

Listing Council Decision 2010-2

Identification  
Number 605

**Rule 5550(a)(2):** For continued listing, the minimum bid price per share for common stock shall be at least \$1 per share.

**Issue:** The company was delisted by a Hearings Panel for failing to regain compliance with Listing Rule 5550(a)(2) after it was provided with the full extent of time available to do so by Staff and a Hearings Panel. The company appealed the Hearings Panel decision to the Listing Council.

**Determination:** Affirmed. The Hearings Panel was willing to grant the company an extension of time so that it could regain compliance with Listing Rule 5550(a)(2) because the company had committed to gaining shareholder approval of a stock split in a ratio sufficient to regain compliance with the rule. The company was unable to gain such approval in the time afforded. The Hearings Panel issued a second decision, which granted the company the full extent of time available under the rules contingent on the company gaining the required shareholder approval by a date sufficient for it to regain compliance with Listing Rule 5550(a)(2) prior to the expiration of the extension. The company failed to gain shareholder approval by the deadline, and the Hearings Panel issued a decision to delist the company's shares.

In affirming the Hearings Panel decisions, the Listing Council finds that granting the company extensions to regain compliance with the \$1 bid price requirement was reasonable and appropriate given the facts and circumstances presented by the record at the time the decisions were issued. In particular, it was reasonable for the Hearings Panel to rely on the company's statements and commitments. It is incumbent on a company to provide NASDAQ accurate statements and to make commitments based on well-considered and reasonable assumptions. In the present case, it is not clear that the company's failure to achieve the various commitments made to the Hearings Panel was due to a failure to consider all contingencies or was a result of unreasonable assumptions. In any event, the company failed to meet the most critical of those commitments, and the Listing Council finds no reason not to affirm the decision to delist the company's securities.

Publication Date\*: 7/31/2012

Identification Number: 605

Listing Council Decision 2006-11

Identification  
Number 640

**Rule 4350(i)(1)(D)(ii):** Each issuer shall require shareholder approval or prior to the issuance of 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 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.

**Issue:** The company failed to obtain shareholder approval before issuing Series E preferred stock that was convertible into the common stock. The company had previously completed two series of similar financings. After analysis, Staff determined to aggregate the three financings. As such, when aggregated with the prior financings, the Series E preferred stock transaction required shareholder approval because it was issued at a discount to market value and its issuance could potentially exceed greater than 20% of the company's pre-transaction total shares outstanding. The Panel delisted the company's securities based on a violation of the shareholder approval rules.

**Determination:** The company was properly suspended because it had violated the shareholder approval requirements, as set forth in

Rule 4350(i)(1)(D)(ii). NASDAQ shareholder approval requirements are designed to provide shareholders with a meaningful voice in significant transactions and in transactions where they may face significant dilution, such as in the current case before the Listing Council. The Listing Council believes that this voice, mandated by NASDAQ rules, is a basic tenet of the NASDAQ corporate governance rules. The NASDAQ shareholder approval requirements are also designed to provide shareholders with notice prior to the consummation of the transaction so that they have the opportunity to sell their shares. In this case, there was no shareholder vote or advance notice of the consummation of this transaction. The Listing Council agrees with the Panel's assessment that because the Series E documents do not by their terms preclude an issuance without shareholder approval; there exists a theoretical possibility that the company could be compelled to issue the securities. The Listing Council also considered the company's argument that it would either restructure the transaction with investors unrelated to the Series C, D, and E transactions in an effort to craft a re-financing plan that would allow the company to unwind the Series E transaction, or move forward with a shareholder vote for approval of the Series E transaction. To date the company has done neither. As such, the company is still in violation of the shareholder approval rules. At the time of its deliberations, the Listing Council noted that: (i) there have been no Form 8-K filings with announcements regarding a re-financing plan that would allow the company to unwind the Series E transaction, (ii) the company's recently filed definitive proxy statement for its annual meeting of stockholders and did not include any proposals to obtain shareholder approval of the Series E transaction, and (iii) the company did not provide an update as to the status of its previously filed amended proxy statement and notice of a special meeting of shareholders, in which the company was seeking shareholder approval for the Series E financing. The Listing Council does not disagree with the company's assessment that its imperfect efforts to file completed Listing of Additional Shares Notifications should be the cause of its delisting. However, the Listing Council notes that the company was effectively put on notice by staff's letter, regarding its, first of three, Listing of Additional Shares Notification violations. The Listing of Additional Shares program is used by NASDAQ to monitor compliance with listing rules governing shareholder approval, public interest concerns, reverse mergers, and voting rights. As such, the Listing Council views compliance with the Listing of Additional Shares program as essential in order to protect investors in securities listed on The NASDAQ Stock Market.

The Listing Council is aware that the company is a repeat offender of both the filing of Listing of Additional Shares Notifications and the shareholder approval requirements. If the company was a first time offender, the Listing Council may have been more sympathetic, such is not the case here. In its deliberations, the Listing Council considered that: (i) there is a large amount of easily accessible information on the NASDAQ Legal and Compliance website regarding staff's views as to when shareholder approval for transactions is required and when a Listing of Additional Shares Notification must be filed; (ii) Staff stands ready to offer informal guidance to assist issuers in structuring transactions so that there will not be violations of the Marketplace Rules; and (iii) there is a process pursuant to Rule 4550, which requires the payment of a fee, for formal guidance regarding shareholder approval interpretations. As such, the company's argument that once its senior management and Board learned of the repeated Listing of Additional Shares violations they acted promptly and decisively to ensure that no similar violations would occur in the future, was not persuasive. Management should have been on notice with the staff's warning letter to become more actively engaged and should have taken proactive steps at that time in an effort to prevent future violations. Based on the foregoing, the Listing Council affirms the Panel's decision to delist the company's securities from The NASDAQ Stock Market.

