontractor. You stated that the Project was not unusual or remarkable in size or scope of billings for the Firm. You also stated that upon election of the Proposed Director to the Board, it is expected that neither the Proposed Director nor the Firm would be hired for any future consulting engagements with the company.

Following our review of the information you provided, we have determined the company's Board is not precluded by the Rules from finding that the Proposed Director is independent. In this regard, we note that Rule 4200(a)(15)(D) is applicable, rather than Rule 4200(a)(15)(B), because the payments were made to an entity (the Firm) of which the Proposed Director is an executive officer and the controlling shareholder and not directly to or for the benefit of the Proposed Director. Under Rule 4200(a)(15)(D), the Proposed Director is eligible to be independent because the payments were less than the greater of 5% of the Firm's revenues or \$200,000 in the current year or any of the past three fiscal years. We are not making a determination regarding the eligibility to qualify as an independent director under any other provision of Rule 4200(a)(15). In addition, pursuant to IM-4200, a company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors.

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Staff Interpretative Letter 2005-36

This is in response to your letter regarding the company's proposed exchange offer (the "Exchange") relating to its Stock Plan (the "Plan"). In the Exchange, shares of restricted common stock ("Restricted Stock") would be offered in exchange for certain outstanding options. You asked whether the Exchange would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). The Plan was approved by the company's shareholders.

According to the information you provided, the company proposes to calculate the current fair market value of all stock options with an exercise price equal to or greater than a pre-determined exercise price (the "Eligible Options") using the Black-Scholes valuation model. In the Exchange, the company would issue Restricted Stock to each consenting holder of Eligible Options based on the ratio of such calculated value to the current fair market value of the company's common stock. The difference between the number of Eligible Options exchanged and the number of shares of Restricted Stock issued would be cancelled and unavailable for future grant under the Plan. You stated that in no event would the number of shares of Restricted Stock issued in the Exchange exceed the number of Eligible Options exchanged.

The Plan provides that the Plan Administrator (the "Administrator") has the authority to, among other things, reduce the exercise price of any option to the then current fair market value if the fair market value of the common stock covered by such option shall have declined since the date the option was granted. The Plan also provides that the Administrator has the authority to offer to buy out for a payment in cash or shares, an option previously granted, based on such terms and conditions as the Administrator shall establish. The Plan allows the issuance of rights to purchase Restricted Stock.

Following our review of the information you provided, we have determined that shareholder approval for the Exchange is not required pursuant to the Rule because the Plan contains provisions permitting the specific actions proposed. Specifically, the Plan permits the repurchase for cash of previously granted options and the issuance of Restricted Stock at the market price. Further, we note that the Plan also permits the repricing of options.

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Staff Interpretative Letter 2005-37

This is in response to your letter regarding Marketplace Rules 4200(a)(15)(B) and 4200(a)(15)(D) (the "Rules"). You asked whether Mr. X (the "Director") would be eligible to be an independent director following a purchase and sale transaction (the "Transaction") and a leasing agreement (the "Leasing Agreement") involving the company and the Director as described below.

According to the information you provided, Mr. X has been a member of the company's Board of Directors (the "Board") since 2002. In the Transaction, a wholly-owned subsidiary (the "Subsidiary") of the company will sell an office building (the "Office Building") to the Director for an amount that is higher than either of two appraisals obtained by the Subsidiary. In the Leasing Agreement, the Subsidiary will lease space in the Office Building currently occupied by the Subsidiary as a bank branch, resulting in annual lease payments to the Director of less than \$60,000, an amount which you stated is in line with the rates mentioned in the aforementioned appraisals. The Board and the audit committee of the Board have approved the Transaction.

Following our review of the information you provided, we have determined the company's Board would not be precluded by the Rules from finding that the Director is independent. With respect to the sale of the Office Building, Rule 4200(a)(15)(D) does not preclude the Director from being independent because the payment in the Transaction is less than 5% of the revenues of the recipient (which is the company). Further, Rule 4200(a)(15)(B) does not preclude the Director from being independent, provided the payments the Director will receive pursuant to the Leasing Agreement are less than \$60,000 during any period of twelve consecutive months. We are not making a determination regarding the eligibility to qualify as an independent director under any other provision of Rule 4200(a)(15). In addition, pursuant to IM-4200, a company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors. We are not expressing any opinion as to whether it would be appropriate for the company's Board to make such a finding.

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Staff Interpretative Letter 2005-38

This is in response to your letters regarding a proposed private placement of shares of the company's common stock and warrants expected to be consummated in July 2005 (the "Proposed Transaction"). Specifically, you asked whether the Proposed Transaction would be aggregated with a convertible note and warrant offering completed in December 2004, (the "Prior Transaction") for purposes of Marketplace Rule 4350(i)(1)(D) (the "Rule"). Your question relates also to the applicability of Rules 4350(i)(1)(A) and 4350(i)(1)(B)

According to the information you provided, in the Prior Transaction, the company sold a convertible promissory note (the "Note") and a related warrant (the "Warrant"), each having a term of five years. The Note is convertible into approximately 19.9% of the pre-transaction outstanding shares, and the Warrant is exercisable for approximately 1.6% of the pre-transaction outstanding shares. No officers, directors, employees or consultants of the company participated in the Prior Transaction. Although both the Note and the Warrant contain anti-dilution provisions, the Note cannot be converted into more than 19.9% of the pre-transaction shares at a discount unless shareholder approval is obtained, and the exercise price of the Warrant is subject to a minimum price which is a premium to both the market and book value immediately preceding the signing of the definitive agreement. Accordingly, shareholder approval of the Prior Transaction was not required by the Rule. The use of the proceeds was for general working capital purposes, general corporate purposes, and the repayment of certain outstanding indebtedness.

You stated that in the Proposed Transaction, the company will sell shares of common stock equal to approximately 14% of the pre-transaction outstanding shares (the "Proposed Transaction Stock") and warrants exercisable for up to 9% of the pre-transaction outstanding shares (the "Proposed Transaction Warrants") to purchasers including three capital management firms, and three directors and three officers of the company (the "Insiders"). The Insiders will purchase, in the aggregate, up to approximately 3% of the shares being issued, and no other officers, directors, employees, or consultants of the company will participate in the transaction. The price paid by the Insiders will be no less than the greater of book and market value at the time of the definitive agreement. The price paid for the common stock by the other purchasers will be at a discount to the market price, and the exercise price of the Proposed Transaction Warrants will be no less than the greater of book and market value immediately preceding the execution of the definitive agreement unless shareholder approval is obtained. The Proposed Transaction Warrants will not be exercisable until six months after closing.

