

NASDAQ Staff Interpretative Letters

January - December 2004

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 While NASDAQ staff may remove summaries and/or letters containing outdated material, companies and their representatives are strongly encouraged to contact Listing Qualifications at 301.978.8008 if they have questions regarding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

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Staff Interpretative Letter 2004-1

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In a proposed transaction (the "Proposed Transaction"), the company plans to issue common stock equal to approximately 18% of its outstanding shares. The common stock will be priced at a discount to the greater of the book and market value of the company's shares.

Four months prior to the expected closing date of the Proposed Transaction, the company issued notes (the "Convertible Note Issuance") with the potential to convert into approximately 14% of the company's total shares outstanding on a pre-issuance basis at a discount to the greater of book or market value at that time. Three months prior to the Convertible Note Issuance and six months prior to the Proposed Transaction, the company issued shares of common stock equal to approximately 15% of its total shares outstanding on a pre-issuance basis at a discount to the greater of book or market value at the time of the issuance.

There were no common investors for the three issuances, and none of the transactions was contingent upon any of the others. In addition, the intended use of proceeds from the Proposed Transaction was for a distinct business purpose, different from that of the other issuances, and none of the transactions was part of the same financing plan as any other.

Issue: Will the Proposed Transaction be aggregated together with one or more of the prior issuances for the purpose of determining whether or not shareholder approval will be required?

Determination: No. In this case, NASDAQ determined not to aggregate the shares to be issued in the Proposed Transaction with either of the prior issuances because the investors in each transaction are different, the purposes of the transactions and the use of proceeds are different, and the three transactions are not contingent upon each other. Accordingly, NASDAQ would assess whether shareholder approval is required for the Proposed Transaction based only on the shares issued in that transaction. Future transactions that result or could potentially result in issuances of common stock will be reviewed by Staff, who may determine that it is appropriate to aggregate such issuances with prior issuances, including those discussed within.

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 2004-3

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In 2002, a company entered into an equity line of credit (the "2002 Transaction"), wherein the company's common shares and warrants were issued to the lender (the "Lender") in exchange for cash. The purchase price of the shares is determined based upon the market value of the shares at the time of subsequent drawdowns, subject to a floor that is in excess of both book and market value at the time of the agreement. Further, the terms of the 2002 Transaction prohibited the Lender from holding more than 9.9% of the company's total outstanding shares at any given time. In 2003, the company made two drawdowns on this equity line and issued common stock and warrants constituting approximately 18% of the company's pre-transaction shares.

Over one year later, the company entered into another financing transaction (the "2003 Transaction") with the Lender. Under the terms of this agreement, the company would issue additional shares to the Lender at a discount to the market price of the shares. The 2003 Transaction represented 7.3% of the company's pre-transaction total shares outstanding.

The company plans to enter into an agreement with several investors, pursuant to which the company would issue shares and warrants (the "PIPE Transaction"). In addition, the company would issue warrants to the placement agent, and under certain circumstances, additional warrants to the investors. The warrants to be issued in the PIPE Transaction have a cap as to the number that can be issued and are exercisable at a premium to the market price on the date of the issuance. The PIPE Transaction would be completed approximately two months after the 2003 Transaction.

Issue: Is shareholder approval required for the PIPE Transaction?

Determination: In this case, NASDAQ determined that shareholder approval for the PIPE Transaction under Rule 4350(i)(1)(D)(ii) was not required. While the PIPE Transaction and the 2003 Transaction would be aggregated for the purposes of Rule due to their close proximity in time and similar use of proceeds, the two issuances constitute only 19.85%, as measured by the company's total shares outstanding prior to the 2003 Transaction. NASDAQ would not include the 2002 Transaction in the aggregation because this transaction was entered into over one year prior to the 2003 Transaction and at a price greater than book and market value at the time of the transaction.

In addition, shareholder approval of the 2002 Transaction and the 2003 Transaction was not required under Rule 4350(i)(1)(B) because of the ownership limitation on the Lender, whereby the Lender cannot hold more than 9.9% of the company's common stock or voting power. Accordingly, these transactions could not result in a change of control.

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Staff Interpretative Letter 2004-5

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to amend several stock option plans (the "Plans") to extend the exercise period for options upon termination of service from ninety days to thirty-six months, after the retirement of an employee, but in no event, beyond the original expiration date of the option (the "Amendments"). The Plans empower the compensation committee of the company's board of directors to determine the terms and conditions of any option granted, which specifically include the ability to extend the exercise period of the options upon termination of service.

Issue: Would the proposed Amendments be considered material amendments to the Plans, and as such, require shareholder approval pursuant to the Rule?

Determination: No. Under Rule 4350(i)(1)(A), the proposed Amendments are not material amendments to the Plans. The proposed Amendments do not provide for a material increase in benefits to participants because they are limited in scope, as they affect only retirees, and the exercise period in no event will extend beyond the option's original term. Additionally, the proposed Amendments would not result in an increase in the number of shares to be issued under the Plans, an expansion of the class of eligible participants in the Plans, or an expansion of the types of options or awards available under the Plans.

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Staff Interpretative Letter 2004-6

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretive Material Regarding Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 4350(i)(1)(A). These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. NASDAQ would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in a connection with a merger or acquisition would be counted by NASDAQ in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 4350(i)(1)(C).

Relevant Facts: A NASDAQ listed company intends to acquire another company ("Target"). Under the terms of the acquisition agreement, the company will assume the equity compensation plans of the Target upon the effectiveness of the acquisition. The company plans to seek shareholder approval in connection with the acquisition for the adoption and assumption of the Target's plans. If it does not receive such approval, then the grants by the company after the acquisition will be subject to the following limitations: (i) the time during which the shares will be available for grants will not be not extended beyond the period when they would have been available under the Target plans, absent the transaction; and (ii) awards covering the shares acquired in the acquisition will not be granted to individuals, who were employed by the company or its subsidiaries at the time immediately prior to the consummation of the acquisition (the "Limitations").

Issue: If the company acquires the shares from the Target's plans for grants of awards under either the Target's plans or the company's plans, may pre-acquisition awards under the Target's plans that are cancelled, forfeited, lapsed or otherwise terminated before, at or after the acquisition, in accordance with the provisions of the Target's plans, be available for future grants under either the Target's plans or the company's plans?

Determination: Yes. As set forth in IM-4350-5, shares available under plans acquired in acquisitions may be used for post-transaction awards subject to the Limitations. In the acquisition, this includes shares that become available (in accordance with, and to the extent permitted by, the provisions of Target 's plans) due to the cancellation, forfeiture, lapsing or termination of outstanding awards.

Issue: If the company receives the requisite shareholder approval for the adoption and assumption of the Target's plans and the shares available thereunder for use under a company plan in order to make grants to company employees, would the Limitations apply?

Determination: No. The Limitations apply to the assumption of plans without shareholder approval. If shareholder approval is obtained, then the Limitations do not apply unless the company chooses to include them as provisions of the plans from which the awards would be made.

Issue: The company intends to make inducement grants following the transaction to persons who were employees of the Target before the transaction. May the company satisfy the "inducement" grant exception under Rule 4350(i)(1)(A)(iv), if an independent committee of the company's board issues a "form" letter, stating that the company will grant equity awards to such persons, where the letter specifies the maximum

term, exercise price (or method for calculating such – e.g., 100% of fair market value on the date of grant), and vesting schedule, but states that the number of shares will be commensurate with the new employee's job classification according to the company's equity compensation policy?

Determination: No. In the case of a "form" letter sent generally to a target company's employees, it is not known whether the award was a material inducement to an individual's entering into employment with the company. Employees who received the letter may have the opportunity to accept the award even if they would have entered into employment absent the award.

Issue: Can the company establish a new plan from which it could grant awards using shares available under the Target's plans?

Determination: Yes, provided that: (i) the terms and provisions of the newly created plan are not materially different than those of one of the Target Plans or the company's Plans; and (ii) the Limitations are satisfied or shareholder approval is obtained. IM-4350-5 provides that shares available under plans acquired in acquisitions may be used for post-transaction awards either under the pre-existing plan or arrangement or another plan subject to the Limitations. In determining whether the newly created plan is materially different from the Target Plans or the company Plans, NASDAQ would look to whether the differences would constitute material amendments requiring shareholder approval under Rule 4350(i)(1)(A) and IM-4350-5 as applied to plans outside of the merger context.

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Staff Interpretative Letter 2004-7

Rule 4200(a)(15): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.

Rule 4350(c)(4)(D): Independent director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, this does not relieve a company’s obligation to comply with the committee composition requirements under Rules 4350(c) and (d).

Relevant Facts: A Governance Agreement exists between the company and Entity A that provides Entity A with the right to designate directors to the company’s board. Two of the directors nominated, pursuant to the governance agreement, are not employed by Entity A or its affiliates. Neither director has received any compensation from the company other than for board service, nor do they fall under other provisions that would disqualify them under Rule 4200(a)(15).

Two other directors nominated pursuant to the governance agreement received compensation, either directly or indirectly, from the company for activities other than board service, in the prior fiscal year. One of these directors received compensation in an amount less than \$60,000 for consulting work. The company may pay the director for consulting services in the current year in an amount less than \$60,000. The other director is “Of Counsel” to a law firm, which provides legal services to the company. For the past three fiscal years, the law firm has not received fees from the company in excess of the greater of \$200,000 or 5% of the law firm’s consolidated gross revenues for each year.

Issue: Can the directors designated by Entity A be considered independent pursuant to Rule 4200(a)(15)?

Determination: Pursuant to Rule 4200(a)(15), the directors designated by Entity A are not precluded from being found independent by the company’s board. They are also not subject to the additional requirements of Rule 4350(c)(4)(A), which set forth the requirements for the nomination of directors by independent directors. NASDAQ’s determination is based on the fact that the Governance Agreement assigns the right to nominate these directors to Entity A. Notwithstanding this finding, the company must comply with the independent board and committee composition requirements set forth in Rules 4350(c) and (d).

Issue: Are the directors who provided services (directly and indirectly) considered independent under Rule 4200(a)(15)?

Determination: The director who provided consulting services for the company would not be precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B), because the payments received are less than \$60,000. Additionally, future payments for consulting services in an amount under \$60,000 per year likewise would not preclude a board finding of independence under the provisions of Rule 4200(a)(15). However, such future payments would preclude the director from service on the Audit Committee, pursuant to Rule 4350(d)(2)(A) and IM 4350-4.

Similarly, the director, who is “Of Counsel” to a law firm providing services to the company, is not precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(D), because the payments received are less than the greater of \$200,000 or 5% of the law firm’s consolidated gross revenues for each year. Any such on-going payments, however, would make the director ineligible to serve on the Audit Committee, pursuant to Rule 4350(d)(2)(A) and IM 4350-4.

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Staff Interpretative Letter 2004-9

Rule 4200(a)(15)(E): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent ... (E) a director of the listed company who is, or has a Family Member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the listed company served on the compensation committee of such other entity.

Relevant Facts: An individual (the “Director”) was appointed to the company’s board of directors in April 2003. Before joining the company’s board, the Director was an executive officer at another company (“Entity A”). The Director retired from Entity A in September 2002. An executive officer of the company (the “Officer”) has served on Entity A’s compensation committee since 1997.

Issue: Based on these facts, is the Director precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(E)?

Determination: Since the Director is no longer employed as an executive officer of Entity A, NASDAQ determined that the company’s board is not precluded by Rule 4200(a)(15)(E) from finding that the Director is independent.

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Staff Interpretative Letter 2004-10

Rule 4350(i)(1)(C): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: (i) any director, officer or substantial shareholder of the issuer has a 5 percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5 percent or more; or (ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the stock or securities.

Relevant Facts: The company is negotiating to acquire two related entities. Under the proposed terms of the first acquisition, the company will issue securities to acquire Target 1, subject to the limitation that the company will pay cash in the minimum amount necessary to ensure that the number of shares issued will be less than 20% of its pre-transaction total shares outstanding. The company will also simultaneously purchase a related entity ("Target 2") for approximately 8.5% of its pre-transaction total shares outstanding. Target 2 owns 39.7% of Target 1.

As a result of the company's 100% ownership of Target 2, the shares issued to Target 2 in connection with the acquisition of Target 1 will revert back to the company and become treasury shares. After the acquisitions close, the net number of shares to be issued in the acquisitions will equal 19.5% of the issued and outstanding shares of the company prior to the acquisitions.

Issue: Is shareholder approval required in connection with the acquisitions of the two related entities?

Determination: No. Based on these facts, shareholder approval under Rule 4350(i)(1)(C) is not required. The shares issued in connection with Target 1 will be less than 20% of the company's total shares outstanding prior to the acquisitions. While the additional share issuance for the Target 2 acquisition causes the total shares issued for the acquisitions to exceed 20% of the company's pre-transaction outstanding shares, NASDAQ has determined that the shares issued to Target 2 in connection with the acquisition of Target 1 (the "treasury shares") will not be aggregated for purposes of the Rule. The company will reacquire these shares upon the acquisition of Target 2, and they will become treasury shares at that time. While the Target 1 acquisition will be completed first, the two acquisitions will occur virtually simultaneously. Accordingly, the treasury shares will be issued, but will not be outstanding. Therefore, the net increase in outstanding shares will equal less than 20% of the pre-transaction outstanding shares.

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Staff Interpretative Letter 2004-11

Rule 4350(i)(1)(A)(ii): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants, except for ... (ii) tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the issuer's compensation committee or a majority of the issuer's independent directors; or plans that merely provide a convenient way to purchase shares on the open market or from the issuer at fair market value.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to establish an incentive compensation program for certain key employees with an amount of specified compensation expressed as a dollar figure at the time of the award (the "Plan"). The company would then determine, at its sole discretion, that a specified portion of the award would be paid in cash with the remaining portion to be awarded in the form of restricted stock units. Upon vesting, the restricted stock units would be exercisable for common stock at fair market value.

