

Listing Council Decision 2014-3

Identification  
Number 1134**Bid Price and Stockholders' Equity****Rule 5505: Initial Listing of Primary Equity Securities**

A Company applying to list its Primary Equity Security on the Capital Market must meet all of the requirements set forth in Rule 5505(a) and at least one of the Standards in Rule 5505(b).

**(a) Initial Listing Requirements for Primary Equity Securities:**

- (1) (A) Minimum bid price of \$4 per share

**Rule 5550: Continued Listing of Primary Equity Securities**

A Company that has its Primary Equity Security listed on the Capital Market must continue to meet all of the requirements set forth in Rule 5550(a) and at least one of the Standards set forth in Rule 5550(b). Failure to meet any of the continued listing requirements will be processed in accordance with the provisions set forth in the Rule 5800 Series.

**(b) Continued Listing Standards for Primary Equity Securities:**

- (1) Equity Standard: Stockholders' equity of at least \$2.5 million;  
(2) Market Value of Listed Securities Standard: Market Value of Listed Securities of at least \$35 million; or  
(3) Net Income Standard: Net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.

**Issue:** At issue in this matter is whether the Company should remain listed, yet suspended from trading, notwithstanding that the Company has not received approval of its listing application for listing of the newly-merged company, which was treated as a change of control for purposes of Rule 5110(a), and because the Company does not comply with the Capital Market \$4 bid price initial listing requirement of Rule 5505(a)(1)(A). Moreover, it is unclear whether the Company meets all other initial listing standards for listing on the Capital Market.

Prior to its merger, the Company did not comply with Rule 5550(b)(1), which requires a Capital Market company to maintain a minimum of \$2.5 million in stockholders' equity for continued listing.

**Determination:** Reverse the Panel decision to delist the Company.

It is clear from the record, the Company has had difficulty in resolving what it believes to be the only Capital Market initial listing requirement that it does not meet, namely the \$4 bid price requirement. Although it appears that there is some disagreement over whether the Company meets all other listing standards other than bid price, the Listing Council need not settle this factual issue. The Listing Council notes that the Company received approval of, and implemented, a stock split as it had committed to do. The Company requested an extension until September 30, 2014 to evidence compliance with all Capital Market initial listing standards. In light of the brief nature of the extension and because the Company's securities are currently suspended from trading on Nasdaq, the Listing Council is willing to grant the Company a brief extension to evidence compliance with all initial listing requirements for listing on the Capital Market and to receive approval of an application for listing thereon from Staff.

Accordingly, the Listing Council reverses the Panel decision to delist the Company and grants the Company through September 30, 2014 to inform the Listing Council that it has achieved compliance with all requirements for initial listing on the Capital Market and received approval of an initial listing application for listing thereon. Should the Company fail to meet the terms of this decision, the Company's securities will be delisted from Nasdaq.

Publication Date\*: 11/19/2014

Identification Number: 1134

#### Listing Council Decision 2011-4

Identification  
Number 601

**Rule 5550(b):** For continued listing of a Company's Primary Equity Security on the Capital Market, a Company shall maintain: (1) Stockholders' equity of at least \$2.5 million; (2) Market Value of Listed Securities of at least \$35 million; or (3) Net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.

**Issue:** In November, 2010, the Hearings Panel placed the company on a one-year monitor pursuant to Listing Rule 5815(d)(4)(A), which obligated the company to proactively inform the Hearings Panel of potential non-compliance with continued listing requirements. The company had a record of non-compliance with the stockholders' equity continued listing standard. In May 2011, the company filed its Form 10-Q for the quarter ended March 31, 2011, which evidenced that the company was no longer in compliance with NASDAQ's stockholders' equity requirement at the close of the quarter. The company had not informed the Hearings Panel of the deficiency at any point prior to the filing of the Form 10-Q. The Hearings Panel determined to delist the company for the stockholders' equity deficiency and for violating Rule 5815(d)(4)(A) by not proactively informing the Hearings Panel of the deficiency. The company appealed the Hearings Panel decision to the Listing Council.

**Determination:** Remand. The Listing Council agrees with the Hearings Panel that the company should have been delisted based on the facts and circumstances before the Hearings Panel at the time of its determination. The company has been unable to maintain adequate stockholders' equity over the past year, and has ignored the Hearings Panel's direction to keep it proactively informed of potential non-compliance. Adding to the Listing Council's concerns is the fact that the company has historically missed projected milestones.

Through its submissions to the Listing Council, the company has described some positive developments concerning the sale of assets and the potential acquisition of others. As result of closing a transaction for the sale of a company asset, the company now has stockholders' equity in excess of continued listing requirements and, based on the pro forma burn rate projection provided by the company, it will continue to have stockholders' equity in excess of the continued listing requirements for at least a full year.

The Listing Council continues to have concerns regarding the company's ability to maintain compliance with NASDAQ's listing standards, and is therefore directing the Hearings Panel to place the company under a Hearings Panel monitor for one year from the date of this decision. A Hearings Panel monitor will allow NASDAQ to quickly address any deficiencies that arise, while also allowing the company's stock to trade as normal. The Listing Council stresses in the strongest terms that, while it is subject to the Hearings Panel monitor, the company has an obligation to promptly notify the Hearings Panel in the event its stockholders' equity falls below \$2.5 million and in the event the company falls out of compliance with any other applicable listing requirement. The Listing Council may not object to the Hearings Panel delisting the company based solely on non-compliance with this notice obligation. Accordingly, the Listing Council finds that the company has regained compliance with NASDAQ's continued listing requirements and remands this matter to the Hearings Panel for a one year monitor pursuant to Listing Rule 5815(d)(4)(A).

Publication Date\*: 7/31/2012

Identification Number: 601

#### Listing Council Decision 2008-5

Identification  
Number 608

**Rule 4450(a)(3):** A company must have a minimum of \$10,000,000 of stockholders' equity for continued listing on The NASDAQ Global Market.

**Issue:** The company was properly delisted because at the time of the Panel decision, the company reported stockholders' equity of \$2,792,000. The company argued that it should be allowed to transfer to The NASDAQ Capital Market, which has a stockholders' equity maintenance requirement of \$2,500,000. The Panel denied the company's request based on concerns regarding the company's ability to maintain compliance with the Capital Market continued listing standards. The Panel determined to delist the company's shares from The NASDAQ Global Market for failing to maintain stockholders' equity of at least \$10,000,000.

