

NASDAQ Staff Interpretative Letters

January – December 2007

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 While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at 301.978.8008 if they have questions regarding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

Director Independence

Affected Marketplace Rule 4200

- [Staff Interpretative Letter 2007-6](#)
- [Staff Interpretative Letter 2007-8](#)
- [Staff Interpretative Letter 2007-12](#)

Director Nominations

Affected Marketplace Rule 4350(c)(4)

- [Staff Interpretative Letter 2007-11](#)

Shareholder Approval – Acquisitions

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2007-7](#)
- [Staff Interpretative Letter 2007-15](#)
- [Staff Interpretative Letter 2007-29](#)
- [Staff Interpretative Letter 2007-31](#)
- [Staff Interpretative Letter 2007-33](#)

Shareholder Approval – Change of Control

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2007-4](#)
- [Staff Interpretative Letter 2007-15](#)
- [Staff Interpretative Letter 2007-18](#)
- [Staff Interpretative Letter 2007-19](#)
- [Staff Interpretative Letter 2007-20](#)
- [Staff Interpretative Letter 2007-23](#)
- [Staff Interpretative Letter 2007-25](#)
- [Staff Interpretative Letter 2007-30](#)

Shareholder Approval – Equity Compensation Plans

Affected Marketplace Rule 4350(i) and IM-4350-5

- [Staff Interpretative Letter 2007-1](#)
- [Staff Interpretative Letter 2007-2](#)
- [Staff Interpretative Letter 2007-10](#)
- [Staff Interpretative Letter 2007-14](#)
- [Staff Interpretative Letter 2007-16](#)
- [Staff Interpretative Letter 2007-20](#)

- [Staff Interpretative Letter 2007-21](#)
- [Staff Interpretative Letter 2007-25](#)
- [Staff Interpretative Letter 2007-26](#)
- [Staff Interpretative Letter 2007-28](#)
- [Staff Interpretative Letter 2007-35](#)

Shareholder Approval – Financial Viability Exception

Affected Marketplace Rule 4350(i)(2)

- [Staff Interpretative Letter 2007-4](#)

Shareholder Approval – Private Placements

Affected Marketplace Rule 4350(i)

- [Staff Interpretative Letter 2007-3](#)
- [Staff Interpretative Letter 2007-4](#)
- [Staff Interpretative Letter 2007-5](#)
- [Staff Interpretative Letter 2007-7](#)
- [Staff Interpretative Letter 2007-9](#)
- [Staff Interpretative Letter 2007-13](#)
- [Staff Interpretative Letter 2007-15](#)
- [Staff Interpretative Letter 2007-17](#)
- [Staff Interpretative Letter 2007-18](#)
- [Staff Interpretative Letter 2007-19](#)
- [Staff Interpretative Letter 2007-20](#)
- [Staff Interpretative Letter 2007-22](#)
- [Staff Interpretative Letter 2007-23](#)
- [Staff Interpretative Letter 2007-24](#)
- [Staff Interpretative Letter 2007-25](#)
- [Staff Interpretative Letter 2007-27](#)
- [Staff Interpretative Letter 2007-32](#)
- [Staff Interpretative Letter 2007-34](#)

Voting Rights

Affected Marketplace Rule 4351

- [Staff Interpretative Letter 2007-7](#)
- [Staff Interpretative Letter 2007-11](#)
- [Staff Interpretative Letter 2007-23](#)

Staff Interpretative Letter 2007-1

This is in response to your correspondence regarding the company's proposal to establish an international employee stock purchase plan (the "IESPP"). You asked whether the adoption of this plan and the related amendment to the company's existing employee stock purchase plan (the "ESPP") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule").

According to the information you provided, the ESPP is a shareholder-approved plan designed to qualify under Section 423 of the Internal Revenue Code. The ESPP is a payroll-deduction based plan that enables employees of the company to purchase shares of the company's common stock at a discount. Under the IESPP, employees of the company's foreign subsidiaries would be entitled to purchase shares of the company's stock at substantially the same terms as those of the ESPP but subject to the laws of the foreign jurisdictions. The share reserve previously approved by the shareholders for the ESPP would be used for issuances under both the ESPP and the IESPP. The Amendment would specify that each share of stock issued under the IESPP would automatically reduce, on a one-for-one basis, the number of shares available under the ESPP.

You stated that while employees of the company's foreign subsidiaries are eligible to participate in the ESPP, the company has determined to establish the IESPP to allow certain differences from the ESPP to comply with applicable local laws relating to tax, securities, and employment. For example, the securities or employment laws in some countries require that separate bank accounts be created for each employee's payroll deductions while other countries may prohibit such segregation of funds. You stated that it is not permissible under Section 423 to provide different terms or conditions for one or more subgroups of employees and that the company therefore needs to establish the IESPP to ensure that its employees in the United States can continue to purchase shares under the ESPP on a tax-favored basis.

Following our review of the information you provided, we have determined that the Amendment and the adoption of the IESPP will not require shareholder approval under the Rule. In that regard, we note that all shares issued under the IESPP will come from the same share reserve that shareholders approved for the ESPP. Further, the terms of the IESPP are substantially the same as the terms of the ESPP. The IESPP will be broadly available to employees of the company's foreign subsidiaries. These employees can purchase shares through a payroll deduction, at a discount that cannot exceed 15%, identical to the terms of the ESPP, and subject to a limitation on the maximum purchase size that is identical to the limit on the ESPP. As such, the IESPP provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan that the company provides to its U.S. employees (the ESPP). The Amendment will not result in an increase in the number of shares available for issuance, a material increase in the benefits to participants, a material expansion of the class of eligible participants, or an expansion in the types of awards available. Therefore, the Amendment (and the creation of the IESPP) is not a material amendment to the ESPP.

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 2007-2

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to the Plan would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). The Amendment, as more fully described below, would set forth that increases in the exercise prices of certain outstanding stock options is permitted under the Plan. Executive officers and directors are not eligible to receive awards under the Plan.

According to the information you provided, the company recently discovered that it may have used an incorrect date of grant for some options that have been awarded under the Plan. As a result, some of those options (the "Below Market Options") may have exercise prices less than fair market value as of the correct grant date for financial reporting purposes. You stated that under Internal Revenue Code Section 409A ("409A"), holders of such options could be subject to unfavorable tax consequences which were not contemplated at the time the grants were made. To alleviate the unfavorable tax treatment, the company is considering amending the Below Market Options to increase the exercise price to the fair market value as of the correct grant date.

Pursuant to a specific provision of the Plan, the company's board of directors (the "Board") does not have the authority to: (i) reprice any option so that the exercise price becomes less than the fair market value on the grant date or (ii) take any other action that is treated as a repricing under generally accepted accounting principles. You stated that the company believes that this provision was intended solely to withhold authority from the Board to reduce exercise prices and does not believe that the intent was to deny the authority to increase exercise prices. The Board is contemplating the Amendment to clarify that this provision does not prohibit an increase in an exercise price to the fair market value as of the correct grant date. After making the Amendment, the company would offer to amend eligible options to increase their exercise price. You stated that under generally accepted accounting principles, including FAS 123(R), the company would not record any additional expense as a result of the amendments to the Below Market Options. While FAS 123(R) does not define a repricing, under FAS 123 and FIN 44, which were in effect when the plan was adopted, these amendments would not have been treated as a repricing, which would require the recognition of additional total compensation expense.

Following our review of the information you provided, we have determined that the Amendment would not require shareholder approval under the Rule because it would not be a material amendment to the Plan. In that regard, pursuant to IM-4350-5, a material amendment includes any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options or (ii) reduce the price at which options may be offered. Because the Amendment would permit an increase, rather than a decrease, in the exercise price, the Amendment is not material under the Rule. Further, the Amendment would not result in an increase in the number of shares to be issued under the Plan, an expansion of the class of eligible participants, or an expansion in the types of awards available. Accordingly, the Rule does not require shareholder approval of 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 2007-3

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

According to the information you provided, the company issued the Notes in a private placement (the "Note Offering") approximately nine months ago, and the conversion price exceeded the book and market value of the company's stock. As such, shareholder approval was not required under the Rule for the Note Offering. The Holder purchased approximately 9% of the Notes. In the Proposed Transaction the company would enter into an agreement with the Holder pursuant to which the company would make a cash payment (the "Inducement Payment") to the Holder to induce the Holder to convert all or a portion of the Notes that it holds. The conversion would take place at the Notes' original terms, which would not be changed. Because a definitive agreement relating to the Proposed Transaction has not been reached, it is unknown whether the Holder's effective conversion price, after giving effect to the Inducement Payment, would exceed the greater of book or market value. The number of shares that would be issued, however, would be less than 20% of the company's pre-transaction outstanding shares. The Holder is not an officer, director, employee, or consultant of the company. The company has no plans to enter into similar agreements with other holders of the Notes.

In a transaction (the "Equity Offering") completed approximately four months ago, the company sold shares of its common stock and warrants. Shareholder approval was not required by the Rule because the aggregate issuance was limited to 19.9% of the pre-transaction outstanding shares. The Holder was a participant in, and purchased approximately 10% of, the Equity Offering.

You stated that the Equity Offering was completed to fund the company's development efforts. The Proposed Transaction would not raise any new funds, but is being undertaken to restructure the company's securities and to eliminate debt outstanding on the company's balance sheet. You also said that the Proposed Transaction would be completed on terms that represent a discount to the interest that otherwise would be payable on the Notes, if they were held to maturity.

Following our review of the information you submitted, we have concluded that the Proposed Transaction will not require shareholder approval under the Rule. Specifically, the Proposed Transaction would not be aggregated with the Equity Offering because: (i) the number of shares that would be issued in the Proposed Transaction is determined by the terms of indenture covering the Note Offering and, accordingly, there would be no increase in the number of common shares that are issuable; (ii) there are no contingencies between the Proposed Transaction and the Equity Offering; and (iii) the transactions are not part of the same financing plan, in that the Equity Offering was to raise funds for specific corporate purposes, and the Proposed Transaction would be designed to restructure the company's balance sheet. Further, while the Inducement Payment could result in the conversion price of the Holder's Notes being at a discount to the market price, the number of common shares that would be issued is less than 20% of the pre-transaction outstanding shares. Be advised, however, that any similar transactions with the Holder and with other holders of the Notes would be aggregated for purposes of determining whether the resultant net conversion price is at a discount to the greater of book or market value, and, therefore, whether shareholder approval is required.

