

START-UP COMPANY FINANCE

Professor John Orcutt

Spring Semester 2007

FINAL EXAMINATION**Instructions:**

1. This is an open-book examination. You may bring any materials you wish to the examination with the exception of computers, telephones or other electronic devices. Calculators, however, are permitted.
2. This is a 3-hour examination and is worth 140 points.
3. This examination consists of five "groups" of questions.
 - ▶ Question 1 = 35 points
 - ▶ Question 2 = 15 points
 - ▶ Question 3 = 32 points
 - ▶ Question 4 = 32 points
 - ▶ Question 5 = 26 points

It is your responsibility to apportion your time appropriately amongst the four questions. If you base your time on the number of possible points per question, the time apportionment should be:

- ▶ Question 1 = 45 minutes
 - ▶ Question 2 = 20 minutes
 - ▶ Question 3 = 41 minutes
 - ▶ Question 4 = 41 minutes
 - ▶ Question 5 = 33 minutes
4. The grading of examinations is anonymous. So, you must write your examination number on the examination and each blue book that you use. **YOU MAY NOT WRITE YOUR NAME ON ANYTHING – YOU MAY ONLY USE YOUR EXAM NUMBER.**
 5. Please write your answers in blue books. Remember to write your examination number on each blue book that you use. The only answers that will be graded are the answers written into a blue book. While you are free to use scratch paper, answers written on scratch paper, or anything else other than a blue book, will not be read and will not be counted for any credit. Please write only on the front side of the pages in the blue book. Please remember that organization, persuasiveness, neatness and legibility all count in determining your grade on an answer. To improve the organization of an answer, you may wish to quickly outline the answer on a separate sheet of paper prior to writing your full answer in the blue book.
 6. Should you find it necessary in answering a question to assume a fact not given in the problem as stated, you may do so. However, you should clearly indicate that you are making an assumption and you should explain why you consider it a reasonable assumption to make. I have tried my best to write and proofread the exam so that there are no distracting typos or other errors – but, I may not have been totally successful. If you believe there is a typo or other error that makes it difficult to answer a particular question, please point out the error in your blue book and any assumption you used to answer the question.

Good luck on the examination!

DO NOT TURN TO PAGE 2 UNTIL THE PROCTOR TELLS YOU TO BEGIN

ATTACHMENTS TO THIS EXAM:

In order to assist you with the examination, I have attached the following documents to this exam:

- Attachment A = Sections 1 through 5 of the Securities Act
- Attachment B = Rule 701 of the Securities Act
- Attachment C = Regulation D of the Securities Act
- Attachment D = The TechnoCad Stock Purchase Agreement (the same copy that we used for our class assignments on stock purchase agreements)
- Attachment E = The CSGI Term Sheet (the same copy that we used for our class assignments on term sheets)
- Attachment F = CSGI Amended and Restated Certificate of Incorporation (the same copy that we used for our class assignments on term sheets)
- Attachment G = Section 242 of the Delaware General Corporation Law
- Attachment H = Rule 144 of the Securities Act

QUESTION NO. 1 (35 points possible – 45 minutes suggested):

May 10, 2007 (please assume you are answering this question on May 10th): Your law firm has just been hired by Cool Gaming Software, Inc. ("CGSI") to assist it with a private offering (i.e., the offering must be structured so as to be exempt from section 5 of the Securities Act) of its preferred stock. In the past, CSGI used McNally & Son as its outside legal counsel. Apparently, CSGI has heard about your firm's particular expertise in the law of start-up company finance and decided to switch to your law firm to see what it can do.

CGSI is a non-reporting company¹ and the offering will involve two tranches:

- (1) A Rule 506 tranche with the following details:
 - Amount = Expected that \$30 million of Series C preferred stock will be sold
 - Investors = The only investors will be venture capital funds
 - Timing = The offering is expected to commence on May 21, 2007 and close some time in July 2007

- (2) A Rule 701 tranche with the following details:
 - Amount = Expected that \$800,000 of Series C preferred stock will be sold
 - Investors = 85 employees of CSGI
 - Timing = The offering is expected to coincide with the Rule 506 offering

This will be CSGI's first deal in a long time. CSGI has not otherwise offered or sold any securities since April 2006.

You have been asked to look at the 701 portion of the offering (another associate will deal with the 506 offering). Specifically, please answer the following questions:

- (a) Will the employee offering comply with Rule 701? Please analyze.
- (b) The 85 employees are located in 4 different states. Please analyze the significance of that fact.
- (c) You are working on this assignment with Lois Griffin, who is a partner at your law firm. Lois likes the prospects of CSGI and would like to invest in CSGI through the Rule 701 offering. Please analyze whether Lois can participate as a purchaser in CSGI's Rule 701 offering?

¹ CSGI is a private company that is not required to file periodic disclosure reports with the SEC.

QUESTION NO. 2 (15 points possible – 20 minutes suggested):

May 10, 2007 (please assume you are answering this question on May 10th): Your law firm has just been hired by Acme Inc. ("Acme") to assist it with a private offering (i.e., the offering must be structured so as to be exempt from section 5 of the Securities Act) of preferred stock. It has been decided that the deal will be structured under Rule 506.

The details of the deal are as follows:

- Amount = Expected that \$2.2 million of Series A preferred stock will be sold
- Timing and Investors = The offering commenced on April 21, 2007. Currently, it appears that the following parties intend to purchase Series A preferred stock in the offering:
 - 2 venture capital funds; and
 - 36 individual investors (none of whom qualifies as an accredited investor – but each of whom is a friend of Acme's CEO).

This will be Acme's first deal in a long time. Acme has not otherwise offered or sold any securities since June 2008.

Lois Griffin, the partner on the deal, recognizes the problem of having 36 non-accredited investors, but Wile E. Coyote, the CEO of Acme, is adamant that he wants all 36 non-accredited investors to participate in the offering. Mr. Coyote has informed Lois that he wants each of them to have an opportunity to be an Acme shareholder.

Please answer the following question:

Lois has recommended that Acme go forward with the 36 non-accredited investors since the violation of Rule 506 would be so minimal. In the alternative, Lois suggests hiring a purchaser representative to alleviate the problem. Please analyze Lois's recommendations.

QUESTION NO. 3 (32 points possible – 41 minutes suggested):

Please assume that you are an attorney working for Milkem and Bilkem, who serves as outside legal counsel to TechnoCad, Inc. ("TechnoCad").

TechnoCad is in the process of conducting an offering of Series A Preferred Stock. After discussions with several different VC groups, it looks as though a group led by Greed Izgood Investors will be the purchasers of \$5 million of Series A Preferred Stock from TechnoCad. Legal counsel for the Greed Izgood group is Billem Moore & Moore. You have been provided with a copy of the current draft of the Stock Purchase Agreement (a copy of which is attached as Attachment D), which (a) was prepared by Milkem and Bilkem and (b) includes hand-marked comments from Billem Moore & Moore.

Please note the Attachment D copy of the Stock Purchase Agreement is the same copy that I provided to you for our class assignments on stock purchase agreements.

Prior to accepting or rejecting any of Billem Moore & Moore's comments and entering into the Stock Purchase Agreement, Jane Doerr (the CEO of TechnoCad) has asked you to answer the following questions so that TechnoCad can make an informed decision:

- (a) Why is TechnoCad being asked to provide such extensive representations and warranties in the Stock Purchase Agreement?
- (b) The Stock Purchase Agreement contains (on p. 5) a representation/warranty entitled "Environmental Laws."² The Billem Moore & Moore mark-up proposes striking the phrase: "To the best of Company's knowledge." Jane has told you that she does not believe TechnoCad has any environmental problems. What would be the impact if TechnoCad were to allow the knowledge qualifier to be removed from the Environmental Laws representation/warranty?

² The Environmental Laws representation/warranty was originally labeled as Section 2(u), but in the Billem Moore & Moore mark-up, Billem Moore & Moore has labeled it Section 2(y).

QUESTION NO. 4 (32 points possible – 41 minutes suggested):

Cool Gaming Software, Inc. (“CSGI”) is in the process of conducting an offering of Series C Preferred Stock. CSGI has signed a term sheet with a group of investors led by Greed Izgood Investors (“Greed Izgood”), a leading VC fund. You have been provided with:

- A copy of the Series C term sheet that was furnished by Greed Izgood (attached as Attachment E); and
- A copy of CSGI’s current Amended and Restated Certificate of Incorporation (attached as Attachment F).

Please note the Attachment E Term Sheet and the Attachment F Amended and Restated Certificate of Incorporation are the same copies that I provided to you for our class assignments on term sheets.

Please answer the following questions:

- (a) Please assume that CSGI conducts the offering as laid out in the term sheet. In order to sell the Series C Preferred Stock to the Greed Izgood group, CSGI will need to further amend its Amended and Restated Certificate of Incorporation in order (i) to create a new series of Preferred Stock that would be designated as “Series C” and (ii) modify certain rights and provisions that impact the holders of Common Stock, Series A Preferred Stock and Series B Preferred Stock.

Please explain what will be required under section 242 of the Delaware General Corporation Law to accomplish this further amendment to the Amended and Restated Certificate of Incorporation.

- (b) Please explain the impact of the liquidation preference on the founders and managers of CSGI, who predominantly own common stock of CSGI and not preferred stock. In answering this question, please explain how the liquidation preference serves to align the interests of management with those of the external shareholders (primarily the venture capital investors).

QUESTION NO. 5 (26 points possible – 33 minutes suggested):

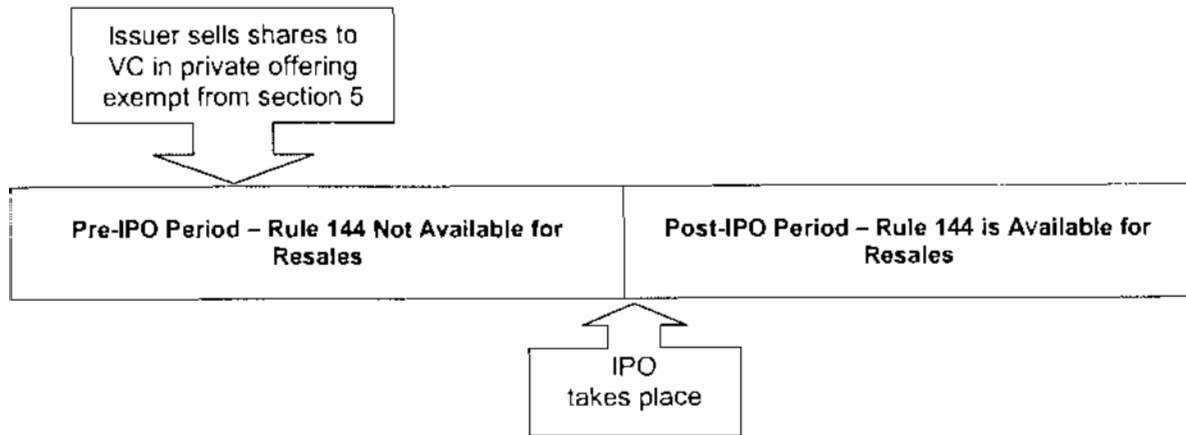
Please answer the following questions, which relate to the ability of investors to exit their investments in start-ups:

(a) **May 10, 2007 (assume you are answering this question on May 10th):** You are an associate at Milkem and Bilkem, a leading law firm, where you have been specializing in representing start-up companies and investors in start-up companies. One of your clients, Verbyl Belch, has come to you for advice regarding an investment she holds in a company called Genomix, Inc. ("Genomix"). Please assume the following facts:

- On March 1, 2005, Michael Milken purchased 1.5 million shares of common stock from Genomix in a Rule 506 transaction.
- On June 1, 2006, Michael gifted all 1.5 million shares of common stock to Verbyl.
- On July 1, 2006, Genomix conducted an IPO and is now quoted on the Nasdaq National Market. Genomix is a reporting company under the Securities Exchange Act of 1934 and is in compliance with all of its reporting requirements.
- Genomix has 100 million shares of common stock outstanding and the average trading volume of Genomix common stock for the four calendar weeks ending last Friday is 700,000 shares per week.
- Verbyl is not an affiliate of Genomix.

Verbyl would like to sell 100% of her Genomix common stock as soon as possible. Please advise Verbyl on her ability to sell the shares. Can she sell all of her shares immediately? If not, please explain why and please provide an analysis of the possibilities available to Verbyl for when and how she can sell her shares of Genomix common stock. Please explain your advice (including a thorough explanation of the purpose of Rule 144) and cite authority where appropriate.

- (b) From a practical standpoint, Rule 144 (with the possible exception of Rule 144(k)) is not available as a safe harbor for investors who wish to resell their equity investments in a start-up company until after the start-up company completes an initial public offering ("IPO").



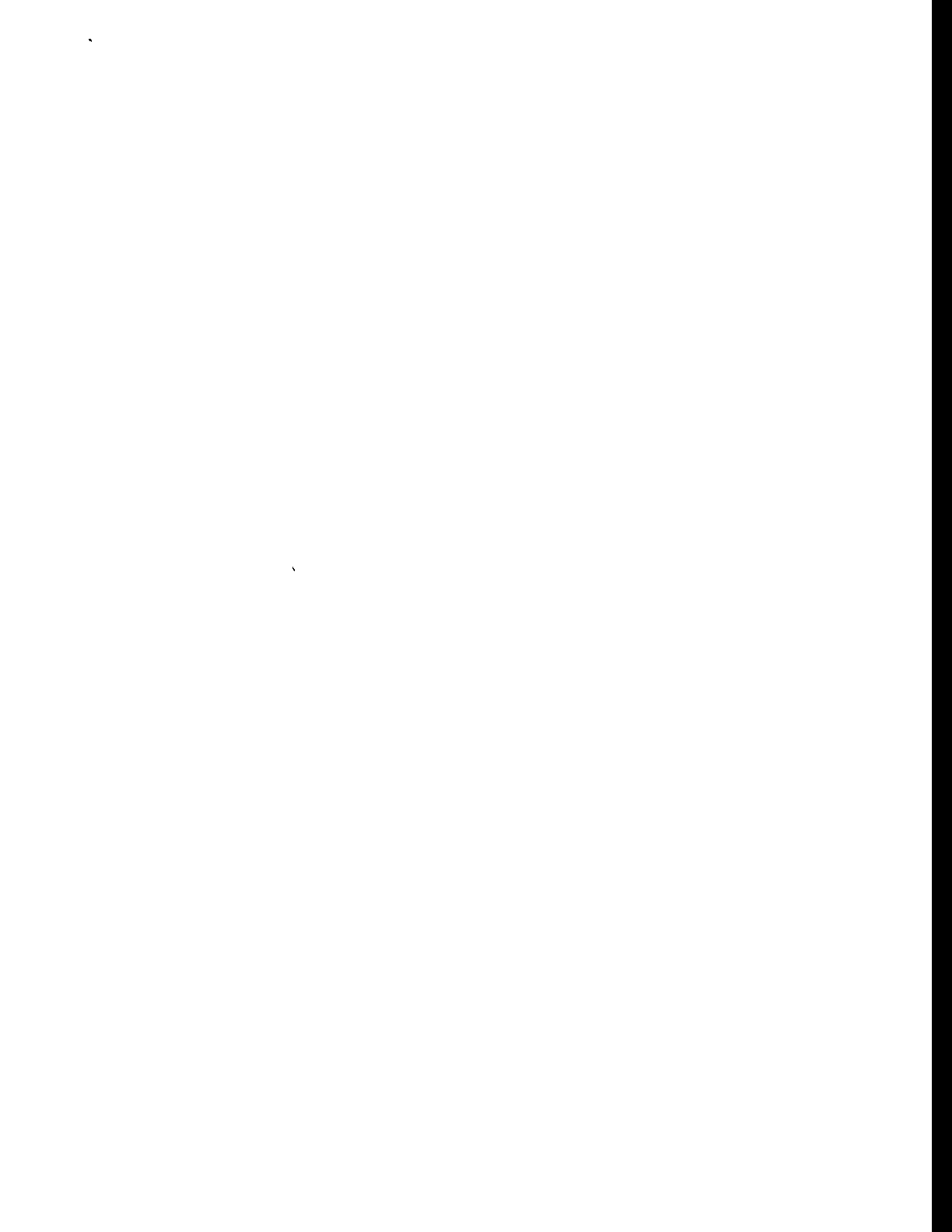
Please explain why Rule 144 is not available for resales in the Pre-IPO Period, including an explanation of why Rule 144(k) is not likely to be available. If an investor wishes to sell her shares during the Pre-IPO Period, what is her most realistic option for doing so? Please explain.