You stated that the Initial Investor had no involvement in the negotiation of the Proposed Transaction. However, pursuant to the terms of the Prior Transaction, this investor has a right of first refusal with respect to any subsequent securities offering for two years. Under this right, the Initial Investor has notified the company that it intends to participate in the Proposed Transaction, purchasing approximately 24% of the shares to be sold.

You stated that the company had not contemplated the Proposed Transaction at the time of the Prior Transaction and that there were no contingencies between the two transactions. In addition, you stated that events subsequent to closing of the Prior Transaction gave rise to the need for additional financing. Specifically, you stated that events identified by the company in its second quarter 2005 caused it to incur additional losses, resulting in the breach of financial covenants in its credit facility. The covenants will be amended as part of the Proposed Transaction.

According to a Schedule 13G filed with the Securities and Exchange Commission, four shareholders, with aggregate holdings equal to approximately 20.5% of the company's outstanding shares of common stock, constitute a group (the "Group") within the meaning of Rule 13d-5(b). The Group is the largest holder of the company's common stock; the next largest owns approximately 10%. Members of the Group will participate in the Proposed Transaction, and the Group will remain the largest shareholder following the Pending Transaction.

Following our review of the information you provided, we have determined that the shares to be issued in the Proposed Transaction will not be aggregated with the shares issued in the Prior Transaction for purposes of the Rule because: (i) the Proposed Transaction was not contemplated at the time of the Prior Transaction; (ii) there were no contingencies between the two transactions; (iii) the investor in the Prior Transaction will participate in the Prior Transaction only to limited extent and only because of the right of first refusal; and (iv) approximately seven months will have passed between the two transactions. In addition, based on your representations regarding the Proposed Transaction, shareholder approval is not required under Rule

4350(i)(1)(D) because less than 20% of the common shares and voting power outstanding on a pre-transaction basis will be issued at a price less than market and book value . In that regard, while approximately 22% of the pre-transaction shares outstanding could be issued in the Proposed Transaction, the Proposed Transaction Warrants may not be exercised until six months after the date of closing and the exercise price of those warrants will be greater than book and market value. As such, the Proposed Transaction Warrants will not count towards the 20% calculation for purposes of Rule 4350(i)(1)(D). Shareholder approval is not required pursuant to Rule 4350(i)(1)(A) because the shares issued to the Insiders will not be at a discount. In addition, given the size of the Group's current ownership position and because the Group will remain the largest shareholder, the Proposed Transaction will not result in a change of control and, therefore, will not require shareholder approval under Rule 4350(i)(1)(B).

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Staff Interpretative Letter 2005-39

This is in response to your letter, regarding the company, which is a foreign private issuer as defined in Rule 3b-4 under the Securities Exchange Act of 1934. You asked whether the exemptive process (the "Exemptive Process") pursuant to Marketplace Rule 4350(a) (the "Rule") may be utilized with regard to the requirement under Rule 4350(d)(2)(A) that a company have at least three members on its audit committee (the "Three-Member Requirement"). You stated that the company intends to have an audit committee consisting of one member.

Pursuant to the Rule, a foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall comply with Rules 4350(b)(1)(B) (Disclosure of Going Concern Opinion), 4350(j) (Listing Agreement) and 4350(m) (Notification of Material Noncompliance). Such an issuer must have an audit committee that satisfies Rule 4350(d)(3), and the members of the audit committee must meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1), subject to the exemptions provided in Rule 10A-3(c) under the Securities Exchange Act of 1934). As such, the Exemptive Process may be utilized for the Three-Member Requirement such that a foreign private issuer may have fewer than three persons on its audit committee. Note, however, that any member of the audit committee must meet all applicable requirements of Rule 10A-3.

Pursuant to IM-4350-6, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 must submit to NASDAQ a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws. This certification is required at the time the company seeks to adopt its first non-compliant practice. Rule 4350 requires the company to make appropriate disclosures in its annual filings with the Securities and Exchange Commission and also disclose each requirement of Rule 4350 that it does not follow and include a brief statement of the home country practice the issuer follows in lieu of these corporate governance requirement(s).

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Staff Interpretative Letter 2005-40

This is in response to your letters regarding a proposed private placement of shares of the company's common stock and warrants expected to be consummated in July 2005 (the "Proposed Transaction"). Specifically, you asked whether for purposes of Marketplace Rule 4350(i)(1)(D) (the "Rule"), the Proposed Transaction would be aggregated with a prior transaction (the "Prior Transaction") which was initially entered into on November 2004, and subsequently amended in April 2005.

In the Prior Transaction, the company sold convertible notes ("Notes") and warrants to Investors (together, the "Prior Transaction Investors") with interest on the Notes payable in shares of common stock (or cash, at the election of the company) at a discount to the market price of the common stock on the payable date. Pursuant to the terms of the Prior Transaction, the aggregate issuance was limited to 19.99% of the pre-transaction outstanding shares without shareholder approval (the "19.99% Limitation"). No officer, director, employee, or consultant of the company participated in the Prior Transaction. The purpose of the Prior Transaction was for general corporate purposes and to fund the company's business plan.

You stated that in April 2005, the company and the Prior Transaction Investors agreed to an amendment (the "Amendment") to the Prior Transaction to improve the company's liquidity position. The Amendment: (i) permitted the company to repay two principal installments in shares of common stock rather than in cash; (ii) reduced the amount of cash balance that the company was required to maintain during the term of the Note; (iii) accelerated the payment of two principal installments; and (iv) reduced the exercise price of the warrants. In connection with the Amendment, the Prior Transaction Investors made no further investment of cash into the company, and the aggregate issuance remained subject to the 19.99% Limitation.

Pursuant to the Proposed Transaction, the company will issue shares of common stock (or securities convertible into common stock), at a discount, and warrants that could result in an issuance of common stock equal to approximately 30% of its currently outstanding shares. Such issuance would be subject to the limitation, however, that it cannot exceed 19.9% of the pre-transaction outstanding shares unless shareholder approval is obtained of the additional issuance (the "Additional Issuance"). At the closing of the Proposed Transaction, the funds related to the Additional Issuance would be placed into an escrow account held by a third party. The securities relating to the Additional Issuance would not be issued into escrow, but, instead, would be issued only if shareholder approval is obtained. If shareholders do not approve the Additional Issuance, there would be no changes in the terms of the Proposed Transaction; the escrow funds would be returned to the investors, and the Additional Issuance would not take place.

According to the company's correspondence, the purpose of the Proposed Transaction would be to redeem a portion of the Notes that were issued in the Prior Transaction, with the remainder to be used for general corporate purposes, including the funding of the company's business plan. No officer, director, employee, or consultant of the company will participate in the Proposed Transaction. In connection with the Proposed Transaction, no purchaser will own, or have the right to acquire, 20% or more of the company's common stock or voting power.