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**Rule 4310(c)(4):** For continued inclusion, the minimum bid price per share for common stock shall be \$1.

**Issue:** At the time of the Listing Council's deliberations, the bid price of the company's common stock was below \$1.

**Determination:** As an additional and separate ground for its decision, the Listing Council finds that the company fails to comply with the \$1.00 minimum bid price requirement contained in Listing Rule 4310(c)(4). The Listing Council notes that although the company was provided an opportunity to address its non-compliance with this rule, the company declined to do so. Given that at the time of the Listing Council's deliberations the company's bid price as quoted on the OTC Bulletin Board was \$0.57, the Listing Council finds this violation of Listing Rule 4310(c)(4) as a separate and additional basis for affirming the company's suspension and delisting from The NASDAQ Stock Market.

Publication Date\*: 7/31/2012

Identification Number: 640

Listing Council Decision 2006-6

Identification  
Number 684

**Rules 4450(b)(4) and 4450(a)(5):** \$3, or its alternative \$1, minimum bid price requirement for continued listing on the National Market.

**Issue:** The company's bid price was below \$1. The company did not submit a plan to regain compliance, but requested additional time to meet the continued listing requirements following its recapitalization.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. Approximately four months had elapsed since the completion of the recapitalization, and the company had not regained compliance. Additionally, the company did not provide a definitive plan to regain compliance in the near term or maintain compliance over the long term with the minimum bid price requirement. The company also did not comply with the alternative requirements for continued listing on the National Market or for continued listing on the SmallCap Market.

\* \* \*

**Rule 4450(b)(3):** Market value of publicly held shares of \$15,000,000 for continued listing on the National Market.

**Issue:** The market value of publicly held shares of the company's common stock was below \$15,000,000.

**Determination:** The company was properly delisted for failure to comply with the market value of publicly held shares requirement. The company did not provide any information indicating how it planned to regain compliance with the market value of publicly held shares requirement or maintain compliance over the long term.

Publication Date\*: 7/31/2012

Identification Number: 684

Listing Council Decision 2006-5

Identification  
Number 646

**Rule 4310(c)(2)(B):** For continued inclusion on The NASDAQ Capital Market, the issuer shall maintain:

(i) stockholders' equity of \$2,500,000; (ii) market value of listed securities of \$35,000,000; or (iii) net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

**Issue:** At the time of the Panel's decision, the company did not meet the minimum stockholders' equity requirement or its alternatives for continued listing on The NASDAQ Capital Market. The company's plan included an asset sale, which would allow it to demonstrate compliance. However, after the sale, the company was not able to publicly announce that the transaction had increased its stockholders' equity to \$2,500,000. The Panel delisted the company's securities.

**Determination:** The company was properly delisted because at the time of the Panel's decision, the company was not able to demonstrate compliance with the minimum stockholders' equity requirement or its alternatives, and its plan to regain compliance was not sufficiently definitive. At the time of the Listing Council's deliberations, the company had been non-compliant for more than twelve months, had still not provided any public filing which demonstrated compliance with the rule, and had not provided any definitive documentation regarding potential increases of equity which could be accomplished in the short-term and would allow the company to achieve and sustain compliance.

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**Rule 4310(c)(4):** For continued inclusion, the minimum bid price per share for common stock shall be \$1.

**Issue:** The bid price of the company's common stock was below \$1 for approximately nine months.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. At the time of the Listing Council's deliberations, the company's bid price was still under \$1, and the company had not proffered a plan to remedy its deficiency.

Publication Date\*: 7/31/2012

Identification Number: 646

Listing Council Decision 2004-8

Identification  
Number 652

**Rule 4310(c)(4):** For continued inclusion, the minimum bid price per share for common stock shall be \$1.

**Issue:** The bid price of the company's common stock was below \$1. The company believed its common stock price would increase after it received shareholder approval for the sale of its water treatment business.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. The company had been deficient for 237 trading days. Anticipated favorable market reaction is not a definitive plan to regain compliance with the minimum

bid price requirement. Furthermore, the preliminary proxy that the company filed with the Securities and Exchange Commission did not include a proposal to effect a reverse stock split.

Publication Date\*: 7/31/2012

Identification Number: 652

Listing Council Decision 2003-15

Identification  
Number 665

**Rule 4310(c)(14):** The issuer shall file with NASDAQ all reports and other documents required to be filed with the Securities and Exchange Commission ("SEC"). Annual reports filed must contain audited financial statements.

**Issue:** The company had not filed its Form 10-K or the past two Forms 10-Q and did not provide an estimated date for filing these SEC reports.

**Determination:** The company was properly delisted for failure to comply with the filing requirement. The Listing Council takes seriously the requirement to file accurate and reliable financial statements and the concomitant purpose to provide investors with current information regarding the company. Investors in securities listed on NASDAQ are entitled to assume that issuers of those securities will promptly and accurately comply with their reporting obligations under the Securities Exchange Act of 1934. In this case, however, investors did not have access to accurate financial information regarding the company for more than one year. Furthermore, in the absence of accurate and reliable financial statements, Staff was unable to determine if the company was in compliance with all of the NASDAQ continued listing requirements.

