NASDAQ Staff Interpretative Letters
January – December 2008

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 While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at +1 301 978 8008 if they have questions regarding transactions and the applicability of NASDAQ rules.

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Staff Interpretative Letter 2008-1

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(C) to an issuance of common stock in connection with an acquisition (the "Acquisition"). Specifically, you asked whether shareholder approval would be required under Rule 4350(i)(1)(C)(i) if the issuance by the company were to equal or exceed 5% of the company's pre-transaction total shares outstanding or voting power.

According to the information you provided, the company currently owns 80% of the outstanding shares of the Target. In the Acquisition, the company would issue shares of its common stock to acquire the remaining 20% (the "Minority Interest"). The Minority Interest is owned by approximately 20 shareholders, including three officers or directors of the company (the "Affiliated Shareholders"). None of the Affiliated Shareholders owns as much as 5% of the outstanding shares of the Target; in the aggregate, they own approximately 5.4%. No substantial shareholder of the company owns any of the outstanding shares of the Target. The number of shares that would be issued in the Acquisition is not yet known because the terms have not been determined. You stated that it is intended that the purchase price will represent a fair value as determined through arms-length negotiations. A valuation analysis is being performed by a financial consulting firm retained by the independent members of the company's board of directors.

Following our review of the information you provided, we have determined that Rule 4350(i)(1)(C)(i) will not require shareholder approval because no officer, director, or substantial shareholder of the issuer has a 5% or greater interest (or such persons, collectively, 10% or greater) in the Target or in the consideration to be paid. For purposes of the applicability of the rule, the assessment is made according to the Affiliates Shareholders' interest in the Target overall, not merely in the Minority Interest. The fact that the company does not have to acquire from itself its already-owned majority interest will not cause the rule to be applicable. Pleased be advised, however, that shareholder approval would be required under Rule 4350(i)(1)(C)(ii) if the issuance in the Acquisition could reach or exceed 20% of the company's pre-transaction outstanding shares or voting power.

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 2008-2

This is in response to your correspondence regarding the applicability of the shareholder approval requirements to a proposed change in the exercise prices (the "Exercise Price Change") of two sets of previously issued warrants, the first issued in 2001 (the "2001 Warrants") and the second in 2005 (the "2005 Warrants"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B) and 4350(i)(1)(D)(ii) (the "Rules").

According to the information you provided, the company issued the 2001 Warrants in connection with a private placement (the "2001 Issuance") which occurred approximately three years prior to its initial public offering in 2004. In 2005, the company conducted a private placement of shares of its common stock and the 2005 Warrants (the "2005 Issuance"). The 2001 Issuance was not subject to NASDAQ's shareholder approval requirements because the issuance occurred prior to the company's listing on NASDAQ. The 2005 Issuance did not require shareholder approval under the Rules because the issuance price was not less than the greater of book or market value and did not result in a change of control.

You stated that as a result of recent unfavorable events involving its clinical stage product candidates, the company has re-evaluated and substantially revised the strategic plan that had been in place at the time of the 2001 and the 2005 Issuances. These events included unfavorable results on two product candidates, resulting in the termination of collaboration agreements with one third-party partner and the expected termination with another. Because of these events, the company is seeking alternative forms of financing as it refocuses its product development strategy and attempts to enter into new collaboration agreements. As such, the company is considering the Exercise Price Change as a means of raising capital.

In the Exercise Price Change, the company would offer to reduce the exercise prices of the 2001 Warrants and the 2005 Warrants to a price equal to the consolidated closing bid price immediately preceding the time the company and the holders of the warrants enter into a binding agreement with the respect to the change (the "New Exercise Price"). The company's market value exceeds its book value. Under the agreement, warrant holders who accept the offer would be required to exercise their warrants within a specified time period. The company is also considering issuing new warrants (the "New Warrants"), to participating warrant holders, with an exercise price equal to the New Exercise Price. Current warrant holders include entities with which certain of the members of the company's board of directors are affiliated. You stated that as result of the Exercise Price Change and the issuance of any New Warrants, no investor would own or have the right to acquire as much as 20% of the company's outstanding shares of common stock or voting power (the "Ownership Positions"). In addition, you stated that the number of shares of common stock subject to the Exercise Price Change plus the number of shares of common stock issuable pursuant to the New Warrants is expected to be less than 20% of the company's pre-transaction total shares outstanding. If such aggregate number were to exceed 20%, then the New Warrants would not be exercisable until at least six months after the transaction.

Following our review of the information you submitted, we have determined that the Exercise Price Change will not require shareholder approval under the Rules. For determining whether the exercise price is at a discount to the market value, the Exercise Price Change is considered to be a new transaction because of the amount of time that has elapsed since the original transactions and the significant changes in circumstances since the original transactions giving rise to the company's need to seek additional sources of financing. As such, because the New Exercise Price will not be less than the market value, shareholder approval is not required of the Exercise Price Change or the New Warrants by: (i) Rule 4350(i)(1)(A) because an issuance at market value is not considered to be equity compensation, or (ii) Rule 4350(i)(1)(D). Shareholder approval is not required by Rule 4350(i)(1)(B) because, due to the Ownership Positions, the New Exercise Price and the potential New Warrants will not result in a change of control.

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Staff Interpretative Letter 2008-3

This is in response to your correspondence regarding the applicability of the shareholder approval requirements to a proposed issuance of securities by the company in a private placement (the "Transaction"). Specifically, you asked about the potential applicability of Marketplace Rules 4350(i)(1)(A) and 4350(i)(1)(B) (the "Rules").

According to the information you submitted, in the Transaction the company would issue shares of common stock and warrants to the Investor at market value. In the aggregate, the number of shares that would be issued, including those that could be issued upon the exercise of the warrants, would equal approximately 5% of the company's pre-transaction outstanding shares. The proceeds of the Transaction would be used to fund a strategic acquisition (the "Acquisition"). As a result of prior transactions, the Investor currently beneficially owns 19.32% of the company's outstanding common stock. The company's board of directors includes two members who are affiliated with the Investor.

The purchase price of the common stock and the exercise price of the warrants will equal the closing bid price immediately prior to entering into the binding agreement, and the purchase price of the warrants will be $0.125 for each share of common stock subject to the warrants. You stated that the aggregate number of shares to be issued in the Transaction and the Acquisition would be significantly less than 20% of the shares outstanding before the Transaction.

Approximately three years ago, the company entered into an agreement to issue common stock and warrants to the Investor in a prior transaction (the "Prior Transaction"). The company sought shareholder approval of the Prior Transaction for reasons including that the issuance would result in a change of control for purposes of Rule 4350(i)(1)(B). Following the approval of its shareholders (the "Shareholder Approval") approximately two and one-half years ago, the company issued the securities in the Prior Transaction resulting in the Investor owning approximately 24.5% of the company's then outstanding shares of common stock. Subsequently, the Investor has acquired additional shares on the open market, and the company has issued additional shares to other investors in acquisitions and in a public offering, together resulting in a decrease in the Investor's beneficial ownership to 19.32% of the shares outstanding. The company's second largest shareholder beneficially owns approximately 6.5%.

Following our review of the information you provided, we have determined that the Transaction will not require shareholder approval under the Rules. Although two members of the board are affiliated with the Investor, shareholder approval under Rule 4350(i)(1)(A) is not required because the purchase price is not at a discount to market value. Shareholder approval is not required under Rule 4350(i)(1)(B) because the company's shareholders previously approved a change of control with regard to the Investor, and since that time: (i) the Investor's ownership position has not significantly decreased and only recently has fallen below 20% to its current level of 19.32%; (ii) the decrease was not caused by any action of the Investor but rather was a result of issuances by the company to other investors; and (iii) the Investor has remained the largest shareholder. You did not ask, and we do not express any opinion on whether the Acquisition would require shareholder approval under NASDAQ rules.

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Staff Interpretative Letter 2008-4

This is in response to your correspondence regarding whether the company's proposed course of action (the "Proposal") with respect to Plan 1 and Plan 2 (collectively, the "Plans") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). The Plans are equity compensation plans. Under the Proposal, as more fully described below, the company would increase the exercise price of certain outstanding stock options and make a cash payment to the affected optionees.

According to the information you provided, in the course of a review of its financial statements, the company discovered that it may have used an incorrect date of grant for determining the exercise prices of certain options that were awarded under the Plans. As a result, some of those options may have exercise prices less than market value as of the correct grant date (the "Correct Date") for financial reporting and tax purposes. You stated that such misdated options may be deemed to result in "deferred compensation" under Internal Revenue Code Section 409A and, therefore, may subject the optionees to significant adverse taxation upon vesting and exercise, contrary to the company's intent. The company believes that the Proposal would have the effect of eliminating the adverse taxation while preserving the original compensatory benefits. The Proposal would be conducted as a tender offer under the rules of the Securities and Exchange Commission and would be open for at least 20 business days.