You stated that although the Prior Transaction Investors will have no involvement in the negotiation of the Proposed Transaction, they have participation rights permitting them to purchase up to one-third of the securities sold in any securities offering for two years from the date of the closing of the Prior Transaction. The company does not know whether investors will exercise their participation rights with respect to the Proposed Transaction. You stated that there are no contingencies between the Prior Transaction and the Proposed Transaction and that at the time of the original issuance of the securities in the Prior Transaction, the company did not have a specific plan or intention to pursue the Proposed Transaction.

As we discussed telephonically with your representatives, NASDAQ had determined that we would aggregate the Proposed Transaction with the Prior Transaction, in part because a portion of the proceeds from the Proposed Transaction would be used to redeem the securities issued in the Prior Transaction, and thus it appeared to be part of the same financing plan.

The company subsequently asked whether, in the event the transactions are aggregated, the conclusion would be changed if the Proposed Transaction was consummated as planned, but:

- The company would pay any cash amount needed to redeem the first principal installment of the Notes from a credit facility (and not from the proceeds of the Proposed Transaction) ("Option 1"); or

- The company would obtain from the Noteholders more time to redeem the first principal installment of the Notes, so that the redemption would be effected using only shares of common stock and no cash ("Option 2").

Following our review of the information you provided, we have determined that for purposes of the Rule, the shares to be issued in the Proposed Transaction would be aggregated with the shares issuable in the Prior Transaction based on the connection arising from the uses of proceeds, even if the company also obtains additional cash from another source as proposed in Option 1. In that regard, we note in particular that the company's earlier submission states that the principal purpose of the Proposed Transaction is to redeem a portion of the principal amount of the Notes issued in the Prior Transaction. While you indicate that with Option 1 you would raise additional cash that would not involve the issuance of equity, we cannot draw a distinction between the cash from the credit facility and the cash to be raised in the Proposed Transaction in view of the prior stated intention of using a portion of the proceeds from the Proposed Transaction to fund the redemption.

The transactions would not be aggregated, however, under Option 2 because only shares of common stock would be issued in the redemption, and as a result, proceeds from the Proposed Transaction could not be used to repurchase the securities issued in the Prior transaction. The shares that would be issued in the redemption would be subject to the 19.99% Limitation.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-41

This is in response to your letters regarding the applicability of The NASDAQ Stock Market's shareholder approval and voting rights requirements to the company's proposed issuance of securities (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(B), 4350(i)(1)(C), 4350(i)(1)(D), and Rule 4351 (the "Rules"). In addition, your question relates to IM-4350-2.

According to the information you provided, in the Transaction the company will issue convertible senior subordinated notes (the "Notes"), the proceeds from which will be used to fund an acquisition. Initially, the Notes are not convertible into any other security. Beginning 180 days after their issuance, the Notes will become convertible into shares of common stock, subject to a limit of 19.9% of the pre-transaction outstanding shares (the "Limitation"), at a price not less than the greater of book and market value.

The market value will be the closing bid price immediately preceding the execution of the definitive agreement ("Market Value"). Within 120 days of the issuance of the Notes, the company will seek shareholder approval for the exchange of the Notes for a new class of preferred stock, the shares of which will be convertible into common stock. Until the Notes are exchanged, any Note conversion that would have been in excess of the Limitation would instead be redeemed for cash, in an amount based on the market value of the common stock on the date on which the conversion notice is given.

The preferred stock will vote on an as-converted basis but will not vote at a heavier rate than as if converted at the market price of the common stock on the date of issuance of the preferred stock. The investors would be entitled to three of seven (approximately 43%) of the seats on the company's board of directors. Giving effect to their investment, the investors' relative contribution to the company would be approximately 45% of the market value of the company (based on the minimum expected investment and the current market value).

You stated that: (i) no officer, director, employee, or consultant of the company will participate in the Transaction; and (ii) no director, officer, or substantial shareholder of the company has a 5% or greater interest (nor such persons collectively, 10% or greater) in the assets to be acquired.

Following our review of the information provided, we have concluded that by structuring the Transaction as you described, the company will comply with the Rules. Specifically, under Rule 4350(i)(1)(B), due to the Limitation, the Transaction will not result in a change of control without shareholder approval. Rule 4350(i)(1)(C)(i) is not applicable because no director, officer or substantial shareholder of the company has a 5% or greater interest (nor such persons collectively, 10% or greater) in the assets to be acquired. Rule 4350(i)(1)(C)(ii) and 4350(i)(1)(D) will be satisfied because, due to the Limitation, the issuance cannot exceed 20% of the pre-transaction outstanding shares of common stock without shareholder approval. The Transaction complies with IM-4350-2 because no common shares will be issued prior to the shareholder vote and because the terms of the Transaction will not change as a result of the shareholder vote. Finally, the requirements of Rule 4351 will be satisfied because: (i) the preferred stock will not have greater voting power than as if converted at market value on the date of issuance of the preferred stock, and (ii) the investors' representation on the board of directors will be consistent with the amount of their investment in the company.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-42

This is in response to your letter regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to an issuance of securities which you described (the "Issuance") and whether NASDAQ would waive the requirements of the Rule for the Issuance. You also requested a description of the consequences on the company's eligibility for continued listing on NASDAQ in the event that the company completes the Issuance without shareholder approval and NASDAQ does not waive the requirements.

According to the information you provided, pursuant to the Issuance, the company would seek to redeem shares of a certain class of its preferred stock through the issuance of additional shares of its common stock. The number of additional shares of common stock to be issued would exceed 20% of the then-outstanding shares, and the newly issued shares would be valued at less than the greater of the book and market value of the common stock.

Following our review of the information you provided, we have concluded that shareholder approval is required under the Rule prior to the Issuance because the Issuance would exceed 20% of the of the common stock outstanding before the Issuance at a price less than the greater of book and market value. Under NASDAQ's rules and procedures, NASDAQ staff has no basis on which to waive the requirements of Rule 4350(i)(1)(D)(ii) other than the financial viability exception described in Rule 4350(i)(2), which you stated is inapplicable. As a result, should the company complete the Issuance without shareholder approval, its securities would be subject to delisting from NASDAQ pursuant to the Procedures for the Review of NASDAQ Listing Determinations set forth in the 4800 Series of the Marketplace Rules.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-43

This is in response to your letters regarding the applicability of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") to the company's proposed stock purchase program (the "Program").

