

# NASDAQ Staff Interpretative Letters

## January – December 2009

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 While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at +1 301 978 8008 if they have questions regarding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 2009-1

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"). You stated that the purpose of the Amendment would be to eliminate an inconsistency regarding the Plan's eligibility requirements.

According to the information you provided, the Plan was originally adopted and approved by shareholders approximately six years ago. Certain amendments to the Plan were adopted and approved by shareholders approximately three years ago (the "Plan Amendments"). The amendments did not relate to the eligibility requirements. The Plan, both as originally adopted and as amended, contains a provision relating to eligibility (the "Eligibility Provision") which states that awards may be made to officers, employees, or consultants of the company or a subsidiary or an affiliate. However, as a result of what you described as an apparent scrivener's error, the Plan Amendments introduced a definition of a "Participant" in another section of the Plan as any employee of the company, a subsidiary or an affiliate. This definition does not include "officers" or "consultants."

You stated that it has always been the company's intent and practice to allow awards to be made to not only employees, but also to officers and consultants, and that the change in the definition of "Participant" in the Plan as amended was apparently an inadvertent error. Notwithstanding this definition, the Plan as amended contains the Eligibility Provision, which allows for awards to be made to officers and consultants as well as employees. Moreover, the proxy statements for the shareholders' meetings at which the shareholders approved the Plan and the Plan Amendments each specifically stated that the company's officers, employees and consultants would be eligible to participate in the Plan.

You stated that to eliminate the inconsistency, the company would adopt the Amendment to revise the definition of "Participant" to make it consistent with the Eligibility Provision and make other conforming changes.

Following our review of the information you provided, we have determined that the Amendment would not require shareholder approval under the Rule because it would not be a material amendment to the Plan. The Amendment would not expand the class of eligible participants because officers and consultants are already eligible to participate in the Plan under the Eligibility Provision. Furthermore, the proxy statements for the meetings where the company's shareholders approved the Plan and the Plan Amendments each stated that such persons are eligible to participate. In addition, the Amendment would not result in: (i) any increase in the number of shares available under the Plan; or (ii) any material increase in benefits to participants; or (iii) any expansion in the types of options or awards available.

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

## Staff Interpretative Letter 2009-2

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 transaction that will enable the company to repay or refinance its 2009 Debt Obligations (the "Proposed Transaction").

According to the information you provided, when a portion of the company's 2009 Debt Obligations recently matured, the company lacked sufficient capital to repay it (without seeking protection under the bankruptcy laws) and only the Investor was willing to extend adequate credit to refinance it. The Investor extended to the company an initial credit facility to allow the company to repay the portion of its 2009 Debt Obligations then due and to provide additional working capital.

The Investor also agreed to invest additional funds in the Proposed Transaction, which would enable the company to service or refinance the remainder of its 2009 Debt Obligations. In order to induce the Investor to commit to making such additional investment, the company agreed to issue two series of convertible preferred stock, one voting and one non-voting, convertible into more than 20% of the pre-transaction outstanding common shares at a discount to the market price of the company's common stock. The company also agreed that the Investor would be allowed to designate a number of board members that would approximately correspond to its initial percentage equity ownership interest in the company and would decline pro ratably with any future decline in its ownership percentage.

Without the requested exception, shareholder approval would be required pursuant to: (i) Rule 4350(i)(1)(B) because the 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 market value. Additionally, without the exception, the Proposed Transaction would not comply with the voting rights rule contained in Marketplace Rule 4351 because the voting convertible preferred stock would vote on an as-converted basis and could be converted at a discount to the market value.

You stated that the recent economic downturn and deepening credit crisis had forced the company to look for new sources of capital to survive as a going concern. You further stated that absent the funding from the Proposed Transaction, the company would have no choice other than to file for protection under applicable bankruptcy laws. In that regard, you noted that failure by the company to have in place a committed plan that would resolve the 2009 Debt Obligations within approximately two weeks of the date of your letter to us would constitute default under the company's credit facilities, which would accelerate the company's obligation to repay immediately the entire 2009 Debt Obligations and cross-accelerate repayment obligations with respect to a substantial portion of the company's other indebtedness. As a result, you indicated that unless the company completed the Proposed Transaction, it would be forced to seek bankruptcy protection.

You stated that for the past six months the company has been exploring its refinancing options with two separate investment advisors. However, due to the prevailing instability in the credit and financial markets, the company has been unable to enter into any other refinancing transaction. The company proposed various recapitalization structures to potential investors, including the Investor, which would have provided the company sufficient time to obtain shareholder approval. However, the Investor insisted that the stock issuance be completed in a manner necessitating complying with, or obtaining an exception from, the shareholder approval requirements, and the company was unable to identify any viable alternatives.

The company believes that the Proposed Transaction would enable it to service or refinance its 2009 Debt Obligations, as well as its other debt obligations due in the following years. The company expects that if it receives the exceptions discussed above and completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ except for the bid-price requirement. In that regard, the company has committed, if necessary, to complete a reverse stock split of a ratio sufficient 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 and voting rights rule. This determination is based on your representations regarding the company's inability to repay its 2009 Debt Obligations while maintaining adequate working capital 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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## Staff Interpretative Letter 2009-3

This is in response to your correspondence regarding the applicability of Marketplace Rule 4350(i)(1)(A) and IM-4350-5 (collectively, the "Rule") to the Plan if a proposed amendment (the "Amendment") were to be adopted. Under the Amendment, the Plan's evergreen provision (the "Evergreen Provision") would be eliminated. The Evergreen Provision currently provides that the number of awards available under the Plan automatically increases annually by a specified percentage of the total shares of common stock outstanding, subject to an annual maximum. Pursuant to the Rule, a plan that contains an evergreen provision cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. The Plan does not have an expiration date.

Pursuant to the Amendment, the Evergreen Provision would be eliminated prior to the ten-year anniversary of the date that shareholders last approved the Plan. Following the effectiveness of the Amendment, the Plan would continue to operate without an expiration date, but with a fixed number of shares available for issuance. No additional shares would be added to the Plan except pursuant to the Plan's existing provisions relating to the forfeiture or termination of outstanding awards or the provisions relating to protection against dilution, such as adjusting for stock splits.

Following our review of the information you provided, we have determined that the Amendment is not a material amendment to the Plan under the Rule. In that regard, we note that the Amendment would not provide (i) any increase in the number of shares to be issued under the Plan; (ii) any increase in the benefits available to participants; (iii) any expansion of the class of participants; or (iv) any expansion in the types of options or awards available. As such, shareholder approval is not required under the Rule for either the Amendment or the Plan following the Amendment. In addition, we have determined that following the Amendment, the Plan could continue to operate without a specific expiration date because it would then have a fixed number of shares available for issuance. Finally, the Plan would continue to be considered a grandfathered Plan, not subject to the requirements of the Rule, following the Amendment because the Plan was adopted prior to June 30, 2003, and the Amendment is not a material amendment to the Plan.

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## Staff Interpretative Letter 2009-4

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

According to the information you provided, in a prior transaction approximately eight months ago (the "Prior Transaction"), the company issued the Securities which are convertible into shares of the company's common stock at any time at the discretion of the holders (the "Holders"). Because the Prior Transaction was a public offering, shareholder approval was not required under the Rules.

In the Proposed Transaction, the company would offer the Holders the opportunity to exchange the Securities for: (i) that number of common shares that would be issuable upon conversion at the existing terms (the "Conversion Shares"); and (ii) cash and/or an additional number of common shares (the "Additional Shares") as an inducement to accept the offer given that the conversion price for the Securities is well in excess of the current market value of the company's common stock. The number of Additional Shares would equal less than 20% of the company's currently outstanding shares of common stock. None of the Holders would own as much as 10% of the company's outstanding shares of common stock as a result of the Proposed Transaction (the "Ownership Maximum").

You stated that at no time during the structuring of the Prior Transaction did the company, a financial institution, contemplate the Proposed Transaction. At that time, the company did not intend to seek conversion of the Securities prior to the fifth anniversary of their issuance. Economic and market conditions have worsened considerably more than could have been reasonably anticipated at the time of the Prior Transaction, and financial institutions have been particularly adversely impacted. As a result, financial institutions, including the company, need to raise capital to maintain financial strength and meet regulatory requirements. In that regard, you stated that there has been increased focus on the amount of tangible common equity that financial institutions have in relation to their assets ("Tangible Common Equity Ratio"). The Proposed Transaction would improve the company's Tangible Common Equity Ratio by replacing securities which are not treated as common equity, the Securities, with shares of common stock. The company believes that the Proposed Transaction would strengthen its capital position such that it would then have greater flexibility in taking other actions that would further improve its overall capital structure.