* * * * *

END OF EXAM

FOR THE 3Ls AND GRADUATING GRADUATE STUDENTS: Enjoy wonderful careers and please keep in touch.

FOR THE 2Ls AND RETURNING GRADUATE STUDENTS: I look forward to seeing you next year.



Attachment A:

Sections 1 through 5 of the Securities Act

SECURITIES ACT OF 1933

(References in brackets [] are to title 15, United States Code)

AN ACT To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. [77a] This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. [77b] (a) DEFINITIONS.—When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to

buy" as used in subsection (c) of section 5 shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been offered and sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be an offer or sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security. Any offer or sale of a security futures product by or on behalf of the issuer of the securities underlying the security futures product, an affiliate of the issuer, or an underwriter, shall constitute a contract for sale of, sale of, offer for sale, or offer to sell the underlying securities.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

(5) The term "Commission" means the Securities and Exchange Commission.

(6) The term "Territory" means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.¹

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10 at the time of such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed thereiu, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent,

¹The words "Philippine Islands" were deleted from the definition of the term "Territory" on the basis of Presidential Proclamation No. 2695, effective July 4, 1946 (11 F.R. 7517; 60 Stat. 1352), which granted independence to the Philippine Islands.

broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

(13) The term "insurance company" means a company which is organized as an insurance company, whose primary and predominant business activity is the writing of insurance or the reinsuring of risks underwritten by insurance companies, and which is subject to supervision by the insurance commissioner, or a similar official or agency, of a State or territory or the District of Columbia; or any receiver or similar official or any liquidating agent for such company, in his capacity as such.

(14) The term "separate account" means an account established and maintained by an insurance company pursuant to the laws of any State or territory of the United States, the District of Columbia, or of Canada or any province thereof, under which income, gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(15) The term "accredited investor" shall mean—

(i) a bank as defined in section 3(a)(2) whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974,¹ if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe.

(16) The terms "security future", "narrow-based security index", and "security futures product" have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934.

(b) CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

¹ 29 U.S.C. 1001 et seq. [Printed in appendix to this volume.]

SEC. 2A. [77b-1] SWAP AGREEMENTS.

(a) **NON-SECURITY-BASED SWAP AGREEMENTS.**—The definition of “security” in section 2(a)(1) of this title does not include any non-security-based swap agreement (as defined in section 206C of the Gramm-Leach-Bliley Act).

(b) **SECURITY-BASED SWAP AGREEMENTS.**—

(1) The definition of “security” in section 2(a)(1) of this title does not include any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act).

(2) The Commission is prohibited from registering, or requiring, recommending, or suggesting, the registration under this title of any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act). If the Commission becomes aware that a registrant has filed a registration statement with respect to such a swap agreement, the Commission shall promptly so notify the registrant. Any such registration statement with respect to such a swap agreement shall be void and of no force or effect.

(3) The Commission is prohibited from—

(A) promulgating, interpreting, or enforcing rules; or

(B) issuing orders of general applicability;

under this title in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act).

(4) References in this title to the “purchase” or “sale” of a security-based swap agreement shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), as the context may require.

EXEMPTED SECURITIES¹

SEC. 3. [77c] (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Reserved.

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or

¹ Additional exemptions contained at: 7 U.S.C. 1932(d)(6); 12 U.S.C. 1455, 1717, 1719, 1723c; 15 U.S.C. 77c, note; 20 U.S.C. 1087-2, 1087hh; 22 U.S.C. 283(h), 285h, 286k-1, 290i-9, 43 U.S.C. 1625; and 45 U.S.C. 720. [Printed in appendix to this volume except for 7 U.S.C. 1932(d)(6) and 15 U.S.C. 77c.]

any interest or participation in any common trust fund or similar fund that is excluded from the definition of the term "investment company" under section 3(c)(3) of the Investment Company Act of 1940; or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954)¹ the interest on which is excludable from gross income under section 103(a)(1) of such Code if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code (determined as if paragraphs (4)(A), (5), and (7)² were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security; or any interest or participation in a single trust fund, or in a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954,³ (B) an annuity plan which meets the requirements for the deduction of the employer's contributions under section 404(a)(2) of such Code,⁴ or (C) a governmental plan as defined in section 414(d) of such Code⁵ which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, other than any plan described in clause (A), (B), or (C) of this paragraph (i) the contributions under which are held in a single trust fund or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or any company directly or indirectly controlling, controlled by, or under common control with the employer, (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code, or (iii) which is a plan funded by an annuity contract described in section 403(b)⁶ of such Code. The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section

¹ Section 103(c) of the Internal Revenue Code of 1954 redesignated as section 103(b) by section 1901(a)(17) of Pub. L. 94-455 (26 U.S.C. 103(b)). [Printed in appendix to this volume.]

² Paragraph (7) redesignated as paragraph (13) (26 U.S.C. 103(b)(13)). [Printed in appendix to this volume.]

³ 26 U.S.C. 401. [Printed in appendix to this volume.]

⁴ 26 U.S.C. 404(a)(2). [Printed in appendix to this volume.]

⁵ 26 U.S.C. 414(d). [Printed in appendix to this volume.]

⁶ 26 U.S.C. 403(b). [Printed in appendix to this volume.]

401(c)(1) of the Internal Revenue Code of 1954, if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act of 1940;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual; or any security of a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940;

(5) Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of the Internal Revenue Code of 1954,¹ (ii) a corporation described in section 501(c)(16) of such Code² and exempt from tax under section 501(a) of such Code, or (iii) a corporation described in section 501(c)(2) of such Code which is exempt from tax under section 501(a) of such Code and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii);

(6) Any interest in a railroad equipment trust. For purposes of this paragraph "interest in a railroad equipment trust" means any interest in an equipment trust, lease, conditional sales contract, or other similar arrangement entered into, issued, assumed, guaranteed by, or for the benefit of, a common carrier to finance the acquisition of rolling stock, including motive power;

¹28 U.S.C. 521. [Printed in appendix to this volume.]

²26 U.S.C. 501(c)(16). [Printed in appendix to this volume.]

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;¹

(9) Except with respect to a security exchanged in a case under title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(12) Any equity security issued in connection with the acquisition by a holding company of a bank under section 3(a) of the Bank Holding Company Act of 1956 or a savings association under section 10(e) of the Home Owners' Loan Act, if—

(A) the acquisition occurs solely as part of a reorganization in which security holders exchange their shares of a bank or savings association for shares of a newly formed holding company with no significant assets other than securities of the bank or savings association and the existing subsidiaries of the bank or savings association;

(B) the security holders receive, after that reorganization, substantially the same proportional share interests in the holding company as they held in the bank or savings association, except for nominal changes in shareholders' interests resulting from lawful elimination of fractional interests and the exercise of dissenting shareholders' rights under State or Federal law;

(C) the rights and interests of security holders in the holding company are substantially the same as those in the bank or savings association prior to the transaction, other than as may be required by law; and

¹ But see section 24(d) of the Investment Company Act of 1940, *infra*.

(D) the holding company has substantially the same assets and liabilities, on a consolidated basis, as the bank or savings association had prior to the transaction.

For purposes of this paragraph, the term "savings association" means a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(13) Any security issued by or any interest or participation in any church plan, company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940.

(14) Any security futures product that is—

(A) cleared by a clearing agency registered under section 17A of the Securities Exchange Act of 1934 or exempt from registration under subsection (h)(7) of such section 17A; and

(B) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the Securities Exchange Act of 1934.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds \$5,000,000.

(c) The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities exempted as provided in this section any class of securities issued by a small business investment company under the Small Business Investment Act of 1958¹ if it finds, having regard to the purposes of that Act, that the enforcement of this Act with respect to such securities is not necessary in the public interest and for the protection of investors.

EXEMPTED TRANSACTIONS²

SEC. 4. [77d] The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

¹ 15 U.S.C. 661 et seq.

² See additional exemption contained at 11 U.S.C. 1145. (Printed in appendix to this volume.)

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 8 is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

(5)(A) Transactions involving offers or sales of one or more promissory notes directly secured by a first lien on a single parcel of real estate upon which is located a dwelling or other residential or commercial structure, and participation interests in such notes—

(i) where such securities are originated by a savings and loan association, savings bank, commercial bank, or similar banking institution which is supervised and examined by a Federal or State authority, and are offered and sold subject to the following conditions:

(a) the minimum aggregate sales price per purchaser shall not be less than \$250,000;

(b) the purchaser shall pay cash either at the time of the sale or within sixty days thereof; and

(c) each purchaser shall buy for his own account only; or

(ii) where such securities are originated by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 203 and 211¹ of the National Housing Act and are offered or sold subject to the three conditions specified in subparagraph (A)(i) to any institution described in such subparagraph or to any insurance company subject to the supervision of the insurance commissioner, or any agency or officer performing like function, of any State or territory of the United States or the District of Columbia, or the Federal Home Loan Mort-

¹ 12 U.S.C. 1709, 1715b.

gage Corporation, the Federal National Mortgage Association, or the Government National Mortgage Association.

(B) Transactions between any of the entities described in subparagraph (A)(i) or (A)(ii) hereof involving non-assignable contracts to buy or sell the foregoing securities which are to be completed within two years, where the seller of the foregoing securities pursuant to any such contract is one of the parties described in subparagraph (A)(i) or (A)(ii) who may originate such securities and the purchaser of such securities pursuant to any such contract is any institution described in subparagraph (A)(i) or any insurance company described in subparagraph (A)(ii), the Federal Home Loan Mortgage Corporation, Federal National Mortgage Association, or the Government National Mortgage Association and where the foregoing securities are subject to the three conditions for sale set forth in subparagraphs (A)(i) (a) through (c).

(C) The exemption provided by subparagraphs (A) and (B) hereof shall not apply to resales of the securities acquired pursuant thereto, unless each of the conditions for sale contained in subparagraphs (A)(1) (a) through (c) are satisfied.

(6) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 3(b) of this title, if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. [77e] (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. [77f] (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) REGISTRATION FEE.—

(1) RECOVERY OF COST OF SERVICES.—The Commission shall, in accordance with this subsection,¹ collect registration fees that are designed to recover the costs to the government of the securities registration process, and costs related to such process, including enforcement activities, policy and rule-making activities, administration, legal services, and international regulatory activities.

(2) FEE PAYMENT REQUIRED.—At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to \$92 per \$1,000,000 of the maximum aggregate price at which such securities are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (5) or (6).

(3) OFFSETTING COLLECTIONS.—Fees collected pursuant to this subsection for any fiscal year—

¹ But see sections 24(e) and 24(f) of the Investment Company Act of 1940, *infra*.



Attachment B:

Rule 701 of the Securities Act

SEC **Potential persons who are to respond to the collection of information contained in this**
 xxxx **form are not required to respond unless the form displays a currently valid OMB**
control number.

OMB APPROVAL
OMB Number: 3235-0522
Expires: xxxxxxxxxxxx
Estimated average burden hours per response. . . . 1

**UNITED STATES
 SECURITIES AND EXCHANGE COMMISSION
 Washington, D.C. 20549**

REGULATION 701

**EXEMPTION FOR OFFERS AND SALES OF SECURITIES
 PURSUANT TO CERTAIN COMPENSATORY BENEFIT PLANS
 AND CONTRACTS RELATING TO COMPENSATION**

PRELIMINARY NOTES

1. This section relates to transactions exempted from the registration requirements of section 5 of the Act (15 U.S.C. 77c). These transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers and persons acting on their behalf have an obligation to provide investors with disclosure adequate to satisfy the antifraud provisions of the federal securities laws.
2. In addition to complying with this section, the issuer also must comply with any applicable state law relating to the offer and sale of securities.
3. An issuer that attempts to comply with this section, but fails to do so, may claim any other exemption that is available.
4. This section is available only to the issuer of the securities. Affiliates of the issuer may not use this section to offer or sell securities. This section also does not cover resales of securities by any person. This section provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.
5. The purpose of this section is to provide an exemption from the registration requirements of the Act for securities issued in compensatory circumstances. This section is not available for plans or schemes to circumvent this purpose, such as to raise capital. This section also is not available to exempt any transaction that is in technical compliance with this section but is part of a plan

or scheme to evade the registration provisions of the Act. In any of these cases, registration under the Act is required unless another exemption is available.

- (a) **Exemption.** Offers and sales made in compliance with all of the conditions of this section are exempt from section 5 of the Act (15 U.S.C. 77e).
- (b) **Issuers eligible to use this section.**
- (1) **General.** This section is available to any issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") (15 U.S.C. 78m or 78o(d)) and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).
 - (2) **Issuers that become subject to reporting.** If an issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)) after it has made offers complying with this section, the issuer may nevertheless rely on this section to sell the securities previously offered to the persons to whom those offers were made.
 - (3) **Guarantees by reporting companies.** An issuer subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m, 78o(d)) may rely on this section if it is merely guaranteeing the payment of a subsidiary's securities that are sold under this section.
- (c) **Transactions exempted by this section.** This section exempts offers and sales of securities (including plan interests and guarantees pursuant to paragraph (d)(2)(ii) of this section) under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer is a business trust), officers, or consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. This section exempts offers and sales to former employees, directors, general partners, trustees, officers, consultants and advisors only if such persons were employed by or providing services to the issuer at the time the securities were offered. In addition, the term "employee" includes insurance agents who are exclusive agents of the issuer, its subsidiaries or parents, or derive more than 50% of their annual income from those entities.
- (1) **Special requirements for consultants and advisors.** This section is available to consultants and advisors only if:
 - (i) They are natural persons;
 - (ii) They provide *bona fide* services to the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent; and
 - (iii) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.
 - (2) **Definition of "Compensatory Benefit Plan."** For purposes of this section, a *compensatory benefit plan* is any purchase, savings, option, bonus, stock appreciation,

profit sharing, thrift, incentive, deferred compensation, pension or similar plan.

- (3) **Definition of "Family Member."** For purposes of this section, *family member* includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, former spouse, sibling, niece, nephew, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive relationships, any person sharing the employee's household (other than a tenant or employee), a trust in which these persons have more than fifty percent of the beneficial interest, a foundation in which these persons (or the employee) control the management of assets, and any other entity in which these persons (or the employee) own more than fifty percent of the voting interests.

(d) **Amounts that may be sold.**

- (1) **Offers.** Any amount of securities may be offered in reliance on this section. However, for purposes of this section, sales of securities underlying options must be counted as sales on the date of the option grant.
- (2) **Sales.** The aggregate sales price or amount of securities sold in reliance on this section during any consecutive 12-month period must not exceed the *greatest* of the following:
- (i) \$1,000,000;
 - (ii) 15% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees), measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end); or
 - (iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on this section, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end).

(3) **Rules for calculating prices and amounts.**

- (i) **Aggregate sales price.** The term *aggregate sales price* means the sum of all cash, property, notes, cancellation of debt or other consideration received or to be received by the issuer for the sale of the securities. Non-cash consideration must be valued by reference to *bona fide* sales of that consideration made within a reasonable time or, in the absence of such sales, on the fair value as determined by an accepted standard. The value of services exchanged for securities issued must be measured by reference to the value of the securities issued. Options must be valued based on the exercise price of the option.
- (ii) **Time of the calculation.** With respect to options to purchase securities, the aggregate sales price is determined when an option grant is made (without regard to when the option becomes exercisable). With respect to other securities, the calculation is made on the date of sale. With respect to deferred compensation or similar plans, the calculation is made when the irrevocable election to defer is made.
- (iii) **Derivative securities.** In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section, treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options,

warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption.