According to the information you submitted, the company will designate from time to time certain employees of the company or its subsidiaries to participate in the Program (each, a "Participant"). Under the Program, a Participant who has earned an annual or periodic bonus will be given the opportunity to elect to receive the bonus in cash or in the form of a full recourse loan, which would bear a market rate of interest and which must be used to purchase shares of the company's common stock (the "Stock") at market value (the "Loan"). Each Loan will be forgiven by the company over three years from the date of the Loan, if the Participant is then employed by the company. Participants electing to receive a cash bonus instead of a Loan would have no obligation to use such bonus to purchase Stock. You stated that Loans would not be available to any employee subject to the proscriptions on loans to executives adopted by the Sarbanes-Oxley Act of 2002. In addition, you stated that the purpose of the Program is to allow Participants to invest a larger amount of the bonus in Stock because the Loan is not subject to taxes until it is forgiven, whereas a cash bonus would be immediately subject to all applicable taxes.

You stated that in most cases the Loan would be exactly equal in value to the cash bonus the Participant would otherwise receive and that in these cases the shares issued may or may not be issued from the company's shareholder-approved Equity Incentive Plan (the "Plan"). However, in certain circumstances, you stated that "the company may decide to reward valuable employees by making available a Loan in an amount modestly larger than the cash bonus." In these cases, the Stock would only be issued under the Plan. You further stated that the Plan permits the sale of restricted stock with no vesting schedule and allows the company's Compensation Committee, as the administrator of the Plan, to set the amount that Participants must pay to receive such stock.

Following our review of the information you provided, we have determined that the Program satisfies the requirements of the Rule. In that regard, we note that in most cases, the Participant will have the choice of whether to purchase stock using a Loan or to receive a cash bonus in the same amount. These issuances would be permitted without shareholder approval under the provision of the Rule that states that shareholder approval is not required of plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value. Further, all issuances in connection with any Loan that exceeds the cash bonus that would otherwise be available would come from a shareholder-approved plan allowing such issuances and, therefore, would be permitted under the Rule.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-44

This is in response to your letter wherein you asked whether Mr. X is eligible to be an independent director pursuant to the provisions of Marketplace Rule 4200(a)(15). Specifically, your question relates to Rules 4200(a)(15)(B) and 4200(a)(15)(D) (the "Rules"). Mr. X is the sole owner and president of Consulting Firm, which has nine employees that specializes in receivership services, bankruptcy consulting, and business valuations.

According to the information you provided, in December 2004, the company acquired Target and its three subsidiaries, including the Subsidiary Bank, which became subsidiaries of the company as a result of the acquisition.

You stated that effective on Date 1, a State district court appointed the Consulting Firm as the receiver of various assets of two debtor parties and that in furtherance of that appointment, the Consulting Firm was ordered to take charge of, manage, and operate the business of one of the debtor parties. The Subsidiary Bank held deed of trust and security interest in certain of the receivership properties.

You further stated that in its "Order Appointing Receiver", the court authorized the Consulting Firm to issue "receiver's certificates" to preserve and maintain one of the debtor's businesses in exchange for funds advanced by third parties or the Subsidiary Bank during the term of the receivership. The certificates are a lien and security interest superior to all liens.

In addition, you stated that the Subsidiary Bank advanced funds to the Consulting Firm, as receiver, in 2003, 2004, and through June 30, 2005. The Subsidiary Bank expects that any additional advances it makes to the Consulting Firm will be immaterial in amount. You stated that the value of the assets in the receivership estate substantially exceeds the aggregate amount of the funds advanced, and that because the advances are represented by receiver's certificates, the Subsidiary Bank expects to recover all the funds it advanced to the Consulting Firm.

Following our review of the information you provided, we have determined that Mr. X is not eligible to be an independent director under the Rules. The three-year "look-back" period of the Rules applies without regard to whether a subsidiary, which entered into the relationship giving rise to the payments, was a subsidiary at the time of the entering into of the relationship. Moreover, rather than having ceased by the time of the acquisition of the Subsidiary Bank by the company, the relationship between the Subsidiary Bank and the Consulting Firm is ongoing and additional payments were made following the acquisition. Accordingly, Mr. X does not meet the requirements of either 4200(a)(15)(B) or 4200(a)(15)(D). Rule 4200(a)(15)(B) applies because Mr. X is the sole owner of the entity that received the payments, and such payments exceeded the \$60,000 threshold. Because the payments exceeded the greater of 5% of the Consulting Firm's revenues or \$200,000, during at least one of the past three years, Mr. X is also not eligible under Rule 4200(a)(15)(D). Even though, the Subsidiary Bank expects to recover the advances, the Rules are nonetheless applicable because the payments were, in fact, made to the Consulting Firm.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-45

This is in response to your letter regarding proposed changes to the company's Employee Stock Option Plan (the "Employee Plan") and its Nonstatutory Stock Option Plan (the "NSO Plan"), and, together with the Employee Plan, the "Plans"). You asked whether the changes would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule").

According to the information you provided, the Employee Plan currently allows for the granting of stock options and the award of restricted stock through stock purchase rights. Pursuant to the proposed changes, the company would add the ability to grant stock appreciation rights ("SARs") and restricted stock units ("RSUs"). The NSO Plan currently allows only for the granting of stock options. Pursuant to the proposed changes, the company would add the ability to award restricted stock, RSUs, and SARs to the NSO Plan.

Under the proposal, the SARs would be settled in shares of the company's common stock. You stated that the SARs would provide eligible recipients with the opportunity to receive the appreciation in value of a specified number of shares of common stock over a specified period of time. You further stated that, when settled, the SARs would provide the equivalent benefit as that of stock options with a net exercise feature and that the other features of the SARs would be identical to those of non-statutory stock options. The RSUs would provide eligible recipients the opportunity to receive a specified number of shares of common stock at a date following the grant of the RSU upon the vesting of the award.

Following our review of the information you provided, we have determined that the proposed change to allow the granting of SARs under the Plans would not require shareholder approval under the Rule because the change would not constitute an expansion of the types of awards available under the Plans, since the SARs would be substantially the equivalent of stock options which are currently authorized under the Plans. Further, the addition of RSUs to the Employee Plan would also not require shareholder approval under the Rule because the RSUs would be substantially the equivalent of restricted stock awards which are currently authorized under the Employee Plan.¹ Finally, we have determined that the addition of restricted stock awards and RSUs to the NSO Plan would require shareholder approval because this change would expand the types of awards available under the NSO Plan. In that regard, we note that the NSO Plan currently authorizes only stock options and do not agree that the issuance of RSUs and restricted stock is substantially equivalent to the grant of deeply discounted options. SARs and stock options are substantially equivalent because both provide eligible recipients with the opportunity to receive the appreciation in value over a base price (or exercise price) for a specified number of shares of common stock over a specified period of time. An award of stock, however, provides value to the recipients without regard to whether the value of the stock appreciates and without the recipients having to pay an exercise price. Accordingly, revising a plan that authorizes only stock options to also permit stock awards would require shareholder approval because such a revision would expand the types of awards available.