\* \* \*

**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1 for approximately 21 months. The company planned to effect a 1-for-4 reverse stock split after its annual meeting.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. Even if the company effected its planned 1-for-4 reverse stock split, its share price would still be below \$1.

\* \* \*

**Rule 4350(g):** Issuers are required to solicit proxies and provide proxy statements for all meetings of shareholders.

**Issue:** Although the company recently filed a definitive proxy statement with the SEC, it previously had not filed a proxy statement, or solicited proxies, since its securities were listed on NASDAQ in 2000.

**Determination:** The company was properly delisted for failure to comply with the proxy solicitation requirements.

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**Rule 4310(c)(7):** \$1,000,000 market value of publicly held shares requirement for continued listing.

**Issue:** Based on information in the company's information statement and its most recent stock price, its market value of publicly held shares was less than \$1,000,000. The company believed its stock was undervalued.

**Determination:** The company was properly delisted for failure to comply with the market value of publicly held shares requirement.

Publication Date\*: 7/31/2012

Identification Number: 665

Listing Council Decision 2003-4

Identification  
Number 676

**Rule 4310(c)(2):** \$2,500,000 shareholders' equity requirement, or its alternatives, for continued listing on the SmallCap Market.

**Issue:** The company no longer satisfied the shareholders' equity requirement. The company asserted that it would regain compliance after it received financing in connection with a transaction with a potential partner. The company expected to consummate the

transaction within three months. The company also planned to raise financing through a placement agent.

**Determination:** The company was properly delisted for failure to comply with the shareholders' equity requirement. The company had been deficient for approximately eight months and had not provided sufficient evidence to indicate that its proposed transaction would occur in the near term. There was no evidence in the record, and the company had not filed any reports on Form 8-K or issued any press releases, announcing that it received a term sheet or entered into a definitive agreement with the potential partner. In addition, the company had not provided any evidence or publicly announced that it raised any financing through its placement agent.

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**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1. The company believed its common stock price would increase after it received financing in connection with its proposed transaction. Even though the company had been non-compliant with the bid price requirement for one year, it indicated that it would only implement a reverse stock split if its plan did not improve its bid price.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. The company had been deficient for approximately one year. Anticipated favorable market reaction is not a definitive plan to regain compliance with the minimum bid price requirement. Furthermore, the company had not filed a preliminary proxy statement to effect a reverse stock split.

Publication Date\*: 7/31/2012

Identification Number: 676

Listing Council Decision 2003-3

Identification  
Number 677

**Rule 4450(b)(4):** \$3 minimum bid price requirement for continued listing on the National Market under Maintenance Standard 2.

**Rule 4450(b)(3):** \$15,000,000 market value of publicly held shares requirement for continued listing on the National Market under Maintenance Standard 2.

**Issue:** At the time of the Panel's decision, the company's common share closing bid price was below \$3, and its market value of publicly held shares was below \$15,000,000. The company also did not meet the requirements for continued inclusion on the SmallCap Market.

**Determination:** The Panel's determination to delist the company's securities from The NASDAQ Stock Market was appropriate at the time of the decision. Based on events occurring after the Panel's decision, the Panel's decision was reversed. Under Listing Rule 4330 (e), a security that has been terminated from NASDAQ must meet the initial listing requirements before re-inclusion. Approximately two weeks after the Panel's decision, the company's stock price increased above \$1. The company also met all of the initial listing requirements for the National Market, except for the \$5 minimum bid price requirement, as set forth in Listing Rule 4420, and the initial listing requirements for the SmallCap Market, except for the \$4 minimum bid price requirement, as set forth in Listing Rule 4310(c)(4). The company's closing bid price had been above \$1 per share for approximately two months; therefore, the company would still have been

within the 180-day bid price grace period afforded to SmallCap issuers, as set forth in Listing Rule 4310(c)(8)(D). Accordingly, the Listing Council waived the \$4 initial listing bid price requirement and instead required that the company meet the \$1 continued listing bid price requirement on the SmallCap Market. The company was not provided with an exception to the \$5 minimum bid price initial listing requirement on the National Market, because it was non-compliant for nine months with the \$3 minimum bid price continued listing requirement. The matter was remanded to the Panel with instruction to relist the company's securities on the SmallCap Market effective upon the completion of Staff's review of the company's application. This process requires the company to: (1) file an application for new listing, (2) pay all applicable listing fees, and (3) evidence compliance with all requirements for initial listing on the SmallCap Market, except that the company must demonstrate a minimum bid price of \$1 instead of \$4. Furthermore, at the time of Staff's review of the application, there must be no adverse developments or public interest reasons justifying denial of listing.

Publication Date\*: 7/31/2012

Identification Number: 677

Listing Council Decision 2003-1

Identification  
Number 679

**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1 for more than one year. The company stated it had received board

approval for a reverse stock split and had prepared preliminary proxy materials to be filed with the Securities and Exchange Commission.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. The company did not demonstrate the ability to regain compliance in the near term or to maintain compliance over the long term. The company had not filed a preliminary proxy statement seeking shareholder approval for a reverse stock split to cure the bid price deficiency and did not expect to do so until it completed negotiations for the sale of one of its businesses.