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 2007-4

This is in response to your correspondence regarding a proposed issuance of securities in connection with a restructuring of the company's debt (the "Restructuring") and a subsequent private placement (the "Private Placement"). With respect to the Restructuring and Private Placement (collectively, the "Transactions"), you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2).

According to the information you provided, due to recent concerns about its solvency, the company has retained bankruptcy counsel. Approximately one month ago, the company failed to make principal and interest payments under its senior convertible note (the "Note") and took steps toward an intended filing under Chapter 11 of the U.S. Bankruptcy Code. Prior to the intended filing, the company entered into negotiations regarding the Restructuring with the Original Holder to whom the company had issued the Note approximately nine months ago and who still held the Note at the time the negotiations commenced.

Under the Restructuring, pursuant to a note purchase agreement (the "Note Purchase Agreement"), the Original Holder has already sold the Note to the Buyer, and the company has promised to issue warrants (the "Warrants") to the Original Holder exercisable for shares of common stock. The Warrants will be issued only after the company is permitted to do so under the applicable NASDAQ requirements. The Buyer has agreed that the company will not be required to make any payments of principal or interest for 30 days following the Note Purchase Agreement (the "Forbearance Period"). Following the Forbearance Period, the principal and interest payments would resume unless the Notes have been fully converted into common stock as expected under the terms of the Restructuring. In that regard, the company and the Buyer have agreed to amend the terms of the Note to provide that when permitted by NASDAQ's rules, the Notes will convert into shares of common stock. Following such conversion, all of the covenants (the "Covenants") and required payments under the Notes will cease to exist. You stated that as a condition to the Buyer purchasing the Note, the company has entered into an agreement for the Private Placement with new investors (the "Investors"). The number of shares of common stock that would be issued in the Restructuring and the Private Placement would equal more than 20% of the pre-transaction outstanding shares. As such, without the requested exception, shareholder approval would be required pursuant to Rule 4350(i)(1)(D)(ii) and possibly also pursuant to Rule 4350(i)(1)(B).

Previously, the company attempted to raise new capital but investors were unwilling to invest due to the Covenants associated with the Note. The Original Holder was unwilling to renegotiate the terms of the Covenants, but was willing to sell the Note to the Buyer under the Restructuring. The Investors will purchase shares in the Private Placement only after the Covenants cease to exist.

In your submission, you stated that the delay necessary to seek shareholder approval would seriously jeopardize the financial viability of the company and that the Restructuring and the Private Placement are the company's last alternative to filing for bankruptcy protection. You stated that the company does not have sufficient cash on hand or otherwise available to continue its operations, or to meet its other current obligations, long enough to obtain shareholder approval. In that regard, you noted that the company's past due general vendor payables and payroll expenses exceed its available cash. Moreover, you indicated that the company would be unable to make payments on the Note following the Forbearance Period.

The Private Placement would enable the company to meet its current obligations, specifically rent, utilities and payroll. In addition, the company would be better positioned for the future because the proceeds would be used in part to increase its manufacturing capacity to enable it to fulfill an existing sales agreement.

Based on our review of the circumstances described in your correspondence and on your representations regarding the company's financial condition, we have determined to grant the exception from the shareholder approval requirements. This determination 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 Transactions are delayed. The exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Transactions, a letter describing the Transactions and alerting them to its omission to seek the shareholder approval that would otherwise be required; (ii) the letter must indicate that the audit committee, or a comparable body of

the board of directors, has expressly approved the exception; and (iii) the company must issue a press release that includes the information required to be included in the shareholder mailing.

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 2007-5

This is in response to your correspondence regarding the company. You asked about the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to a proposed transaction (the "Proposed Transaction") involving an issuance of convertible notes (the "Notes") and warrants.

According to the information you provided, in the Proposed Transaction the company would issue notes convertible into, and warrants exercisable for, shares of the company's common stock in exchange for cash proceeds (the "Proceeds"). The Notes would be convertible into more than 20% of the company's pre-transaction outstanding shares (the "Note Shares") and the warrants would be exercisable for an additional number of shares equal to 25% of the Note Shares. The Notes would be convertible at a price that is not less than the closing bid price per share immediately prior to entering into the binding agreement concerning the Proposed Transaction plus \$0.03125 to allow for the attribution of \$0.125 for each share of common stock for which the warrants are exercisable. The warrants would be exercisable for not less than the closing bid price per share immediately prior to entering into the binding agreement concerning the Proposed Transaction. The company's market value exceeds its book value.

Interest on the Notes would be payable semi-annually in cash or shares of common stock (the "Interest Shares") at the company's option. For the Interest Shares, the common stock would be valued at 100% of the closing price on the interest payment date. The company could force conversion of the Notes if the closing price per share has exceeded 150% of the conversion price for at least 20 trading days within any 30-consecutive trading day period. If such forced conversion occurs prior to the third anniversary of the closing date of the sale of the Notes, the company would pay a premium equal to three years of interest less interest paid prior to the conversion (the "Foregone Interest"). Such payment would be in cash or common shares (the "Foregone Interest Shares") at the company's option. If the payment is made in shares of common stock, the common stock would be valued at approximately 95% of the market price on the conversion date. Aside from the repayment of principal, the interest and Foregone Interest are the only cash payments that could be made in connection with the Notes and, as noted above, in each case the payment in cash or shares is at the company's option.

In the event of certain fundamental changes to the company pursuant to which the Notes are converted prior to maturity, the company would be obligated to issue additional shares of common stock (the "Fundamental Change Shares").

Neither the Notes nor the warrants contain anti-dilution adjustments for issuances which are below the market price, the conversion price, or the exercise price. Adjustment would be made only in the event of dividends on shares of the common stock and subdivisions, combinations, and reclassifications of the common stock.

Following our review of the information you submitted, we have concluded that in calculating whether shares are being issued for less than market value, NASDAQ would divide the Proceeds and the interest paid in shares by the sum of the Interest Shares, the Foregone Interest Shares, the Fundamental Change Shares, and shares issued or issuable upon conversion of the Notes. Payment of cash in connection with interest or with the forced conversion would not enter into the calculation. Please be advised that you have not asked us to reach, and we have not reached, a conclusion on whether shareholder approval would be required or on any other aspect of the shareholder approval requirements with regard to the Proposed Transaction. Pursuant to NASDAQ's Listing of Additional Shares process, NASDAQ will review the final terms of the transaction and, if there is a potential issuance of 20% or more of the company's shares outstanding at a price below market value, shareholder approval would be required 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 2007-6

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 under Rule 4200(a)(15)(D) (the "Rule"), notwithstanding the receipt of the company's common stock by the Investor in connection with a merger between Target and the company (the "Merger"). The Director is a managing member of the general partner of the Investor.

Prior to the Merger, the Investor was a shareholder of Target. As a result of the Merger, the outstanding shares of the common stock of Target were cancelled and exchanged for shares of the company's common stock. As such, the Investor received merger consideration in the form of shares of common stock of the company in exchange for the shares previously held in Target. The shares of stock held by the Investor were treated in the identical manner as shares of stock held by other stockholders of Target. As a result of the Merger, Target became a wholly-owned subsidiary of the company. You stated that the merger consideration exceeded 5% of the Investor's revenues, which is greater than \$200,000.

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 receipt of merger consideration, on a pro rata basis in the same manner as other stockholders of the Target, is not a payment for property or services within the meaning 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 2007-7

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(C) and 4350(i)(1)(D) (the "Shareholder Approval Rules") and the voting rights requirements of Rule 4351 (the "Voting Rights Requirements") to a proposed transaction (the "Proposed Transaction").

According to the information you provided, the company has one class of common stock (the "Common Stock"), which carries one vote per share. At its next annual meeting, the company will seek shareholder approval for the creation of a new Class B Common Stock ("Class B Common") and the elimination of a current charter provision which prohibits the issuance of non-voting stock (the "Non-Voting Prohibition"). If both proposals are approved, the Class B Common would be non-voting; if the latter proposal is not approved, the Class B Common would have a fraction of a vote per share ("Nominal Voting Rights").

In the Proposed Transaction, the company would sell Series A Preferred Stock and Series B Preferred Stock (the "Preferred Stock") to the Investor. The Series A Preferred would be convertible, at the option of the Investor, into shares of Common Stock at a price per share that exceeds both the closing bid price of the Common Stock and the book value per share immediately preceding the entering into of the binding agreement (the "Conversion Price"). Initially, the Series B Preferred would convert into Class B Common, although if certain conditions were met, it could subsequently convert into Common Stock. Due to the Non-Voting Prohibition, each class of Preferred Stock would have Nominal Voting Rights.

Currently, the Investor has the largest ownership position in the company, approximately 36%. The issuance in the Proposed Transaction would equal approximately 50% of the pre-transaction outstanding shares, such that the Investor's post-transaction ownership would be approximately 57%, subject to certain limitations. Three of the Investor's employees or affiliates ("Investor Employee Directors") are presently members of the company's eight-member board of directors, although the Investor has no rights to cause their future election. You stated that these directors were among those designated for Board membership by the creditors' committee, in connection with the company's plan of reorganization.

Following the closing of the Proposed Transaction, the Investor would have the right to nominate one new Board member, and the Board size would be increased to nine. In addition, if the company fails to make three dividend payments, the Preferred Stock would have the right, as a class, to elect two additional directors (the "Dividend Default Directors") to what would then be an eleven-member Board, until the dividend arrearages were paid. Although this right is vested in the holders of the Preferred Stock, rather than specifically with the Investor, you stated that it would be exercisable by the Investor, immediately upon closing, in the event of a default. If that right is triggered, the Investor would then have the right to designate three of eleven Board members, in addition to the three Investor Employee Directors. Pursuant to the terms of the Preferred Stock, the Dividend Default Directors cannot be employees or affiliates of the Investor, if their appointment would result in the Investor's employees or affiliates holding a majority of the company's Board seats. The Dividend Default Directors are also subject to the "reasonable approval" by the company if such directors would cause a majority of the Board to be appointed by holders of the Preferred Stock.

In the event of a change of control, as defined in the transaction documents, the Preferred Stock may, at the option of the holder, be redeemed for cash or converted at its terms into Common Stock or Class B Common. If the holder chooses such redemption or conversion, the holder would be entitled to receive cash or stock, in the amount of dividends that would have been paid over a specified time period (the "Dividend Payment"). If the Dividend Payment is made in stock, it would be paid in shares of a new series of non-voting preferred stock (the "New Preferred"), which could not convert into any class of common stock without shareholder approval, or if shareholder approval has been obtained, it would be paid in shares of Class B Common.

