

NASDAQ Staff Interpretative Letters

January – December 2006

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 While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at 301.978.8008 if they have questions regarding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.

Contents by Rule Description

Applicability of Rules

Affected Marketplace Rule 4350(a)

- [Staff Interpretative Letter 2006-23](#)
- [Staff Interpretative Letter 2006-41](#)

Definition of Public Offering

Affected Marketplace Rule: IM-4350-3

- [Staff Interpretative Letter 2006-2](#)
- [Staff Interpretative Letter 2006-25](#)

Director Independence

Affected Marketplace Rule 4200

- [Staff Interpretative Letter 2006-1](#)
- [Staff Interpretative Letter 2006-13](#)
- [Staff Interpretative Letter 2006-17](#)
- [Staff Interpretative Letter 2006-27](#)
- [Staff Interpretative Letter 2006-31](#)
- [Staff Interpretative Letter 2006-37](#)

Listing of Additional Shares

Affected Marketplace Rule 4310(c)17

- [Staff Interpretative Letter 2006-10](#)

Shareholder Approval – Acquisitions

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2006-2](#)
- [Staff interpretative Letter 2006-10](#)
- [Staff Interpretative Letter 2006-12](#)
- [Staff Interpretative Letter 2006-21](#)
- [Staff Interpretative Letter 2006-36](#)
- [Staff Interpretative Letter 2006-43](#)
- [Staff Interpretative Letter 2006-45](#)

Shareholder Approval – Change of Control

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2006-4](#)
- [Staff Interpretative Letter 2006-6](#)
- [Staff Interpretative Letter 2006-10](#)
- [Staff Interpretative Letter 2006-15](#)
- [Staff Interpretative Letter 2006-19](#)
- [Staff Interpretative Letter 2006-28](#)
- [Staff Interpretative Letter 2006-34](#)
- [Staff Interpretative Letter 2006-38](#)
- [Staff Interpretative Letter 2006-39](#)
- [Staff Interpretative Letter 2006-40](#)
- [Staff Interpretative Letter 2006-43](#)

Shareholder Approval – Equity Compensation Plans

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2006-3](#)
- [Staff Interpretative Letter 2006-4](#)
- [Staff Interpretative Letter 2006-5](#)
- [Staff Interpretative Letter 2006-7](#)
- [Staff Interpretative Letter 2006-8](#)
- [Staff Interpretative Letter 2006-11](#)
- [Staff Interpretative Letter 2006-14](#)
- [Staff Interpretative Letter 2006-16](#)
- [Staff Interpretative Letter 2006-20](#)
- [Staff Interpretative Letter 2006-22](#)
- [Staff Interpretative Letter 2006-23](#)
- [Staff Interpretative Letter 2006-26](#)
- [Staff Interpretative Letter 2006-29](#)
- [Staff Interpretative Letter 2006-30](#)
- [Staff Interpretative Letter 2006-32](#)
- [Staff Interpretative Letter 2006-36](#)
- [Staff Interpretative Letter 2006-42](#)
- [Staff Interpretative Letter 2006-44](#)
- [Staff Interpretative Letter 2006-46](#)

Shareholder Approval – Financial Viability Exception

Affected Marketplace Rule 4350(i)(2)

- [Staff Interpretative Letter 2006-4](#)

Shareholder Approval – Private Placements

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2006-4](#)
- [Staff Interpretative Letter 2006-6](#)
- [Staff Interpretative Letter 2006-10](#)
- [Staff Interpretative Letter 2006-12](#)
- [Staff Interpretative Letter 2006-15](#)
- [Staff Interpretative Letter 2006-19](#)
- [Staff Interpretative Letter 2006-24](#)
- [Staff Interpretative Letter 2006-25](#)
- [Staff Interpretative Letter 2006-28](#)
- [Staff Interpretative Letter 2006-34](#)

- [Staff Interpretative Letter 2006-38](#)
- [Staff Interpretative Letter 2006-39](#)
- [Staff Interpretative Letter 2006-40](#)
- [Staff Interpretative Letter 2006-43](#)
- [Staff Interpretative Letter 2006-46](#)

Shareholder Approval – Use of Share Caps and Alternative Outcomes

Affected Marketplace Rule 4350(i) and IM-4350-2

- [Staff Interpretative Letter 2006-21](#)
- [Staff Interpretative Letter 2006-38](#)
- [Staff Interpretative Letter 2006-39](#)
- [Staff Interpretative Letter 2006-40](#)
- [Staff Interpretative Letter 2006-43](#)

Voting Rights

Affected Marketplace Rule 4351

- [Staff Interpretative Letter 2006-4](#)
- [Staff Interpretative Letter 2006-14](#)
- [Staff Interpretative Letter 2006-15](#)
- [Staff Interpretative Letter 2006-18](#)
- [Staff Interpretative Letter 2006-35](#)
- [Staff Interpretative Letter 2006-46](#)

Staff Interpretative Letter 2006-1

This is in response to your correspondence regarding Marketplace Rules 4200(a)(15)(A) and 4200(a)(15)(B) (the "Rules"). You asked whether the Director is eligible to serve as an independent director notwithstanding the duties he performed, and the compensation he received, in connection with carrying out an oversight function of the company's management as you described.

According to the information you provided, the Director has served as non-executive Chairman of the Board of Directors and as the Presiding Director. He is neither an officer nor an employee of the company, nor has he been within the past three years. The company hired a new chief executive officer ("CEO") on Date. The Board felt that due to the unfamiliarity of the CEO with the company and its industry, a Board member should exercise particularly close oversight of management during a transition period (the "Oversight Function"). On behalf of the Board and in his capacity as Chairman, the Director agreed to perform the Oversight Function.

You stated that as compensation for the additional time required for the Oversight Function, the Director received a cash retainer upon appointment as Chairman and was to receive a monthly retainer in recognition of the expected time commitment. In addition, the Director received an award of an option (from a shareholder-approved plan) to purchase shares of common stock. Because the time commitment of the Oversight Function turned out to be less than originally expected, the monthly retainer fee was subsequently reduced. You stated that all compensation paid by the company to the Director was for Board service only, and that the duties associated with the Oversight Function are board services. You further stated that this arrangement, including the associated compensation, was approved by the Board's Nominating and Corporate Governance Committee and Compensation Committee, and by the independent directors other than the Director.

Following our review of the information you provided and based on your representations, we have determined the company's Board is not precluded by the Rules from finding that the Director is independent. The Director is not ineligible under Rule 4200(a)(15)(A) because he has not been employed by the company within the past three years. He is not ineligible under Rule 4200(a)(15)(B) because all payments made by the company to the Director were for Board service only. 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.

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 2006-2

This is in response to your correspondence regarding the applicability of the shareholder approval requirement of Marketplace Rule 4350(i)(1)(C)(ii) (the "Rule") to a proposed acquisition (the "Acquisition"). You asked whether: (i) securities issued in the company's proposed offering of securities for cash (the "Offering") would be included for purposes of determining whether shareholder approval is required under the Rule; and (ii) whether the Offering is a public offering under the definition set forth in IM-4350-5. The company is a foreign private issuer incorporated outside of the United States and its American Depositary Shares ("ADS") are listed on The NASDAQ Stock Market.

According to the information you provided, in the Acquisition, the consideration that would be paid to the shareholders of the target company would consist of ordinary shares ("Shares") and cash. The aggregate number of Shares that would be issued to the target's shareholders would equal less than 20% of the company's pre-transaction outstanding Shares (and correspondingly, less than 20% of the pre-transaction outstanding ADS). You stated that the cash portion may come from the proceeds of the Offering, and you asked whether the ADS issued in the Offering would be included in determining whether the 20% threshold of the Rule is reached. No director, officer, or substantial shareholder of the company has a 5% or greater interest (or such persons collectively, a 10% or greater interest) in the Target. Accordingly, the 5% threshold of Rule 4350(i)(C)(i) does not apply.

You stated that the Offering, which will be will be conducted by a syndicate on a best-efforts basis, will be registered with the Securities and Exchange Commission on Form F-1. You further stated that it will be marketed to a wide range of institutional and retail investors through group and one-on-one meetings. A roadshow of approximately three days is scheduled with stops in New York, Boston, San Francisco, and Hong Kong, and conference calls with European and Asian investors are also being arranged. The underwriters expect to meet with 100 to 150 potential investors and expect to allocate the shares in the Offering to approximately 100 investors. The company expects to issue approximately 5% of its existing shares outstanding in the Offering at a discount of 3% to 5% of the market price of the ADS. The distribution of the securities will be primarily determined by the underwriters and not the company, and the company expects that the potential investors will include primarily new investors.

Following our review of the information you provided, we have concluded that if the Offering is conducted in a manner consistent with the information you submitted, it will be a public offering within the meaning of IM-4350-3. We have reached the conclusion that the Offering is a public offering based on the broad scope of the marketing effort, the expected number of purchasers, the manner in which the offering will be priced, and the limited control of the company in the distribution of the securities offered. In addition, we confirm that pursuant to the Rule, securities issued in a public offering for cash are not subject to the Rule, and, therefore, securities issued in the Offering will not be included in determining whether the 20% threshold of the Rule is reached.

You have not asked us to reach, and we are not reaching, a conclusion as to whether shareholder approval is otherwise required of the Acquisition.

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 2006-3

This is in response to your correspondence regarding a proposed amendment (the "Proposed Amendment") to the company's stock option plan (the "Plan"). You asked whether the Proposed 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, pursuant to the Proposed Amendment, any unvested options would become fully vested and exercisable in the event of a merger or other change in control. You stated that no such merger or other change of control transaction is currently contemplated. No other changes would be made to the Plan.

Following our review of the information you provided, we have determined that the Proposed Amendment is not a material amendment under the Rule. In that regard, we note that the Proposed Amendment would not result in: (i) any material increase in the number of shares to be issued under the Plan; (ii) any material increase in the benefits to participants; (iii) any material expansion to the class of participants; or (iv) any expansion in the types of options or awards available. Accordingly, the Rule does not require shareholder approval for the Proposed Amendment.

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 2006-4

This is in response to your correspondence, wherein you described a proposed issuance of securities in connection with a restructuring of the company's debt (the "Restructuring"). With respect to the Restructuring, you asked that the company be granted exceptions to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) and to the voting rights requirements of Marketplace Rules 4351 and IM-4351 (collectively, the "Voting Rights Rule").

According to the information you provided, in the Restructuring the company would replace its existing senior secured credit facility with one or more new credit facilities. In addition, the company would refinance its indebtedness underlying certain outstanding convertible notes through an exchange offer that would include the issuance of: (i) senior subordinated notes; (ii) new convertible notes that would be convertible into Series B preferred stock; and (iii) Series A preferred stock. Both the Series A and the Series B would be convertible into common stock.

The potential issuance of common stock exceeds 20% of the pre-transaction outstanding shares and could be at a price less than the greater of book and market value, and it could result in a change of control. As such, without the requested exception, shareholder approval would be required under Rules 4350(i)(1)(D)(ii) and 4350(i)(1)(B).

In addition, you stated that in connection with the Restructuring the company would adopt a management incentive plan ("MIP") pursuant to which certain senior management employees could receive shares of common stock as equity compensation. The total amount of shares reserved under the MIP would be 10% of the company's outstanding stock. Without the requested exception, shareholder approval would be required for the MIP under Rule 4350(i)(1)(A).

You stated that certain of the preferred stock that would be issued in the Restructuring would be entitled to vote on an as-converted basis and may be convertible at a discount to the market price of the common stock (the "Voting Power"). In addition, four of the seven members of the company's Board of Directors would be designated, at least initially, by certain of the holders of the company's outstanding debt, and the board representation may be at a percentage that exceeds the debt holders' relative contribution to the company (the "Board Representation"). Without the requested exception, the Voting Power and the Board Representation would not be permitted under the Voting Rights Rule. You stated that the company has been advised that the lenders would not agree to any limitation on these voting rights and believes that attempts to impose limits would greatly endanger the prospects of effecting the restructuring.

In your submission, you stated that the company must restructure its debt immediately or it will almost certainly be forced to file for bankruptcy, and it does not believe that it has time to obtain shareholder approval. The company is currently in default under its credit agreement due to violations of financial covenants in the third and fourth quarters of last year.