Issue: Does the Plan require shareholder approval under NASDAQ's rules?

Determination: Yes. The Plan would require shareholder approval and would not be covered by the exception set forth in Rule 4350(i)(1)(A)(ii). An award under the Plan would be based upon a payout ratio of cash and restricted stock units, which was predetermined by the company, and the award recipient could not elect to receive cash in lieu of common stock. As such, the incentive compensation plan is essentially an equity compensation arrangement and is not merely providing a convenient way to purchase shares on the open market or from the company at fair market value. Accordingly, shareholder approval is required pursuant to Rule 4350(i)(1)(A).

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Staff Interpretative Letter 2004-12

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In late 2003, a company proposed a private placement (the "Offering"). Pursuant to the Offering, the company intends to sell common stock and warrants exercisable into common stock to a number of accredited investors. The common stock and warrants will constitute approximately 50% and 25%, respectively, of the company's pre-transaction outstanding shares.

The price of the units will equal the market value of the common stock immediately preceding the execution of the definitive agreement, plus an additional cost to allow for the attribution of \$0.125 for each full share purchasable under a warrant. The warrants will be exercisable at the same market value at any time after issuance. The warrants will contain anti-dilution protection for stock splits and similar events, but will not contain price adjustments. According to the terms of the transaction, no investor individually, or as part of a group, can beneficially own more than 19.9% of the company's outstanding common shares or voting power as a result of the issuance.

The company subsequently closed only a portion of the unit offering (the "Initial Issuance") and now plans to issue the remainder of the securities discussed above (the "Proposed Transaction") on virtually identical terms to the securities issued in the Initial Issuance. The market value will be determined immediately prior to the company entering into the binding agreement for the Proposed Transaction plus the attribution of the appropriate value for the warrants. The Proposed Transaction, if consummated, together with the Initial Issuance, would result in the issuance of common shares and warrants convertible into common shares on a fully-diluted basis, totaling 45% of the company's total shares outstanding prior to the Initial Issuance. The company noted that only differences between the two issuances would be that the securities would be sold pursuant to separate agreements, and that the shares to be issued in the Proposed Transaction would have a different price than those issued in the Initial Issuance.

Issue: Is shareholder approval required for the Proposed Transaction?

Determination: No. NASDAQ determined that the Proposed Transaction does not require shareholder approval pursuant to the Rules. While the Proposed Transaction will be aggregated with the Initial Issuance for purposes of Rule 4350(i)(1)(D), and the aggregate number of shares issuable pursuant to both transactions exceeds 20% of the company's total shares outstanding, both transactions were priced at no less than the greater of book or market value. Therefore, shareholder approval under Rule 4350(i)(1)(D)(ii) was not required for either the Initial Issuance or the Proposed Transaction. In addition, shareholder approval for the Proposed Transaction is not required pursuant to Rule 4350(i)(1)(B) because the transaction will not result in a change of control since no participating investor will own alone, or as a group, hold 20% or more of the company's common stock or voting power following the Proposed Transaction.

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

Staff Interpretative Letter 2004-13

Rules 4200(a)(15)(B) and 4200(a)(15)(D): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years.

(D) a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient’s consolidated gross revenues for that year, or \$200,000, whichever is more.

Relevant Facts: A company represented that a member of its board of directors (the “Director”) is an officer of a partnership that manages several venture capital funds (“Management Partnership”). The company is a limited partner in one of these funds (the “Capital Fund”) and has invested approximately \$3 million over the past four years, which represents only 2% of Capital Fund’s investments. The Capital Fund pays a management fee to the Management Partnership, which does not exceed 5% of that entity’s consolidated gross revenues and is less than \$200,000 per year. The company also stated that while the Capital Fund does not hold any of the company’s securities, the Director in question personally holds an indirect equity interest in the company of less than 5% of the total voting power outstanding.

Issue: Based on these facts, is the Director precluded from serving as an independent director, pursuant to Rules 4200(a)(15)(B) or 4200(a)(15)(D)?

Determination: No. Because the Director is an executive officer of an organization to which the company made payments for services, it is appropriate to apply the corporate measurements of paragraph (D) rather than the individual measurements of paragraph (B) under Rule 4200(a)(15). In that regard, because the company’s payments do not exceed the greater of 5% of the Management Partnership’s consolidated gross revenues or \$200,000 per year, the Director is not precluded from serving as an independent director. Moreover, as stated in IM-4200, NASDAQ does not believe that ownership of company stock by itself would preclude a board finding of independence. Accordingly, the Director’s indirect equity interest in the company’s common stock also does not preclude a board finding of independence.

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Staff Interpretative Letter 2004-14

Rule 4200(a)(15)(B): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: ... (B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years.

Rule 4350(c)(3)(C): If the compensation committee is comprised of at least three members, one director who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual’s membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

Relevant Facts: Mr. X served as the interim chief executive officer from June 30 through September 30, 2003. The company paid him in excess of \$60,000 for his service as interim CEO.

Issue: Notwithstanding the amount of compensation received from the company, is Mr. X precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B)?

Determination: Yes. Based on the facts presented, NASDAQ determined that Mr. X is precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B), because the compensation received as interim CEO was in excess of \$60,000.

Issue: In the event that Mr. X is precluded from serving as an independent director, do “exceptional and limited” circumstances exist such that the board may appoint Mr. X to the compensation committee?

Determination: When a director is not a current officer or employee or a Family member of an officer or employee, use of the exception is contingent on whether a company’s board determines that the individual’s membership on the committee is required by the best interests of the company and its shareholders. Approval by NASDAQ is not required. Rather, pursuant to Rule 4350(c)(3)(C), the board must disclose, in its proxy statement for the next annual meeting subsequent to the board’s determination, the nature of the relationship and the reasons for the determination to rely upon the exception.

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Staff Interpretative Letter 2004-15

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to amend an existing Stock Incentive Plan (the "Plan") that was previously approved by its shareholders. A provision in the Plan currently states that all options will vest and become immediately exercisable in the event of a hostile change of control. The proposed amendment (the "Amendment") would change the Plan to allow for the full acceleration of the vesting schedule of all outstanding Plan options in the event of any change of control. The company indicated that it is considering a transaction wherein the company would be acquired by a wholly-owned subsidiary of another entity, thereby causing a change of control, in a transaction that would not be hostile. The company noted that the Plan specifically authorizes the board of directors, in its sole discretion, to alter the vesting schedule of outstanding options at any time.

Issue: Is the proposed Amendment a material amendment to the Plan, and as such, require shareholder approval?

Determination: No. Shareholder approval is not required under Rule 4350(i)(1)(A) because the Proposed Amendment would not result in a material change to: (i) the benefits available; (ii) the number of shares available; or (iii) the class of eligible participants. In addition, NASDAQ notes that the Plan specifically authorizes the board to modify the vesting schedule of the outstanding options as it deems appropriate.

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Staff Interpretative Letter 2004-17

Rule 4350(i)(1)(C): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company ... where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the stock or securities.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

IM-4350-3. Definition of a Public Offering: When determining whether an offering is a "public offering" for purposes of the shareholder approval rules, NASDAQ will consider all relevant factors, including but not limited to: (i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best efforts basis, or whether the offering is self-directed by the issuer); (ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort); (iii) the breadth of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors); (iv) the offering price (including the extent of any discount to the market price of the securities offered); and (v) the extent to which the issuer controls the offering and its distribution.

Relevant Facts: A company planned to complete an issuance of up 20,000,000 shares of common stock (the "Proposed Transaction") in connection with a merger to fund the combined entity. In connection with the Proposed Transaction, the company notes the following:

- The Proposed Transaction would be conducted on a best efforts basis with two placement agents;
- The shares to be issued were registered with the Securities and Exchange Commission on a Form S-4 that was declared effective prior to the transaction;
- The company issued a press release and Form 8-K, instructing the reader how to obtain a copy of the preliminary prospectus;
- The company mailed the Form S-4/proxy statement to its shareholders. Subsequent to that mailing, the company determined that it could raise more money than indicated on the proxy by selling the same number or fewer shares due to an increase in the company's stock price;
- The company marketed the Proposed Transaction to over 300 prospective investors via industry conferences, road shows, and other meetings with prospective investors;
- The Proposed Transaction would be limited to the sale of 20,000,000 common shares with the discount expected to be between 2% to 10% below the market price of the company's outstanding common shares on the date of issuance;
- The placement agents anticipated the shares would be distributed to approximately 100 retail accounts and over 50 institutional accounts with the retail investors expected to purchase between 5% to 10% of the shares offered;
- No current investor will hold more than 5% of the company's total shares outstanding on a post-transaction basis; and
- The company would have no control over the distribution of the shares other than to decide whether or not to proceed with the Proposed Transaction once it reviewed the investor commitment lists.

Issue: Is the Offering considered a public offering for purposes of Rule 4350(i)(1)(D)(ii)?

Determination: Yes. In this case, NASDAQ determined that the Proposed Transaction constituted a public offering due to the broad scope of the marketing effort, including the distribution of prospectuses and meetings with over 300 potential investors, and the expected number of purchasers. Further, the discount of

the shares issued was comparable to public secondary firm commitment underwritten transactions around the same period; and the company had limited control over the distribution of the shares. Accordingly, shareholder approval was not required.

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Staff Interpretative Letter 2004-18

Rule 4350(i)(1)(C): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: (i) any director, officer or substantial shareholder of the issuer has a 5 percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5 percent or more; or (ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the stock or securities.

Relevant Facts: A company proposes a private placement of convertible notes (the "Notes Transaction") to augment its cash position. In addition, the company, in the course of regular business, identifies and assesses potential acquisitions. At the time of the proposed Notes Transaction, the company had no binding agreements or board resolutions to commence an acquisition before the financing is consummated. The company had cash on hand and other available sources of cash to fund future acquisitions without the proceeds from the notes. The company also represented that the private placement investors would not be permitted to participate in the financing of any future acquisitions.

Issue: Will NASDAQ aggregate any or all of the proceeds from the Notes Transaction with shares issued in future acquisitions for the purpose of determining whether or not shareholder approval is required?

Determination: No. NASDAQ determined that the Notes Transaction will not be considered to be in connection with an acquisition and will not require shareholder approval pursuant to Rule 4350(i)(1)(C) based on the company's representations that: (i) the company will make an independent decision to proceed with the Notes Transaction irrespective of any potential acquisition; (ii) no agreement will exist for any acquisition at the time when the Notes Transaction is consummated; (iii) the company's Board has not (and will not have at or prior to the consummation of the Notes Transaction) authorized the company to enter into an agreement for any acquisition; (iv) the company has other sources of funds which could be used to finance an acquisition; and (v) the closing of the Notes Transaction would not be contingent on any acquisition. Because the terms of the Notes Transaction had not been finalized, no determination was made regarding whether shareholder approval would be required for the Notes Transaction under any other provision of Rule 4350(i) or whether the Notes Transaction would comply with the Voting Rights Rule and Policy set forth in Rule 4351 and IM-4351.

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Staff Interpretative Letter 2004-20

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company proposes a private placement (the "Unit Offering"). Pursuant to the Unit Offering, the company intends to sell units consisting of one share of common stock and one warrant exercisable into a fractional share of common stock. The common stock and warrants represent approximately 25% and 15%, respectively, of the company's pre-issuance total shares outstanding.

The price of the units will equal the market value of the common stock immediately preceding the signing of the definitive agreement, plus an additional cost to allow for the attribution of \$0.125 for each full share purchasable under a warrant. The warrants will contain anti-dilution provisions for stock splits and similar events, including transactions affecting all shareholders generally, but will not contain other adjustments affecting either the price or the number of shares. The exercise price of the warrants would be set at a 25% premium (or higher) to the price per unit.

Additionally, the company states that no participating investor, alone or as a member of a group, will own or otherwise control greater than 19.9% of the company's common stock or 19.9% of the voting power of the company on a post-transaction basis.

Issue: Is shareholder approval required for the Unit Offering?

Determination: No. By structuring the transaction as described, shareholder approval will not be required under NASDAQ rules. While the Unit Offering will result in an issuance of 20% or more of the company's pre-transaction outstanding shares, as contemplated by Rule 4350(i)(1)(D)(ii), the price of the common stock to be issued will not be less than the greater of book and market value. Further, the warrants to be issued were not priced at a discount, assigned an appropriate value and do not contain any price protection or anti-dilution provisions. In addition, shareholder approval is not required, pursuant to Rule 4350(i)(1)(B), because the Unit Offering will not result in a change of control, since no participating investor, alone or as a member of a group, will own or otherwise control 20% or more of the company's common stock or voting power following the proposed transaction.

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Staff Interpretative Letter 2004-21

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company's board of directors is considering an offer to purchase, for cash, certain outstanding stock options ("Option Purchases") granted under its Key Employee Incentive Compensation Plan (the "Plan"). All of the options have exercise prices that exceed the current trading price of the company's common stock. The Option Purchases will constitute a tender offer under Sections 13 and 14 of the Securities Exchange Act of 1934, as amended. Accordingly, the company will comply with all the procedures under the Act that apply to tender offers.

The terms of the Plan prohibit the repricing of options via a cancellation of options in exchange for replacement option grants. The Plan does not address the purchase of options for cash. The Option Purchases would be actions completely distinct from the Plan and would not implicate or amend the Plan's terms. Under the terms of the Plan, no future awards can be granted; therefore, the options purchased will not be returned to the Plan. The company represented that the Option Purchases would not be treated as a repricing under generally accepted accounting principles.

Issue: Under NASDAQ rules, is shareholder approval required for the proposed transaction?

Determination: No. In the tender offer, the consideration for the Option Purchases would be cash, not equity. As such, Rule 4350(i)(1)(A) does not apply.

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Staff Interpretative Letter 2004-22

Rule 4200(a)(15)(D): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: ... (D) a director who is, or has a Family Member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient’s consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following: (i) payments arising solely from investments in the company’s securities; or (ii) payments under non-discretionary charitable contribution matching programs.