- (iv) **Other exemptions.** Amounts of securities sold in reliance on this section do not affect "aggregate offering prices" in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on this section.
- (c) **Disclosure that must be provided.** The issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable. In addition, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds \$5 million, the issuer must deliver the following disclosure to investors a reasonable period of time before the date of sale:
- (1) If the plan is subject to the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. 1104 - 1107), a copy of the summary plan description required by ERISA;
 - (2) If the plan is not subject to ERISA, a summary of the material terms of the plan;
 - (3) Information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and
 - (4) Financial statements required to be furnished by Part F/S of Form 1-A (Regulation A Offering Statement) (§239.90 of this chapter) under Regulation A (§§230.251 - 230.263). Foreign private issuers as defined in §230.405 must provide a reconciliation to generally accepted accounting principles in the United States (U. S. GAAP) if their financial statements are not prepared in accordance with U. S. GAAP (Item 17 of Form 20-F (§249.220f of this chapter)). The financial statements required by this section must be as of a date no more than 180 days before the sale of securities in reliance on this exemption.
 - (5) If the issuer is relying on paragraph (d)(2)(ii) of this section to use its parent's total assets to determine the amount of securities that may be sold, the parent's financial statements must be delivered. If the parent is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), the financial statements of the parent required by Rule 10-01 of Regulation S-X (§210.10-01 of this chapter) and Item 310 of Regulation S-B (§228.310 of this chapter), as applicable, must be delivered.
 - (6) If the sale involves a stock option or other derivative security, the issuer must deliver disclosure a reasonable period of time before the date of exercise or conversion. For deferred compensation or similar plans, the issuer must deliver disclosure to investors a reasonable period of time before the date the irrevocable election to defer is made.
- (f) **No integration with other offerings.** Offers and sales exempt under this section are deemed to be a part of a single, discrete offering and are not subject to integration with any other offers or sales, whether registered under the Act or otherwise exempt from the registration requirements of the Act.
- (g) **Resale limitations.**
- (1) Securities issued under this section are deemed to be "restricted securities" as defined in §230.144.
 - (2) Resales of securities issued pursuant to this section must be in compliance with the registration requirements of the Act or an exemption from those requirements.

- (3) Ninety days after the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold by persons who are not affiliates (as defined in [§230.144](#)) in reliance on [§230.144](#) without compliance with paragraphs (c), (d), (e) and (h) of [§230.144](#), and by affiliates without compliance with paragraph (d) of [§230.144](#).

<http://www.sec.gov/divisions/corpfin/forms/701.htm>

Last update: 01/18/2000



Attachment C:

Regulation D of the Securities Act

OMB APPROVAL	
OMB Number:	3235-0076
Expires:	April 30, 2008
Estimated average burden hours per response.	1

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

REGULATION D

**RULES GOVERNING THE LIMITED OFFER AND SALE OF SECURITIES
WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933**

Preliminary Notes

1. The following rules relate to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the "Act") [15 U.S.C. 77a et seq., as amended]. Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under this regulation, in light of the circumstances under which it is furnished, not misleading.
2. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of federal-state limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act. In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to registration of persons who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.
3. Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of Rule 506 shall not raise any presumption that the exemption provided by section 4(2) of the Act is not available.
4. These rules are available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resales of the issuer's securities. The rules provide an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.
5. These rules may be used for business combinations that involve sales by virtue of Rule 145(a) (17 CFR 230.145(a)) or otherwise.
6. In view of the objectives of these rules and the policies underlying the Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.
7. Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this note, however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

Definitions and Terms Used in Regulation D

Reg. § 230.501. As used in Regulation D [§§ 230.501-230.508], the following terms shall have the meaning indicated:

- (a) *Accredited investor.* "Accredited investor" shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

SEE ATTACHED INTERPRETIVE RELEASE 33-6455

- (1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, savings and loan association, insurance company, or registered adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;
 - (2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
 - (3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000;
 - (4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;
 - (5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds \$1,000,000;
 - (6) Any natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
 - (7) Any trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and
 - (8) Any entity in which all of the equity owners are accredited investors.
- (b) *Affiliate.* An "affiliate" of, or person "affiliated" with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.
- (c) *Aggregate offering price.* "Aggregate offering price" shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.
- (d) *Business combination.* "Business combination" shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if, immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).
- (e) *Calculation of number of purchasers.* For purposes of calculating the number of purchasers under §§ 230.505(b) and 230.506(b) only, the following shall apply:
- (1) The following purchasers shall be excluded:
 - (i) Any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;

- (ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (c)(1)(i) or (e)(1)(iii) of this § 230.501 collectively have more than 50 percent of the beneficial interest (excluding contingent interests);
 - (iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (c)(1)(i) or (e)(1)(ii) of this § 230.501 collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and
 - (iv) Any accredited investor.
- (2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§ 230.501-230.508), except to the extent provided in paragraph (e)(1) of this section.
 - (3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

Note: The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

- (f) *Executive officer.* "Executive officer" shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.
- (g) *Issuer.* The definition of the term "issuer" in section 2(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 et seq.), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.
- (h) *Purchaser representative.* "Purchaser representative" shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:
 - (1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:
 - (i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;
 - (ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this § 230.501 collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or
 - (iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this § 230.501 collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;
 - (2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;
 - (3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and
 - (4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually

understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

Note 1: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78a *et seq.*, as amended] and relating to investment advisers under the Investment Advisers Act of 1940.

Note 2: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this § 230.501 must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for "all securities transactions" or "all private placements," is not sufficient.

Note 3: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

General Conditions to be Met

Reg. § 230.502. The following conditions shall be applicable to offers and sales made under Regulation D (§§ 230.501-230.508).

- (a) *Integration.* All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in Rule 405 under the Act [17 CFR 230.405].

Note: The term "offering" is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this § 230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (i.e., are considered "integrated") depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33-6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

- (a) whether the sales are part of a single plan of financing;
- (b) whether the sales involve issuance of the same class of securities;
- (c) whether the sales have been made at or about the same time;
- (d) whether the same type of consideration is being received; and
- (e) whether the sales are made for the same general purpose.

See Release No. 33-4552 (November 6, 1962) [27 F.R. 11316].

- (b) *Information requirements.*

- (1) *When information must be furnished.*

If the issuer sells securities under § 230.505 or § 230.506 to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (h)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under § 230.504, or to any accredited investor.

Note: When an issuer provides information to investors pursuant to paragraph (h)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) *Type of information to be furnished.*

- (i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities, the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business, and the securities being offered:
- (A) *Non-financial statement information.* If the issuer is eligible to use Regulation A (§ 230.251-263), the same kind of information as would be required in Part II of Form 1-A (§ 239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.
- (B) *Financial Statement Information.*
- (1) *Offerings up to \$2,000,000.* The information required in Item 310 of Regulation S-B (§ 228.310 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.
- (2) *Offerings up to \$7,500,000.* The financial statement information required in Form SB-2 [§ 239.10 of this chapter]. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.
- (3) *Offerings over \$7,500,000.* The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.
- (C) If the issuer is a foreign private issuer eligible to use Form 20-F (§ 249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i)(B)(1), (2) or (3) of this section, as appropriate.
- (ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities, the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(i)(A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(i)(C) of this section:
- (A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of § 240.14a-3 or 240.14c-3 under the Exchange Act, the definitive proxy statement filed in connection with that annual report, and, if requested by the purchaser in writing, a copy of the issuer's most recent Form 10-K and 10-KSB [17 CFR 249.310 and 249.310b] under the Exchange Act.
- (B) The information contained in an annual report on Form 10-K (§ 249.310 of this chapter) or 10-KSB (§ 249.310b of this chapter) under the Exchange Act or in a registration statement on Form S-1 (§ 239.11 of this chapter), SB-1 (§ 239.9 of this chapter), SB-2 (§ 239.10 of this chapter) or S-11 (§ 239.18 of this chapter) under the Act or on Form 10 (§ 249.210 of this chapter) or Form 10-SB (§ 249.210b of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.
- (C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraph (A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

- (D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b)(2)(i)(A) or (B) of this section, the information contained in its most recent filing on Form 20-F or Form F-1 (§ 239.31 of this chapter).
- (iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10-K and Form 10-KSB report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his written request, a reasonable time prior to his purchase.
- (iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506, the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.
- (v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under § 230.505 or 230.506 the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2)(i) or (ii) of this § 230.502.
- (vi) For business combinations or exchange offers, in addition to information required by Form S-4 [17 CFR 239.25], the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S-4 by compliance with paragraph (b)(2)(i) of this § 230.502.
- (vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506, the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.
- (c) *Limitation on manner of offering.* Except as provided in § 230.504(b)(1), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:
- (1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and
 - (2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising.

Provided, however, that publication by an issuer of a notice in accordance with §230.135c shall not be deemed to constitute general solicitation or general advertising for purposes of this section. *Provided further,* that, if the requirements of §230.135c are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.

- (d) *Limitations on resale.* Except as provided in § 230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(11) of the Act, which reasonable care may be demonstrated by the following:

Provided, however, that publication by an issuer of a notice in accordance with §230.135c shall not be deemed to constitute general solicitation or general advertising for purposes of this section.

- (1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;
- (2) Written disclosure to each purchaser prior to sale that the securities have not been registered under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and
- (3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, § 230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

Filing of Notice of Sales

Reg. § 230.503.

- (a) An issuer offering or selling securities in reliance on § 230.504, § 230.505 or § 230.506 shall file with the Commission five copies of a notice on Form D (17 CFR 239.500) no later than 15 days after the first sale of securities.
- (b) One copy of every notice on Form D shall be manually signed by a person duly authorized by the issuer.
- (c) If sales are made under § 230.505, the notice shall contain an undertaking by the issuer to furnish to the Commission, upon the written request of its staff, the information furnished by the issuer under § 230.502(b)(2) to any purchaser that is not an accredited investor.
- (d) Amendments to notices filed under paragraph (a) of this § 230.503 need only report the issuer's name and the information required by Part C and any material change in the facts from those set forth in Parts A and B.
- (e) A notice on Form D shall be considered filed with the Commission under paragraph (a) of this § 230.503:
 - (1) As of the date on which it is received at the Commission's principal office in Washington, D.C.; or
 - (2) As of the date on which the notice is mailed by means of United States registered or certified mail to the Commission's principal office in Washington, D.C., if the notice is delivered to such office after the date on which it is required to be filed.

Exemption for Limited Offerings and Sales of Securities Not Exceeding \$1,000,000

Reg. § 230.504.

- (a) *Exemption* Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:
 - (1) subject to the reporting requirements of section 13 or 15(d) of the Exchange Act;
 - (2) an investment company; or
 - (3) a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.
- (b) *Conditions to be met.*
 - (1) To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and §230.502(a),(c) and (d), except that the provisions of §230.502(c) and (d) will not apply to offers and sales of securities under this §230.504 that are made:
 - (i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;

- (ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or
 - (iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to "accredited investors" as defined in 230.501(a).
- (2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed \$1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b) of the Act, or in violation of section 5(a) of the Securities Act.

Note 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold \$900,000 on June 1, 1987 under this § 230.504 and an additional \$4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the \$1,000,000 limit within the preceding twelve months.

Note 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold \$1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional \$500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

Exemption for Limited Offers and Sales of Securities Not Exceeding \$5,000,000

Reg. § 230.505.

- (a) *Exemption.* Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.505 by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.
- (b) *Conditions to be met.*
 - (1) *General conditions.* To qualify for exemption under this section, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.
 - (2) *Specific conditions.*
 - (i) *Limitations on aggregate offering price.* The aggregate offering price for an offering of securities under this § 230.505, as defined in § 230.501(c), shall not exceed \$5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.505 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

Note: The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sold \$2,000,000 of its securities on June 1, 1982 under this § 230.505 and an additional \$1,000,000 on September 1, 1982, the issuer would be permitted to sell only \$2,000,000 more under this § 230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the \$5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell \$4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months.

Example 2. If an issuer sold \$500,000 of its securities on June 1, 1982 under § 230.504 and an additional \$4,500,000 on December 1, 1982 under this § 230.505, then the issuer could not sell any of its securities under this § 230.505 until June 1, 1983. At that time it could sell an additional \$500,000 of its securities.

- (ii) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section § 230.505.

Note: See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may

not constitute an offering under this section.

- (iii) *Disqualifications.* No exemption under this section shall be available for the securities of any issuer described in § 230.262 of Regulation A, except that for purposes of this section only:
 - (A) The term "filing of the offering statement required by § 230.252" as used in § 230.262(a), (b) and (c) shall mean the first sale of securities under this section;
 - (B) The term "underwriter" as used in § 230.262(b) and (c) shall mean a person that has been or will be paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and
 - (C) Paragraph (b)(2)(iii) of this § 230.505 shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

Reg. § 230.506.

- (a) *Exemption.* Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) of this § 230.506 shall be deemed to be transactions not involving any public offering within the meaning of section 4(2) of the Act.
- (b) *Conditions to be met.*
 - (1) *General conditions.* To qualify for exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.
 - (2) *Specific conditions.*
 - (i) *Limitation on number of purchasers.* There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this § 230.506.

Note: See § 230.501(c) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under this section 230.506.
 - (ii) *Nature of purchasers.* Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

Disqualifying Provision Relating to Exemptions Under §§ 230.504, 230.505 and 230.506

Reg. § 230.507.

- (a) No exemption under § 230.504, § 230.505 or § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily or permanently enjoining such person for failure to comply with § 230.503
- (b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that exemption be denied.

Insignificant Deviations From a Term, Condition or Requirement of Regulation D

Reg. § 230.508.

- (a) A failure to comply with a term, condition or requirement of § 230.504, § 230.505 or § 230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity,

if the person relying on the exemption shows:

- (1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and
 - (2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504, paragraphs (b)(2)(i) and (ii) of § 230.505 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and
 - (3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 230.504, § 230.505 or § 230.506.
- (b) A transaction made in reliance on § 230.504, § 230.505 or § 230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.



Attachment D:

The TechnoCad Stock Purchase Agreement (the same copy that we used for our class assignments on stock purchase agreements)

Bilkem Moore & Moore

Comments

3/12/07

Milkem and Bilkem

1st DRAFT

Dated 3/07/07

Series A Preferred Stock Purchase Agreement

THIS SERIES A PREFERRED STOCK PURCHASE AGREEMENT (this "Agreement") is made as of the ____ day of _____, 2007, by and between TechnoCAD, Inc., a Delaware corporation (the "Company"), and each of the persons listed on Schedule A hereto (each of which is herein referred to as an "Investor").

Section 1. Purchase and Sale of Stock

(a) **Sale and Issuance of Series A Preferred Stock.** On the basis of the representations, warranties and agreements herein contained, and upon the terms but subject to the conditions herein set forth, the Company agrees to sell and issue to each Investor at the Closing (as defined below) and each Investor agrees to purchase at the Closing that number of shares of the Company's Series A Preferred Stock set forth opposite each Investor's name on Schedule A at a purchase price of \$2.00 per share. The Series A Preferred Stock will have the rights, preferences, privileges and restrictions set forth in the Amended and Restated Certificate of Incorporation, the form of which is attached hereto as Exhibit A (the "Restated Certificate").

severally and not jointly,

(b) **The Closing Date.** The purchase, sale and delivery of the shares of Series A Preferred Stock shall take place at the offices of Milkem & Bilkem, 2 White Street, Concord, NH 03301 on April 21, 2007, or at such other time and place as the Company and Investors acquiring in the aggregate more than half the shares of Series A Preferred Stock being sold pursuant hereto shall mutually agree, either orally or in writing (such time, place and date of payment and delivery being herein called the "Closing").

