

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

**FORM S-3**  
REGISTRATION STATEMENT  
UNDER  
THE SECURITIES ACT OF 1933

**VERTEX PHARMACEUTICALS INCORPORATED**

(Exact name of registrant as specified in its charter)

**Massachusetts**  
(State or other jurisdiction of  
incorporation or organization)

**04-3039129**  
(I.R.S. Employer  
Identification Number)

**130 Waverly Street  
Cambridge, Massachusetts 02139  
(617) 444-6100**

(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

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**Approximate Date of Commencement of Proposed Sale to the Public:** From time to time after the effective date of this registration statement.

If the only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans, please check the following box:

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box:

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

If this Form is a registration statement pursuant to General Instruction I.D. or a post-effective amendment thereto that shall become effective upon filing with the Commission pursuant to Rule 462(e) under the Securities Act, check the following box:

If this Form is a post-effective amendment to a registration statement filed pursuant to General Instruction I.D. filed to register additional securities or additional classes of securities pursuant to Rule 413(b) under the Securities Act, check the following box:

**CALCULATION OF REGISTRATION FEE**

<b>Title of each class of securities to be registered</b>	<b>Amount to be registered/Proposed maximum offering price per security/Proposed maximum aggregate offering price</b>	<b>Amount of registration fee</b>
Convertible Senior Subordinated Notes due 2013	(1)	(2)
Common Stock, \$0.01 par value per share(3)	(4)	(5)

- (1) An indeterminate amount of convertible senior subordinated notes as may be offered at indeterminate prices are being registered. The convertible senior subordinated notes may be offered in different series, with different interest rates and with different maturity dates.
- (2) In accordance with Rules 456(b) and 457(r) under the Securities Act of 1933, the registrant is deferring payment the entire registration fee.
- (3) Each share of common stock includes a right to purchase our series A junior participating preferred stock, which is initially attached to and trades with the shares of the common stock being registered hereby. No separate consideration will be received for these rights.
- (4) An indeterminate number of shares of common stock may be issued from time to time upon conversion of the convertible senior subordinated notes.
- (5) No additional consideration will be received for the common stock issuable upon conversion of the convertible senior subordinated notes. Therefore, no additional registration fee is required pursuant to Rule 457(i) of the Securities Act of 1933.



The information in this prospectus is not complete and may be changed. This prospectus is not an offer to sell these securities and we are not soliciting an offer to buy these securities in any jurisdiction where the offer or sale is not permitted.

Subject to Completion  
Preliminary Prospectus dated February 11, 2008

**PROSPECTUS**

**\$250,000,000**



**VERTEX PHARMACEUTICALS INCORPORATED**

**% Convertible Senior Subordinated Notes due 2013**

We are offering \$250,000,000 of convertible notes. The notes will bear interest at the rate of \_\_\_\_\_ % per year, payable in cash semiannually in arrears on February \_\_\_\_\_ and August \_\_\_\_\_ of each year, beginning on August \_\_\_\_\_, 2008. The notes will mature on February \_\_\_\_\_, 2013. The notes will be our unsecured senior subordinated obligations and will rank junior in right of payment to our existing and future senior debt, equal in right of payment with our existing and future senior subordinated debt, and senior in right of payment to our existing and future subordinated debt. In addition, the notes will effectively rank junior in right of payment to all of our existing and future secured debt, to the extent of the value of the assets securing such debt, and to the debt and all other liabilities of our subsidiaries.

\_\_\_\_\_ Holders may convert, at any time prior to maturity, any outstanding notes into shares of our common stock. The notes are convertible at a conversion rate of \_\_\_\_\_ shares per \$1,000 principal amount of notes, which is equal to a conversion price of approximately \$ \_\_\_\_\_ per share, subject to adjustment.

Upon a fundamental change relating to our company, each holder may require us to purchase all or a portion of such holder's notes at a price equal to the principal amount thereof, together with accrued and unpaid interest, if any, to, but excluding, the repurchase date. If a holder elects to convert notes in connection with certain fundamental change events, such holder may also be entitled to receive a make-whole premium upon conversion.

After February \_\_\_\_\_, 2010, we may redeem all or a portion of the notes at the redemption prices specified in this prospectus, plus accrued and unpaid interest to, but excluding, the redemption date.

Our common stock is listed on the Nasdaq Global Select Market under the symbol "VRTX." On February 8, 2008, the last sale price for our common stock as reported on the Nasdaq Global Select Market was \$18.10 per share.

Concurrently with this offering, we are offering 6,000,000 shares of our common stock (or a total of 6,900,000 shares if the underwriters exercise their overallotment option in full) pursuant to a separate registration statement and prospectus. Although this note offering is not contingent upon the common stock offering and the common stock offering is not contingent upon this note offering, we currently anticipate raising approximately \$358,600,000 in aggregate gross proceeds from the two offerings based on the last reported sale price of our common stock on February 8, 2008. However, amounts sold in each offering may increase or decrease based on market conditions relating to that particular security. See "Concurrent Common Stock Offering."