Relevant Facts: A director of a listed company is a partner of a law firm that serves as executor and trustee for a client of one of the company’s bank subsidiaries. The law firm does not provide any services to the parent company or the subsidiary, nor does the director in question directly provide any services to the accounts in question. The legal fees billed by the law firm are paid from the assets of the estate/trust and do not exceed the 5%/\$200,000 test of Rule 4200(a)(15)(D). Lastly, the law firm was only retained after a specific, unsolicited request by the client and after the subsidiary’s determination as a fiduciary that the representation was appropriate.

Issue: Based on these facts, is the director precluded from serving as an independent director on the audit committee?

Determination: No. The director would not be precluded from serving as an independent member of the audit committee. The law firm was selected to serve as counsel for trusts and estates overseen by the subsidiary at the specific, unsolicited recommendation of a client and upon the subsidiary’s determination as a fiduciary that such representation is appropriate. The director will not serve as counsel to the subsidiary’s clients. While it is NASDAQ’s view that this relationship would not constitute a direct or indirect “consulting, advisory or other compensatory fee from the issuer or any subsidiary thereof,” as contemplated by Rule 10A-3(b)(1)(ii)(A), should the Securities and Exchange Commission determine otherwise, this interpretation could no longer be relied upon. NASDAQ is not making a determination regarding the eligibility of the director to qualify as an independent director under any other provision of the rules. In addition, a company’s board has a responsibility to make an affirmative determination that no relationships exist that would impair the independence of an individual serving as an independent director

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Staff Interpretative Letter 2004-23

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: If a plan contains a formula for automatic increases in the shares available (sometimes called an “evergreen formula”), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

Relevant Facts: A company proposes to adopt a new stock option plan (“Plan”), which will have a term of ten years. Following shareholder approval, the Plan will have an initial award pool of ten million shares. Pursuant to a specific provision (the “Provision”) of the Plan, any shares of common stock reacquired by the company on the open market, or through the use of the cash proceeds received by the company from the exercise of stock options granted under the Plan or any other existing equity incentive plans, will be restored to the award pool. The number of shares under this Provision that may be reacquired and restored to the Plan will be equal to the amount of the proceeds, divided by the fair market value of the stock on the date of the exercise which generated such proceeds.

Issue: Is shareholder approval required for each grant occurring under the Provision of the Plan?

Determination: No. While NASDAQ determined that the Provision is a “formula”, as described in IM-4350-5, because the Plan will not have a term in excess of ten years, shareholder approval is not required pursuant to Rule 4350(i)(1)(A) for each grant under the Plan.

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Staff Interpretative Letter 2004-24

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

IM-4350-3. Definition of a Public Offering: When determining whether an offering is a “public offering” for purposes of the shareholder approval rules, NASDAQ will consider all relevant factors, including but not limited to: (i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best efforts basis, or whether the offering is self-directed by the issuer); (ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort); (iii) the breadth of the offering’s distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors); (iv) the offering price (including the extent of any discount to the market price of the securities offered); and (v) the extent to which the issuer controls the offering and its distribution.

Relevant Facts: Six months prior to a proposed private placement (the “Proposed Transaction”), a company completed an issuance of common stock (the “Offering”) to an underwriter (the “Underwriter”), pursuant to a firm commitment underwriting agreement. In the Offering, the company issued approximately 19% of its total shares outstanding on a pre-issuance basis. In connection with the Offering, the company provided the following information:

- The Offering was conducted as a firm commitment private offering, and the company had no control over the distribution of the shares;
- The shares issued to the Underwriter were registered with the Securities and Exchange Commission, pursuant to a shelf registration statement that was declared effective prior to the transaction;
- The Underwriter contacted potential investors generally known to invest in similar transactions within the company’s industry; and
- The sale price of the shares was fixed at a 12% discount to market, which the company represented was similar to other comparable public offerings around the time of the Offering.

Issue: Is the Offering considered a public offering for purposes of Rule 4350(i)(1)(D)(ii)?

Determination: In this case, NASDAQ determined that the Offering constituted a public offering for purposes of Rule 4350(i)(1)(D)(ii) because: (i) the Offering was conducted on a firm commitment basis; (ii) the discount of the shares issued was comparable to similar transactions around the same period; and (iii) the company had no control over the distribution process of the shares.

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

Staff Interpretative Letter 2004-25

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: If a plan contains a formula for automatic increases in the shares available (sometimes called an “evergreen formula”), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. However, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

Relevant Facts: A company proposes to amend an equity based compensation plan (the “Plan”), which currently provides for, among other things, the award of stock bonuses for past services rendered to the company. Pursuant to the proposed amendments (the “Amendments”), the company could grant restricted stock units (“RSUs”), which subject to vesting, could be redeemed for shares of the company’s common stock. Additionally, for all public financial reporting purposes, the company treats a RSU grant as if it was a stock bonus grant (e.g., if a stock bonus of a certain number of shares and a RSU for the same number of shares were both granted on the same day, both grants would be reported in the same manner). Further, the RSU would appear immediately dilutive on the existing shareholders’ equity in the same manner as a stock bonus.

Issue: Would the Amendments be considered material amendments to the Plan, and as such, require shareholder approval pursuant to the Rule?

Determination: No. The Amendments are not material amendments to the Plans under the Rule because they would not result in a material increase in benefits to participants. Because RSUs are substantially equivalent to stock awards, which are currently permissible under the Plan, the Amendment would not expand the types of options or awards available under the Plan. Further, the Amendments do not result in an increase in the number of shares issuable under the Plan or an expansion of the eligible participants. Therefore, shareholder approval is not required under Rule 4350(i)(1)(A).

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

Staff Interpretative Letter 2004-26

Rule 4350(c)(5): A Controlled Company is exempt from the requirements of Rule 4350(c), except for the requirements of subsection (c)(2), which pertain to executive sessions of independent directors. A Controlled Company is a company of which more than 50% of the voting power is held by an individual, a group or another company. A Controlled Company relying upon this exemption must disclose in its annual meeting proxy statement (or, if the issuer does not file a proxy, in its Form 10-K or 20-F) that it is a Controlled Company and the basis for that determination.

Relevant Facts: A company represented that two separate corporate entities currently together own in excess of 50% of the voting power in the company's securities. The company stated, and Staff verified, that each of the entities has a Schedule 13D on file with the Securities and Exchange Commission, wherein each acknowledges that it may be considered to be acting as a member of a group with the other.

Issue: Is the company considered a "Controlled Company," as defined in Rule 4350(c)(5), and thus eligible for the exemptions from certain independent director requirements set forth in Rule 4350(c)?

Determination: Yes. Based on these representations, NASDAQ has no reason to disagree with the company's assertion that it is a "Controlled Company." As such, the company is eligible for exemptions under Rule 4350(c), except for the "executive sessions" requirements of subsection (c)(2). NASDAQ also reminded the company that the Rule requires the company to disclose its status as a "Controlled Company" in its next annual meeting proxy statement and to provide the basis for that determination.

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Staff Interpretative Letter 2004-27

Rule 4200(a)(15)(A): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: (A) a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company.

IM-4200. Definition of Independence: The Rule’s reference to a “parent or subsidiary” is intended to cover entities the issuer controls and consolidates with the issuer’s financial statements as filed with the U.S. Securities and Exchange Commission (but not if the issuer reflects such entity solely as an investment in its financial statements).

Relevant Facts: Listed Company has a Director on its board who was formerly employed by another entity (“Entity A”). Entity A is a foreign private issuer incorporated in England. During the period of the Director’s employment, Entity A owned approximately 50% to 60% of the Listed Company’s outstanding common stock, but Entity A’s voting power was limited to 49% of the total votes eligible to be cast on any matter submitted to a vote of the Listed Company’s stockholders. Following the recent sale of a portion of its holdings, Entity A now owns less than 10% of the Listed Company’s common stock and holds less than 10% of the voting power.

Entity A prepares its financial statements in accordance with U.K. GAAP, and such information is available to U.S. investors through Entity A’s filings with the Securities and Exchange Commission. For the past three years, Entity A has held less than 50% of the voting power in the Listed Company’s securities. Consequently, the Listed Company was considered an “associate” and was not consolidated as part of Entity A’s financial statements.

Issue: Based on these facts, is the Director precluded from serving as an independent director to the Listed Company, pursuant to Rule 4200(a)(15)(A) or IM-4200?

Determination: No. NASDAQ determined that the Listed Company’s board is not precluded from finding that the Director is independent, since Entity A held less than 50% of the voting power in the Listed Company’s securities during the previous three years and did not consolidate its financial statements with those of the Listed Company. Accordingly, Entity A is not the parent of the Listed Company within the meaning of the Rule and IM-4200.

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Staff Interpretative Letter 2004-29

Rule 4350(i)(2): Exceptions to the shareholder approval requirements may be made upon application to NASDAQ when: (A) the delay would seriously jeopardize the financial viability of the enterprise; and (B) reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors. A company relying on this exception must mail to all shareholders no later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required and indicating that the audit committee or a comparable body of the board of directors has expressly approved the exception.

Rule 4351: Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

IM-4351. Voting Rights Policy: [NASDAQ's] Voting Rights Policy is based upon, but more flexible than, former SEC Rule 19c-4. Accordingly, The NASDAQ Stock Market will permit corporate actions or issuances by NASDAQ issuers that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, NASDAQ will consider, among other things, the economics of such actions or issuances and the voting rights being granted. NASDAQ's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of NASDAQ issuers change over time.

Relevant Facts: A company proposes to issue convertible preferred stock and a warrant (the "Preferred Stock" and the "Warrant", respectively) to a group of investors (the "Investors"). In addition, as a condition to making the investment, the Investors are requiring that the principal amount and the accrued and unpaid interest of the outstanding debentures previously issued by the company to other investors be converted into Preferred Stock at the first closing (together with the Preferred Stock and the Warrant, the "Proposed Transaction").

The Preferred Stock will vote on an as-converted basis; however, the Investors will not be entitled to vote on the shares to be issued in the second closing. Additionally, the Investors will be entitled to nominate two directors to the company's board of directors. The company's board is currently comprised of seven directors. Assuming the Investors' nominees replace two current directors, the Investors' representation on the board would equal approximately 29%.

As structured, the Proposed Transaction would require shareholder approval. The company represented that a delay in the completion of the Proposed Transaction, due to the need to secure shareholder approval, would seriously jeopardize the financial viability of the company. Accordingly, the company sought relief from NASDAQ's shareholder approval rules, pursuant to the Financial Viability Exception (the "Exception") available under Rule 4350(i)(2), stating that its cash and cash equivalents could not sustain the company through the duration of the proxy solicitation process and that without the Exception, it would significantly curtail, or cease entirely, its operations and/or file for bankruptcy protection. The company noted that its audit committee had approved the reliance on the Exception.

The company is requesting the Exception solely for the issuance of \$15 million in Proposed Transaction at the first closing. Subsequently, the company will seek shareholder approval for the remaining \$10 million investment prior to a second closing.

Issue: Is the company eligible for a Financial Viability Exception, pursuant to Rule 4350(i)(2)?

Determination: Based on a review of the circumstances described above, NASDAQ determined to grant the company's request for an exception from the shareholder approval requirements because without the requested exemption the company would have no alternative to meet its capital requirements and may have to seek bankruptcy protection in the event that the transaction was delayed. The company was required to send a letter to all shareholders and to issue a press release describing the transaction at least ten days prior to closing the transaction and alerting shareholders of the company's omission to seek the shareholder approval that would otherwise be required.

Issue: Is the issuance of the Preferred Stock consistent with Rule 4351, NASDAQ's Voting Rights Rule, and IM-4351, NASDAQ's Voting Rights Policy?

Determination: NASDAQ determined that because the Preferred Stock will vote on an as-converted basis and may be converted at a discount to market value, the issuance of the Preferred Stock would be presumed to be prohibited. See, e.g., IM-4350-1. However, NASDAQ noted that under the Voting Rights Rule and Policy, it is appropriate to consider whether an issuance is designed to "rescue" a company in financial distress. In such cases, it may be permissible to issue preferred stock with heightened voting protection that is consistent with the reasonable expectations of investors willing to provide additional equity to the company in these circumstances. See Section III.C.2 of SEC Release No. 34-35121. Accordingly, based on the company's assertion that the voting rights provisions of the Preferred Stock as described are the only basis on which the Investors are willing to proceed with the Proposed Transaction, the company's representations regarding its financial situation, and the analysis of the voting rights in these circumstances, NASDAQ concluded that the Preferred Stock conversion and voting provisions are consistent with the Voting Rights Rule and Policy.

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Staff Interpretative Letter 2004-31

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to amend its existing Executive Deferred Compensation Plan (the "Plan"), which defers the receipt of both cash and equity compensation in order to delay the current income tax liability thereon. Participants in the Plan may elect to defer salary, cash bonuses, awards of common stock, and net shares of common stock resulting from the exercise of stock options. Currently, the Plan has separate deferral accounts for cash and for common stock. Participants may elect how the cash deferral account is invested, from among a number of investment funds that the company makes available at its discretion. Payment of cash deferral accounts is made in cash.

Pursuant to the proposed amendment (the "Amendment"), participants in the Plan would be able to elect to invest their cash deferral accounts in the company's common stock. These investments would be made by purchasing shares on the open market, or possibly directly from the company, at fair market value at the time of the deferral and payable in kind upon distribution.

Issue: Would the proposed Amendment require shareholder approval under NASDAQ's Rule?

Determination: No. NASDAQ determined that the Amendment will not require shareholder approval because, as permitted under Rule 4350(i)(1)(A), the proposed change merely provides a convenient way, at the election of the participants, to purchase shares on the open market or from the company at fair market value.