(c) **Payment for, and Delivery of, the Shares.** At the Closing, the Company shall deliver to each Investor a certificate representing the shares of Series A Preferred Stock that such Investor is purchasing against payment of the purchase price therefore by check or by wire transfer, in each case payable to the order of the Company.

(d) **Subsequent Sale of Series A Preferred Stock.** If less than all of the authorized shares of Series A Preferred Stock are sold at the Closing, then, subject to the terms and conditions of this Agreement, the Company may sell, on or before ~~October 31~~, 2007, up to the balance of the authorized but unissued shares of Series A Preferred Stock to such persons as the Board of Directors of the Company may determine at the same price per share as the Series A Preferred Stock purchased and sold at the Closing. Any such sale shall be made upon the same terms and conditions as those contained herein, and such persons or entities shall become parties to this Agreement, that certain Investors' Rights Agreement dated as of ~~11~~, 2007, by and among the Company and the Investors, the form of which is attached hereto as Exhibit B (the "Investors' Rights Agreement"), and that certain Co-Sale Agreement dated as of ~~11~~, 2007, by and among the Company, the Investors and the founders of the Company named therein, the form of which is attached hereto as Exhibit C (the "Co-Sale Agreement"), and shall have the same rights and obligations of an Investor hereunder and thereunder.

May 21

the Closing

the Closing

to be

Section 2. Representations and Warranties of the Company.

The Company hereby represents, warrants and covenants to each Investor, as of the date of this Agreement, as follows:

(a) *Incorporation and Good Standing of the Company.* The Company has been duly organized and is validly existing as a corporation or limited liability company, as the case may be, in good standing under the laws of the State of Delaware with full corporate power and authority to own its properties and conduct its business as described in the Business Plan (as defined below) *Insert 2A*

(b) *Series A Stock Purchase Agreement.* This Agreement has been duly authorized, executed and delivered by the Company *Insert 2B*

(c) *Other Agreements.* Each of the Investors' Rights Agreement and the Co-Sale Agreement has been duly authorized, executed and delivered by, and is a valid and binding agreement of, the Company, enforceable in accordance with its terms, except as rights to indemnification thereunder may be limited by applicable law and except as the enforcement thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights and remedies of creditors or by general equitable principles.

(d) *Valid Issuance of Preferred and Common Stock.* The Series A Preferred Stock that is being purchased by the Investors hereunder, when issued, sold and delivered in accordance with the terms of this Agreement for the consideration expressed herein, will be duly and validly issued, fully paid and nonassessable and will be free of restrictions on transfer other than restrictions on transfer under this Agreement and the Investors' Rights Agreement and under applicable state and federal securities laws. The Common Stock issuable upon conversion of the Series A Preferred Stock has been duly and validly reserved for issuance and, upon issuance in accordance with the terms of the Restated Certificate, will be duly and validly issued, fully paid and nonassessable and will be free of restrictions on transfer other than restrictions on transfer under this Agreement and the Investors' Rights Agreement and under applicable state and federal securities laws.

(e) *Disclosure.* The Company has provided each Investor with all the information reasonably available to it without undue expense that such Investor has requested for deciding whether to purchase the Series A Preferred Stock *Insert 2C*

(f) *Business Plan.* The Business Plan dated February 7, 2007 previously delivered to each Investor, a copy of which is attached hereto as Exhibit D (the "Business Plan") was prepared in good faith by the Company *Insert 2D*

(g) *Company's Accounting System.* The Company maintains a system of accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with U.S. GAAP and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Insert 2E

Insert 2A

, and is duly qualified to do business as a foreign corporation and is in good standing under the laws of each jurisdiction which requires such qualification

Insert 2B

, enforceable in accordance with its terms, except as rights to indemnification hereunder may be limited by applicable law and except as the enforcement hereof may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the rights and remedies of creditors or by general equitable principles

Insert 2C

and all information that the Company believes is reasonably necessary to enable such Investor to make such decision. Neither this Agreement nor any other agreements, written statements or certificates made or delivered in connection herewith contains any untrue statements or certificates made or delivered in connection herewith contains any untrue statement of a material fact or omits to state a material fact necessary to make the statements herein or therein not misleading

Insert 2D

and does not contain any untrue statement of a material fact nor does it omit to state a material fact necessary to make the statements therein not misleading, except that with respect to assumptions, projections and expressions of opinion or predictions contained in the Business Plan, the Company represents only that such assumptions, expressions of opinion and predictions were made in good faith and the Company believes there is a reasonable basis therefore

Insert 2E

(g) *Preparation of the Financial Statements.* The Company has delivered to each Investor its audited financial statements (**list the financial statements delivered, typically it would be:**) balance sheet at ____, 200__ and income statement, statement of cash flows and statement of stockholders' equity for the year ended ____, 200__) and its unaudited financial statements (**list the financial statements delivered, typically it would be:**) balance sheet at ____, 200__ and income statement for the ___ period ended ____, 200__) (collectively, the "Financial Statements"). The Financial Statements present fairly the financial position of the Company as of and at the dates indicated and the results of its operations and cash flows for the periods specified, subject in the case of the unaudited Financial Statements to normal year-end audit adjustments. The Financial Statements have been prepared in conformity with U.S. generally accepted accounting principles ("U.S. GAAP") applied on a consistent basis throughout the periods involved, except that unaudited Financial Statements may not contain all footnotes required by U.S. GAAP as may be expressly stated in the related notes

thereto. Except as disclosed in the Financial Statements, the Company is not a guarantor or indemnitor of any indebtedness of any other person, firm or corporation.

Insert 3A

(j) (b) *Subsidiaries of the Company.* The Company does not own or control, directly or indirectly, any corporation, association or other entity. The Company is not a participant in any joint venture, partnership or similar arrangement.

(k) (i) *Material Contracts.* Except as set forth in the Schedule of Exceptions attached hereto, there are no agreements, understandings, instruments, contracts, proposed transactions, judgments, orders, writs or decrees to which the Company is a party to or, to its knowledge, by which it is bound which may involve (i) obligations (contingent or otherwise) of, or payments to, the Company in excess of \$100,000 (other than obligations of, or payments to, the Company arising from purchase or sale agreements entered into in the ordinary course of business), (ii) the transfer or license of any patent, copyright, trade secret or other proprietary right to or from the Company (other than licenses arising from the purchase of "off the shelf" or other standard products), (iii) provisions restricting the development, manufacture or distribution of the Company's products or services or (iv) indemnification by the Company with respect to infringements of proprietary rights (other than indemnification obligations arising from purchase or sale or license agreements entered into in the ordinary course of business).

(l) (i) *Related-Party Transactions.* Except as set forth in the Schedule of Exceptions, there are no business relationships or related-party transactions involving the Company and any employee, officer, stockholder or director. Insert 3B

(m) (k) *Capitalization.* The authorized, issued and outstanding capital stock of the Company is as set forth in Schedule B hereto. The Series A Preferred Stock and the Common Stock conform in all material respects to the description thereof contained in the Restated Certificate. None of the outstanding shares of Common Stock were issued in violation of any preemptive rights, rights of first refusal or other similar rights to subscribe for or purchase securities of the Company. There are no authorized or outstanding options, warrants, preemptive rights, rights of first refusal or other rights to purchase, or equity or debt securities convertible into or exchangeable or exercisable for, any capital stock of the Company or any of its subsidiaries other than those accurately described in Schedule B. The description of the Company's stock option, stock bonus and other stock plans or arrangements, and the options or other rights granted thereunder, set forth in Schedule B accurately and fairly presents the rights, preferences, privileges and restrictions of such plans, arrangements, options and rights.

(n) (i) *No Consents, Approvals or Authorizations Required.* No consent, approval, authorization, filing with or order of any court or governmental agency or regulatory body is required in connection with the transactions contemplated herein, except (i) the filing of the Restated Certificate with the Secretary of State of the State of Delaware, (ii) such filings as have been made prior to the Closing, except any notices of sale required to be filed with the Securities and Exchange Commission under Regulation D of the Securities Act of 1933, as amended (the "Securities Act"), or such post-closing filings as may be required under applicable state securities laws, which will be timely filed in the applicable periods therefore.

(o) (m) *u.c. Non-Contravention of Existing Instruments Agreements.* ~~to the best of the Company's knowledge~~ neither the issue and sale of the Series A Preferred Stock nor the consummation of any other of the transactions herein contemplated nor the fulfillment of the terms hereof will conflict with, result in a breach or violation or imposition of any lien, charge or encumbrance upon any property or assets of the Company pursuant to, (i) the charter or by-laws of the Company, (ii) the terms of any indenture, contract, lease, mortgage, deed of trust, note agreement, loan agreement or other agreement, obligation, condition, covenant or instrument to which the Company is a party or bound or to which its property is subject or

Insert 3A

(i) *No Material Adverse Change.* Subsequent to the _____, 200__ **[insert the most recent date of the Financial Statements]**: (i) there has been no material adverse change, or any development that could reasonably be expected to result in a material adverse change, in the condition, financial or otherwise, or in the earnings, business, operations or prospects, whether or not arising from transactions in the ordinary course of business, of the Company (any such change or effect, where the context so requires, is called a "Material Adverse Change"); (ii) the Company has not incurred any material liability or obligation, indirect, direct or contingent, not in the ordinary course of business nor entered into any material transaction or agreement not in the ordinary course of business; and (iii) there has been no dividend or distribution of any kind declared, paid or made by the Company or repurchase or redemption by the Company of any class of capital stock.

Insert 3B

or any member of their immediate families. None of such persons has any direct or indirect ownership interest in any firm, corporation or other business entity with which the Company has a business relationship or competes, except that employees, officers, stockholders or directors or members of their immediate families may own stock in publicly traded companies (representing less than 1% of such company) that have a business relationship or compete with the Company

(iii) any statute, law, rule, regulation, judgment, order or decree applicable to the Company or any of its subsidiaries of any court, regulatory body, administrative agency, governmental body, arbitrator or other authority having jurisdiction over the Company or any of its subsidiaries or any of its or their properties.

(p) (ii) *No Defaults or Violations.* ~~To the best of the Company's knowledge~~ The Company is not in violation or default of (i) any provision of its charter or by-laws, (ii) the terms of any indenture, contract, lease, mortgage, deed of trust, note agreement, loan agreement or other agreement, obligation, condition, covenant or instrument to which it is a party or bound or to which its property is subject or (iii) any statute, law, rule, regulation, judgment, order or decree of any court, regulatory body, administrative agency, governmental body, arbitrator or other authority having jurisdiction over the Company or any of its properties, as applicable, except any such violation or default which would not, singly or in the aggregate, result in a Material Adverse Change.

(q) (i) *No Actions, Suits or Proceedings.* No action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or its property is pending or, to the best knowledge of the Company, threatened that (i) could reasonably be expected to have a Material Adverse Change on the performance of this Agreement or the consummation of any of the transactions contemplated hereby or (ii) could reasonably be expected to result in a Material Adverse Change.

(r) (p) *All Necessary Permits, Etc.* The Company possesses such valid and current certificates, authorizations or permits issued by the appropriate state, federal or foreign regulatory agencies or bodies necessary to conduct its business, and the Company has not received any notice of proceedings relating to the revocation or modification of, or non-compliance with, any such certificate, authorization or permit which, singly or in the aggregate, if the subject of an unfavorable decision, ruling or finding, could result in a Material Adverse Change.

(s) *Insert 4A*
(q) *Tax Law Compliance.* The Company has filed all necessary federal, state and franchise tax returns or have properly requested extensions thereof and has paid all taxes required to be paid by any of them and, if due and payable, any related or similar assessment, fine or penalty levied against any of them except as may be being contested in good faith and by appropriate proceedings. These returns and reports are true and correct in all material respects. The Company is not aware of any tax deficiency that has been or might be asserted or threatened against the Company that could result in a Material Adverse Change.

(t) *Intellectual Property Rights.* ~~To the best of its knowledge (but without having conducted any special investigation or patent search)~~ The Company owns or possesses adequate rights to use all patents, patent rights or licenses, inventions, collaborative research agreements, trade secrets, know-how, trademarks, service marks, trade names and copyrights which are necessary to conduct its businesses as described in the Business Plan; the expiration of any patents, patent rights, trade secrets, trademarks, service marks, trade names or copyrights would not result in a Material Adverse Change; the Company has not received any notice of, and has no knowledge of, any infringement of or conflict with asserted rights of the Company by others with respect to any patent, patent rights, inventions, trade secrets, know-how, trademarks, service marks, trade names or copyrights; and the Company has not received any notice of, and has no knowledge of, any infringement of or conflict with asserted rights of others with respect to any patent, patent rights, inventions, trade secrets, know-how, trademarks, service marks, trade names or copyrights which, singly or in the aggregate, if the

Insert 4A

(s) *Title to Properties.* The Company has good and marketable title to all the properties and assets reflected as owned in the Financial Statements, in each case free and clear of any security interests, mortgages, liens, encumbrances, equities, claims and other defects, except such as do not materially and adversely affect the value of such property and do not materially interfere with the use made or proposed to be made of such property by the Company. The real property, improvements, equipment and personal property held under lease by the Company are held under valid and enforceable leases, with such exceptions as are not material and do not materially interfere with the use made or proposed to be made of such real property, improvements, equipment or personal property by the Company.

subject of an unfavorable decision, ruling or finding, might have a Material Adverse Change. There is no claim being made against the Company regarding patents, patent rights or licenses, inventions, collaborative research, trade secrets, know-how, trademarks, service marks, trade names or copyrights. The Company does not in the conduct of its business as now or proposed to be conducted as described in the Business Plan infringe or conflict with any right or patent of any third party, or any discovery, invention, product or process which is the subject of a patent application filed by any third party, known to the Company or any of its subsidiaries, which such infringement or conflict is reasonably likely to result in a Material Adverse Change.

(w) ~~Insert SA~~
(*) Insurance.

The Company is insured by recognized, financially sound and reputable institutions with policies in such amounts and with such deductibles and covering such risks as are generally deemed adequate and customary for its business including, but not limited to, policies covering real and personal property owned or leased by the Company against theft, damage, destruction, acts of vandalism and earthquakes, general liability and Directors and Officers liability. The Company has no reason to believe that it will not be able (i) to renew its existing insurance coverage as and when such policies expire or (ii) to obtain comparable coverage from similar institutions as may be necessary or appropriate to conduct its business as now conducted and at a cost that would not result in a Material Adverse Change. The Company has not been denied any insurance coverage which it has sought or for which it has applied.

(x) (i) Labor Matters. To the best of Company's knowledge, no labor disturbance by the employees of the Company exists or is imminent. ~~Insert SB~~

(y) (ii) Environmental Laws. ~~To the best of Company's knowledge,~~ The Company (i) is in compliance with all rules, laws and regulations relating to the use, treatment, storage and disposal of toxic substances and protection of health or the environment ("Environmental Laws") which are applicable to its business, except where the failure to comply would not result in a Material Adverse Change, (ii) has received no notice from any governmental authority or third party of an asserted claim under Environmental Laws, and (iii) is not currently aware that it will be required to make future material capital expenditures to comply with Environmental Laws. No property which is owned, leased or occupied by the Company has been designated as a Superfund site pursuant to the Comprehensive Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9601, et seq.), or otherwise designated as a contaminated site under applicable state or local law.

~~Insert SC~~

Section 3. Representations and Warranties of the Investors.

Each Investor hereby represents, warrants and covenants to the Company, as of the date of this Agreement, as follows:

(a) *Authorization.* Such Investor has full power and authority to enter into this Agreement. This Agreement, when executed and delivered by such Investor, will constitute a valid and legally binding obligation of such Investor.