Following our review of the information you provided, we have determined that the Proposed Transaction would not require shareholder approval under the Rules. Given the Ownership Maximum, 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). With respect to Rule 4350(i)(1)(D), the Conversion Shares would not be aggregated with the Additional Shares for purposes of calculating whether the 20% threshold of Rule 4350(i)(1)(D) could be reached because: (i) the Conversion Shares would be issued in connection with an exchange offer for the Securities, which were issued in a public offering; (ii) several months will have passed between the Prior Transaction and the Proposed Transaction; and (iii) there have been unforeseen changes in both the company's circumstances and economic conditions generally since the Prior Transaction, which gave rise to the need for the company to enter into the Proposed Transaction at this time. The Additional Shares would not require shareholder approval under Rule 4350(i)(1)(D) because the potential issuance is less than 20% of the company's pre-transaction outstanding shares. NASDAQ is expressing no opinion on whether shareholder approval is required under any other provision of Rule 4350(i).

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## Staff Interpretative Letter 2009-5

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 the issuance of warrants in connection with a proposed amendment to the financial covenants under the company's Term Loan Agreement (the "Amendment").

Under the Amendment, the holders of the Term Loan have agreed to, among other things, provide relief from the financial covenants for one year in exchange for warrants to purchase more than 20% of the shares outstanding at a price less than both book and market value. Additional warrants with the same terms could be issued 90 days and 150 days after the effective date of the Amendment if at least 75% of the Convertible Notes are not converted into equity securities of the company. The company also agreed that the Term Loan holders would be allowed to designate a number of board members that would be approximately proportional to their post-exercise ownership interest in the company on a fully diluted basis.

Without the requested exception, shareholder approval would be required pursuant to: (i) Rule 4350(i)(1)(B) because the issuance could 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 greater of book or market value. Additionally, without an exception, the Amendment would not comply with the voting rights rule contained in Rule 4351 because the Term Loan holders would be able to appoint members to the board based on their post-exercise ownership interest, and not their actual equity interest in the company.

According to the information you provided, the Amendment is necessary to avoid the default and potential cross-default and cross-acceleration of the company's debt obligations. You stated that the company's financial predicament is not the result of insufficient cash. You explained that the recent economic downturn has affected the company's ability to meet certain financial ratios required by the Term Loan that were set approximately 2 years ago based on then-current projections, and in light of a relatively stable economy. Because these ratios are calculated on a rolling four-quarter basis, the company expects to fail to meet these ratios early this year because the results from the first and second quarters last year will be replaced with current results reflecting the severe economic slow-down. The Amendment would provide the company with at least four quarters of relief from its financial covenants. In addition, the company's independent auditors indicated that they would be unable to provide a "clean" audit opinion for its most recently completed fiscal year absent the Amendment, loan modifications to other loan agreements and significant borrowings thereunder, or an infusion of capital. A going concern opinion would result in a default under the Revolving Line of Credit, which in turn, could allow the Term Loan holders to declare the full amount of the Term Loan to be immediately due and payable. Furthermore, you stated that default under the Revolving Line of Credit would trigger a cross-default of the Convertible Notes resulting in the potential for cross-acceleration of all three debt instruments. The company does not have the cash on hand to satisfy repayment of the debt instruments and would be unable to arrange alternate borrowings. As a result, you stated that failure to enter into the Amendment will result in a cross-acceleration of these loans, which would require the company to seek bankruptcy protection.

You stated that the company has been in negotiations with the holders of the Term Loan for approximately four months and has explored numerous alternatives, including a possible sale of the company, to avoid the need for an amendment to the Term Loan. However, due to the prevailing instability in the credit and financial markets, the company has been unable to enter into any other refinancing transaction. The company proposed various amendments to the Term Loan holders which would have not required shareholder approval. However, the Term Loan holders insisted that the stock issuance be completed in a manner necessitating complying with, or obtaining an exception from, NASDAQ's shareholder approval requirements, and the company was unable to identify any viable alternatives.

The company believes that the Amendment would enable it to secure a supply of inventory sufficient to meet its needs for at least the next several months. The company expects that if it receives the exceptions discussed above and completes the Amendment, it will meet the requirements for continued listing on NASDAQ for the next several months, except for the bid-price requirement. In that regard, the company has committed, if necessary, to complete a reverse stock split of a ratio sufficient 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 inability to find alternative sources of capital and its likely need to seek bankruptcy protection in the event that the Amendment is delayed. In addition, we have determined to grant an exception from the voting rights requirement of Rule 4351. In that regard, we note that under the former SEC Rule 19c-4, as well as under the Rule 4351, it is appropriate to consider whether an issuance is designed to rescue a company in financial distress.

The exceptions are subject to the following: (i) the company must mail to all shareholders, not later than ten days before the issuance of any securities in the Amendment, a letter describing the Amendment 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 exceptions; 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 2009-6

This is in response to your correspondence regarding whether proposed amendments (the "Amendments") to the Plan would require shareholder approval pursuant to Listing Rule 5635(c) and IM-5635-1 (collectively, the "Rule").

According to the information you provided, the Plan is intended to meet the requirements of Section 423 of the Internal Revenue Code (the "Code"). Plans that meet the requirements of Section 423 do not require shareholder approval under the Rule. As required by the Code, the Plan was approved by the company's shareholders subsequent to its adoption. Pursuant to the Amendments, the company would establish a component of the Plan not intended to meet the requirements of Section 423 (the "Non-423 Component") to facilitate participation in the Plan by employees located in certain countries outside the United States ("Non-U.S. Employees"), in compliance with local laws and regulations, without running afoul of the Section 423 requirements. Employees residing in the United States and working for the company, a subsidiary, or an affiliate of the company in the United States would not be permitted to participate in the Non-423 Component.

Participants in the Non-423 Component would be subject to substantially the same requirements as participants in the Section 423 component. The amount of permissible contributions, the limit on the number of shares a participant may purchase, and the purchase price would be the same for both components. The establishment of the Non-423 Component would not result in the creation of a new plan. Instead, the Non-423 Component would be a part of the Plan, and the number of shares available under the Plan would not be increased as a result of the establishment of the Non-423 Component. The types of awards available under the Plan would not be expanded by the Amendments. Further, the Amendments would not generally change the eligibility requirements of the Plan, although participation in the Non-423 Component would be permitted for employees not otherwise eligible to the extent required by local law, and the company's compensation committee would be permitted to expand eligibility in the Non-423 Component to the non-U.S. employees of entities which are not subsidiaries of the company, but in which the company has an equity or ownership interest.

Following our review of the information you provided, we have determined that the Amendments as described herein, including the establishment of the Non-423 Component, would not require shareholder approval under the Rule. In that regard, we note that the provisions of the Non-423 Component would be substantially the same as those of the Plan. The Non-423 Component would provide the company's non-U.S. employees with substantially the same benefits as currently provided under the Plan. All shares issued under the Non-423 Component would come from the authorized share reserve of the Plan and would, therefore, not increase the number of shares available under the Plan. Further, the change in the eligibility requirements described above would not materially expand the class of eligible participants. As such, the Amendments would not result in an increase in the number of shares available for issuance, a material increase in the benefits to participants, a material expansion of the class of eligible participants, or an expansion in the types of awards available. Therefore, the Amendments (including the establishment of the Non-423 Component) would not be material amendments to the Plan and would not require shareholder approval under the Rule. Please be advised that we are expressing no opinion as to the status of the Plan, or the impact of the Amendments, under the Code.

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## Staff Interpretative Letter 2009-7

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 Listing Rules 5605(a)(2)(B) and 5605(a)(2)(D) (the "Rules") notwithstanding payments made by the company to the Director and the Firm in connection with the acquisition of the Target (the "Acquisition"). The Director has been a member of the company's board of directors for approximately fifteen years and has served as its chairman for about four years.

According to the information you provided, the company acquired the Target approximately two years ago. Prior to the closing of the Acquisition, the Director was the chairman of the board and an executive officer of the Target. The Director resigned from these positions immediately prior to the Acquisition. The Target's capital stock consisted of common stock and preferred stock. The Director personally owned shares of common stock of the Target equal to approximately 15% of the Target's outstanding capital stock. In addition, the Director is the founder and a managing director of the Firm, a venture capital firm which was the sole owner of the preferred stock. The number of shares of preferred stock was equal to approximately 40% of the Target's outstanding capital stock. The consideration for the Acquisition, which the company paid to the Target's shareholders, consisted of cash and shares of the company's common stock. All holders of the Target's common stock received the same consideration per share of Target common stock held (the "Common Stock Consideration"). Due to the liquidation preferences of the preferred stock, the Firm received a higher amount of consideration per preferred share than the per share common stock consideration (the "Preferred Stock Consideration"). You stated that the liquidation preferences were negotiated among the shareholders of the Target well in advance of the Acquisition and were in no way related to the Acquisition. The total number of shares of common stock issued as acquisition consideration was equal to approximately one percent of the company's total shares outstanding, and the aggregate cash consideration was approximately \$3,000,000.

In addition, the Firm had outstanding bridge notes of the Target, which were repaid by the Target at the closing of the Acquisition in accordance with the terms of such bridge notes. You represented that the terms of the bridge notes, including the interest rate and maturity triggers, were standard.

You stated that the Director and the Firm had no role in determining the allocation of the acquisition consideration among the stockholders of the Target because the allocation was entirely pre-determined on a pro-rata basis by the terms of the Target's securities. To evaluate the Acquisition, the company's board of directors established a committee of independent directors (the "Board Committee") of which the Director was not a member. You stated that the Director did not participate on behalf of the company in any actions with respect to the Acquisition and did not participate in any deliberations or other activities of the Board Committee.