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Staff Interpretative Letter 2004-34

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to amend an equity based compensation plan (the "Plan"), which currently provides for, among other things, the award of restricted stock. Pursuant to the proposed amendment (the "Amendment"), the company could grant restricted stock units ("RSUs"), which subject to vesting, could be redeemed for shares of the company's common stock. The terms and conditions of RSUs are, in all material respects, the same as the terms and conditions of restricted stock. Both awards provide the same economic benefit and have the same tax treatment, accounting treatment, and securities law implications.

Issue: Would the Amendment be considered a material amendment to the Plan, and as such, require shareholder approval pursuant to the Rule?

Determination: No. The Proposed Amendment is not considered a material amendment under the Rule because the Amendment would not result in an expansion of the types of awards available under the Plan. The RSUs are substantially the equivalent of awards of restricted stock, which are currently permissible under the Plan. Further, the Amendment does not result in an increase in the number of shares issuable under the Plan, a material increase in benefits to participants, or an expansion of the class of eligible participants. Therefore, shareholder approval is not required under Rule 4350(i)(1)(A) and IM-4350-5.

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Staff Interpretative Letter 2004-36

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Rule 4351: Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

IM-4351. Voting Rights Policy: [NASDAQ's] Voting Rights Policy is based upon, but more flexible than, former SEC Rule 19c-4. Accordingly, The NASDAQ Stock Market will permit corporate actions or issuances by NASDAQ issuers that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, NASDAQ will consider, among other things, the economics of such actions or issuances and the voting rights being granted. NASDAQ's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of NASDAQ issuers change over time.

Relevant Facts: Pursuant to a proposed private placement (the "Proposed Transaction"), a company plans to offer convertible Preferred Stock to institutional investors. In connection with the private placement, the company provided the following information:

- The Preferred Stock will be convertible into common stock at a conversion price of approximately 110% of the volume weighted average price of the common stock for the five trading days immediately prior to the signing of the definitive agreement;
- The Proposed Transaction would initially result in an issuance of common stock of 19.2% of the company's total shares outstanding (on a pre-issuance basis);
- The Preferred Stock would contain anti-dilution provisions, which adjust the conversion price, such that it may potentially reduce the conversion price below the market value at the date of the definitive agreement and also increase the number of shares of common stock issuable in connection with the Proposed Transaction. However, the shares issued as a result of the anti-dilution provisions would be subject to a cap that limits the shares issued, in the Proposed Transaction, including shares issued for anti-dilution adjustments, to 19.9% of shares outstanding on the definitive agreement date, unless shareholder approval is obtained.
- The Certificate of Designation for the Preferred Stock will include a provision that, unless stockholder approval is obtained: (i) limits the company's ability to pay dividends and redemption payments in common stock; and (ii) caps the total shares issuable upon conversion of the Preferred Stock, including shares issued for anti-dilution adjustments, to 19.9% of the company's outstanding common stock (the "Maximum Issuance"), as of the execution date;
- The Preferred Stock will vote on an as-converted basis with such voting power fixed at the initial conversion ratio, which is based on a 10% premium to the market price on the execution date, and the voting power will not be increased as a result of any anti-dilution calculations; and
- The investors participating in the Proposed Transaction will have the right to participate in future equity-linked financings for one year following the closing, other than strategic investments, underwritten public offerings and employee and director stock options provided that no investor will be permitted to participate if such participation will result in such investor holding more than 19.9% of the voting power of the company unless shareholder approval is obtained. In addition, shares issued under the right to participation will be included in the Maximum Issuance permitted without shareholder approval.

In January 2004, prior to the company's re-listing on The NASDAQ National Market,¹ the company issued 1,000,000 shares of common stock in a private placement (the "Previous Transaction") to two funds affiliated

¹ The company was listed on The NASDAQ SmallCap Market until early 2003, when it was delisted and commenced trading on the Over-the-Counter Bulletin Board. The company was subsequently approved for re-listing on The NASDAQ National Market in early 2004.

with a large institutional investor (the “Investor”). Under the terms of the private placement to the Investor, the purchasers have the right to participate in the company’s future private equity offerings for one year following the date of closing. The company does not expect the Investor to participate in the Proposed Transaction, and, if the Investor does participate, such participation is expected to be in the same proportion as its existing ownership.

Issue: Is shareholder approval required for the Proposed Transaction under NASDAQ’s rules?

Determination: No. NASDAQ determined that shareholder approval for the Proposed Transaction was not required under Rule 4350(i)(1)(D)(ii), since the cap will restrict the potential issuance of common stock to less than 20% of the company’s pre-transaction outstanding shares and voting power unless shareholder approval is obtained. In the event that shareholder approval is not obtained, the terms of the transaction will not change.

Issue: Will the shares issuable under the Proposed Transaction be aggregated with the shares issued in the Previous Transaction for purposes of determining whether or not shareholder approval under the Rule is required?

Determination: No. The Proposed Transaction will not be aggregated with the Previous Transaction for application purposes of Rule 4350(i)(1)(D)(ii). NASDAQ based its determination on the following factors: (i) there are no contingencies between the two transactions; (ii) both transactions involve issuances of different classes of securities; and (iii) the proceeds from the Proposed Transaction will be used for purposes distinct from those of the Previous Transaction.

NASDAQ advised the company that future transactions that result or could potentially result in issuances of common stock will be reviewed by Staff, which may determine that it is appropriate to aggregate such issuances with prior issuances, including those discussed within.

Issue: Does the issuance of the Preferred Stock comply with Rule 4351 and NASDAQ’s Voting Rights Policy?

Determination: Yes. The Preferred Stock will vote in the same proportion as its initial conversion price, which is at a price greater than market value. Accordingly, the Proposed Transaction complies with the Voting Rights Rule and Policy.

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Staff Interpretative Letter 2004-38

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company is considering a public offering (the "Public Offering") of its common stock. Approximately one year earlier, the company's shareholders had approved a private placement of Series A Convertible Preferred Stock and warrants (the "Financing"). Shareholder X was one of the participants in the private placement. Upon the closing of the Financing, Shareholders X and Y beneficially owned approximately 25% and 32%, respectively, of the company's outstanding shares. One year later, Shareholder X has become the largest beneficial owner as a result of open market purchases. At the time of the proposed Public Offering, Shareholders X and Y beneficially own 24.7% and 24.5%, respectively.

Pursuant to the terms of the Financing, all of the investors were afforded the right to participate in future equity offerings by the company up to an amount that would enable them to maintain their pre-transaction beneficial ownership percentage. If Shareholder X was to exercise its right, this investor could purchase up to 11.6% of the company's pre-transaction outstanding shares. Any shares bought by Shareholder X would be: (i) purchased in the public offering at the same terms available to all other purchasers; and (ii) covered by the same registration statement as all other shares in the Transaction.

Issue: Is shareholder approval required for the investors' participation in the Public Offering under NASDAQ's rules?

Determination: No. In accordance with NASDAQ's shareholder approval requirements, shares issued in a public offering are not subject to shareholder approval. In addition, Shareholder X's participation in the Public Offering would be pursuant to the terms of the participation rights from the Financing, a shareholder approved transaction. As such, NASDAQ determined that Shareholder X's participation in the proposed Public Offering would not require shareholder approval under Rule 4350(i)(1)(D). In addition, prior to the Public Offering Shareholder X was the largest beneficial owner of the company's outstanding stock as a result of open market purchases, which are not considered for purposes of NASDAQ's shareholder approval requirements. Accordingly, shareholder approval, pursuant to Rule 4350(i)(1)(B), would not be required since a change of control would not result from the proposed Public Offering.

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Staff Interpretative Letter 2004-39

Rule 4200(a)(15)(B): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: ... (B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years.

IM-4200. Definition of Independence: The Rule’s reference to a “parent or subsidiary” is intended to cover entities the issuer controls and consolidates with the issuer’s financial statements as filed with the U.S. Securities and Exchange Commission (but not if the issuer reflects such entity solely as an investment in its financial statements).

Rule 4350(d)(2)(A): Each issuer must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be independent as defined under Rule 4200(a)(15); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c)); (iii) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a company’s balance sheet, income statement, and cash flow statement. Additionally, each issuer must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual’s financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

Relevant Facts: A company stated that a member of its board of directors (the “Director”) had accepted payments from an entity (“Target A”), which had been acquired by the company approximately two years ago. The Director had been granted options by Target A for services provided prior to the acquisition. Upon consummation of the acquisition, the company assumed all of Target A’s outstanding options. Target A also continued to provide services to the newly combined company. The Director in question received payments, less than \$60,000, for services he provided to the company shortly after the acquisition. The services were rendered within the past two years, but not within the last year.

Issue: Based on these facts, is the Director precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B), or as an audit committee member, pursuant to Rule 4350(d)(2)(A)?

Determination: No. NASDAQ determined that the company’s board is not precluded from finding that the Director is independent under the Rule and that the Director is not precluded from serving on the Audit Committee. With regard to the options, the Director’s payments are deemed to have been made as of the date of the award as calculated according to a generally accepted pricing model. In this case, the options were awarded before the three-year look-back period set forth in Rule 4200(a)(15)(B). Further, the Director did not receive payments in excess of \$60,000 from Target A other than for board service (and any value provided by the assumption of the options, which were for board service only, and the reimbursement of expenses) during the current or any of the past three fiscal years. Moreover, because the Director did not participate in the preparation of the financial statements of the company or its subsidiary at any time during the past three years, he is not precluded from serving on the company’s audit committee pursuant to Rule 4350(d)(2)(A).

Notwithstanding these determinations that such service is not precluded by the Rule, pursuant to IM-4200, the company’s board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors.

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 2004-42

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

IM-4350-3. Definition of a Public Offering: When determining whether an offering is a “public offering” for purposes of the shareholder approval rules, NASDAQ will consider all relevant factors, including but not limited to: (i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best efforts basis, or whether the offering is self-directed by the issuer); (ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort); (iii) the breadth of the offering’s distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors); (iv) the offering price (including the extent of any discount to the market price of the securities offered); and (v) the extent to which the issuer controls the offering and its distribution.

Relevant Facts: A company proposes an issuance of 3 million shares of its common stock (the “Offering”) in a registered offering, pursuant to a prospectus supplement under a shelf registration filed with the Securities and Exchange Commission and declared effective prior to the transaction. In connection with the Offering, the company provided the following information:

- The Offering will be conducted on a best-efforts basis for which the company has engaged a placement agent;
- The Offering is being broadly marketed. The company previously sought to conduct an offering, but withdrew it prior to closing. Nevertheless, the effort generated substantial investor interest, and the placement agent intends to solicit approximately 35-40 of the former potential investors for the proposed Offering. Additional marketing efforts, such as road shows and marketing meetings, are being planned to attract approximately 20 to 25 new potential investors;
- The company will issue a press release, which will state that this transaction is a public offering through a placement agent;
- There are no restrictions as to the nature of the investors who may participate in the Offering. Further, the company is working to include retail investors through a second firm;
- The company will not have control over the distribution process; and
- The Offering’s pricing mechanism has not yet been fully negotiated by the parties, but the company has indicated that it expects the terms to be similar to those used in its past transactions, i.e., at a discount to market ranging between 7% and 11%.

Issue: Is the Offering considered a public offering for purposes of Rule 4350(i)(1)(D)(ii)?

Determination: Yes. NASDAQ determined that the Offering constituted a public offering under IM-4350-3 for purposes of Rule 4350(i)(1)(D)(ii) because of the broad scope of the marketing effort, the expected number of purchasers, the manner in which the offering will be priced (including the fact that it will be consistent with the price of a public secondary firm commitment underwriting), and the limited control of the company in the distribution of the shares to be offered. Accordingly, shareholder approval pursuant to Rule 4350(i)(1)(D)(ii) is not required.

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

Staff Interpretative Letter 2004-45

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company proposes an exchange offer of new convertible notes for its outstanding notes, to be effected through a tender offer (the "Proposed Transaction Offer"). The company is also offering additional notes for cash. The notes are convertible into common stock, which could be issued to settle interest payments as well. The potential issuance is 20% or more of the company's common stock and voting power outstanding before the transaction. The price of the common stock issuable under the notes is based upon the market price of the company's common stock. This price, however, is subject to a floor, which is equal to the market value of the company's common stock on the second trading day immediately preceding the closing of the tender offer. The company used the closing price on the second trading day immediately preceding the closing of the tender offer in order to comply with SEC tender offer rules. The market value of the common stock is greater than its book value. The company will impose an ownership limitation, which prevents a holder from acquiring 19.9% or more of the common stock or voting power outstanding.

Issue: Is shareholder approval required for the Proposed Transaction under NASDAQ's rules?

Determination: No. NASDAQ determined that the pricing of the Proposed Transaction was at least as much as the greater of book or market value. Accordingly, shareholder approval under Rule 4350(i)(1)(D)(ii) was not required for the Proposed Transaction. Furthermore, shareholder approval is not required under Rule 4350(i)(1)(B) because no participant in the Proposed Transaction will acquire 20% or more of the company's outstanding common stock or voting power as a result of the transaction.

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

Staff Interpretative Letter 2004-49

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In a private placement (the "First Transaction") conducted approximately three and one-half months ago, a company sold shares of its common stock and warrants, representing in the aggregate approximately 35% of its pre-transaction outstanding shares, to a group of institutional investors at a premium to the market price.

The company now proposes a second private placement of units (the "Proposed Transaction") to a different group of institutional investors. The common stock portion of the units will be issued at a 10% discount to the market price, and the warrant coverage will not exceed 20%. Additionally, the warrants will be exercisable at a premium to the market price of the company's common stock. In the aggregate, the Proposed Transaction would not exceed 20% of the company's currently outstanding shares. None of the Proposed Transaction investors participated in the prior private placement.

While the proceeds from both offerings will generally be used for working capital to promote ongoing research, development and operations, there is a different emphasis between the two transactions. The proceeds of the First Transaction were used primarily to fund the completion of certain clinical trials, while the proceeds to be raised in the Proposed Transaction will be used to broaden the company's technology portfolio. At the time of the First Transaction, the company did not have a specific plan or intention to pursue the Proposed Transaction. Further, there are no contingencies between the two Transactions, as the terms of the Proposed Transaction will be separately negotiated with the new investors.