This interpretation 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 interpretation was issued.

¹ We also note that these changes do not result in an increase in the number of shares to be issued under the Plans, a material increase in benefits to the participants, or an expansion of the class of eligible participants.

Staff Interpretative Letter 2005-46

This is in response to your letters regarding the applicability of the voting rights requirements of Marketplace Rule 4351 (the "Rule") and the Voting Rights Policy (the "Policy") set forth in IM-4351 to a proposed issuance of securities (the "Issuance") by the company to an Investor. Since its initial public offering, the company has had two classes of common stock: (i) Class A which is listed on NASDAQ and which has 1 vote per share, and (ii) Class B which is not publicly traded and which has 10 votes per share. The Investor beneficially owns all of the outstanding shares of the Class B. In the Issuance, subject to the approval of its shareholders, the company would issue additional shares of Class B to the Investor as partial consideration for the acquisition by the company of several businesses currently owned by the Investor.

According to the information you provided, the Class A represents approximately 57% of the company's aggregate number of common shares, and 12% of the voting power, and the Class B, approximately 43% of the aggregate number of common shares and 88% of the voting power. In addition to its Class B holdings, the Investor controls, through its affiliates, Class A shares, which when combined with its Class B holdings result in the Investor owning 89% of the aggregate voting power of the company.

The company expects to fund the acquisition of the businesses with cash and the issuance of Class B Shares. Following the Issuance, the Investor would hold 67% of the company's aggregate number of common shares and 93% of the voting power (compared with the current 43% and 89%, respectively).

You stated that the transaction will be a "transformative event" for the company, potentially tripling its equity value. You further stated that the issuance of the Class B would help lessen the possibility that the Investor could inadvertently become an investment company in the event that its voting power in the company fell below a majority while the Investor still held a significant portion of its (the Investor's) assets in the form of the company's common stock.

Following our review of the information you provided, we have determined that the Issuance is consistent with the Rule and the Policy. The Policy provides that "...issuers with existing dual class capital structures would generally be permitted to issue additional shares of existing super voting stock without conflict with this policy." Because it was in place at the time of the company's initial public offering, the company's capital structure is an "existing" structure for purposes of the applicability of the Rule and Policy. In addition, as stated in IM-4351, the Policy is based on, but more flexible than, former Rule 19c-4 under the Securities Exchange Act of 1934. Thus, NASDAQ will permit corporate actions or issuances that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with the Policy. In the adopting release for Rule 19c-4, the Securities and Exchange Commission stated that in certain circumstances minority shareholders would not necessarily benefit from the Rule's protection.¹ We believe that this is such a circumstance. Currently, the company's Class A shareholders have little voting power because the Investor controls approximately 89% of the overall voting power of the company. Although the Issuance would somewhat affect the voting rights of the existing Class A shareholders by increasing the Investor's voting control to 93%, given the Investor's existing working control of the company, the Issuance would not meaningfully alter the voting disparity that already exists.

Accordingly, based on the foregoing, we have concluded that the Issuance, as described in your letter, would not violate the Rule or the Policy.

This interpretation 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 interpretation was issued.

¹ See SEC Release No. 34-25891.

Staff Interpretative Letter 2005-47

This is in response to your letters regarding issuances of shares of the company's common stock. Specifically, you asked whether for purposes of Marketplace Rule 4350(i)(1)(D) (the "Rule"), a prior transaction (the "Prior Transaction") and a proposed transaction (the "Proposed Transaction") would be aggregated.

According to the information you provided, in the Prior Transaction, the company issued shares of its common stock in exchange for its outstanding trust preferred securities through a tender offer available to all holders of the trust preferred (the "Trust Preferred Exchange"). The Trust Preferred Exchange was approved and initiated by the company's Board of Directors in June 2005 and the tender offer period expired in July 2005. As a result of the exchange, the company issued shares approximating 12.3% of the pre-transaction outstanding common shares.

You stated that you believe that both the original issuance of trust preferred securities and the issuance of common shares in the Trust Preferred Exchange were public offerings for purposes of IM-4350-3, which sets forth the definition of a "public offering" for purposes of the Rule. The offering of trust preferred securities was underwritten by 40 separate underwriters on a firm commitment basis. Upon issuance, the securities were listed on the New York Stock Exchange, and there were over 400 beneficial shareholders. Subsequently, and at the time of the Trust Preferred Exchange, the trust preferred securities were traded on the Over-the-Counter Bulletin Board. Broker searches conducted by the company identified approximately 300 holders holding approximately 27% of the outstanding trust preferred securities. The tender offer was offered and available to all holders of the trust preferred, and approximately 91.6% of the trust preferred securities were tendered.

In the Proposed Transaction, the company would issue shares of its common stock in exchange for its outstanding Series A Senior Notes. The terms have not been determined, but you have represented that the issuance would be less than 20% of the pre-transaction outstanding shares.

You stated that at the time of the closing of the Prior Transaction, the company had no definitive plans to commence the Proposed Transaction. The company's Board has not yet approved the Proposed Transaction.

Following our review of the information you provided, we have determined that for purposes of the Rule, the common shares that would be issued in the Proposed Transaction would not be aggregated with the common shares issued in the Prior Transaction. Specifically, we find that the Prior Transaction was a "public offering" for the purposes of IM-4350-3, and, as such, is not subject to the Rule. In determining that the Prior Transaction was a public offering, we note that it was available to all of the holders of the trust preferred securities, that the trust preferred securities were widely held and publicly traded, that anyone who wanted to participate in the Trust Preferred Exchange could have done so by purchasing and tendering the trust preferred securities, and that the exchange was conducted as a tender offer, subject to the SEC's rules governing such tender offers. In reaching this determination, we are rendering no opinion on whether the Proposed Transaction will require shareholder approval.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-48

This is in response to your letters regarding the applicability of the shareholder approval and voting rights requirements to the company's proposed issuance of securities (the "Transaction") which you described. Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), 4350(i)(1)(C), 4350(i)(1)(D), and 4351 (the "Rules").