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**Rule 4310(c)(2):** \$2,500,000 shareholders' equity requirement, or its alternatives, for continued listing on the SmallCap Market.

**Issue:** The company no longer satisfied the shareholders' equity requirement. The company planned to regain compliance by disposing of one of its businesses, converting debt to equity and raising additional funds.

**Determination:** The company was properly delisted for failure to comply with the shareholders' equity requirement. The company did not provide any definitive documentation or timetable to indicate when the company expected to achieve its plan. Furthermore, the company had not filed a proxy statement to obtain shareholder approval for certain debt to equity conversions, as represented by the company during the Panel hearing.

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**Rule 4310(c)(13):** NASDAQ annual and listing of additional shares fees.

**Issue:** The company failed to pay NASDAQ annual and listing of additional shares fees.

**Determination:** The company was properly delisted for failure to pay the requisite annual and listing of additional shares fees. The annual fee was outstanding for more than six months, and the listing of additional shares fee was outstanding for more than one year.

Publication Date\*: 7/31/2012

Identification Number: 679

Listing Council Decision 2002-9

Identification  
Number 681

**Rule 4330(f):** An issuer must apply for initial inclusion following a transaction whereby the issuer combines with a non-NASDAQ entity, resulting in a change of control of the issuer and potentially allowing the non-NASDAQ entity to obtain a NASDAQ listing. In determining whether a reverse merger has occurred, NASDAQ will consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer. NASDAQ will also consider the nature of the businesses and the relative size of the NASDAQ issuer and non-NASDAQ entity.

**Issue:** Following a merger, shareholders of the non-NASDAQ entity controlled approximately 40% of the company. Former directors and officers of the company, who owned approximately 65% of the company prior to the transaction, owned approximately 23% after the transaction. The shareholders of the non-NASDAQ entity serving as directors and executive officers of the company owned no shares of the company prior to the transaction, but beneficially owned approximately 40% after the transaction. Such shareholders as a group constituted the single largest shareholder of the company. Following the transaction, two out of five directors on the board resigned and were replaced by shareholders of the non-NASDAQ entity, and four out of the seven executive officers listed in the company's proxy statement were shareholders of the non-NASDAQ entity. The company asserted that no change of control occurred because shareholders of the non-NASDAQ entity did not acquire majority control of the company's common stock or board. The company also asserted that the financial structure and the relative sizes of the non-NASDAQ entity and the company did not indicate a reverse merger.

**Determination:** The company was properly delisted because it entered into a transaction that resulted in a reverse merger, and it did not meet the initial listing standards following the reverse merger. Even though the shareholders of the non-NASDAQ entity did not have majority control of the company, a significant change in the ownership structure had occurred. The transaction with the non-NASDAQ entity resulted in a change of control and significant changes to the company's management, board of directors, voting power, ownership, financial structure and business. The company's business was not similar to the non-NASDAQ entity, and the company's financial structure adversely changed as a result of the transaction. The company distributed substantial capital dividends shortly before the transaction and recorded significant goodwill as a result of the transaction. The company did not meet the requirements for initial listing on the SmallCap Market.

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**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. The company stated that it wanted to finalize the reverse merger issue before it resumed its investment in an aggressive investor relations program in order to regain compliance with the minimum bid price requirement. Because the company did not have a definitive plan to regain compliance in the near term, it would be inappropriate to relist the company's securities. In this regard, the Securities and Exchange Commission has determined that investors are entitled to assume that the securities on NASDAQ meet the listing requirements.\*

\* See JJFN Services, Inc., Securities Exchange Act Rel. No. 39343 (November 21, 1997) (citing Tassaway, Inc., Securities Exchange Act Rel. No. 34151 (March 13, 1975)).

Publication Date\*: 7/31/2012

Identification Number: 681

Listing Council Decision 2002-8

Identification  
Number 682

**Rule 4310(c)(2):** \$2,500,000 shareholders' equity requirement, or its alternatives, for continued listing on the SmallCap Market.

**Issue:** Following the Panel's February decision to delist the company's securities based on a deficiency with the shareholders' equity requirement, the company regained compliance through the completion of several equity offerings. In July, the Listing Council issued a decision reversing the Panel's decision to delist the company's securities and remanded the matter to the Panel for further consideration, pursuant to an exception. Pursuant to its discretionary authority under Listing Rule 4300, the Listing Council determined that the company's public filings for the following quarter must reflect shareholders' equity exceeding the minimum \$2,500,000 continued listing requirement as a result of the company's history of operating losses. The company did not comply with the terms of the Listing Council's July decision.

**Determination:** In November, the Listing Council determined that the company's securities should not be relisted, based on its failure to comply with the shareholders' equity requirement, as set forth in the Listing Council's July decision.

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**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** Pursuant to the Listing Council's July decision, the company was required to demonstrate a closing bid price of at least \$1 per share within 90 days of the decision. However, the company's bid price remained below \$1 during and after such period.

**Determination:** In November, the Listing Council determined that the company's securities should not be relisted, based on its failure to comply with the terms of the Listing Council's July decision and the minimum bid price requirement.