The company will pay the Investor a placement fee and will reimburse the Investor in cash for certain legal fees and expenses incurred by the Investor in connection with the Proposed Transaction (collectively, the "Fees and Expenses").

Approximately two months after entering into the definitive agreement relating to the Proposed Transaction, the company entered into a definitive agreement for the acquisition of all of the outstanding stock of another company (the "Acquisition"). The consideration in the Acquisition consists of cash and the assumption of debt. You stated that the Proposed Transaction was not entered into in contemplation of the Acquisition or for any other specific use of proceeds; neither the Proposed Transaction nor the Acquisition was contingent

on the other; the company has sufficient cash for the Acquisition without regard to the Proposed Transaction; and, the Proposed Transaction would have been entered into without regard to whether the Acquisition would take place. You also stated that at the time the company committed to the Proposed Transaction, it had no reason to believe that it would be successful in its attempt to complete the Acquisition.

Following our review of the information you provided, we have concluded that the Proposed Transaction complies with the Shareholder Approval Rules and the Voting Rights Requirements. Specifically, Rule 4350(i)(1)(C) does not apply because, as summarized above, you represented that the Proposed Transaction is not in connection with the Acquisition. There were no contingencies between the two, and each would take place without regard to the occurrence of the other. Rule 4350(i)(1)(D) does not require shareholder approval because any common stock, or securities convertible into common stock, issuable in the transaction will be issued at a price not less than the greater of book or market value of the common stock. The payment of the Fees and Expenses and the Dividend Payment in cash would not be considered in determining whether the issuance price is at a discount. Further, the Dividend Payment would not require shareholder approval if it is paid in stock because the only stock that could be issued without shareholder approval is the New Preferred, which cannot convert into common stock without shareholder approval.

Finally, the proposed director representation complies with the Voting Rights Requirements because the Investor's right to nominate or designate Board members will not be at a higher percentage than its equity ownership interest in the company.

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

Staff Interpretative Letter 2007-8

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 (the "Board"). Specifically, you asked whether certain payments made by the University to the Director ("Director Royalties" as defined below) should be considered to be compensation from the company for purposes of Marketplace Rule 4200(a)(15)(B).

According to the information you provided, the Director has been a member of the Board for approximately eight years and has been a professor at the University for more than twenty years. Pursuant to a license agreement, the University licensed to the company certain intellectual property rights (the "Licensed Technology"), including certain patent rights relating to patents of which the Director is named as inventor. Under this license agreement, the company pays the University a specified amount of royalties (the "Royalties") on net sales received by the company from the sale of products based on the Licensed Technology. The University pays the Director a portion of the Royalties (the "Director Royalties") pursuant to an agreement between the Director and the University.

You stated that the amount of the Director Royalties is controlled solely by the University. The company has no formal or informal agreement, understanding, or arrangement with the Director or the University regarding the amount, if any, of the Royalties that will be paid to the Director. In addition, you stated that the amount of Director Royalties is determined according to the University's fixed rate for this type of arrangement.

Following our review of the information you provided, we have determined that the Director Royalties are not compensation from the company for purposes of Rule 4200(a)(15)(B). We have reached this conclusion: (i) because the Director Royalties are not paid by the company but instead are paid pursuant to an agreement between the Director and the University and (ii) based on your representations that the company has no control or influence over whether any Director Royalties are paid. Accordingly, the Director Royalties would not preclude the company's Board from finding that the Director is independent. 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 2007-9

This is in response to your correspondence regarding whether the company's proposed issuance of securities (the "Proposed Transaction") would be aggregated with a prior transaction (the "Prior Transaction") for purposes of the shareholder approval requirements of Marketplace Rule 4350(i). Specifically, your question relates to the applicability of Rule 4350(i)(1)(D)(ii) (the "Rule").

According to the information you provided, in the Prior Transaction, which closed approximately five months ago, the company sold shares of common stock in a private placement to several investors at a price that exceeded the greater of book or market value. The number of shares that were issued was equal to approximately 15% of the pre-transaction outstanding shares.

In the Proposed Transaction, which is expected to close within approximately one month, the company would issue shares of common stock in a private placement to several investors at a discount to the market value. The number of shares that would be issued would equal less than 20% of the pre-transaction outstanding shares.

You stated that there are no contingencies between the transactions, the proceeds are for different purposes, and a change in circumstances subsequent to the Prior Transaction gave rise to the need for the Proposed Transaction. Specifically, you indicated that the funds raised in the Prior Transaction had been used for sales and marketing of a product that did not receive an expected regulatory approval. You stated that the Proposed Transaction is necessary to fund initiatives that the company previously expected to fund through sales of that product. In addition, you stated that although the placement agent for the Proposed Transaction will attempt to seek investors different from those who participated in the Prior Transaction, the company does not yet know whether there will be any commonality of investors.

Following our review of the information you provided, and on the assumption that there is no significant overlap between the investors in the Prior Transaction and the investors in the Proposed Transaction, we have determined that the Proposed Transaction would not be aggregated with the Prior Transaction for purposes of the Rule. As such, given that the issuance in the Proposed Transaction would equal less than 20% of the pre-transaction outstanding shares, the Proposed Transaction would not require shareholder approval under the Rule.

Please note that if there is significant overlap between the investors in the Prior Transaction and investors in the Proposed Transaction our determination may change. Note also that you have not asked us to, and we have not, reached a conclusion as to whether any other provision of Rule 4350(i) would require shareholder approval of the Proposed Transaction. For example, if any shares were to be sold at a discount to any officer, director, employee, or consultant of the company, shareholder approval would be required under 4350(i)(1)(A), and if the issuance could result in a change of control, shareholder approval would be 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 2007-10

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to the Plan would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). The Amendment would set forth that the company may, with the consent of the affected optionees, amend outstanding options to increase the exercise price to the extent necessary to avoid adverse tax consequences under Section 409A of the Internal Revenue Code.

According to the information you provided, the company has determined that certain stock options (the "Options") it previously awarded to over 2,000 of its employees had exercise prices that were less than the fair market value of the underlying shares. You stated that the aggregate dollar amount involved was sufficiently small such that no restatement of the company's financial statements is required.

You stated that any stock option with an exercise price less than fair market value on the date of grant constitutes deferred compensation under Section 409A of the Internal Revenue Code. As such, the optionees would be subject to significant adverse tax consequence at the time of vesting. To alleviate the unfavorable tax treatment, the company would permit the optionees to elect to increase the exercise prices to the fair market value of the underlying shares as of the grant date. The amount of the permitted increase would be approximately 5% of the original exercise price. The current market price of the shares underlying the Options is more than 100% higher than the original exercise price. The company intends to make cash payments to certain optionees electing to increase their exercise price; such payments will be equal to the difference between the new exercise price and the original exercise price for each share underlying the Options. Executive officers of the company would not receive the cash payment.

The Plan currently provides that shareholder approval is required for increases or decreases in the exercise prices of outstanding options. You stated that the restriction with regard to an increase in exercise price was an inadvertent result of a prior amendment to the Plan, which was adopted by the company's board of directors to prohibit exercise price reductions without shareholder approval. The Amendment would allow for increases in exercise prices to the extent necessary to avoid adverse tax consequences under Section 409A.

Following our review of the information you provided, we have determined that the Amendment would not require shareholder approval under the Rule because it would not be a material amendment to the Plan. The Amendment would, under the very specific, limited circumstances described above, allow for an election to increase the exercise prices. The Amendment would not result in an increase in the number of shares to be issued under the Plan, an expansion of the class of eligible participants, or an expansion in the types of awards available. Furthermore, based on these facts, the cash payment to be made in connection with the change in exercise price to the rank-and-file employees, who are optionees, does not raise concerns 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 2007-11

This is in response to your correspondence wherein you asked whether the company's proposed process for the selection of the members of its board of directors (the "Nominations Process") pursuant to a shareholders agreement (the "Shareholders Agreement") would comply with the requirements of Marketplace Rule 4350(c)(4)(A) and IM-4350-4 (collectively, the "Rule"). In addition, your question relates to the applicability of the voting rights requirements of Rule 4351 (the "Voting Rights Requirements") with respect to the rights that the Target Owner and the Chairman would have to nominate directors (the "Nomination Rights").

According to the information you provided, the company will acquire, subject to the approval of its shareholders, certain assets from the Target Owner in exchange for cash and common stock. In connection with the acquisition, the Shareholders' Agreement will be entered into among the company, the Chairman, and the Target Owner. Following the closing, the Target Owner will own approximately 40% of the company's then outstanding shares of common stock, and the Chairman will own approximately 9%.

Pursuant to the Shareholders' Agreement, the membership of the company's nine-member board would be determined as follows. Initially, the Target Owner will have the right to nominate four directors (the "Target Owner's Directors"), two of whom must be independent, and the Chairman will have the right to nominate one independent director (the "Chairman's Director"). The board will also include the company's Chief Executive Officer. The remaining three directors will be nominated by the company's nominating committee and must qualify as independent directors.

If their ownership positions were to decline, the number of directors the Target Owner and the Chairman could nominate would decline pro rata such that the percentage of the board that each could nominate would remain approximately equal to their percentage equity interest in the company. The nominating committee would be responsible for nominating directors to fill any vacancies created in this manner. Pursuant to the Shareholders' Agreement, for so long as either the Target Owner or the Chairman has the right to nominate one or more directors, the other has agreed to vote in favor of such nominee(s).

Following our review of the information you provided, we have concluded that the Nominations Process complies with the Rule and that the Nomination Rights comply with the Voting Rights Requirements. Specifically, the Nominations Process is consistent with Rule 4350(c)(4)(D), which states that independent director oversight of director nominations shall not apply in a case where the right to nominate a director legally belongs to a third party. In the company's case, the Shareholders' Agreement provides the Target Owner and the Chairman with the legal right to nominate board members as described above. Regarding the Voting Rights Requirements, the Nomination Rights would comply because the percentage of the board members that the Target Owner and the Chairman would be entitled to nominate would approximately equal their percentage equity ownership interest in the company and would decline pro rata with a decline in their ownership positions. Please be advised that notwithstanding this conclusion, the company remains subject to the provisions of Rules 4350(c) and 4350(d) including those relating to board committee composition and the requirement to have a majority of independent directors on the board.

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 2007-12

This is in response to your correspondence regarding the applicability of Marketplace Rule 4200(a)(15). Specifically, you asked whether the Director is eligible to be an independent member of the company's board of directors under Rule 4200(a)(15)(D) (the "Rule") notwithstanding certain payments made in connection with investment banking services provided by the Firm. The Director is an executive officer of the Firm.

