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#### About Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP is a California law firm with more than 230 attorneys practicing out of seven offices in Los Angeles, Century City, Orange County, Del Mar Heights, San Diego, San Francisco and Walnut Creek. The firm's broad based areas of focus include corporate, real estate, construction, real estate finance, business litigation, employment and labor law, taxation, land use, bankruptcy and creditors' rights, intellectual property and environmental. [more...](#)

## California Corporations Commissioner Extends Key Listed Securities Exemptions to NASDAQ Capital Market Issuers

On August 17, 2009, the California Corporations Commissioner certified the NASDAQ Capital Market under two key provisions of the Corporate Securities Law of 1968. These

certifications will immediately extend significant legal benefits to companies with securities listed on that market.

**This alert applies to corporations with securities listed on the NASDAQ Capital Market.**

Previously, the Nasdaq Stock Market operated as an over-the-counter market and consisted of the Nasdaq National Market and the Nasdaq Capital Market (fka Nasdaq SmallCap Market). On August 1, 2006, the Nasdaq Stock Market began operating as a national securities exchange. At about the same time, the Nasdaq National Market was renamed the NASDAQ Global Market. The NASDAQ Global Market presently consists of two tiers – the NASDAQ Global Market and the NASDAQ Global Select Market.

Securities listed or authorized for listing on the NASDAQ Global Market are "covered securities" under the National Securities Markets Improvement Act (the "NSMIA"). As a result, California and other states cannot impose qualification or registration requirements under their securities or "blue sky" laws. In 2007, the listing standards for the NASDAQ Capital Market were increased and the Securities and Exchange Commission (the "SEC") added securities listed or approved for listing on that market to the list of "covered securities" for purposes of the NSMIA.

In general, the offer and sale of securities in California must be qualified with the Commissioner unless an exemption from qualification is available or state regulation has been preempted by federal law such as the NSMIA. Long before Congress preempted state qualification requirements for covered securities, California had exempted securities of companies listed on exchanges certified by the Commissioner pursuant to Corporations Code Section 25100(o). This exemption was from the qualification, but not anti-fraud, provisions of California's securities laws. While Congress' enactment of the NSMIA in 1996 seemed to make this exemption irrelevant, it remained important because it is unclear whether the federal preemption of state qualification requirements pursuant to the NSMIA extends to options, warrants and other rights to acquire a listed security. Because Section 25100(o) also excepts warrants and other rights to acquire a security listed or approved for listing on a certified exchange, the exemption continues to be relevant and important.

Despite the SEC's 2007 decision to extend "covered security" status to NASDAQ Capital Market securities, the Commissioner did not certify that market for purposes of Section 25100(o). This meant that options, warrants and other rights to acquire NASDAQ Capital Market listed securities remained subject to qualification even though the underlying securities were "covered securities". The Commissioner's recent certification of the NASDAQ Capital Market means that companies with securities listed on that market will no longer need to be concerned with qualification in California of options, warrants and other rights to acquire their NASDAQ Capital Market listed securities.

The Commissioner has also certified the NASDAQ Capital Market for purposes of Corporations Code Section 25101(a). That statute provides an exemption from qualification for offers and sales of securities in non-issuer (i.e., secondary) transactions. The exemption is available for any security of a person that is the issuer of a security listed on an exchange certified by the Commissioner. While the preemptive effect of the NSMIA obviates the need for this exemption in the case of "covered securities" (or equal or senior securities), the exemption has some residual utility because it covers not just the covered security (or an equal or senior security) but *any* security issued by a person that is the issuer of a security listed on a certified exchange.

The Commissioner's certification of the NASDAQ Capital Market will provide a non-securities law benefit to NASDAQ Capital Market companies as well. California has constitutional usury limitations. Pursuant to Corporations Code Section 25117(a), evidences of indebtedness and the purchasers or holders thereof are exempt if the issuer has any security listed or approved for listing on a national securities exchange certified by the Commissioner under Section 25100(o). The Commissioner's certification should therefore make it easier for smaller publicly traded companies to issue debt without concern for California's constitutional usury limits.

If you are interested in learning more about the consequences of the Commissioner's certifications of the NASDAQ Capital Market, please call any member of the Allen Matkins Corporate Group.

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