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**Rule 4350(i)(1)(D):** Shareholder approval requirement for a transaction other than an initial public offering involving the sale or issuance of common stock, or securities convertible into or exercisable for common stock, equal to 20% or more of the common stock or voting power outstanding before the issuance, for less than the greater of book or market value.

**Issue:** In its proxy statement, the company solicited shareholder approval for a non-specific transaction that set forth the maximum number of shares to be issued. The company disclosed in the proxy that such issuance might be at a discount to market and could exceed 20% of the company's outstanding common stock. Following shareholder approval of its proposal, the company issued preferred shares, but failed to provide in the transaction documents the maximum number of shares issuable in accordance with the shareholder proposal.

**Determination:** In November, the Listing Council determined that the company's securities should not be relisted, based on its failure to comply with the shareholder approval requirement. If shareholder approval for a transaction is necessary under NASDAQ rules, NASDAQ's policy requires that a company provide specific details to shareholders regarding the nature of the transaction; for example, the number of shares offered, the type of security being issued, the names of the investors and the purchase price. NASDAQ permits

shareholder proposals for non-specific private placements, if shareholders have sufficient information to make a meaningful decision, including the maximum number of shares to be issued, the maximum dollar amount of the issuance, the maximum amount of discount (if any) to the market, and the time frame to complete the transaction (generally limited to three months). Although the company provided sufficient information to shareholders in the proxy statement, the transactional and corporate documents in the record on review did not evidence the maximum number of shares to be issued upon conversion of the preferred shares, as set forth in the shareholder proposal. Since the number of shares issuable upon conversion of the preferred shares potentially may exceed the maximum number set forth in the shareholder proposal, the company failed to comply with the shareholder approval requirements.

Publication Date\*: 7/31/2012

Identification Number: 682

Listing Council Decision 2002-7

Identification  
Number 683

**Rules 4450(a)(3) and 4450(b)(1):** \$4,000,000 net tangible assets/\$10,000,000 shareholders' equity, or its alternatives, the \$50,000,000 market value of listed securities/\$50,000,000 total assets and \$50,000,000 total revenue requirements for continued listing on the National Market.

**Issue:** The company no longer satisfied the net tangible assets/shareholders' equity continued listing requirement for the National Market. The company also did not comply with the alternative requirements for continued listing under Maintenance Standard 2 on the National Market, as set forth in Listing Rule 4450(b). The company did not submit a plan to regain compliance with the National Market requirements, but requested that it be granted the opportunity to list its common stock on the SmallCap Market. The company submitted an unaudited consolidated balance sheet, which reflected shareholders' equity exceeding the SmallCap Market continued listing requirement.

**Determination:** The company was properly delisted for failure to satisfy the net tangible assets/ shareholders' equity requirement for continued listing on the National Market. The company did not submit a definitive plan to regain compliance with the net tangible assets/shareholders' equity requirement or to maintain compliance over the long term. The company also did not provide evidence of its ability to sustain compliance with the shareholders' equity requirement for continued listing on the SmallCap Market in the near or long term and did not meet any of the alternatives for the shareholders' equity requirement, as set forth in Listing Rule 4310(c)(2)(B). The company would soon fall below the shareholders' equity requirement for continued listing on the SmallCap Market based on its projections and history of losses.

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**Rule 4450(a)(5):** \$1 minimum bid price requirement for continued listing on the National Market.

**Issue:** The company's bid price was below \$1. The company believed that if its common stock were listed on the SmallCap Market, the resulting increase in visibility and liquidity would increase its stock price, so that it could effect a reverse stock split to regain compliance with the \$1 minimum bid requirement.

**Determination:** The company was properly delisted for failure to comply with the \$1 minimum bid price requirement for continued listing on the National Market. The Listing Council is unwilling to rely on anticipated favorable market reaction in order to find that a company can regain compliance with the minimum bid price requirement. Although the company received shareholder approval for a reverse stock split more than eight months prior to the decision, the company did not announce a definitive date to effect such a reverse stock split.

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**Rule 4450(a)(2):** Market value of publicly held shares of \$5,000,000 for continued listing on the National Market.

**Issue:** The market value of publicly held shares of the company's common stock was below \$5,000,000 for more than four months. The company requested that it be granted the opportunity to list its common stock on the SmallCap Market.

**Determination:** The company was properly delisted for failure to comply with the market value of publicly held shares requirement. The company had not submitted a definitive plan to regain compliance with the publicly held shares requirement or maintain compliance over the long term. Although the company's market value of publicly held shares exceeded the SmallCap continued listing requirements, the company failed to evidence compliance with all of the SmallCap Market standards for continued listing.

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**Rules 4350(c) and 4350(d)(2):** Independent director and audit committee composition requirements.

**Issue:** For more than four months, the company's audit committee was only comprised of two members. The company stated that it expected to appoint a qualified audit committee member in the near future.

**Determination:** The company was properly delisted for failure to demonstrate compliance with the independent director and audit committee composition requirements. As of the date of the Listing Council's meeting on this matter, the company had not announced the appointment of a new independent director.

Publication Date\*: 7/31/2012

Identification Number: 683

Listing Council Decision 2002-5

Identification  
Number 685

**Rules 4300 and 4330(a)(3):** NASDAQ may exercise its discretion in applying additional or more stringent criteria for initial or continued inclusion or suspend or terminate the inclusion of an otherwise qualified security if NASDAQ deems it necessary to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, or to protect investors and the public interest.