Based on our review of the circumstances described in your letters and on your representations regarding the company's financial condition, we have determined to grant the exception from the shareholder approval requirements with the limitation that such exception will not apply to the MIP. This limited exception is based on your representations regarding the company's inability to meet its financial commitments and its likely need to seek bankruptcy protection in the event that the Restructuring is delayed. In addition, we have determined to grant an exception from the Voting Rights Rule applicable to the Voting Power and the Board Representation. In that regard, we note that under the former Rule 19c-4, as well as under the Voting Rights Rule, it is appropriate to consider whether an issuance is designed to rescue a company in financial distress. Be advised that the MIP will require shareholder approval under Rule 4350(i)(1)(A). As a general matter, we do not believe that an issuance of securities as equity compensation is an appropriate application of Marketplace Rule 4350(i)(2). Further the exceptions do not apply to any other requirements and, notwithstanding the granting of the exception with regard to Board Representation, the company remains subject to NASDAQ's board independence and committee requirements including Marketplace Rules 4350(c) and 4350(d).

The exceptions are 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 Restructuring, a letter describing the Restructuring and alerting them to its omission to seek the shareholder approval that would otherwise be required and describing the Voting Rights and Board Representation; (ii) the letter must indicate that the audit committee, or a comparable body of the board of directors, has expressly approved the exceptions; and

(iii) the company must issue a press release that includes the information required to be included in the shareholder mailing.

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 2006-5

This is in response to your correspondence regarding the company's stock option plan (the "Plan"). You asked whether the company would be required in 2006 either to terminate the Plan or to obtain shareholder approval under Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") as a result of the Plan's terms providing for annual increases in the number of shares reserved for issuance (the "Evergreen Provision"). The Plan provides for the award of incentive stock options, non-qualified stock options, common stock, and stock appreciation rights. With respect to the granting of incentive stock options, the Plan terminates in 2006. For all other awards, the Plan continues, without a specified ending date, unless terminated by the board of directors.

According to the information you provided, in 1999 the company's shareholders approved an amendment to the Plan to add the Evergreen Provision, whereby the number of shares reserved for issuance would be increased annually by an amount equal to the lesser of: (i) a specified number of shares, (ii) a specified percentage of the company's outstanding shares at the end of the company's preceding fiscal year, and (iii) a lesser amount determined by the company's Board of Directors. In 2002, the company's shareholders approved an amendment to the Evergreen Provision, whereby the number of shares reserved for issuance under the Plan would be increased annually by an amount equal to the lesser of: (i) a specified percentage of the company's outstanding shares at the end of the company's preceding fiscal year, and (ii) a lesser amount determined by the company's Board of Directors.

Following our review of the information you provided, we have determined that the company is not required by the Rule either to terminate the Plan in 2006 or to obtain shareholder approval in 2006. As set forth the Rule, a plan that contains an evergreen formula cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. Accordingly, because the Evergreen Provision was most recently approved by shareholders in 2002, the company is not required to resubmit the Plan for shareholder approval until 2012, assuming that the Plan is not materially amended in the interim. This determination does not affect the termination of the Plan in 2006, with respect to incentive stock 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 2006-6

This is in response to your correspondence 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 two weeks. You asked whether the Proposed Transaction would be aggregated with a private placement completed six months ago (the "Prior Transaction") for purposes of the applicability of the Rule. In addition, your question relates to Marketplace Rule 4350(i)(1)(B).

According to the information you provided, pursuant to the Proposed Transaction, the company would issue shares of its common stock to approximately eight purchasers at a price less than market value. The number of shares that would be issued would equal less than 20% of the pre-transaction outstanding shares. In the Prior Transaction, the company sold shares of its common stock equal to 19.9% of the pre-transaction outstanding shares to four purchasers at a discount to the market price. There are no contingencies between the transactions.

You stated that the proceeds from the Prior Transaction were used primarily for: (i) research and development; (ii) commercialization expenses; (iii) potential licenses and acquisitions of complimentary products, technologies or businesses, and (iv) general corporate purposes. You described a change in circumstances following the Prior Transaction giving rise to the need for the Proposed Transaction. Specifically, at the time of the Prior Transaction the company had anticipated entering into a collaboration agreement with a third party relating to the marketing, distribution, and sales of the company's products. Because no such collaboration agreement has been reached, the company expects to use the proceeds from the Proposed Transaction to finance its own sales and marketing efforts.

You stated that the purchasers in the Proposed Transaction may include two investors (the "Prior Purchasers") who purchased approximately 60% of the shares sold in the Prior Transaction. In the Proposed Transaction, such purchasers would purchase no more than 30% of the shares that would be sold and would constitute no more than 25% of the number of purchasers. Neither of the Prior Purchasers would be either the lead investor or the largest purchaser in the Proposed Transaction. The purchasers in the Proposed Transaction will not include any company officer, director, employee, or consultant.

In addition, you stated that: (i) the Proposed Transaction would not result in any purchaser owning as much as 20% of the company's outstanding shares; (ii) the purchasers would act as individuals and not as a group; (iii) there would be no additional arrangements between the company and any of the investors; and (iv) none of the purchasers currently has board representation and none would have any such representation as a result of the Proposed Transaction.

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) a change in circumstances following the Prior Transaction gave rise to the need for the Proposed Transaction; (ii) approximately six months would have passed between the transactions; and (iii) there are no contingencies between the transactions, and the Proposed Transaction was not contemplated at the time of the Prior Transaction. As such, based on your representations, shareholder approval of the Proposed Transaction would not be required under Rule 4350(i)(1)(D) because the issuance of common shares at less than market value would equal less than 20% of the common shares and voting power outstanding on a pre-transaction basis. Further, given the ownership limitation and the lack of other arrangements between the company and the purchasers as described above, the Proposed Transaction would not result in a change of control and would 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 2006-7

This is in response to your correspondence regarding a proposed amendment (the "Amendment") to the company's equity compensation plan (the "Plan"). You asked whether the Amendment would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule").

According to the information you provided, the Plan currently provides for the award of stock options, stock bonuses, and restricted stock, including issuances on a deferred basis. Pursuant to the Amendment, the company would authorize the granting of restricted stock units ("RSUs") under the Plan. RSUs would be awards of restricted stock subject to a vesting schedule such that the common stock underlying the RSUs would not be issued until after any applicable vesting requirements are satisfied. You have indicated that the accounting and tax treatment applicable to RSUs is the same as for awards of restricted stock.

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 result in 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.

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 2006-8

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to the company's stock option plan (the "Plan") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). Pursuant to the Amendment, the company would permit the cashless exercise of stock options.

According to the information you provided, the Plan currently provides that the exercise price for options shall be paid: (i) in cash, by certified check or money order, or such cash equivalent as is approved by the Board of Directors or any committee thereof, (ii) by the assignment of the proceeds of a sale of some or all of the ordinary shares being acquired upon the exercise of an option, or (iii) by a combination thereof.

Pursuant to the Amendment, an exercise of options could be settled by the company's issuing to the optionee that number of ordinary shares, or American Depository Shares ("ADS"), equal in value to the difference between the value of the ordinary shares underlying the options and the aggregate cost to exercise the options. As a result, the optionee would receive the same value that would be obtained by exercising all of the stock options and selling that number of ordinary shares (or ADS) to cover the cost of exercise as is currently permitted under the Plan. The company's Board of Directors would have the choice of whether to include this cashless exercise feature in any given option award.

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 cashless exercise would not provide a material increase in benefits to participants as compared to the methods of exercise currently permitted under the Plan. In addition, the Amendment would not result in an increase in the number of shares available for issuance under the Plan, an expansion of the class of eligible participants, or an expansion of the types of awards available. Accordingly, the Rule does not require shareholder approval for the Amendment.

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 2006-10

This is in response to your correspondence regarding whether the company could complete the transaction you described (the "Proposed Transaction") prior to the end of the 15-day notice period for the Listing of Additional Shares referenced in Marketplace Rule 4310(c)(17)(D). In addition, your question relates to the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B), 4350(i)(1)(C), and 4350(i)(1)(D) (the "Rules").

According to the information you submitted, in the Proposed Transaction the company would issue shares of common stock ("Common Shares") and warrants ("Warrants") to several investors, none of whom is an officer, director, employee, or consultant of the company. The number of Common Shares would equal no more than 19.9% of the pre-transaction outstanding shares and would be sold at a discount to market value. The number of shares of common stock that could be issued upon the exercise of the Warrants would be up to approximately 5% of the pre-transaction outstanding shares. The Warrants would be exercisable into common stock at a price not less than the closing bid price immediately preceding the entering into of the binding agreement notwithstanding any anti-dilution provisions except those relating to stock splits and similar events. The company's market value exceeds its book value. The Warrants will not be exercisable until six months after issuance.

You stated that as a result of the Proposed Transaction, no investor individually or as part of a group would obtain, or have the right to obtain, 20% or more of the voting power or total shares outstanding of the company. No investor has been or will be offered board representation in connection with the Proposed Transaction, and there would be no other arrangements between the company and any of the investors.

The proceeds of the Proposed Transaction would be used to repay debt assumed in connection with an acquisition in May 2005. You stated that the Proposed Transaction is not required by the transaction documents relating to the acquisition and that at the time of the acquisition, the company did not have a specific intention to conduct the Proposed Transaction or any other specified financing to pay down the debt incurred in the acquisition. Instead, the company had intended to pay down the debt through cash from operations from the acquired entity. You stated that other than in the normal course of business in connection with issuing securities in shareholder-approved employee benefit plans, the company has not issued shares in an equity financing since May 2005.

Following our review of the information you provided, we have determined that the Proposed Transaction will not require shareholder approval under the Rules. Rule 4350(i)(1)(C) will not require shareholder approval because the issuance will not be in connection with an acquisition. In that regard, we note that the most recent acquisition occurred approximately ten months ago and that at the time of that acquisition there was no plan or agreement to conduct any equity financing. Rule 4350(i)(1)(D) will not require shareholder approval 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 cannot be exercised until six months after the date of closing, the Warrants will not require shareholder approval. Further, given the ownership positions and the lack of any other arrangements between the company and any of the investors, the Proposed Transaction would not result in a change of control and therefore will not require shareholder approval under Rule 4350(i)(1)(B). Lastly, because we have completed our review, the company may close the Proposed Transaction prior to the end of the 15-day notice period referenced in Marketplace Rule 4310(c)(17) provided that the company submits to NASDAQ all required documentation prior to closing.

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 2006-11

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to the company's stock option plan (the "Plan") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). Pursuant to the Amendment, the company would increase the size of automatic awards to non-employee directors and change the grant date for the automatic annual awards to non-employee directors.

Currently, the Plan provides that each non-employee director shall receive, upon joining the board of directors, an option to purchase shares (the "Initial Award"), and, thereafter, an annual award (the "Annual Award") of an option to purchase shares. Pursuant to the Amendment, the Initial Award would increase to 150% of the current award, and the Annual Award, would increase to 120% of the current award. Currently, the Plan provides that the Annual Award shall be made on the last business day of the company's fiscal year. You stated that changes in accounting rules have made this grant date administratively burdensome. Pursuant to the Amendment, the Annual Award would be made a few weeks before, or possibly one week after, the end of the fiscal year. You indicated that the Amendment to the Initial Award would be applied to the non-employee directors who joined the company's Board of Directors since the most recent annual meeting. As a result, these directors will receive the adjusted number of options as part of their Initial Award, although the exercise price of the increased amount will be set at 100% of the fair market value of the stock on the grant date, rather than the date these directors joined the board. The Amendment would not affect the maximum number of shares available under the Plan. You stated that the company believes the Amendment is necessary because the company's director compensation package was below the desired market position and could lead to difficulty in attracting directors.

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 notwithstanding the increase in the size of the Initial Award and the Annual Award, the aggregate number of shares of common stock available under the Plan is not affected by the Amendment. In addition, the Amendment would not expand either the class of participants eligible to participate or the types of awards available. Accordingly, the Rule does not require shareholder approval for the Amendment. Further, in this case, we believe it is not inappropriate to apply the Initial Award to the individuals appointed since the company's last annual meeting of shareholders prior to the submission of your request, given that they were appointed "mid-term", and, at that time, the company was concerned about its director compensation package and had discussed making a change such as the Amendment.