Issue: Will the Proposed Transaction be aggregated with the First Transaction for purposes of determining whether shareholder approval under NASDAQ rules is required?

Determination: In this case, NASDAQ determined not to aggregate the shares issued in the two transactions because: (i) the investors in each transaction are different, (ii) the purposes of the transactions and the use of proceeds are different, and (iii) the two transactions are not contingent upon each other. Accordingly, NASDAQ would assess whether shareholder approval is required for the Proposed Transaction under Rule 4350(i)(1)(D) based only on the shares issued in that transaction.

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

Staff Interpretative Letter 2004-50

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: Approximately four months ago, a company sold shares of common stock in a private placement (the "First Transaction"), representing approximately 19.96% of its pre-transaction outstanding shares to five institutional investors at a discount to market.

The company now proposes a second transaction (the "Proposed Transaction"), which may be at a discount to market value, although the structure, size and final terms of the private placement have not yet been finalized.

The proceeds of the First Transaction were used to raise funds to permit the company to conduct the patient enrollment phase of its Phase III clinical trial of its product. The proceeds from the Proposed Transaction will be used to finance certain activities that will be required to bring its product to market after the completion of the enrollment phase of its current clinical trial. At the time of the First Transaction, the company did not have a specific plan or intention to pursue the Proposed Transaction. Additionally, none of the investors in the First Transaction will participate in the second offering. Finally, there are no legal or other contingencies between the two transactions, as the terms of the Proposed Transaction will be separately negotiated with the new investors.

Issue: Will the Proposed Transaction be aggregated with the First Transaction for purposes of determining whether shareholder approval under NASDAQ rules is required?

Determination: In this case, NASDAQ determined not to aggregate the shares issued in the two transactions because the investors, the purpose and the use of proceeds in the transactions are different. In addition, the terms of the Proposed Transaction will be separately negotiated with the new investors. The Proposed Transaction will not close until approximately four months following the consummation of First Transaction, at the earliest. Finally, the Board gave separate approval to management for the Proposed Transaction, and there are no legal contingencies between the two transactions. Accordingly, NASDAQ would assess whether shareholder approval is required for the Proposed Transaction under Rule 4350(i)(1)(D) based only on the shares issued in that transaction.

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

Staff Interpretative Letter 2004-51

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: Approximately five months ago, a company sold shares of its common stock (the "First Transaction"), representing approximately 19.8% of its pre-transaction outstanding shares, to two entities that are affiliated with each other (the "Major Investors"). The company now proposes a second transaction (the "Proposed Transaction"), in which the company would sell up to 500,000 shares of common stock and a certain number of warrants, which together represent less than 20% of the company's common stock outstanding on a pre-transaction basis.

However, if the shares issued in the First Transaction are aggregated with the Proposed Transaction, the issuances would exceed 20% of the common stock outstanding prior to the First Transaction. The Proposed Transaction would include three investors, and the Major Investors from the First Transaction will purchase approximately one-third of the securities issued under the Proposed Transaction.

Issue: Will the Proposed Transaction be aggregated with the First Transaction for purposes of determining whether shareholder approval under NASDAQ rules is required?

Determination: Yes. Because of the level of participation by the Major Investors in the Proposed Transaction, NASDAQ determined that the two transactions would be aggregated for purposes of determining shareholder approval under Rule 4350(i)(1)(D). The Major Investors purchased all of the securities issued in the First Transaction and are expected to purchase up to one-third of the securities issued in the Proposed Transaction. Further, the securities in both transactions will be issued at a discount to market value, and the aggregate shares purchased by the Major Investors at a discount will exceed 20% of the total shares outstanding prior to the First Transaction.

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

Staff Interpretative Letter 2004-52

Rules 4200(a)(15)(B) and 4200(a)(15)(C): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than the following: (i) compensation for board or board committee service; (ii) payments arising solely from investments in the company’s securities; (iii) compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company; (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or (v) loans permitted under Section 13(k) of the Act. Provided, however, that audit committee members are subject to additional, more stringent requirements under Rule 4350(d).

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer;

Relevant Facts: In November 2002, a director (the “Director”) was appointed to the audit committee of a company. At the time, and until October 2003, the company was a wholly-owned subsidiary of the parent company (the “Parent”). In October 2003, the Parent distributed to its stockholders on pro-rata basis all of the outstanding shares of the company (the “Distribution”). Upon the closing of the Distribution, the company commenced trading on The NASDAQ Stock Market. The Director’s sibling was employed by the Parent as an executive officer from February 2002 until the Distribution. The Director’s sibling then ceased to be employed by the Parent.

Issue: Based on these facts, is the Director precluded from serving as an independent director for the company, pursuant to Rule 4200(a)(15)(B) or Rule 4200(a)(15)(C)?

Determination: Yes. NASDAQ determined that the Director is not independent under the Rules. For purposes of the three-year look-back under the Rules, employment with a parent company is deemed to end on the earlier of when: (i) the employment relationship with the former parent terminates; or (ii) the parent/subsidiary relationship terminates. Because the Parent employed the Director’s sibling as an executive officer within the past three years, and because the sibling was employed during a period in which the parent/subsidiary relationship existed, the Director is not currently eligible to serve as an independent director, pursuant to Rule 4200(a)(15)(C). Further, in the event that the Parent paid the Director’s sibling in excess of \$60,000 during one of the past three years, the Director would also be ineligible, pursuant to Rule 4200(a)(15)(B).

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

Staff Interpretative Letter 2004-53

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: Under its existing compensation plan (the "Plan"), a company has issued options to its President and its Chief Operating Officer. Each person has received options to purchase 500,000 shares. Pursuant to the proposed amendment (the "Amendment"), the company would permit the cashless exercise of these options by canceling a sufficient number of the "in-the-money" options to cover the cost of the exercise of the remaining options, including the withholding for taxes and Medicare and other customary payroll deductions. In addition, the options cancelled in the cashless exercise would not be available for re-grant.

Issue: Would the Amendment be considered a material amendment to the Plan, and as such, require shareholder approval pursuant to the Rule?

Determination: No. In this case, NASDAQ determined that the Amendment is not a material amendment to the Plan under the Rule. In that regard, the Amendment will not provide a material increase in the number of shares granted under the Plan or a material expansion of the class of participants. Further, the Amendment will not expand the types of options or the awards provided under the Plan and there will not be a material increase in benefits to the holders of the options. As such, shareholder approval for the Amendment is not required under Rule 4350(i)(1)(A).

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Staff Interpretative Letter 2004-54

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company has three stock option plans (collectively, the "Plans") and seeks guidance as to the applicability of Rule 4350(i)(1)(A) on the cancellation of existing options under the Plans and the re-granting of options to employees and directors (the "Proposal"). The actions resulting from the Proposal would apply broadly to almost all of the employees of the company.

Two of the Plans (collectively, the "Omnibus Plans") contain specific provisions allowing for both the cancellation and the re-granting of options. The third plan (the "1990 Plan") provides the designated committee of the board with the authority to make and establish such rules and procedures, as it deems appropriate for the administration of the plan. However, the 1990 Plan does not contain specific provisions regarding the cancellation and re-granting of options. There are no provisions in any of the three Plans, which prohibit the repricing or exchange of options.

Issue: Does NASDAQ require shareholder approval for the Proposal under these Plans?

Determination: In this case, shareholder approval under Rule 4350(i)(1)(A) was not required for the Omnibus Plans since they contain provisions permitting the cancellation and re-granting of options and there are no provisions of the Plans that would prohibit a repricing or exchange of outstanding options. However, shareholder approval for the Proposal would be required under the 1990 Plan because this plan does not contain provisions permitting the underlying actions. As stated in IM-4350-5, the general authority to amend a plan does not obviate the need for shareholder approval.

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Staff Interpretative Letter 2004-55

Rules 4200(a)(15)(A) and 4200(a)(15)(B): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company;

(B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than the following: (i) compensation for board or board committee service; (ii) payments arising solely from investments in the company's securities; (iii) compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company; (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or (v) loans permitted under Section 13(k) of the Act. Provided, however, that audit committee members are subject to additional, more stringent requirements under Rule 4350(d).

Relevant Facts: Since April 2000, a non-executive chairman of the board of directors (the “Director”) has received \$150,000 per year for his services in that capacity. The Director did not receive payment from the company in any other capacity. The Director's compensation was (but no longer is) paid through the company's employee payroll system, as a matter of administrative convenience, as if he were an employee. Consistent with the form in which the Director's compensation was paid at the time in question, the company characterized him in its 2003 and prior proxy statements as receiving compensation as an employee. The company did not make annual option awards to him under its non-employee directors' stock option plan. In addition, the Director has not participated in any of the company's employee benefit plans and was specifically excluded from the group term life and disability plan in which all employees are automatically enrolled.

Recently, the company has reconsidered the issue of whether the Director is eligible to be an independent director and whether he was in fact an employee of the company, notwithstanding the company's prior disclosure. The company's current view that he is not and never has been an employee of the company, as that term is ordinarily understood. During the period in question, he has instead been a full-time employee of another company. The company concluded that under state law, he would not be found to be an employee as a result of the scope, character, and nature of his responsibilities. The Director's only relationship with the company is in his capacity as the non-executive chairman of the board.

Issue: Based on these facts, is the Director precluded from serving as an independent director, pursuant to Rules 4200(a)(15)(A) or 4200(a)(15)(B)?

Determination: No. Based on the company's representations, NASDAQ determined that the board is not precluded from a finding that the Director is independent pursuant to the Rules. Specifically, the company stated that the Director is not, and never has been, an employee of the company, and that he has received no payment from the company other than for board service. NASDAQ notes that as stated in IM-4200, a company's board has a responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individuals serving as independent directors. At the time the Director became the chairman of the board, the company did not make a determination as to whether or not he was an employee of the company. Moreover, pursuant to Rule 4350(c), a company is required to disclose in its annual proxy (or, if the company does not file a proxy, in its Form 10-K or 20-F) those directors that the board of directors has determined to be independent under Rule 4200. In view of the company's previous disclosure that the Director was an employee, NASDAQ recommended that the company make correcting and clarifying disclosure of the company's current view of whether the Director is, or ever was, an employee.

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 2004-57

Rule 4200(a)(15)(B): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: ... (B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than the following: (i) compensation for board or board committee service; (ii) payments arising solely from investments in the company’s securities; (iii) compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company; (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or (v) loans permitted under Section 13(k) of the Act. Provided, however, that audit committee members are subject to additional, more stringent requirements under Rule 4350(d).

Relevant Facts: A company granted a stock option for 25,000 shares of its common stock with an exercise price of \$6.00 to a member of its board of directors (the “Director”). The exercise price represented 50% of the fair market value of the common stock at the time the Director joined the board in November 1999. The practice of the company is to issue stock options to outside directors upon their appointment to the board. However, in this case, the stock option grant to the Director was delayed until February 2000, when the company filed its registration statement with the Securities and Exchange Commission for its initial public offering (“IPO”). With the IPO underway, the exercise price of the stock option was reset to \$12.50 per share. Because the stock option had an exercise price in excess of the price promised when the Director joined the board, the company agreed to extend a forgivable loan (the “Loan”) to him in an amount equal to the difference to honor its prior commitment. The Loan stipulated that if the Director served three years as a director of the company, the Loan would be forgiven in full. The maximum value of the Loan was \$150,000. In November 2002, the company entered into a written agreement with the Director, whereby the Loan was terminated, and the Director received a lump sum cash payment of \$150,000 from the company (the “Cash Payment”). The company stated that the Cash Payment was an ancillary component of the stock option granted to the Director in connection for his services as a director and was properly characterized as compensation for board services. The company believed that the Cash Payment satisfied the company’s commitment to grant the Director a stock option at the previously agreed per share exercise price and ensured that he would receive the full economic benefit of that commitment.

Issue: Based on these facts, is the Director precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B)?

Determination: No. Based on the facts presented, NASDAQ determined that the Director is not precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B), because of the company’s representation that the Cash Payment was for board services only. Notwithstanding this determination, NASDAQ noted that, pursuant to IM-4200, a company’s board has the responsibility to make an affirmative determination that no relationship exists that would impair the independence of any individual serving as an independent director.

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Staff Interpretative Letter 2004-58

Rule 4350(i)(1)(B): Each issuer shall require shareholder approval prior to the issuance of designated securities ... when the issuance or potential issuance will result in a change of control.

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company and its primary lender (the "Bank") have an existing credit arrangement (the "Agreement"). The Bank subsequently entered into junior participation agreements (the "Participation") with certain investors (the "Junior Participants"). In connection with the Participation, the Bank advanced approximately \$10,000,000 to the company, pursuant to the Agreement, and the Junior Participants acquired 100% participation in the Bank's loan to the company. Effectively, the Junior Participants loaned the \$10,000,000 to the company. Officers and directors of the company hold approximately \$5,000,000 principal amount of the Participation. The company is proposing to issue common stock, at market value, to satisfy the \$10,000,000 Participation, thus converting the original debt to equity (the "Proposed Transaction"). The issuance would be less than 20% of the company's pre-transaction outstanding shares.

Issue: Is shareholder approval required for the Proposed Transaction under NASDAQ's rules?

Determination: No. In this case, NASDAQ determined that shareholder approval under Rule 4350(i)(1)(D) is not required because the issuance will equal less than 20% of the company's pre-transaction outstanding shares. Since no investor will, alone or as a member of a group, own or otherwise control 20% or more of the company's common stock or voting power as a result of the Proposed Transaction, no change of control, as set forth in Rule 4350(i)(1)(B), will occur. Although officers and directors will receive shares in the Proposed Transaction, the issuance will be at a price that is not less than market value. Finally, the company represented that its audit committee, as required by Rule 4350(h), had reviewed and approved the Proposed Transaction.