Under the Proposal each misdated option held by a current employee (excluding current or former executive officers) would be amended to adjust the exercise price to the lower of: (i) the fair market value of the common stock on Correct Date (the "Correct Date Price"), and (ii) the closing price of the common stock on the last day of the offer. The amended exercise price is called the "Revised Price". Thereafter, the company would either:

(1) If the Revised Price is higher than the original exercise price for the option, the company would pay the affected optionee an amount of cash equal to the increase in the exercise price for each affected option; or

(2) If the Revised Price is the same as, or lower than, the original exercise price, the option will be repriced to the Correct Date Price and then cancelled and replaced with a new option having an exercise price equal to the original exercise price. In this situation the optionee will not receive a cash payment.

As a result of the Proposal, no optionee will receive a corrected option with an exercise price of less than the original price or receive a cash payment in excess of the minimum increase in the exercise price necessary to avoid the consequences of Section 409A.

Pursuant to the provisions of each of the Plans, the plan administrator has the authority to amend, modify, or cancel any outstanding award with the consent of the holder. Neither of the Plans specifically prohibits the company's ability to: (i) cancel an outstanding award and issue a replacement award, or (ii) conduct any other action that may be interpreted as repricing.

Following our review of the information you provided, we have determined that the Proposal would not require shareholder approval under the Rule because it would not be a material amendment to the Plans. 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 Proposal would result in an increase (or no change), rather than a decrease, in the exercise price, the Proposal is not material under the Rule. 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. Finally, based on these facts, the cash payment to be made in connection with the change in exercise price to employees other than current and former executive officers does not raise concerns under the Rule. These conclusions are based on your representations that the purpose of the Proposal is to address the tax consequences of Section 409A.

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Staff Interpretative Letter 2008-5

This is in response to your correspondence regarding a proposed issuance of securities to the Controlling Stockholder (the "Transaction"). You asked about the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), and 4350(i)(1)(D)(ii) (the "Rules"). In addition, you asked whether the Controlling Stockholder may vote the shares it currently owns in a shareholder vote to approve the Transaction.

According to the information you provided, in the Transaction the company would issue notes (the "Notes") to the Controlling Stockholder. The Notes would be convertible into common stock only if the company obtains shareholder approval of the issuance of common stock upon conversion. The conversion price will be at a discount to the market value of the common stock at the time the company and the Controlling Investor enter into a definitive agreement to issue the Notes. The number of shares that would be issued upon conversion equals approximately 32% of the pre-transaction outstanding shares.

Currently, the Controlling Stockholder owns approximately 73% of the company's outstanding common stock, which it obtained approximately five years ago in a transaction unrelated to the Transaction. The Controlling Stockholder has three representatives on the company's board of directors. These directors have an indirect pecuniary interest in the holdings of the Controlling Stockholder.

Following our review of the information you provided, we have determined that the Transaction complies with the Rules. Shareholder approval is not required under Rule 4350(i)(1)(B) because the Transaction will not result in a change of control given that the Controlling Stockholder will have a control position both before and after the Transaction. Shareholder approval is required under Rule 4350(i)(1)(A) because of the equity compensation that would result from a discounted issuance of common stock to directors. Shareholder approval is also required under Rule 4350(i)(1)(D) because the issuance of common stock would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. The Transaction complies with Rule 4350(i)(1)(A) and Rule 4350(i)(1)(D), however, because no shares of common stock could be issued until after shareholder approval. Accordingly, the Notes may be issued prior to the receipt of such approval. For purposes of complying with the Rules, the Controlling Stockholder is not prohibited from voting the shares it currently owns to approve the Transaction because those shares are not part of the Transaction.

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Staff Interpretative Letter 2008-6

This is in response to your correspondence wherein you asked 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 seven months ago, the company sold shares of common stock and warrants to purchase shares of common stock in a private placement. The common stock was issued at a discount to the greater of book or market value and was less than 10% of the pre-transaction outstanding shares. The total number of shares issuable in the Prior Transaction, giving effect to the exercise of the warrants, was equal to approximately 13% of the pre-transaction outstanding shares prior to giving effect to anti-dilution adjustments. The warrants are exercisable for common stock at a price that initially exceeded the greater of book or market value with weighted average anti-dilution protection (the "Anti-dilution Protection") that could increase the number of shares issuable. The warrants contain a limitation such that the company cannot issue shares in the Prior Transaction that would require shareholder approval under the Rule unless such approval is obtained (the "Prior Transaction Cap").

In the Proposed Transaction, the company would issue shares of common stock in a private placement to several investors at a discount to the market value. The company may also issue warrants to purchase shares of common stock. It is anticipated that the warrants will have an exercise price in excess of the greater of book value or market value and will not be exercisable until six months after the closing of the Proposed Transaction. The number of shares that would be issued, including shares that could be issued upon the exercise of the warrants, would equal less than 20% of the pre-transaction outstanding shares. Because of the Anti-Dilution Protection applicable to the warrants issued in the Prior Transaction, the company will be required to issue additional warrants to the investors in the Prior Transaction (the "Additional Warrants").

You stated that there are no contingencies between the transactions, the Proposed Transaction was not contemplated at the time of the Prior Transaction, and the proceeds are for different purposes. Specifically, you indicated that the funds raised in the Prior Transaction had been used to pay contract research organization costs associated with, and to enroll patients for, the company's Phase II clinical trials and to make regulatory filings with the FDA. You stated that the Proposed Transaction is necessary to fund Phase III trials and the eventual commercialization of its drug product. In addition, you stated that there may be up to a 25% overlap in the two transactions because the investors in the Prior Transaction have a contractual right to purchase up to 25% of any subsequent transactions. Although the company has solicited elections from the investors in the Prior Transaction, it does not yet know whether there will be any commonality of investors. Finally, you stated that no officers, directors, employees, or consultants participated in the Prior Transaction, and none will participate in the Proposed Transaction.

Following our review of the information you provided, we have determined that the Proposed Transaction would not be aggregated with the Prior Transaction for purposes of the Rule. Additionally, the Additional Warrants will not be added to the shares issued in the Proposed Transactions because they are being issued in accordance with the terms of the Prior Transaction and are subject to the Prior Transaction Cap. 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 commonality of investors in the Prior Transaction and the Proposed Transaction, our determination may change. Note also that you have not asked us, 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).

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Staff Interpretative Letter 2008-7

This is in response to your correspondence regarding a proposed issuance of securities by the company (the "Proposed Issuance") and the sale (the "Proposed Sale") of common stock by the chairman of the company's board of directors (the "Chairman"). You asked about the potential applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), and 4350(i)(1)(D)(i) (the "Rules").

According to the information you provided, in the Proposed Issuance the company would issue convertible debt to the Investor. Initially, the conversion price would be greater than both the market and book value of the common stock such that the number of shares that could be issued upon conversion would equal approximately 13% of the pre-transaction outstanding shares. The conversion price is subject to adjustment, however, which could result in its being at a discount to market or book value. As such, pursuant to the terms of the Proposed Issuance, the number of shares issuable upon conversion cannot reach or exceed 20% of the pre-transaction outstanding shares without shareholder approval.

The Investor is the company's largest shareholder and currently owns approximately 40% of the outstanding shares. The Investor acquired its current ownership position approximately seven months ago in connection with a prior transaction approved by shareholders (the "Prior Transaction"). The company's board of directors includes two members (the "Directors') who are executive officers of a subsidiary of the Investor, but not of the Investor itself. You stated that neither of the Directors would be the beneficial owner of, nor have a pecuniary interest in, the securities that would be issued in the Proposed Issuance.

In the Proposed Sale, pursuant to an agreement entered into in connection with the Prior Transaction, the Investor will purchase shares of the company's common stock equal to approximately 10% of the company's outstanding shares from the Chairman (the "Chairman's Shares"). You stated that the terms of the agreement have been amended to reduce the price at which the Investor would purchase the Chairman's Shares; however, no additional shares of common stock would be issued by the company or sold by the Chairman in the Proposed Sale.

Following our review of the information you provided, we have determined that the Proposed Issuance complies with the Rules. Shareholder approval is not required under Rule 4350(i)(1)(A) because the Proposed Issuance will not result in equity compensation to any officer, director, employee, or consultant of the company, or to any affiliated entity of any such person. The Directors would not be the beneficial owner of, or have any pecuniary interest in, the securities that would be issued in the Proposed Issuance. Shareholder approval is not required under Rule 4350(i)(1)(B) because the Proposed Issuance will not result in a change of control given that the Investor will have a control position both before and after the Proposed Issuance. The Proposed Issuance satisfies the requirements of Rule 4350(i)(1)(D)(i) because the issuance cannot reach 20% of the pre-transaction outstanding shares without shareholder approval. The Chairman's Shares do not contribute to the 20% calculation because the sale of those shares would be pursuant to the Prior Transaction, which was approved by shareholders, and the reduction of the price that the Chairman will receive in that transaction does not require additional shareholder approval. Please note that pursuant to IM-4350-2: (i) shares to be 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 a transaction unless shareholder approval is obtained; and (iii) if the terms of a transaction can changed based on the outcome of the shareholder vote, then no shares of common stock may be issued prior to the vote.

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Staff Interpretative Letter 2008-8

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(C)(ii) and IM-4350-2 to an issuance of common stock and preferred stock in an acquisition (the "Acquisition").