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 2006-12

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(C) and 4350(i)(1)(D) (the "Rules") to a proposed issuance of securities (the "Proposed Issuance"). As more fully described below, in the Proposed Issuance, to raise funds for an acquisition (the "Acquisition"), the company would offer to issue new warrants (the "New Warrants") to the holders of existing warrants ("Existing Warrants"), who would exercise their Existing Warrants prior to the closing of the Acquisition.

According to the information you provided, the Existing Warrants were issued together with shares of common stock in a private placement approximately six months ago (the "Prior Transaction"). Shareholder approval under Rule 4350(i)(1)(D) was not required of the Prior Transaction because the securities were not sold at a discount to market or book value. The proceeds of the Prior Transaction were to be used to redeem shares of outstanding preferred stock, to pay down debt, and to provide funds to expand the company's base of stores. The Acquisition was not contemplated by the company at the time of the Prior Transaction.

In the Acquisition, the company expects the purchase price to consist of cash, a cash earnout, a seller non-convertible note, and warrants to purchase common stock equal to approximately 4% of the pre-transaction outstanding shares (the "Acquisition Warrants"). The Acquisition Warrants could not be exercised without the approval of the company's shareholders. You stated that none of the company's officers, directors, or substantial shareholders has a 5% or greater interest in the Acquisition target.

In the Proposed Issuance, the company would issue New Warrants to the holders of Existing Warrants who exercise their Existing Warrants prior to the closing of the Acquisition. Although the terms of the Proposed Issuance have not been finalized, the company currently expects that for each Existing Warrant that is exercised, the holder would receive a New Warrant exercisable for two or more shares of common stock at a price that could be a discount to the market price of the common stock. The terms of the Existing Warrants would not be changed. The New Warrants could not be exercised without the approval of the company's shareholders.

If all the Existing Warrants were exercised, the resulting issuance of common stock would exceed 20% of the company's pre-issuance outstanding shares. The cash portion of the purchase price would be limited, however, to the amount that would be raised by the exercise of that number Existing Warrants that would result in the issuance of 19.9% of the pre-transaction outstanding shares. The proceeds from the exercise of any additional Existing Warrants would be used for general corporate purposes and not to fund any portion of the Acquisition.

Following our review of the information you provided, we have determined that shareholder approval of the exercise of the Existing Warrants is not required by the Rules. Specifically, Rule 4350(i)(1)(D) will not require shareholder approval because the exercise would be on the original terms, which did not require shareholder approval. Rule 4350(i)(1)(C) will not require shareholder approval of the exercise of the Existing Warrants because the issuance in connection with the Acquisition, as a result of the exercise of the Existing Warrants, would be limited to 19.9% of the pre-transaction outstanding shares. In addition, the Rules do not prohibit the issuance of the New Warrants or the Acquisition Warrants prior to shareholder approval because such warrants could be exercised only following shareholder approval. In the event shareholders do not approve, there would be no alternative outcome. Because the New Warrants and Acquisition Warrants could be exercised only after shareholder approval, these issuances will comply with Rule 4350(i)(1)(D), notwithstanding the fact that they may be exercisable at a price below the market price. Shares of common stock issued and outstanding prior to the offer being made to issue the New Warrants will be entitled to vote to approve the issuance of shares upon the exercise of the New Warrants and the Acquisition Warrants.

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 2006-13

This is in response to your correspondence regarding Marketplace Rules 4200(a)(15)(B) and 4200(a)(15)(D) (the "Rules"). You asked whether the Director is eligible to serve as an independent director notwithstanding the payments the company made to an insurance agency (the "Agency") of which the Director is a 52% owner and President.

According to the information you provided, the Agency has approximately 20 employees. The company makes payments (the "Premiums") to the Agency consisting of insurance policy premiums payable by the company to insurance companies (the "Insurance Companies") under the terms of the company's insurance policies with the Insurance Companies. You stated that the Agency, as part of its normal course of business as an insurance agency, collects the Premiums from the company and remits the bulk of the Premiums to the Insurance Companies. You further stated that the amounts retained constitute commissions payable by the company's insurers to the Agency (the "Commissions").

The Premiums were approximately \$200,000 in 2003, \$65,000 in 2004, and \$100,000 in 2005, and the Commissions were approximately \$20,000, \$8,000, and \$10,000, respectively. You stated that the Agency was acting in its capacity as the agent of the Insurance Companies in collecting the premiums and was obligated to pass those amounts, less the Commissions, to the Insurance Companies. You stated that the only amounts included in the Agency's revenues were the Commissions, which were less than \$200,000 during each of 2003, 2004, and 2005. The Commissions are income to the Agency, and any profits of the Agency are distributed to its shareholders according to their respective ownership interest in the company.

Following our review of the information you provided and based on your representations, we have determined the company's Board is not precluded by the Rules from finding that the Director is independent. As the Premiums are paid to the Agency for services of the Agency, they are appropriately considered under Rule 4200(a)(15)(D), rather than Rule 4200(a)(15)(B). Further, in reviewing the payments made to the Agency under Rule 4200(a)(15)(D), it is appropriate to consider only the Commissions, as these are the amounts retained by the Agency and included in the Agency's revenues and are the amounts that represent the payments from the company to the Agency for "property or services". The Director is not ineligible under Rule 4200(a)(15)(D) because the Commissions did not exceed \$200,000 in any of the past three fiscal years. We also note, in any event, that the Premiums did not exceed 5% of the total premiums collected by the agency in any of the past three fiscal years. 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.

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 2006-14

This is in response to your correspondence regarding whether Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") would require shareholder approval of the company's proposed amendments (the "Amendments") to its stock option plans, specifically, its Employee Plan and its Director Plan (collectively, the "Plans"). Your question also relates to the voting rights requirements of Rule 4351 (the "Voting Rights Rule"). Pursuant to the Amendments, in connection with a special stock dividend (the "Dividend"), there would be an adjustment to: (i) the maximum number of shares available under the Plans (the "Share Reserve Increase"), and (ii) the maximum number of shares that may be subject to award for an individual participant under the Employee Plan in any one year (the "Award Increase").

The company has three series of common stock: Series A with one vote per share, a higher voting Series B, and a non-voting Series C, which has no voting power except as required by applicable state law. In 2005, the company's Board of Directors approved the Dividend consisting of one share of Series C for each share of Series A and Series B resulting in the doubling of the aggregate common shares outstanding. Prior to the payment of the Dividend, there had been no shares of Series C outstanding.

According to the information you submitted, the Employee Plan and the Director Plan each provide a maximum number of shares of common stock that may be issued, subject to the anti-dilution and other adjustment provisions of the Plans. In addition, the Employee Plan provides that no person may be granted in any calendar year awards covering more than a certain number of shares of common stock. The Plans do not otherwise limit the number of shares of any series of common stock that may be the subject of awards.

Pursuant to the Share Reserve Increase, the company proposes to double the shares available under the Plans. Pursuant to the Award Increase, the company proposes to double the maximum number of shares that may be awarded to an individual participant in a calendar year. The increases would reflect the doubling of the number of common shares outstanding resulting from the Dividend. Notwithstanding the increases that would result from the Amendments, the number of shares of Series B that may be the subject of awards will be limited to the number that would have been available prior to the Amendments (the "Series B Limitation").

You stated that both the Share Reserve Increase and the Award Increase are specifically permitted under the provisions of the Employee Plan and the Director Plan, which provide that adjustments can be made to preserve the benefits or potential benefits intended to be made available under the plan following any stock dividend or similar corporate event, including adjustments to any or all of: (i) the number and kind of shares or stock which thereafter may be awarded, optioned, or otherwise made subject to the benefits contemplated by the Plan; and (ii) the number and kind of shares of stock subject to outstanding Awards.

Following our review of the information you provided, we have determined that the Rule does not require shareholder approval of either the Share Reserve Increase or the Award Increase because both are specifically permitted by provisions of the Plans. As stated in IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. The Voting Rights Rule is not implicated because, as a result of the Series B Limitation, the Amendments cannot increase the number of outstanding shares of the high vote stock.

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 2006-15

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") to a proposed issuance of securities (the "Proposed Transaction"). In addition, you asked about the potential applicability of the voting rights requirements of Rule 4351 (the "Voting Rights Rule").

According to the information you submitted, in the Proposed Transaction, the company would issue shares of Preferred Stock (the "Initial Preferred Shares") and a warrant (the "Warrant") to purchase additional shares of Preferred Stock (the "Additional Preferred Shares") to an investor (the "New Investor"). The Initial Preferred Shares would be convertible into more than 20% of the pre-transaction outstanding shares, and the Additional Preferred Shares into approximately 10%.

The conversion price (the "Conversion Price") of the Initial Preferred Shares and the Additional Preferred Shares would equal the closing bid price of the common stock immediately preceding the execution of the definitive purchase agreement (the "Closing Bid Price"). In addition, the New Investor would pay \$0.125 for each share of common stock that could be issued upon the exercise of the Warrant. The exercise price (the "Exercise Price") of the Warrant would be no less than the Closing Bid Price. The Initial Preferred Shares, the Additional Preferred Shares, and the Warrant would not contain any "reset" or other price-based adjustments provisions. The company's market value exceeds its book value.

Currently, the largest shareholder (the "Largest Shareholder") owns between 35% and 40% of the company's outstanding shares. On a post-transaction basis after giving effect to the to the total number of common shares that could be issued in the Proposed Transaction, the Largest Shareholder would own more than 25% of company's outstanding shares, and approximately 1.5% more than the New Investor.

You stated that as a result of the Proposed Transaction, the New Investor would have the right to elect one member to the company's Board of Directors, which will have six members. There will be no additional arrangements between the company and the New Investor. The Preferred Stock would vote on as-converted basis. The proceeds of the Proposed Transaction would be used for general corporate purposes. No officer, director, employee, or consultant of the company would be a purchaser in the Proposed Transaction.

Following our review of the information you submitted, we have concluded that shareholder approval of the Proposed Transaction is not required pursuant to the Rules. Although the issuance would exceed 20% of the pre-transaction outstanding shares, the Conversion Price and the Exercise Price would 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, because the Largest Shareholder would remain the largest shareholder following the Proposed Transaction, the Proposed Transaction would not result in a change of control, and, accordingly, shareholder approval is not required pursuant to Rule 4350(i)(1)(B). Additionally, the requirements of the Voting Rights Rule 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, and (ii) the percentage of the members of the board of directors that may be appointed by the New Investor will not exceed the New Investor's relative contribution to 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 2006-16

This is in response to your correspondence regarding a proposed amendment (the "Amendment") to the company's stock option plan (the "Plan"). You asked whether the Amendment would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule").

According to the information you provided, the Plan currently provides for the award of stock options, stock awards, and stock retainers. As defined in the Plan, stock awards are grants of restricted stock subject to vesting, and stock retainers are outright grants of stock which may or may not be subject to vesting. Pursuant to the Amendment, the company would authorize the granting of restricted stock units ("RSUs") under the Plan. RSUs would be awards of common stock subject to a vesting schedule such that the common stock underlying the RSUs would not be issued until after any applicable vesting requirements are satisfied. The other features of the RSUs would be identical to stock awards under the Plan or, as applicable, stock retainers, including being subject to the same restrictions and to the same limitations with respect to value. The Amendment would not increase the maximum number of shares of common stock available under the Plan.

Following our review of the information you provided, we have determined that the Amendment would not be a material amendment under the Rule. In that regard, we note that the Amendment would not result in a material increase in benefits to participants, or in an expansion of the types of awards available, because the RSUs are substantially equivalent to the stock awards which are currently permissible under the Plan. We also note that the Amendment would 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.

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 2006-17

This is in response to your correspondence regarding the applicability of Marketplace Rule 4200(a)(15). You asked whether the Director Candidate is eligible to be an independent member of the company's board of directors notwithstanding: (i) his serving as the Chief Executive Officer of Target, an entity the company expects to acquire; and (ii) the payments he will receive under the terms of the Severance Agreement with the Target. Specifically, your question relates to Rules 4200(a)(15)(A) and 4200(a)(15)(B) (the "Rules").