**Determination:** After a review of the record in this matter, the Listing Council affirms the Panel's decision to delist the company's securities. The company noted that it was pursuing multiple avenues by which it would be able to increase its stockholders' equity; however, none of the avenues were definitive in nature or sufficient to allow the Listing Council to conclude that the company would be able to regain compliance with the Global Market continued listing standards, or maintain compliance with the Capital Market continued listing standards going forward.

**Rule 4310(c)(14):** The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

**Issue:** The company was not able to file its delinquent periodic SEC reports because it had encountered a number of corporate issues that had strained resources and diverted attention from filing. The Panel determined to delist the company's securities.

**Determination:** The company was properly delisted because at the time of the Panel decision the company was not current in all required public filings. The Listing Council notes that the company was current in filing its periodic reports at the time of the issuance of the Listing Council decision and the company believed it had remedied the issues that caused the company to become delinquent. 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.

Publication Date\*: 7/31/2012

Identification Number: 608

Listing Council Decision 2007-10

Identification  
Number 630

**Rule 4450(b)(1):** For continued listing on The NASDAQ Global Market, an issuer must demonstrate either: (A) a market value of listed securities of \$50 million; or (B) total assets and total revenue of \$50 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.

**Rule 4350(i)(1)(D)(i):** Requires shareholder approval in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into 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.

**Issues:** At the time of the Panel's decision, the company did not meet the market value of listed securities/total assets and total revenue requirement for continued listing on The NASDAQ Global Market. In addition, the company violated NASDAQ's shareholder approval rules by entering into transactions designed to positively impact the company's market value of listed securities shortfall. As a result, the Panel transferred the company's securities to The NASDAQ Capital Market, granted the company a short extension to cure the shareholder approval rule violation by gaining shareholder approval for the transactions, and issued a letter of reprimand to the company for the shareholder approval rule violation. The company appealed and requested to be allowed to relist on The NASDAQ Global Market under the less stringent continued listing requirements, and not the more stringent initial listing standards.

**Determination:** The Listing Council affirms the Panel's decision and denies the company's request for an exception to The NASDAQ Global Market continued listing standards. In reaching its determination, the Listing Council applied a facts and circumstances analysis. Based upon its analysis, the Listing Council found that the Panel properly determined that the company did not comply with all of the requirements for continued listing on the Global Market and as a consequence should be delisted from The NASDAQ Global Market. The Listing Council notes that the initial inclusion requirements are the appropriate standards to apply when a company has been delisted from a NASDAQ market. In determining whether to grant an exception to the initial listing requirements, the Listing Council considered, among other things, the company's behavior before being delisted.

The Listing Council notes that Staff was concerned that the transaction originally contemplated to enable the company to regain compliance with Listing Rule 4450(b)(1) would require shareholder approval, based on the limited information available to Staff at the time. As such, the company was put on notice of staff's concerns when it received the staff's Hearing Memo. The Listing Council further notes that the issue of whether shareholder approval was necessary, as a result of the aggregation of the two offerings subsequently contemplated by the company, was raised at the Panel Hearing, and the company stated that it would consult with staff. There is no

evidence in the record that the company was proactive in consulting Staff on either occasion. Thereafter, the company completed the offerings and, as a consequence, violated the shareholder approval rules. It was only after staff's notice of violation of the shareholder approval rules that the company contacted staff. The Panel concluded that the company's violation of the shareholder approval rule was the result of insufficient attention to its obligations under the rules. The Listing Council also notes that the amount raised through the transactions was less than discussed at the Panel Hearing, and the company did not provide the Panel with a calculation of the transaction's impact on market capitalization or projections of continued compliance.

After an examination of the facts and circumstances surrounding this case, the Listing Council denies the company's request for an exception to list on The NASDAQ Global Market and finds the Panel's decision to allow the company the opportunity to list on The NASDAQ Capital Market was appropriate at the time it was rendered. Based on the foregoing, the Listing Council affirms the Panel's decision to transfer the listing of the company's securities from The NASDAQ Global Market to The NASDAQ Capital Market.

Publication Date\*: 7/31/2012

Identification Number: 630

#### Listing Council Decision 2007-6

Identification  
Number 634

**Rule 4450(a)(3):** To continue its listing on the NASDAQ Global Market, the issuer must maintain stockholders' equity of at least \$10 million.

**Issue:** The company reported a stockholders' equity (deficit) of (\$5,148,000) at December 31, 2005. Furthermore, the company's plan to increase its stockholders' equity was not sufficiently definitive at the time of the Panel or Listing Council's decisions.

**Determination:** The company was properly suspended, pending delisting because it had violated the \$10,000,000 minimum stockholders' equity requirement, as set forth in Listing Rule 4450(a)(3), and its plan to regain compliance was not sufficiently definitive. The Listing Council finds that the Panel appropriately delisted the company's securities from the Global Market because at the time of the Panel decision, the company reported stockholders' equity (deficit) of (\$5,148,000). Furthermore, the company's plan to increase its stockholders' equity was not sufficiently definitive at the time of the Panel decision. The Listing Council noted that the company has been deficient with the stockholders' equity requirement for more than twelve months, was not in compliance as of the date of these deliberations, and has not provided any definitive documentation regarding potential increases of equity which could be accomplished in the short-term.

Although the company has argued that the trial against the U.S. for the taking of the business of its subsidiary has been completed, the company has not provided any evidence of: (i) a decision in favor of the company, (ii) the amount of any potential award, or (iii) a timetable as to when any potential award would be paid. With regards to the company's alternative plan of compliance, the settlement of real estate claims, again, there is no public information that supports a settlement has been reached. Absent, information that a settlement had been reached with a sum certain, the Listing Council cannot provide the company with relief. Even if the company was successful in its settlement and was able to reverse the \$8,000,000 in charges, the company would still not be able to demonstrate compliance with the \$10,000,000 stockholders' equity requirement.