According to the information you provided, the company would issue cash and shares of both common and preferred stock at the closing of the Acquisition, which would occur prior to the company's obtaining shareholder approval. The number of shares of common stock that could be issued would be limited to 19.9% of the pre-transaction outstanding shares (the "Limitation") unless shareholder approval is obtained. The preferred stock would be non-voting except as required under applicable state law and could not convert into common stock unless shareholder approval is obtained. The cash portion of the Acquisition price would come from a credit facility that could not result in the issuance of any shares of the company's equity securities. The Acquisition contains an earn-out provision which could result in future issuances (the "Earn-Out Issuances") to the Target's shareholders. The Earn-Out Issuances would consist only of preferred stock unless the shareholders have approved the removal of the Limitation.

The terms of the Acquisition would not change as a result of the shareholder vote to remove the Limitation. The Limitation would apply unless shareholder approval is obtained, without regard to whether the company is listed on NASDAQ. In a vote to approve the removal of the Limitation, the former stockholders of the Target would not be entitled to vote any shares of the company's capital stock held by such former stockholders. In addition, you stated that no director, officer, or substantial shareholder of the company has a 5% or greater interest (or such persons collectively, a 10% or greater interest), directly or indirectly, in the Target.

Following our review of the information you provided, we have determined that the issuances of the common stock and the preferred stock in the Acquisition would comply with Rule 4350(i)(1)(C)(ii) because the common stock issuance would be limited to 19.9% of the pre-transaction shares unless shareholder approval is obtained. The preferred stock is non-voting, except as may be required by applicable state law, and cannot be converted into common stock unless shareholder approval is obtained. In addition, the issuances comply with IM-4350-2 because: (i) the terms of the Acquisition and the preferred stock would not change as a result of the shareholder vote; (ii) the Limitation would apply for the life of the transaction unless shareholder approval is obtained; and (iii) shares issued under the Limitation held by the Target's shareholders would not be counted in the vote to approve the removal of the Limitation. Accordingly, the shares of common stock and preferred stock may be issued at the closing of the Acquisition as you described without prior shareholder approval.

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Staff Interpretative Letter 2008-9

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), 4350(i)(1)(C), and 4350(i)(1)(D) (the "Rules") to an issuance of securities.

According to the information you provided, approximately two months ago the company entered into agreements (the "Agreements") with the Shareholder relating to the formation of a limited liability company (the "LLC"). The Shareholder currently owns approximately 8% of the company's outstanding shares. Pursuant to the Agreements, the company and the Shareholder would each contribute certain assets to the LLC and, through the LLC, would jointly develop certain properties for the operation of a business (the "Project"). The closing of the Agreements is conditioned on, among other things, financing being received by the LLC. The financing would not be provided by the company and would not involve an issuance of securities by the company.

After the Agreements were reached, an affiliate of the Shareholder (the "Shareholder's Affiliate") proposed making an investment in the company, and the company and the Shareholder's Affiliate entered into a agreement for a private placement (the "Private Placement") pursuant to which the Shareholder's Affiliate would purchase shares of common stock equal to approximately 14% of the company's pre-transaction outstanding shares at a discount to market value. The Private Placement has not yet closed. The closings of the Private Placement and the Agreements are not contingent on each other, and each would close without regard to the other. Further, the Private Placement is not conditioned on the consummation of any of the transactions contemplated by the Agreements, and the proceeds of the Private Placement will not be used to finance the Project.

Following the closing of the Private Placement, the Shareholder and the Shareholder's Affiliate would own, in the aggregate, less than 20% of the company's then outstanding common shares and voting power (the "Aggregate Ownership"). The Shareholder's Affiliate is not an officer, director, employee, or consultant of the company.

Following our review of the information you provided, we have determined that the issuance of the common stock in the Private Placement does not require shareholder approval under the Rules. Although the shares would be sold at a discount, shareholder approval would not be required under: (i) Rule 4350(i)(1)(A) because the purchaser is not an officer, director, employee, or consultant of the company; or (ii) Rule 4350(i)(1)(D) because the number of shares issued would equal less than 20% of the pre-transaction outstanding shares. In addition, shareholder approval would not be required under Rule 4350(i)(1)(B) because the issuance would not result in a change of control given the Aggregate Ownership. Finally, Rule 4350(i)(1)(C) is not applicable because the issuance would not be in connection with the acquisition of the stock or assets of another company.

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Staff Interpretative Letter 2008-10

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 about the applicability of Marketplace Rule 4200(a)(15)(B)(ii) to compensation and consulting fees that the company paid to the Director's Son.

According to the information you provided, the Director's Son was employed as a vice president of the company from August 2002 until September 2005 but was not an "officer" as that term is defined in Rule 16a-1(f) under the Securities Exchange Act of 1934 (the "Act"). When he ceased to be an employee in September 2005, the Director's Son entered into an independent contractor agreement (the "Agreement") with the company pursuant to which he provided consulting services. In 2005, the company paid the Director's Son more than $100,000 in compensation as an employee (the "Compensation"). The aggregate amount the company paid the Director's Son under the Agreement, which was terminated in 2006, was less than $100,000 (the "Consulting Fees").

Following our review of the information you provided, we have concluded that for determining the Director's eligibility to be independent, the Compensation is not counted in the calculation of whether the Director's Son received in excess of $100,000 during any period of twelve consecutive months within three years preceding the date of the independence determination. The compensation is not counted because Rule 4200(a)(15)(B)(i) excludes compensation paid to a Family Member as an employee other than an executive officer. IM-4200 indicates that the rule's reference to executive officer means those officers covered in SEC Rule 16a-1(f) under the Act. You stated that the Director's Son was not an executive officer under Rule 16a-1(f). The Consulting Fees would contribute to the calculation. However, because the Consulting Fees were less than the $100,000 threshold, they would not preclude the company's Board from finding that the Director is independent. As such, the Compensation and Consulting Fees would not preclude the Director from being found to be an independent director under Rule 4200(a)(15)(B). 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 2008-11

This is in response to your correspondence regarding the eligibility of Director One and Director Two (collectively, the "Directors") to serve as independent directors on the company's board of directors (the "Board") under the requirements of Marketplace Rule 4200(a)(15)(A) (the "Rule"). The company currently trades on the OTCBB and has applied for listing on NASDAQ.

According to the information you provided, the company was initially formed as a special purpose acquisition company (the "SPAC") for the sole purpose of conducting an initial public offering ("IPO") to raise funds to acquire one or more unidentified operating companies. The IPO was completed approximately two years ago, and the proceeds were deposited into a trust account pending an acquisition. Approximately four months ago, the SPAC completed its acquisition of an operating company (the "Target") and changed its name.

You stated that prior to the merger, the SPAC had no operations, no employees, and no assets other than an indirect interest in the trust account. The Directors were executive officers, but not employees, of the SPAC, and received no compensation from the SPAC for serving as officers. The Directors were designated as officers to facilitate an acquisition or, if no acquisition were to occur, to liquidate the trust account and distribute the net proceeds to the SPAC's shareholders. Upon the closing of the acquisition, the Directors resigned as officers. Following the acquisition, the sole operations of the company were the operations of the Target, and the CEO, President/COO, CFO, and General Counsel of the Target took those roles with the company. The company's financial statements carry forward the historical financial statements of the Target.

Following our review of the information you provided, we have determined that the mere fact of the Directors' prior service without compensation as non-employee officers of the SPAC will not preclude the Board from finding that the Directors are independent under the Rule. This conclusion is based on your representation that the Directors were not employees of the SPAC or the company and received no compensation for serving as executive officers. Further, we note that the Directors resigned their positions upon the closing of the acquisition. As such, the Rule does not preclude the Directors from being considered independent directors in this case. 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 Directors.

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Staff Interpretative Letter 2008-12

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for a transaction (the "Proposed Transaction") under consideration by the company. In addition, you asked that to the extent necessary, the company be granted an exception to the voting rights requirements of Marketplace Rule 4351 with respect to Investor's right to appoint members of the company's board of directors (the "Board").

According to the information you provided, in the Proposed Transaction, the company would issue to the Investor: (i) non-convertible senior secured notes (the "Notes"); and (ii) shares of common stock equal to approximately 62% of the pre-transaction outstanding shares at a discount to market value. As such, without the requested exception, shareholder approval would be required pursuant to: (i) Marketplace Rule 4350(i)(1)(B) because the issuance would result in a change of control; and (ii) Marketplace Rule 4350(i)(1)(D)(ii) because the issuance would exceed 20% of the pre-transaction outstanding shares at a discount to the market value.

Pursuant to the Proposed Transaction, the Investor would have the right to appoint members of the Board (the "Board Rights"). The percentage of the company's Board that the Investor could appoint would be consistent with its percentage ownership interest in the company. If the ownership position were to decline, the number of directors the Investor could appoint would decline pro ratably such that the percentage of the Board that it could appoint would remain approximately equal to its percentage ownership interest in the company. As such, the Board Rights comply with Rule 4351.

You stated that as a result of several events since 2005, the company's business has deteriorated significantly. Among those events is a decline in revenue due to a new federal law that impacted the company's customers such that the customers were less likely to purchase the company's products. As a cost-savings measure, the company eliminated approximately 27% of its work force during the first quarter of the current year. Nonetheless, without the Proposed Transaction, the company likely could not fund its operations longer than approximately one month. You stated that any delay in closing the Proposed Transaction to seek shareholder approval most likely would cause the company to seek the protections of bankruptcy.