In the first quarter of 2006, the company entered into an agreement to acquire the Target. Effective at the closing of the acquisition, the Director Candidate would no longer be employed by the Target, and he would not become an employee of the company. The Director Candidate would join the company's board of directors following the closing of the acquisition.

According to the information you provided, under the terms of the Severance Agreement, due to the termination of the Director Candidate's employment as a result of the acquisition, the Target will be obligated to: (i) pay the Director Candidate an amount equal to 24 months of his base salary; and (ii) reimburse the Director Candidate's expenses for continuing healthcare coverage for up to an 18-month period.

You stated that the company's President and Chief Executive Officer has been a member of Target's board of directors since April 2005, but played no role in recommending or approving the Director Candidate's compensation or the Severance Agreement.

Following our review of the information you provided, we have determined that the company's board of directors is not precluded by the Rules from finding that the Director Candidate is independent. Specifically, the Director Candidate is not precluded by Rule 4200(a)(15)(A) because, following the closing of the acquisition, the Director Candidate: (i) will no longer be employed by the Target; and (ii) will not become an employee of the company. The Director Candidate is not precluded by Rule 4200(a)(15)(B) because the payments under the Severance Agreement will be non-discretionary and will be as a result of a pre-existing agreement not involving the company. 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 with respect to the Director Candidate.

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 2006-18

This is in response to your correspondence regarding whether the company's proposed issuance of the Preferred Stock would comply with the voting rights requirements set forth in Marketplace Rule 4351, IM-4351 and IM-4350-1 with respect to the voting power (the "Voting Power") and the right to appoint members of the company's board of directors (the "Board Rights").

According to the information you provided, the company would sell to the Investor the Preferred Stock, which would be convertible into shares of the company's common stock at a price that is greater than the closing bid price immediately before the company and the Investor enter into a binding agreement to issue the securities. The Preferred Stock would not contain any price-based adjustment provisions or economic anti-dilution protection. You indicated that because the transaction could result in a change of control, the company will obtain shareholder approval to issue the Preferred Stock. Each share of Preferred Stock would automatically convert into common stock immediately upon transfer to any person other than certain affiliates of the Investor or if the holder of such shares experiences a change of control. In addition, the Investor has entered into an agreement to purchase additional shares of the company's common stock (the "Common Shares") from a third party (the "Common Stock Purchase"). The Common Stock Purchase and the Preferred Stock issuance are contingent on each other.

Pursuant to the Board Rights, the holders of the Preferred Stock would be entitled to appoint that number of directors to the board such that the Investor's board representation is consistent with its percentage ownership interest in the company (the "Investor Percentage"). The Investor Percentage as of a particular date would be calculated by dividing: (a) the sum of the Common Shares and the shares of common stock issuable upon conversion of the Preferred Stock, by (b) the total shares of common stock outstanding, including those issuable upon the conversion of the Preferred Stock. If the Investor Percentage were to decline, the number of directors the Investor would be entitled to appoint would decline proportionally, subject to a pre-established formula setting forth the permitted board representation for various ranges of the Investor Percentage.

Pursuant to the Voting Rights, the Preferred Stock would vote on an as-converted basis. In addition, the terms of the Preferred Stock would contain approval rights such that until the Investor Percentage is less than 20%, the company could not take any of the following actions without the approval of the majority of the outstanding shares of Preferred Stock: (i) change the size of the board of directors; (ii) sell or issue any additional shares of the Preferred Stock, except under certain limited circumstances; (iii) acquire any business or assets if the purchase price exceeds a specified size; or (iv) amend the company's certificate of incorporation or by-laws relating to the rights of the Preferred Stock.

Following our review of the information you provided, we have determined that the Voting Power and the Board Representation would satisfy the voting rights requirements. In that regard, (i) the Preferred Stock would not have higher voting power than as if converted at the market value immediately preceding the company and the Investor entering into the binding agreement to issue the Preferred Stock, and (ii) the Board Rights will be consistent with the ownership interest attributable to the holder of the Preferred Stock and would decline proportionally if the ownership interest were to decline.

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 2006-19

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") to a proposed transaction (the "Proposed Transaction") which you described.

According to the information you submitted, in the Proposed Transaction the company would enter into a new agreement (the "Agreement") with the holders of the Notes (the "Note Holders") pursuant to which the Note Holders would immediately convert the Notes. Under the Agreement, the company would reduce the conversion price of the Notes and issue warrants to the Note Holders. The number of common shares that could be issued upon conversion exceeds 20% of the company's pre-transaction outstanding shares. The conversion price would be no less than the closing bid price immediately preceding the entering into of the binding agreement (the "Closing Bid"), plus \$0.125 for each share of common stock issuable upon the exercise of the warrants. In addition, the warrants would be exercisable for no less than the Closing Bid and would not have any anti-dilution price adjustments other than for stock dividends, combinations, and similar events. The company's market value exceeds its book value.

You stated that the company has several reasons for entering into the Agreement. In the last four months, the company has changed its executive management, which was responsible for using the Notes as a financing vehicle. Further, the company's board has implemented a new operating plan and funding strategy after assessing its funding needs. An investment bank hired by the company has advised that the complexity and overhang created by the company's existing securities, including the Notes, are a significant deterrent in attracting long-term equity investors. As a result of the Proposed Transaction, the company would eliminate the obligation to pay principal and interest and would no longer be subject to covenants which restrict the company's ability to: (i) incur liens or debt senior to or on par with the Notes; (ii) pay dividends or redeem common stock; and (iii) engage in certain change of control or other transactions materially affecting the company's capital structure. In addition, following the Proposed Transaction, the company would be free to sell assets that are pledged as collateral for the Notes. The Note Holders, by agreeing to immediately convert and thereby foregoing the rights to future interest payments, will be able to convert at a lower price and will receive warrants.

You stated that the company will not consummate the Proposed Transaction if it would result in any stockholder owning 20% or more of the company's outstanding shares or voting power. The Note Holders do not, and will not, have any board representation or any rights to board seats, and no additional arrangement between the company and the Note Holders is contemplated.

Following our review of the information you submitted, we have concluded that shareholder approval of the Proposed Transaction is not required pursuant to the Rules. For purposes of determining whether the issuance price is at least as much as market value, it is appropriate to use the closing bid price immediately prior to the binding agreement for the Proposed Transaction rather than that immediately prior to the original transactions. The more recent closing bid is used because of the changes in circumstances since entering into of the original agreements that led to the desire to consummate the Proposed Transaction and because of the significant changes in terms that would be reflected in the Agreement, as described above. As such, although the issuance could exceed 20% of the pre-transaction outstanding shares, shareholder approval is not required pursuant to Rule 4350(i)(1)(D) because the issuance price will not be less than the greater of book or market value. The Proposed Transaction will not result in a change of control because no Note Holder could own as much as 20% of the company's outstanding stock or voting power and there will be no other arrangements between any of the Note Holders and the company. Accordingly, shareholder approval of the Proposed Transaction is not required 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 2006-20

This is in response to your correspondence regarding a proposed amendment (the "Amendment") to the company's equity compensation plan (the "Plan"). You asked whether the Amendment would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule").

According to the information you provided, the Plan currently provides for the award of restricted stock through stock purchase rights ("Stock Purchase Rights") and stock options. The Plan defines Stock Purchase Rights as the right to purchase common stock at a price determined by the Plan administrator. You stated that the price paid is typically zero or perhaps par value. You further stated that shares granted pursuant to Stock Purchase Rights may be subject to repurchase by the company, thus making them subject to a vesting schedule.

Pursuant to the Amendment, the company would authorize the granting of restricted stock units ("RSUs") under the Plan. RSUs would be awards of common stock subject to a vesting schedule such that the common stock underlying the RSUs would not be issued until after any applicable vesting requirements are satisfied. You stated that in all material respects, the terms and conditions of the RSUs would be the same as the terms and conditions of restricted stock. Specifically, you indicated that RSUs and Stock Purchase Rights would have the same tax treatment, accounting treatment, and securities law implications. The Amendment would not increase the maximum number of shares of common stock available under the Plan.

Following our review of the information you provided, we have determined that the Amendment would not be a material amendment under the Rule. In that regard, we note that the Amendment would not result in a material increase in benefits to participants, or in an expansion of the types of awards available, because the RSUs are substantially equivalent to the stock awards currently permissible under the Plan. We also note that the Amendment would 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.

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 2006-21

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(C)(ii) (the "Rule") and IM-4350-2 to a proposed issuance of securities (the "Proposed Issuance") to raise funds to partially fund an acquisition (the "Acquisition").

According to the information you provided, in the Proposed Issuance, the company would issue the Preferred Stock and warrants exercisable for shares of the company's common stock (the "Warrants"). Assuming full conversion and exercise, the common stock issuance would exceed 20% of the pre-transaction outstanding shares. The Preferred Stock and Warrants (collectively, the "Securities") would be issued and the Acquisition would close before shareholder approval is sought, but the Preferred Stock could not be converted and the Warrants could not be exercised until after such approval is obtained. If shareholders do not approve the conversion and exercise, there would be no change in the terms of the Preferred Stock, but the company would be obligated to repurchase each warrant (the "Warrant Repurchase") for the amount of the Securities' purchase price expected to be allocated to the Warrants. Neither the Preferred Stock nor the Warrants would have any voting rights. There are no rights to representation on the company's board of directors associated with the Proposed Issuance.

Following our review of the information you submitted, we have concluded that the Proposed Issuance would comply with the Rule and IM-4350-2. In that regard, although the potential issuance of common stock exceeds 20% of the pre-transaction outstanding shares and voting power, no common shares would be issuable without shareholder approval, and the Securities would have no voting rights. Further, although the Warrant Repurchase is an alternative outcome, the Proposed Issuance complies with IM-4350-2 because no common stock could be issued prior to the shareholder vote.

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 2006-22

This is in response to your correspondence regarding whether the company's proposed course of action (the "Proposal") with respect to two of its stock option plans (collectively, the "Plans") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). Under the Proposal, as more fully described below, the company would buy back certain outstanding stock options for cash and increase the exercise prices of certain other outstanding options in exchange for a cash payment.

According to the information you provided, as permitted under the Plans, certain option grants were made at less than fair market value on the date of the grant. You stated that under Internal Revenue Service Code Section 409A, any stock option with an exercise price less than fair market value on the date of grant constitutes deferred compensation and must comply with Section 409A. As such, the optionees likely would be subject to potentially significant additional taxation at the time of vesting. You stated that it was not the company's intent for the optionees to be subject to these tax consequences.

Under the Proposal, the company would take the following two courses of action to prevent the application of Section 409A to the optionees:

- (1) Where the fair market value of discounted stock options at the time of grant is known, the company would increase the exercise price of such options to 100% of the fair market value on the stock options' original date of grant and compensate optionees for the increased exercise price with a cash payment equal to the spread between the original exercise price and the revised exercise price of the stock options (the "Exercise Price Increase"); or
- (2) Where the fair market value of the stock option cannot be determined, the company would provide optionees with a cash payment equal to the stock options' current Black-Scholes value in exchange for the cancellation of such stock options (the "Option Repurchase").

Under the provisions of the Plans, the administrator may at any time offer to buy out for a payment in cash or in shares of common stock an option previously granted based on such terms and conditions as the administrator shall establish and communicate to the optionees.

Following our review of the information you provided, we have determined that the Proposal would not be a material amendment to the Plans under the Rule. The Proposal would not result in a material increase in benefits to the participants. In that regard, the Exercise Price Increase would increase rather than decrease the exercise price, and the cash payment to the optionees in connection with that change would equal the difference between the revised exercise price and the original exercise price. You stated that the Exercise Price Increase and the cash payment would be consistent with the approach envisioned by the Internal Revenue Service in the regulatory proceedings to implement Section 409A. In making this determination, NASDAQ notes that less than 10% of the options subject to the Exercise Price Increase are presently out of the money. The Option Repurchase also would not result in a material amendment to the Plans because the Plans specifically permit the company to do so and because the consideration to be paid would be cash, and not equity. We also note that the Proposal would not result in an increase in the number of shares to be issued under the Plans, an expansion of the class of eligible participants, or an expansion in the types of awards available. Accordingly, the Rule does not require shareholder approval of the Proposal. This conclusion is based on your representations that the purpose of the Proposal is to address the tax consequences of Section 409A.