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, notwithstanding the payment of the acquisition consideration to the Director and the Firm. The acquisition consideration is not compensation from the company under Rule 5605(a)(2)(B), and it is not a payment for property or services within the meaning of Rule 5605(a)(2)(D). In reaching this conclusion, we note that the acquisition consideration was paid pro-ratably to all shareholders of the Target based on their ownership interest in the Target. Although the Preferred Stock Consideration was larger than the Common Stock Consideration, such Preferred Stock Consideration was likewise determined pursuant to the terms of the preferred stock, which was negotiated among the Target's shareholders prior to the Acquisition and was in no way related to the Acquisition. The repayment by the Target of the bridge loan is also neither compensation by the company under Rule 5605(a)(2)(B) nor a payment by the company for property or services under Rule 5605(a)(2)(D), as the loan terms were standard and it was re-paid by the Target pursuant to its terms.

Notwithstanding this determination, pursuant to IM-5605, 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.

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## Staff Interpretative Letter 2009-8

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to a proposed issuance of securities in exchange for the Old Notes (the "Exchange"). You asked about the potential applicability of Listing Rules 5635(b) and 5635(d)(2) (the "Rules").

According to the information you provided, approximately one year ago the company issued the Old Notes, which are convertible into shares of the company's common stock. In the Exchange, for each \$1,000 principal amount of the Old Notes, the company would issue to each participating note holder: (i) a lesser principal amount of new notes (the "New Notes") convertible into shares of common stock (the "Conversion Shares"); (ii) a specified amount of cash (the "Cash Component"); and (iii) a specified number of shares of common stock or warrants exercisable for such shares (the "New Common Shares"). The Conversion Shares include shares of common stock that could be issued: (i) in connection with interest payments on the New Notes; and (ii) as a result of adjustments to the conversion rate, other than adjustments relating to stock splits and similar events.

The total number of shares of common stock that could be issued as a result of the Exchange (the "Aggregate Issuance"), which is calculated as the sum of the Conversion Shares and the New Common Shares, exceeds 20% of the pre-transaction outstanding shares. However, the Aggregate Issuance would be subject to a maximum number of shares (the "Maximum") such that the price per share (the "Price"), calculated as described below, would not be less than the greater of book or market value prior to entering into the agreement for the Exchange. The Price will be calculated by dividing the face amount of the Old Notes that are exchanged, less the Cash Component paid by the company, by the Aggregate Issuance. In addition, the company will not effectuate the Exchange if it could result in any stockholder owning 20% or more of the company's outstanding stock or voting power (the "Ownership Maximum"). The holders of the New Notes would not have any board representation, and there would be no additional agreement between the company and the note holders.

You stated that following the issuance of the Old Notes, the company's financial and liquidity positions have been negatively impacted as a result of the worsening global and national economic conditions, giving rise to the need for the company to seek additional sources of financing. The Exchange would decrease the amount of indebtedness, delay for at least two years payments that otherwise would be due under the Old Notes, provide greater operational and financial flexibility, and provide terms under the New Notes that would be more favorable than those under the Old Notes.

Following our review of the information you submitted, we have determined that the Exchange would not require shareholder approval under the Rules. Given that the Exchange would not result in any stockholder exceeding the Ownership Maximum, the Exchange would not result in a change of control and, therefore, would not require shareholder approval under Rule 5635(b). In addition, the Exchange is considered to be a new transaction under Rule 5635(d) because of the amount of time that has elapsed since the issuance of the Old Notes and the ensuing significant changes in circumstances giving rise to the company's need to enter into the Exchange. As such, because the Exchange is structured such that the Price is not less than the greater of book or market value, the Exchange would not require shareholder approval under Rule 5635(d). 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. 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 2009-9

This is in response to your correspondence regarding proposed amendments to the company's stock purchase plans (the "Amendments"). You asked whether the Amendments would require shareholder approval under Listing Rule 5635(c) and IM-5635-1 (collectively, the "Rule").

According to the information you provided, the company has two stock purchase plans: one for eligible employees in the United States (the "U.S. ESPP"), which is designed to qualify under Section 423 of the Internal Revenue Code, and one for eligible employees who are neither U.S. citizens nor U.S. residents for tax purposes (the "Non-U.S. ESPP"). The company obtained shareholder approval of the U.S. ESPP, as required by Section 423 of the Internal Revenue Code. The Non-U.S. ESPP has not been approved by shareholders; such approval was not required under the Listing Rules in effect at the time the Non-U.S. ESPP was adopted.

You stated that Section 423 generally does not permit qualified employee stock purchase plans to provide different terms or conditions for one or more subgroups of employees. For this reason, the company maintains the Non-U.S. ESPP, which operates in a manner that complies with Section 423 except for variations due to differences in local law. For example, the securities or employment laws in some countries may require that separate bank accounts be created for each employee's payroll deductions under a stock purchase plan, while other countries may prohibit such segregation of funds. You stated that other than variations due to such local law differences, the material features of the Plans are the same, including those relating to the purchase price, the length of the offering period, and the maximum amount that a participant can purchase during an offering period.

Pursuant to the Amendments, the company would add a specified number of shares of its common stock (the "Shares") to the shares available under the Non-U.S. ESPP and would correspondingly reduce, on a one-for-one basis, the number of shares available under the U.S. ESPP. You stated that the company is seeking to make the Amendments because it projects that the Non-U.S. ESPP does not have a sufficient number of shares available for future issuances.

Following our review of the information you provided, we have determined that the Amendments would not require shareholder approval under the Rule because the Shares would come from the available share reserve that shareholders approved for the U.S. ESPP and the terms of the Non-U.S. ESPP are substantially the same as those of the U.S. ESPP. The Amendments would not result in an increase in the number of shares available for issuance, a material increase in the benefits to participants, a material expansion of the class of eligible participants, or an expansion in the types of awards available.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-10

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to proposed issuances of common stock in exchange for one or more series of the Securities (the "Exchange"). Specifically, you asked whether the Exchange would be a public offering pursuant to IM-5635-3.

According to the information you provided, the Securities consist of two series of perpetual preferred stock and four series of trust preferred securities, which were initially issued at various times in underwritten public offerings. The first offering was conducted approximately twelve years ago, and the most recent, approximately five years ago. Four of the series are listed on NASDAQ, and the other two are traded over-the-counter. Each series has at least 600 beneficial owners.

The Exchange would be conducted as a tender offer. All of the holders of each series for which an offer is made would be offered common stock with a value expected to be more than the trading price, but less than the liquidation value, of the Securities that would be exchanged. The exact pricing would be determined by the company's board of directors after considering analysis from a nationally recognized investment bank. The number of shares of common stock that could be issued in the Exchange would exceed 20% of the pre-transaction outstanding shares. You stated that the Exchange would not vest control with any shareholder due, in part, to requirements applicable to the company as a financial institution.

The company is planning the Exchange in response to the adverse economic and market conditions over the past several months that have resulted in the need for financial institutions to raise equity capital to maintain financial strength and meet regulatory requirements. In the Exchange, the company would replace the Securities, which are not treated as common equity, with common stock.

Following our review of the information you submitted, we have determined that the Exchange would be a public offering pursuant to IM-5635-3. We have reached this conclusion because the Securities were initially publicly offered and are currently publicly traded, the Securities are widely held, and the Exchange would be by means of a registered exchange offer available at the same price to all holders of any series of the Securities that is the subject of an exchange offer.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-11

This is in response to your correspondence regarding the applicability of NASDAQ's voting rights requirements of Listing Rule 5640 and IM-5640 (collectively, the "Rule") to the voting structure that would be implemented in connection with the combination of the company and the Merger Partner.

The company currently has one class of common stock; each share has one vote. The Parent owns over 50% of the company's outstanding shares of common stock with the voting power limited to approximately 48% pursuant to an agreement between the company and the Parent entered into approximately one year ago. The Holder has the substantial ability to control the Parent through his position as Chairman of the Parent and his approximately 35% voting power in the Parent. The Merger Partner would have two classes of common stock, Class A with one vote per share and Class B with 10 votes per share.

In the merger, a holding company (the "Holding Company") would be formed such that the Merger Partner and the company each would become wholly-owned subsidiaries of the Holding Company. The Holding Company would be NASDAQ listed, and the Merger Partner and the company both would cease to be listed. The Holding Company would be comprised of assets contributed by both the Merger Partner and the company. The Holding Company would have two classes of common stock, Class A with one vote per share and Class B with 15 votes per share. In the merger, each shareholder of the company would receive one share of Holding Company Class A for each share of the company's common stock. Each holder of Merger Partner Class A and Class B, except the Holder and its affiliates (collectively, the "Holders"), would receive 1.1 shares of Holding Company Class A common stock for each share held. The Holders would receive 1.1 shares of Holding Company Class B common stock for each share of Merger Partner Class B stock held. As a result, the Holders would own all of the Holding Company's Class B common stock. The voting power of the Class B would be limited to 24% of the aggregate voting power of the Holding Company with any excess to be voted in the same manner, pro ratably, as all other shareholders. The shares of Holding Company Class B would automatically convert into Class A upon any proposed public transfer to a non-affiliate. In addition, the Holding Company would be able to re-purchase the Class B upon certain future events.