According to the information you provided, in the Transaction, the company would sell to Investor approximately 24.8% of its pre-transaction outstanding shares of common stock (the "Private Placement Shares"). You stated that as a result of the Transaction, the Investor would own 19.9 % of the company's post-transaction outstanding shares (the "Ownership Position"). You stated that the company has no current plans to issue any shares to the Investor in addition to the Private Placement Shares. No officer, director, employee or consultant of the company would receive any of the company's securities in the Transaction. The proceeds will be used for general corporate purposes and will not be used in connection with the acquisition of the stock or assets of another company. The Investor will not be entitled to any seat on the company's Board of Directors, and the Private Placement Shares will not have any heightened voting power.

You stated that the shares would be sold at a premium to the closing bid price at the time the purchase agreement (the "Purchase Agreement") relating to the Transaction was signed. You stated that the conditions to closing include:

- Compliance with the Hart-Scott-Rodino Antitrust Improvements Act and other applicable regulatory requirements;
- The absence of litigation against the company or the Investor that relates to the issuance of the shares;
- The accuracy of the representations and warranties made by the company;
- The performance and compliance with all covenants, agreements and conditions contained in the Purchase Agreement to be performed or complied with by the company;
- Delivery of a legal opinion from the company's counsel;
- The absence of a Material Adverse Effect as defined in the Purchase Agreement;¹
- The listing of the Private Placement Shares on the NASDAQ National Market; and
- The Research Collaboration and License Agreement to be entered into between the company and an affiliate of the Investor shall have been executed as required by the Purchase Agreement upon satisfaction of the other conditions to closing.

Following our review of the information provided, we have concluded that by structuring the Transaction as you described, the company would comply with the Rules. Specifically, Rule 4350(i)(1)(A) is not applicable because no shares would be acquired by any officer, director, employee or consultant of the company. Rule 4350(i)(1)(B) will not require shareholder approval because, given the size of the Ownership Position, the Transaction would not result in a change of control. Rule 4350(i)(1)(C) will not require shareholder approval because the Transaction would not be in connection with the acquisition of the stock or assets of another company. Even though the Transaction would result in an issuance of more than 20% of the company's pre-transaction outstanding shares, Rule 4350(i)(1)(D) will not require shareholder approval because the price would not be less than the greater of book or market value immediately preceding the entering into of the binding agreement (the signing of the Purchase Agreement). The Transaction would not violate the

¹ Pursuant to the Purchase Agreement, a Material Adverse Effect means a material adverse effect on the business, properties, financial condition or results of operations of the company and its Subsidiaries, taken as a whole; provided, however, that none of the following shall constitute, or shall be considered in determining whether there has occurred, a Material Adverse Effect: (a) changes that are the result of general economic or political factors affecting the national, or world economy or acts of war or terrorism (except to the extent that such changes have a disproportionate effect on the company and its Subsidiaries, taken as a whole); (b) changes that are the result of factors generally affecting the industries or markets in which the company operates (except to the extent that such changes have a disproportionate effect on the company and its Subsidiaries, taken as a whole); (c) any adverse change, effect or circumstance arising out of or resulting from actions contemplated by the parties in connection with this Agreement or the pendency or announcement of the transactions contemplated by this Agreement; (d) changes in law, rule or regulations or generally accepted accounting principles and (e) any action taken pursuant to or in accordance with this Agreement or at the request of the Investor.

voting rights requirements of Rule 4351 because the Private Placement Shares would not have any heightened voting power.

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Staff Interpretative Letter 2005-49

This is in response to your letter regarding the applicability of Marketplace Rule 4200(a)(15)(E) (the "Rule"). You asked whether Mr. X, a member of the company's Board of Directors since May 2002, is eligible to serve as an independent director pursuant to the definition set forth in the Rule under the circumstances you described.

According to the information you provided, in August 2004, Mr. X was appointed to serve as Chairman of the Board of Directors and interim Chief Executive Officer of Company A. At the time of such appointment, Mr. Y, co-Chairman of the Board of Directors, co-President and co-Chief Executive Officer of the company, served on the compensation committee of the Board of Directors of Company A. Later in August of 2004, Mr. Y resigned as a member of Company A's compensation committee. Mr. X resigned as the interim CEO of Company A on August 1, 2005. Both Mr. Y and Mr. X continue to be members of Company A's Board.

Following our review of the information you provided, we have determined the company's Board is not precluded by the Rule from finding that Mr. X is independent. The Rule applies in the event a director of the listed company is currently employed as an executive officer of the other entity. Because Mr. X is no longer employed by Company A, the Rule does not apply. Please note that we are not making a determination regarding the eligibility to qualify as an independent director under any other provision of Rule 4200(a)(15). In addition, pursuant to IM-4200, a company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors. We are not expressing any opinion as to whether it would be appropriate for the company's Board to make such a finding.

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Staff Interpretative Letter 2005-50

This is in response to your letter regarding whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval of the award of restricted stock units ("RSUs"), in exchange for certain outstanding stock options (the "Exchange") under the company's 1999 Stock Incentive Plan (the "Plan").

According to the information you submitted, the company plans to replace, with RSUs, outstanding stock options that were awarded to 12 officers and 4 non-employee directors and that have an exercise price greater than a minimum threshold. The market value of the common stock underlying the RSUs would equal the value of the options to be replaced, as calculated using the Black-Scholes valuation model. You stated that the vesting schedule of certain of the options may be accelerated to reduce the amount the company would be required to record as compensation expense under FAS 123(R).

The Plan permits the award of stock options, restricted stock, and other stock based awards. The Plan includes the following provisions:

- Regarding vesting: "If the Board or Committee, as the case may be, provides, in its discretion, that any Stock Option is exercisable only in installments, the Board or Committee, as the case may be, may waive such installment exercise provisions at any time at or after the time of grant in whole or in part, based upon such factors as the Board or the Committee, as the case may be, shall determine."
- Regarding the granting of stock-based awards: "Other Stock-Based Awards, which may include performance shares and shares valued by reference to the performance of the company or any Subsidiary, may be granted either alone or in tandem with Stock Options, Restricted Stock or Deferred Stock."
- Regarding exchanges of awards, "For purposes of illustration and not of limitation, the Board or Committee, as the case may be, shall have the authority . . . (vii) to substitute (A) new Stock Options for previously granted Stock Options, including previously granted Stock Options which have higher exercise prices and/or containing other less favorable terms, and (B) new awards of any other type for previously granted awards of the same type, including previously granted awards which contain less favorable terms."

Following our review of the information you provided, we have determined that shareholder approval of the Exchange would not be required pursuant to the Rule because the Plan, as approved by the company's shareholders, contains provisions permitting the actions proposed. Specifically, the Plan permits the awarding of restricted stock and other stock based awards, the substitution of new awards for previously granted awards, and the re-pricing of stock options. We also note that the value of the new awards will be equal to the value of the stock options to be exchanged.