The Listing Council finds that there is too little information to assume that the two alternatives presented by the company would in fact be completed in a timely manner, if at all. Given that the settlement alone is insufficient for the company to be able to demonstrate compliance, the Listing Council is not willing to provide the relief that the company is requesting.

The Listing Council also considered, and was: (i) concerned about by the company's argument at the Panel level that its generally accepted accounting principles based historical financial statements were prepared on conservative basis, and (ii) concerned about the recent resignation of the company's independent auditors. As such, the Listing Council affirms the Panel's decision to suspend and delist the company's securities because it has not demonstrated the ability to regain compliance in the near term or maintain compliance over the long term with stockholders' requirement as set forth in Listing Rule 4450(a)(3), and has not presented a definitive plan that will allow it to regain compliance with this requirement in the near term or maintain compliance over the long term.

Publication Date\*: 7/31/2012

Identification Number: 634

#### Listing Council Decision 2007-4

Identification  
Number 636

**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.

The company argued that it would demonstrate in excess of \$2,500,000 in stockholders' equity when it filed its Form 10-K for the fiscal year ended June 30, 2006. When the Form 10-K was filed late, without an auditors opinion, and reported a stockholders' (deficit) of (\$3,985,558), the Panel suspended, pending delisting, the company's securities.

**Determination:** The company was properly suspended, pending delisting, 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. At the time of the Listing Council's deliberations, the company had been deficient with the stockholders' equity requirement for more than nine months, there was nothing in the public record which demonstrated compliance, and there was no evidence that the company had regained compliance on a pro-forma basis.

Furthermore, the company's plan to increase its stockholders' equity was not sufficiently definitive at the time of the Panel decision. The company did not provide any definitive documentation regarding potential increases of equity that could be accomplished in the short-term that would enable the company to demonstrate compliance or to maintain compliance with the stockholders' equity requirement over the long term. Accordingly, after a review of the record in this matter, the Listing Council affirmed the Panel's decision to delist the company's securities for failure to demonstrate compliance with the minimum stockholders' equity requirement or its alternatives, as set forth in Rule 4310(c)(2)(B) for continued listing on the Capital Market.

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**Rule 4310(c)(14):** The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Securities and Exchange Commission ("Commission"). This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

**Issue:** As a separate and additional ground for affirming the Panel's decision, the Listing Council noted that the company had not followed through on its plans to file its delinquent September 30, 2006 Form 10-Q "within five business days after filing its Form 10-K", and was still delinquent in its periodic reporting obligation.

**Determination:** As an additional ground for affirming the delisting, the Listing Council found that the company had not demonstrated compliance with the filing requirement and thus, was not in compliance with Listing Rule 4310(c)(14).

Publication Date\*: 7/31/2012

Identification Number: 636

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 2005-8

Identification  
Number 611

**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 of compliance included a projected increase in stockholders' equity to \$2,874,000 at June 30, 2005. However, at the time of its decision, the Panel had not received any information from the company indicating it had achieved this projection or that it planned to report stockholders' equity in compliance when it reported its second quarter earnings.

**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 ten months and had still not provided any public filing which demonstrated compliance with the rule.

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**Rule 4310(c)(14):** The issuer shall file with NASDAQ three (3) copies of all reports and other documents filed or required to be filed with the Commission. This requirement is considered fulfilled for purposes of this paragraph if the issuer files the report or document with the Commission through the Electronic Data Gathering, Analysis, and Retrieval system. An issuer that is not required to file reports with the Commission shall file with NASDAQ three (3) copies of reports required to be filed with the appropriate regulatory authority. All required reports shall be filed with NASDAQ on or before the date they are required to be filed with the Commission or appropriate regulatory authority. Annual reports filed with NASDAQ shall contain audited financial statements.

**Issue:** The company's March 31, 2005 Form 10-Q contained financial statements that were not reviewed by independent auditors in conformance with SAS 100, as required by SEC Rule 10-01(d) of Regulation S-X. As such, the company did not comply with the filing requirement contained in Listing Rule 4310(c)(14).

**Determination:** The company was properly delisted because at the time of the Panel's decision the company was not current in all required public filings. Even though the company became current shortly before the Listing Council's deliberations, investors had been without access to current financial information for a period of nine months. 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. The Listing Council noted that in the absence of accurate and reliable financial statements, Staff was unable to determine if the company was in compliance with all of the Capital Market continued listing requirements.

Publication Date\*: 7/31/2012

Identification Number: 611

Listing Council Decision 2005-4

Identification  
Number 615

**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 decision, the company did not meet the minimum stockholders' equity requirement or its alternatives for continued listing on The NASDAQ Capital Market. The company had been deficient for over six months, its plan to raise equity was not definitive, and the sale of a subsidiary would not close for at least another quarter. The company also argued that it could evidence compliance by demonstrating \$500,000 in net income from continuing operations by the end of its third quarter.

**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. The company's plans to increase its stockholders' equity were not sufficiently definitive because: (i) the company did not provide any documentation regarding potential sales of equity, which could be accomplished in the short-term and (ii) the sale of a company subsidiary would not close for at least another three months. The Listing Council also rejected the company's position that it could demonstrate compliance with the \$500,000 net income from continuing operations alternative in the Rule by the end of the third quarter of 2005. The Listing Council noted that the Rule requires a demonstration of net income from continuing operations in the most recently completed fiscal year or in two of the last three most recently completed fiscal years, and, as such, the Rule does not provide for compliance on a prospective basis. Consequently, the company would not be able to demonstrate compliance before its 2005 fiscal year end.

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Identification Number: 615

Listing Council Decision 2005-3

Identification  
Number 616

**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 argued that it would demonstrate in excess of \$500,000 in net income from continuing operations when it filed its Form 10-K for the fiscal year ended December 31, 2004. As such, the company requested an exception for six months to file its Form 10-K. Alternatively, the company requested additional time to consummate a combination with an American Stock Exchange listed company. The effect of the combination would increase the company's stockholders' equity above the \$2,500,000 continued listing requirement. The Panel was unwilling to grant the company additional time to file its Form 10-K and also opined that the combination was not sufficiently definitive for an extension of time.