**Issue:** Staff's investigation revealed a stock exchange settlement agreement involving a director of the company, who was also an officer and significant shareholder. The agreement, in which the director acknowledged the facts in the agreement as true and correct, set forth the regulatory history of the director, including misrepresentations to the stock exchange and numerous serious violations of sales practice regulations, which occurred in the mid-1990's. The company stated that it made good faith efforts to address Staff's concerns through the director's resignation from the board and his position as an officer. In addition, the director provided irrevocable proxies for his voting rights to the independent directors of the company.

**Determination:** The company was properly delisted based on public interest concerns. The Listing Council believed that the stock exchange findings constituted a pattern of fraudulent behavior towards public investors. Furthermore, the director continued to exert influence over the company as a significant shareholder and an employee serving in an important role. Although the director provided irrevocable proxies to independent directors, the proxies expired in two years, and the director was not prevented from disposing of his shares or purchasing and voting additional shares of the company prior to such time. The director's admitted past violations of the stock exchange securities regulations and his continued influence over the company raised the risk of future violations of securities laws and regulations and provided grounds for denying the company's request for continued listing in order to protect the quality of and public confidence in The NASDAQ Stock Market and to protect investors and the public interest. The Securities and Exchange Commission ("SEC") has held that "the risk associated with investing in NASDAQ is market risk rather than the risk that the promoter or other persons exercising substantial influence over the issuer is acting in an illegal manner."\* The SEC has further held that "both the tax and the securities regulatory schemes depend on the honor, candor, and integrity of regulated persons to report accurately to the regulatory authority the information sought by such authority."\*\*

\* \* \*

**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1. The company stated that its stock was below \$1 for only two days prior to delisting and, therefore, had not been below \$1 for the 30 consecutive business days as required by Listing Rule 4310(c)(8)(B). The company maintained that its compliance with the minimum bid price requirement should therefore be evaluated based on the first 30 consecutive days after it begins trading on NASDAQ.

**Determination:** The company was properly delisted based on public interest concerns. Because the company did not comply with the minimum bid price requirement and did not have a definitive plan to regain compliance in the near term, it would be inappropriate to relist the company. In this regard, the SEC has determined that investors are entitled to assume that the securities on NASDAQ meet the listing requirements.

\* DHB Capital Group, Inc., Securities Exchange Act Rel. No. 37069 (April 5, 1996) (quoting Tassaway, Inc., Securities Exchange Act Rel. No. 34151 (March 13, 1975)).

\*\* JJFN Services, Inc., Securities Exchange Act Rel. No. 39343 (November 21, 1997).

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**Rule 4310(c)(2):** \$2,000,000 net tangible assets/\$2,500,000 shareholders' equity requirement, or its alternatives, for continued listing on the SmallCap Market.

**Issue:** The company no longer satisfied the net tangible assets/shareholders' equity requirement. Based on the company's plan to raise equity in the near term, the Panel determined to continue listing the company's securities subject to the company providing executed subscription agreements, absent any material contingencies, to the Panel. Following the Panel's determination, the company definitively stated that it would not be able to enter into binding subscriptions prior to the Panel's deadline. The Panel then delisted the company. Two days after the Panel's delisting decision, the company stated that it had received a binding subscription agreement from an investor, which would bring it into compliance with the shareholders' equity requirement. The agreement was conditioned upon the company maintaining the listing of its securities on The NASDAQ Stock Market at all times prior to the funding.

**Determination:** The company was properly delisted for failure to comply with the Panel's exception and the net tangible assets/shareholders' equity requirement. The Panel may provide a company with an exception to the continued listing requirements, if it believes that a company may come into compliance with the requirements in the near term. Once it becomes clear that a company cannot comply with the terms of the exception by the expiration date (even if such information is provided prior to the expiration date), the Panel may in its discretion immediately delist the company. Furthermore, the company's contemplated transaction pursuant to the subscription agreement did not appear feasible due to the material condition that could not be satisfied.

\* \* \*

**Rule 4310(c)(4):** \$1 minimum bid price requirement for continued listing on the SmallCap Market.

**Issue:** The bid price of the company's common stock was below \$1. The company believed its common stock price would increase, if its securities were relisted on the SmallCap Market. It also believed that its stock price would rise as a result of recent news announcements related to its products.

**Determination:** The company was properly delisted for failure to comply with the minimum bid price requirement. Anticipated favorable market reaction is not a definitive plan to regain compliance with the minimum bid price requirement.

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## Public Interest

**Rule 5101:** NASDAQ is entrusted with the authority to preserve and strengthen the quality of and public confidence in its market. NASDAQ stands for integrity and ethical business practices in order to enhance investor confidence, thereby contributing to the financial health of the economy and supporting the capital formation process. NASDAQ Companies, from new public Companies to Companies of international stature, are publicly recognized as sharing these important objectives. NASDAQ, therefore, in addition to applying the enumerated criteria set forth in the Listing Rule 5000 Series, has broad discretionary authority over the initial and continued listing of securities in NASDAQ in order to maintain the quality of and public confidence in its market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. NASDAQ may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on NASDAQ inadvisable or unwarranted in the opinion of NASDAQ, even though the securities meet all enumerated criteria for initial or continued listing on NASDAQ. In all circumstances where the Listing Qualifications Department (as defined in Listing Rule 5805) exercises its authority under Listing Rule 5101, the Listing Qualifications Department shall issue a Staff Delisting Determination under Listing Rule 5810(c)(1), and in all circumstances where an Adjudicatory Body (as defined in Listing Rule 5805) exercises such authority, the use of the authority shall be described in the written decision of the Adjudicatory Body.