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

Staff Interpretative Letter 2004-59

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In August 2003, a company issued convertible promissory notes and warrants to six purchasers in a private placement (the "First Transaction"). The underlying common stock issuance was limited to 19.99% of the company's pre-transaction outstanding shares unless shareholder approval was obtained. The terms of the First Transaction included price-based anti-dilution provisions, which allow for the conversion and the exercise prices to be reduced, and additional common shares to be issued in the event that the company subsequently sold securities below a specified price. In addition, the First Transaction provided the purchasers a right of first refusal over certain future issuances of equity securities by the company. In October 2003, the company's shareholders approved the First Transaction, including the removal of the 19.99% limitation.

Under the proposed new transaction (the "Proposed Transaction"), the company has entered into subscription agreements, under which the company would issue additional convertible promissory notes and warrants. The shares in the Proposed Transaction would be issued at a price that is less than the greater of book or market value as of the date of the agreement. However, the shares in the Proposed Transaction may not be converted into or exercised for common shares in excess of 19.99%, based on the number of common shares outstanding immediately prior to the Proposed Transaction, without the approval of the company's shareholders. Four of the six investors from the First Transaction will participate in the Proposed Transaction. No officers or directors of the company will participate in the Proposed Transaction. Finally, since the issuance of securities in the Proposed Transaction would result in a reduction of the conversion and exercise prices of securities issued in the First Transaction, additional shares would be issued as a result of the price-based anti-dilution provisions (the "Additional Shares").

Issue: Will the First Transaction, including the Additional Shares, be aggregated with the Proposed Transaction for purposes of determining whether shareholder approval under NASDAQ rules is required?

Determination: No. With regard to the application of Rule 4350(i)(1)(D), NASDAQ determined that the First Transaction, including the Additional Shares, will not be aggregated with the Proposed Transaction because: (i) the First Transaction was approved by the company's shareholders; (ii) the two transactions are not contingent on each other; (iii) the transactions were not part of the same financing plan; and (iv) the transactions were separated by nine months. In addition, shareholder approval is not required for the Proposed Transaction, pursuant to Rule 4350(i)(1)(B), since no investor will, alone or as a member of a group, own or otherwise control 20% or more of the company's common stock or voting power as a result of the Proposed Transaction. Thus, no change of control will result upon the consummation of the Proposed Transaction.

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

Staff Interpretative Letter 2004-60

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretive Material Regarding Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Rule 4350(i)(1)(A). These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. NASDAQ would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in a connection with a merger or acquisition would be counted by NASDAQ in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements under Rule 4350(i)(1)(C).

Rule 4350(i)(1)(C): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: (i) any director, officer or substantial shareholder of the issuer has a 5 percent or greater interest (or such persons collectively have a 10 percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5 percent or more; or (ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the stock or securities.

Relevant Facts: A company has entered into a definitive agreement (the "Agreement") to acquire another company (the "Target"). Under the Agreement, the outstanding options to purchase shares of Target's common stock will be: (i) assumed and exercisable for shares of the company's common stock (the "Assumed Options"), or (ii) terminated and substituted with options to purchase common stock issued under the company's existing stock option plans (the "Substitute Options").

The company will not issue any additional stock options under Target's stock option plans assumed in connection with the merger. In addition, the company plans to issue an additional \$3,500,000 of shares of restricted stock over a period of a year (the "Restricted Shares") to certain of Target's employees as a retention incentive. These shares will be issued from the company's Non-Officer Employee Stock Incentive Plan. None of these plans was adopted in contemplation of the acquisition.

Issue: Are the Substitute Options, Assumed Options and the Restricted Shares included in the calculation for determining whether shareholder approval, pursuant to Rule 4350(i)(1)(C), is required?

Determination: The Substitute Options and the Restricted Shares will not count in determining whether the transaction involves the issuance of 20% or more of the company's common stock under Rule 4350(i)(1)(C) because any shares available for issuance will come from the share reserves of the company's pre-existing equity plans. None of these plans was adopted in contemplation of the acquisition. However, as stated in

IM-4350-5, NASDAQ will count any additional shares available for issuance under a plan or arrangement acquired in connection with a merger or acquisition in determining whether the 20% threshold is reached. Therefore, shares issuable under the Assumed Options will count in the 20% calculation under Rule 4350(i)(1)(C) because they will result in additional shares being available for issuance.

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 2004-63

Rule 4350: Qualitative Listing Requirements for NASDAQ National Market and NASDAQ SmallCap Market Issuers Except for Limited Partnerships.

Relevant Facts: A privately-held bank holding company has established three affiliated Trusts and is the issuer of certain subordinated debentures that comprise the sole assets of these Trusts. Two of the three Trusts ("Trust I and Trust II") are listed on The NASDAQ National Market. The company subsequently listed a third Trust ("Trust III") on the New York Stock Exchange ("NYSE"). The company is inquiring whether NASDAQ's corporate governance standards would still be applicable if the company complies with the NYSE corporate governance standards.

Issue: Must the company comply with NASDAQ's corporate governance standards if it already meets the applicable standards of the NYSE?

Determination: Yes. Because Trust I and Trust II are listed on The NASDAQ National Market, they must satisfy all applicable requirements for continued listing, including the corporate governance requirements. The fact that, subsequent to the listing of the two trusts on NASDAQ, the company elected to list Trust III on the NYSE is not a basis for an exemption from NASDAQ's corporate governance standards.

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 2004-64

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: The compensation committee (the "Committee") of the board of directors, which administers the company's amended and restated equity incentive plan (the "Plan"), is contemplating the repricing of certain outstanding incentive and non-qualified stock options (the "Options") under the Plan. The Options currently have exercise prices considerably higher than the trading prices of the company's common stock. The Committee has proposed that the company effect the repricing of the Options, pursuant to an exchange tender offer, whereby new options will be issued to the previous Option holders six months after the expiration of the tender offer in the same share amounts as the Options, but at exercise prices equal to the market price of the company's common stock on the date of the new grants (the "Proposal"). The Plan provides the Committee with the authority to offer an exchange or to redeem any previously granted award for a payment in cash, stock, or another award based on the terms and conditions the Committee determines and communicates to the Option holder at the time the offer is made.

Issue: Would the Proposal be considered a material amendment to the Plan, and as such, require shareholder approval pursuant to the Rule?

Determination: In this case, shareholder approval, pursuant to Rule 4350(i)(1)(A) is not required because the Plan contains provisions permitting the underlying actions. As stated in IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. In addition, there are no provisions of the Plans that would prohibit a repricing or exchange of outstanding options.

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

Staff Interpretative Letter 2004-67

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In March 2004, a company issued convertible debentures (the "March Transaction"), which are convertible into shares of the company's common stock. In addition, the investors received warrants to purchase additional shares of common stock. Two months later, the company issued common stock and warrants (the "May Transaction"). The placement agent for this transaction also received warrants to purchase shares of common stock.

Assuming the full conversion of the debentures from the March Transaction and the exercise of the warrants from both transactions, the company could issue an aggregate of approximately 19% of its total shares outstanding prior to the first transaction. The company used the proceeds from both of these transactions for an acquisition.

In July 2004, the company proposes to sell shares of its common stock (the "Proposed Transaction"), which represent approximately 19.6% of its total shares and voting power outstanding. None of the investors in the Proposed Transaction participated in the March or May Transactions, and no officers or directors of the company will participate in the Proposed Transaction. In addition, the company represents that there are no contingencies between the transactions, that the Proposed Transaction is independent of the previous transactions, and that the proceeds from the Proposed Transaction will be used for various capital expenditures, such as research and technology enhancements, and not for the acquisition.

Issue: Will the Proposed Transaction be aggregated with the March and May Transactions for purposes of determining whether shareholder approval under NASDAQ rules is required?

Determination: NASDAQ determined not to aggregate the shares issued in the first two transactions with the Proposed Transaction for purposes of determining whether shareholder approval is required pursuant to Rule 4350(i)(1)(D) because the investors in the Proposed Transaction will be different from those of the March and May Transactions, the purposes of the transactions and the uses of proceeds are different, and there were no contingencies between either of the earlier Transactions and the Proposed Transaction.

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

Staff Interpretative Letter 2004-68

Rule 4200(a)(15)(B): “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: ... (B) a director who accepted or who has a Family Member who accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years.

IM-4200. Definition of Independence: It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 4200.

Relevant Facts: A company proposes to add a new director (the “Nominee”) to its Board of Directors and its Audit Committee. The Nominee presently serves on the company’s Scientific Advisory Board (“SAB”). In that capacity, the Nominee provides consulting services to the company and receives payments of \$2,000 per quarter for this service. In addition, the company has granted the Nominee options to purchase 50,000 shares of its common stock, with the exercise price set at market value on the date of the grant. Using the Black-Scholes method, the aggregate value of the options on the grant dates was \$25,000. After his appointment to the Board and the Audit Committee, the Nominee would remain on the SAB but would no longer be paid any compensation for his service on the SAB or as a consultant. In addition, he would forfeit his right to all unvested options granted in connection with his SAB or consultancy services (the “Forfeiture”). Because the company is “modifying” the option, the Forfeiture would require the company to take a non-cash accounting charge (the “Charge”). The Nominee is not, and has not been, an employee of the company.

Issue: How does NASDAQ value options that vest over time for purposes of calculating the \$60,000 payment threshold under Rule 4200(a)(15)(B)?

Determination: For purposes of the Rule, the payment is deemed to have been made as of the date of grant as calculated according to a generally accepted pricing model.

Issue: Would NASDAQ view the Charge, either at the time of the amendment or spread over the option vesting period, as a payment to the director, such that it would need to be considered in calculating whether the Nominee satisfies the \$60,000 payment threshold under Rule 4200(a)(15)(B)?

Determination: The Charge will not be considered when calculating whether the \$60,000 payment is reached because it will not result in a payment to the Nominee.

Issue: Based on these facts, is the Nominee precluded from serving as an independent director, pursuant to Rule 4200(a)(15)(B)?

Determination: No. Based on the information provided, NASDAQ determined that the company’s Board is not precluded from finding that the Nominee is independent under Rule 4200(a)(15)(B). Notwithstanding these determinations, the company’s board has a responsibility, pursuant to IM-4200, to make an affirmative determination that no relationship exists (including those described) that would impair the independence of the Nominee.

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 2004-70

Rule 4350(i)(1)(D): Each issuer shall require shareholder approval ... prior to the issuance of designated securities in connection with a transaction other than a public offering involving: (i) the sale, issuance or potential issuance by the issuer of common stock (or securities convertible in to or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: Under the terms of a Securities Purchase Agreement (the "Transaction"), the company will issue to certain investors (the "Investors") the following securities: (i) ordinary shares at a discount to the current market price; (ii) convertible notes (the "Notes") convertible into 1,400,000 ordinary shares at a premium to the current market price; and (iii) Additional Investment Rights (the "Rights") and Warrants (the "Warrants") to purchase ordinary shares. The Rights and Warrants are exercisable, beginning six months after the closing of the Transaction, at a premium to the current market price.

Under the terms of the Notes, the maximum number of ordinary shares that can be issued upon conversion, even in the event of an anti-dilution adjustment, when added to the ordinary shares issued at the closing, cannot exceed 19.99% of the company's pre-transaction outstanding shares, unless shareholder approval is obtained. The terms of the Transaction will not change in the event that the shareholders vote to prohibit the removal of the 19.99% limitation. Further, this cap will apply for the life of the Transaction unless shareholder approval is obtained.

In the event of an anti-dilution adjustment, the exercise price of the Rights and the Warrants cannot be lowered to a price less than the market value immediately prior to the execution of the definitive agreement.

The Investors do not have a pre-existing investment in the company; there is no common control among the Investors; and the Investors are not acting in concert. Furthermore, no participant in the Transaction will acquire, or have the right to acquire, 20% or more of the company's outstanding common stock or voting power as a result of the Transaction, even in the event of an anti-dilution adjustment. In addition, no officers or directors will participate in the Transaction, and the proceeds of the Transaction will be used for general corporate purposes.

Issue: Is the company required to seek shareholder approval of the Transaction, pursuant to Rule 4350(i)(1)(D)?

Determination: No. NASDAQ determined that the Transaction, as described, does not require shareholder approval under the Rule because the ordinary share issuance at a price below market value will not exceed 19.99% of the company's ordinary shares or voting power outstanding on a pre-transaction basis. Specifically, under the terms of the Notes, the maximum number of ordinary shares that can be issued upon conversion, even in the event of an anti-dilution adjustment, when added to the ordinary shares issued at the closing, cannot exceed 19.99% of the company's outstanding stock prior to the closing of the Transaction, unless shareholder approval is obtained. There is no alternative outcome in the event shareholders do not approve the removal of the 19.99% limitation, and the cap applies for the life of the Transaction unless shareholder approval is obtained. Furthermore, because the Rights and the Warrants are not exercisable until six months from the date of the agreement and the exercise price of each cannot be below the market price, the ordinary shares underlying these securities do not contribute to the 20% calculation under Rule 4350(i)(1)(D).

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 2004-71

Rule 4350(i)(1)(C): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: (i) any director, officer or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or (ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities.

Relevant Facts: A company has entered into an Agreement and Plan of Merger (the "Merger") with another entity (the "Target"). The consideration for the Merger will be paid in shares of the company's common stock. Upon consummation of the transaction, which is subject to the approval by the company's shareholders, the Target will become a wholly owned subsidiary of the company.

After the Merger is completed, the company may enter into a financing transaction (the "Financing"), wherein some of the proceeds may be used to pay down all or a portion of Target's debt. The company represents that Target's debt is not convertible and, therefore, would not become convertible into shares of the company's common stock upon consummation of the Merger. Further, the company states that its board of directors has not yet considered any specific financing transaction and may choose not to pursue any such transaction. Finally, the Merger is not contingent on any subsequent financing.