**Investing in the notes involves risks. See "Risk Factors" beginning on page 11 of this prospectus.**

	<u>Per Note</u>	<u>Total</u>
Public offering price	%	\$
Underwriting discount	%	\$
Proceeds, before expenses, to Vertex	%	\$

We have granted the underwriters an option to purchase up to an additional \$37,500,000 principal amount of the notes to cover overallotments, if any.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The notes will be ready for delivery in book entry form only through the facilities of the Depository Trust Company on or about \_\_\_\_\_, 2008.

**Merrill Lynch & Co.**

The date of this prospectus is \_\_\_\_\_, 2008.

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**You should rely only on the information contained or incorporated by reference in this prospectus. We have not authorized anyone to provide you with information that is different. The information contained or incorporated by reference in this prospectus is accurate only as of the date hereof, regardless of the time of delivery or of any sale of the notes. It is important for you to read and consider all information contained in this prospectus, including the documents incorporated by reference herein, in making your investment decision. You should also read and consider the information in the documents to which we have referred you under the captions "Where You Can Find More Information" and "Incorporation by Reference" in this prospectus.**

**We are offering to sell, and are seeking offers to buy, the notes only in jurisdictions where offers and sales are permitted. The distribution of this prospectus and the offering of the notes in certain jurisdictions may be restricted by law. Persons outside the United States who come into possession of this prospectus must inform themselves about and observe any restrictions relating to the offering of the notes and the distribution of this prospectus outside the United States. This prospectus does not constitute, and may not be used in connection with, an offer to sell, or a solicitation of an offer to buy, any securities offered by this prospectus by any person in any jurisdiction in which it is unlawful for such person to make such an offer or solicitation.**

Unless we have indicated otherwise, or the context otherwise requires, references in this prospectus to "Vertex," the "Company," "we," "us" and "our" or similar terms are to Vertex Pharmaceuticals Incorporated, a Massachusetts corporation, and its subsidiaries.

"Vertex" is a registered trademark of Vertex. "Lexiva," "Telzir" and "Agenerase" are registered trademarks of GlaxoSmithKline plc. Other brands, names and trademarks contained in this prospectus are the property of their respective owners.

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## SUMMARY

*This summary highlights information contained elsewhere in or incorporated by reference in this prospectus. This summary does not contain all of the information that you should consider before deciding to invest in the notes. You should read this entire prospectus carefully, including the "Risk Factors" section contained in this prospectus and our consolidated financial statements and the related notes and the other documents incorporated by reference herein.*

### Business Overview

We are in the business of discovering, developing and commercializing small molecule drugs for the treatment of serious diseases. Telaprevir, our lead drug candidate, is an oral hepatitis C protease inhibitor and one of the most advanced of a new class of antiviral treatments in clinical development that target hepatitis C virus, or HCV, infection, a life-threatening disease. We expect to begin a Phase 3 clinical trial of telaprevir in March 2008 to evaluate 24-week telaprevir-based treatment regimens in treatment-naïve patients with genotype 1 HCV.

We have built a drug discovery capability that integrates biology, pharmacology, biophysics, chemistry, automation and information technologies in a coordinated manner, with the goal of more efficiently identifying promising drug candidates to address significant unmet medical needs. Using this drug discovery capability we have identified, among other drug candidates: VX-770 and VX-809, two novel drug candidates targeting cystic fibrosis, or CF; VX-500 and VX-813, two second-generation HCV protease inhibitors; and VX-509, a novel janus kinase 3, or JAK3, inhibitor that targets immune-mediated inflammatory diseases, or IMID. We have a number of other drug candidates in clinical trials or preclinical studies being developed either by us or in collaboration with other pharmaceutical companies, including drug candidates targeting cancer, IMID, pain and other neurological diseases and disorders. We currently are building our drug development, supply chain management and commercialization organizations to prepare for the potential commercial launch of telaprevir and to support the development of the other drug candidates in our pipeline.

We are conducting a comprehensive global clinical development program for telaprevir in collaboration with Janssen Pharmaceutica, N.V., or Janssen, a Johnson & Johnson company, and Mitsubishi Tanabe Pharma Corporation. This program is designed to support potential registration of telaprevir by us in North America and our collaborators in international markets for treatment-naïve and treatment-experienced patients across a range of HCV genotypes. In March 2008, we expect to begin a global, 3-arm Phase 3 clinical trial of telaprevir designed to enroll approximately 1,050 treatment-naïve patients with genotype 1 HCV, the most prevalent form of HCV in the United States, European Union and Japan. Patients in the two 24-week telaprevir-based treatment arms will be dosed with telaprevir for 8 or 12 weeks in combination with pegylated interferon, or peg-IFN, and ribavirin, or RBV, and will continue to receive peg-IFN and RBV after the dosing of telaprevir is complete. The third arm is a control arm with peg-IFN and RBV treatment, alone, for 48 weeks. We expect to complete enrollment in this trial in the fourth quarter of 2008. We expect to receive sustained viral response, or SVR, data from all treatment arms in the first half of 2010.