(b) *Investment Purpose.* This Agreement is made with each Investor in reliance upon such Investor's representation to the Company, which by such Investor's execution of this Agreement such Investor hereby confirms, that the Series A Preferred Stock to be purchased by such Investor and the Common Stock issuable upon conversion thereof (collectively, the "Securities") will be acquired for investment for such Investor's own account, not as a nominee or agent, and not with a view to the resale or distribution of any part thereof, and that such

as to such Investor severally and not jointly

Insert 5A

(v) *Proprietary Information and Inventions Agreement.* Each current and former employee, officer and director of the Company and each current and former consultant to the Company has executed a Proprietary Information and Inventions Agreement substantially in the form or forms which have been delivered to counsel for the Investors. No current or former employee, officer, director or consultant has excluded works or inventions made prior to his or her employment or consulting relationship with the Company from his or her assignment of inventions made prior to his or her employment or consulting relationship with the Company from his or her assignment of inventions pursuant to such person's Proprietary Information and Inventions Agreement.

Insert 5B

; and the Company is not aware of any existing or imminent labor disturbance by the employees of any of its principal suppliers, subassemblers, value added resellers, subcontractors, original equipment manufacturers, authorized dealers or distributors that might be expected to result in a Material Adverse Change.

Insert 5C

(z) *Qualified Small Business.* The Company covenants that so long as any of the shares of Series A Preferred Stock, or the Common Stock into which such shares are converted, are held by an Investor (or a transferee in whose hands such shares or Common Stock are eligible to qualify as Qualified Small Business Stock as defined in Section 1202(c) of the Internal Revenue Code of 1986, as amended (the "Code"), it will comply with any applicable filing or reporting requirements imposed by the Code on issuers of Qualified Small Business Stock.

(aa) *No Unlawful Contributions or Other Payments.* Neither the Company nor, to the best of the Company's knowledge, any employee or agent of the Company, has made any contribution or other payment to any official of, or candidate for, any federal, state or foreign office in violation of any law.

Investor has no present intention of selling, granting any participation in, or otherwise distributing the same. By executing this Agreement, each Investor further represents that such Investor does not have any contract, undertaking, agreement or arrangement with any person to sell, transfer or grant participations to such person or to any third person, with respect to any of the Securities.

(c) *Investors' Representations.* Each Investor understands that the Series A Preferred Stock is not, and any Common Stock acquired on conversion thereof at the time of issuance may not be, registered under the Securities Act on the ground that the sale provided for in this Agreement and the issuance of securities hereunder is exempt from registration under the Securities Act, and that the Company's reliance on an exemption from the Securities Act is predicated on the Investors' representations set forth herein and in the Investors' Questionnaire, the form of which is attached hereto as Exhibit E (the "Investors' Questionnaire"). Each Investor confirms the accuracy and truthfulness of each representation and warranty made under each of this Agreement and the Investors' Questionnaire.

(d) *Receipt of Information.* Each Investor believes that such Investor has received all the information such Investor considers necessary or appropriate for deciding whether to purchase the Series A Preferred Stock. Each Investor further represents that such Investor has had an opportunity to ask questions and receive answers from the Company regarding the terms and conditions of the offering of the Series A Preferred Stock and the business, prospects and financial condition of the Company and to obtain additional information (to the extent the Company possessed such information or could acquire it without unreasonable effort or expense) necessary to verify the accuracy of any information furnished to such Investor or to which such Investor had access. *Insert 6A*

(e) *Investor Experience.* Each Investor represents that such Investor is experienced in evaluating and investing in private placement transactions of securities of companies in a similar stage of development and acknowledges that such Investor is able to fend for himself, herself or itself, can bear the economic risk of such Investor's investment, and has such knowledge and experience in financial and business matters that such Investor is capable of evaluating the merits and risks of the investment in the Series A Preferred Stock. If other than an individual, Investor also represents such Investor has not been organized for the purpose of acquiring the Series A Preferred Stock.

(f) *Accredited Investors.* Each Investor represents to the Company that the information furnished by such Investor in the Section entitled "Accredited Investor Status" of the Investors' Questionnaire is true and correct and can be relied on by the Company.

(g) *Restricted Securities.* Each Investor understands that the Series A Preferred Stock (and any Common Stock issued on conversion thereof) may not be sold, transferred or otherwise disposed of without registration under the Securities Act or an exemption therefrom, and that in the absence of an effective registration statement covering the Series A Preferred Stock (or the Common Stock issued on conversion thereof) or an available exemption from registration under the Securities Act, the Series A Preferred Stock (and any Common Stock issued on conversion thereof) must be held indefinitely. In particular, each Investor is aware that the Series A Preferred Stock (and any Common Stock issued on conversion thereof) may not be sold pursuant to Rule 144 of the Securities Act unless all of the conditions of Rule 144 are met. Among the conditions for use of Rule 144 may be the availability of current information to the public about the Company. Such information is not now available and the Company has no present plans to make such information available.

Insert 6A

The foregoing, however, does not limit or modify the representations and warranties of the Company in Section 2 of this Agreement or the right of the Investors to rely thereon.

(h) *Legends.* To the extent applicable, each certificate or other document evidencing any of the Series A Preferred Stock or any Common Stock issued upon conversion thereof shall be endorsed with the legends substantially in the form set forth below:

(1) The following legend under the Securities Act:

"THE SHARES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND MAY NOT BE SOLD, TRANSFERRED, ASSIGNED, PLEDGED OR HYPOTHECATED UNLESS AND UNTIL REGISTERED UNDER SUCH ACT, OR UNLESS THE COMPANY HAS RECEIVED AN OPINION OF COUNSEL OR OTHER EVIDENCE SATISFACTORY TO THE COMPANY AND ITS COUNSEL THAT SUCH REGISTRATION IS NOT REQUIRED.

(2) Any legend imposed or required by the Company's by-laws or applicable state securities laws.

(i) *Public Sale.* Each Investor agrees not to make, without the prior written consent of the Company, any public offering or sale of the Series A Preferred Stock (or any Common Stock issued upon conversion thereof) although permitted to do so pursuant to Rule 144(k) of the Securities Act, until the earlier of (i) the date on which the Company effects its initial registered public offering pursuant to the Securities Act or (ii) the date on which the Company becomes a registered company pursuant to Section 12(g) of the Securities Exchange Act of 1934, as amended.

Section 4. Conditions of the Obligations of the Investors at Closing. *the waiver of which shall not be effective against any Investor who does not consent in writing thereto*

The obligations of each Investor to purchase and pay for the shares of Series A Preferred Stock set forth next to its name on Schedule A are subject to fulfillment on or before the Closing of each of the following conditions:

(a) *Corporate Proceedings.* All corporate proceedings and other legal matters in connection with this Agreement and the transactions contemplated hereby shall have been completed. *Insert 7A*

(b) *Filing of the Restated Certificate.* The Company shall have adopted and filed the Restated Certificate with the Secretary of State of the State of Delaware on or before the Closing.

(c) *Performance.* The Company shall have performed and complied with all agreements, obligations and conditions contained in this Agreement and that are required to be performed or complied with by it on or before the Closing.

(d) *Qualifications.* All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Series A Preferred Stock pursuant to this Agreement shall be duly obtained and effective as of the Closing.

Insert 7B
(e) *Representations and Warranties.* The representations and warranties of the Company contained in Section 2 shall be true on and as of the Closing with the same effect as

(h)

Insert 7A

, and all documents incident thereto shall be reasonably satisfactory to Investors' Counsel, and such counsel shall have been furnished with such papers and information as they may reasonably have requested to enable them to pass upon the matters referred to in this Section

Insert 7B

(e) *No Material Adverse Change.* Subsequent to the execution and delivery of this Agreement and prior to the Closing, or any subsequent closing, as the case may be, there shall not have been any Material Adverse Change in the condition (financial or otherwise), earnings, operations, business or business prospects of the Company.

(f) *Opinion of Counsel for the Company.* Each Investor shall have received on the Closing an opinion of Milkem and Bilkem, counsel for the Company, substantially in the form of Exhibit F attached hereto, dated the Closing, addressed to the Investors and with reproduced copies or signed counterparts thereof for each of the Investors.

(g) *Opinion of Intellectual Property Counsel for the Company.* Each Investor shall have received on Closing an opinion of [NAME OF PATENT COUNSEL], intellectual property counsel for the Company substantially in the form of Exhibit G attached hereto, dated the Closing, addressed to the Investors and with reproduced copies or signed counterparts thereof for each of the Investors.

though such representations and warranties had been made on and as of the date of the Closing.

HP (1)

(i) → (f) *Officers' Certificate.* Each investor shall have received on Closing a certificate of the Company, dated the Closing, signed by the Chief Executive Officer and Chief Financial Officer of the Company, to the effect that the representations and warranties of the Company in this Agreement are true and correct, as if made on and as of the Closing, and the Company has complied with all the agreements and satisfied all the conditions on its part to be performed or satisfied at or prior to the Closing.

(j) ← *Insert 8 A*
(g) *Investors' Rights Agreement.* The Company and each Investor shall have entered into the Investors' Rights Agreement in the form attached hereto as Exhibit B.

(k) (h) *Co-Sale Agreements.* Greed Izgood Investors shall have entered into a Co-Sale Agreement in the form attached hereto as Exhibit C.

Section 5. Conditions of the Obligations of the Company at Closing.

The obligations of the Company to issue and sell to each Investor the shares of Series A Preferred Stock set forth next to such Investor's name on Schedule A are subject to fulfillment on or before the Closing of each of the following conditions by the Investors:

(a) *Qualifications.* All authorizations, approvals or permits, if any, of any governmental authority or regulatory body of the United States or of any state that are required in connection with the lawful issuance and sale of the Series A Preferred Stock pursuant to this Agreement shall be duly obtained and effective as of the Closing.

Insert 8A

(2) Subsequent to the date of this Agreement, there has not been (a) any material adverse change in the condition (financial or otherwise), earnings, operations, business or business prospects of the Company, (b) any transaction that is material to the Company, except transactions entered into in the ordinary course of business, (c) any obligation, direct or contingent, that is material to the Company, incurred by the Company, except obligations incurred in the ordinary course of business, (d) any change in the capital stock or outstanding indebtedness of the Company that is material to the Company, (e) any dividend or distribution of any kind declared, paid or made on the capital stock of the Company, or (f) any loss or damage (whether or not insured) to the property of the Company which has been sustained or will have been sustained which has a material adverse effect on the condition (financial or otherwise), earnings, operations, business or business prospects of the Company.

(b) *Representations and Warranties.* The representations and warranties of each Investor contained in Section 3 shall be true on and as of the Closing with the same effect as though such representations and warranties had been made on and as of the date of the Closing.

(c) *Minimum Investment.* The Investors shall purchase an aggregate of at least 2.5 million shares of Series A Preferred Stock at the Closing.

Section 6. Payment of Expenses.

Irrespective of whether the Closing is effected, the Company shall pay all costs and expenses that it incurs with respect to the negotiation, execution, delivery and performance of this Agreement. If the Closing is effected, the Company shall, at the Closing and upon receipt of a bill therefor, reimburse the reasonable fees and expenses of one counsel for the investors in an amount not to exceed \$25,000.

Section 7. Miscellaneous.

(a) *Entire Agreement.* This Agreement and the documents referred to herein constitute the entire agreement among the parties and no party shall be liable or bound to any other party in any manner by any warranties, representations or covenants, except as specifically set forth herein or therein.

(b) *Survival of Warranties.* The warranties, representations and covenants of the Company and the Investors contained in or made pursuant to this Agreement shall survive the execution and delivery of this Agreement and the Closing.

(c) *Notices.* All communications hereunder shall be in writing and shall be mailed, hand delivered or faxed and confirmed to the parties hereto as follows:

If to the Company:

2 White Street
Concord, NH 03301
Facsimile: (555) 555-1212
Attention: Jane Doerr

If to an Investor:

At such address or fax number as is set forth on the signature page hereto.

Any party hereto may change the address for receipt of communications by giving written notice to the others.

(d) *Successors.* This Agreement will inure to the benefit of and be binding upon the parties hereto, and to their respective successors, and no other person will have any right or obligation hereunder. The term "successors" shall not include any purchaser of the Series A Preferred Stock (or the Common Stock issuable upon conversion thereof) as such from any of the Investors merely by reason of such purchase.

(e) *Partial Unenforceability.* The invalidity or unenforceability of any Section, paragraph or provision of this Agreement shall not affect the validity or enforceability of any other Section, paragraph or provision hereof. If any Section, paragraph or provision of this Agreement is for any reason determined to be invalid or unenforceable, there shall be deemed to be made such minor changes (and only such minor changes) as are necessary to make it valid and enforceable.

(f) *Governing Law Provisions.*

(1) *Governing Law.* This agreement shall be governed by and construed in accordance with the internal laws of the state of New ~~Hampshire~~ ^{York} applicable to agreements made and to be performed in such state.

(2) *Consent to Jurisdiction.* Any legal suit, action or proceeding arising out of or based upon this Agreement or the transactions contemplated hereby ("Related Proceedings") may be instituted in the federal courts of the United States of America located in the City of ~~Concord, New Hampshire~~ ^{New York, New York} or the courts of the State of ~~Hampshire~~ ^{New York} located in the City of ~~Concord, New Hampshire~~ (collectively, the "Specified Courts"), and each party irrevocably submits to the personal jurisdiction (except for proceedings instituted in regard to the enforcement of a judgment of any such court (a "Related Judgment"), as to which such jurisdiction is non-exclusive) of such courts in any such suit, action or proceeding. Service of any process, summons, notice or document by mail to such party's address set forth above shall be effective service of process for any suit, action or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action or other proceeding in the Specified Courts and irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such suit, action or other proceeding brought in any such court has been brought in an inconvenient forum.

← (g) *General Provisions.* This Agreement may be executed in two or more counterparts, each one of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. Section headings herein are for the convenience of the parties only and shall not affect the construction or interpretation of this Agreement.

(h) *Amendments and Waivers.* Any terms of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively), only with the written consent of the Company and the holders of more than 50% of the Common Stock not previously sold to the public that is issued or issuable upon conversion of the Series A Preferred Stock. Any amendment or waiver effected in accordance with this paragraph shall be binding upon each holder of any securities purchased under this Agreement at the time outstanding (including securities into which such securities have been converted), each future holder of all such securities and the Company.

(i) *Effect of Amendment or Waiver.* Each Investor acknowledges that by the operation of Section 7(h) hereof, the holders of more than 50% of the Common Stock not previously sold to the public that is issued or issuable upon conversion of the Series A Preferred Stock will have the right and power to diminish or eliminate all rights of such Investor under this Agreement.

[The remainder of this page has been intentionally left blank.]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first written above.

Very truly yours,

TECHNOCAD, INC.

By: _____
Name: Jane Doerr
Title: President and CEO

GREED IZGOOD INVESTORS

By: _____
Name:
Address:
Tel. Number:
Fax Number:

VULTURE INVESTMENTS

By: _____
Name:
Address:
Tel. Number:
Fax Number:

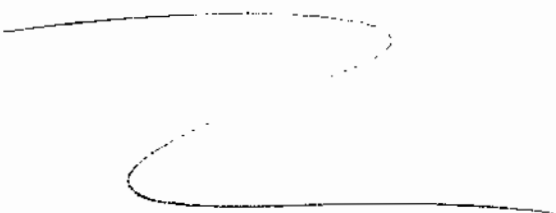
RICHIE RICH

By: _____
Name:
Address:
Tel. Number:
Fax Number:

SCHEDULE A

Investors	Number of Shares of Series A Preferred Stock To be Purchased
Greed Izgood Investors.....	2,000,000
Vulture Investments	250,000
Richie Rich	<u>250,000</u>
Total.....	2,500,000

Remaining schedules and
exhibits for stock
purchase agreement have
been omitted





Attachment E:

The CSGI Term Sheet (the same copy that we used for our class assignments on term sheets)

COOL GAMING SOFTWARE, INC.