Over the past several months, the company explored other financing alternatives but was unsuccessful in finding a suitable transaction. The company expects that the Proposed Transaction would provide sufficient capital for it to survive its current difficulties and succeed in executing its business plans. Further, the company expects that if it completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ over the next several months with the possible exception of the bid-price requirement.

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 fund its operations and its likely need to seek bankruptcy protection in the event that the Proposed Transaction is delayed. The exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Proposed Transaction, a letter describing the Proposed Transaction and alerting them to its omission to seek the shareholder approval that would otherwise be required; (ii) the letter must indicate that the audit committee, or a comparable body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities. Because the Board Rights comply with the voting rights requirements, an exception to Rule 4351 is not needed.

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 2008-13

This is in response to your correspondence regarding the applicability of the shareholder approval requirements of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule") to a proposed transaction (the "Proposed Transaction") involving a reduction in the exercise prices of two series of previously issued warrants (the "Old Warrants") and the issuance of new warrants (the "New Warrants").

According to the information you provided, the Old Warrants were issued approximately fifteen months ago in a transaction (the "Prior Transaction"), which was approved by the company's shareholders. The Old Warrants contain anti-dilution provisions (the "Anti-dilution Provisions"), which could reduce the exercise prices of the Old Warrants and increase the number of shares of common stock for which they are exercisable. None of the holders of the Old Warrants is a director or officer of the company.

In the Proposed Transaction, the company would offer to reduce the exercise price of the Old Warrants to less than the current market value of the shares for which they are exercisable. Warrant holders who accept the offer (the "Participating Holders") would agree to immediately exercise their Old Warrants at the reduced exercise price, and the company would issue New Warrants to the Participating Holders. The number of shares that would be issued as a result of the exercise of the Old Warrants by the Participating Holders would be less than 19.9% of the company's pre-transaction outstanding shares. The number of common shares underlying the New Warrants would not be greater than the number underlying the Old Warrants that would be exercised in the Proposed Transaction. The New Warrants would have an exercise price not less than the greater of book or market value, would not be exercisable for six months after issuance, and would not contain anti-dilution provisions other than with respect to stock splits and similar events. The exercise price of the Old Warrants held by warrant holders who do not accept the offer would be reduced as a result of the Anti-dilution Provisions, which would be triggered by the Proposed Transaction.

You stated that the Proposed Transaction was not contemplated at the time of the Prior Transaction. At that time, the company believed that any additional capital needs would be funded through research and development grants or investments from new sources. The proceeds from the Prior Transaction were used primarily to finance the company's efforts to secure a grant from the federal government. The grant would have been used to fund the development of one of the company's products. Subsequent to the closing of the Prior Transaction, the company learned that it would not receive the grant. As a result, the company revised its strategy and reassessed its capital needs. You stated the financing contemplated by the Proposed Transaction came about solely as a result of discussions that the company had regarding its financing needs approximately 10 months after the closing of the Prior Transaction.

Following our review of the information you submitted, we have determined that the Proposed Transaction will not require shareholder approval under the Rule. Although it involves a modification to the warrants issued in the Prior Transaction, the Proposed Transaction is considered to be a new transaction because of the amount of time that has elapsed, and the significant change in circumstances since the Prior Transaction giving rise to the company's need to seek additional financing. As such, because the number of shares of common stock that could be issued as a result of the exercise price reduction would be less than 20% of the shares outstanding prior to the Proposed Transaction, shareholder approval is not required under the Rule. In addition, the shares underlying the New Warrants would not be aggregated with the shares that would be issued as a result of the exercise price reduction, because the New Warrants would not be exercisable for less than the greater of book or market value and could not be exercised until at least six months after the closing of the Proposed Transaction. The additional shares that could be issued under the Anti-dilution Provisions of the Prior Transaction would not be aggregated with the Proposed Transaction because the issuance of those shares was approved by shareholders. 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.

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Staff Interpretative Letter 2008-14

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for certain proposed transactions (the "Proposed Transactions").

According to the information you provided, in the Proposed Transactions, the company would issue more than 20% of its pre-transaction outstanding common shares at a discount: (i) in a private placement to several institutional investors including certain existing shareholders; and (ii) in exchange for the Note and warrants held by the Note Holder (the "Exchange"). No officer, director, employee, or consultant of the company would acquire securities in the Proposed Transactions. Without the requested exception, shareholder approval would be required pursuant to: (i) Rule 4350(i)(1)(B) because the issuance would result in a change of control; and (ii) Rule 4350(i)(1)(D)(ii) because the issuance would exceed 20% of the pre-transaction outstanding shares at a discount to the market value.

You stated that the company does not have sufficient cash resources to operate its business for the time that it would take to obtain shareholder approval. You further stated that absent the funding from the Proposed Transactions, the company would have no choice other than to file for protection under applicable bankruptcy laws. The company does not have the cash resources to meet its payroll requirements, and, in fact, it failed to pay its employees for the most recent pay period. The company is unable to fund it accounts payable obligations. Some of its suppliers and service providers have stopped doing business with the company, and many others will do likewise unless funding is obtained immediately.

The company has previously required, and expects to require in the future, significant infusions of equity capital to continue the development of its products. For nearly a year, the company has unsuccessfully sought to raise equity capital. Approximately six months ago, the company issued the Note and pledged all of its assets as security for the Note. Subsequent to the issuance of the Note, potential investors who expressed interest in the company would agree to invest only if the Note Holder would exchange its debt for equity. Previously, the Note Holder would not agree to such an exchange. You stated that because of the increasingly high likelihood of a bankruptcy filing absent an equity infusion, the Note Holder has only recently agreed to the Exchange.

The company believes that the Proposed Transactions would enable it to continue its operations for at least three years and to return to profitability. Further, the company expects that if it completes the Proposed Transactions, it will meet the requirements for continued listing on NASDAQ except for the bid-price requirement. In that regard, the company has committed to complete a reverse stock split at a ratio sufficient to comply with the bid-price requirement in the near term.

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 fund its operations and its likely need to seek bankruptcy protection in the event that the Proposed 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 Proposed Transactions, a letter describing the Proposed 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 reliance on the exception; and (iii) the company must also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities.

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Staff Interpretative Letter 2008-15

This is in response to your correspondence regarding whether the establishment of an equity compensation plan (the "Plan") for the Subsidiary would require the approval of the company's shareholders under Marketplace Rule 4350(i)(1)(A).

According to the information you provided, the Subsidiary is a wholly-owned subsidiary of the company and currently represents less than 10% of the company's overall revenues. You stated that in order to provide an incentive to employees of the Subsidiary, the Subsidiary intends to create the Plan, which would authorize the grant of stock options and other equity-based awards based solely on the common stock of the Subsidiary. No award under the Plan would be exercisable for, or convertible into, any of the company's equity securities. Eligible participants would be officers, directors, employees, and consultants of the Subsidiary. The Plan would be subject to the approval of the Subsidiary's board of directors and of the company, as the sole stockholder of the Subsidiary. Generally, awards under the Plan would be exercisable only in connection with a liquidity event, such as an initial public offering of the Subsidiary.

Following our review of the information you provided, we have determined that the approval of the Plan by the company's shareholders is not required pursuant to the Rule because no shares of the company's equity securities could be issued under the Plan. In reaching this determination, we also took into account the size of the Subsidiary relative to the size of the company.

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Staff Interpretative Letter 2008-17

This is in response to your correspondence regarding whether the Director is eligible to be an independent member of the company's board of directors under Marketplace Rules 4200(a)(15)(A) and 4200(a)(15)(B) (the "Rules") notwithstanding the Director's relationship with the Target and certain payments which the company will make to the Director.

According to the information you provided, the company completed the acquisition of the Target (the "Acquisition") approximately four months ago. As a result of the Acquisition, the Target became a wholly-owned subsidiary of the company. Prior to the closing of the Acquisition (the "Closing"), the company and the Target were not affiliated. The Director became an executive officer of the Target several years ago and continued to hold that position until the Closing, at which time her employment ended. The Director is not currently, and never has been, an officer or employee of the company. Following the Closing, the Director became a member of the company's board of directors.

As consideration in the Acquisition, the company issued shares of its common stock in exchange for the outstanding shares of the Target ("Merger Consideration"). Accordingly, as an owner of shares in the Target, the Director received Merger Consideration pro ratably in the same manner as the Target's other shareholders. The Director will receive additional shares of the company's common stock as a result of the company's assumption of the Target's stock options and restricted stock units (collectively, "Equity Awards"), which were outstanding at the time of the closing and which were converted into the right to purchase or receive, as applicable, shares of the company's common stock pursuant to the terms of the Acquisition.

The Director's employment agreement with the Target contained certain "change of control" and severance provisions (the "Control and Severance Provisions"), which were triggered by the Acquisition and pursuant to which the Director is entitled to receive cash payments of specified amounts. As a result of the Acquisition, the company is obligated to make these payments.