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 2006-23

This is in response to your correspondence regarding the potential applicability of Marketplace Rule 4350(i)(1)(A) (the "Rule") and IM-4300 to proposed equity awards (the "Awards") to the Officers. Your letter relates to whether: (i) the company is subject to the Rule and (ii) the Awards would affect the company's eligibility to list on NASDAQ.

According to the information you provided, the company's securities were delisted from the New York Stock Exchange and have since traded in the Pink Sheets. The company has applied to list on NASDAQ.

You stated that the Compensation Committee of the company's Board of Directors plans to grant the Awards upon confirmation that the Awards would not impair the company's application to be listed on NASDAQ.

Following our review of the information you provided, we have concluded that the Awards would not be subject to the Rule, provided that the agreement relating to the Awards is finalized and the Awards are made prior to the company's listing on NASDAQ. Furthermore, granting the Awards prior to listing on NASDAQ would not impair the company's eligibility for listing, provided that the company's actions with respect to the Awards are consistent with the assumptions stated herein. In that regard, the provisions of IM-4300 would not lead to a different conclusion: the agreement would be reached and the Awards made at a time when the company was not listed on NASDAQ or an exchange that imposed corporate governance requirements; over one year would have elapsed since the company's delisting from an exchange that imposed requirements that would have been applicable; and the delisting from that exchange was unrelated to the Awards or any other shareholder approval concern. Please note, however, that if the company lists on NASDAQ prior to granting the Awards, the Awards would require shareholder approval 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 2006-24

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(i) and (ii) (the "Rule") to a Transaction involving: (i) a sale by Holder to the company of shares of the company's common stock it currently owns; and (ii) a proposed issuance of common stock by the company (the "Company Issuance"). In addition, if shareholder approval is required, you asked whether Holder would be permitted to vote its shares on the proposal to approve the Company Issuance.

According to the information you provided, Holder currently owns more than 50% of the shares of the company's outstanding common stock ("Holder's Shares"), and wants to liquidate its investment. In the Transaction: (i) the company would purchase from Holder a portion of Holder's Shares and warrants to purchase additional shares (the "Buyback"); and (ii) the company would sell newly issued shares and warrants to third party investors to raise funds to finance the Buyback. The Company Issuance would be greater than 20% of the pre-transaction outstanding shares (the "20% Threshold") and would be at a discount to market value. You stated that giving effect to both the Buyback and the Company Issuance, the net increase in shares outstanding would be less than 20% of the shares outstanding before the Transaction.

Following our review of the information you provided, we have determined that the Company Issuance requires shareholder approval under the Rule. We make this determination notwithstanding your representation that the net issuance will equal less than the 20% Threshold, because the Company Issuance will exceed the 20% Threshold and will be at a discount to market value. Regarding Holder's eligibility to vote, NASDAQ Rules would not prevent Holder from voting its shares in a shareholder vote to approve the Company Issuance and the Transaction.

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 2006-25

This is in response to your correspondence regarding whether the company's proposed offering (the "Offering") of its senior convertible notes (the "Notes") would be a public offering pursuant to the definition set forth in IM-4350-3, and thereby not subject to the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D) (the "Rule"). The company is incorporated in Country, but is not a foreign private issuer. The company's ADRs are listed on NASDAQ.

According to the information you provided, the offering will be conducted on a firm commitment basis, and the offerees will be institutional and retail investors in Country and other jurisdictions. The Managing Underwriter will select the offerees. You stated that to comply with certain regulations in Country, the company will not offer the Notes for sale in the United States. The company anticipates marketing the offering to 150 to 250 institutional investors, and it expects 40 to 100 of those will actually invest. The company will make a general solicitation of investors in Country, including the issuance of a press release describing the offering, and any retail investor may place an order in the offering. The company further stated that it expects any retail investor that is interested in participating in the offering will be able to participate to the desired extent. It is not expected that any officers or directors of the company will purchase Notes in the offering. The Notes will have a conversion price above the current market value of the ordinary shares, subject to adjustment upon occurrence of certain events, and will be convertible on a net share settlement basis. Generally, under a net share settlement, for each \$1,000 principal amount, an investor receives \$1,000 cash plus ordinary shares equal in value to the gain, if any, resulting from any excess of the market price of the ordinary shares at the time of conversion over the conversion price. The Notes will be admitted to trading on a market outside of the United States.

Following our review of the information you provided, we have concluded that if the Offering is conducted in a manner consistent with the information you submitted, it will be a public offering within the meaning of IM-4350-3. We have reached this conclusion based on the scope of the marketing effort, the ability for retail investors to participate, the expected number of purchasers, and the limited control of the company over the distribution of the securities offered. Pursuant to the Rule, securities issued in a public offering for cash are not subject to the Rule. Accordingly, the Offering will not require shareholder approval under the Rule. We reach this conclusion notwithstanding our view that shares issued as a result of a net share settlement are appropriately viewed as being issued at a discount to 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 2006-26

This is in response to your correspondence regarding whether certain proposed amendments (the "Amendments") to the company's equity compensation plan (the "Plan") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule"). Pursuant to the Amendments: (i) restricted stock awards ("RSAs") would be permitted; and (ii) changes would be made to the vesting schedule for certain stock options (the "Vesting Revisions").

According to the information you provided, the Plan currently authorizes the award of stock options, stock appreciation rights, and performance share awards ("PSAs"). You stated that RSAs would be similar to PSAs, which are awards of the right to receive a specified number of shares of common stock contingent upon the achievement of specified performance objectives, including continued employment, over a specified time period. RSAs would be awards of restricted stock subject to forfeiture if certain performance criteria are not met and/or employment with the company is terminated prior to the end of the restriction period. For RSAs, the Plan administrator would have the authority to shorten or terminate the restricted period or waive any other restrictions. Currently, for PSAs, the Plan administrator has the right to amend the terms of outstanding awards, subject to certain limitations. In addition, as is currently authorized under the Plan for PSAs, for RSAs the Plan administrator would determine to whom such awards would be granted, the number of common shares subject to each award, and the vesting schedule including any performance criteria. You stated that RSAs would be treated the same as PSAs for accounting, tax, and financial statement purposes.

Under the Vesting Revisions, the vesting period would be changed for stock options awarded to non-employee directors. Currently, such options are vested and exercisable 50% on the date of grant, 25% one year after the grant date, and the remaining 25% two years after the grant date. Pursuant to the Vesting Revision, the options would vest in annual increments of 25% beginning one year after the grant date.

Following our review of the information you provided, we have determined that the Amendments would not require shareholder approval under the Rule. In that regard, we note that the addition of RSAs would not result in a material increase in benefits to participants, or in an expansion of the types of awards available, because RSAs would not be materially different from PSAs, which are currently permissible under the Plan. Both types of awards involve the issuance of common stock, and both are subject to the terms and provisions determined by the Plan administrator. In addition, the Vesting Revisions would not require shareholder approval because changes to delay vesting are not material amendments under the Rule. We also note that the Amendments would 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 Amendments.

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 2006-27

This is in response to your correspondence regarding the applicability of Marketplace Rule 4200(a)(15). You asked whether the Director is eligible to be an independent member of the company's board of directors notwithstanding payments made to the Director by the company and the Former Subsidiary in connection with: (i) the spin-off by the company of the Former Subsidiary (the "Spin-off"), and (ii) a rights offering covering shares of the Former Subsidiary's common stock (the "Rights Offering") conducted by the Former Subsidiary following the Spin-off. Specifically, your question relates to Rule 4200(a)(15)(B) (the "Rule"). Prior to the Spin-off, the Former Subsidiary had been wholly-owned by the company.

According to the information you provided, pursuant to a Standby Purchase Agreement (the "Agreement") relating to the Rights Offering, certain payments were made to the Investor, an entity controlled by the Director and that is the company's largest shareholder. The Agreement was entered into among the Investor, the company, and the Former Subsidiary prior to the Spin-off. Pursuant to the Agreement, the Investor agreed to purchase all of the shares it was eligible to receive in the Rights Offering and all shares that remained unpurchased upon conclusion of the Rights Offering. In return, the company paid to the Director a fee, which was less than \$60,000, following the final approval of the Spin-off by the company's Board of Directors and prior to the effectiveness of the Spin-off. In addition, as compensation for the Agreement, after the effectiveness of the Spin-off, the Former Subsidiary issued to the Director warrants exercisable for shares of the Former Subsidiary's common stock (the "Warrants") and reimbursed (or is obligated to reimburse) the Director for expenses relating to the Rights Offering and the Spin-off. In the aggregate, the fee paid by the company, the value of the Warrants, and the amount of expenses subject to reimbursement (collectively, the "Payments") exceed \$60,000.

Following our review of the information you provided, we have determined that the Director is not eligible to be an independent director under the Rule because the Director received payments that exceed \$60,000 over a twelve-month period within the past three years. Although a portion of the Payments were made after the Spin-off and were made by the Former Subsidiary rather than by the company, each component of the Payments was made pursuant to an agreement which was entered into among the company, the Investor, and the Former Subsidiary at a time when the Former Subsidiary was still wholly-owned by the company. As such, for purposes of the Rule, the Payments are attributed to 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 2006-28

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules") to a proposed transaction (the "Proposed Transaction") which you described.

According to the information you submitted, approximately two years ago the company issued the Notes, which are convertible into shares of the company's common stock at a price in excess of the market value of that common stock at the time of issuance. The indenture agreement contains certain restrictive covenants (the "Covenants"), and the repayment of the Notes is secured by a security interest (the "Security Interest") in the company's assets, including all real and personal property and all subsidiary equity interests. At the time of the issuance of the Notes, you stated that the company anticipated developing a property (the "Property") with Group 1. As such, the indenture is structured such that the Security Interests and the Covenants terminate only upon achieving specified milestones in that development specifically with Group 1. Due to a number of unanticipated events, however, Group 1 has been unable to proceed with the development of the Property.

More than a year after the issuance of the Notes, the company was approached by Group 2 and has since entered into an agreement with Group 2, which the company hopes will lead to the development of the Property. In the Proposed Transaction, the company would amend the terms of the Notes to allow the Security Interests and the Covenants to terminate upon development of the Property with any Group. Thus, the Note holders would give up their right to enforce the Security Interest and the Covenants with respect to the participation of Group 1, and the company could proceed with the development of the Property with Group 2. As consideration for these modifications, the company anticipates it will have to reduce the conversion price on the Notes and issue warrants to the holders of the Notes. The revised conversion price would be no less than the closing bid price of the company's common stock immediately preceding the execution of the binding agreement to modify the Notes (the "Closing Bid"), plus \$0.125 for each share of common stock issuable upon the exercise of the warrants. In addition, the warrants would be exercisable for no less than the Closing Bid and would not have any anti-dilution price adjustments other than for stock dividends, combinations, and similar events. The company's market value exceeds its book value. You stated that no Note holder could own as much as 20% of the company's outstanding shares or voting power as a result of the Proposed Transaction, and there are no other arrangements between any of the Note holders and the company.

Following our review of the information you submitted, we have concluded that shareholder approval of the Proposed Transaction is not required pursuant to the Rules. For purposes of determining whether the issuance price is at least as much as market value, it is appropriate to use the closing bid price immediately prior to the binding agreement for the Proposed Transaction, rather than that immediately prior to the initial issuance, because of the changes in circumstances since the company entered into the original agreement that led to the desire to consummate the Proposed Transaction and because of the changes in terms that would be reflected in the Proposed Transaction, as described above. As such, although the issuance could exceed 20% of the pre-transaction outstanding shares, shareholder approval is not required pursuant to Rule 4350(i)(1)(D) because the issuance price will not be less than the greater of book or market value. The Proposed Transaction will not result in a change of control because no Note holder could own as much as 20% of the company's outstanding stock or voting power and there will be no other arrangements between any of the Note holders and the company. Accordingly, shareholder approval of the Proposed Transaction is not required 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 2006-29

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to the company's equity compensation plan (the "Plan") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). Pursuant to the Amendment, the company would be permitted, by means of a net issuance feature ("Net Issuance"), to withhold the taxes that a participant would owe in connection with awards of restricted stock, restricted stock units, and stock appreciation rights (the "Taxes").