According to the information you provided, the Firm has provided investment banking services for the company during the last three years including a firm commitment underwritten offering of the company's common stock and best efforts placement agency offerings. You stated that in connection with these services, payments by the company to the Firm were less than 5% of Firm's revenues (which exceeded \$200,000) in the current year or any of the past three years (the "Threshold"). This includes any payment that may be ascribed in connection with the Firm's exercising over-allotment options ("Green Shoes") where the price the Firm paid for the securities was less than the market value. The purchase price paid by the Firm in the exercise of Green Shoes was the same as that paid by all other purchasers in the respective offerings. In addition, you stated that any payments made by the Firm to the company in connection with the investment banking services were less than 5% of the company's revenues (which exceeded \$200,000) in the current year or any of the past three years.

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 because the payments were less than the Threshold. 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. You have not asked us to reach, and we have not reached, a conclusion as to whether the Director is eligible to serve on the audit committee. Such eligibility should be assessed under Marketplace Rule 4350(d) and under Exchange Act Rule 10A-3.

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 2007-13

This is in response to your correspondence regarding the applicability of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to the company's issuance of securities to settle litigation (the "Settlement Transaction") associated with a prior stock issuance (the "Prior Transaction").

According to the information you provided, the Prior Transaction was a private placement of common stock (the "Common Shares") to several investors, at a discount to the market value, along with warrants (the "Warrants") exercisable for additional shares of common stock. Shareholder approval of the Prior Transaction was not required under the Rule because: (i) the number of Common Shares was limited to less than 20% of the pre-transaction outstanding shares and (ii) and the Warrants were exercisable for not less than the greater of book or market value and were not exercisable until six months following closing. The investors in the Prior Transaction did not include any officer, director, employee or consultant of the company.

The Prior Transaction closed approximately five months ago. Approximately two months after that closing, one of the investors in the Prior Transaction commenced litigation alleging that the company and eight of its officers and directors violated federal and state law by misrepresenting, and failing to disclose, certain material information regarding the company's business and forecasted revenues in connection with the purchase of the securities in the Prior Transaction. The complaint sought rescission of the Prior Transaction and both compensatory and punitive damages. Subsequent to the filing of the complaint, the company was approached by other investors in the Prior Transaction, all of whom also sought damages or rescission.

To settle these claims, the company has reached agreements with the investors resulting in the Settlement Transaction, which will consist of: (i) a cash payment by the company to the investors; (ii) the issuance of notes (the "Notes") convertible into common stock; and (iii) the cancellation of the Warrants. Initially, the conversion price is such that the aggregate number of shares that could be issued in the conversion of the Notes would equal less than 20% of the pre-transaction outstanding shares. In the event the company is in default of its obligations under the Notes, however, the conversion price would be reset to a specified discount to the then market price, and the aggregate issuance of common stock could exceed 20% of the pre-transaction outstanding shares (the "Reset Provision"). The Notes specifically stipulate that any conversion is subject to the applicability of NASDAQ's shareholder approval requirements.

Following our review of the information you provided, we have determined that the Settlement Transaction will not be aggregated with the Prior Transaction for purposes of the Rule because the Settlement Transaction was not expected at the time of the Prior Transaction, but instead arose as a result of subsequent legal action. In addition, over five months have passed between the Prior Transaction and the settlement. Nonetheless, please note that before the Notes could be converted into common stock, the company must obtain shareholder approval because the Reset Provision could result in the company being required to issue more than 20% of the pre-transaction outstanding shares at a discount. However, because the Notes contain a provision requiring such approval before conversion, the company is not foreclosed from issuing the Notes before such approval is obtained. Please note also that you have not asked us to, and we have not, reached a conclusion as to whether any other provision of Rule 4350(i) would require shareholder approval of the Settlement Transaction. For example, if the issuance could result in a change of control, shareholder approval would be 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 2007-14

This is in response to your correspondence regarding whether the company's proposed course of action (the "Proposal") with respect to the Plan 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 extend the term of certain options granted under the Plan.

According to the information you provided, approximately eight months ago the company announced that it initiated an investigation regarding the timing of its past stock option grants and related issues. Pending the completion of the investigation, the company has not filed its required periodic financial reports with the Securities and Exchange Commission (the "SEC"). You stated that the rules of the SEC prohibit the company from processing stock option exercises while it is delinquent in its filings (the "Blackout Period"). The company expects that during the Blackout Period certain stock options granted under the Plan, and which otherwise would have been exercised, will expire (the "Expiring Options").

The Plan allows for the grant of both Incentive Stock Options ("ISOs") and Non-Statutory Stock Options ("NSOs"). The Plan provides that ISOs have a maximum term of ten years but does not limit the term of NSOs. Typically, although it is not required to do so, the company has chosen to limit the term of NSOs to 10 years. Pursuant to the Proposal, the company would extend the term of the Expiring Options, including both ISOs and NSOs. You stated that consistent with the provisions of Section 409A of the Internal Revenue Code, the extended term would expire thirty days after the end of the Blackout Period. Any ISO that is extended would lose its status as an ISO and would become, instead, a NSO. The Expiring Options that the company will extend are held by approximately 40 individuals. You advised that one of them is currently a Section 16 officer at the company; however, this individual was not such an officer when the Expiring Options were granted, and he had no role in the events currently being investigated relating to the timing of past option grants. You advised that no other Section 16 officers or company directors will be eligible for an extension under the Proposal.

Following our review of the information you provided, we have determined that the Proposal would not be a material amendment to the Plan under the Rule. Any ISO that is extended would become a NSO and, under the Plan, the company already has the authority to award NSOs with a term of its choosing. As such, the Proposal would not result in a material increase in benefits to participants. In addition, the Plan provides that the plan administrator has the authority to modify or amend awards so long as such modification or amendment would not impair the optionee's rights. Further, the Proposal would not result in an increase in the number of shares to be issued under the Plan, an expansion of the class of eligible participants, or an expansion in the types of awards available. Accordingly, the Rule does not require shareholder approval of the Proposal.

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 2007-15

This is in response to your correspondence regarding whether a proposed transaction (the "Proposed Transaction") would be aggregated with a prior transaction (the "Prior Transaction", and together with the Proposed Transaction, the "Transactions") for purposes of the applicability of NASDAQ's shareholder approval requirements. Specifically, your question relates to Marketplace Rules 4350(i)(1)(B), 4350(i)(1)(C)(ii), and 4350(i)(1)(D).

According to the information you submitted, in the Prior Transaction, which was completed approximately seven weeks ago, the company issued shares of its common stock and warrants to purchase additional shares to several investors in a private placement. The proceeds were raised to satisfy the company's working capital needs through the end of 2008. The Prior Transaction did not require shareholder approval under the Rules.

You stated that the purpose of the Prior Transaction was to effect a capital infusion without which the company would not have had sufficient cash to fund its ongoing operations for more than approximately seven months. Approximately one month after the closing of the Prior Transaction, the company began to consider the Proposed Transaction when an acquisition opportunity ("Acquisition") became available due to the actions of an independent third party.

In the Proposed Transaction, the terms of which have not been finalized, the company would issue up to 19.9% of its pre-transaction outstanding shares to one or more investors at a price that could be less than market value. The proceeds from the Proposed Transaction would be used to partially fund the acquisition of the Target. The remainder of the Acquisition funding would come from a term loan and not from the Prior Financing. The investors in the Proposed Transaction would not include any of the investors in the Prior Transaction or any officers, directors, employees, or consultants of the company.

You stated that there are no linkages or contingencies between the Transactions. The Proposed Transaction would be done solely to fund the Acquisition. If the Acquisition does not take place, the Proposed Transaction will not be consummated.

You stated that the investors in the Proposed Transaction would hold less than 20% of the company's outstanding shares in the aggregate and would not have any "control-type" arrangements with the company. The investors would be granted the right to nominate one director to the company's board of directors, which would then have six members.

Following our review of the information you provided, we have determined that the Proposed Transaction would not be aggregated with the Prior Transaction because there are no linkages or contingencies between the Transactions, there will be no commonality of investors, the proceeds will be used for different purposes, and the need for the Proposed Transaction arose only after the closing of the Prior Transaction.

Accordingly, provided the issuance is less than 20% of the pre-transaction outstanding shares, shareholder approval of the Proposed Transaction would not be required under either Rule 4350(i)(1)(C)(ii) or Rule 4350(i)(1)(D). Please be advised that for purposes of the shareholder approval requirements, the Proposed Transaction would be considered to be in connection with the Acquisition meaning that the percentage thresholds of Rule 4350(i)(1)(C) would apply without regard to whether the issuance is at a discount. With regard to Rule 4350(i)(1)(B), given the ownership positions and the lack of other arrangements between the company and any of the investors, the Proposed Transaction would not result in a change of control and therefore would not require shareholder approval under that 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 2007-16

This is in response to your correspondence regarding whether recently adopted amendments (the "Amendments") to the Plans 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 Amendments, any unvested options granted under the Plans to non-employee members of the company's board of directors will become fully vested and exercisable in the event of a change in control, as such term is defined in the Plans. No other changes will be made to the Plans pursuant to the Amendments. You stated that the company was not in discussions with any party at the time it amended the Plans, nor is it currently in discussions with any party, to consummate the type of transaction that would constitute a change of control that would trigger this acceleration of vesting.

Following our review of the information you provided, we have determined that the Amendments are not material under the Rule. In that regard, we note that the Amendments will not result in any material increase in the number of shares to be issued under the Plan; any material increase in the benefits to participants; any material expansion to the class of participants; or any expansion in the types of options or awards available. 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 2007-17

This is in response to your correspondence regarding whether a proposed transaction (the "Proposed Transaction") would be aggregated with a prior transaction (the "Prior Transaction", and together with the Proposed Transaction, the "Transactions") for purposes of the applicability of NASDAQ's shareholder approval requirements. Specifically, your question relates to Marketplace Rule 4350(i)(1)(D).

According to the information you submitted, in the Prior Transaction, which was completed approximately three months ago, the company issued convertible notes to several investors in a private placement. The notes are convertible into common stock at a discount to the market value of the common stock, but the number of shares issuable upon conversion is limited to 19.9% of the company's pre-transaction outstanding shares. The primary purpose of the Prior Transaction was to raise funds to resolve debt covenant issues which arose due to the company's recent financial performance. The proceeds were used to pay down debt under the company's term loan agreement and for general corporate purposes.