In addition, the Target was required to purchase officers' and directors' liability insurance polices (the "Insurance Policies"), which would cover the Target's former directors and officers for a specified number of years following the Closing. As the surviving corporation, the company is obligated to maintain these policies for their full term.

Following our review of the information you provided, we have determined that the company's board of directors is not precluded by the Rules from finding that the Director is independent given that following the closing the Director ceased to be employed by the Target and did not become an employee of the company. For purposes of the Rules, the Director's employment by the Target, and compensation paid by the Target to the Director, prior to the closing are not included when determining whether the Director has been employed by the company, or has received compensation from the company, during the past three years. The Merger Consideration is not compensation under Rule 4200(a)(15)(B) because it was paid pro ratably to all shareholders of the Target. The issuances under the Equity Awards, the payments under the Control and Severance Provisions, and the payments to maintain the Insurance Policies are not compensation for purposes of Rule 4200(a)(15)(B) because they will be a result of pre-existing agreements between the Director and the Target not involving the company, but which the company assumed in connection with the Acquisition. Notwithstanding this determination, pursuant to Rule 4200(a)(15) and 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 company's audit committee. Such eligibility should be assessed under Marketplace Rule 4350(d) and under Rule 10A-3 of the Securities Exchange Act of 1934.

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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 2008-18

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for two proposed transactions (the "Proposed Transactions").

According to the information you provided, in one of the Proposed Transactions, the company would issue to Investor One shares of common stock, and warrants exercisable for additional shares, in connection with a loan agreement pursuant to which Investor One would provide a credit facility. In the other of the Proposed Transactions, the company would issue to Investor Two a note convertible into shares of common stock (the "Convertible Note") and warrants exercisable for additional shares. Because the Proposed Transactions would occur at about the same time and the proceeds would be used for the same purpose as described below, the Proposed Transactions would be aggregated for purposes of determining whether shareholder approval would be required. Without the requested exception, shareholder approval would be required pursuant to Rule 4350(i)(1)(D)(ii) (the "Rule") because the aggregate issuance would exceed 20% of the pre-transaction outstanding shares at a discount to the greater of book or market value. Neither Investor One nor Investor Two (collectively, the "Investors") is an officer, director, employee, or consultant of the company. Neither would own as much as 20% of the company's outstanding shares of common stock or voting power as a result of the Proposed Transactions. Investor Two would be entitled to appoint one member of the company's board of directors for as long as it and its affiliates hold a specified interest in the company.

With regard to the company's financial condition, you stated that the company lacks the necessary funds to pay the outstanding principal amount on its Senior Secured Notes (the "Senior Notes"), which will be due in full at maturity in approximately two weeks (the "Amount Due"). The Amount Due is approximately triple the amount of the company's current cash and cash equivalents. The Senior Notes are secured by a first lien security interest in all of the company's assets. The company has unsuccessfully attempted to pursue a restructuring of the Senior Notes. You stated that if the company does not pay the Amount Due at maturity, the holder of a majority of the Senior Notes could initiate foreclosure proceedings, which would likely force the company to seek bankruptcy protection. The proceeds from the Proposed Transactions would be used in part to make the required payment on the Senior Notes.

You stated that over the past several months the company attempted to secure financings with sufficient time to obtain shareholder approval or that would not require shareholder approval. In that regard, approximately two weeks ago, discussions between the company and the Investors resulted in term sheets for transactions which the company believed would not require shareholder approval. Subsequently, however, the company's market value declined to an amount below its book value such that the definitive terms included an issuance price below book value, thereby requiring shareholder approval. In addition, the terms have changed such that the issuance price and exercise price would be below market value and would be subject to future reductions. The company unsuccessfully attempted to get the Investors to restructure the Proposed Transactions to meet the requirement of the Rule, such as by seeking shareholder approval for any issuance beyond 19.9% of the pre-transaction outstanding shares. You stated that the Investors have been unwilling to delay any portion of their funding pending shareholder approval. Moreover, you stated that the company has concluded that the delay in securing shareholder approval would seriously jeopardize the financial viability of the company.

The company believes that following the Proposed Transactions it will be in compliance with all of the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed to effect a reverse split of its common stock if necessary to comply with the bid-price requirement upon the expiration of any applicable grace periods.

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 payment obligations on the Senior Notes and its likely need to seek bankruptcy protection in the event that the Proposed 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 Proposed Transactions, a letter describing the Proposed 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 reliance on the exception; and (iii) the company must also make a public announcement through the news

media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities.

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Staff Interpretative Letter 2008-19

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for a proposed issuance of securities (the "Proposed Transaction"). The company is a bank holding company, whose primary asset is the Bank.

According to the information you provided, in the Proposed Transaction, the company would sell shares of its common stock, and notes convertible into additional shares of common stock, to institutional investors (the "Investors"). The issuance would exceed 20% of the company's pre-transaction outstanding shares of common stock and could be at a price less than the greater of book or market value. None of the Investors would own or have the right to acquire more than 9.9% of the company's post-transaction outstanding shares. The Investors would not include any of the company's officers, directors, employees or consultants. Without the requested exception, shareholder approval would be required pursuant to Rule 4350(i)(1)(D)(ii) (the "Rule") because the issuance would exceed 20% of the pre-transaction outstanding shares and could be a discount to the greater of book or market value. You stated that the delay that would result in seeking shareholder approval of the Proposed Transaction could lead to the company's bankruptcy.

With regard to the company's financial condition, you stated that the company and the Bank have been negatively impacted by current economic conditions. The company has experienced substantial losses during the past three quarters, and the quality of its loan portfolio has significantly declined. The company does not have sufficient cash to meet its current and long-term obligations including its debt-service requirements. The company is in default under a line of credit, which is collateralized by 100% of the Bank's outstanding common stock. All of the company's other credit facilities have been terminated due to the company's financial condition, and, as a result, the company has no additional available funds under those facilities.

The company's primary source of funds had been dividends received from the Bank. As result of applicable banking regulatory restrictions, that source of funds is no longer available.

You stated that approximately four months ago, the company announced that it had engaged financial advisors to explore strategic alternatives, including raising additional capital. To date, these efforts have been unsuccessful, and the company believes that the Proposed Transaction is the last available alternative.

You stated that the Proposed Transaction is intended to address the urgent liquidity needs of the company and the Bank, to help decrease the deposit run-off currently being experienced, and to bring the company and the Bank back into compliance with the applicable minimum capital requirements.

The company believes that following the Proposed Transaction it will be in compliance with all of the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed to effect a reverse split of its common stock if necessary to comply with the bid-price requirement.

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 financial condition and its likely need to seek bankruptcy protection in the event that the Proposed Transaction is delayed. The exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Proposed Transaction, a letter describing the Proposed Transaction and alerting them to its omission to seek the shareholder approval that would otherwise be required; (ii) the letter must indicate that the audit committee, or a comparable body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities.

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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 2008-20

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for a proposed issuance of warrants in a proposed transaction (the "Proposed Transaction") with the Investors.

According to the information you provided, in the Proposed Transaction, the company would issue to the Investors non-convertible notes and warrants. The warrants would be exercisable for more than 20% of the company's pre-transaction outstanding shares of common stock at a price less than the greater of book or market value. Without the requested exception, shareholder approval would be required of the issuance of the warrants pursuant to: (i) Rule 4350(i)(1)(B) because the potential issuance could result in a change of control; and (ii) Rule 4350(i)(1)(D)(ii) because the potential issuance would exceed 20% of the pre-transaction outstanding shares at a discount to the greater of book or market value. You stated that absent the exception, the company would be required to cease its operations and either file for bankruptcy protection or liquidate.

The company believes that its current and future financial operations, and its potential sources of funding, have been negatively impacted by several factors including economic conditions, which the company believes has caused it to experience lower than expected sales. You stated that in light of its difficulties, the company undertook extensive efforts to conserve cash and reduce expenditures, and it has laid-off approximately 20% of its employees. Nevertheless, the company projects that it will run out of cash in approximately three weeks unless it can complete the Proposed Transaction. Following the Proposed Transaction, the company expects to restructure its operations and to explore additional options for further cost reductions. You stated that without the Proposed Transaction, the company faces certain insolvency and would be unable to pursue these activities. The company has already retained bankruptcy counsel.

Over the past several months, the company unsuccessfully attempted to obtain financing either on terms that would not require shareholder approval or within a timeframe that would have allowed the transaction to be submitted to shareholders. With respect to the Proposed Transaction, the Investors indicated to the company that they would be unwilling to proceed if the warrant coverage were to be eliminated or reduced. In addition, the Investors indicated that they are not willing to proceed based on a deferred issuance of the warrants or a delay in the warrants' exercisability pending a shareholder vote.

As a condition to the Proposed Transaction, the company will adopt a budget that includes cost reduction and asset management measures intended to ensure that the company can reach positive cash flow operations without reliance on additional financing. These measures include the possible sale of certain assets (the "Assets Sale"). The company has retained investment banking firms to assist in the Assets Sale and has already entered into agreements for the sale of a significant portion of its assets.

The Investors do not include any officer, director, employee, or consultant of the company. An employee of Investor One serves on the company's board of directors. That director, however, is not a partner in, or a controlling shareholder or executive officer of, Investor One and will not be the beneficial owner of, or have a pecuniary interest in, the securities that Investor One would acquire in the Proposed Transaction.