You stated that the ultimate purpose of the merger is to put the control of the company in the hands of all of its shareholders rather than one controlling shareholder, the Parent. In that regard, the Holders effective voting power would be reduced from 48% of the company to 24% of the Holding Company. In addition, the Holders would lose their current ability to block certain significant transactions and governance changes. You further stated that the company believes that simplifying the ownership structure would eliminate stock overhang and arbitrage issues, increase liquidity, and remove confusion over the valuation and trading of the company's common stock.

Following our review of the information you provided, we have determined that the voting structure of the Holding Company would not violate the Rule. The Holding Company's structure would effectively continue a voting structure similar to that of both the Merger Partner and the company, but would provide more meaningful voting rights to the Holding Company's public shareholders. While the company does not have a dual-class structure currently, the Holders effectively control approximately 48% of the voting power of the company through the control of the Merger Partner and can block significant transactions and governance changes. As such, the public holders of the company have limited voting power today, and the proposed transaction would therefore serve to enhance their voting power rather than to disenfranchise them. In addition, the proposed structure would provide a path towards the elimination of the dual-class structure in favor of a single class of common stock, requiring the conversion of the Class B into Class A under certain circumstances. As a result, the voting power of the current stockholders of the company would not be reduced or restricted by the formation of the Holding Company. Rather, the net result of the transaction would be to enhance the voting rights of the public shareholders at the expense of the Holders because the Holders would no longer be able to control the company. In addition, the fact that the holders of the Class B common stock of the Merger Partner (other than the Holders) would receive Class A common stock in the merger is permissible because those holders currently have little or no voting control with respect to the existing Class B shares as the Holders own more than 90% of the aggregate Class B shares. In reaching these determinations, we note that the proposed transaction is a bona fide transaction being effected for

legitimate business purposes aside from the changes to the voting structure and that, through the structure, the Holders' voting power would remain proportionate to, or less than, their current voting power.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-12

This is in response to your correspondence wherein you asked that the company be granted an exception to NASDAQ's shareholder approval requirements for a proposed transaction (the "Proposed Transaction") pursuant to Listing Rule 5635(f).

According to the information you provided, in the Proposed Transaction the company would sell shares of its common stock, and warrants exercisable for additional shares, to accredited investors in a private placement. Without the requested exception, shareholder approval would be required pursuant to Rule 5635(d) because the number of shares that could be issued exceeds 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value.

Regarding the company's financial condition, you stated that without the funds that would be raised in the Proposed Transaction, the company would run out of cash in approximately three weeks by which time the company would no longer be financially or operationally viable. You stated that delaying the Proposed Transaction for the time that it would take to get shareholder approval would be catastrophic to the company leaving it no viable alternative to bankruptcy. The company has already consulted with counsel regarding financial restructuring and bankruptcy. The company has concluded that the Proposed Transaction is its only opportunity to avoid insolvency and the cessation of its operations. The investors are not willing to enter into the Proposed Transaction on terms that would comply with the shareholder approval requirements, such as requiring shareholder approval of any issuance beyond 19.9% of the pre-transaction outstanding shares.

You stated that over a year ago, the company engaged an investment banker in an effort to raise sufficient capital to last through the current year and beyond. The effort was unsuccessful, and the engagement was terminated. Approximately ten months ago, the company successfully completed a private placement but in an amount substantially below its fundraising goal. Additional capital raising efforts have been unsuccessful due in part, the company believes, to the current economic climate. In the meantime, the company's cash reserves have been depleted by the increased costs of the development of its subsidiaries' products. To conserve cash and reduce expenses, the company has reduced its workforce by approximately 67%, closed one of its facilities, reduced management salaries, and negotiated reductions in liabilities.

You stated that the Proposed Transaction would rescue the company such that it would be financially and operationally viable. The company believes that following the Proposed Transaction, it will be in compliance with all of the requirements for continued listing on NASDAQ.

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 the company's belief that the Proposed Transaction is its only opportunity to avoid insolvency and the cessation of its operations. 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 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.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-13

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements of Listing Rules 5635(b) and 5635(d) (the "Rules") to a proposed issuance of common stock (the "Proposed Offering"). In addition, you asked whether the Proposed Offering would be aggregated with a prior private placement (the "Prior Offering") so as to cause the Prior Offering to violate Rule 5635(d). Relevant to the applicability of the Rules is whether the Proposed Offering would be a public offering pursuant to IM-5635-3.

According to the information you provided, prior to the public announcement of the Proposed Offering, the company would spend approximately four days contacting and meeting with approximately 30 to 40 institutional investors to identify potential core institutional investors. These institutions would be asked to sign confidentiality agreements or otherwise commit to maintain the confidentiality of any material non-public information. If the company determines to proceed with the Proposed Offering, then shortly after the close of the market the company would file a preliminary prospectus with the Securities and Exchange Commission specifying the number of shares to be offered and publicly announce the Proposed Offering by means of a press release that would contain information about the offering including how to obtain a copy of the preliminary prospectus. The Proposed Offering would be conducted by underwriters on a firm commitment basis. The shares which would be issued would be registered under the company's effective shelf registration statement.

You stated that promptly after the public announcement, the underwriters would undertake a broad and active marketing effort in the United States and Europe from approximately 4:30 p.m. EDT until shortly before the opening of the market the morning after the public announcement. During that period, the underwriters would expect to: (i) conduct a road show with the company involving telephonic or in-person meetings with approximately 30 to 40 institutional investors; (ii) make available an internet road show to prospective investors; (iii) undertake retail marketing through a network of more than 1,500 brokers to several thousand retail accounts; and (iv) distribute electronic copies of the preliminary prospectus to more than 100 prospective institutional investors and more than 1,500 retail brokers.

You stated that the Proposed Offering would be priced shortly before the opening of the market the morning after the public announcement at a discount to the prior day's closing price in a range, approximately 5 % to 10%, expected to be customary for underwritten offerings of comparable companies. In addition, you stated that you expect purchasers in the Proposed Offering will include 15 to 30 or more institutional investors and 300 to 500 retail investors. The number of shares that would be issued in the Proposed Offering exceeds 20% of the company's pre-transaction shares of outstanding common stock.

Following our review of the information you provided, we have determined that the Proposed Offering would be a public offering under IM-5635-3 because: (i) the offering would be a firm commitment offering of registered securities; (ii) the offering would be broadly marketed to both retail and institutional potential investors; (iii) the company expects that there would be many purchasers in the offering including both retail and institutions; (iv) the discount to the market is expected to be in a range consistent with underwritten offerings of comparable companies; and (v) the company would have little control over the Proposed Offering. Accordingly, because the Proposed Offering would be a public offering, shareholder approval would not be required under the Rules, and the Proposed Offering would not affect the compliance of the Prior Offering with the Rules. NASDAQ is expressing no opinion on whether shareholder approval is required under any other provision of Rule 5635.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-14

This is in response to your correspondence wherein you asked that the company be granted an exception to NASDAQ's shareholder approval requirements for a proposed transaction (the "Proposed Transaction") pursuant to Listing Rule 5635(f).

According to the information you provided, in the Proposed Transaction the company would convert all of the indebtedness it owes to the Debt Holder into shares of its common stock at a conversion price in excess of the current market price. Following the Proposed Transaction, the Debt Holder together with its affiliates would beneficially own approximately 60% of the company's then outstanding common shares. Currently, no shareholder owns as much as 10% of the outstanding shares. Without the requested exception, shareholder approval would be required pursuant to Listing Rule 5635(b) because the issuance would result in a change of control.

You stated that the company is an operator of upscale restaurants and that during the recent economic downturn consumers have eaten out much less than before, resulting in mounting losses and the depletion of the company's cash. As a result, while the company has halted its planned development of new locations and has negotiated with its suppliers and landlords the reduction of certain costs, expenses, and lease obligations, the company is experiencing significant negative cash flow and has been unable to meet its obligations with its lessors and other creditors.

You stated that the company has received default notices from some of its creditors and landlords and that such notices are expected to increase dramatically as more time elapses without payment. Defaults on leases likely would cause the company's vendors to demand cash on delivery for future transactions resulting in the company having to cease operations because it would be unable to acquire a food supply for its restaurants. Without the Proposed Transaction, the company would have enough cash to meet its obligations for only one month. In addition, you stated that any delay in the Proposed Transaction beyond a month, or perhaps slightly more if its creditors would agree, would mean that the company would be forced to file for bankruptcy. The company has retained counsel to prepare a bankruptcy filing, should one become necessary.

The Debt Holder is one of the company's landlords and is its primary store equipment lessor. The amount the company owes to the Debt Holder under the leases represents substantially all of the company's secured indebtedness, and the Debt Holder has indicated it may declare the leases in default. Pursuant to the Proposed Transaction, however, the default on the leases with the Debt Holder would be avoided. In addition, the amount of the ongoing lease payments the company would owe to the Debt Holder would be substantially reduced, which you stated is necessary for the company's ongoing financial viability. You stated that the timetable for obtaining shareholder approval for the Proposed Transaction would require the company to exceed its cash position and that the company needs to take quick action before it is forced into bankruptcy by its creditors. The company has been unable to structure a transaction that would not require shareholder approval, and it has sought strategic alternatives without success.