**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. At the time of the Listing Council's deliberations, the company had been non-compliant for over eight months and had still not consummated its business combination with the American Stock Exchange listed company.

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**Rule 4350(c):** Each issuer shall maintain a sufficient number of independent directors on its board of directors to satisfy the audit committee requirement set forth in Listing Rule 4310(d)(2).

**Rule 4310(d)(2):** 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 Listing 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.

**Issue:** After the Panel had issued its decision, a member of the company's audit committee resigned, leaving the company with only two independent audit committee members.

**Determination:** As a separate and additional ground for affirming the delisting of the company's common stock, the Listing Council found that because the company had not appointed a new independent director to the company's audit committee, the company had failed to demonstrate compliance with the independent directors and audit committee composition requirements.

Publication Date\*: 7/31/2012

Identification Number: 616

Listing Council Decision 2004-12

Identification  
Number 619

**Rule 4310(c)(2)(B):** For continued inclusion, the issuer shall maintain: (i) stockholders' equity of \$2.5 million; (ii) market value of listed securities of \$35 million; 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 decision, the company did not meet the minimum stockholders' equity requirement or its alternatives. The company argued that it had demonstrated in excess of \$500,000 in net income from continuing operations for its first three quarters and projected compliance when it filed its Form 10-K for the year ended June 30, 2004. As such, the company requested an exception for additional time to file its Form 10-K, which would demonstrate compliance with the net income alternative in the Rule. The Panel was unwilling to grant the company the additional three months the company required to file its Form 10-K.

**Determination:** The company was properly delisted because at the time of the Panel's decision the company was not able to demonstrate compliance with minimum stockholders' equity requirement or its alternatives. Under Listing Rule 4330(e), a security that has been terminated from NASDAQ must meet the initial listing requirements before re-inclusion. Because the Panel properly delisted the company's securities from the SmallCap Market, the initial listing requirements provide the correct standard for a review of the company's listing qualifications. The Listing Council reversed the Panel's decision, and the Panel was instructed to relist the company, based on events occurring after the Panel's decision. Specifically, during the pendency of the Listing Council's review, the company filed its Form 10-K, which demonstrated net income from continuing operations of \$6,556,000 in the most recently completed fiscal year. As such, the company met all of the requirements for initial listing on the SmallCap Market, except for the \$4 bid price. Based upon the totality of the circumstances, the Listing Council determined to waive the \$4 initial listing bid price requirement and instead required that the company meet the \$1 continued listing bid price requirement.

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Identification Number: 619

Listing Council Decision 2004-5

Identification  
Number 655

**Rule 4310(c)(2)(B):** For continued inclusion, the issuer shall maintain: (i) stockholders' equity of \$2.5 million; (ii) market value of listed securities of \$35 million; 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:** The company, a Foreign Private Issuer, no longer satisfied the stockholders' equity requirement. The company planned to regain compliance by acquiring a similar business, reporting income, raising additional equity from a private placement, the exercise of warrants by warrant holders, and the conversion of debt into equity by note holders.

**Determination:** The company was properly delisted for failure to comply with the stockholders' equity requirement. The company did not provide any definitive documentation or timetable to indicate when the company expected to achieve its plan. The company had been non-compliant for approximately fifteen months and still had not made a public filing demonstrating compliance. The company had not filed any reports on Form 6-K or issued any press releases that evidenced that the acquisition had closed, and the company had not provided any specific information or documentation to demonstrate that it had stemmed its current reported losses and would be able to generate income in the near or long term. Furthermore, there was uncertainty as to whether the holders of the warrants or notes would choose to exercise their rights, and if so, the timing of such exercises or conversions.

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Identification Number: 655

Listing Council Decision 2004-4

Identification  
Number 656

**Relevant Facts:** After appearing before a Panel, the company was granted an exception that required the company to demonstrate stockholders' equity of \$2,500,000 in its next periodic filing. During the exception period, the company was also required to provide the Panel with prompt notification of any significant events that occurred, and should there be a material change in the company's financial or operational character, the Panel reserved the right to reconsider the terms of the exception. The company made the required public filing, and the Panel determined that the company had met the terms of the exception and placed the company back into compliance. Later that year, in a Form 8-K filing, the company disclosed that, during the exception period, it had discovered an overstatement of certain balance sheet items included in its previously filed financial statements, which led to an inquiry by management that was subject to oversight by the company's audit committee.

**Rule 4310(c)(2)(B):** For continued inclusion, the issuer shall maintain: (i) stockholders' equity of \$2.5 million; (ii) market value of listed securities of \$35 million; 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:** The company no longer satisfied the stockholders' equity requirement or its alternatives. The company planned to regain



compliance by raising \$1,300,000 of additional equity from a private placement and from the conversion of debt into equity by note holders.

**Determination:** The company's Form 10-Q for the quarter ended October 31, 2003, which was filed after being delisted, reflected stockholders' equity of \$1,900,000. As such, the company did not demonstrate compliance with the stockholders' equity requirement. Even if the additional equity of \$1,300,000 from the private placement and the debt to equity conversion was included in the calculation of stockholders' equity, given the company's history of losses, the company would have been non-compliant at the date of the Listing Council's consideration. In analyzing whether a company will be able to regain and sustain compliance with the stockholders' equity requirement over the long term, the Listing Council reviews the company's recent losses and how such losses would affect stockholders' equity over the next 12-month period. Accordingly, the company did not demonstrate sustainable compliance.

\* \* \*

**Rule 4330(c):** NASDAQ may request any additional information or documentation, public or non-public, deemed necessary to make a determination regarding a security's initial or continued inclusion, including, but not limited to, any material provided to or received from the Commission or other appropriate regulatory authority. Information requested pursuant to this subparagraph shall be submitted within a reasonable period. An issuer may be delisted if it fails to provide such information. An issuer may also be delisted if any communication to NASDAQ contains a material misrepresentation or omits material information necessary to make the communication to NASDAQ not misleading.

**Issue:** The company did not inform the Panel that it had an overstatement of certain balance sheet items included in its previously filed financial statements. The Panel relied upon those financial statements in determining that the company had demonstrated compliance.

**Determination:** The company was properly delisted based upon a failure to provide information relating to the accounting issues and the investigations in violation of Listing Rule 4330(c), as well as the requirements of the Panel's decision.