The company believes that following the Proposed Transaction it will be in compliance with all of the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed to take the necessary action to address the bid price issue during the applicable compliance period.

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 financial condition and its likely need to seek bankruptcy protection in the event that the Proposed Transaction is delayed. The exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Proposed Transaction, a letter describing the Proposed Transaction and alerting them to its omission to seek the shareholder approval that would otherwise be required; (ii) the letter must indicate that the audit committee, or a comparable body of the board of directors, has expressly approved reliance on the exception; and (iii) the

company must also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities.

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 2008-21

This is in response to your correspondence regarding whether the company's proposed cancellation of previously granted stock options and the granting of new options (the "Cancellation and Issuance") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule"). You stated that the company believes that the actions comprising the Cancellation and Issuance are authorized under the Plans' current provisions. Both Plans were approved by the company's shareholders.

According to the information you provided, under the Cancellation and Issuance, the company would cancel certain options granted under the Plans and grant new options (the "Replacement Options") to the optionees whose options were cancelled. Prior to any cancellation becoming effective, the company would obtain the written consent from each optionee whose options would be cancelled. All the Replacement Options would be granted under Plan 2 using currently available grants. No changes would have to be made to Plan 2 for the Replacement Options to be granted.

Both Plans contain provisions authorizing the plan administrator: (i) to establish a program that would allow an opitonee to exchange an award under the plan for one or more other types of awards on terms as determined by the administrator, and (ii) to offer to buy out for a payment in cash or shares or other consideration any grant previously made.

Following our review of the information you provided, we have determined that the Cancellation and Issuance would not be a material amendment to the Plans under the Rule because the specific actions that would be involved are specifically permitted by the provisions of the Plans. As such, the Cancellation and Issuance would not require shareholder approval under the Rule.

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

Staff Interpretative Letter 2008-22

This is in response to your correspondence regarding whether the Director is eligible to be an independent member of the company's board of directors under Marketplace Rule 4200(a)(15)(B) (the "Rule") notwithstanding certain payments which the company makes to the Director's father (the "Director's Father") under a retirement plan as described below. Specifically, you asked whether the payments are "non-discretionary" for purposes of the Rule and, therefore, not included in the Rule's $120,000 annual limitation (the "Limitation").

According to the information you provided, the Director's Father is the company's co-founder and former chief executive officer. The Director has never been an officer or employee of the company. Approximately five years ago, the Director's Father ceased to be employed by the company and began receiving retirement benefits under the company's Non-Qualified Supplemental Executive Retirement Plan (the "SERP") which was established approximately ten years ago. The annual payments under the SERP (the "SERP Payments") to the Director's Father are of a fixed amount, not subject to change, and exceed the Limitation. You stated that the payments are legal obligations of the company not contingent in any way on continued service to the company in any capacity.

Following our review of the information you provided, we have determined that for purposes of the Rule, the SERP Payments are non-discretionary and, as such, are not considered in determining if there are payments to the Director or a family member of the Director in excess of the Limitation. We have reached this conclusion because the SERP Payments are legal obligations of the company under a retirement plan and are not contingent on continued service to the company by the Director's Father. Accordingly, under the Rule, the SERP Payments will not preclude the company's board of directors from finding that the Director is independent. Notwithstanding this determination, pursuant to Rule 4200(a)(15) and 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 2008-23

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to an issuance of securities in a private placement (the "Proposed Transaction"). You asked about the potential applicability of Marketplace Rules 4350(i)(1)(A), 4350(i)(1)(B), 4350(i)(1)(C), and 4350(i)(1)(D) (the "Rules").

According to the information you provided, in the Proposed Transaction, the company would sell shares of convertible preferred stock, which would be convertible into common stock. The potential issuance of common stock would exceed 20% of the company's pre-transaction outstanding shares. The conversion price would exceed the greater of book or market value and would not be subject to any adjustment provision other than in connection with stock splits and similar changes to the company's capitalization. The company expects that between 5 and 25 investors will participate in the Proposed Transaction. No investor individually, or as part of a group, would beneficially own, or have the right to acquire, more than 19.9% of the company's outstanding shares or voting power on a post-transaction basis (the "Ownership Limitation"). The proceeds would be used to provide additional capital and for other general corporate purposes. The lead investor in the Proposed Transaction would be entitled to designate one member of the company's board of directors until it ceases to own at least 3% of the company's voting equity securities. You sated that the Proposed Transaction is not connected with any acquisition or merger.

Following our review of the information you provided, we have determined that the Proposed Transaction would not require shareholder approval under the Rules. Rule 4350(i)(1)(A) would not require shareholder approval because no shares of common stock could be acquired by any officer, director, employee or consultant of the company at a discount to market value. Given the Ownership Limitation, the Proposed Transaction would not result in a change of control, and, therefore, would not require shareholder approval under Rule 4350(i)(1)(B). Because the issuance would not be in connection with the acquisition of the stock or assets of another company, shareholder approval would not be required under Rule 4350(i)(1)(C). Finally, shareholder approval would not be required under Rule 4350(i)(1)(D) because the conversion price would not be less than the greater of book or market value.

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

Staff Interpretative Letter 2008-24

This is in response to your correspondence wherein you asked whether shareholder approval would be required of an issuance of securities in a proposed transaction (the "Proposed Transaction") pursuant to Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule").

According to the information you provided, in a prior transaction (the "Prior Transaction"), which closed approximately five months ago, the company sold shares of convertible preferred stock (the "Preferred Stock") in a private placement to several investors (the "Investors"). In compliance with the Rule, the company received shareholder approval of the Prior Transaction to allow the Investors to convert the Preferred Stock into 20% or more of the company's total shares of common stock at a discount to the greater of the company's book value or market value. Accordingly, the Preferred Stock is currently fully convertible into common stock at any time at the option of the holder and will be mandatorily converted in approximately three years. You stated that subsequent to the Prior Transaction, the company's circumstances changed significantly due to the generally worsening credit and business environment affecting all companies in its sector.

Approximately three weeks ago, one of the Investors (the "Holder") initiated discussions with the company regarding the Proposed Transaction. In the Proposed Transaction, the Holder would convert all of its Preferred Stock into common stock, pursuant to the terms approved by shareholders, provided that it would receive, in addition, the number of shares of common stock having a value that would be approximately equal to the present value of the dividends that would be payable to the Holder if the Preferred Stock were held to the mandatory conversion date. The number of shares of common stock that could be issued in the payment of the dividends (the "Dividend Shares") would be less than 20% of the company's shares of common stock outstanding prior to the execution of the agreement for the Proposed Transaction. You stated that the Holder is not an officer, director, or employee of the company and that the Proposed Transaction will not result in a change of control. You indicated that the Proposed Transaction, which was not contemplated at the time of the Prior Transaction, would be valuable in helping the company enhance its equity capital position, preserve cash and improve liquidity.

Following our review of the information you provided, we have determined that the Rule will not require shareholder approval of the Proposed Transaction. The shares that would be issued to the Holder in the conversion of its Preferred Stock would be issued pursuant to terms that the company's shareholders have approved, and, therefore, would not be aggregated with the Dividend Shares for purposes of calculating whether the 20% threshold of the Rule could be reached. The Dividend Shares would not require shareholder approval under the Rule because the potential issuance is less than 20% of the company's pre-transaction outstanding shares. Please be advised that any similar future transactions may be aggregated with each other and with the Dividend Shares for purposes of the applicability of the Rule. Please note also 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.

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 2008-25

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to the company's assumption of certain of the Target's outstanding equity awards (the "Assumption"). Specifically, you asked whether the shares of the company's common stock that could be issued as a result of the Assumption should be excluded when determining whether shareholder approval is required pursuant to Marketplace Rule 4350(i)(1)(C)(ii) and IM-4350-5.

According to the information you provided, the company will acquire the Target in exchange for cash and shares of the company's common stock. Upon the closing of the acquisition, under the Assumption, the company will assume certain awards the Target previously made under the Target's equity compensation plans. Specifically, the company will assume certain of the Target's outstanding stock options and purchase rights and will maintain all of the existing terms under the Target's plan pursuant to which they originally were issued. Upon issuance of the company's shares in respect of such awards, the company will correspondingly reduce (consistent with the acquisition exchange ratio) the number of shares available under the company's equity compensation plans. You stated that all awards that will be assumed could have been granted under the terms of the applicable company plan.

Two of the three company plans that would be reduced in connection with the Assumption have been approved by the company's shareholders. The third plan did not require shareholder approval under the requirements in effect at the time of its adoption because it is a broadly-based plan. The company will not assume any awards under this plan for any person who will become an officer or director of the company as a result of the Acquisition. You stated that none of the plans was adopted in contemplation of the Acquisition.