Issue: Will any or all of the shares to be issued in the Financing be deemed to be "in connection with the acquisition" of the Target, thereby requiring shareholder approval under Rule 4350(i)(1)(C)?

Determination: No. For the purposes of Rule 4350(i)(1)(C), NASDAQ determined that the shares issued in the Financing would not be aggregated with the shares issued in the Merger because: (i) the proceeds of the Financing would not be used to fund the Merger; (ii) the two transactions would not be contingent upon each other; and (iii) there is no financing transaction currently being contemplated by the company.

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

Staff Interpretative Letter 2004-74

Rule 4350(i)(1)(C)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: ... (ii) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities.

Rule 4350(i)(1)(D): Each issuer shall require shareholder approval ... prior to the issuance of designated securities in connection with a transaction other than a public offering involving: (i) the sale, issuance or potential issuance by the issuer of common stock (or securities convertible in to or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company has outstanding convertible notes (the "Notes") and proposes to reduce the conversion price of the Notes to a price below the current market price of the common stock (the "Repricing"), which would increase the number of underlying shares that could be issued to 20% or more of the company's pre-transaction outstanding shares at a price less than the greater of book or market value.

The company also has entered into a letter of intent and is negotiating a definitive agreement for the acquisition of another entity (the "Acquisition") at a price which shall be payable in common stock of the company. The purchase price is expected to be approximately 32% of the company's current outstanding shares.

Issue: Will the shares issued in the two transactions be aggregated for the purposes of determining whether or not shareholder approval under the Rules is required?

Determination: No. NASDAQ determined that the shares issued in the Repricing would not be aggregated with the shares issued in the Acquisition for purposes of determining the applicability of the Rules. This conclusion was based on the company's representations that: (i) the Repricing is unrelated to the Acquisition; (ii) the company will implement the Repricing regardless of the outcome of the current negotiations for the Acquisition; and (iii) the holders of the Notes have no affiliation with any of the stockholders of the target company.

Pursuant to Rule 4350(i)(1)(D), shareholder approval is required for the Repricing because it could result in an issuance of 20% or more of the company's pre-transaction outstanding shares at a price less than the greater of book or market value. Based on the number of currently outstanding shares, shareholder approval would be required for the Acquisition pursuant to Rule 4350(i)(1)(C)(ii) because it would result in the issuance of 20% or more of the pre-transaction outstanding shares in connection with an acquisition. However, because the two transactions will not be aggregated, any common shares issued as a result of the Repricing prior to the closing of the Acquisition, will be included in the number of pre-transaction shares outstanding for purposes of determining whether the Acquisition requires shareholder approval pursuant to Rule 4350(i)(1)(C)(ii).

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Staff Interpretative Letter 2004-76

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company has an existing equity incentive plan (the "Plan") and would like to offer an exchange program (the "Exchange Offer"), pursuant to which the company would permit certain employees to exchange "underwater" options for a smaller number of restricted stock units ("RSUs"). The company represents that the Plan contains provisions allowing for both the cancellation of the "underwater" options followed by the grant of RSUs. Specifically, the Plan grants the authority to a committee of the Board of Directors (the "Committee") to grant both options and restricted stock and to "substitute new options for previously granted options, including previously granted options having higher exercise prices".

Issue: Is shareholder approval required under Rule 4350(i)(1)(A) prior to the company's implementation of the Exchange Offer?

Determination: No. Shareholder approval for the Exchange Offer is not required pursuant to Rule 4350(i)(1)(A) because the Plan contains provisions permitting the underlying actions.

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 2004-77

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company has a Stock Plan (the "Plan"), which currently provides that, upon termination of employment, an optionee has 90 days, or such other time period as provided in the option agreement, to exercise all vested options or else they are forfeited. Any unvested options are surrendered and lapse upon termination of employment. Under a proposed amendment (the "Amendment"), the company would add a change of control provision to the Plan, which would provide for the vesting of all outstanding stock options upon: (i) a change in control of the company; and (ii) the involuntary termination of the option holder's employment without cause within one year after the change of control. The Amendment would not extend the maximum term of the options set forth in the Plan. The company represents that it is not undergoing, and is not anticipating, a change of control event at this time.

Issue: Would the Amendment be considered a material amendment to the Plan, and as such, require shareholder approval pursuant to Rule 4350(i)(1)(A)?

Determination: Shareholder approval of the Amendment is not required pursuant to Rule 4350(i)(1)(A) because the Amendment does not result in a material change to: (i) the number of shares available; (ii) the benefits available to participants; or (iii) the class of eligible participants. In addition, there is no change in the types of options or awards provided under the Plan.

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Staff Interpretative Letter 2004-82

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes a program (the "Program") pursuant to which certain holders of vested employee stock options would receive cash for their options. The option holders who would be eligible to participate in the Program ("Eligible Optionees") are persons who hold vested options to purchase the company's common stock as a result of employee stock options under the company's plans (the "Plans"). Any option holder who is a current employee of the company, or was an employee at any time after a certain date, would not be an Eligible Optionee, and officers and directors would not be Eligible Optionees.

Under the Program, all vested options held by Eligible Optionees who elect to participate will be cancelled in exchange for a cash payment. The cancelled options would not be subject to reissuance, and the number of shares available for issuance under the Plans would be reduced by such number of options that are cancelled. As part of the Program, the company would issue non-plan stock options (the "New Options") to an investment bank (the "Bank"). The Bank would pay the company an amount to be negotiated on an arm's length basis, in part by reference to Black-Scholes and other option pricing models, and the company would pay such amount, less certain costs incurred in providing the Program, to the Eligible Optionees who elect to participate in the Program. The number of options issued to the Bank would equal the number of stock options that are cancelled as a result of the Program. The potential issuance to the Bank under the Program would equal less than 20% of the company's pre-transaction outstanding shares of common stock and voting power.

The Plans do not permit transfer of outstanding stock options to a third party except in certain limited cases, such as by will or the laws of descent and distribution. However, under the Program, there would be no transfer of stock options by any Eligible Optionee to the Bank or to any other third party. Instead, the options issued to the Bank would be new options and would not be issued from any of the company's current or future equity compensation plans. None of the stock option plans prohibits the reacquisition of stock options by the company or the cancellation of stock options granted under the Plans, as is contemplated in the Program.

Issue: Is shareholder approval required for the Program or the issuance of New Options under Rule 4350(i)(1)(A)?

Determination: Shareholder approval of the Program is not required pursuant to Rule 4350(i)(1)(A) because no amendment to any of the Plans is needed. As stated in IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. Additionally, the issuance of New Options would not require shareholder approval under the Rule because the Bank is not among the classes of participants (officer, directors, employees, and consultants) referenced

In Rule 4350(i)(1)(A). Moreover, the Program involves only former employees of the company, and current employees are not eligible to participate.

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Staff Interpretative Letter 2004-83

Rule 4351: Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.

Examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.

IM-4351. Voting Rights Policy: [NASDAQ's] Voting Rights Policy is based upon, but more flexible than, former SEC Rule 19c-4. Accordingly, The NASDAQ Stock Market will permit corporate actions or issuances by NASDAQ issuers that would have been permitted under Rule 19c-4, as well as other actions or issuances that are not inconsistent with this policy. In evaluating such other actions or issuances, NASDAQ will consider, among other things, the economics of such actions or issuances and the voting rights being granted. NASDAQ's interpretations under the policy will be flexible, recognizing that both the capital markets and the circumstances and needs of NASDAQ issuers change over time.

Relevant Facts: In 1986, a company completed its initial public offering and listed on NASDAQ with a single class of common stock with one vote per share. In 2001, the company replaced the single class structure with its current dual class structure (the "Dual Class Structure") consisting of Class A common stock with one-tenth vote per share and Class B common stock with one vote per share (the "super-voting stock"). Both classes are listed on NASDAQ. At the time of the listing, NASDAQ advised the company that the Dual Class Structure would be in compliance with both the Rule and the Policy, subject to certain limitations and restrictions, including that no additional shares of Class B stock could be issued without the prior approval of NASDAQ. The restriction on future issuance of the heavier voting Class B stock is an appropriate safeguard against potential shareholder disenfranchisement, which is necessary because the company's newly created dual structure is not an "existing structure" of the type contemplated by the Policy.

The company is contemplating various proposed purchases (the "Transactions") of its super-voting stock by the current majority shareholder (the "Shareholder"). The Shareholder currently owns approximately 63% of the Class B Stock and has approximately 58% of the total voting power of the company. The proposed Transactions include:

- Purchases of Class B shares on the open market (the "Open Market Purchases");
- Purchases of Class B shares from the holders of the Class B shares in privately negotiated transactions (the "Private Purchases");
- An open-ended tender offer by the Shareholder to purchase Class B shares (the "Tender Offer"). This transaction would be conducted so as not to jeopardize the listing eligibility of the Class B shares on NASDAQ; and
- Purchase of newly issued Class B shares directly from the company (the "Direct Purchase").

Issue: Are the proposed Transactions consistent with Rule 4351 and IM-4351?

Determination: NASDAQ concluded that the Open Market Purchases, the Private Purchases, and the Tender Offer would not violate the Rule or the Policy because none of these transactions would involve the issuance of additional securities by the company, and none would be a corporate action that would have the effect of reducing or restricting the voting rights of existing shareholders. However, the Direct Purchase would not be permitted. Although the Policy provides that companies with existing dual class capital structures would generally be permitted to issue additional shares of the existing super voting stock, the company's structure is not an "existing dual structure" for purposes of the Policy. Generally, NASDAQ believes that an "existing dual structure" is one that was in place prior to a company's being subject to the Rule or the Policy, such as prior to its initial public offering. The company's dual class structure was implemented after its initial public offering. As such, because the Direct Purchase involves the issuance of new shares of Class B shares to advance the Shareholder's objective of acquiring substantially all of the

company's Class B shares, NASDAQ concluded that the Direct Purchase would disenfranchise existing shareholders and, therefore, is not permitted under the Rule or the Policy.

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Staff Interpretative Letter 2004-85

Rule 4350(i)(1)(D): Each issuer shall require shareholder approval ... prior to the issuance of designated securities in connection with a transaction other than a public offering involving: (i) the sale, issuance or potential issuance by the issuer of common stock (or securities convertible in to or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company proposes to enter into an offering (the "Proposed Offering") to sell up to 19.9% of its pre-transaction outstanding shares at a discount to the market price. The company indicates that none of its directors, officers, employees, or consultants will participate in the Proposed Offering.

The company asks whether for purposes of Rule 4350(i)(1)(D), the Proposed Offering would be aggregated with any of its three prior private placements consummated in February, May, and September 2003 (collectively, the "Prior Financings") or with a public offering completed in December 2003 (the "Public Offering"). The company indicates that there are no contingencies between the Proposed Offering and either the Prior Financings or the Public Offering. In addition, these transactions are not part of the same financing plan, and the uses of proceeds are different. All of the investors in the Proposed Offering participated in one or more of the Prior Financings, but no single investor or group of investors, acting in concert, in the Proposed Offering, will own 20% of the company's outstanding stock or voting power on a post-transaction basis.

Issue: Will the Proposed Offering be aggregated with the any of the Prior Financings or the Public Offering for purposes of determining whether shareholder approval under the Rule is required?

Determination: NASDAQ determined that the Proposed Offering would not be aggregated with the Prior Financings or the Public Offering for purposes of the Rule. Although there will be significant commonality of investors in the transactions, NASDAQ concluded not to aggregate in view of: (i) the amount of time between the Proposed Offering and the most recent of the Prior Financings (approximately 11 months); (ii) the lack of contingencies between the Proposed Offering and the Prior Financings or Public Offering; (iii) the fact that use of the Proceeds from the Proposed Offering are largely different from that of the Prior Financings; and (iv) the fact that the Prior Financings and the Proposed Offerings are not part of the same financing plan. Further, under the Rule, public offerings do not require shareholder approval, and therefore, the Public Offering is not a part of the aggregation analysis under the Rule. Finally, none of the company's directors, officers, employees, or consultants will participate in the Proposed Offering.

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Staff Interpretative Letter 2004-86

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes an exchange offer (the "Exchange Offer"), under which stock options granted under its stock option plan (the "Plan") could be exchanged by option holders for new options with a lower exercise price, but with the same value, as determined using Black-Scholes or a similar option valuation methodology.

The Plan permits the surrender of outstanding stock options and the substitution of new stock options with a lower exercise price, as set forth in the Exchange Offer. The Exchange Offer, which involves the cancellation and regrant of options, may be effected under the Plan without any amendment to the Plan.

Issue: Is shareholder approval required for the Exchange Offer?

Determination: NASDAQ determined that shareholder approval of the Exchange Offer is not required pursuant to Rule 4350(l)(1)(A) because, as stated in IM-4350-5, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. In this case, the Plan specifically permits the actions contemplated in the Exchange Offer.

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Staff Interpretative Letter 2004-87

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Rule 4350(i)(2): Exceptions to the shareholder approval requirements may be made upon application to NASDAQ when: (A) the delay would seriously jeopardize the financial viability of the enterprise; and (B) reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors. A company relying on this exception must mail to all shareholders no later than ten days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required and indicating that the audit committee or a comparable body of the board of directors has expressly approved the exception.

Relevant Facts: A company proposes an equity financing (the "Proposed Transaction") and requests that it be granted an exception to NASDAQ's shareholder approval requirements pursuant to Rule 4350(i)(2) (the "Exception"). The company states that a delay in completing the Proposed Transaction to secure shareholder approval would seriously jeopardize the financial viability of the company. Specifically, the company represents that it would be unable to meet its payroll and trade obligations for the following month and would be required to file for bankruptcy within two months. The company notes that its Audit Committee has approved reliance on the Exception.

Under the proposal, the company plans to issue common stock up to 20% of its pre-transaction shares at a discount to the market price with 50% warrant coverage. The warrants will have an exercise price 10% above the purchase price of the common stock and would have only the standard anti-dilution provisions related to changes in the company's capital structure. The company states that no directors, officers, employees, consultants or affiliates will participate in the private placement. No investor will obtain a post-transaction holding of 20% of the common stock outstanding. The company represents that the proceeds from the Proposed Transaction will provide sufficient funding for operations for the next nine months.