The company believes that the Proposed Transaction would solve its current cash flow problems and also allow the company to seek additional financing. The company expects that if it completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed, if necessary, to complete a reverse stock split of a ratio sufficient 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 the company's representations that it needs to quickly proceed with the Proposed Transaction to avoid bankruptcy and the possible cessation of its operations. 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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## Staff Interpretative Letter 2009-15

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements of Listing Rules 5635(b), 5635(d), and IM-5635-2 (the "Rules") to a proposed issuance of securities (the "Proposed Transaction"). In addition, you asked about the applicability of the voting rights requirements of Listing Rule 5640 and IM-5640 (the "Voting Rights Requirements") to rights that the Investor in the Proposed Transaction would receive allowing it to designate members to serve on the company's board of directors and to have non-member board observers (the "Designation Rights").

The company has two classes of common stock, Class A, which is listed on NASDAQ, and Class B, which is not publicly traded (collectively, the "Common Stock"). The Class A has one vote per share, and the Class B has ten votes per share. The number of shares of Class A outstanding equals approximately 97% of the shares of Common Stock outstanding, and the number of shares of Class B outstanding equals approximately 3% of the shares of Common Stock outstanding. The aggregate voting power of the Class A is approximately 79% of the company's total outstanding voting power, and the Class B, approximately 21%. The company's chief executive officer owns all of the Class B shares. No other shareholder owns as much as 10% of the company's outstanding voting power or outstanding shares of Common Stock.

According to the information you provided, in the Proposed Transaction the company would issue to the Investor: (i) non-convertible senior secured notes with an aggregate principal amount equal to approximately three times the current aggregate market value of the company's outstanding shares of Common Stock; and (ii) warrants to purchase shares of Class A equal in number to approximately 55% of the pre-transaction outstanding shares of Common Stock, subject to the restrictions described below (the "Warrants"). On a post-transaction basis, the potential issuance would equal approximately 36% of the then outstanding shares of Common Stock and approximately 31% of the company's then outstanding voting power.

Pursuant to the Designation Rights, upon the closing of the Proposed Transaction one designee of the Investor would be added to the company's board of directors (the "Board"), representing not more than 11% of the total number of members of the Board. Following shareholder approval of the Proposed Transaction, the Investor would be entitled to a second designee on the Board, with the two designees representing not more than 20% of the total number of members of the Board. In addition, the Investor would be entitled to have one or two non-voting observers attend meetings of the Board. At any given time, the number of designees together with the number of observers would not exceed two. The audit, nomination, and compensation committees could exclude the observers from the proceedings at the discretion of the respective committee. The Designation Rights would include step-downs for reduced Board representation if the size of the Investor's stake in the company were to decrease.

Absent shareholder approval, the exercise price of the Warrants would not be less than the greater of book or market value prior to entering into the binding agreement (the "Exercise Price Restriction"). In addition, absent shareholder approval, a holder of the Warrants would not be entitled to exercise Warrants if immediately following such exercise: (i) the aggregate voting power of such holder (or any group including such holder) would exceed 19.9% of the aggregate voting power of the company; or (ii) the aggregate shares of the class of common stock underlying the Warrants owned by such holder (or any group including such holder) would exceed 19.9% of the company's aggregate outstanding common shares (the "Ownership Limitation").

The Exercise Price Restriction and the Ownership Limitation would apply until such time as shareholder approval is obtained. The Warrants would not be exercisable to any extent until the earlier of: (i) shareholder approval; (ii) the holding of a specified maximum number of meetings of the company's shareholders at which shareholder approval would be sought; and (iii) a specified maximum period of time after the closing of the Proposed Transaction during which the company would be permitted to seek shareholder approval pursuant to the agreement relating to the Proposed Transaction. The interest rate on the notes would increase over time unless shareholder approval has been obtained.

Following our review of the information you provided, we have determined that the Proposed Transaction, structured as you described and as summarized above, would satisfy the requirements of the Rules. Given the Ownership Limitation, the Proposed Transaction could result in a change of control only after shareholder approval is obtained, thereby satisfying Rule 5635(b). Given the Exercise Price Restriction, the exercise price could be less than the greater of book or market value only after shareholder approval is obtained, thereby satisfying Rule 5635(d). With respect to IM-5635-2, no shares of common stock could be issued in the Proposed Transaction (i.e., the Warrants would not be exercisable to any extent), unless

either: (i) shareholder approval has been obtained, or (ii) shareholder approval could no longer be sought pursuant to the terms of the agreement. As such, absent shareholder approval, the Warrant would be exercisable only if there would not be a subsequent shareholder vote to approve the Proposed Transaction, and then only to the extent permissible under the Exercise Price Restriction and the Ownership Limitation. Accordingly, the Proposed Transaction complies with IM-5635-2. In addition, the Designation Rights satisfy the Voting Rights Requirements given the economics of the Proposed Transaction relative to the company's aggregate market value and because such rights would decline if the size of the Investor's stake in the company were to decrease.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-16

This is in response to your correspondence regarding whether proposed amendments (the "Amendments") to the Plans would require shareholder approval under Listing Rule 5635(c) and IM-5635-1 (collectively, the "Rule"). The Amendments, as described below, would extend the period of time following the termination of certain optionee's service with the company that outstanding vested stock options could be exercised (the "Post-termination Exercise Period").

According to the information you provided, both Plans were approved by the company's shareholders and provide for a limited Post-termination Exercise Period. Currently, unless the option agreement provides otherwise, the Post-termination Exercise Period is generally 90 days for executive officers and other employees and six months for non-employee members of the board of directors.

You stated that pursuant to the Amendments, the Post-termination Exercise Period would be extended for vested options held by executive officers and non-employee board members ("Officers and Directors") because these individuals may from time to time be precluded from selling shares of the company's stock as a result of being in possession of material, non-public information during the Post-termination Exercise Period. The Amendments would extend the Post-termination Exercise Period for Officers and Directors to 12 months, but in no event later than the expiration of the option as set forth in the option agreement. Both Plans currently authorize the plan administrator to extend the post-termination exercisability of stock options.

Following our review of the information you provided, we have determined that the Amendments would not require shareholder approval under the Rule. As a general matter, extending the term of an option is not a material amendment provided that the extension is not beyond the maximum term permissible under the plan. Moreover, the Plans specifically permit the extension of exercise periods. As set forth in IM-5635-1, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. In addition, the Amendments would not result in an increase in the number of shares available for issuance, a material increase in the benefits to participants, a material expansion of the class of eligible participants, or an expansion in the types of awards available. Accordingly, the Amendments are not material amendments, and, therefore, would not require shareholder approval under the Rule.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-17

This is in response to your correspondence requesting: (i) an exemption under Listing Rule 5635(f) from NASDAQ's shareholder approval requirements and (ii) an exemption from the voting rights requirements of Listing Rule 5640 and IM-5640 (collectively, the "Voting Rights Rule"), with respect to a proposed transaction ("Proposed Transaction"). The company is a provider of investment banking and brokerage services.

According to the information you provided, the company proposes to issue to multiple investors (the "Investors") preferred stock convertible into shares of the company's common stock and warrants exercisable for additional common shares. Approximately 90% of the securities would be purchased by persons or entities not currently affiliated with the company. The remainder would be purchased by officers, directors, or employees of the company (the "Insiders") who would be participating in the Proposed Transaction as a condition imposed by the lead outside investor and on the same terms as all other Investors. The purchase price would be a price less than the greater of book or market value, and the number of common shares that could be issued upon conversion and exercise exceeds 20% of the pre-transaction outstanding shares.

As such, without the requested exceptions, the Proposed Transaction would require shareholder approval pursuant to: (i) Listing Rule 5635(b) because the issuance would result in a change of control; (ii) Listing Rule 5635(c) because the issuance at a discount to the Insiders would be considered equity compensation; and (iii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. Additionally, without the requested exception, the Proposed Transaction would not comply with the Voting Rights Rule because the preferred stock would effectively have greater voting rights than the common shares as, although it would vote on an as-converted basis, it would convert at a discount to the market value.

According to the information you submitted, the severity of the company's current financial situation is largely a result of litigation brought against it in connection with the activities of a former client and a former employee of the company (the "Litigation"). The company has spent several million dollars in legal fees over the past year in connection with the Litigation and recently entered into a tentative settlement with the litigants for an amount equal to approximately 75% of the amount of its most recently reported stockholders' equity. The company believes that a binding settlement agreement cannot be reached unless the company has access to the funds that would be raised in the Proposed Transaction. The proceeds from the Proposed Transaction would be used to provide funds for the settlement and to inject funds into the company's operations.