In the Proposed Transaction, the company would issue to an institutional investor shares of its common stock up to a fixed aggregate dollar value, at a discount to market value. The number of shares to be issued will be further capped so as to make sure that it remains below 20% of the total shares outstanding prior to the Proposed Transaction. The investor in the Proposed Transaction was not an investor in the Prior Transaction and is not an officer, director, employee, or consultant of the company. You stated that the Transactions are distinct and unrelated and each came to the attention of the company separately. Neither is contingent on the other.

You stated that at the time of the closing of the Prior Transaction, the company anticipated that it would have sufficient liquidity for the foreseeable future and had not planned any additional capital raising efforts in the short term. Subsequent changes in circumstances, however, gave rise to the need for the Proposed Transaction. Specifically, (i) there was a significant increase in the cost of raw materials that the company purchases for use in its manufacturing process; (ii) the company entered into a contract settlement that resulted in its having to make a higher than anticipated payment; and (iii) the company experienced operational difficulties that resulted in lower than expected revenue after the Prior Transaction was completed. These events caused the company's working capital requirements to increase significantly beyond the amount that had been anticipated at the time of the Prior Transaction, and the proceeds from the Proposed Transaction would be used to fund those requirements.

Following our review of the information you provided, we have determined that the Proposed Transaction would not be aggregated with the Prior Transaction because there are no linkages or contingencies between the Transactions, there will be no commonality of investors, the proceeds will be used for different purposes, and the need for the Proposed Transaction arose only after the closing of the Prior Transaction. Accordingly, provided the issuance is less than 20% of the pre-transaction outstanding shares, shareholder approval of the Proposed Transaction would not be required under Rule 4350(i)(1)(D). Of course, if the investor in the Proposed Transaction acts with the intent to sell or resell company shares to any of the investors in the Prior Transaction, then our conclusion could be different. Please note that you have not asked us to reach, and we have not reached, a conclusion as to whether any other provision of Rule 4350(i) would require shareholder approval of the Proposed Transaction. For example, if the issuance could result in a change of control, shareholder approval would be 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 2007-18

This is in response to your correspondence regarding whether a proposed recapitalization (the "Recapitalization") would require shareholder approval under Marketplace Rule 4350(i)(1)(B) or 4350(i)(1)(D).

According to the information you submitted, the Notes were issued approximately 2.5 years ago. The Holder owns all of the Notes and over half of the company's voting stock. The Notes are mandatorily convertible into common stock four years after issuance or earlier at the option of the Holder. The initial conversion price is higher than the market value (and the book value) of the common stock immediately preceding the entering into of the binding agreement to issue the Notes. Subsequent to the issuance of the Notes, shareholder approval was obtained of anti-dilution provisions that could cause the conversion price to be reduced to below that market value.

Approximately one month ago, the company entered into a new debt facility (the "New Debt Facility") with new lenders (the "New Lenders"). As a condition to entering into the New Debt Facility, the New Lenders required the Holder: (i) to subordinate its rights as a creditor of the company under the Notes to the New Lenders; and (ii) to fully convert the Notes within four months. To induce the Holder to subordinate its rights, the company and the Holder entered into an agreement relating to the Recapitalization. Pursuant to the Recapitalization, the Holder will convert the Notes within four months, and the company will pay the Holder a restructuring fee in a combination of cash and additional shares of common stock (the "Additional Shares"). The number of shares that the Holder will receive upon conversion will give effect to the amount of payment-in-kind interest that would have been paid had the Notes been held to maturity. The number of Additional Shares will equal less than 20% of the pre-transaction total shares outstanding.

The securities that will be issued to the Holder upon conversion will include not only shares of common stock but also warrants exercisable for common stock, for a nominal exercise price, to the extent necessary to prevent the Holder from exceeding restrictions on its ownership of the company's voting power. You stated that there are certain regulatory restrictions on the Holder's permitted level of voting power. The issuance of the warrants does not change the economics of the transaction because the warrants, due to their nominal exercise price, provide the economic equivalence of owning the common stock but without the voting power. You stated that structuring the transaction in this manner, with the issuance of the warrants, will not cause an increase in the number of shares of common stock ultimately issuable.

The purpose of the New Debt Facility is to bring to the company additional funding to address a cash shortage caused by the acceleration of payments to certain key vendors and to allow for the refinancing of other debt. No stock will be issued in payment of the New Debt Facility. Equity, not cash from the New Debt Facility, will be used to pay off the Note. Following the New Debt Facility and the Recapitalization, the Holder will remain the company's largest shareholder.

Following our review of the information you provided, we have determined that the Recapitalization will not require shareholder approval under the Rules. With respect to Rule 4350(i)(1)(D), we note that the company's shareholders have approved the issuance of shares upon conversion of the Notes and that those Notes will be converted pursuant to those approved terms. While the company will issue the Holder the Additional Shares, as an inducement for the Holder to enter into the Recapitalization agreement, we note that the Recapitalization agreement only recently became necessary and that the number of Additional Shares is less than 20% of the pre-transaction outstanding shares. Therefore, shareholder approval of the Additional Shares is not required under Rule 4350(i)(1)(D). Shareholder approval will not be required under Rule 4350(i)(1)(B) because the Holder, as the majority shareholder both before and after the Recapitalization, will remain the largest shareholder.

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 2007-19

This is in response to your correspondence regarding whether a proposed transaction (the "Proposed Transaction") would be aggregated with a prior transaction (the "Prior Transaction", and together with the Proposed Transaction, the "Transactions") for purposes of the applicability of NASDAQ's shareholder approval requirements. Specifically, your question relates to Marketplace Rules 4350(i)(1)(B) and 4350(i)(1)(D) (the "Rules").

According to the information you submitted, in the Prior Transaction, which was completed approximately five months ago, the company issued shares of its common stock, at a discount to market value, and warrants to purchase additional shares in a private placement. The number of shares of common stock was less than 20% of the pre-transaction total shares outstanding. The warrants, if exercised, would result in an aggregate issuance of more than 20% of the pre-transaction outstanding shares in the Prior Transaction. The warrants are exercisable for not less than the greater of book or market value and cannot be exercised until six months following closing. The Prior Transaction did not require shareholder approval under the Rules.

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 for additional shares of common stock. The Shares would be issued at a price per share equal to the closing bid price immediately before the company enters into the binding agreement (the "Purchase Price") plus \$0.125 for each Warrant. The Warrants would be exercisable for not less than the Purchase Price and would not have any anti-dilution adjustments other than for stock dividends, stock splits, and similar events. The company's market value exceeds its book value.

The company expects that one of the five investors (the "Prior Investor") in the Prior Transaction will be among the approximately ten investors in the Proposed Transaction. The Prior Investor purchased approximately 41% of the securities issued in the Prior Transaction and may purchase up to approximately 35% of the securities issued in the Proposed Transaction.

The proceeds of the Prior Transaction were used to fund a project safety study relating to products in development and for general corporate purposes. The proceeds from the Proposed Transaction would be used to fund further stages of that development, to expand manufacturing capacity, and for general corporate purposes.

You stated that there are no contingencies between the Transactions, and that at the time of the Prior Transaction, there was no plan or agreement to initiate the Proposed Transaction. You stated that, as a result of the Proposed 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 (the "Ownership Limit"), and there would be no other related arrangements between the company and any of the investors. To assure that the Ownership Limit is not exceeded, the exercise of the Warrants will be limited with respect to one investor whereby the investor will agree not to exercise Warrants if the number of shares issuable upon such exercise would result in the investor holding more than 19.9% of the post-transaction outstanding shares (the "Exercise Limit").

Although the issuance under the Proposed Transaction would exceed 20% of the pre-transaction outstanding shares, shareholder approval would not be required by Rule 4350(i)(1)(D) because the issuance would not be at a discount. The Proposed Transaction also would not be aggregated with the Prior Transaction because the Proposed Transaction will not be at a discount to book or market value. In addition, based on the information you provided, there are no linkages or contingencies between the Transactions, and there was no plan for the Proposed Transaction at the time of the Prior Transaction. Further, given the ownership positions, the Exercise Limit, 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).

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 2007-20

This is in response to your correspondence regarding the applicability of NASDAQ's 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)(A), 4350(i)(1)(B), and 4350(i)(1)(D) (the "Rules").

According to the information you submitted, in the Transaction the company will issue convertible debentures ("Debentures") to several investors. Initially, the conversion price will be greater than market and book value, and the number of shares of common stock issuable upon conversion would equal approximately 10% of the pre-transaction total shares outstanding. The Debentures contain anti-dilution provisions, however, which could reduce the conversion price to below market value and increase the number of shares that would be issued. The effect of any anti-dilution adjustments will be limited by a provision of the Debentures which will prohibit conversion into more than 19.9% (the "Conversion Limitation") of the pre-transaction outstanding shares at an average conversion price which is less than the closing bid price immediately prior to entering into the binding agreement ("Market Value") unless shareholder approval is obtained. The company's market value exceeds its book value.

The investors will include two members (the "Directors") of the board of directors (the "Board") and two advisory directors (the "Advisory Directors") who, although not members of the Board, provide consulting services to the company. The conversion price for the Directors and the Advisory Directors will be limited so that it will not be less than Market Value (the "Conversion Price Limitation"). The investors will not include any employees or officers of the company, or any other directors or consultants.

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 (the "Ownership Limitation", and together with the Conversion Limitation and the Conversion Price Limitation, the "Limitations").

You stated that the Limitations may be removed only if shareholder approval is obtained. The terms of the Transaction would not otherwise change as a result of a shareholder vote.

Following our review of the information you provided, we have determined that the Transaction complies with the Rules. The Transaction would not require shareholder approval under Rule 4350(i)(1)(A) because, due to the Conversion Price Limitation, no shares could be acquired by any officer, director, employee, or consultant of the company at a discount to market value. Given the Ownership Limitation and the lack of any other related 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). Due to the Conversion Limitation, the Transaction could not result in the issuance of 20% or more of the pre-transaction outstanding shares or voting power at a discount to the greater of book or market value, and, therefore, shareholder approval would not be required under Rule 4350(i)(1)(D). The Limitations could be removed only after shareholder approval is 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 2007-21

This is in response to your correspondence asking whether the company's proposed course of action (the "Proposal") with respect to the Plan 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 modify certain stock options granted under the Plan to avoid adverse tax consequences under Internal Revenue Service Code Section 409A ("409A").

According to the information you provided, certain options were granted with an exercise price less than fair market value on the date of grant (the "Discounted Options"). You stated that under 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 optionholders 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 optionholders to be subject to these adverse tax consequences.