Term Sheet for Series C Round of Financing¹

Set forth below are the proposed general terms and conditions of the proposed investment by a group of investors led by Greed Izgood Investors in Cool Gaming Software, Inc. (the "Company").

I. Principal Terms of the Securities

A. Type of Security	Series C Preferred Stock
B. Number of Shares	10 million shares
C. Price	\$1.00 per share
D. Dividends	Mandatory (if earned) but non-cumulative dividends of \$0.10 per share per annum. The Series B mandatory and cumulative dividend must be eliminated.
E. Liquidation Preference	Series C will be the senior class of the Company's capital stock. The liquidation preference will be \$1.00 per share plus all accrued but unpaid dividends. Thereafter, Series C participates in liquidating distributions with the Common Stock (and the Series A and B) on an as-converted basis. Acquisitions of the Company are treated as liquidations.
F. Redemption ²	There will be no redemption provision.

¹ In order not to get overly bogged down in detail, many of the provisions of this Term Sheet template have been substantially simplified from what one would expect in an actual term sheet.

² Most venture capital financings do not include redemption provisions. A redemption provision allows the investors to require that the Company redeem the securities purchased at, or over, a certain prescribed time. In short, the Company has to buy back the securities, and sometimes at a premium. In most cases, the investors have the ability to waive or defer the redemption if they desire. Whenever you see redeemable preferred stock, you should consider whether the preferred stock is really functioning as a debt security rather than an equity security.

<p>G. Conversion Features:</p> <p>1. Conversion Price</p> <p>2. Voluntary Conversion</p> <p>3. Automatic Conversion Events</p> <p>4. Antidilution Protection (including exceptions)</p>	<p>Each share of Series C shall be convertible into one share of Common Stock, subject to adjustment</p> <p>At a holder's option, at any time</p> <p>(a) Upon completion of a firmly underwritten public offering of the Company's Common Stock with a pre-money valuation of at least \$150 million</p> <p>(b) Upon a vote or written consent of at least 2/3's of the Series A Preferred Stock then outstanding</p> <p>(a) Proportional adjustments for splits, dividends, recapitalizations and the like.</p> <p>(b) Weighted-average ratchet adjustment for issuances below the Purchase Price. Exceptions for Common Stock issuable upon conversion of Preferred Stock and for shares of Common Stock issued pursuant to employee and other compensation plans and for issuances pursuant to currently outstanding options and warrants. The Series B full-ratchet anti-dilution adjustment must be eliminated.</p>
<p>H. Voting Rights</p>	<p>(a) General Voting: Holders of Series C have number of votes equal to largest number of full shares of Common Stock into which Series C may be converted.</p> <p>(b) Election of Directors: Series C will be entitled to elect three out of the Company's seven directors.</p> <p>(c) Company needs consent of 50+% of Series C, voting as a class, to engage in a "sale" of the company</p>

I. Restrictions and Limitations	<p>(a) Company needs consent of two-thirds of Series C:</p> <p>(i) to repurchase any equity securities (exception for buy-backs under employee and related plans);</p> <p>(ii) to authorize or issue any senior or pari passu³ equity security;</p> <p>(iii) to amend the Certificate of Incorporation in a way that changes the rights, preferences or privileges of Series C Preferred Stock</p>
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II. Principal Terms of the Purchase Documents

<p>A. Preferred Stock Purchase Agreement</p> <p>1. Closing</p> <p>2. Expenses</p>	<p>May 21, 2007</p> <p>If the transaction closes, the Company will pay reasonable fees and expenses of special counsel for the Investors</p>
<p>B. Investors' Rights Agreement</p> <p>1. Registration Rights</p>	<p>(a) Cover common stock issuable upon conversion of Series C Preferred Stock</p> <p>(b) Two demand registrations; 50% to request; minimum of \$5 million to be sold; standoff and blackout provisions; demand cannot be made before earlier of 3 years after Series C closing and 1 year after IPO</p> <p>(c) Piggyback rights, with underwriter cutbacks</p> <p>(d) Resale registration statement once Company is S-3 eligible</p> <p>(e) Company pays usual registration expenses (including one counsel for selling shareholders)</p>

³ Pari passu means at an equal status with.

<p>2. Covenants</p>	<p>(f) Shareholders will covenant to enter into standard lock-up agreements (180 days IPO/90 days follow-on) if Company conducts public offerings</p> <p>(g) Rights expire on the earlier of (i) the date all of such person's stock may be sold under Rule 144 during any 90-day period and (ii) 3 years after IPO</p> <p>(a) Annual and quarterly financials</p> <p>(b) Monthly financials, budgets and additional information rights to Investors who purchase in excess of \$1 million of Series A</p>
<p>C. Co-Sale Agreement</p>	<p>The Series C Investors must be included in any sale of 50% or more of the ownership interests or assets of the Company.</p>

III. Employee Stock Purchase Plan

<p>A. Employee Stock Purchase Plan</p>	<p>One shall be adopted for the key employees of the Corporation.</p>
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IV. Exclusivity

Upon execution of this Term Sheet and until May 21, 2007 or such earlier date on which the Investors inform the Company that they are no longer interested in financing the Company, the Company will not initiate, respond to, or participate in any way, in any discussions regarding, or accept any proposal for, any equity financing or sale of the Company.

* * * * *

Except with respect to the "Exclusivity" provision, this Term Sheet does not create any legally binding obligations on the parties, and no such obligations will be created unless and until a Series C Preferred Stock Purchase Agreement is executed and delivered by the parties. Without limiting the generality of the foregoing, it is the parties' intent that, until that event, with the exception of the "Exclusivity" provision, no agreement shall exist between them and that there be no obligations whatsoever based on such as parol evidence, extended negotiations, "handshakes", oral understanding or courses of conduct (including reliance and changes of positions). Except with respect to the "Exclusivity" provision, no legally binding obligations whatsoever are to be created, implied or inferred until a document explicitly entitled "final" has been executed and delivered.

TECHNOCAD INC.

GREED IZGOOD INVESTORS

Name: Jane Doerr
Title: President and CEO
Date: _____, 2007

/s/ GILLIAN AIRE

Name: Gillian Aire
Title: Partner
Date: April __, 2007



Attachment F:

CSGI Amended and Restated Certificate of Incorporation (the same copy that we used for our class assignments on term sheets)

**AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION**

OF

COOL GAMING SOFTWARE, INC.

The undersigned, Lara Kroft, certifies that she is the President and Chief Executive Officer of Cool Gaming Software, Inc. (the "Corporation"), a corporation organized and existing under the General Corporation Law of the State of Delaware (the "DGCL"), and hereby further certifies as follows:

1. The original Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware on April 21, 2002.
2. A Restated Certificate of Incorporation of the Corporation was filed with the Secretary of State of Delaware on May 21, 2004.
3. This Amended and Restated Certificate of Incorporation of the Corporation, which amends and restates the Certificate of Incorporation of the Corporation as heretofore amended and restated, has been duly adopted in accordance with the provisions of Sections 242 and 245 of the DGCL by the directors and stockholders of the Corporation.
4. The Amended and Restated Certificate of Incorporation of the Corporation so adopted reads in full as set forth below:

ARTICLE I

Name

The name of the Corporation is Cool Gaming Software, Inc.

ARTICLE II

Registered Office and Registered Agent

The address of the registered office of the Corporation in the State of Delaware is 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801. The name of the registered agent of the Corporation at that address is The Corporation Trust Company.

ARTICLE III

Corporate Purpose

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL.

ARTICLE IV

Capital Stock

1. Authorization.

This Corporation is authorized to issue two classes of stock to be designated, Common Stock and Preferred Stock. The maximum number of shares of capital stock that the Corporation is authorized to have outstanding at any one time is 21,000,000 shares, consisting of: (i) 14,000,000 shares of Common Stock, par value \$0.01 per share ("Common Stock"); and (ii) 7,000,000 shares of Preferred Stock, par value \$0.01 per share (the "Preferred Stock").

2. Common Stock

The voting powers, preferences and relative, participating, optional or other special rights of the Common Stock, and the qualifications and restrictions thereon, shall be as follows in this Section 2.

2.1 Dividends: Except as otherwise provided by the DGCL and subject to any powers, rights, privileges, preferences and priorities of any outstanding series of Preferred Stock, dividends may be declared and paid upon the Common Stock upon the terms set by the Board of Directors.

2.2 Voting Powers: Except as otherwise provided by the DGCL or by the terms of any outstanding series of Preferred Stock, all the voting power of the stockholders of the Corporation shall be vested in the holders of the Common Stock, and each holder of Common Stock shall have one vote for each share held by such holder on all matters voted upon by the stockholders of the Corporation.

3. Preferred Stock

The Preferred Stock shall be divided into series. The first series shall consist of 5,000,000 shares and is designated "Series A Preferred Stock". The second series shall consist of 2,000,000 shares and is designated "Series B Preferred Stock".

3.1 Dividends:

3.1.1 Series A: The holders of Series A Preferred Stock shall receive dividends to the same extent as, and as if they were, holders of Common Stock.

3.1.2 Series B: The holders of Series B Preferred Stock shall receive dividends at the rate of \$0.50 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) per annum, payable out of funds

legally available therefore. Such dividends shall be payable when the Board of Directors is legally entitled to declare them. Dividends not paid in a given year shall accumulate and shall be due and payable quarterly in arrears. No dividends (other than those payable solely in Common Stock) shall be paid on any Common Stock or Series A Preferred Stock of the Corporation during any fiscal year of the Corporation until dividends in the amount of \$0.50 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) on the Series B Preferred Stock shall have been paid or declared and set apart during that fiscal year and any prior year in which dividends accumulate but remain unpaid. Unpaid dividends shall accrue interest at a rate of 5% per annum.

3.2 Voting Powers:

3.2.1 Series A:

3.2.1.1 General: Each holder of shares of Series A Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series A Preferred Stock could be converted and shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise expressly provided herein or as required by law) voting together with the Common Stock as a single class. Each holder of shares of Series A Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation.

3.2.1.2 Board of Director Voting: The Board of Directors of the Corporation shall consist of seven members. So long as at least 3 million shares of Series A Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the holders of Series A Preferred Stock, voting as a class, shall be entitled to elect two members of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors.

3.2.1.3 Senior Class of Securities: So long as at least 3 million shares of Series A Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the Corporation may not, without the approval of at least a majority of the then outstanding shares of Series A Preferred Stock voting as a class, authorize or issue, or obligate itself to issue, any other equity security senior to, or on parity with, the Series A Preferred Stock with regard to dividend, redemption or voting rights or liquidation preferences.

3.2.1.4 Material Adverse Change: The Corporation may not materially adversely change the rights, preferences or privileges of the Series A Preferred Stock without the approval of at least a majority of the then outstanding shares of Series A Preferred Stock voting as a class.

3.2.2 Series B:

3.2.2.1 General: Each holder of shares of Series B Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which such shares of Series B Preferred Stock could be converted and shall have voting rights and powers equal to the voting rights and powers of the Common Stock (except as otherwise expressly provided herein or as required by law) voting

together with the Common Stock as a single class. Each holder of shares of Series B Preferred Stock shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the Corporation.

3.2.2.2 Board of Director Voting: The Board of Directors of the Corporation shall consist of seven members. So long as at least 1 million shares of Series B Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the holders of Series B Preferred Stock, voting as a class, shall be entitled to elect one member of the Board of Directors at each meeting or pursuant to each consent of the Corporation's stockholders for the election of directors.

3.2.2.3 Senior Class of Securities: So long as at least 1 million shares of Series B Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the Corporation may not, without the approval of at least a majority of the then outstanding shares of Series B Preferred Stock voting as a class, authorize or issue, or obligate itself to issue, any other equity security senior to, or on parity with, the Series B Preferred Stock with regard to dividend, redemption or voting rights or liquidation preferences.

3.2.2.4 Material Adverse Change: The Corporation may not materially adversely change the rights, preferences or privileges of the Series B Preferred Stock without the approval of at least a majority of the then outstanding shares of Series B Preferred Stock voting as a class.

ARTICLE V

Conversion of Preferred Stock

1. *Voluntary Conversion into Common Stock*

1.1 Series A Preferred Stock:

Each share of Series A Preferred Stock shall be convertible, at the option of the holder, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into one share of Common Stock.

1.2 Series B Preferred Stock:

Each share of Series B Preferred Stock shall be convertible, at the option of the holder, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, as follows: Each share of Series B Preferred Stock may be converted into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$3.00 (as adjusted for any stock dividends, combinations or splits with respect to such shares) by the Series B Conversion Price (as defined below) that is applicable to such share and that is in effect on the date the certificate is surrendered for conversion. The price at which shares of Common Stock shall be deliverable upon conversion of shares of the Series B Preferred Stock (the "Series B Conversion Price") shall initially be \$3.00 per share of Common Stock (as adjusted for any stock dividends, combinations or splits with respect to such shares). Such initial Series B Conversion Price shall also be adjusted as follows: If any

series of shares of capital stock of the Corporation, whether or not currently existing, is issued at a pre-money equity valuation for the Corporation of less than \$18 million (the "Reduced PMEIV"), the Series B Conversion Price shall be reduced pursuant to the following formula:

$$\text{Series B Conversion Price} = \frac{\text{Reduced PMEIV}}{\$6,000,000}$$

2. *Automatic Conversion into Common Stock*

Each share of Series A and Series B Preferred Stock shall automatically be converted into shares of Common Stock as set forth in Part 1 of this ARTICLE V upon the earlier of: (a) the date specified by vote or written consent or agreement of holders of at least 66 2/3% of the shares of such series then outstanding, or (b) immediately upon the closing of the sale of the Corporation's Common Stock in a firm commitment, underwritten public offering registered under the Securities Act of 1933, other than pursuant to an employee benefit plan, with a pre-money equity value of at least \$100 million and aggregate proceeds to the Corporation and/or any selling shareholders of at least \$20 million (after deduction of underwriters' discounts and other expenses borne by the Corporation and any selling shareholders).

ARTICLE VI

Liquidation Preference

1. *Series B Preferred Stock Preference*

In the event of any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, the holders Series B Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Series A Preferred Stock or the Common Stock by reason of their ownership thereof, the amount of \$3.00 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) plus all accrued or declared but unpaid dividends for each share of Series B Preferred Stock then held by them. If upon the occurrence of such event, the assets and funds thus distributed among the holders of Series B Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series B Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

2. *Series A Preferred Stock Preference*

In the event of any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, and subject to the payment in full of the liquidation preference to holders of Series B Preferred Stock that is set forth in Part 1 of this ARTICLE VI, the holders Series A Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Common Stock by reason of their ownership thereof, the amount of \$1.00 per share (as adjusted for any stock dividends, combinations or splits with respect to such shares) plus all declared but unpaid dividends for each share of Series A Preferred Stock then held by them. Subject to the payment in full of the liquidation

preference to holders of Series B Preferred Stock that is set forth in Part 1 of this ARTICLE VI, if upon the occurrence of such event, the assets and funds thus distributed among the holders of Series A Preferred Stock shall be insufficient to permit the payment to such holders of the full aforesaid preferential amount, then the entire assets and funds of the Corporation legally available for distribution shall be distributed ratably among the holders of the Series A Preferred Stock in proportion to the preferential amount each such holder is otherwise entitled to receive.

3. *Remainder*

After payment in full to the holders of Series B and Series A Preferred Stock of the amounts set forth in Parts 1 and 2 of this ARTICLE VI, the entire remaining assets and funds of the Corporation legally available for distribution, if any, shall be distributed among the holders of Common Stock and the Series A and Series B Preferred Stock in proportion to the shares of Common Stock then held by them and the shares of Common Stock which they then have the right to acquire upon conversion of the shares of Series A and Series B Preferred Stock then held by them.