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Staff Interpretative Letter 2005-51

This is in response to your letters wherein you described a proposed private offering of the company's securities (the "Transaction") and asked that the company be granted an exception (the "Exception") to the stockholder approval requirements pursuant to Marketplace Rule 4350(i)(2).

Prior to this Transaction, you had previously issued the following securities (the "Prior Transactions"):

- (i) convertible preferred stock and warrants pursuant to a transaction entered into September 2004, and amended in August 2005 (the "Amended September 2004 Transaction");
- (ii) shares of common stock, in connection with the Amended September 2004 Transaction;
- (iii) shares of common stock and warrants in August 2005 (the August 2005 Transaction");
- and (iv) the potential issuance of common stock due to the exercise of participation rights (following the August 2005 Transaction) held by investors who purchased convertible notes from the company in March 2005.

According to the information you provided, in the Transaction, the company would sell shares of its common stock, at below market value, with warrants attached that would allow the purchase of additional shares of the common stock. You represented that no officers, directors, employees or consultants will participate in the Transaction.

Although the issuance in the Transaction would be less than 20% of the pre-transaction outstanding shares, the Transaction would require shareholder approval pursuant to 4350(i)(1)(D) because together with the Prior Transactions with which the Transaction would be aggregated, the potential issuance would exceed 20% of the pre-transaction shares outstanding at a price less than market value.

In your submission, you stated that without the Exception, the company may be required to seek bankruptcy protection within a week, and that the company therefore does not have time to seek shareholder approval. Specifically, according to the company's cash projection, it will run out of cash within two weeks unless it successfully liquidates certain investments and defers payment on substantial amounts of its account payables. In any event, the company does not expect to be able to meet its current and ongoing obligations for more than three weeks. The company estimates that it would take a minimum of seven weeks and as many as thirteen weeks, to obtain shareholder approval for this Transaction. You stated that completing the Transaction pursuant to the Exception seems to be the company's last alternative to bankruptcy.

In addition, you stated that the company would expect material and potentially long-lasting material adverse effects on its business if it is unable to secure the needed financing. It would be unable to pursue protection of its intellectual property rights and to retain its employees. If it is able to consummate the Transaction, the company expects it would be able to continue operations into early 2006 and be better positioned to pursue an underwritten public offering to further extend the company's viability.

Based on our review of the circumstances described in your letter and on your representations regarding the company's financial condition, we have determined to grant the Exception. This determination is based on your representations regarding the company's inability to meet its financial commitments and likely need to seek bankruptcy protection in the event that the Transaction is delayed. The Exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Transaction, a letter describing the Transaction and alerting them to its omission to seek the shareholder approval that would otherwise be required; (ii) the letter must indicate that the audit committee, or a comparable body of the board of directors, has expressly approved the Exception; and (iii) the company must issue a press release that includes the information required to be included in the shareholder mailing.

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Staff Interpretative Letter 2005-52

This is in response to your letters regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") to a proposed repurchase of stock options (the "Repurchase") by the company. In the Repurchase, the company would purchase, for cash, certain stock options (the "Options") from its former Chief Executive Officer, who is currently a non-employee member of the Board of Directors (the "Former CEO").

According to the information you provided, the Options were awarded in connection with the Former CEO's employment with the company: (i) from shareholder approved plans; (ii) from broadly-based plans adopted in accordance with the shareholder approval rules in effect at the time of the award; or (iii) as inducements for the Former CEO's entering into employment with the company. All of the Options have exercise prices above the current market value of the company's common stock, and you stated that the company believes the Options are substantially without value. The company expects to pay \$0.01 per underlying share, for a total of approximately \$2,200.

You stated that the company desires to repurchase the Options because substantially all of the company's remaining unissued authorized shares are reserved for issuance under existing option, warrant, and equity incentive plans. Following the Repurchase, the common shares underlying the Options will be available for other purposes, including issuance in acquisitions and as inducement awards.

You stated that the company has a historical practice of providing to its non-employee directors annual option grants. Pursuant to this practice, the Former CEO received an option to purchase shares (the "Director Grant") following the company's recent annual meeting. This grant was at the same size and on the same terms as the grants received by all of the company's other non-employee directors. In addition, you stated that the Former CEO and the company have no understanding or agreement under which the Repurchase would be undertaken in exchange for any other grant (including the Director Grant) or for any alteration of the Former CEO's outstanding options.

Following our review of the information you provided, we have determined that the Rule would not require shareholder approval of the Repurchase. The Repurchase would not result in an increase in the number of shares available under the relevant plans, an expansion in the class of participants, an expansion in the types of options or awards available, or an increase to the benefits available. In the Repurchase, cash, not equity, will be the sole consideration issued in exchange for the Options.

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-53

This is in response to your letters regarding whether the company satisfied the requirements of Marketplace Rules 4350(h) regarding the review and approval of certain transactions with Company X, an insurance brokerage and risk management firm, and Company Y, an insurance agency and brokerage firm. The son of the company's chairman and chief executive officer (the "CEO") is a Vice President of Company X, and the son-in-law of the CEO is an owner of Company Y.

According to the information you provided, during the past four years a significant portion of the company's business insurance has been obtained through Company X. In addition, since 1994 the company has purchased life insurance on certain of its senior officers through Company Y. Until purchases made during the past twelve months, the most recent purchase through Company Y had been in 1998. You have indicated that consistent with Item 404 of Regulation S-K, the company will disclose the purchase of insurance from Company X and Company Y (the "Transactions"). In November 2005, the company's audit committee of the Board of Directors ratified and approved the Transactions.

Following our review of the information you provided, we have determined that the audit committee's approval of the Transactions satisfies the requirements of Rule 4350(h). In reaching this conclusion, we are not expressing an opinion as to whether the Transactions are "related party transactions" as that term is defined in Rule 4350(h).

This interpretation 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 interpretation was issued.

Staff Interpretative Letter 2005-54

This is in response to your letters regarding the applicability of the audit committee eligibility requirements. Specifically, your question relates to Marketplace Rules 4200(a)(15)(B) and 4350(d)(2)(A) and to SEC Rule 10A-3(b)(1) under the Securities Exchange Act of 1934 (the "Rules"). You asked whether a potential candidate (the "Candidate") could satisfy the requirements after having served as a financial consultant to the audit committee.