Under the Proposal, to prevent the application of 409A to the optionholders, the company would: (i) increase the exercise price per share of the Discounted Options to the fair market value as of the date of grant and (ii) pay the optionholder the amount equal in value to the difference between the original exercise price and the revised exercise price (the "Payment"). The Payment would be in cash or in shares of common stock in the form of restricted stock units ("RSUs"). The RSUs issued as Payment would be granted under the Plan subject to the maximum number of shares reserved under the Plan. These RSUs would be subject to the same vesting schedule as the options for which the exercise price was increased. Optionholders who are employees of the company at the time the Payment is made would receive the Payment in RSUs. Cash, instead of RSUs, would be paid: (i) for fractional shares and (ii) if the number of RSUs that otherwise would be issuable to an optionholder would be less than a minimum that may be established by the company. If the optionholder is no longer an employee at the time the Payment would be made, the Payment would be made in cash and would be made only for those options that would be vested as of the date of the employee's termination.

Pursuant to the Plan, the administrator may at any time offer to buy out an option for a payment in cash or in shares of common stock based on terms and conditions established by the administrator. The Plan provides for awards of both stock options and shares of common stock (including restricted shares), although it does not currently provide for RSUs. An award of an RSU typically results in the issuance of restricted stock on a deferred basis after vesting requirements are met.

Following our review of the information you provided, we have determined that the Proposal would not be a material amendment to the Plan under the Rule and, therefore, would not require shareholder approval under the Rule. This conclusion is based on your representations that the purpose of the Proposal is to address the tax consequences of 409A. The Proposal would not result in a material increase in benefits to the participants. In that regard, the exercise price would increase rather than decrease, and the Payment would equal the value of the difference between the revised exercise price and the original exercise price. The Payments would be consistent with the Plan's provisions that authorize the company to buy back outstanding options for cash or stock. In addition, adding RSUs to the permissible types of awards under the Plan is not an expansion in the types of awards available because the Plan already authorizes awards of restricted stock, and RSUs are substantially equivalent to awards of restricted stock. Further, because any shares that would be issued as a Payment would be subject to the Plan's authorized share reserve, the Proposal would not increase the number of shares available under the Plan. We also note that the Proposal would not result in an expansion of the class of eligible participants.

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 2007-22

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements of Marketplace Rule 4350(i)(1)(D) (the "Rule") to a proposed issuance (the "Proposed Issuance") of common stock. You asked whether the Proposed Issuance, which would be less than 20% of the pre-transaction total shares outstanding, would be aggregated with subsequent issuances when determining whether shareholder approval is required under the Rule for those subsequent issuances.

According to the information you submitted, the company has entered into an agreement (the "Agreement") with the Investment Banker whereby the company would sell shares of its common stock from time to time through the Investment Banker. Each time the company wishes to sell shares under the Agreement, it will send a notice to the Investment Banker setting forth the number or shares to be issued, the time period during which the sales are to be made, the minimum price at which sales may be made, and any limitation on the number of shares to be sold in any one day. If the Investment Banker accepts the placement notice, it will sell the shares into the existing trading market at the prevailing market price at the time of sale in ordinary brokerage transactions. The sales will be open to all market participants, and the Investment Banker will make the shares available in the same way it makes available any other securities that it is requested to sell by any shareholder of any issuer. The company will have no control over the sale of the shares after submitting a placement notice. No officers or directors of the company would purchase shares in the Proposed Issuance.

You stated that in the vast majority (over 98%) of cases, the Investment Banker will make the sales on an agency basis, not taking ownership of the shares that are sold. However, the Investment Banker will have the flexibility to act as principal to facilitate sales that otherwise might not close. For example, when dealing with sales orders that it may be unable to fill prior to an expiration date without causing downward pressure on the stock price, the Investment Banker may purchase those shares to resell them into the market at the prevailing market price when it could do so without causing a disruption in the market (no more than a few days later).

Following our review of the information you submitted, we have determined that the Proposed Issuance would be a "public offering" under the Rule and therefore does not require shareholder approval under the Rule. As such, the Proposed Issuance would not be aggregated with subsequent issuances that are subject to the Rule. We have reached this conclusion because the sales in the Proposed Issuance would be made directly into the market at the prevailing market prices in ordinary brokerage transactions open to all market participants.

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 2007-23

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

According to the information you provided, in the Transaction the company would issue shares of non-voting exchangeable preferred stock (the "Preferred Stock") to the Investor in a private placement. Although the final terms have not been reached, the number of common shares that could be issued in the event of an exchange could exceed 20% of the pre-transaction total shares outstanding at a price that is less than market value. The Preferred Stock would be exchangeable for common stock only if shareholder approval is first obtained. The holder of the Preferred Stock would have no voting rights other than the right to consent to any amendment of the terms or to the creation or issuance of any capital stock or debt securities that rank senior to or equal with the Preferred Stock, or as otherwise required by applicable state law.

The Investor would have the right to designate one member of the company's seven-member Board of Directors for so long as it owns at least 50% of the Preferred Stock, or in the event of an exchange for common, for so long as it owns at least: (i) 10% of the company's total stock outstanding or (ii) 50% of the common stock acquired pursuant to the Exchange. If shareholder approval is not received within one year of closing, the Preferred Stock would be entitled to receive cumulative cash dividends at an annual rate of 10%. If still outstanding after four years, the Preferred Stock would become redeemable for cash at the option of either the company or the holder. The holder may require the company to redeem the Preferred Stock for cash upon the occurrence of certain events, such as liquidation or a change of control.

Following our review of the information you provided, we have concluded that the Transaction, structured as you described, would comply with the Rules because no common shares or voting power (except limited voting power as describe above) could be issued until after shareholder approval is obtained. Specifically, the Transaction would comply with: (i) Rule 4350(i)(1)(B) because a change in control could not occur without shareholder approval, and (ii) Rule 4350(i)(1)(D) because the issuance could not reach 20% of the pre-transaction outstanding shares or voting power without shareholder approval. Further, IM-4350-2 is not implicated because no shares of common stock could be issued prior to the shareholder vote. In addition, the right to designate one director would be consistent with the voting rights provisions of Rule 4351 because the percentage of the board of directors that may be appointed by the Investor would not exceed its percentage economic contribution to the company. Please be advised that you have not asked us to reach, and we have not reached, a conclusion as to whether any director designated by the Investor would be eligible to be an independent director or to serve on committees of the board.

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 2007-24

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements of Marketplace Rule 4350(i)(1)(D) (the "Rule") to a proposed issuance (the "Proposed Issuance") of common stock which could exceed 20% of the pre-transaction outstanding shares. You asked whether the Proposed Issuance would be considered to be a public offering and, therefore, not require shareholder approval under the Rule.

According to the information you submitted, the company has entered into an agreement with the Investment Banker whereby the company could, at its choice, sell shares of its common stock (the "Shares") from time to time to the Investment Banker, which would purchase the shares on a firm commitment basis for approximately 94% of market value. The Investment Banker would then sell the Shares through several brokerage firms (the "Brokers") via ordinary market transactions on the Foreign Stock Exchange at prevailing market prices. The company is also listed on the Foreign Stock Exchange, and over 80% of its volume has traded on that market over the last three months. The sales would be open to all market participants, and the company would have no control over the sale of the Shares after selling the Shares to the Investment Banker. You stated that it is the intent of the Investment Banker to distribute the Shares to the Brokers for resale immediately after acquiring them from the company.

Following our review of the information you submitted, we have determined that the Proposed Issuance would be a "public offering" under the Rule and therefore would not require shareholder approval under the Rule. We have reached this conclusion because the Shares would be sold into the market at the prevailing market prices in ordinary brokerage transactions open to all market participants. This conclusion is based on the representation that the Investment Banker intends to distribute the Shares to the Brokers for resale into the market immediately after acquiring them from 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 2007-25

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to proposed issuances of securities by the company (the "Transaction") to the New Investor and the Prior Investor as described below. Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), and 4350(i)(1)(D) (the "Rules"). In addition, you asked whether the company would be required to provide notice of the Transaction to NASDAQ pursuant to Rule 4310(c)(17).

According to the information you submitted, approximately two weeks ago the company entered into an agreement with the New Investor pursuant to which the New Investor will purchase newly issued shares of the company's common stock in up to three separate closings. As a result of a prior transaction with the Prior Investor, the Prior Investor has the right (the "Purchase Right"), but not the obligation, to purchase a portion of any new equity securities issued by the company to maintain its ownership position. The Purchase Right would be triggered by each issuance to the New Investor. The aggregate number of shares that could be issued to the New Investor in the three closings would equal approximately 5% of the pre-transaction total shares outstanding. If the Prior Investor were to exercise the Purchase Right in full, an additional approximately 3% of the pre-transaction total shares outstanding would be issued to the Prior Investor, resulting in a total issuance equal to approximately 8% of the pre-transaction shares outstanding.

Two members of the company's board of directors are executive officers of the Prior Investor. The Prior Investor is currently the largest owner of the company's outstanding common stock and will remain such following the issuances, with an ownership position of approximately 25% of the outstanding shares both before and after the Transaction.

Following our review of the information you provided, we have reached the following conclusions. The issuances to the Prior Investor are subject to the provisions of Rule 4350(i)(1)(A) because directors of the company are officers of the Prior Investor. As such, for the Transaction to comply with Rule 4350(i)(1)(A), the issuances to the Prior Investor cannot be at a discount to the market value of the common stock, unless shareholder approval is obtained. That is, such issuances cannot be at a price less than the closing bid price immediately preceding the time the Prior Investor exercises the Purchase Right with respect to any investment by the New Investor. Rule 4350(i)(1)(B) will not require shareholder approval because, given the ownership positions, the Transaction will not result in a change of control. Rule 4350(i)(1)(D) is not applicable because the aggregate potential issuance is less than 20% of the pre-transaction outstanding shares. With respect to Rule 4310(c)(17), because the aggregate issuance in the Transaction will equal less than 10% of the outstanding shares, notification to NASDAQ would not be required provided that: (i) the issuances to the Prior Investor are not at a price less than market value or (ii) the issuances to the Prior Investor, if at a discount to the market value, are approved by the company's shareholders.

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

Staff Interpretative Letter 2007-26

This is in response to your correspondence regarding whether a proposed issuance of restricted common stock (the "Stock") for the benefit of certain of the employees of the company's subsidiaries in South Africa (the "Subsidiaries") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) (the "Rule").