ARTICLE VII

Directors

Subject to the other provisions of this Certificate of Incorporation, the business of the Corporation shall be managed under the direction of its Board of Directors. The number of directors constituting the Board of Directors shall be seven, subject to increase or decrease from time to time as provided in the By-Laws of the Company. Elections of directors of the Corporation need not be by written ballot, except and to the extent provided in the By-Laws of the Corporation.

The Directors of the Corporation shall be divided into three classes: Class I, Class II and Class III. There will be four Class I Directors, two Class II Directors and one Class III Director. So long as at least 1 million shares of Series B Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the holders of Series B Preferred Stock, voting as a class, shall elect the Class III Director. So long as at least 3 million shares of Series A Preferred Stock remain outstanding (as adjusted for any stock dividends, combinations or splits with respect to such shares), the holders of Series A Preferred Stock, voting as a class, shall elect the Class II Directors. The Class I Directors shall be elected collectively by holders of Common Stock and Series A and Series B Preferred Stock. In the event that there are not at least 1 million shares of Series B Preferred Stock outstanding, the Class III Director seat will be re-designated as a Class I Director seat. In the event that there are not at least 3 million shares of Series A Preferred Stock outstanding, the Class II Director seats will be re-designated as Class I Director seats.

ARTICLE VIII

Liability of Directors

1. *Limitation of Liability*

(a) To the fullest extent permitted by the Delaware General Corporation Law as it now exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than permitted prior thereto), and except as otherwise provided in the Corporation's By-laws, no Director of the Corporation shall be liable to the Corporation or its stockholders for monetary damages arising from a breach of fiduciary duty owed to the Corporation or its stockholders.

(b) Any repeal or modification of the foregoing paragraph by the stockholders of the Corporation shall not adversely affect any right or protection of a Director of the Corporation existing at the time of such repeal or modification.

2. *Right to Indemnification*

Each person who was or is made a party or is threatened to be made a party to or is otherwise involved (including involvement as a witness) in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding"), by reason of the fact that he or she is or was a Director or officer of the Corporation or, while a Director or officer of the Corporation, is or was serving at the request of the Corporation as a Director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to an employee benefit plan (an "indemnitee"), whether the basis of such proceeding is alleged action in an official capacity as a Director or officer or in any other capacity while serving as a Director or officer, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the Delaware General Corporation Law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than permitted prior thereto), against all expense, liability and loss (including attorneys' fees, judgments, fines, excise taxes or penalties and amounts paid in settlement) reasonably incurred or suffered by such indemnitee in connection therewith and such indemnification shall continue as to an indemnitee who has ceased to be a Director, officer, employee or agent and shall inure to the benefit of the indemnitee's heirs, executors and administrators; provided, however, that, except as provided in Part 3 of this ARTICLE VIII with respect to proceedings to enforce rights to indemnification, the Corporation shall indemnify any such indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors of the Corporation. The right to indemnification conferred in this Part 2 of this ARTICLE VIII shall be a contract right and shall include the obligation of the Corporation to pay the expenses incurred in defending any such proceeding in advance of its final disposition (an "advance of expenses"); provided, however, that, if and to the extent that the Delaware General Corporation Law requires, an advance of expenses incurred by an indemnitee in his or her capacity as a Director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the Corporation of an undertaking (an "undertaking"), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be

determined by final judicial decision from which there is no further right to appeal (a "final adjudication") that such indemnitee is not entitled to be indemnified for such expenses under this Part 2 or otherwise. The Corporation may, by action of its Board of Directors, provide indemnification to employees and agents of the Corporation with the same or lesser scope and effect as the foregoing indemnification of Directors and officers.

3. *Procedure for Indemnification*

Any indemnification of a Director or officer of the Corporation or advance of expenses under Part 2 of this ARTICLE VIII shall be made promptly, and in any event within forty-five days (or, in the case of an advance of expenses, twenty days), upon the written request of the Director or officer. If a determination by the Corporation that the Director or officer is entitled to indemnification pursuant to this ARTICLE VIII is required, and the Corporation fails to respond within sixty days to a written request for indemnity, the Corporation shall be deemed to have approved the request. If the Corporation denies a written request for indemnification or advance of expenses, in whole or in part, or if payment in full pursuant to such request is not made within forty-five days (or, in the case of an advance of expenses, twenty days), the right to indemnification or advances as granted by this ARTICLE VIII shall be enforceable by the Director or officer in any court of competent jurisdiction. Such person's costs and expenses incurred in connection with successfully establishing his or her right to indemnification, in whole or in part, in any such action shall also be indemnified by the Corporation. It shall be a defense to any such action (other than an action brought to enforce a claim for the advance of expenses where the undertaking required pursuant to Part 2 of this ARTICLE VIII, if any, has been tendered to the Corporation) that the claimant has not met the standards of conduct which make it permissible under the Delaware General Corporation Law for the Corporation to indemnify the claimant for the amount claimed, but the burden of such defense shall be on the Corporation. Neither the failure of the Corporation (including its Board of Directors, independent legal counsel or its stockholders) to have made a determination prior to the commencement of such action that indemnification of the claimant is proper in the circumstances because he or she has met the applicable standard of conduct set forth in the Delaware General Corporation Law, nor an actual determination by the Corporation (including its Board of Directors, independent legal counsel or its stockholders) that the claimant has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that the claimant has not met the applicable standard of conduct. The procedure for indemnification of other employees and agents for whom indemnification is provided pursuant to Part 2 of this ARTICLE VIII shall be the same procedure set forth in this Part 3 for Directors or officers, unless otherwise set forth in the action of the Board of Directors providing indemnification for such employee or agent.

ARTICLE IX

Amendments

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Amended and Restated Certificate of Incorporation in the manner now or hereinafter prescribed herein and by the laws of the State of Delaware, and all rights conferred upon stockholders herein are granted subject to this reservation. Notwithstanding anything contained in this Amended and Restated Certificate of Incorporation to the contrary, ARTICLE VIII and this ARTICLE IX shall not be altered,

amended or repealed and no provision inconsistent therewith shall be adopted without the affirmative vote of the holders of at least 66 2/3% of the voting power of the then outstanding shares of capital stock of the Corporation entitled to vote on such alteration, amendment or repeal, voting together as a single class.

ARTICLE X

By-Laws

The directors of the Company shall have the power to adopt, amend or repeal by-laws.

* * * * *

IN WITNESS WHEREOF, the Corporation has caused its corporate seal to be hereunto affixed and this Amended and Restated Certificate of Incorporation to be signed by Lara Croft, its President and Chief Executive Officer, this 27^h day of November, 2005.

COOL GAMING SOFTWARE, INC.

/s/ Lara Croft

Lara Croft
President and CEO



Attachment G:

Section 242 of the Delaware General Corporation Law



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[§ 241.](#) | [§ 242.](#) | [§ 243.](#) | [§ 244.](#) | [§ 245.](#) | [§ 246.](#)

TITLE 8

Corporations

CHAPTER 1. GENERAL CORPORATION LAW

Subchapter VIII. Amendment of Certificate of Incorporation; Changes in Capital and Capital Stock

§ 241. Amendment of certificate of incorporation before receipt of payment for stock.

(a) Before a corporation has received any payment for any of its stock, it may amend its certificate of incorporation at any time or times, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of filing the amendment.

(b) The amendment of a certificate of incorporation authorized by this section shall be adopted by a majority of the incorporators, if directors were not named in the original certificate of incorporation or have not yet been elected, or, if directors were named in the original certificate of incorporation or have been elected and have qualified, by a majority of the directors. A certificate setting forth the amendment and certifying that the corporation has not received any payment for any of its stock and that the amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed in accordance with § 103 of this title. Upon such filing, the corporation's certificate of incorporation shall be deemed to be amended accordingly as of the date on which the original certificate of incorporation became effective, except as to those persons who are substantially and adversely affected by the amendment and as to those persons the amendment shall be effective from the filing date. (8 Del. C. 1953, § 241; 56 Del. Laws, c. 50; 64 Del. Laws, c. 112, § 23; 70 Del. Laws, c. 587, § 13.)

§ 242. Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations.

(a) After a corporation has received payment for any of its capital stock, it may amend its certificate of incorporation, from time to time, in any and as many respects as may be desired, so long as its certificate of incorporation as amended would contain only such provisions as it would be lawful and proper to insert in an original certificate of incorporation filed at the time of the filing of the amendment; and, if a change in stock or the rights of stockholders, or an exchange, reclassification, subdivision, combination or cancellation of stock or rights of stockholders is to be made, such provisions as may be necessary to effect such change, exchange, reclassification, subdivision, combination or cancellation. In particular, and without limitation upon such general power of amendment, a

corporation may amend its certificate of incorporation, from time to time, so as:

- (1) To change its corporate name; or
- (2) To change, substitute, enlarge or diminish the nature of its business or its corporate powers and purposes; or
- (3) To increase or decrease its authorized capital stock or to reclassify the same, by changing the number, par value, designations, preferences, or relative, participating, optional, or other special rights of the shares, or the qualifications, limitations or restrictions of such rights, or by changing shares with par value into shares without par value, or shares without par value into shares with par value either with or without increasing or decreasing the number of shares, or by subdividing or combining the outstanding shares of any class or series of a class of shares into a greater or lesser number of outstanding shares; or
- (4) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared; or
- (5) To create new classes of stock having rights and preferences either prior and superior or subordinate and inferior to the stock of any class then authorized, whether issued or unissued; or
- (6) To change the period of its duration.

Any or all such changes or alterations may be effected by 1 certificate of amendment.

(b) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner:

(1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders. Such special or annual meeting shall be called and held upon notice in accordance with § 222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby, as the directors shall deem advisable. At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against the proposed amendment. If a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(2) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not

so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph. The number of authorized shares of any such class or classes of stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote irrespective of this subsection, if so provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock.

(3) If the corporation has no capital stock, then the governing body thereof shall adopt a resolution setting forth the amendment proposed and declaring its advisability. If a majority of all the members of the governing body shall vote in favor of such amendment, a certificate thereof shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title. The certificate of incorporation of any such corporation without capital stock may contain a provision requiring any amendment thereto to be approved by a specified number or percentage of the members or of any specified class of members of such corporation in which event such proposed amendment shall be submitted to the members or to any specified class of members of such corporation without capital stock in the same manner, so far as applicable, as is provided in this section for an amendment to the certificate of incorporation of a stock corporation; and in the event of the adoption thereof by such members, a certificate evidencing such amendment shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

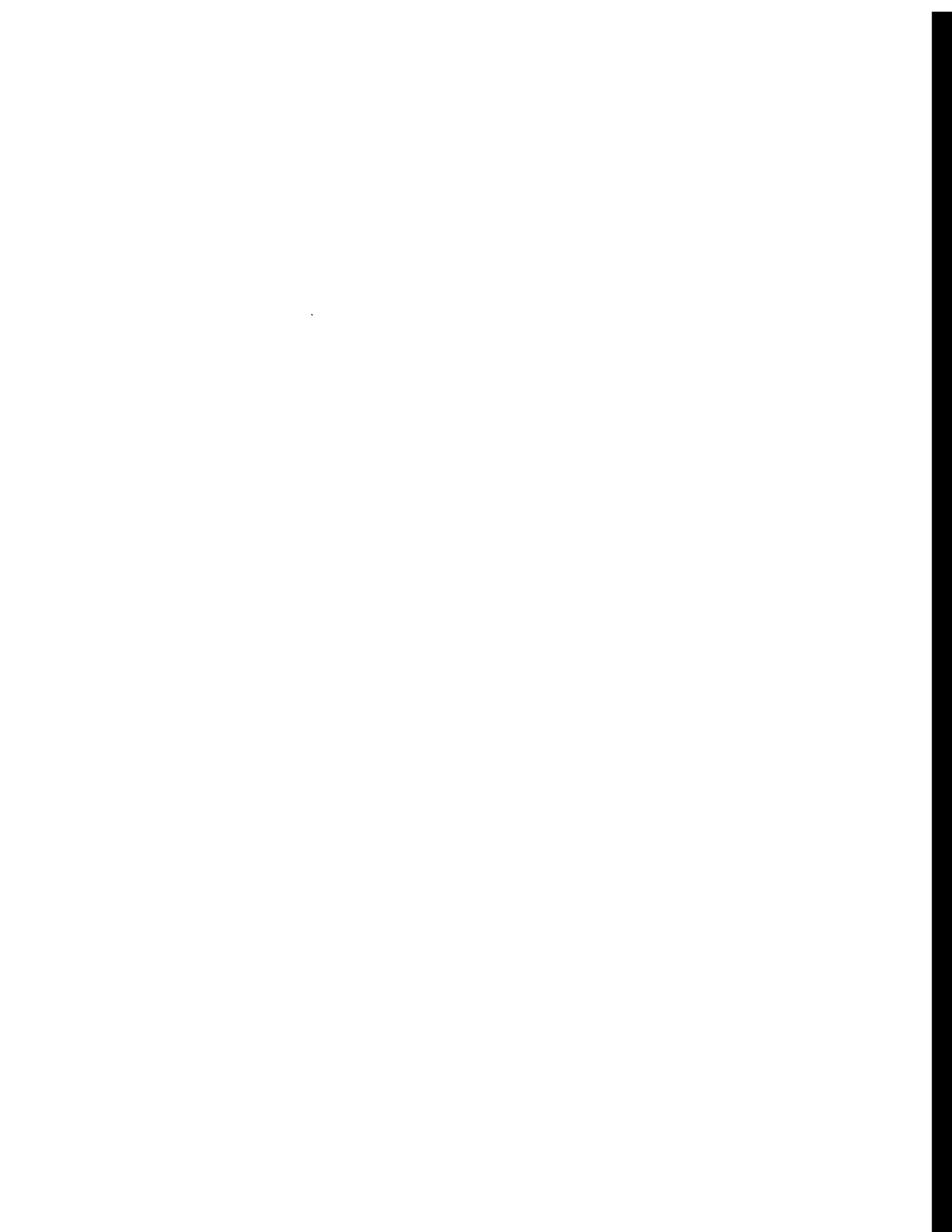
(4) Whenever the certificate of incorporation shall require for action by the board of directors, by the holders of any class or series of shares or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.

(c) The resolution authorizing a proposed amendment to the certificate of incorporation may provide that at any time prior to the effectiveness of the filing of the amendment with the Secretary of State, notwithstanding authorization of the proposed amendment by the stockholders of the corporation or by the members of a nonstock corporation, the board of directors or governing body may abandon such proposed amendment without further action by the stockholders or members. (8 Del. C. 1953, § 242; 56 Del. Laws, c. 50; 57 Del. Laws, c. 148, §§ 18-21; 59 Del. Laws, c. 106, § 7; 63 Del. Laws, c. 25, § 12; 64 Del. Laws, c. 112, § 24; 67 Del. Laws, c. 376, § 10; 70 Del. Laws, c. 349, §§ 5-7; 70 Del. Laws, c. 587, § 14, 15; 72 Del. Laws, c. 123, § 5.)

§ 243. Retirement of stock.

(a) A corporation, by resolution of its board of directors, may retire any shares of its capital stock that are issued but are not outstanding.

(b) Whenever any shares of the capital stock of a corporation are retired, they shall resume the status of authorized and unissued shares of the class or series to which they belong unless the certificate of incorporation otherwise provides. If the certificate of incorporation prohibits the reissuance of such shares, or prohibits the



Attachment H:

Rule 144 of the Securities Act

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

RULE 144
PERSONS DEEMED NOT TO BE ENGAGED IN A DISTRIBUTION
AND THEREFORE NOT UNDERWRITERS

Preliminary Note to Rule 144

Rule 144 is designed to implement the fundamental purposes of the Act, as expressed in its preamble, "To provide full and fair disclosure of the character of the securities sold in interstate commerce and through the mails, and to prevent fraud in the sale thereof.