## Bid Price

**Rule 5550(a)(2):** A Company that has its Primary Equity Security listed on the Capital Market must continue to maintain a minimum bid

price of at least \$1 per share.

**Issue:** The company was delisted by a Hearings Panel for public interest concerns and for failure to regain compliance with NASDAQ's minimum bid price requirement.

After granting the company two 180 day compliance periods to regain compliance with the minimum bid requirement, Staff issued a delisting determination. The company appealed the determination to the Hearings Panel. During the Hearings Panel proceedings, Staff determined the company was a public interest concern based on the action it took in writing off substantial loans owed by the company's CEO, who is also Chairman of the company. On November 16, 2011, the Hearings Panel issued a decision to delist the company based on its non-compliance with the minimum bid price requirement and for public interest concerns. On November 29, 2011, the company appealed the Hearings Panel decision to delist the company to the Listing Council.

#### *Bid Price*

The company has been, and continues to be, out of compliance with NASDAQ's bid price requirement. The company failed to regain compliance with the bid price rule by effectuating a reverse stock split, as it had committed to do as a condition of receiving a second 180 compliance period. Staff issued a delisting determination at the expiration of the second compliance period, consistent with Listing Rule 5550(a)(2).

Subsequent to Staff's delisting determination, and the company's appeal of the matter to the Hearings Panel, the company asserted that it had regained compliance with Listing Rule 5550(a)(2) since its bid price had closed at or above \$1.00 for ten trading days. Staff had not made such a determination and was reviewing what it considered suspicious trading in the company's stock. Upon completion of its preliminary review of the aberrant trading in the company's stock, Staff determined to extend the period to regain compliance with the bid price requirement to twenty days, consistent with the authority provided by Listing Rule 5810(c)(3)(F). Staff based its decision on several facts that led it to believe that the stock was manipulated.

The company did not maintain a bid price of \$1 or more during the twenty day compliance period, never had a closing bid price significantly over \$1, and currently has closing bid prices in the mid 20 cent range, which is near the price it had traded prior to the brief run up in its stock price. The company had committed to effectuate a stock split if its stock was still below \$1.00 at the end of the second compliance period, a condition to receiving the second period pursuant to Listing Rule 5810(c)(3)(A)(ii), yet did not do so. The company did not indicate a willingness to effectuate a reverse stock split during the Hearings Panel proceedings.

#### *Public Interest Concerns: Related Party Loan Write Off*

Prior to its listing in August 2008, the company extended loans totaling approximately \$140 million to two companies controlled by the company's CEO and largest shareholder for the stated purpose of funding the construction of expressways in China. Subsequently, the loan terms were modified and extended on multiple occasions. Despite receiving only one interest payment on the non-performing notes, the company also froze interest accruals on the non-performing notes and determined to extend \$129 million in new loans to the two entities owned and controlled by the Chairman and CEO, in addition to two other companies also owned by him (collectively, the "Non-Performing Loans").

In September 2009, in an attempt to collect on the monies owed by the CEO's entities, the company entered into a letter of intent to purchase 51% of one of the companies, yet it had to abandon the purchase when it was clear that government approval was not forthcoming. In July 2011, the company announced that its board of directors had determined to write off a substantial portion of the Non-Performing Loans. The company also announced that the CEO had offered ownership interest in a commercial, residential real estate and retail shopping mall development project as partial payment of the Non-Performing Loans, and that the board of directors was evaluating the proposal. In August 2011, the company issued a press release that announced that the board of directors had met and discussed, among other things, the company's plans to write off the Non-Performing Loans involving the CEO, and taking a 51% interest in a property held by the CEO as a partial offset to the Non-Performing Loans. In a Form 8-K filed with the SEC in October 2011, the company stated that it had entered into agreements to acquire 51% of the entity controlled by the CEO, (the "Development Company"), as described in the company's prior disclosures. The company also noted that it had recorded provisions for bad debt expense of \$149.5 million, or more than 70% of the \$210 million owed by the companies controlled by the CEO.

In October 2011, Staff informed the company that it had determined that the company's actions concerning the related party Non-Performing Loans represented a public interest concern, which was an additional basis for delisting pursuant to Listing Rule 5101. As a basis for its determination, Staff asserted that the company failed to undertake sufficient efforts to collect the amounts due on the Non-Performing Loans, instead accepting rights to control a separate related-party company, the value of which was much less than the outstanding principal and interest balances. Staff further noted that the company's failure to aggressively pursue collection efforts, and the subsequent transactions, were done for the benefit of the CEO and to the detriment of non-affiliated shareholders. In response to the additional basis for delisting, the company claimed that management and the board of directors acted in the best interests of the

public shareholders with respect to the Non-Performing Loans, noting that it had modified, extended, and deferred interest payments on the loans as a normal response to any non-performing loan and the decision to write off the majority of the loan was made only made after all efforts were exhausted.