Following our review of the information you provided, we have determined that the shares of the company's common stock that will be issued as a result of the Assumption will not count in determining whether the transaction involves the issuance of 20% or more of the company's common stock under Rule 4350(i)(1)(C)(ii). We have reached this conclusion because no additional shares will be available for issuance as a result of the Assumption. Instead, all such shares will come from the share reserves of the company's pre-existing equity plans, in a manner consistent with the terms of those plans. As such, the Assumption will not result in any increase in the potential dilution of the combined enterprise. 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 to the Acquisition in any way other than as addressed 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 2008-26

This is in response to your correspondence wherein you asked that the company be granted an exception to the shareholder approval requirements pursuant to Marketplace Rule 4350(i)(2) for a proposed issuance of convertible notes (the "Notes") in a transaction with the Investor (the "Proposed Transaction").

According to the information you provided, the company would borrow funds by issuing to the Investor the Notes, which would be convertible into more than 20% of the company's pre-transaction outstanding shares of common stock at a discount to the market value. Following conversion, the Investor could own a majority of the company's then outstanding shares of common stock. In addition, as part of the Proposed Transaction, the Investor would make a cash payment to the company in exchange for an exclusive license to develop and distribute one of the company's products. Without the requested exception, shareholder approval would be required of the issuance of the Notes pursuant to: (i) Rule 4350(i)(1)(B) because the potential issuance could result in a change of control; and (ii) Rule 4350(i)(1)(D)(ii) because the potential issuance would exceed 20% of the pre-transaction outstanding shares at a discount to the greater of book or market value. In addition, because two members of the company's board of directors are also on the board of the Investor, shareholder approval may be required pursuant to Rule 4350(i)(1)(A).

According to the information you provided, for over a year the company has unsuccessfully attempted to secure other financings. You stated that the two most cited obstacles to securing investments in the company have been the uncertainty with respect to approval of one of its products by the United States Food and Drug Administration (the "FDA") and the high cost to maintain the company's manufacturing infrastructure during the approval process. The company does not know whether or when it will secure FDA approval.

The company has implemented cash conservation measures including reducing its workforce by approximately 24%, reducing salaries for certain senior employees, and deferring payments to certain suppliers. Nevertheless, the company currently projects that it will have enough cash to fund operations for less than four weeks at which point it would no longer be financially or operationally viable absent the Proposed Transaction. You stated that its cash cannot sustain it through the duration of a proxy solicitation process and, consequently, the company would be required to cease operations and file for bankruptcy or otherwise liquidate, absent the exception.

You stated that the Investor is not willing to enter into the Proposed Transaction on terms that would comply with the shareholder approval requirements and is not willing to commit to any part of the Proposed Transaction subject to any material contingency. You indicated that the Proposed Transaction represents the company's best opportunity to avoid insolvency and the cessation of its operations. The company has retained bankruptcy counsel.

The company would use the proceeds from the Proposed Transaction to fund its activities in support of its efforts to obtain FDA approval. The company expects that the Proposed Financing would be sufficient to fund its operations for more than six months. Currently, the company is pursuing alternatives for an additional financing, and, in that regard, it has hired a placement agent. You stated that without the Proposed Transaction, however, the company would not be able to pursue this or any other additional financing (the "Subsequent Financing").

Two of the company's directors are also on the board of the Investor, and one of those directors is the Investor's CEO. Both of the directors recused themselves from all of the company's board decisions relating to the Proposed Transaction and will not receive any compensation from the company or the Investor in connection with the Proposed Transaction.

The company currently complies with all requirements for continued listing except for the bid price and stockholders' equity requirements and has addressed these deficiencies at a hearing before a NASDAQ Qualifications Panel (the "Panel"). As of the date of this letter, the Panel has not rendered a decision regarding these concerns. However, the company has received shareholder approval to effect a reverse stock split to address its bid price deficiency and believes that it will comply with the market value of listed securities alternative to the equity requirement when the Proposed Transaction is announced. The company also believes that it will satisfy the equity requirement if it is successful in completing the Subsequent Financing.

Based on our review of the circumstances described in your correspondence, we have determined to grant the exception from the shareholder approval requirements. This determination is based on your representations regarding the company's financial condition and its likely need to seek bankruptcy protection in the event that the issuance of the Notes is delayed. The exception is subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in connection with the issuance of the Notes, a letter describing the issuance of the Notes 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 reliance on the exception; and (iii) the company must also make a public announcement through the news media disclosing the same information as promptly as possible, but no later than ten days prior to the issuance of the securities. This determination in no way affects the jurisdiction of the Panel, or any decision that is rendered by the Panel, with regard to the matters under its consideration relating to the company's compliance with the continued listing requirements.

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 2008-27

This is in response to your correspondence regarding whether the course of action the company is considering taking under its equity compensation plans (the “Exchange Program”) would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the “Rule”). Under the Exchange Program, as more fully described below, the company would offer certain of its employees the opportunity to cancel underwater stock options, previously granted under the Plans, in exchange for a lesser number of restricted stock units (“RSUs”).

According to the information you provided, the Exchange Program is expected to be open for approximately one month and would be available to the company’s employees who are employed throughout the duration of the Exchange Program. However, you stated that executive officers of the company and members of its board of directors would not be eligible to participate. The exchange ratio has not been set but would be determined based on the exercise price of the exchanged options.

The RSUs would be granted from Plan 1 from its currently authorized share reserve. Pursuant to the provisions of Plan 1, the company may modify, or accept the cancellation of, outstanding options, whether or not granted under Plan 1, in return for new options at the same or a different exercise price. In addition, each of Plan 2, Plan 3, and Plan 4 provides that the company may replace outstanding options with new options for the same or a different number of shares, at the same or a different exercise price. As such, each of the Plans permits options to be re-priced.

Plan 1 permits the grant of stock options at a discounted exercise price, provided the exercise price is at least $0.0001 per share. You indicated that the grant of an option issued at such a nominal exercise price is essentially identical to the grant of an RSU for economic, tax, and accounting purposes.

Following our review of the information you provided, we have determined that the Exchange Program would not require shareholder approval under the Rule because it would not be a material amendment to the Plans. Specifically, while the effect of the Exchange Program is equivalent to a re-pricing of the options, each of the Plans already permits such a re-pricing. Further, Plan 1, from which the new RSUs would be granted, already allows for the grant of stock units. Plan 1 further provides that the company may replace outstanding options with new options, whether or not the outstanding options were granted under Plan 1, and such new options could be granted with a nominal exercise price. Given that you have indicated that the economic, accounting, and tax treatment of options with such a nominal exercise price are the same as RSUs, we do not consider it a material amendment to the Plans to permit the issuance of RSUs in the Exchange Program. In addition, the Exchange Program would not result in an increase in the number of shares available under the Plans because the RSUs would be granted from the currently authorized share reserve of Plan 1. Finally, the Exchange Program would not expand 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 2008-28

This is in response to your correspondence regarding whether an exchange program under the Plans (the "Exchange Program") and an amendment to Plan 2 (the "Plan 2 Amendment") would require shareholder approval pursuant to Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule").

According to the information you provided, under the Exchange Program the company would offer certain of its employees the opportunity to: (i) exchange certain underwater stock options granted under Plan 1 for a lesser number of new options with an exercise price equal to the current fair market value at the time the new options are granted; and (ii) exchange certain underwater stock options granted under Plan 2 for a lesser number of restricted stock units ("RSUs"). Although the exchange ratio has not been determined, the company intends that the Exchange Program would be a value-for-value exchange under Financial Accounting Standard No. 123(R), such that the fair market value of a new stock option or a new RSU, as applicable, would equal the fair market value of the original option. Current and former executive officers and members of the company's board of directors would not be eligible to participate.

Plan 1 specifically authorizes a reduction in the exercise price of any grants, sales, or awards (the "Repricing Provision"). While Plan 2 specifically prohibits such a reduction, it provides that awards may be bought out for a payment in cash or shares of common stock. Plan 2 currently allows for awards of stock options and stock purchase rights ("SPRs"). Under the provisions of Plan 2, the administrator is authorized to determine the terms and conditions of any SPR, including the number of shares covered by the SPR, and the price to be paid, which could be zero or par value.

Under the Plan 2 Amendment, awards of RSUs would be specifically authorized. RSUs would be awards of restricted stock subject to a vesting schedule, such that the common stock underlying the RSUs would not be issued until after any applicable vesting requirements are satisfied. Plan 2 already authorizes the granting of restricted stock pursuant to the SPRs. You stated that the accounting and tax treatments applicable to the RSUs are the same as those for awards of restricted stock, and that upon vesting, the economic benefits of a RSU are the same as those of restricted stock, and that the disclosure and registration requirements are the same under federal securities laws for RSUs and restricted stock.

Following our review of the information you provided, we have determined that neither the Exchange Program nor the Plan 2 Amendment would require shareholder approval under the Rule because neither would be a material amendment. Specifically, with respect to Plan 1, while the effect of the Exchange Program is equivalent to a repricing of the options, Plan 1 already permits such a repricing under the Repricing Provision. With respect to Plan 2, the Plan 2 Amendment does not result in a material increase in benefits to participants, or in an expansion of the types of awards available, because the RSUs are substantially the equivalent of restricted stock, awards of which are currently permissible under the Plan. Further, the Exchange Program would not be a material amendment to Plan 2 because Plan 2 provides that awards may be bought out for shares of common stock, which is what will occur under the Exchange Program.