According to the information you provided, the Plan originally allowed only for the grant of options to participants. Thereafter, the Plan was amended, with shareholder approval, to also allow for the award of restricted stock, restricted stock units, and stock appreciation rights. Due to a clerical error when this amendment was made, the provision that allows for Net Issuance for stock options was not also expanded to include other types of awards. The Amendment would correct this oversight, such that upon the vesting or exercise of an award, as applicable, the company could withhold from a participant a portion of the shares otherwise issuable equal in value to the dollar amount of the Taxes and would pay that amount to the appropriate tax authorities. Any such redemption would occur at the fair market value of the shares at the time of withholding.

Following our review of the information you provided, we have determined that the Amendment would not be a material amendment under the Rule. We note that the Amendment would not result in a material increase in benefits to the participants because the market value of the withheld shares would equal the dollar amount of the Taxes. We also note that the Amendment would not result in an increase in the number of shares to be issued under the Plan, in an expansion of the class of eligible participants, or in an expansion of the types of options or awards available. Accordingly, the Rule does not require shareholder approval for the Amendment.

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 2006-30

This is in response to your correspondence regarding whether the company's proposed extension of the termination date of the Plan (the "Extension") in the manner described below would comply with the shareholder approval requirements of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule").

According to the information you provided, unless extended, the Plan will expire on the Current Termination Date. Under the Extension, the termination date would be extended to the New Termination Date. You stated that the company's board of directors intends to approve the Extension prior to the Current Termination Date, and prior to obtaining shareholder approval, but no awards would be made pursuant to the Extension unless shareholder approval is obtained. If shareholder approval is not obtained at the company's next annual shareholders' meeting, the Plan will be deemed to have expired as of the Current Termination Date, and no further awards under the Plan will be granted.

Following our review of the information you provided, we have determined that the Extension satisfies the requirements of the Rule. Under the Rule, an extension of the duration of a plan requires shareholder approval. Although it would be adopted by the company's board prior to shareholder approval being sought, the Extension satisfies the Rule because no shares of common stock could be issued pursuant to the Extension unless shareholder approval is obtained.

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 2006-31

This is in response to your correspondence regarding the applicability of Marketplace Rule 4200(a)(15). You asked whether the Director is eligible to be an independent member of the company's board of directors notwithstanding a payment (the "Payment") made to the Investor by the company in connection with a merger between Company A and Company B (the "Merger"). The Director is an executive officer of the Investor. Specifically, your question relates to Rule 4200(a)(15)(D) (the "Rule").

According to the information you provided, the company was formed in the Merger and became the successor to Company A and Company B. As a result of the Merger, the outstanding shares of the common stock of both Company A and Company B were cancelled and exchanged for shares of the company's common stock.

Prior to the Merger, the Investor held senior notes (the "Notes") issued by, and warrants (the "Warrants") to purchase shares of common stock of, Company A. In connection with the Merger, the company, Company A, and the Investor entered into an agreement to restructure the Notes and the Warrants. Pursuant to the restructuring, upon consummation of the Merger, the Notes and the Warrants were exchanged for the Payment, which consisted of cash and shares of the company's common stock. Had the restructuring not occurred, upon the consummation of the Merger, the Warrants would have become exercisable for shares of the company's stock and the Investor would have had the right to demand repayment in full from Company A, which would then have been a wholly-owned subsidiary of the company.

Following our review of the information you provided, we have determined that the company's board of directors is not precluded by the Rule from finding that the Director is independent. The Rule provides that payments arising from an investment in a company's securities are not considered in determining whether payments reach the threshold set forth in the Rule. The Payment was made in exchange for securities which would have become securities in, and ultimately an obligation of, the company upon the consummation of the Merger. As such, it is appropriate to consider the Payment, which was designed to replace the value of the Investor's holdings in Company A with approximately the same value in the form of cash and securities in the company, as having arisen from an investment in the company's securities for purposes of the Rule. Notwithstanding this determination, 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 with respect to the Director.

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 2006-32

This is in response to your correspondence regarding whether a reduction in the exercise price of outstanding stock options (the "Reduction") under the company's equity compensation plans (the "Plans") 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, pursuant to the Reduction, the company would offer option holders under the Plans the opportunity to have the exercise price of "underwater" options reduced to the fair market value of the company's common stock on the date of the Reduction. Each of the Plans provides that the company's Board of Directors has the authority, in its discretion, to determine the terms and provisions of each option granted and, "with the consent of the holder thereof, modify or amend any provisions (including provisions relating to exercise price)" of any option granted.

Following our review of the information you provided, we have determined that the Reduction would not be a material amendment under the Rule because each Plan specially authorizes the company's board to modify or amend provisions relating to the exercise price of outstanding options. Pursuant to IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. Accordingly, the Rule does not require shareholder approval for the Reduction.

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 2006-34

This is in response to your correspondence regarding the applicability of the shareholder approval requirements to a proposed issuance of securities by the company 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 submitted, in the Transaction the company would issue shares of common stock ("Common Shares") and warrants to purchase additional shares of common stock ("Warrants") to several investors, none of whom is an officer, director, employee, or consultant of the company. In addition, the company would issue Warrants to the placement agent (the "Placement Agent Warrants"). The number of Common Shares would equal no more than 19.9% of the pre-transaction outstanding shares and would be sold at a discount to market value. The number of shares of common stock that could be issued upon the exercise of the Warrants, including the Placement Agent Warrants, would equal approximately 6% of the pre-transaction outstanding shares. The Warrants would be exercisable into common stock at a price not less than the closing bid price immediately preceding the entering into of the binding agreement notwithstanding any anti-dilution provisions except those relating to stock splits and similar events. The Warrants will not be exercisable until 180 days after issuance. The company's market value exceeds its book value.

You stated that, as a result of the Transaction, no investor individually, or as part of a group, could beneficially own, or obtain 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, and there would be no other related arrangements between the company and any of the investors.

Following our review of the information you provided, we have determined that the Transaction will not require shareholder approval under the Rules. Rule 4350(i)(1)(D) will not require shareholder approval 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 as described above, and the Warrants cannot be exercised until 180 days after the date of closing, the Warrants will not require shareholder approval. Further, given the ownership positions and the lack of any other arrangements between the company and any of the investors, the Proposed Transaction would 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 2006-35

This is in response to your correspondence regarding the applicability of Marketplace Rule 4351 and IM-4350-1 (collectively, the "Voting Rights Rule") to certain rights (the "Rights") that the Investor would have in connection with a proposed transaction (the "Proposed Transaction"). The Rights relate to the composition of the board of directors (the "Board Rights"), the right to veto certain corporate actions (the "Veto Rights"), and the removal and replacement of the chief executive officer (the "CEO Rights").

According to the information you provided, in the Proposed Transaction, subject to shareholder approval: (i) the company would issue shares of its common stock to the Investor such that that the Investor would own 51% of the company's outstanding shares immediately following the issuance, and (ii) the company would receive a cash payment from the Investor and the Investor's ownership interest in certain of the Investor's subsidiaries.

Pursuant to the Board Rights, the Investor would be entitled to designate or nominate up to four of the seven members of the company's Board of Directors, representing approximately 57% of the Board.

Pursuant to the Veto Rights, the consent of the Investor would be required for certain actions of the company, including the selection of the chief financial officer, the approval of certain budgets and business plans, material financings and acquisitions, certain issuances or repurchases of securities, amendments to the by-laws and charter, declaration of dividends, the disposition of assets, entering into voluntary bankruptcy proceedings or dissolution, and certain mergers, consolidations, investments or similar events.

Pursuant to the CEO Rights, beginning two years after closing of the Proposed Transaction, under certain circumstances when the Board is unable to reach a decision on the appointment or removal of the CEO, two of the board members nominated by the Investor pursuant to the Board Rights would have the right to appoint an interim CEO, until such time as the full board reaches a decision.

The Investor would have the Rights only for so long as it holds more than 50% of the company's outstanding shares except that it could temporarily retain the Rights under a grace period provision (the "Grace Period Provision"). Under the Grace Period Provision, the Investor would retain the Rights for a period of time (the "Grace Period") if its ownership of the company's common stock were to decrease to between 40% and 50% of the outstanding shares as a result of the issuance of additional shares of the company's stock to third parties at a time when the Investor would not be able to purchase additional shares of the company's stock because such purchase could reasonably be expected to result in a violation of applicable law. Under these circumstances, the Grace Period would apply only if the Investor made a binding and irrevocable commitment to purchase additional shares such that it would continue to hold a greater than 50% ownership interest when such purchase would no longer reasonably be expected to result in a violation of applicable law, at the market price at the time when the purchase is actually completed. If at any time, however, the Investor's interest were to fall below 40%, the Grace Period would end immediately, although the Investor would still be committed to purchase the shares. Otherwise, the Grace Period would end at the earlier of the date of the company's next periodic filing, after the beginning of the Grace Period, or the due date of such filing. The determination as to whether a purchase of stock by the Investor could reasonably be expected to result in a violation of law will be made by independent counsel to the company's Audit Committee.

Following our review of the information you provided, we have determined that the Rights would not violate the Voting Rights Rule. The Veto Rights and the CEO Rights are not actions or issuances that would disparately reduce or restrict the voting rights of shareholders, and the Board Rights are consistent with the Investor's proposed ownership interest in the company. In addition, we note that subject to a possible limited-duration extension pursuant to the Grace Period Provision, the Rights would not be exercisable if the Investor's ownership position were to fall below 50%.

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 2006-36

This is response to your correspondence regarding the applicability of Marketplace Rules 4350(i)(1)(A) and 4350(i)(1)(C)(ii) and IM-4350-5 to the company's proposed assumption of certain outstanding stock options (the "Options") of Target, a privately-held corporation, in connection with the company's planned acquisition of Target (the "Acquisition").

The Options will include both options that were issued pursuant to the Target's shareholder-approved plans and options that were awarded without shareholder approval ("Non-Plan Options"). No further awards will be made under the Target's option plans following the Acquisition.

Any outstanding Options will be adjusted to reflect the Acquisition and, subject to the limitation described below, will become exercisable for shares of the company's common stock. However, to the extent that shares issuable pursuant to such Options together with other shares issuable in the Acquisition would equal or exceed 20% of the company's pre-Acquisition total shares outstanding, the company will exchange newly granted options (the "Exchanged Options"), issued under a plan approved by the company's shareholders, for such number of Non-Plan Options as would be necessary in order for the 20% threshold not to be reached when the shares issuable pursuant to the Exchanged Options are not counted. The company has advised that its Plan specifically contemplates exchanges of options in the event of a merger or acquisition such as the exchange being proposed in the Acquisition and allows for such awards to be made without regard to the stock price at the time of issuance of the options when options are granted pursuant to the assumption of, or substitution for, other options in a qualifying manner.

Following our review of the information you provided, we have determined that the assumption of the Options in connection with the Acquisition will not require shareholder approval under Rule 4350(i)(1)(A) because IM-4350-5 provides that shareholder approval under Rule 4350(i)(1)(A) is not required to convert, replace, or adjust outstanding options in connection with an acquisition, without regard to whether such options have been approved by the target's shareholders. Pursuant to IM-4350-5, shares issuable pursuant to the Options will be considered in determining whether the Acquisition involves the issuance of 20% or more of the company's stock and thereby triggers the shareholder approval requirements under Rule 4350(i)(1)(C). Finally, to the extent the company issues Exchanged Options, shares underlying such Exchanged Options would not be considered in determining whether shareholder approval of the Acquisition is required under Rule 4350(i)(1)(C) if the Exchanged Options and the underlying shares will be issued pursuant to a shareholder-approved plan that contemplates such an issuance and will reduce the number of shares otherwise available in that plan.

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 2006-37

This is in response to your correspondence regarding the Director's eligibility to serve as an independent director on the company's board of directors. Specifically, you asked whether certain payments (the "Payments") should be considered under Rule 4200(a)(15)(B) or Rule 4200(a)(15)(D). The company has applied to list on The NASDAQ Global Market.