Issue: Is the company eligible for a Financial Viability Exception, pursuant to Rule 4350(i)(2)?

Determination: NASDAQ noted that the Proposed Transaction would require shareholder approval pursuant to Rule 4350(i)(1)(D). However, based on the company's representation that without the requested Exception its financial viability would be seriously jeopardized, NASDAQ determined to grant the company's request. Under the terms of the Exception, the company was required to send a letter to all shareholders and to issue a press release describing the transaction at least ten days prior to the closing of the transaction.

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Staff Interpretative Letter 2004-89

Rule 4350(i)(1)(D)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with a transaction other than a public offering involving: ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: In a May 2002 private placement (the "Transaction"), a company issued 500 shares of convertible preferred stock ("Initial Preferred") and warrants ("Initial Warrants"). Under the terms of the Transaction, the Initial Preferred was to be repaid in 15 equal liquidating redemptions, payable in cash or common stock. The Initial Warrants included an anti-dilution clause, such that if the company were to sell securities below a threshold price, the number of shares issuable upon exercise could be increased, and the exercise price would be reduced. Finally, the Transaction provided for a maximum issuance of 19.99% of the company's pre-transaction outstanding shares ("Issuable Maximum") without shareholder approval.

Approximately one year later, the company closed a debt financing that included warrants exercisable at a lower price than the Initial Warrants. Under the adjustment, the number of shares issuable upon exercise of the Initial Warrants was increased, and the exercise price was reduced.

During the past two years, the company has issued common stock to satisfy the redemption of the Initial Preferred. Deducting these shares from the Issuable Maximum, the company has only 500,000 common stock shares remaining under the Issuable Maximum, which is insufficient to satisfy the exercise of the Initial Warrants. Accordingly, in a proposed transaction (the "Proposed Transaction"), the company would implement the following revisions: (i) cancel the Initial Warrants; (ii) issue new warrants exercisable at a lower price for the number of remaining shares available under the Issuable Maximum; and (iii) issue new warrants ("New Warrants"), exercisable above the market price immediately preceding entering into the binding agreement to issue the New Warrants. The New Warrants would have a cashless exercise feature and an expiration date that will be five and one-half years after the date of issuance.

Issue: Is shareholder approval required for the Proposed Transaction under NASDAQ's rules?

Determination: No. NASDAQ determined that the Proposed Transaction would comply with Rule 4350(i)(1)(D)(ii) because the aggregate issuances, apart from those due to any exercise of the New Warrants, would not exceed 19.99% of the company's pre-Transaction shares. The New Warrants will have an exercise price that is greater than the book and market value at the time of the signing of both the initial and the revised agreements, and these warrants will not be exercisable until six months after issuance. Notwithstanding this determination, NASDAQ advised that the Proposed Transaction must provide for no further adjustment or revisions that could increase the number of shares issuable under the Transaction or reduce the exercise prices of the warrants.

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Staff Interpretative Letter 2004-93

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes two amendments (the "Amendments") to its equity incentive plan (the "Plan"). Pursuant to Amendment 1, the Plan would be amended to eliminate the limit on the number of shares of common stock that may be granted in any one calendar year under the Plan, while retaining the existing annual per participant limit. This Amendment would not affect the aggregate number of shares available under the Plan. Amendment 2 would change a section of the Plan to provide for an adjustment in the shares available for issuance under the Plan, along with the maximum number of shares subject to awards that may be granted to a participant in one year, in the event of a reorganization, stock split, merger, spinoff or similar transaction.

Issue: Are the Amendments considered material amendments to the Plan, and as such, require shareholder approval pursuant to Rule 4350(i)(1)(A)?

Determination: NASDAQ determined that the Amendments are not material amendments to the Plan under the Rule. In that regard, neither Amendment will result in an expansion of the class of participants or an expansion in the types of options or awards available. Although Amendment 1 would increase the number of awards that could be granted in any one calendar year, it would not increase the total number of shares available under the Plan. In addition, under Amendment 1, no change would be made to the per participant share limit. Amendment 2 would have the effect only of adjusting outstanding awards and available award, to reflect changes in the company's capital structure. As such, Amendment 2 will not result in an increase in benefits. Further, any increase in the number of shares available under the Plan as a result of Amendment 2 would not be considered a material increase consistent with IM-4350-5, which excludes an increase in the number of shares to be issued under the plan to reflect a reorganization, stock, split, merger, spin-off or similar transaction from those material increases in shares that require shareholder approval.

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Staff Interpretative Letter 2004-95

Rule 4350(i)(1)(C)(i): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company if: (i) any director, officer or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more.

Relevant Facts: A company proposes a transaction (the "Transaction") involving an entity controlled by its chairman of the board (the "Entity"). The Entity beneficially owns more than 30% of the company's outstanding common stock. In the proposed transaction, the Entity would be merged into a newly formed subsidiary of the company. In exchange, the company would issue the same number of shares of the company's common stock to the shareholders of the Entity that the Entity now holds. The shares currently held by the Entity would be distributed to the company and immediately cancelled. As a result, there would be no change in the number of outstanding shares of the company. The sole change would be that the shares of the company's common stock that were held by the Entity would now be held directly by the Entity's shareholders.

Issue: Is shareholder approval for the Transaction required under NASDAQ's rules?

Determination: NASDAQ determined that the Transaction would not require shareholder approval under the Rule because it will not result in an increase of the number of outstanding common shares or voting power.

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

Staff Interpretative Letter 2004-97

Rule 4350(i)(1)(A): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants.

IM-4350-5. Interpretative Material on Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements: Rule 4350(i)(1)(A) requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following: (1) any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); (2) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan; (3) any material expansion of the class of participants eligible to participate in the plan; and (4) any expansion in the types of options or awards provided under the plan. While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required.

Relevant Facts: A company proposes to amend an equity based compensation plan, which authorizes the granting only of stock options (the "Amendment"). The Amendment would authorize the awarding of Stock Appreciation Rights ("SARs"). The SARs would provide the opportunity for recipients to benefit from an appreciation in value of a specified number of shares of the company's stock over a specified period of time and would be settled in the company's stock. When settled, the SARs would provide the equivalent benefit as that of stock options with a net exercise feature, and the other features of the SARs would be identical to those of non-statutory stock options.

Issue: Is the Amendment considered a material amendment to the Plan, and as such, require shareholder approval pursuant to Rule 4350(i)(1)(A)?

Determination: The Amendment is not a material amendment to the Plan under Rule 4350(i)(1)(A) and accordingly will not require shareholder approval. The Amendment does not provide a material increase in benefits to participants or in an expansion of the types of awards available, because the SARs are substantially the equivalent of stock option awards that are currently authorized under the Plan. As in the case of stock options, the benefit to recipients of SARs is determined by the amount of any increase in the value of the common stock between the date of the award and the date of the settlement (or the date of exercise of stock options). In addition, the Amendment does not result in an increase in the number of shares to be issued under the Plan or in an expansion of the class of eligible participants.

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Rule 4350(i)(1)(B): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company...when the issuance or potential issuance will result in a change of control of the issuer.

Rule 4350(i)(1)(C)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ...in connection with the acquisition of the stock or assets of another company ...where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities.

Rule 4350(i)(1)(D): Each issuer shall require shareholder approval prior to the issuance of designated securities...in connection with a transaction other than a public offering involving ... (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable [for] common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: The company proposes an issuance of convertible debentures with 50% warrant coverage to 10 to 15 institutional investors (the "Proposed PIPE"). The debentures will be convertible at an initial conversion price equal to the greater of: (i) 105% of the closing bid price of the company's common stock on the trading day immediately preceding the closing date of the Proposed PIPE, which is when the company and investors will enter into a definitive agreement (the "Closing Bid"), or (ii) the sum of the Closing Bid and \$0.0625. The warrants will be exercisable at the greater of: (i) a set price or (ii) the Closing Bid. The warrants are not exercisable until 181 days after closing. The conversion price and the exercise price will be subject to adjustment in the event of a future stock split, merger, or reorganization and similar changes affecting holders of the common stock generally, but neither the debentures nor the warrants will contain "market-price" or "exercise-price" anti-dilution adjustment provisions.

The company will not at any time issue shares in payment of interest on, or in redemption of, debentures at a price below the Closing Bid if such shares, when aggregated with all prior issuance of shares pursuant to the debentures (excluding warrant shares), represent more than 19.9% of the outstanding common stock as of the closing of the Proposed PIPE, unless shareholder approval has been obtained. No officers, directors, employees, or consultants of the company will be among the purchasers in the Proposed PIPE.

The company completed a PIPE in October (the "First PIPE"). None of the investors in the First PIPE will participate in the Proposed PIPE. Substantially all of the proceeds of the First PIPE have been used to pay the initial price of the company's acquisition of Entity A. The proceeds from the Proposed PIPE will be used for general corporate purposes that are largely unrelated to the acquisition. There are no contingencies between the First PIPE and the Proposed PIPE. No purchaser in the Proposed PIPE will be permitted to own more than 4.99% of the company's common stock by means of conversion or exercise.

Issue: Will the Proposed PIPE be aggregated with the First PIPE, for purposes of determining whether shareholder approval is required pursuant to Marketplace Rules 4350(i)(1)(B), 4350(i)(1)(C)(ii) and 4350(i)(1)(D)?

Determination: NASDAQ determined that the First PIPE and the Proposed PIPE will not be aggregated for purposes of Rule 4350(i)(1)(D) because the investors in each transaction are different, the purposes of the transactions and the uses of proceeds are different, and the two transactions are not contingent upon each other. In the Proposed PIPE, the company cannot issue shares at a discount prior to obtaining shareholder approval when such shares, aggregated with all prior issuances pursuant to the debentures, would represent more than 19.9% of the pre-transaction outstanding shares. The warrants cannot be exercised at a price less than the greater of book or market value as of the date as of the definitive agreement. Accordingly, the Proposed PIPE will meet the requirements of Rule 4350(i)(1)(D). In addition, shareholder approval is not required pursuant to Rule 4350(i)(1)(B) because the Proposed PIPE will not result in a

change of control since no participating investor will be permitted to own more than 4.99% of the company's common stock as a result of the Proposed PIPE. Further, Rule 4350(i)(1)(C) is not implicated by the Proposed PIPE because the issuance is not in connection with an acquisition.

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Rule 4350(i)(1)(A)(iii): Each issuer shall require shareholder approval ... when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants except for... (iii) plans or arrangements relating to an acquisition or merger as permitted under IM-4350-5.

Relevant Facts: Pursuant to a merger agreement, the company will assume the Target's Stock Incentive Plan (the "Plan"). The Plan includes a provision that allows for an automatic annual increase to the shares reserved for issuance (the "Evergreen Provision"). Target's shareholders approved the Plan before the merger negotiations commenced. The company will adjust the share limitation formulas included in the plan to reflect the exchange ratio. Any future increases in the share reserve pursuant to the Evergreen Provision will be calculated according to Target's diluted outstanding shares prior to the merger. The Plan has a term of less than 10 years.

Issue: Does Rule 4350(i)(A)(iii) require shareholder approval for the assumption of the plan and automatic annual share reserve increases?

Determination: NASDAQ determined that, subject to the limitations of IM-4350-5 (the "Limitations"), shareholder approval will not be required under 4350(i)(1)(A) for the assumption of the Plan including the Evergreen Provision. Pursuant to the Limitations: (i) the time during which shares are available for grants under the Plan cannot be extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and (ii) options and any other awards under the Plan cannot be granted to individuals who were employed by the company or its subsidiaries at the time the merger was consummated.

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Rule 4350(i)(1)(B): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ... in connection with the acquisition of the stock or assets of another company...when the issuance or potential issuance will result in a change of control of the issuer.

Rule 4350(i)(1)(C)(ii): Each issuer shall require shareholder approval ... prior to the issuance of designated securities ...in connection with the acquisition of the stock or assets of another company ...where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (a) the common stock has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock; or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the stock or securities.

Rule 4350(i)(1)(D): Each issuer shall require shareholder approval ... prior to the issuance of designated securities in connection with a transaction other than a public offering involving: (i) the sale, issuance or potential issuance by the issuer of common stock (or securities convertible in to or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or substantial shareholders of the company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or (ii) the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% of more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.

Relevant Facts: A company is considering a private placement (the "Proposed Transaction"). Approximately one year earlier, the company issued shares and warrants to an investor ("Investor A"). The proceeds from the sale of this transaction (the "Prior Transaction") were used to purchase shares of a target company (the "Target"). The company also received shareholder approval to issue additional shares in exchange for more shares of the Target (the "Share Exchange").

Investor A would not participate in the Proposed Transaction, and no one investor could own more than 4.99% of the company's outstanding ordinary shares as a result of the Proposed Transaction. In addition, no officers, directors, employees or consultants of the company will purchase shares in the Proposed Transaction. The purpose of the Proposed Transaction is to provide the company with financing to support the business of Target.

Issue: Would the Proposed Transaction be aggregated, for purposes of NASDAQ's shareholder approval rules, with either the Prior Transaction or the Share Exchange?

Determination: The Proposed Transaction would not be aggregated with the Share Exchange for purposes of Rules 4350(i)(1)(C)(ii) or 4350(i)(1)(D) because the shareholders approved the Share Exchange. In addition, the Prior Transaction and the Proposed Transaction will not be aggregated for purposes of these rules because: (i) a substantial length of time has elapsed between the transactions; (ii) there is no commonality of investors; and (iii) the transactions are not contingent on each other. In addition, shareholder approval is not required pursuant to Rule 4350(i)(1)(B) because the Proposed Transaction will not result in a change of control since no participating investor will be permitted to own more than 4.99% of the company's ordinary shares as a result of the Proposed Transaction.

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