According to the information you provided, the company currently has three members on its audit committee, each of whom has the ability to read and understand financial statements, and two of whom are considered to have "financial sophistication" as described in Marketplace Rule 4350(d)(2)(A). The company has not, however, designated one of these audit committee members to be an "audit committee financial expert," as defined in Item 402(h)(2) of SEC Regulation S-K. You stated that the company has conducted a search for an individual with the necessary experience, education, background, and knowledge to qualify as the audit committee financial expert. The timing of the appointment of any such candidate, however, will be affected by the regulations applicable to the company. Specifically, as a manufacturer and distributor of supplies in a regulated industry, any member of the company's board of directors must be found suitable by the applicable regulatory authorities in most of the over 100 jurisdictions where the company operates.

You stated that to access the financial expertise of the Candidate during the screening process but prior to appointment to the board of directors, the company proposed to engage the Candidate as a paid financial consultant to the audit committee. The payment for the consulting services (the "Consulting Payments") would not exceed \$60,000 in any twelve-month period, and you stated that the Candidate would be eligible to be an independent director under the criteria for independence set forth in the Rule 4200(a)(15). The Candidate would advise the audit committee members on topics or situations that are under the purview of the audit committee but would not directly participate in the preparation of the company's financial statements and would not provide any advice or other consulting services directly to management of the company. The consulting relationship and the Consulting Payments would cease prior the Candidate's becoming a member of the board and the audit committee.

Following our review of the information you provided, we have determined that the company's board would not be precluded by the Rules from finding that the Candidate would be eligible to serve on the audit committee. The Consulting Payments would not preclude the Candidate from being independent under Rule 4200(a)(15)(B) because such payments would be less than \$60,000 during any period of twelve consecutive months. Further, because the payments would cease prior to the Candidate's appointment to the Audit Committee, the Consulting Payments would not otherwise preclude the Candidate from audit committee eligibility.¹ In addition, service as a consultant to the audit committee in the manner you described will not be considered to be participation in the preparation of the financial statements of the company. Please note, however, that pursuant to IM-4200, the company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors. We are not expressing any opinion as to whether it would be appropriate for the company's board to make such a finding.

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¹ We note that SEC Rule 10A-3 does not contain a look-back period in its prohibition on payments to directors, and, as noted above, the NASDAQ look-back period would not be applicable as the payment is less than \$60,000.

Staff Interpretative Letter 2005-55

This is in response to your letter regarding a proposed amendment (the "Amendment") to the company's Equity Incentive Plan (the "Plan"). You asked whether the Amendment would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule").

According to the information you provided, the Plan currently provides for the award of restricted stock. Pursuant to the Amendment, the company could grant restricted stock units ("RSUs") which, subject to vesting, could be redeemed for shares of the company's common stock. You noted that the terms and conditions of RSUs are, in all material respects, the same as the terms and conditions of restricted stock. You added that both awards provide the same economic benefit and have the same accounting treatment and securities law implications. You stated that the company proposes to add RSUs because such awards: (i) have more favorable tax treatment in several countries outside of the United States; and (ii) are generally less burdensome from an administrative standpoint.

Following our review of the information you provided, we have determined that the Amendment is not a material amendment under the Rule. In that regard, we note that the Amendment does not provide a material increase in benefits to participants, or in an expansion of the types of awards available, because the RSUs are substantially the equivalent of restricted stock, awards of which are currently permissible under the Plan. We also note that the Amendment does not result in an increase in the number of shares to be issued under the Plan or in an expansion of the class of eligible participants. Accordingly, the Rule does not require shareholder approval for the Amendment.

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Staff Interpretative Letter 2005-56

This is in response to your letters regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to a proposed issuance of securities (the "Proposed Transaction") expected to close within a month. You asked whether the Proposed Transaction would: (i) be aggregated with a private placement completed approximately five months ago (the "Prior Transaction") for purposes of the applicability of the Rule, and (ii) result in a change of control that will require shareholder approval under Rule 4350(i)(1)(B). While incorporated outside the United States, the company does not qualify as a foreign private issuer. Its American Depositary Shares ("ADS") are listed on The NASDAQ Capital Market, and the ratio of ADS to ordinary shares is one-to-one.

According to the information you provided, pursuant to the Proposed Transaction, the company would issue Exchangeable Preferred Shares (the "Preferred Shares") to approximately eight investors. Each Preferred Share would be convertible based on a conversion price which is expected to be a discount to the market price. Each Preferred Share would carry an annual dividend payable in ADS for the first year only and thereafter only in cash. The maximum number of ADS issuable upon the conversion of the Preferred Shares and the payment of the dividends would be 19.9% of the pre-transaction outstanding ADS. In addition, in the Proposed Transaction, the investors would receive warrants representing 115% warrant coverage of the ADS issuable in the transaction. The warrants would be exercisable for no less than the closing bid price immediately preceding the entering into of the binding agreement and would not be exercisable until six months following the date of closing.

In the Prior Transaction, the last tranche of which closed approximately five months ago, the company issued securities representing approximately 19.9% of the pre-transaction outstanding ADS at a discount to the market price.

You stated that at the time of the Prior Transaction, the Proposed Transaction was not contemplated, and the company did not anticipate the need to complete any type of additional financing until well into 2006 or later. However, a line of credit, which had been secured and subsequently approved by shareholders in the 2nd quarter of 2005 is no longer available because the company's stock price has fallen below the minimum allowable under the line of credit agreement. As a result, the company needs the additional financing to be raised in the Proposed Transaction. The proceeds from both the Prior Transaction and the Proposed Transaction will be used for the company's general working capital.

You stated that none of the investors that participated in the Prior Transaction will participate in the Proposed Transaction. In addition, no officer, director, employee, or consultant of the company will participate in the Proposed Transaction. You stated that there are no affiliates or groups among the investors and that pursuant to the terms of the Proposed Transaction, no investor will be permitted to hold more than 4.9% of ADS outstanding. The Preferred Shares have no voting power, and the investors will not be entitled to any special board representation.

Following our review of the information you provided, we have determined that the Proposed Transaction would not be aggregated with the Prior Transaction for purposes of the Rule because: (i) the Proposed Transaction was not contemplated at the time of the Prior Transaction; (ii) there were no contingencies between the two transactions; (iii) none of the investors who participated in the Prior Transaction will participate in the Proposed Transaction; and (iv) approximately six months will have passed between the two transactions. In addition, based on your representations regarding the Proposed Transaction, shareholder approval is not required for the Proposed Transaction under the Rule because the issuance of the ADS, although at a price less than market value, will equal less than 20% of the ADS and voting power outstanding on a pre-transaction basis. Because the exercise price of the warrants will not be less than the greater of book and market value, and the warrants may not be exercised until six months after the date of closing, the warrants also do not require shareholder approval. Further, given the ownership limitation described above, the Proposed Transaction will not result in a change of control and will not require shareholder approval under Rule 4350(i)(1)(B).

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