The Firm has provided engineering consulting services (the "Services") to the company or its subsidiaries in exchange for the Payments. The Director had, and the Director's Son has, a relationship with the Firm. Specifically, until 2004, the Director and the Director's Son were the sole members of the Firm. Thereafter, the Firm admitted new members. The Director was the controlling member of the Firm until earlier this year when he sold his ownership interest to the remaining six members. The Director's Son is currently the controlling member of the Firm, but plans to sell his ownership interest shortly after the company's initial public offering. After this sale, neither the Director nor the Director's Son will be a partner, controlling shareholder, or executive officer, or their equivalent, of the Firm. While neither the Director nor the Director's Son currently personally performs any of the Services, in the past portions of the Services were provided by the Director and the Director's Son, along with other partners of the Firm. The Director spent twenty hours performing Services in the current year, all prior to selling his ownership interest, and the Director's Son has not performed any of the Services for over two years.

Following our review of the information you provided and based on your representations, we have determined that the Payments should be considered under Rule 4200(a)(15)(B) during the time period when the Director and the Director's Son were the sole members of the Firm. As such, with regard to the Payments, the Director's eligibility to be independent is measured according to whether the Payments exceeded \$60,000 during any period of twelve consecutive months during the period that began on the date that is three years preceding the date of the determination of independence and ended on the date that additional owners acquired their interests in the Firm. After the date when the additional owners acquired their interests, the assessment of independence may be made under Rule 4200(a)(15)(D). Under Rule 4200(a)(15)(D), the Director would be eligible to be independent if: (i) neither the Director nor the Director's Son is a partner in, controlling shareholder, or executive officer of the Firm, or (ii) the Payments in the current fiscal year or any of the past three years do not exceed 5% of the Firm's consolidated gross revenues or \$200,000, whichever is more. You did not ask us to reach a determination regarding the eligibility of the Director to be an independent director. Please note that 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 regarding the Director.

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 2006-38

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D) (the "Rule") to a proposed transaction (the "Proposed Transaction") which you described.

According to the information you provided, in the Proposed Transaction, the company would issue convertible notes (the "Notes") to several investors in a private placement through a Rule 144A offering. Although the Notes provide for adjustments in the conversion price based on certain future issuances of common stock, the maximum number of shares that could be issued in the Proposed Transaction is limited to 19.9% of the pre-transaction outstanding shares unless shareholder approval is obtained. The terms of the Proposed Transaction would not change as a result of the shareholder vote. Investors in the Proposed Transaction will not include any of the company's officers, directors, employees, or consultants. The company intends to use the proceeds from the Notes to expand its business and for general corporate purposes.

Following our review of the information you submitted, we have determined that by structuring the Proposed Transaction as you described, the company would comply with the requirements of the Rule because the issuance of common stock would be less than 20% of the pre-transaction outstanding shares unless shareholder approval is obtained, and the terms of the transaction would not change as a result of the shareholder vote. Pursuant to IM-4350-2, (i) shares issued under a cap cannot be counted in the vote to approve the removal of the cap; (ii) a cap must apply for the life of the transaction unless shareholder approval is obtained; and (iii) if the terms of a transaction can change based on the outcome of the shareholder vote, then no shares of common stock may be issued prior to the vote. In your letter, you stated that that you were not asking us to determine (and we have not determined) whether the Proposed Transaction would result in a change of control. Please be advised, however, that if the Proposed Transaction would result in a change of control, shareholder approval would be required under Rule 4350(i)(1)(B), which requires such approval when an issuance will result in a change of control.

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 2006-39

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) to a proposed transaction (the "Proposed Transaction") which you described.

According to the information you provided, the company would issue shares of its common stock in exchange for a portion of the outstanding principal amount of indebtedness currently held by the Investor. The Proposed Transaction would be structured such that either: (i) the shares would be issued at a price (the "Issuance Price") not less than the closing bid price immediately preceding the entering into of the binding agreement ("Market Value"); or (ii) if the Issuance Price were to be less than the Market Value, the company would limit the issuance of common stock to less than 20% of its pre-transaction outstanding shares unless shareholder approval were obtained. The company's market value exceeds its book value. You have represented that the Investor is not an officer, director, employee, or consultant of the company, and that the investor is not an affiliate of any such person or entity.

The company's officers and directors own in the aggregate approximately 26% of the company's outstanding shares of common stock. The Investor is the next largest stockholder with approximately 12% of the outstanding shares. After the Proposed Transaction, each of these holdings would equal approximately 23% of the then outstanding shares with the officers' and directors' combined holdings being slightly larger than the Investor's. You stated that the Investor would not: (i) have any right to appoint or otherwise have a designee become a member of the company's board of directors; (ii) have the right to participate in the management of the company; or (iii) be granted any other right in connection with the Proposed Transaction. In addition, the company stated that: (i) based upon an inquiry of each current officer and director of the company, no such person intends to sell shares of the company's stock in the near term; (ii) the Investor is acquiring the shares in the Proposed Transaction as an investment in the company and not with the intent of seeking to obtain control over the company; and (iii) the company does not intend to sell the Investor any shares other than those that would be sold in the Proposed Transaction. In addition, based upon the negotiations between the Investor and the company regarding the Proposed Transaction, the company believes that the Investor does not intend to acquire shares of the company's stock other than in the Proposed Transaction.

Following our review of the information you submitted and based on your representations, we have determined that shareholder approval is not required under Rule 4350(i)(1)(B) because the Proposed Transaction would not result in a change of control. Following the Proposed Transaction, the officers' and directors' aggregate holdings would exceed the ownership position of the Investor, albeit by only a small amount. In addition, as described above, there are no additional arrangements between the company and the Investor that would allow the Investor to acquire board representation or otherwise act to control the direction of the company. Note that this conclusion is based on the specific ownership positions you provided, and that if those ownership positions change soon after the Proposed Transaction is completed (such, for example, as through a sale of shares by an officer or director, a departure of an officer or director, an acquisition by the Investor of additional stock, acquisition by the Investor of additional rights in the company, or other circumstances) our conclusion could be different and therefore shareholder approval would be required pursuant to Rule 4350(i)(1)(B). In addition, given the conclusion that the Investor will not control the company as a result of the Proposed Transaction, please be advised that any future issuance of shares by the company to the Investor, or the entering into of other arrangements with the Investor, could result in a change of control, which may require shareholder approval under Rule 4350(i)(1)(B).

The Proposed Transaction would comply with Rule 4350(i)(1)(D), subject to the restrictions contained in IM-4350-2, because if the Issuance Price was to be less than Market Value, the issuance would equal less than 20% of the pre-transaction outstanding shares, unless shareholder approval were obtained. Please note that pursuant to IM-4350-2: (i) shares issued under a cap cannot be counted in the vote to approve the removal of the cap; (ii) a cap must apply for the life of the transaction unless shareholder approval is obtained; and (iii) if the terms of a transaction can change based on the outcome of the shareholder vote, then no shares of common stock may be issued prior to the vote.

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 2006-40

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(B) to a proposed transaction (the "Proposed Transaction"), which you described. You asked whether the Transaction would result in a change of control and, if so, whether the proposed alternative structure would comply with the requirements of the Rule.

According to the information you submitted, in the Proposed Transaction the company would sell shares of its common stock (the "Shares") and warrants (the "Warrants") to several investors. The number of Shares would equal more than 20% of the pre-transaction outstanding shares, and the Warrants would be exercisable into that number of shares of common stock equal to 25% of the number of Shares. The Shares would be issued at a price per share equal to the closing bid price immediately preceding the entering into of the binding agreement (the "Purchase Price"), and the Warrants would be sold for \$0.125 each. The Warrants would be exercisable for not less than the Purchase Price and would not have any anti-dilution price adjustments other than for stock dividends, stock splits, and similar events. The company's market value exceeds its book value.

Currently, the company's officers and directors own in the aggregate approximately 21% of the company's outstanding shares of common stock (the "D&O Shares"). No single shareholder, nor any holders reporting as a group, own as much as 20% of the outstanding shares. Following the Proposed Transaction, the D&O Shares would represent approximately 18% of the then outstanding shares, and each of the two largest investors in the Proposed Transaction (the "Principal Investors") would own approximately 22%. The company has agreed to appoint to its board of directors, on a one-time basis, an individual who is an affiliate of one of the Principal Investors (the "Limited Board Right").

You stated that according to the terms of the Proposed Transaction, if shareholder approval is required under the Rule, the Principal Investors would be prohibited from owning in excess of 19.99% of the outstanding shares unless shareholder approval has been obtained (the "Limitation") of a change in control. Due to the allocation of the securities that would be sold, no other investor could acquire as much as 19.99% of the company's outstanding shares. If shareholder approval is obtained, there would be a second closing in which the Principal Investors would be the only purchasers. There would be no change in the terms of the Proposed Transaction if the shareholders do not approve the removal of the Limitation.

Following our review of the information you submitted, we have concluded that without the Limitation the Proposed Transaction would require shareholder approval under Rule 4350(i)(1)(B) because it would result in a change of control. Although each Principal Investor would have the same ownership position as the other, Rule 4350(i)(1)(B) would nonetheless apply because of the significant change in the ownership structure resulting from the Proposed Transaction, including two new ownership positions which would be over 20% of the shares then outstanding and each of which would be larger than the current largest ownership position, the D&O Shares. By including the Limitation, however, the company has structured the Proposed Transaction in a manner that complies with Rule 4350(i)(1)(B). Specifically, due to the Limitation, no investor in the Transaction could own more than 19.99% of the company's common stock without shareholder approval. Further, other than the Limited Board Right, there are no relationships between any of the Principal Investors and the company. Please be advised that pursuant to IM-4350-2: (i) shares issued under a cap (in this case, the cap is the Limitation that is applicable to the Principal Investors) cannot be counted in the vote to approve the removal of the cap; (ii) a cap must apply for the life of the transaction unless shareholder approval is obtained; and (iii) if the terms of a transaction can change based on the outcome of the shareholder vote, then no shares of common stock may be issued prior to the vote.

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 2006-41

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1) (the "Rule") to a proposed restructuring (the "Restructuring") which you described.

According to the information you provided, in the Restructuring, the company would issue shares of its common stock (the "Shares") solely to certain of its directly or indirectly wholly-owned subsidiaries (the "Subsidiaries"). One or more of the Subsidiaries would use certain of the Shares to acquire the equity interest of other wholly-owned subsidiaries of the company. Because all of the Shares would be held by directly or indirectly wholly-owned subsidiaries of the company, the company would directly or indirectly hold all of the Shares both prior to and following the Restructuring.

You stated that the company does not intend to register the Shares with the Securities and Exchange Commission. You also stated that, under the laws of the company's state of incorporation, the Shares would not be permitted to be voted and would not be considered as outstanding for purposes of calculating the shares required to be present to form a quorum. In addition, you stated that the Shares would be treated as treasury shares for purposes of generally accepted accounting principles, and, because they will be held by subsidiaries, the Shares would not be considered in calculating the company's earnings per share.

Following our review of the information you submitted, we have determined that the Restructuring will not be subject to Rule 4350(i)(1) because, for purposes of the Rule, we would not consider the Shares to be issued and outstanding. This is based on your representations about the treatment of the shares for state law purposes and under generally accepted accounting principles. Please be advised that any subsequent issuance of the Shares, whether by the company or the Subsidiaries, and any change in circumstances that could result in the Shares becoming outstanding, would need to be assessed 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 2006-42

This is in response to your correspondence regarding whether shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule") would be required of certain proposed actions (the "Proposal") involving the Plan.

According to the information you provided, pursuant to the Proposal the company would offer to purchase for cash stock options that have been previously granted to six of the company's senior executives (the "Designated Executives"). The purchase price would equal the par value of the shares of common stock underlying the options (\$0.001 per share), and all options that are purchased would be cancelled. Pursuant to the terms of the Plan, the shares underlying the cancelled options would remain available for issuance in connection with future awards under the Plan. Following the cancellation, the company would grant additional stock options to employees other than the Designated Executives, utilizing the shares that would remain available as a result of the cancellation, in an effort to provide retention and performance incentives to those individuals. You stated that Designated Executives whose options are purchased would not be entitled to or promised any future consideration for their cancelled options and would not be provided any assurance that they will receive the same number of, or any, future equity awards.