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 2008-29

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to two proposed issuances of securities by the company (the "Proposed Transactions"). Specifically, you asked whether for purposes of Marketplace Rule 4350(i)(1)(D)(ii) (the "Rule"), either or both of the Proposed Transactions would be aggregated with a prior transaction (the "Prior Transaction").

According to the information you provided, approximately one year ago the company and the Investors entered into the agreements relating to the Prior Transaction, pursuant to which the company issued to the Investors shares of its common stock, at a discount to market value, and the Prior Transaction Notes. The Prior Transaction Notes are not convertible into common stock. The number of shares of common stock issued in the Prior Transaction was less than 20% of the company's pre-transaction total shares outstanding. The proceeds from the Prior Transaction were used to strengthen the company's balance sheet and to provide liquidity.

You stated that approximately two years before entering into the Prior Transaction, the company issued the Senior Notes, which are also non-convertible. Subsequent to the Prior Transaction, Investor One purchased a portion of the Senior Notes from certain of their holders (the "Senior Note Holders"), and simultaneously, the Senior Note Holders purchased a portion of the Prior Transaction Notes from Investor One.

Beginning approximately eight months ago, the company entered into individually negotiated transactions (the "Completed Note Exchanges"), whereby it issued shares of common stock, at a discount to market value, in exchange for the Senior Notes. The Investors were not a party to the Completed Note Exchanges. The number of shares issued in the Completed Note Exchanges was less then 10% of the company's total shares outstanding prior to the first exchange.

In the Proposed Transactions, the company would issue, in a series of individually negotiated transactions, shares of its common stock at a discount to market value: (i) in exchange for the Prior Transaction Notes held by holders other than the Investors; and (ii) in exchange for the Senior Notes held by one or more of the Investors.

In the Proposed Transactions, the company would not receive any cash proceeds but would reduce its indebtedness. You stated that there are no contingencies between or among the Prior Transaction and the Proposed Transactions and that the Proposed Transactions were not contemplated at the time of the Prior Transaction. You further stated that changes in circumstances subsequent to the Prior Transaction gave rise to the need for the Proposed Transactions. Specifically, you referenced changes in the financial markets, particularly with respect to the ability of financial institutions to access the capital markets. As a result of these changes, and based on the company's discussions with its banking regulator, the company's new senior management has focused on de-leveraging the company. You stated that the Proposed Transactions would not involve any officer, director, employee or consultant, or their affiliated entities.

Following our review of the information you provided, we have determined that shares issued in the Proposed Transactions would not be aggregated with shares issued in the Prior Transaction under the Rule because: (i) approximately one year passed between the Prior Transaction and the Proposed Transactions, (ii) circumstances changed since the Prior Transaction, (iii) the Proposed Transactions were not contemplated at the time of the Prior Transaction, and (iv) the need for the Proposed Transactions arose only after the closing of the Prior Transaction. We do note, however, that shares issued in the Proposed Transactions would be aggregated with shares issued in the Completed Note Exchanges in determining whether shareholder approval is required. We also note that you have not asked us to reach, and we have not reached, a conclusion as to whether any provision of Rule 4350(i) would require shareholder approval of the Proposed Transactions.

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 2008-30

This is in response to your correspondence regarding the applicability of the voting rights requirements of Marketplace Rule 4351 (the "Voting Rights Requirements") to certain rights that the Investor would receive allowing it to designate members to serve on the company's board of directors (the "Designation Rights") in connection with a proposed transaction (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction, the company would issue to the Investor a convertible note (the "Note") and warrants. The Notes would be convertible into shares of the company's common stock, and the warrants would be exercisable for additional common shares. The closing of the Proposed Transaction would be contingent on the approval of the company's shareholders. The Investor already owns shares of the company's common stock and shares of preferred stock (the "Preferred Stock") which are convertible into additional common shares.

The Designation Rights would allow the Investor to designate members of the board (the "Investor Representatives"), such that the percentage of the company's board members that the Investor could designate would approximately equal its percentage equity ownership interest in the company (the "Ownership Percentage") and would decline pro ratably with a decline in its Ownership Percentage. The maximum number of Investor Representatives would equal the product of: (i) the Ownership Percentage (calculated as described below), and (ii) the total number of directors on the company's board, including the number of Investor Representatives appointed or appointable to the board, provided that if such product is not a whole number, it would be rounded up to the next whole number.

For purposes of determining the Designation Rights, the Ownership Percentage would be determined by dividing: (i) the sum of the number of shares of common stock held by the Investor and any shares of common stock issuable upon conversion of the Preferred Stock and Note that are currently convertible at the Investor's option, by (ii) the sum of the total number of shares of common stock outstanding, any shares of common stock issuable upon conversion of the Preferred Stock and Note that are currently convertible at the Investor's option, and any shares of common stock issuable upon conversion of any similar securities that are currently convertible at the holder's option. The Ownership Percentage would not give effect to any shares of common stock that are issuable upon the future exercise of warrants.

The company's board is divided into three classes with staggered three-year terms, and the Investor Representatives would be appointed across each class in as equal proportion as possible. Once appointed, an Investor Representative would be nominated for re-election at the company's annual meeting of stockholders at which such Investor Representative's current term would expire. If the Ownership Percentage decreases after the initial appointment of the Investor Representatives, the number of Investor Representatives that the Investor is entitled to have would decrease pro ratably. To effect such a decrease, one or more of the Investor Representatives whose term was expiring would not be nominated for re-election at the company's next annual meeting. No decrease in the number of Investor Representatives would be affected by resignations from the board or by intra-term removals. If the Ownership Percentage falls below 21%, the Investor would have no further Designation Rights.

Following our review of the information you provided, we have concluded that the Designation Rights as described above would comply with the Voting Rights Requirements because the percentage of the board members that the Investor would be entitled to designate would approximately equal its percentage ownership interest in the company and would decline pro ratably with a decline in its ownership interest. Note that the Investor may not include the warrants in calculating the Ownership Percentage and may not designate any more directors than as calculated above. Please be advised that if an Investor Representative were to resign intra-term, the Investor could appoint a representative to fill the vacancy only to the extent justified by the above calculations at the time the vacancy would be filled.

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 2008-31

This is in response to your correspondence regarding the applicability of Marketplace Rule 4350(i)(1)(A) (the "Rule") to the company's proposed establishment of an employee stock trust (the "Trust") and the issuance of shares of the company's common stock to the Trust. As described below, shares issued to the Trust ("Trust Shares") would subsequently be used to fulfill the company's obligations under certain of its equity compensation plans or arrangements ("Equity Plans").

According to the information you provided, the Trust would be a funding vehicle, allowing the company to set aside funds, primarily in the form of shares of common stock, to satisfy its ongoing obligations under its employee benefit plans. The company would create the Trust and issue shares of its common stock to the Trust for no consideration. The Trust would be administered by an independent trustee. For financial reporting purposes, the Trust would be consolidated with the company. For tax purposes, assets of the Trust would be treated as assets of the company until distributed to the beneficiary.

Shares held in the Trust would be transferred only for uses either approved by the company's shareholders or for which shareholder approval is not required under NASDAQ rules. The number of shares available for issuance under an equity plan or arrangement which contains a limit on the number of shares available would be reduced by the number of Trust Shares used to fulfill the company's obligations under such plan or arrangement. As such, the Trust could not be used to increase the number of shares that could be issued under any of the company's Equity Plans.

You indicated that the company wishes to establish the Trust to further foster an employee ownership culture and to offer employees an additional level of security with respect to the company's ability to fund benefits under its employee benefit plans.

Following our review of the information you provided, we have determined that the establishment of the Trust, and the issuance of shares of the company's common stock to the Trust, would not require shareholder approval under the Rule. We have reached this conclusion because: (i) the Trust Shares would be used for Equity Plans only for which shareholder approval has been obtained or is not required; and (ii) the Trust could not be used to increase the number of shares that could be issued under any of the company's Equity Plans. 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 in any way other than as addressed 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 2008-32

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").

According to the information you provided, the Plan currently provides for awards of various types including Restricted Stock awards ("Restricted Stock Awards"), which are awards of common stock subject to forfeiture by the recipient. Pursuant to the provisions of the Plan, the Plan's administrator has the sole discretion: (i) to determine the conditions under which Restricted Stock Awards are required to be forfeited; and (ii) to establish the restricted period (the "Restricted Period"), which is the period of time that Restricted Stock Awards are subject to forfeiture. The Plan does not require that the Restricted Period have a minimum length. In addition, the Plan authorizes the administrator to waive, at its discretion, any forfeiture provisions in outstanding awards.

Pursuant to the Amendment, the Plan would provide for awards of Common Stock that are not subject to forfeiture ("Stock Awards").

Following our review of the information you provided, we have determined that the Amendment is not a material amendment under the Rule. In that regard, we note that the Amendment would not result in a material increase in benefits to participants, or in an expansion of the types of awards available, because the administrator currently has the authority to make awards that are substantially the equivalent of the Stock Awards. Specifically, the administrator has the authority to grant Restricted Stock Awards with a nominal Restricted Period and to waive any forfeiture provisions, thereby permitting the administrator to grant what are effectively Stock Awards. We also note that the Amendment would not result in an increase in the number of shares to be issued under the Plan or in an expansion of the class of eligible participants.

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.