Publication Date\*: 7/31/2012

Identification Number: 656

Listing Council Decision 2004-2

Identification  
Number 658

**Rule 4310(c)(2)(B):** For continued inclusion, the issuer shall maintain: (i) stockholders' equity of \$2.5 million; (ii) market value of listed securities of \$35 million; 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:** The company was not able to demonstrate net income of \$500,000 in its most recently completed fiscal year or in two of the last three most recently completed fiscal years, or comply with any of the other alternatives in the Rule. The company was able to demonstrate net income above \$500,000 for its first quarter of the current year. As such, the Panel issued an exception that allowed the company to remain listed.

**Determination:** The Listing Council affirmed the Panel's decision on other grounds. During the pendency of the Listing Council's review, the company demonstrated compliance with the \$35,000,000 market value of listed securities alternative of the Rule. As such, the company was allowed to remain listed. The Listing Council overturned the Panel's grant of an exception from the net income test based on the results from the first quarter of the company's current fiscal year. The application of the net income alternative in the Rule requires a historical demonstration of net income of \$500,000, in either the most recently completed fiscal year or in two of the last three most recent fiscal years. Companies cannot comply with the net income alternative of the Rule based on the financial results of a partially completed fiscal year.

Publication Date\*: 7/31/2012

Identification Number: 658

Listing Council Decision 2003-18

Identification  
Number 662

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

**Issue:** The company did not meet the minimum shareholders' equity requirement or its alternatives. The company planned to regain compliance by acquiring another company and completing a private placement.

**Determination:** The company was properly delisted for failure to comply with the shareholders' equity requirement. The company did not

provide any definitive documentation to evidence compliance with the shareholders' equity requirement. Furthermore, even if the company completed their plan, it had a history of losses. In analyzing whether a company will be able to regain and sustain compliance with the shareholders' equity requirement over the long term, the Listing Council reviews the company's recent losses and how such losses would affect shareholders' equity over the next 12-month period. As such, the company did not demonstrate sustainable compliance.

Publication Date\*: 7/31/2012

Identification Number: 662

Listing Council Decision 2003-17

Identification  
Number 663

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

**Issue:** At the time of the Panel decision, the company did not meet the minimum shareholders' equity requirement or its alternatives, and its plan to raise additional equity was not sufficiently definitive. The company requested that the Panel include its contract and tax assets, which were not fully reflected on the company's balance sheet under generally accepted accounting principles, in the calculation of shareholders' equity. In the alternative, the company was considering a plan to effect a quasi-reorganization, which would allow a fresh start restructuring of its shareholders' equity.

**Determination:** The company was properly delisted for failure to comply with the shareholders' equity requirement. The Panel's unwillingness to consider the inclusion of assets not captured on the company's balance sheet was appropriate. Further, the company did not provide documentation to evidence its ability to restructure its shareholders' equity in the near term.

Publication Date\*: 7/31/2012

Identification Number: 663

Listing Council Decision 2003-16

Identification  
Number 664

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

**Issue:** The company did not meet the minimum shareholders' equity requirement or its alternatives. The company planned to regain compliance by restructuring agreements with third parties to minimize the treatment of those agreements as long-term liabilities; improving its earnings through accelerated expense reductions and revenue generation from a price increase; and pursuing a settlement related to pending litigation.

**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 a history of losses. In analyzing whether a company will be able to regain and sustain compliance with the shareholders' equity requirement over the long term, the Listing Council reviews the company's recent losses and how such losses would affect shareholders' equity over the next 12-month period.

Publication Date\*: 7/31/2012

Identification Number: 664

Listing Council Decision 2003-13

Identification  
Number 667

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

**Issue:** At the time of the Panel decision, the company did not meet the minimum shareholders' equity requirement or its alternatives and its plan to raise additional equity was not sufficiently definitive. The company planned to regain compliance by completing private placements, converting debt to equity and earning a fee upon entering into a license agreement. Following the Panel's delisting decision, the company's stock price increased, which caused the company to meet the \$35 million minimum market value of listed securities continued listing requirement, an alternative to the shareholders' equity requirement.

**Determination:** The company had been deficient with the shareholders' equity requirement or its alternatives for more than eight months. Under Listing Rule 4330(e), a security that has been terminated from NASDAQ must meet the initial listing requirements before reinclusion. Because the Panel appropriately delisted the company's securities from the SmallCap Market, the initial listing requirements provide the correct standard for a review of the company's listing qualifications. The company, however, did not meet the National Market initial listing requirements.

Publication Date\*: 7/31/2012

Identification Number: 667

**Rules 4450(a)(3) and 4450(b)(1):** \$10,000,000 shareholders' equity, or its alternatives, \$50,000,000 market value of listed securities or \$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 shareholders' equity requirement for continued inclusion on the National Market and was transferred to the SmallCap Market. The company stated it would attempt to restructure its preferred stock so that it would be treated as equity on the balance sheet under applicable accounting rules. It also intended to raise proceeds in a private equity offering and explore potential development partner fees. Furthermore, it had ceased its stock buy back program and was cutting down on its expenses to reduce its net losses.

**Determination:** The company was properly delisted from the National Market for failure to comply with the minimum shareholders' equity requirement. The company had been below \$10,000,000 for more than nine months at the time of the Listing Council's determination. In addition, the company has not raised sufficient additional equity or provided any definitive evidence of its plan to increase its shareholders' equity. The company's shareholders' equity would also be negatively impacted as a result of its history of losses. The Panel properly determined that, although the company did not comply with all of the requirements for continued listing on the National Market, it did comply with all of the requirements for continued listing on the SmallCap Market

Publication Date\*: 7/31/2012

Identification Number: 669

**Rule 4310(c)(2)(B):** \$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 expected to receive funding, which it believed would have a material impact on the company's ability to complete manufacturing and shipment of additional product and result in additional profits.

**Determination:** The company was properly delisted for failure to comply with the shareholders' equity requirement. The company's assertion that additional funding would increase profits was not a definitive plan to evidence that the company can regain compliance with the shareholders' equity requirement. In addition, the company had a history of losses.