The company intends to continue to grant new awards under the Plan to employees, including the Designated Executives, in connection with the company's regularly scheduled annual performance reviews. These grants would be made according to criteria that are consistent with its past practices of reviewing and determining the size of annual awards. The number of shares underlying the options that may be granted to the Designated Executives in connection with the annual performance reviews would be unaffected by the purchase and cancellation and would be based solely on the previously established criteria for such annual awards (which do not consider any prior exercises or cancellations of previously granted options). You stated that nothing contained in the Proposal will constitute a repricing for purposes of generally accepted accounting principals ("GAAP").

Following our review of the information you provided, we have determined that the Rule does not require shareholder approval of the Proposal. In that regard, in the purchase of the outstanding options, the Designated Executives would receive cash and not additional stock options or any other form of equity. Further, the Plan provides that shares underlying cancelled options remain available for issuance under the Plan for future awards. In addition, you stated that the Designated Executives will not receive replacement awards for the awards that are purchased and cancelled and that there is nothing in the Proposal that would constitute a repricing under GAAP. As such, the Proposal will not require shareholder approval under Rule 4350(i)(1)(A).

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 2006-43

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(B), 4350(i)(1)(C), and 4350(i)(1)(D) (the "Rules") to two proposed transactions (the "Proposed Transactions") which you described. The Proposed Transactions are: (i) a private placement (the "Private Placement"); and (ii) the acquisition of a portion of the outstanding stock of the Target (the "Acquisition").

According to the information you provided, the Private Placement would consist of the sale of common stock (the "Shares") and warrants (the "Warrants") to several investors. The number of Shares that would be issued (the "Share Issuance") could exceed 20% of the pre-transaction outstanding shares, and, in addition, the Warrants would be exercisable into that number of shares equal to 50% of the Share Issuance. The Warrants would be exercisable, however, only after shareholder approval of such exercise, and the Shares would not be entitled to vote in the shareholder vote to approve the exercise. Should shareholders not approve the exercise of the Warrants, the remaining terms of the Private Placement would not change. The Shares would be sold at a price not less than the closing bid price of the company's common stock immediately preceding the execution of the binding agreement, and there would be no additional consideration that would be attributable to the Warrants. The company's market value exceeds its book value. After giving effect to the Private Placement: (i) no investor in the Private Placement would beneficially own or control, alone or as a part of a group, 20% or more of the outstanding shares or voting power of the company; and (ii) the company's current largest shareholder would remain the largest.

In the Acquisition, the company would issue shares of its common stock (the "Acquisition Shares") and cash in exchange for shares of the Target. The issuance of the Acquisition Shares would take place only after shareholder approval of such issuance.

You stated that: (i) the Proposed Transactions are separate from each other; (ii) the failure of one to occur would not cause the other not to proceed; (iii) they are not contingent on each other; (iv) they will be discussed and approved, if approved, at separate board meetings; (v) no portion of the proceeds of the Private Placement would be used to finance the Acquisition; (vi) the proceeds of the Private Placement will be used for working capital of the company and not for working capital of the Target; and (vii) the cash portion of the Acquisition will be funded from cash on hand.

Following our review of the information you submitted, we have determined that the Proposed Transactions comply with the Rules. The Shares that would be issued in exchange for shares of the Target would be issued only after shareholder approval in compliance with 4350(i)(1)(C). Based on your representations as summarized above, the Shares that would be issued in the Private Placement would not be considered to be in connection with the acquisition of the Target's shares and, accordingly, the Private Placement would not be subject to shareholder approval under Rule 4350(i)(1)(C). The Shares to be issued in the Private Placement will be issued at market value, and therefore shareholder approval is not required for the Private Placement under Rule 4350(i)(1)(D). In that regard, we note that it is not necessary to attribute a value to the Warrants for purposes of determining whether the Shares are being issued at a discount because the Warrants could be exercised only if the company's shareholders vote to approve such exercise, and the Shares cannot be voted in the vote to approve such exercise. Please note that pursuant to IM-4350-2: (i) shares issued under a cap cannot be counted in the vote to approve the removal of the cap; (ii) a cap must apply for the life of the transaction unless shareholder approval is obtained; and (iii) if the terms of a transaction can change based on the outcome of the shareholder vote, then no shares of common stock may be issued prior to the vote. Further, given that following the Private Placement no investor in the Private Placement, either alone or as a part of a group, would own 20% or more of the outstanding shares or voting power of the company, that the company's current largest shareholder would retain that position, and that there are no other arrangements between the company and any of the investors, the Private Placement would not result in a change of control and therefore would not require shareholder approval under Rule 4350(i)(1)(B). Lastly, because we have completed our review, the company may close the Proposed Transaction prior to the end of the 15-day notice period referenced in Marketplace Rule 4310(c)(17) provided that the company submits to NASDAQ all required documentation prior to closing.

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 2006-44

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") to the company's proposed transferable stock option program (the "Program") under the Plan.

According to the information you provided, under the Program, employees of the company could transfer eligible options (the "Eligible Options, as defined below) to certain third-party buyers (the "Buyers") in exchange for a cash payment in an amount established through an auction process. When transferred Eligible Options are exercised by the Buyer, the number of shares subject to such Eligible Options would be deducted from the Plan's share reserve. Eligible Options would be all vested stock options granted under the Plan on and after a certain date.

An Eligible Option that is transferred to a Buyer would be amended immediately after such transfer. The amendments (the "Amendments") would: (1) reduce the term (the "Term") of an Eligible Option to the lesser of: (i) a two year period beginning on the date of transfer, or (ii) its remaining term; (2) remove provisions relating to post-employment exercise and other provisions relating to employment with the company; (3) allow for the net exercise of Eligible Options where the Buyer would pay the applicable exercise price through the cancellation of a portion of the shares subject to the Eligible Options; and (4) replace the current anti-dilution provisions with provisions that specifically set forth the circumstances where they would apply and the type of adjustment that would be made.

Currently, the Plan contains provisions that authorize the Plan administrator to: (1) institute a program giving Plan participants the opportunity to transfer any outstanding awards to a financial institution selected by the administrator; and (2) extend the period during which Plan awards could be exercised following the termination of employment. In addition, the Plan provides that the acceptable forms of consideration for the exercise of options, in addition to cash, include other shares of the company's stock, consideration received under a cashless exercise program, and such other consideration as permitted by applicable laws. Finally, the Plan permits anti-dilution adjustments to be made as determined by the Plan administrator.

Following our review of the information you submitted, we have determined that shareholder approval of the Amendments is not required pursuant to the Rule. As stated in IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. In that regard, the Plan specifically permits the administrator to adopt a program, such as the Program, which permits the transfer of awards to a financial institution. In addition, the Plan permits the administrator to extend the post-termination employment exercise period of Plan awards. Further, the Plan permits the administrator to accept any consideration permissible by law for the option exercise price and to make anti-dilution adjustments on a discretionary basis. The Term reduction is not a material change under IM-4350-5 because it shortens, rather than lengthens, the duration of options. Please note that we are not ruling on other aspects of the Program, including other amendments which you stated would be made, but did not delineate.

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 2006-45

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(C) (the "Rule") to a proposed transaction (the "Proposed Transaction") which you described. Specifically, you asked whether the applicable sub-paragraph is Rule 4350(i)(1)(C)(i), which requires shareholder approval of an issuance that equals or exceeds 5% of the pre-transaction outstanding shares or, instead, Rule 4350(i)(1)(C)(ii), which requires shareholder approval of an issuance that equals or exceeds 20% of the pre-transaction outstanding shares.

According to the information you provided, the company currently owns approximately 70% of the Target's outstanding shares. In the Proposed Transaction, the company would issue shares of its common stock (the "Company Shares") to acquire the remaining shares (the "Remaining Target Shares") of the Target, which it does not already own. In addition, Company Shares would be issued in exchange for outstanding Target stock options in an amount that would reflect the exchange ratio in the acquisition.

Certain officers and directors of the company are also officers and directors of the Target. No such person (nor any other substantial shareholder of the company) owns as much as 5% of the Target, and collectively, the company's officers, directors, and substantial shareholders own less than 10% of the Target. These calculations give effect to the shares of common stock underlying Target stock options held by the officers and directors; no other substantial shareholder of the company has Target options.

Following our review of the information you submitted, we have determined that Rule 4350(i)(1)(C)(ii) is applicable, rather than Rule 4350(i)(1)(C)(i). Rule 4350(i)(1)(C)(i) does not apply because no officer, director, or substantial shareholder of the company has a 5% or greater interest (or such persons collectively, 10% or greater) in the Target. In making this determination, we note that we would not attribute ownership of the Target to these individuals through their ownership of Company Shares. Under Rule 4350(i)(1)(C)(ii), the Transaction would require shareholder approval if the issuance of Company Shares could equal or exceed 20% of the company's pre-transaction outstanding shares. In determining whether the 20% threshold could be reached, all Company Shares that could be issued in connection with the acquisition must be counted, including those that are issued or could be issued: (i) as consideration for the outstanding shares of the Target; (ii) in exchange for outstanding Target options; (iii) upon the exercise of any assumed Target options; and (iv) as a result of any shares available for issuance under any assumed Target equity plans.

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 2006-46

This is in response to your correspondence regarding the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(A) and 4350(i)(1)(D) and the voting rights requirements of Rule 4351 to certain proposed actions, which you described. Specifically, the company would distribute as a stock dividend (the "Dividend"), on a pro rata basis to all current shareholders, shares of its recently authorized non-voting Class A common stock (the "Class A") and, as a result, would make certain adjustments (the "Adjustments") to the Plans. You asked whether: (i) the Adjustments would require shareholder approval under Rule 4350(i)(1)(A); (ii) the distribution of the Dividend would require shareholder approval under Rule 4350(i)(1)(D); and (iii) the company could continue to issue shares of its existing common stock (the "Common Stock") after the distribution of the Dividend.

According to the information you provided, the company's shareholders approved the creation of the Class A, which would have no voting rights, except as required under applicable state law. Pursuant to the capital structure in place at the time of the company's initial public offering, the company currently has shares of two classes of common stock issued and outstanding: (i) Common Stock with one vote per share, which is listed on NASDAQ; and (ii) Class B common stock with 10 votes per share, which is not listed on NASDAQ. No shares of the Class A have been issued yet. Neither existing class will be convertible into shares of the Class A.

You stated that following the distribution of the Dividend, the company would implement the Adjustments as follows: (i) each outstanding option under the Plans would become exercisable for the same number of Class A shares as are paid on a single share of the Common Stock, in addition to the single share of Common Stock each outstanding option is already entitled to receive upon exercise; (ii) each outstanding share of restricted Common Stock issued under the Plans would receive the number of shares of Class A paid on a single share of the Common Stock, which Class A shares would be subject to the same restrictions as the Common Stock; (iii) the reserve under the Plans would be increased on the date of the Dividend by the number of Class A shares that would be payable through the Dividend on the shares remaining unissued in the Plans (the "Reserve Increase"); and (iv) all share numbers under the Plans (such as the cap on grants per individual) would be adjusted accordingly. Notwithstanding the Reserve Increase, the number of shares of Common Stock that may be subject of awards would be limited to the number that would have been available prior to the Reserve Increase. Shares of the Class B are not available for awards under the Plans.

You stated that the Adjustments are authorized by provisions of the Plans, which require that in the event of a stock dividend, adjustments must be made in the number and class of shares which may be delivered under the Plans, and in the number and class of and/or price of shares subject to outstanding options, stock appreciation rights, and restricted stock granted under the Plans, as the appropriate committee of the board of directors, in its sole discretion, shall determine to be appropriate to prevent the dilution or diminishment of awards.

Following our review of the information you provided, we have concluded that the Adjustments will not require shareholder approval under Rule 4350(i)(1)(A) because they are specifically authorized by the Plans. Further, shareholder approval of the Dividend is not required under Rule 4350(i)(1)(D) because it is a pro-rata distribution to all shareholders and, as such, is not dilutive with respect to the percentage of the company's outstanding shares or voting power held by a shareholder. With regard to Rule 4351, future issuances of Common Stock would be permitted, even after the issuance of the Class A, because the Class A is non-voting. As such, the Class A has no voting power that could be reduced or restricted by a future issuance of Common Stock.

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.