According to the information you provided, the Stock would be issued for the benefit of the black employees of the Subsidiaries to ensure that the company's South African operations comply with South African legislation, specifically, the Broad-Based Black Empowerment Act (the "Act") and the Codes of Good Practice (the "Codes") adopted under the Act. The Act is aimed at the economic empowerment of black people through socio-economic strategies and is intended to address what had been the systematic exclusion of black South Africans from participation in the economy under the former Apartheid system. The Act addresses the concern that not all South Africans have been meaningfully integrated into the post-Apartheid economy. The Codes provide a framework for measuring an enterprise's black economic empowerment. A key element in this measurement is the provision of equity ownership in and control of South African operations to blacks, black-owned business partners, and other qualified entities.

You stated that the Act requires every South African government or public entity to take into account an enterprise's score when issuing licenses and making procurement decisions. In addition, the Act has encouraged other entities, including private businesses, to similarly take this score into account in making purchasing decisions. As such, complying with the Codes, including the ownership provisions, both promotes the Act's goal of enhancing broad-based black economic empowerment and transforming the South African economy, and enhances a company's competitive position within South Africa.

You stated that the Stock would be issued to allow the company's South African operations to satisfy the equity ownership requirements adopted under the Codes and to enhance the company's competitive position in South Africa by having a status acceptable to potential customers. The Stock would be issued to a Trust, which would benefit current and future black employees of the Subsidiaries and, to the extent shares are not distributed to those beneficiaries, a non-governmental organization created to further the education of blacks. You stated that the Stock would not be issued for compensatory purposes. Employees that benefit from the Trust would not see their compensation reduced as a result and would remain eligible for all compensation arrangements, including stock based compensation, paid to similarly-situated employees at the Subsidiaries. You represented that the issuance would not be treated as compensatory under South African law. The total number of shares of Stock to be issued would equal approximately one-hundredth of one percent of the company's outstanding shares.

Following our review of the information you provided, we have determined that the issuance of the Stock will not require shareholder approval under the Rule because it is not an equity compensation arrangement within the intent of the Rule. The issuance is not a component of a compensation program for employees, but, instead, would take place only as a result of the unique regulatory environment in South Africa. Most importantly, the issuance will allow the company to comply with the Act and the related socio-economic strategies necessary to address the substantial difficulty caused by Apartheid.

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 2007-27

This is in response to your correspondence wherein you asked whether the company's proposed issuances of securities in two transactions (the "Transactions") would be aggregated for purposes of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule").

According to the information you provided, the Transactions would consist of: (i) the sale of common stock to the Institutional Investor (the "Institutional Investment") in a private placement and (ii) the issuance of common stock and warrants, as described below, in connection with the buy-out of the company's obligation to make certain cash payments (the "Buy-Out Transaction"). In the Buy-Out Transaction, the company would issue shares of its common stock and pay cash to the Payee in satisfaction of its obligation to make cash payments in connection with a royalty agreement originally entered into approximately six years ago. In addition, in connection with the Buy-Out Transaction, the company would issue warrants to the providers of a debt facility, which the company would utilize to pay the cash portion of the Buy-Out Transaction.

You stated that the primary purpose for completing the Institutional Investment would be to fund the needs of the company's operations as well as for other general corporate purposes including preparations for the anticipated launch of a new product in approximately one year. None of the funds raised in the Institutional Investment would be used to fund the Buy-Out Transaction. The Payee would not purchase shares in the Institutional Investment, and the Institutional Investor would not receive shares in the Buy-Out Transaction. The Institutional Investor and the Payee are not affiliated with each other. Neither of the Transactions is contingent on the other, although they may close concurrently.

Following our review of the information you provided, we have determined that the Transactions would not be aggregated for purposes of the Rule because they are for different purposes, there are no contingencies between the Transactions, and there is no commonality of investors. As such, each would be evaluated separately to determine whether shareholder approval is required under Rule 4350(i).

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 2007-28

This is in response to your correspondence regarding whether a proposed amendment to 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 per person annual limitation on the number of awards of restricted stock ("Restricted Stock Awards"). Restricted Stock Awards include awards of shares of restricted stock and awards of restricted stock units. The Plan also provides for awards of stock options.

The Plan, which was approved by the company's shareholders, currently provides that during any calendar year, no person may be granted: (i) options covering more than 300,000 shares of common stock or (ii) Restricted Stock Awards covering more than 50,000 shares (the "Annual Restricted Stock Limitation"). In addition, the Plan specifies a maximum number of shares of common stock available for issuance over the life of the Plan with respect to: (i) all awards (the "Aggregate Plan Limitation") and (ii) Restricted Stock Awards (the "Aggregate Restricted Stock Limitation"). The Amendment would increase the Annual Restricted Stock Limitation to 200,000 shares but would not increase either the Aggregate Plan Limitation or the Aggregate Restricted Stock Limitation.

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 Annual Restricted Stock Limitation, neither the Aggregate Plan Limitation nor the Aggregate Restricted Stock Limitation would be affected by the Amendment. In addition, the Amendment would not expand either the class of participants or 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 2007-29

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 an issuance of securities in the proposed acquisition (the "Acquisition") of the Target. Specifically, this relates to whether either or both of Rule 4350(i)(1)(C)(i) or Rule 4350(i)(1)(C)(ii) would require shareholder approval given the Director's ownership interest in the Target as described below.

According to the information you provided, in the Acquisition the company would acquire the Target for cash and shares of its common stock. The Director does not directly hold any interest in the Target. However, the Fund Group owns approximately 16% of the outstanding shares of the Target, primarily through Fund 1, and the Director is one of nine managing members of the general partner (the "Ultimate General Partner") of the general partner of Fund 1 and Fund 2. The Director is also a limited partner of Fund 2, which owns less than 1% of the Target. Neither the Director nor any other individual managing member of the Ultimate General Partner has a pecuniary interest in the shares of the Target held by Fund 3.

You stated that you do not believe there is any basis for attributing the entire interest of Fund 1 to the Director. As an initial matter, you stated that 75% of the interest is allocable to the limited partners, and the Director is not a limited partner of Fund 1. Further, the nine managing members of the Ultimate General Partner have equal voting rights, and at least two-thirds of the managing members must vote to approve any investment or liquidity decision on behalf Fund 1. As such, you stated that the Director would have neither sole nor shared voting and/or investment power over the shares of the company to be issued as merger consideration (the "Merger Shares") to Fund 1. Accordingly, in any proxy statement of the company, the Merger Shares would not be described as beneficially owned by the Director until such shares are distributed to the general partners and the limited partners, and then only to the extent of the number of shares issued to the Director (the "Director's Shares"). The number of shares issued as Director's Shares would correspond to a less than 5% interest in the Target. This includes all shares that the Director would receive as a result of the association with the Fund Group.

Following our review of the information you submitted, we have determined that for purposes of the Rule, the ownership interest of Fund 1 is attributable to the Director only to the extent of the Director's Shares. We have reached this conclusion based on your representation that the shares issued by the company to the Fund Group in the Acquisition would not be deemed as beneficially owned by the Director under applicable rules of the Securities and Exchange Commission except as described above. As such, for purposes of the Rule, the Director does not have a 5% or greater interest in the Target. Accordingly, with respect to the Director's interest in the Target, Rule 4350(i)(1)(C)(i) will not require shareholder approval. Rule 4350(i)(1)(C)(ii) would require shareholder approval if the issuance in connection with the Acquisition could equal or exceed 20% of the pre-transaction outstanding shares.

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 2007-30

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 "Private Placement") and to a tender offer for the company's common stock. Specifically, you asked whether Marketplace 4350(i)(1)(B) (the "Rule") would require shareholder approval of the Private Placement or tender offer. In addition, you asked whether the company could complete the Private Placement prior to the end of the 15-day notice period for the Listing of Additional Shares referenced in Marketplace Rule 4310(c)(17)(D).

According to the information you submitted, in the Private Placement, the company would sell to the Investor shares of its common stock and a debenture convertible into additional shares of common stock. The debenture would be subject to anti-dilution provisions only for any reclassification, recapitalization, merger, stock splits or other similar transactions. The aggregate potential issuance of common stock in the Private Placement would be less than 20% of the pre-transaction outstanding shares, such that the Investor would own no more than approximately 17% of the company's outstanding common shares as a result of the issuance. The Investor would not have any special right to representation on the company's Board of Directors. Currently, the Investor has no ownership position in the company.

The company and the Investor have agreed that simultaneously with the completion of the Private Placement, the Investor will commence a tender offer for all of the outstanding shares of the company's common stock (the "Tender Offer"). The Tender Offer will contain a minimum tender condition of 50.1% of the company's outstanding shares exclusive of any shares purchased by the Investor in the Private Placement. If the minimum is not met, then no shares would be acquired by the Investor in the Tender Offer.

Following our review of the information you submitted, we have concluded that given the size of the Investor's ownership that could result from the Private Placement, the Rule will not require shareholder approval. Any change of control that occurs will be as a result of the Tender Offer. However, the Rule does not require shareholder approval of the Tender Offer because the Tender Offer is not an issuance of securities by the company. In reaching this conclusion, we have relied on your representation that for the Tender Offer to be completed, at least 50.1% of the outstanding shares will have to be tendered, without regard to any shares that the Investor purchases in the Private Placement. Lastly, because we have completed our review, the company may close the Private Placement prior to the end of the 15-day notice period referenced in 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 2007-31

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 an issuance of securities in connection with the acquisition of assets (the "Acquisition") from a company controlled by the Director Designate, who will become a member of the company's board of directors. Specifically, this relates to whether either or both of Rule 4350(i)(1)(C)(i) and Rule 4350(i)(1)(C)(ii) would require shareholder approval.

According to the information you provided, in the Acquisition, securities would be issued in an initial closing (the "Initial Closing") and in multiple subsequent closings (the "Subsequent Closings") as the assets are delivered to the company. The number of shares that would be issued in the Initial Closing would equal more than 5% but less than 20% of the pre-transaction outstanding shares. Similarly, the number of shares that would be issued in all of the Subsequent Closings combined would equal more than 5% but less than 20% of the pre-transaction shares. In the aggregate, the number of shares that could be issued in the Initial Closing and the Subsequent Closings would equal less than 20% of the shares outstanding prior to the Initial Closing.

The Director Designate would become a member of the company's board of directors following the Initial Closing. The agreements relating to the purchase of the assets and the issuances of the securities in the Initial Closing and in Subsequent Closings will all be entered into prior to the Initial Closing. Currently, the Director Designate owns less than 1% of the company's outstanding common stock and is neither an officer nor a director. The Director Designate has had no other relationship with the company.