Publication Date\*: 7/31/2012

Identification Number: 671

**Rules 4450(a)(3) and 4450(b)(1):** \$10,000,000 shareholders' equity, or its alternatives, \$50,000,000 market value of listed securities or \$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 shareholders' equity requirement for continued inclusion on the National Market and was transferred to the SmallCap Market. The company asserted that it would be in compliance with the National Market shareholders' requirement after it completed a private placement, and it would be able to maintain compliance throughout 2003 according to its financial projections.

**Determination:** The company was properly transferred to the SmallCap Market for failure to comply with the shareholders' equity requirement on the National Market. Following the consummation of the private transaction, it appeared that the company's shareholders' equity was approximately \$11,000,000. However, the company had been deficient with the shareholders' equity requirement for more than six months. Under Listing Rule 4330(e), a security that has been terminated from NASDAQ must meet the initial listing requirements before re-inclusion. Because the Panel appropriately delisted the company's securities from the National Market, the initial listing requirements provide the correct standard for a review of the company's listing qualifications. The company, however, did not meet the National Market initial listing requirements. Furthermore, even under the National Market continued listing requirements, it appeared that the company would be unable to maintain long term compliance with the minimum shareholders' equity compliance given its history of losses. Although the company projected shareholders' equity meeting the National Market continued listing requirements throughout 2003, the company did not provide sufficient information in its projections to predict an accurate rate of monthly income or loss. For example, the company did not provide detailed assumptions for its projections, such as nonrecurring costs or revenues. Based on its net losses for 2002, the company would soon fall below the \$10,000,000 shareholders' equity requirement.

Publication Date\*: 7/31/2012

Identification Number: 673

**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.

\* \* \*

**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

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

**Rule 4450(f):** NASDAQ may suspend or terminate an issuer's securities if the issuer files under any of the sections of the Bankruptcy Act, unless it is determined that the public interest and the protection of investors would be served by continued designation.

**Issue:** The company no longer satisfied the shareholders' equity requirement for the National Market. The company had filed a voluntary bankruptcy petition and reflected a shareholders' deficit for approximately one year. At the time of the Panel's decision, it was uncertain whether the company would conclude its restructuring proceedings in the near term.

**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. The company provided evidence that it consummated its restructuring process and emerged from the bankruptcy proceedings. Under Listing Rule 4330(e), a security that has been terminated from NASDAQ must meet the initial listing requirements before re-inclusion. Following its restructuring, the company did not meet the National Market initial listing requirements, but did meet all of the SmallCap Market initial listing requirements, except for the \$4 minimum bid price. However, because the company was below the \$1 minimum bid price requirement for continued listing on the National Market for approximately three months, it was still within the 90-day grace period afforded to National Market issuers, as set forth in Listing Rule 4450(e)(2). Accordingly, the Listing Council waived the \$4 bid price requirement for initial listing on the SmallCap Market and instead required that the company meet the \$1 continued listing bid price 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: 678

**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.

\* \* \*

**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.

\* \* \*

**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

**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.

\* \* \*

**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.

\* \* \*

**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.

\* \* \*

**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.

\* \* \*

**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.

\* \* \*

**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 2002-3	Identification Number 687
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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.

Publication Date\*: 7/31/2012 Identification Number: 687

**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 requirement for the National Market. The company stated that it was in negotiations with investors to complete several proposed private placements to regain compliance.

**Determination:** The company was properly transferred to the SmallCap Market. The company's plan of compliance was not definitive. The company did not make any public announcements or provide the Listing Council with any information indicating that it had entered into any definitive agreements with investors. The company did not comply with the National Market net tangible assets/shareholders' equity continued listing requirements, but complied with all the requirements for continued listing on the SmallCap Market.

Publication Date\*: 7/31/2012

Identification Number: 689

**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. The company provided projections and stated it would be in compliance after certain reorganization transactions were consummated.

**Determination:** The company was properly delisted for failure to comply with the net tangible assets/ shareholders' equity requirement. Even assuming that the company's projections were accurate, the company would soon fall below the net tangible assets/shareholders' equity requirement based on the company's history of losses.

\* \* \*

**Rule 4310(c)(7):** 500,000-share public float requirement for continued listing.

**Issue:** The company's proxy statement reflected that the company had less than 500,000 shares in the public float. The company stated it had in excess of 500,000 shares in the public float, assuming conversion of its preferred stock.

**Determination:** The company was properly delisted for failure to comply with the public float requirements. The public float requirement is based solely on shares issued and outstanding.

\* \* \*

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

**Issue:** One of the three members of the audit committee beneficially owned approximately 90% of the company.

**Determination:** The company was properly delisted for failure to demonstrate compliance with the independent director and audit committee composition requirements. A director, who has the ability to directly or indirectly control the company through 90% ownership, is an affiliate of the company, as referred to in Listing Rule 4200(a)(14)(A), and accordingly, he is not independent. The company did not disclose in its proxy statement a basis for an exception to the audit committee composition requirements, pursuant to Rule 4350(d)(2) (B).

\* \* \*

**Rules 4350(g) and 4350(e):** Annual meeting and proxy solicitation requirements.

**Issue:** The company did not hold an annual shareholder meeting or mail proxy statements for 2½ years, while it was resolving a takeover contest and related litigation.

**Determination:** The company was properly delisted for failure to comply with the annual shareholder meeting and proxy solicitation requirements. An unresolved takeover contest and related litigation is an insufficient reason to violate the proxy solicitation and annual meeting requirements.

\* \* \*

**Rule 4350(h):** Requirement for independent review of related party transactions for conflicts of interest.

**Issue:** The company, the chief executive officer, a director and a shareholder group led by the director entered into related party transactions and, as majority shareholders, approved the transactions. The company provided minutes of meeting, reflecting the existence of a special committee of directors.

**Determination:** The company was properly delisted for failure to demonstrate that the company's audit committee or a comparable body of the board of directors reviewed the transactions for conflicts of interest. The minutes did not reflect that the audit committee or an independent committee reviewed the transactions for conflicts of interests. The minutes did not state whether the special committee reviewed the transactions for conflicts of interests or which directors were on the special committee.