You have also indicated that the company is operating in a challenging economic environment. The financial impact of these problems has made it difficult for the company's broker-dealer subsidiary, which comprises substantially all of the company's revenues, to remain in compliance with the FINRA minimum net capital requirements. Non-compliance with these requirements could result in FINRA forcing the company to cease operations.

While the company has maintained operations over the past few months through a series of bridge financings, it believes that the Proposed Transaction will provide sufficient funding for the settlement of the litigation and its continued operations. The company's management believes that without the Proposed Transaction, the company may be forced to dissolve in the near future, and the stockholders likely would receive nothing in such dissolution. The company has unsuccessfully explored alternative financings including structures that would satisfy the shareholder approval requirements.

With respect to the participation of the Insiders, you stated that the lead investor is not willing to invest unless such Insiders also participate and that such a refusal would likely preclude a successful consummation of the Proposed Transaction. The terms of the transaction were negotiated with the lead investor, and the Insiders are required to accept the same terms. With respect to the voting power of the preferred stock, you stated that all of the terms of the securities were heavily negotiated with the lead investor and that the company believes that the Proposed Transaction represents the best available option for achieving value for its stockholders and, thus, is in the best interest of stockholders.

In the Proposed Transaction, the company expects to raise sufficient capital to continue operating. The company expects that if it completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company

has committed, if necessary, to complete a reverse stock split of a ratio sufficient to comply with that 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 requested exceptions. This determination is based on the company's representations that it needs to quickly proceed with the Proposed Transaction to avoid the possible cessation of its operations. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must 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.

With respect to the Insider participation, we note that we believe that an exception from the equity compensation rule is generally not appropriate, but have approved the exception in this case because of the circumstances present. Specifically, the Insiders are participating only at the insistence of the lead investor, and the Proposed Transaction likely would not close absent their participation. In addition, the lead investor, and not the Insiders, negotiated the terms with the company, and the aggregate size of the Insiders' participation is relatively small.

Lastly, we determined to grant an exception from the Voting Rights Rule applicable to the voting power of the preferred stock since both that Rule and former Rule 19c-4 permit such an exception where necessary to rescue a company in financial distress.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-18

This is in response to your correspondence regarding the applicability of the shareholder approval requirement of Listing Rule 5635(d) (the "Shareholder Approval Rule") and the voting rights requirements of Listing Rule 5640 and IM-5640 (collectively, the "Voting Rights Rule") to a proposed issuance of securities (the "Proposed Offering").

According to the information you provided, in the Proposed Offering the company would offer shares of a newly designated senior common stock (the "Senior Common") at a fixed price (the "Offering Price") in a continuous private placement on a best-effort basis over a twenty-four month period (the "Offering Period"). The company expects that during the Offering Period, it will accept subscription agreements which would become effective twice monthly. In addition, each holder of the Senior Common would be entitled to reinvest distributions that would be paid on the Senior Common for additional shares of Senior Common at the Offering Price. Except where required by law, the Senior Common would be non-voting.

The Senior Common would be convertible into shares of the company's class of common stock which is listed on NASDAQ (the "Common Stock"). The number of shares of Common Stock that could be issued exceeds 20% of the pre-offering outstanding shares. The conversion price would be equal to the greater of the highest book or market value per share during the Offering Period. The book value would be that value attributable to the company's common stockholders' equity and would not give effect to the company's outstanding preferred stock.

Following our review of the information you provided, we have determined that the Proposed Offering, structured as you described, would satisfy the Shareholder Approval Rule and the Voting Rights Rule. Although the potential issuance exceeds 20% of the pre-offering outstanding shares, shareholder approval would not be required under the Shareholder Approval Rule because the conversion price could not be less than the greater of book or market value per share. The Proposed Offering would comply with the Voting Rights Rule because the issuance of the Senior Common would not disparately reduce or restrict the voting rights of existing shareholders in that it is non-voting, except as required by law. Please note that you have not asked us to reach, and we have not reached, a conclusion as to the applicability of the Listing Rules in any way other than as addressed herein.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-19

This is in response to your correspondence regarding whether certain members of the company's board of directors (the "Directors") may be considered independent directors pursuant to Listing Rule 5605(a)(2) and IM – 5605.

According to the information you provided, as a for-profit educational institution, the company is subject to a federal regulation (the "Regulation") which could negatively impact the company's access to government funding in the event of a change of control. Under the Regulation, a change of control would be deemed to have occurred if the ownership position of the largest shareholder were to fall to below 25%.

Prior to the company's initial public offering ("IPO") approximately 10 months ago, the Largest Investor held approximately 31% of the company's outstanding shares of common stock. In connection with the IPO, the Largest Investor and certain other investors (the "Other Investors") entered into a voting agreement such that upon completion of the IPO, the Largest Investor had voting power over approximately 43% of the outstanding shares (the "Voting Agreement"). Under the Voting Agreement, the Other Investors granted the Largest Investor a proxy to vote their shares, but did not give dispositive or any economic interest in those shares. You stated that the Voting Agreement is permissible under the Regulation and that no change of control will be deemed to have occurred unless the shares subject to the Voting Agreement decreases to less than 25%.

You stated that since the IPO, the Other Investors have sold some of their stock and the company anticipates that over time the voting power of the Largest Investor could decrease to less than 25% as a result of the sale of additional shares that are subject to the Voting Agreement and additional issuances of common stock by the company. To prevent a change of control under the Regulation, the Fund Investor has offered to join the Voting Agreement.

The Directors are managing directors of the Fund Investor. You stated that none of the provisions of Rule 5605(a)(2) precludes the Directors from being considered independent and that the company's board of directors has determined that no other relationship exists that would interfere with the Directors' exercise of independent judgment in carrying out the responsibilities of a director. The Directors would not serve on the audit committee. The Voting Agreement relates only to the voting of the common stock that is subject to the agreement and in no way relates to the Directors' voting as board members on matters that come before the board.

Following our review of the information you provided, we have concluded that the Fund Investor's joining the Voting Agreement would not preclude the company's board from finding that the Directors are independent, provided that the total voting power controlled through the Voting Agreement is less than a majority of the company's outstanding voting power. We have reached this conclusion based on the provision of IM-5605 which states that NASDAQ does not believe that ownership of company stock by itself would preclude a board finding of independence. Please note that pursuant to IM-5605, 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 2009-20

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements to the issuance of shares of common stock in exchange for shares of currently outstanding preferred stock (the "Exchange"). Specifically, you asked about the applicability of Listing Rule 5635(c) if officers and directors (the "Officers and Directors") of the company participate in the Exchange.

According to the information you provided, the company issued preferred stock in private placements approximately fifteen months ago to multiple investors including the Officers and Directors in a shareholder-approved transaction. The preferred stock is currently convertible into common stock at the option of the holders. The company is planning the Exchange in response to the adverse economic and market conditions over the past several months that have resulted in the need for financial institutions, such as the company, to raise equity capital to maintain financial strength and meet regulatory requirements. In the Exchange, the company would replace the preferred stock with common stock.

Under the terms of the Exchange, the number of shares of common stock that would be issued for each share of preferred stock is the sum of: (i) the number of shares into which it is currently convertible (the "Conversion Shares"), and (ii) the number of shares equal in value to 75% of the value of future dividends that that would be payable if the preferred stock were to remain outstanding (the "Dividend Shares"). The aggregate number of shares that could be issued in the Exchange, including both the Conversion Shares and the Dividend Shares, would be less than 20% of the pre-transaction outstanding shares of common stock.

Pursuant to Listing Rule 5635(c), shareholder approval would be required if the Exchange could result in common stock being issued to the Officers and Directors at a price less than market value at the time of the Exchange (the "Market Value"). For this purpose, the Market Value would be the last closing consolidated bid price of the common stock prior to the closing of the Exchange. The price at which the common stock would be issued in the Exchange would be determined by dividing: (i) the amount which the company received for each share of preferred stock and at which the company reflects each preferred share on its balance sheet, by (ii) the aggregate number of Conversion Shares and Dividend Shares issued in the Exchange for each preferred share (such quotient being the "Offer Price"). Based on the information you submitted, the issuance to the officers and directors in the Exchange would not require shareholder approval under the Rule if the Offer Price, calculated as described above, is not less than the Market Value. 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. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this interpretation*

## Staff Interpretative Letter 2009-21

This is in response to your correspondence regarding the applicability of NASDAQ's shareholder approval requirements of Listing Rules 5635(b) and 5635(d) (the "Rules") to a proposed issuance of securities (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction the company would issue warrants (the "Warrants") to a current shareholder (the "Shareholder") in connection with the Shareholder's providing a credit facility (the "Credit Facility"). The Warrants would be exercisable for less than the book value per share. The aggregate number of shares of common stock that could be issued upon the exercise of the Warrants would be limited to 19.99% of the pre-transaction outstanding shares of common stock subject to proportional adjustment for stock splits and similar events (the "Aggregate Limit"). In addition, a holder of the Warrants, whether the Shareholder or a subsequent transferee, could not exercise the Warrants if the result would be the holder's owning more than 19.99% of the company's outstanding shares of common stock or voting power after giving effect to the shares issued as a result of such exercise (the "Ownership Limit"). The Credit Facility is not convertible into common stock.