The rule is designed to prohibit the creation of public markets in securities of issuers concerning which adequate current information is not available to the public. At the same time, where adequate current information concerning the issuer is available to the public, the rule permits the public sale in ordinary trading transactions of limited amounts of securities owned by persons controlling, controlled by or under common control with the issuer and by persons who have acquired restricted securities of the issuer.

Certain basic principles are essential to an understanding of the requirement of registration in the Act:

1. If any person utilizes the jurisdictional means to sell any non-exempt security to any other person, the security must be registered unless a statutory exemption can be found for the transaction.
2. In addition to the exemptions found in Section 3, four exemptions applicable to transactions in securities are contained in Section 4. Three of these Section 4 exemptions are clearly not available to anyone acting as an "underwriter" of securities. (The fourth, found in Section 4(4), is available only to those who act as brokers under certain limited circumstances.) An understanding of the term "underwriter" is therefore important to anyone who wishes to determine whether or not an exemption from registration is available for his sale of securities.

The term underwriter is broadly defined in Section 2(11) of the Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition has traditionally focused on the words "with the view to" in the phrase "purchased from an issuer with a view to... distribution." Thus, an investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that Section. Individual investors who are not professionals in the securities business may also be "underwriters" within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Since it is difficult to ascertain the mental state of the purchaser at the time of his acquisition, subsequent acts and circumstances have been considered to determine whether such person took with a view to distribution at the time of his acquisition. Emphasis has been placed on factors such as the length of time the person has held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors as the above has not assured adequate protection of investors through the maintenance of informed trading markets and has led to uncertainty in the application of the registration provisions of the Act.

It should be noted that the statutory language of Section 2(11) is in the disjunctive. Thus, it is insufficient to conclude that a person is not an underwriter solely because he did not purchase securities from an issuer with a view to their distribution. It must also be established that the person is not offering or selling for an issuer in connection with the distribution of the securities, does not participate or have a direct or indirect participation in any such undertaking, and does not participate or have a participation in the direct or indirect underwriting of such an undertaking.

**Persons who are to respond to the collection of information
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displays a currently valid OMB control number.**

In determining when a person is deemed not to be engaged in a distribution several factors must be considered.

First, the purpose and underlying policy of the Act to protect investors requires that there be adequate current information concerning the issuer, whether the resales of securities by persons result in a distribution or are effected in trading transactions. Accordingly, the availability of the rule is conditioned on the existence of adequate current public information.

Secondly, a holding period prior to resale is essential, among other reasons, to assure that those persons who buy under a claim of a Section 4(2) exemption have assumed the economic risks of investment, and therefore are not acting as conduits for sale to the public of unregistered securities, directly or indirectly, on behalf of an issuer. It should be noted that there is nothing in Section 2(11) which places a time limit on a person's status as an underwriter. The public has the same need for protection afforded by registration whether the securities are distributed shortly after their purchase or after a considerable length of time.

A third factor, which must be considered in determining what is deemed not to constitute a "distribution," is the impact of the particular transaction or transactions on the trading markets. Section 4(1) was intended to exempt only routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions. Therefore, a person reselling securities under Section 4(1) of the Act must sell the securities in such limited quantities and in such a manner as not to disrupt the trading markets. The larger the amount of securities involved, the more likely it is that such resales may involve methods of offering and amounts of compensation usually associated with a distribution rather than routine trading transactions. Thus, solicitation of buy orders or the payment of extra compensation are not permitted by the rule.

In summary, if the sale in question is made in accordance with all of the provisions of the rule, as set forth below, any person who sells restricted securities shall be deemed not to be engaged in a distribution of such securities and therefore not an underwriter thereof. The rule also provides that any person who sells restricted or other securities on behalf of a person in a control relationship with the issuer shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof, if the sale is made in accordance with all the conditions of the rule.

Reg. §230.144.

(a) *Definitions.* The following definitions shall apply for the purposes of this rule.

- (1) An "affiliate" of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.
- (2) The term "person" when used with reference to a person for whose account securities are to be sold in reliance upon this rule includes, in addition to such person, all of the following persons:
 - (i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person;
 - (ii) Any trust or estate in which such person or any of the persons specified in paragraph (a)(2)(i) of this section collectively own ten percent or more of the total beneficial interest or of which any of such persons serve as trustee, executor or in any similar capacity; and
 - (iii) Any corporation or other organization (other than the issuer) in which such person or any of the persons specified in paragraph (a)(2)(i) of this section are the beneficial owners collectively of ten percent or more of any class of equity securities or ten percent or more of the equity interest.
- (3) The term "restricted securities" means:
 - (i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;
 - (ii) Securities acquired from the issuer that are subject to the resale limitations of 230.502(d) under Regulation D or 230.701(c);
 - (iii) Securities acquired in a transaction or chain of transactions meeting the requirements of 230.144A;

- (iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (230.1001); and
 - (v) Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of 230.901 or 230.903 under Regulation S (230.901 through 230.905, and Preliminary Notes).
 - (vi) Securities acquired in a transaction made under § 230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were as of the record date for the rights offering "restricted securities" within the meaning of this paragraph (a)(3); and
 - (vii) Securities acquired in a transaction made under § 230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were "restricted securities" within the meaning of this paragraph (a)(3).
- (h) *Conditions to be Met.* Any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of Section 2(11) of the Act if all of the conditions of this rule are met.
- (c) *Current Public Information.* There shall be available adequate current public information with respect to the issuer of the securities. Such information shall be deemed to be available only if either of the following conditions is met:
- (1) Filing of reports. The issuer has securities registered pursuant to section 12 of the Securities Exchange Act of 1934, has been subject to the reporting requirements of section 13 of that Act for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter); or has securities registered pursuant to the Securities Act of 1933, has been subject to the reporting requirements of section 15(d) of the Securities Exchange Act of 1934 for a period of at least 90 days immediately preceding the sale of the securities and has filed all the reports required to be filed thereunder during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter). The person for whose account the securities are to be sold shall be entitled to rely upon a statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required to be filed by section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter), and has been subject to such filing requirements for the past 90 days, unless he knows or has reason to believe that the issuer has not complied with such requirements. Such person shall also be entitled to rely upon a written statement from the issuer that it has complied with such reporting requirements unless he knows or has reasons to believe that the issuer has not complied with such requirements
 - (2) *Other Public Information.* If the issuer is not subject to Section 13 or 15(d) of the Securities Exchange Act of 1934, there is publicly available the information concerning the issuer specified in paragraph (a)(5)(1) to (xiv), inclusive, and paragraph (a)(5)(xvi) of Rule 15c2-11 (§240.15c2-11 of this chapter) under that Act or, if the issuer is an insurance company, the information specified in Section 12(g)(2)(L)(i) of that Act.
- (d) *Holding Period for Restricted Securities.* If the securities sold are restricted securities, the following provisions apply:
- (1) *General Rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities. If the acquiror takes the securities by purchase, the one-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.
 - (2) *Promissory Notes, Other Obligations or Installment Contracts.* Giving the issuer or affiliate of the issuer from whom the securities were purchased a promissory note or other obligation to pay the purchase price, or entering into an installment purchase contract with such seller, shall not be deemed full payment of the purchase price unless the promissory note, obligation or contract:
 - (i) provides for full recourse against the purchaser of the securities,

- (ii) is secured by collateral, other than the securities purchased, having a fair market value at least equal to the purchase price of the securities purchased; and
- (iii) shall have been discharged by payment in full prior to the sale of the securities.

(3) *Determination of Holding Period.* The following provisions shall apply for the purpose of determining the period securities have been held:

- (i) *Stock Dividends, Splits and Recapitalizations.* Securities acquired from the issuer as a dividend or pursuant to a stock split, reverse split or recapitalization shall be deemed to have been acquired at the same time as the securities on which the dividend or, if more than one, the initial dividend was paid, the securities involved in the split or reverse split, or the securities surrendered in connection with the recapitalization;
- (ii) *Conversions.* If the securities sold were acquired from the issuer for a consideration consisting solely of other securities of the same issuer surrendered for conversion, the securities so acquired shall be deemed to have been acquired at the same time as the securities surrendered for conversion;
- (iii) *Contingent Issuance of Securities.* Securities acquired as a contingent payment of the purchase price of an equity interest in a business, or the assets of a business, sold to the issuer or an affiliate of the issuer shall be deemed to have been acquired at the time of such sale if the issuer or affiliate was then committed to issue the securities subject only to conditions other than the payment of further consideration for such securities. An agreement entered into in connection with any such purchase to remain in the employment of, or not to compete with, the issuer or affiliate or the rendering of services pursuant to such agreement shall not be deemed to be the payment of further consideration for such securities.
- (iv) *Pledged Securities.* Securities which are bona fide pledged by an affiliate of the issuer when sold by the pledgee, or by a purchaser, after a default in the obligation secured by the pledge, shall be deemed to have been acquired when they were acquired by the pledgor, except that if the securities were pledged without recourse they shall be deemed to have been acquired by the pledgee at the time of the pledge or by the purchaser at the time of purchase.
- (v) *Gifts of Securities.* Securities acquired from an affiliate of the issuer by gift shall be deemed to have been acquired by the donee when they were acquired by the donor.
- (vi) *Trusts.* Where a trust settlor is an affiliate of the issuer, securities acquired from the settlor by the trust, or acquired from the trust by the beneficiaries thereof, shall be deemed to have been acquired when such securities were acquired by the settlor.
- (vii) *Estates.* Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such estate by the beneficiaries thereof shall be deemed to have been acquired when they were acquired by the deceased person, except that no holding period is required if the estate is not an affiliate of the issuer or if the securities are sold by a beneficiary of the estate who is not such an affiliate.

Note. While there is no holding period or amount limitation for estates and beneficiaries thereof which are not affiliates of the issuer, paragraphs (c), (h) and (i) of the rule apply to securities sold by such persons in reliance upon the rule.

- (viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in Rule 145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction. This provision shall not apply, however, to a transaction effected solely for the purpose of furnishing a holding company.

(c) *Limitation on Amount of Securities Sold.* Except as hereinafter provided, the amount of securities which may be sold in reliance upon this rule shall be determined as follows:

- (1) *Sales by affiliates.* If restricted or other securities are sold for the account of an affiliate of the issuer, the amount

of securities sold, together with all sales of restricted and other securities of the same class for the account of such person within the preceding three months, shall not exceed the greater of (i) one percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or (ii) the average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or (iii) the average weekly volume of trading in such securities reported pursuant to an effective transaction reporting plan or an effective national market system plan as those terms are defined in § 242.600 of this chapter during the four-week period specified in paragraph (c)(1)(ii) of this section.

- (2) *Sales by persons other than affiliates.* The amount of restricted securities sold for the account of any person other than an affiliate of the issuer, together with all other sales of restricted securities of the same class for the account of such person within the preceding three months, shall not exceed the amount specified in paragraphs (c)(1)(i), (1)(ii) or (1)(iii) of this section, whichever is applicable, unless the conditions in paragraph (k) of this rule are satisfied.
- (3) *Determination of Amount* For the purpose of determining the amount of securities specified in paragraphs (c)(1) and (2) of this rule, the following provisions shall apply:
- (i) Where both convertible securities and securities of the class into which they are convertible are sold, the amount of convertible securities sold shall be deemed to be the amount of securities of the class into which they are convertible for the purpose of determining the aggregate amount of securities of both classes sold;
 - (ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within one year after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in subparagraph (c)(1) or (2) of this section, whichever is applicable.
 - (iii) The amount of securities sold for the account of a donee thereof during any period of three months within one year after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (c)(1) or (2) of this section, whichever is applicable;
 - (iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within one year after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (c)(1) or (2) of this section, whichever is applicable;
 - (v) The amount of securities sold for the account of the estate of a deceased person, or for the account of a beneficiary of such estate, during any period of three months and the amount of securities sold during the same period for the account of the deceased person prior to his death shall not exceed, in the aggregate, the amount specified in paragraph (1) or (2) of this paragraph, whichever is applicable; *Provided*, That no limitation on amount shall apply if the estate or beneficiary thereof is not an affiliate of the issuer;
 - (vi) When two or more affiliates or other persons agree to act in concert for the purpose of selling securities of an issuer, all securities of the same class sold for the account of all such persons during any period of three months shall be aggregated for the purpose of determining the limitation on the amount of securities sold;
 - (vii) The following sales of securities need not be included in determining the amount of securities sold in reliance upon this section: securities sold pursuant to an effective registration statement under the Act; securities sold pursuant to an exemption provided by Regulation A (230.251 through 230.263) under the Act; securities sold in a transaction exempt pursuant to Section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; and securities sold offshore pursuant to Regulation S (230.901 through

(f) *Manner of sale.* The securities shall be sold in "brokers' transactions" within the meaning of section 4(4) of the Act or in transactions directly with a "market maker," as that term is defined in section 3(a)(38) of the Securities Exchange Act of 1934, and the person selling the securities shall not (1) solicit or arrange for the solicitation of orders to buy the securities in anticipation of or in connection with such transaction, or (2) make any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities. The requirements of this paragraph, however, shall not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate provided the estate or beneficiary thereof is not an affiliate of the issuer; nor shall they apply to securities sold for the account of any person other than an affiliate of the issuer, provided the conditions of paragraph (k) of this rule are satisfied.

(g) *Brokers' Transactions.* The term "brokers' transactions" in Section 4(4) of the Act shall for the purposes of this rule be deemed to include transactions by a broker in which such broker---

- (1) does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold; and receives no more than the usual and customary broker's commission;
- (2) neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; provided, that the foregoing shall not preclude (i) inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days, (ii) inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days; or (iii) the publication by the broker of bid and ask quotations for the security in an inter-dealer quotation system provided that such quotations are incident to the maintenance of a bona fide inter-dealer market for the security for the broker's own account and that the broker has published bona fide bid and ask quotations for the security in an inter-dealer quotation system on each of at least twelve days within the preceding thirty calendar days with no more than four business days in succession without such two-way quotations.

Note to Paragraph g(2)(ii): The broker should obtain and retain in his files written evidence of indications of bona fide unsolicited interest by his customers in the securities at the time such indications are received.

- (3) after reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) below.

Notes:

- (i) The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h)
- (ii) The reasonable inquiry required by paragraph (g)(3) of this section should include, but not necessarily be limited to, inquiry as to the following matters:
 - (a) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;
 - (b) The nature of the transaction in which the securities were acquired by such person;
 - (c) The amount of securities of the same class sold during the past three months by all persons whose sales are required to be taken into consideration pursuant to paragraph (c) of this section;
 - (d) Whether such person intends to sell additional securities of the same class through any other means;
 - (e) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

- (f) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and
 - (g) The number of shares or other units of the class outstanding, or the relevant trading volume.
- (h) *Notice of proposed sale.* If the amount of securities to be sold in reliance upon the rule during any period of three months exceeds 500 shares or other units or has an aggregate sale price in excess of \$10,000, three copies of a notice on Form 144 shall be filed with the Commission at its principal office in Washington, D.C.; and if such securities are admitted to trading on any national securities exchange, one copy of such notice shall also be transmitted to the principal exchange on which such securities are so admitted. The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The requirements of this paragraph, however, shall not apply to securities sold for the account of any person other than an affiliate of the issuer, provided the conditions of paragraph (k) of this rule are satisfied.
- (i) *Bona Fide Intention to Sell.* The person filing the notice required by paragraph (h) shall have a bona fide intention to sell the securities referred to therein within a reasonable time after the filing of such notice.
- (j) *Non-exclusive rule.* Although this rule provides a means for reselling restricted securities and securities held by affiliates without registration, it is not the exclusive means for reselling such securities in that manner. Therefore, it does not eliminate or otherwise affect the availability of any exemption for resales under the Securities Act that a person or entity may be able to rely upon.
- (k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. The two-year period shall be calculated as described in paragraph (d) of this section.