\* \* \*

**Rule 4351:** Voting rights requirement.

**Issue:** The company issued convertible preferred shares to investors at a discount to the market price on the date the investors and the company entered into a stock purchase agreement. The company's majority shareholders approved the transaction. The preferred shareholders had the right to vote their shares on an as-converted basis at the company's annual shareholder meeting. To determine whether a voting rights violation exists, the preferred shareholders' voting rights are compared to their relative contribution based on the company's market value at the time of issuance of the preferred shares. The company stated that for purposes of the voting rights rule, the time of issuance of the preferred stock should be the date the letter of intent was signed, not the date the shares were issued.

**Determination:** The company was properly delisted for failure to comply with the voting rights requirements. In determining whether a voting rights violation exists, the execution date of a non-binding agreement cannot be the basis for determining the value of the securities because the value is not definitive if the agreement is unenforceable and the terms can be changed. The company created a new class of securities that vote at a higher rate than the existing common shareholders, and shareholders cannot otherwise agree to permit a voting rights violation by the company through approval of the transaction.

Publication Date\*: 7/31/2012

Identification Number: 688

Listing Council Decision 2012-2

Identification  
Number 1064

## Quantitative Continued Listing Standards

**Rule 5450:** A Company that has its Primary Equity Security listed on the Global Market must continue to substantially meet all of the requirements set forth in Rule 5450(a) and at least one of the Standards in Rule 5450(b). Failure to meet any of the continued listing requirements will be processed in accordance with the provisions set forth in the Rule 5800 Series. A security maintaining its listing under 5450(b)(3) need not also be in compliance with the quantitative maintenance criteria in the Rule 5500 series.

(a)...

(b) Continued Listing Standards for Primary Equity Securities:

(1) Equity Standard

- (A) Stockholders' equity of at least \$10 million;
- (B) At least 750,000 Publicly Held Shares;
- (C) Market Value of Publicly Held Shares of at least \$5 million; and
- (D) At least two registered and active Market Makers.

(2) Market Value Standard

- (A) Market Value of Listed Securities of at least \$50 million;
- (B) At least 1,100,000 Publicly Held Shares;
- (C) Market Value of Publicly Held Shares of at least \$15 million; and

(D) At least four registered and active Market Makers.

(3) Total Assets/Total Revenue Standard

(A) Total assets and total revenue of at least \$50 million each for the most recently completed fiscal year or two of the three most recently completed fiscal years;

(B) At least 1,100,000 Publicly Held Shares;

(C) Market Value of Publicly Held Shares of at least \$15 million; and

(D) At least four registered and active Market Makers.

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**Rule 5550:** A Company that has its Primary Equity Security listed on the Capital Market must continue to meet all of the requirements set forth in Rule 5550(a) and at least one of the Standards set forth in Rule 5550(b). Failure to meet any of the continued listing requirements will be processed in accordance with the provisions set forth in the Rule 5800 Series.

(a) ...

(b) Continued Listing Standards for Primary Equity Securities:

(1) Equity Standard: Stockholders' equity of at least \$2.5 million;

(2) Market Value of Listed Securities Standard: Market Value of Listed Securities of at least \$35 million; or

(3) Net Income Standard: Net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.

**Issue:** The company was before the Hearing Panel on an appeal of a Staff determination to delist the company for failing to provide an adequately definitive plan to regain compliance with Rule 5450(b). In reaching its determination that the company's plan was not definitive, Staff noted that the company did not provide signed agreements or contracts demonstrating its ability to complete multiple capital raising transactions, the form and timing of which had changed multiple times during the period Staff was reviewing the plan. The Hearing Panel issued a decision that moved the company to the Capital Market and provided an extension through June 2012 to regain compliance with Rule 5550(b). The Listing Council called the Hearing Panel decision for review, yet holding the Listing Council proceedings in abeyance until final action was reached in the Hearing Panel matter. Prior to the expiration of the Hearing Panel extension, the company informed the Listing Council that it would not regain compliance with the listing standards by expiration of the Hearing Panel exception and requested that the Listing Council exercise its authority to stay delisting of the company. The Listing Council did not exercise such authority, and the Hearing Panel thereafter issued a decision to delist the company. The company appealed the Hearing Panel decision to delist the company to the Listing Council.

**Determination:** Affirm the decision to delist the company.

The company's estimations both on timing and the amount of capital raised have been consistently over-optimistic and inaccurate. The various milestones set by the company relating to its plan of compliance were not met. With respect to a conversion of notes described in the compliance plan, the company encountered delays in the timeframe set forth to the Staff and the Hearing Panel. The Listing Council was not provided with any update from the company concerning the actual amounts raised through such conversions and the effect such conversions have had in regard to its stockholders' equity deficit. Given the low price of the company's shares relative to the currently applicable conversion prices, the Listing Council agrees with Staff's concern that the company's note holders will not be motivated to convert their debt to equity. With respect to the private placement and registered direct offerings described in the compliance plan, the company's description of the offerings was not definitive. The company's description did not provide milestones, commitments or agreements. The company merely stated that such equity raises would occur sometime following the agreement with the note holders. As recently as August 2012, the company has publicly stated that "it has been difficult so far to attract new equity investments," which provides further evidence that the company is not likely to close a transaction sufficient to regain compliance in the near term and maintain compliance going forward. As such, the Listing Council agrees with Staff that the company's plans of compliance have not been definitive<sup>[1]</sup>, and that the company will not likely be able to regain and maintain compliance with continued listing standards.

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<sup>[1]</sup> Nasdaq FAQs provide guidance to companies on, among other things, what is expected to be presented in plans of compliance (To view these FAQs, click [here](#)). These FAQs are clear that such plans should be definitive and, with regard to private placements and other financial arrangements, companies should provide agreements and lists of investors. The Listing Council acknowledges that the determination of whether a plan of compliance is definitive is a matter of judgment and respects Hearing Panel discretion in the exercise thereof. However, in the present case, the Listing Council failed to find, either in the record or in the Hearing Panel decision, a basis for concluding with any confidence that the Company's plan of compliance was "definitive." This observation affects neither the Hearing Panel decision of March 2012 nor the Hearing Panel decision of June 2012.