Following our review of the information you provided, we have determined that the Proposed Transaction, structured as you described, would not require shareholder approval under the Rules. Given the Ownership Limit, shareholder approval is not required under Rule 5635(b) because the issuance could not result in a change control. Given the Aggregate Limit, shareholder approval is not required under Rule 5635(d) because the number of shares that could be issued is less than 20% of the pre-transaction outstanding shares.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-22

This is in response to your correspondence wherein you asked that the company be granted an exception from the shareholder approval requirements pursuant to Listing Rule 5635(f) for a proposed transaction (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction the company would issue shares of common stock to multiple investors. Without the requested exception, shareholder approval would be required pursuant to: (i) Listing Rule 5635(b) because the issuance could result in a change of control, and (ii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value.

You stated that without the Proposed Transaction, the company would run nearly out of cash in approximately two weeks and, as a result, would face almost certain insolvency and a likely bankruptcy filing. You stated that the company's predicament is attributable to several factors including significant losses and cash flow deficits in recent years and the recent conditions of the global financial and credit markets, which have made it difficult for the company to obtain additional loans. The company's lead secured lender has suspended an expansion of the company's line of credit but retained its interest in the company collateral. As a result, the company does not have sufficient unencumbered collateral to enter into an arrangement with any replacement lender. You further stated that the sharp decline in discretionary consumer spending has also contributed to the company's financial struggles and has negatively impacted its financial performance. As a result of its difficulties, the company has become significantly behind in its payments to its vendors. Without the Proposed Transaction, the company may be forced to default on the principal and interest due to its primary lender in approximately two weeks, and such a default would trigger a cross-default on the company's obligations to another lender. To conserve cash, the company has consolidated operations and reduced its workforce.

The company believes the Proposed Transaction would raise capital sufficient to provide for its financial rescue, funding its ongoing operations and enabling it to meet its obligations to its lenders and vendors. The company expects that if it completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed, if necessary, to complete a reverse stock split of a ratio sufficient to comply with that requirement. You stated that the investors in the Proposed Transaction were not willing to enter into a transaction that would comply with the shareholder approval requirements and that the company unsuccessfully attempted to obtain alternative sources of funding.

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 requested exception. This determination is based on your representations that the company needs to quickly proceed with the Proposed Transaction to avoid insolvency. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must 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 2009-23

This is in response to your correspondence wherein you asked that the company be granted an exception from the shareholder approval requirements pursuant to Listing Rule 5635(f) for a proposed transaction (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction the company would issue shares of common stock and warrants exercisable for additional shares in exchange for indebtedness (the "Outstanding Debt") owed by the company to a lender (the "Lender"). Without the requested exception, shareholder approval would be required pursuant to: (i) Listing Rule 5635(b) because the issuance would result in a change of control, and (ii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. In connection with the Proposed Transaction, the lender also would provide collateral support for a loan from a financial institution, which would be funded at the closing of the Proposed Transaction (the "Loan").

You stated that the company is unable to meet its current obligations, that its short-term liabilities are approximately four times the amount of its cash and cash equivalents, and that the company would have been forced to have sought bankruptcy protection already if not for the forbearance of certain of its vendors. You also stated that if the company delays the Proposed Transaction for the time necessary to seek shareholder approval, it would likely be forced to seek bankruptcy protection and that the Proposed Transaction is its last available alternative to secure financing before it must seek such protection.

You stated that unfavorable global economic conditions have created liquidity problems for certain of the company's customers, which has caused them to default on their commitments to the company under long-term contracts. In addition, the company has been unable to secure additional contracts due to a significant decline in the market price of the company's primary product. Finally, you noted that the company was negotiating a transaction whereby it would be acquired, which recently unexpectedly fell through.

The company believes the Proposed Transaction would solve its financial troubles. The company would be relieved of the obligation, which it would be unable to meet, to repay in cash the Outstanding Debt upon maturity. The Loan would provide sufficient liquidity to pay down past due accounts payable thereby enabling the company to avoid immediate foreclosure and bankruptcy and deliver on the significant contracts it already has in place. The company expects that if it completes the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company has committed, if necessary, to complete a reverse stock split of a ratio sufficient to comply with that 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 requested exception. This determination is based on your representations that the company needs to quickly proceed with the Proposed Transaction to avoid bankruptcy. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must 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 2009-24

This is in response to your correspondence requesting an exception from the shareholder approval requirements under Listing Rule 5635(f) with respect to a proposed transaction (the "Proposed Transaction"). According to the information you provided, in the Proposed Transaction the company would issue shares of its common stock, and warrants exercisable for additional shares, to its primary lender (the "Lender") as part of a restructuring of the company's debt held by the Lender (the "Debt").

You stated that the company has recently experienced significant losses and cash flow deficits and that as a result its current financial position is precarious and its operational viability is uncertain. Over the past year, the unfavorable conditions of the global financial and credit markets have negatively impacted the company's business leading to repeated defaults by the company on certain covenants of the Debt, thereby triggering higher interest rates on the Debt, which the company is no longer able to cover. Additionally, the company is experiencing difficulties with certain of its vendors who are requiring prepayments or significantly reducing credit terms and limits, thereby inhibiting the company's ability to keep its supply lines open. To conserve cash, the company has reduced its workforce, limited business travel, reduced the payment of fees to members of its board of directors, suspended most of its marketing programs, and refocused its business on productive customers in lieu of under-performing accounts. You stated that notwithstanding these efforts, without the Proposed Transaction the company will run out of cash in the next few weeks and would face almost certain insolvency and a likely bankruptcy. The company has already retained bankruptcy counsel.

Over the past eight months, the company has unsuccessfully sought additional financing utilizing the services of two investment banking firms. The company believes that such efforts failed because potential investors were unwilling to invest in the company given the defaults on the covenants of the Debt. As a result, the company entered into negotiations with the Lender leading to the Proposed Transaction. In the Proposed Transaction, a portion of the Debt would be converted into equity, and the terms on the remaining debt would be amended to be more favorable to the company, thereby reducing its monthly interest obligations. In addition, as a result of the Proposed Transaction, the company would have increased cash available under a credit line agreement with the Lender.

Without the requested exceptions, the Proposed Transaction would require shareholder approval pursuant to: (i) Listing Rule 5635(b) because the issuance would result in a change of control; and (ii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. You stated that the Lender was unwilling to enter into a transaction that would satisfy the shareholder approval requirements. Moreover, you stated that the company's current cash is not sufficient to sustain it through the time that it would take to secure shareholder approval. As a result, you stated that the company has concluded that the Proposed Transaction is the only alternative available in the timeframe necessary to avoid a shut-down of the business.

The company expects that the Proposed Transaction will enable it to fund operations at least through the third quarter of its next fiscal year, at which time the company expects to have positive cash flows from its business operations. The company believes that it will meet the requirements for continued listing on NASDAQ upon closing of the Proposed Transaction and over the long term. You stated that the company was prepared to effect a reverse stock split to maintain compliance with the bid price requirement, if necessary.

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 requested exception to the shareholder approval rule. This determination is based on your representations that the company needs to quickly proceed with the Proposed Transaction to avoid bankruptcy. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the

company must 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 2009-25

This is in response to your correspondence regarding whether an issuance of securities in a potential private placement (the "Private Placement") would be aggregated with an issuance in a pending acquisition (the "Acquisition") for purposes of determining whether shareholder approval would be required under Listing Rule 5635(a)(1).

According to the information you provided, approximately six weeks ago the company entered into the agreement for the Acquisition, pursuant to which it will acquire certain property and equipment from the Target in exchange for approximately \$200,000 in cash and shares of the company's common stock equal to approximately 10% of its pre-transaction outstanding shares and voting power. The company first considered the Acquisition over one year ago and held initial discussions with the Target more than ten months ago. On multiple occasions, the company's board of directors considered the Acquisition and directed management to continue its efforts to reach an agreement with the Target. The Acquisition is expected to close within approximately two months.

The company has not yet determined whether it will proceed with the Private Placement nor has it settled on a precise structure. The Private Placement would be part of the company's overall corporate financing strategy and the use of the proceeds from the Private Placement would be for general corporate purposes, working capital, and possible future acquisitions. The company anticipates that if it chooses to proceed, the Private Placement would occur within approximately three months. You stated that the company is considering the Private Placement at this time because it believes that the equity markets have strengthened, making this an opportune time to undertake such a financing. If, however, the equity markets were to weaken materially in the near future, or the company's stock price were to decline, you indicated that the company might not proceed with the Private Placement and would not be forced to sell equity on unfavorable terms in order to raise cash to fund its operations.

You stated that the Acquisition is not linked to, or conditioned upon, the Private Placement and that, likewise, the Private Placement would not be linked to or conditioned upon the Acquisition. The company is obligated to close the Acquisition without regard to whether it chooses to pursue the Private Placement. The Target will be the sole recipient of the company's shares in the Acquisition and will not be a purchaser in the Private Placement. The proceeds from the Private Placement would not be used to replenish any cash expended on the Acquisition. The company's management concluded that the company could complete the Acquisition and still have sufficient cash to meet the anticipated needs of the combined businesses without raising additional capital.