*Public Interest Concerns: CFO Resignation*

In mid-December 2011, the company issued a Form 8-K that disclosed that, the company received a letter of resignation on September 21, 2011 from CFO of the company, who was also a company director. The resignation letter was sent to the CEO. The company asserted in the Form 8-K that it did not accept the CFO's resignation, but that it knew that he did not continue to perform his duties as CFO of the company. There is evidence in the record that the company along with then-company counsel and independent auditors were aware of the CFO's unambiguous and immediate resignation from the company as a director and CFO. The company appointed an interim CFO a day prior to filing the mid-December 2011 Form 8-K.

Notwithstanding the CFO's resignation several SEC disclosures were subsequently filed with the SEC containing his signature. As detailed in the company's mid-December 2011 Form 8-K, the company's Form 10-K for the fiscal year ended June 30, 2011 filed on October 13, 2011, its Quarterly Report on 10-Q for the quarter ended September 30, 2011, filed on November 14, 2011 and its Annual Report on Form 10-K/A for the fiscal year ended June 30, 2011, filed on November 14, 2011, all of which included the resigned CFO's signatures, had in fact not been prepared or reviewed by the resigned CFO, and the resigned CFO had not personally signed such reports or consented to the use of his signature on such reports. It also appears that the company forged the resigned CFO's signature on a letter to Staff, dated September 30, 2011 – eight days after his resignation and unknown to him.

**Determination:** Affirmed. After a review of the record in this matter, the Listing Council affirms the Hearings Panel decision.

*Bid Price*

The Listing Council concludes that Staff acted appropriately in delisting the company based on bid price deficiency and its failure to cure the deficiency with a reverse stock split at the end of its second compliance period as it had committed to do. The Listing Council further concludes that it was appropriate for Staff to apply a 20-day compliance period to the bid price deficiency pursuant to Listing Rule 5810 (c)(3)(F) based on concerns of stock price manipulation. The company asserts that the increases in its stock price and volume are due to the public's positive reaction to the Development Company acquisition. The Listing Council finds this argument unpersuasive given that the abnormal trading in the company's stock began over a month after the initial notice of the potential acquisition on, yet days prior to subsequent news concerning the prospective transaction. The Listing Council further concludes that Hearings Panel acted appropriately in delisting the company for failing to regain compliance with the minimum bid price requirement. The company was unwilling to effectuate a reverse stock split adequate for it to regain compliance with Listing Rule 5550(a)(2) and the company's closing bid price was declining during the period from the Hearings Panel hearing through the issuance of its decision.

The company's revised compliance plan provided to the Listing Council includes a provision to seek authority to effectuate a reverse stock split to regain compliance with Listing Rule 5550(a)(2), which would take approximately 45 to 50 days according to the company. The Listing Council believes that the company has had ample opportunity to cure its bid price deficiency over the 360 days it was afforded by Staff, and as such, the Listing Council finds no reason to reverse the Hearings Panel's decision to delist the company.

*Public Interest Concerns: Related Party Loan Write Off*

The company wrote off as bad debt approximately \$150 million of the \$210 million owed under the Non-Performing Loans. The Listing Council believes that it was a reasonable determination to find a public interest concern based on the facts and circumstances. The Non-Performing Loans were made to entities controlled by the company's Chairman and CEO, who received the benefits of the loans over many years, paying negligible interest and repaying only a fraction of the original amount loaned. The Listing Council is concerned that the company has not acted in the best interest of its public shareholders and believes that the company's actions with respect to the Non-Performing Loans show a pattern of conduct that, in aggregate, reasonably support a determination that delisting was warranted pursuant to Listing Rule 5101.

*Public Interest Concerns: CFO Resignation*

The Listing Council finds very concerning the apparent forgery of the resigned CFO's signature on documents filed with the Commission and submitted to NASDAQ, the failure to disclose the CFO's resignation as CFO and director timely, and the statements made an independent director at the Hearings Panel hearing, which were misleading and evasive. It is undisputed that the CFO resigned in September 2011. It is also undisputed that the CEO and independent director were notified of resignation at the time of the resignation. Notwithstanding, the CEO and independent director permitted the company to submit documents to the SEC and NASDAQ with the resigned CFO's signature as the purported CFO. In addition, at the Hearings Panel hearing, which occurred after the resignation of the CFO yet before the appointment of an interim CFO, an independent director stated that he had spoken to the CFO regarding possible manipulation of the company's stock price. The earliest evidence in the record of NASDAQ's concern regarding possible manipulation of the company's stock price was in a request for information sent to the company's then-counsel on September 22, 2011, a day after the

resignation of the CFO from the company. The Listing Council finds the company's misrepresentations and lack of disclosure concerning CFO's resignation very troubling and an additional basis to delist the company pursuant to Listing Rule 5101.

Rule 5101 provides NASDAQ with "broad discretionary authority" over the listing of securities on NASDAQ "in order to maintain the quality of and public confidence in the market, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and to protect investors and the public interest." This authority stems directly from NASDAQ's delegated responsibilities under the Securities Exchange Act of 1934. Listing Rule 5101 is not invoked lightly and, in instances in which a public interest concern is identified, the issues are very serious. In the present case, Staff's concerns over the company's actions concerning the loans made to the CEO and Chairman were sufficient to find a public interest concern and to delist the company pursuant to Listing Rule 5101. The company's misrepresentations and lack of disclosure concerning the CFO's resignation is an independent, and truly troubling, basis for determining the company represents a public interest concern, and thus warrants delisting pursuant to Listing Rule 5101.

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