Listing Council Decision 2013-3

Identification  
Number 1089**Public Interest and Quantitative Continued Listing Standards**

**Rule 5101:** Nasdaq 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.

**Rule 5110(b):** Nasdaq may use its discretionary authority under the Rule 5100 Series to suspend or terminate the listing of a Company that has filed for protection under any provision of the federal bankruptcy laws or comparable foreign laws, or has announced that liquidation has been authorized by its board of directors and that it is committed to proceed, even though the Company's securities otherwise meet all enumerated criteria for continued listing on Nasdaq. In the event that Nasdaq determines to continue the listing of such a Company during a bankruptcy reorganization, the Company shall nevertheless be required to satisfy all requirements for initial listing, including the payment of initial listing fees, upon emerging from bankruptcy proceedings.

**Rule 5550(b):** For continued listing, a Company shall have either:

(1) Equity Standard: Stockholders' equity of at least \$2.5 million; (2) Market Value of Listed Securities Standard: Market Value of Listed Securities of at least \$35 million; or (3) Net Income Standard: Net income from continuing operations of \$500,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years.

**Issue #1:** As initially presented to the Listing Council, at issue in this matter is whether the Company should remain listed, yet suspended from trading, notwithstanding that the Company does not comply with Rule 5550(b), which requires the Company to have a minimum of \$2.5 million in stockholders' equity, or Rule 5110(b) as the Company filed for protection under Chapter 11 bankruptcy. Staff also raised public interest concerns pursuant to Rules 5101 and IM-5101-1. Staff determined to deny the Company continued listing. On appeal, a Panel initially determined to grant the Company additional time to regain compliance subject to certain milestone, but subsequently determined to delist the Company for failing to meet all of the milestones.

**Determination #1:** Reverse the Panel decision to delist the Company.

In its submissions to the Listing Council, the Company notes that it is diligently working to obtain all necessary approvals, complete the restructuring, emerge from bankruptcy, and immediately evidence compliance with all applicable requirements for initial listing on the Capital Market well within the discretionary period available to the Listing Council. Moreover, the Company notes that the its Board of Directors will be reconstituted concurrent with the Company's emergence from bankruptcy so as to ensure the Company's compliance with all applicable board composition and corporate governance criteria upon emergence from bankruptcy.

Staff argues that the Company should be delisted because it failed to meet the milestones of the Panel decision and its own deadlines, and it failed to provide evidence that it will satisfy the applicable initial listing standards upon its emergence from bankruptcy. In addition, Staff is concerned that maintaining the Company's listing does not protect investors or the integrity of Nasdaq, notwithstanding that its securities are suspended from trading on Nasdaq. In support of this argument, Staff notes that prospective investors have an expectation that companies listed on Nasdaq meet the requirements of listing.

The Listing Council notes Staff's concern, but believes the risk of investor harm is low. The Company has made ongoing disclosure of the status of the bankruptcy and reorganization. Hence investors are aware of the bankruptcy proceedings, and importantly the Company appears to have genuine viable business operations. In this regard, the Company disclosed \$328,377,000 in revenues as of the last fiscal quarter. As such, it is unclear to the Listing Council what prospective investor harm is caused by a Company that is suspended from trading on Nasdaq, is traded with minimal volume over the counter, has provided ongoing public disclosure of its bankruptcy proceedings, and has significant other operations. The Listing Council is aware and considered that the Company has not filed its 10-K for the last fiscal year, but it believes for the reasons set forth above that, even with that failure, the risk of investor harm is low.

Bankruptcy proceedings can take time to resolve and the bankruptcy in the present case is, at the very least, adversarial. The Listing Council is unable to continue the Company's listing in perpetuity as it has limited discretion to grant a deficient company an extension to its listing on Nasdaq. The Panel previously granted the Company the full extent of its discretionary authority to allow the Company to regain compliance. When faced with clear evidence that the Company would be unable to regain compliance within its discretionary period, the Panel appropriately determined to delist the Company. The Listing Council, however, has additional discretionary authority that it can exercise in this matter. Based on the facts and circumstances of this case and for the reasons stated above, the Listing

Council has decided to exercise its discretionary authority and allow the Company to remain listed on Nasdaq, subject to a suspension of trading.

Accordingly, the Listing Council reverses the Panel decision to delist the Company.

**Issue #2:** Should the Company remain listed when, subsequent to the issuance of the Listing Council decision, the Company filed for Chapter 7 liquidation, became deficient for not meeting board independence requirements, and became delinquent in paying its listing fees to Nasdaq. Based on the new facts and circumstances, the Listing Council revisited the matter and issued a second decision.

**Decision #2:** Subsequent to the issuance of the Listing Council decision in this matter, Staff notified the Company and Listing Council of two additional deficiencies: (1) Rule 5250(f), which requires payment of applicable Listing Fees and (2) Rule 5605, which requires a majority independent board and independent directors on certain committees. Staff noted that these deficiencies served as additional bases for delisting the Company's securities from Nasdaq. Staff also noted that the bankruptcy proceedings were converted from Chapter 11 bankruptcy to Chapter 7 liquidation. In response, the Company stated that that an interim Trustee was recently appointed and that the election for the permanent Trustee will be held in the near future, and thereafter the decision relating to the payment of the 2013 Nasdaq annual fee, and the timing of payment of such fee, will be made by the permanent Trustee. Last, the Company noted that it still remains possible that the proceeding could be converted back to a Chapter 11 proceeding in the future.

In conducting its review of the new facts and circumstances of this matter, the Listing Council considered the entire record reviewed by the Listing Council in issuing its initial decision, as supplemented by Staff's letter and the Company's response noted above. As disclosed by Staff's letter, the facts and circumstances on which the Listing Council based its initial decision have changed. The Company's Chapter 11 reorganization has been converted into Chapter 7 liquidation. The Company represented in its response that it remains possible that the bankruptcy could be converted back to Chapter 11 reorganization. However, the Company provided no information on how or when such a conversion could take place. Therefore, in the absence of any evidence that the Company could emerge from its Chapter 7 bankruptcy proceedings as an operating company that can comply with the listing requirements on or prior to the expiration of the discretion afforded to the Listing Council, it has determined to delist the Company.

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Identification Number: 1089