Following our review of the information you provided, we have determined that the issuance in the Private Placement would not be deemed to be in connection with the Acquisition. We have reached the conclusion because: (i) the Private Placement would not be conducted to raise funds to be used as consideration for the Acquisition or to fund the company's cash needs arising from the Acquisition; and (ii) neither the Private Placement nor the Acquisition would be contingent on the other. As such, the issuances in the Private Placement and the Acquisition would not be aggregated for purposes of determining the applicability of Listing Rule 5635(a)(1). Accordingly, the issuance of shares to the Target in the Acquisition will not require shareholder approval under Listing Rule 5635(a)(1) because the issuance will be less than 20% of the pre-transaction outstanding shares and voting power. Please note that we are not providing any guidance as to whether shareholder approval will be required under Listing Rule 5635 for the Private Placement because the terms of that transaction have not yet been determined.

*This interpretation provides guidance based on the rules in effect at the time of issuance. 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 2009-26

This is in response to your correspondence requesting: (i) an exception under Listing Rule 5635(f) from the shareholder approval requirements, and (ii) an exception from the voting rights requirements of Listing Rule 5640 and IM-5640 (collectively, the "Voting Rights Rule"), with respect to a proposed transaction (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction the company would issue to the Investor: (i) preferred stock convertible into common stock, (ii) warrants exercisable for additional common shares, and (iii) a non-convertible senior secured note. The conversion price of the preferred stock and the exercise price of the warrants would be at a discount to the market value of the common stock. The preferred stock would vote on an as-converted basis. As a condition to closing, the Investor requires that members of the company's management (the "Insiders") purchase securities in the Proposed Transaction.

You stated that for the past several years the company has experienced net losses and negative working capital as its current liabilities have exceeded its current assets. The company has been able to operate under these conditions due primarily to advance payments made to it by its largest customer (the "Customer") and to a credit facility (the "Credit Facility") provided by a bank (the "Bank"). Both of these arrangements, however, recently changed in ways detrimental to the company. Approximately four months ago, the Customer notified the company that it was reducing the amount of business it does with the company and, as a result, would require the company to repay a significant amount in advance billings. The company had not anticipated this business reduction or the repayment requirement because it was unprecedented over the course of a long relationship with the Customer. In addition, approximately six months ago, the Bank suspended the Credit Facility as a result of the company's failure to comply with various covenants.

You stated that as a result of the foregoing factors, the company is currently in severe financial distress and has been required to delay substantial payments past due to its clients and vendors, negatively impacting the company's business and its ability to generate revenues. On several recent occasions, the company was able to meet its payroll obligations only after the receipt of funds from clients within 24 hours of the time such obligations were due. Currently, the amount of the company's accounts payable exceeds its available cash.

Approximately six months ago, the company began considering various financing alternatives and believed that it would be able to raise sufficient funds in a transaction that would not require shareholder approval. As its financial condition continued to deteriorate, however, the company concluded that it would need to raise more funds than would be provided by the transactions then under consideration. As a result, the company entered into negotiations with the Investor leading to the Proposed Transaction. The Investor was unwilling to enter into a transaction that would satisfy the shareholder approval and voting rights requirements.

Without the requested exceptions, the Proposed Transaction would require shareholder approval pursuant to: (i) Listing Rule 5635(b) because the issuance would result in a change of control; (ii) Listing Rule 5635(c) because the issuance at a discount to the Insiders would be considered equity compensation; and (iii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. Additionally, without the requested exception, the Proposed Transaction would not comply with the Voting Rights Rule because the preferred stock would effectively have greater voting rights than the common stock because it would vote on an as-converted basis and would convert at a discount to the market value.

You stated that the company has concluded that a delay in closing the Proposed Transaction to secure shareholder approval would seriously jeopardize its financial viability. The company believes that if it does not consummate the Proposed Transaction as soon as possible, its financial position will continue to deteriorate and it will be unable to meet its current obligations, resulting in the company being forced to cease all or a substantial portion of its operations and/or file for bankruptcy.

The company believes that if it is able to consummate the Proposed Transaction, its working capital deficit would be significantly reduced immediately and then eliminated within approximately five months as a result of projected earnings. In addition, the company believes that following the Proposed Transaction, it will meet the requirements for continued listing on NASDAQ.

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 requested exception to the shareholder approval rules. This determination is based on your representations that the company needs to quickly proceed with the Proposed Transaction to avoid bankruptcy and that the Insiders did not negotiate the terms of the Proposed Transaction and are participating only at the insistence of the lead investor and on the same terms as that investor. In addition, we have determined to grant an exception from the Voting Rights Rule as it applies to the voting power of the preferred stock because both that rule and former Rule 19c-4 permit such an exception where necessary to rescue a company in financial distress. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must 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 2009-27

This is in response to your correspondence requesting: (i) an exception under Listing Rule 5635(f) from the shareholder approval requirements; and (ii) an exception from the voting rights requirements of Listing Rule 5640 and IM-5640 (collectively, the "Voting Rights Rule"), with respect to a proposed transaction (the "Proposed Transaction").

According to the information you provided, in the Proposed Transaction the company would issue shares of its common stock and convertible preferred stock in exchange for certain of its outstanding debt securities (the "Notes"). The issuance price of the common stock, and the conversion price of the preferred stock, would be less than the market value of the common stock. The preferred stock would vote on an as-converted basis. The holders of the Notes (the "Noteholders") do not include any officers or directors of the company.

The company provides freight transportation services. You stated that the overall economic conditions and credit crisis beginning last year have had a significant detrimental impact on the company's financial condition and continue to negatively impact its customers' needs to ship goods which, in turn, causes a reduction in the volume of freight the company ships and in the price it receives for its services. In addition, shipping volumes have declined as a result of customers' switching to other carriers due to their concerns regarding the company's financial stability. For each of its most recently completed two fiscal quarters, the company's operating revenues were down approximately 50% compared to the year-earlier periods. The company continues to experience reduced revenue, operating losses, and negative cash flow, and did not make the most recently due interest payment on the Notes. As a result of its financial condition, the company is restricted from accessing a significant portion of its revolving credit facility (the "Credit Facility").

You stated that the Proposed Transaction is a necessary step for the company to address its near-term liquidity issues and to stabilize its financial condition. Subject to the completion of the Proposed Transaction, the company's lenders under the Credit Facility have agreed to allow the company to defer the payment of interest and fees otherwise due (the "Deferral"). After the completion of the Proposed Transaction, and subject to compliance with certain borrowing conditions, the lenders will allow the company to again access the blocked portion of the Credit Facility. In addition, the company has obtained significant concessions from its unionized employees who have agreed to wage reductions and to allow the company to defer contributions to pension funds (the "Concessions"). You stated that the Concessions are essential to the company's remaining a going concern, and the continuation of the Concessions is contingent on the completion of the Proposed Transaction in the near-term. Other measures the company has taken include the consolidation of operations and the sale of excess property and equipment.

Without the requested exceptions, the Proposed Transaction would require shareholder approval pursuant to: (i) Listing Rule 5635(b) because the issuance could result in a change of control; and (ii) Listing Rule 5635(d) because the issuance would exceed 20% of the pre-transaction outstanding shares at a price less than the greater of book or market value. Additionally, without the requested exception, the Proposed Transaction would not comply with the Voting Rights Rule because the preferred stock would effectively have greater voting rights than the common stock because it would vote on an as-converted basis and would convert at a discount to the market value.

You stated that the delay in securing shareholder approval would seriously jeopardize the company's financial viability and that unless the Proposed Transaction is completed within approximately three weeks, the company will likely file for bankruptcy. The company does not have cash sufficient to sustain it for the time that it would take to get shareholder approval of the Proposed Transaction. Moreover, the Noteholders were unwilling to enter into a transaction that would satisfy the shareholder approval and voting rights requirements.

The company believes that if it completes the Proposed Transaction, it will have sufficient liquidity to continue in business as a going concern and to continue operations for at least approximately nine months. The company expects that the benefits of the Proposed Transaction, which include the Deferral, the Concessions, and the availability of the Credit Facility, as well as the elimination of future interest payments associated with the Notes, will further improve the company's liquidity position and overall financial condition. In addition, the company believes that following the Proposed Transaction it will meet the requirements for continued listing on NASDAQ with the possible exception of the bid-price requirement. In that regard, the company plans to complete a reverse stock split, if necessary, at a ratio sufficient to comply with that 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 requested exception to the shareholder approval rules. This determination is based on your representations that the company needs to quickly proceed with the Proposed Transaction to avoid bankruptcy. In addition, we have determined to grant an exception from the Voting Rights Rule as it applies to the voting power of the preferred stock because both that rule and former Rule 19c-4 permit such an exception where necessary to rescue a company in financial distress. 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, a letter describing the Proposed Transaction and alerting shareholders of the omission to seek their otherwise required approval; (ii) the letter must indicate that the audit committee, or a comparable independent body of the board of directors, has expressly approved reliance on the exception; and (iii) the company must 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. To view the current Listing Rules, please click [here](#). Please note that other substantive changes may have been made since this interpretation was issued.*