Following our review of the information you submitted, we have determined that the Director Designate's relationship with the company, as you described, will not cause the company to require shareholder approval of the Acquisition under Rule 4350(i)(1)(C)(i). We have reached this conclusion because the Director Designate would not be a director, officer, or substantial shareholder of the issuer at the time the company enters into the agreements. All of the agreements relating to the Initial Closing and the Subsequent Closings would be reached prior to the Initial Closing, and only after the Initial Closing would the Director Designate become a member of the board. The Acquisition will not require shareholder approval under 4350(i)(1)(C)(ii) because the issuance would equal less than 20% of the pre-transaction outstanding shares.

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 2007-32

This is in response to your correspondence regarding the applicability of the shareholder approval requirements to two proposed transactions. In one transaction, the company would issue shares of its common stock in a private placement (the "Proposed Common Stock Issuance"). In the other transaction, the company would issue warrants (the "Warrants"), exercisable for shares of its common stock, in order to obtain a debt facility. Specifically, you asked whether, for purposes of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule"), the Proposed Common Stock Issuance would be aggregated with a prior issuance of common stock (the "Prior Issuance"). In addition, you asked whether the shares underlying the Warrants would be aggregated with the Proposed Common Stock Issuance in considering whether either requires shareholder approval under the Rule.

In the Prior Issuance, which occurred approximately seven months ago, the company sold shares of its Common Stock at a price less than the market value of the stock in a private placement to several investors. The number of shares that were issued was less than 20% of the pre-transaction outstanding shares.

In the Proposed Common Stock Issuance, the terms of which have not been established, the company would sell up to 20% of its pre-transaction shares of common stock. The investors in the Prior Issuance would not purchase more than 30% of the shares in the Proposed Common Stock Issuance and would not comprise more than 25% of the investors in the Proposed Common Stock Issuance. None of the investors in the Prior Issuance would be the lead investor in the Proposed Common Stock Issuance. As a result of the Proposed Common Stock Issuance, no investor could acquire as much as 20% of the company's outstanding shares of common stock when aggregated with all shares of held by such investor. No officer, director, employee, or consultant of the company would be an investor in the Proposed Common Stock Issuance. There are no contingencies between the Prior Issuance and the Proposed Common Stock Issuance.

You stated that at the time of the Prior Issuance, the company did not know that it would have to consummate another financing at this time. The need for the Proposed Common Stock Issuance is primarily due to the acceleration of Phase 3 trials of a pharmaceutical product the company is developing. This acceleration, which was unforeseen at the time of the Prior Issuance, will result in the costs of research and development being due sooner than anticipated. The proceeds from the Prior Issuance were not used in connection with this product, but instead were used for the development of other products.

The Warrants would be issued to a lender (the "Lender") in connection with a non-convertible debt facility the Lender would provide. The Lender would not be an investor, or an affiliate of any investor, in the Proposed Common Stock Issuance. The exercise price of the Warrants would be not less than the greater of book or market value immediately preceding the entering into of the binding agreement, and the Warrants would not contain any anti-dilution adjustments other than for stock splits and similar events. The Warrants would not be exercisable until at least six months after the later of (i) their issuance, or (ii) the closing of the Proposed Common Stock Issuance.

Following our review of the information you provided, we have determined that the Proposed Common Stock Issuance would not be aggregated with the Prior Issuance for purposes of the Rule because: (i) approximately seven months would have passed between the transactions; (ii) the need for the Proposed Issuance arose from a change in circumstances following the Prior Issuance; (iii) there are no contingencies between the transactions; and (iv) the Proposed Common Stock Issuance was not contemplated at the time of the Prior Issuance. In addition, the Warrants would not be aggregated with the Proposed Common Stock Issuance because the Warrants would not be exercisable for less than the greater of book or market value and could not be exercised until the at least six months after the later of (i) their issuance. or (ii) the closing of the Proposed Common Stock Issuance. Please note that you have not asked us to reach, and we have not reached, a conclusion as to the applicability of the shareholder approval requirements other than as described herein.

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 2007-33

This is in response to your correspondence regarding whether the company's issuance of common stock in a private placement (the "Private Placement") would be deemed to be in connection with the acquisition of Target One for purposes of the applicability of Marketplace Rule 4350(i)(1)(C)(ii) (the "Rule").

Approximately one year ago, the company entered into an agreement to acquire Target One in exchange for cash (the "Cash Portion") and shares of its common stock (the "Stock Portion"). The company obtained required governmental consents and completed the Acquisition approximately seven months ago. The Stock Portion was limited to 19.9% of the company's pre-transaction total shares outstanding, and the Cash Portion was funded by cash on hand and a term loan (the "Loan"). The Loan is not convertible into shares of the company's common stock. Prior to entering into the acquisition agreement, the company received a commitment letter from the Bank under which the Bank committed to provide the Loan. Pursuant to the commitment, the company and the Bank entered into an agreement for the Loan on the date of the completion of the Acquisition.

Approximately eleven months ago, the company submitted a non-binding bid for Target Two, another potential acquisition target. To fund the acquisition price, the company completed the Private Placement approximately eight months ago, immediately prior to submitting its final bid for Target Two. Approximately ten days after the closing of the Private Placement, the company learned that its bid was not successful.

Currently, the company is considering using some or all of the proceeds of the Private Placement, which was conducted to partially fund the acquisition of Target Two, to repay all of or a portion of the Loan, the proceeds from which were used to partially fund the acquisition of Target One.

In your submission, you stated that: (i) the Private Placement was not conducted to raise funds to finance the acquisition of Target One; and (ii) the Bank provided a commitment for the Loan for the acquisition of Target One before the company's board of directors considered the Private Placement for the acquisition of Target Two. The company publicly represented that: (i) the source of the cash portion of the acquisition price for Target One was cash on hand and the Loan; and (ii) the Loan would be repaid through cash flows from operations. The stated use of proceeds for the Private Placement included a reference to the acquisition of Target Two. The company's board approved the acquisition of Target One approximately four months before the Private Placement, which was to be used for the acquisition of Target Two. You further stated that there were no contingencies between the Private Placement and the acquisition of Target One and that each would have taken place without regard to the other. None of the owners of Target One invested in the Private Placement.

Following our review of the information you provided, we have determined that for purposes of the Rule, the Private Placement will not be deemed to be in connection with the acquisition of Target One. Accordingly, the company may use the proceeds from the Private Placement to repay the Loan without causing the shares that were issued in the Private Placement to be considered under the Rule to be in connection with the acquisition of Target One. We have reached this conclusion because: (i) the Private Placement was not conducted to raise funds for the acquisition of Target One; (ii) the Private Placement was not contemplated at the time the company's Board approved the acquisition of Target One; (iii) the company had alternative long-term financing in place to fund the acquisition of Target One; and (iv) there were no contingencies between the Private Placement and the acquisition of Target One.

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 2007-34

This is in response to your correspondence regarding whether the company's proposed equity financing facility (the "New Facility") would be aggregated with its prior equity financing facility (the "Prior Facility") for purposes of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule").

According to the information you provided, the agreement (the "Agreement") for the Prior Facility was entered into with the Purchaser approximately nineteen months ago. Under the Prior Facility, the company, at its discretion, is entitled to sell to the Purchaser, and the Purchaser is obligated to buy, shares of the company's common stock from time to time over a three-year period. The number of shares that can be sold under the Prior Facility cannot exceed 19.9% of the shares outstanding prior to the execution of the Agreement (the "Share Maximum"). In addition, the aggregate dollar value of the shares issued cannot exceed a specified amount (the "Dollar Maximum").

The company's stock price has declined approximately 45% since the date of the Agreement, substantially reducing the amount of funding available under the Prior Facility because of the Share Maximum. The company believes that the amount remaining available under the Prior Facility is insufficient to fund its ongoing activities and that as a result, it needs to enter into the New Facility. Under the New Facility, the company would have the right to sell, and the Purchaser would be obligated to buy, shares of the company's common stock from time to time over a three-year period. The total number of shares that could be issued, including shares that could be issued upon the exercise of warrants issued in connection with entering into the New Facility, would be less than 20% of the shares outstanding prior to entering the agreement for the New Facility. In addition, the New Facility would be subject to a maximum dollar amount of shares that could be issued.

You stated that the Prior Facility contains, and the New Facility would contain, provisions that would prevent the company from issuing shares under either facility that would result in the Purchaser's owning 20% or more of the company's outstanding shares or voting power.

Following our review of the information you provided, we have determined that the Prior Facility and the New Facility will not be aggregated for purposes of the applicability of the Rule. We have reached this conclusion because: (i) at least nineteen months will have passed following the execution of the Agreement and before the execution of the agreement for the New Facility; (ii) there were no contingencies between the facilities; and (iii) there has been a change in circumstances since the company entered into the Prior Facility, specifically, the steep reduction in the stock price resulting in a limitation on the amount of funding available. Please note that you have not asked us to reach, and we have not reached, a conclusion as to the applicability of the shareholder approval requirements other than as described herein.

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 2007-35

This is in response to your correspondence regarding whether a proposed amendment (the "Amendment") to 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 authority to accelerate the vesting of awards would be extended to include certain awards of restricted stock units ("RSUs") to non-employee members of the board of directors.

According to the information you provided, eligible participants under the Plan include officers, directors, employees, and consultants. Awards under the Plan include stock options, stock appreciation rights, restricted stock, and RSUs. The Plan provides for annual automatic awards of RSUs ("Non-Discretionary RSUs") to each non-employee director who owns less than a specified percentage of the company's outstanding shares of common stock. Such RSUs vest 50% upon the board member's continued board service through the end of the calendar year in which the award is made, and the remaining 50% upon the member's continued service through the end of June of the succeeding calendar year.

Currently, a provision of the Plan authorizes the acceleration of vesting of awards. However, another provision states that the board has the authority to determine when an award shall become exercisable, and the duration of the exercise period, except for awards of Non-Discretionary RSUs (the "RSU Limitation"). Pursuant to the Amendment, the RSU Limitation would be removed thereby allowing the acceleration of the vesting of the Non-Discretionary RSUs. Nothing in the Plan prohibits the issuance of discretionary awards (including RSUs) to non-employee directors, or the acceleration of the vesting schedule of such awards.

Following our review of the information you provided, we have determined that the Amendment would not be material under the Rule. Generally, a change in the vesting terms for an award is not a material amendment, provided that the change does not result in either an extension in the term of the award beyond the maximum allowable term under the plan or in an addition to the aggregate shares available. The Amendment would not change the Plan in either of the aforementioned ways. Further, other provisions of the Plan permit the issuance of RSUs that could be subject to accelerated vesting. 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.