We have additional clinical trials ongoing or planned that have the potential to fulfill the anticipated registration requirement of at least one additional adequate and well-controlled clinical trial. We expect to begin enrollment in a clinical trial designed to evaluate a 48-week telaprevir-based treatment regimen in the third quarter of 2008. We expect SVR data from all treatment arms of this clinical trial will be available in mid-2010. PROVE 3 is a Phase 2b clinical trial involving approximately 440 patients with genotype 1 HCV who did not achieve SVR with previous peg-IFN-based treatments, or treatment-experienced patients. We completed enrollment in this clinical trial in June 2007. We expect the first interim clinical trial data to be available in the second quarter of 2008 and the SVR data from all PROVE 3 treatment arms by the end of 2008.

We continue to evaluate interim data from our two Phase 2b clinical trials, PROVE 1 and PROVE 2, which enrolled an aggregate of approximately 580 treatment-naïve patients with genotype 1

HCV. On an intent-to-treat basis, in the 24-week telaprevir-based treatment arms of PROVE 1 and PROVE 2, 61% and 68%, respectively, of patients achieved SVR at 24 weeks post-treatment. In the control arm of PROVE 1, on an intent-to-treat basis, 37% of patients achieved undetectable HCV RNA levels at 12 weeks post-treatment. Post-treatment viral response data for the control arm of PROVE 2 are not yet available. Patients in our clinical trials who achieve SVR have undetectable HCV RNA levels—less than 10 IU/mL as measured by the Roche TaqMan® assay—24 weeks after all treatment has ceased. The interim analyses of safety data from PROVE 1 and PROVE 2 indicated that the most common adverse events, regardless of treatment assignment, were fatigue, rash, headache and nausea. Gastrointestinal disorders, skin adverse events, including rash and pruritus, and anemia were more frequent, and the rash more frequently severe, in the telaprevir arms than in the control arms over the dosing period.

In addition to telaprevir, we are evaluating a number of other drug candidates, including:

- VX-770, a cystic fibrosis transmembrane regulator, or CFTR, potentiator compound, which we are investigating for the treatment of CF. In the second quarter of 2007, we initiated a Phase 2a clinical trial of VX-770 in patients with CF.
- VX-809, a CFTR corrector compound, which we are investigating for the treatment of CF. We have initiated a Phase 1a clinical trial of VX-809.
- VX-500, a second generation oral HCV protease inhibitor, which we are investigating for the treatment of chronic HCV infection. We have initiated a Phase 1a clinical trial of VX-500. We expect VX-813, an additional investigational HCV protease inhibitor, to enter clinical development in 2008.
- VX-509, a novel JAK3 inhibitor that we are investigating for the treatment of immune-mediated inflammatory diseases. We expect to initiate a Phase 1 clinical trial of VX-509 in mid-2008.

In 2006, we entered into a collaboration agreement with Janssen under which we have retained exclusive commercial rights to telaprevir in North America and are leading the clinical development program. Janssen will be responsible for the commercialization of telaprevir, including the manufacture of its own commercial supply of telaprevir, for the Janssen territories, which include the territories outside of North America and the Far East. Janssen has agreed to be responsible for 50% of drug development costs under the development program for North America and the Janssen territories and to make contingent milestone payments for the successful development, approval and launch of telaprevir. Mitsubishi Tanabe is conducting clinical trials of telaprevir in Japan. Our pipeline also includes Aurora kinase inhibitors, which are being developed by Merck & Co., Inc., and AVN-944 (VX-944), which is being developed by Avalon Pharmaceuticals, Inc. A Vertex-discovered compound for the treatment of HIV infection, fosamprenavir calcium, is being marketed by our collaborator GlaxoSmithKline plc as Lexiva in the United States and Telzir in Europe.

## Pipeline

Drug or Drug Candidate	Clinical Indication(s)	Phase	Marketing Rights (Region)
<b>Infectious Diseases</b>			
Lexiva/Telzir Telaprevir (VX-950)	HIV infection Chronic HCV infection	Marketed Phase 3	GlaxoSmithKline (Worldwide) Vertex (North America); Mitsubishi Tanabe (Far East); and Janssen (Rest of World)
VX-500	Chronic HCV infection	Phase 1a	Vertex (Worldwide)
VX-813	Chronic HCV infection	Preclinical	Vertex (Worldwide)
VX-883	Bacterial infection	Preclinical	Vertex (Worldwide)
<b>Cystic Fibrosis</b>			
VX-770	Cystic fibrosis	Phase 2a	Vertex (Worldwide)
VX-809	Cystic fibrosis	Phase 1a	Vertex (Worldwide)
<b>Cancer</b>			
MK-0457(VX-680)	Cancer	Phase 2	Merck (Worldwide)
AVN-944(VX-944)	Cancer	Phase 2	Avalon (Worldwide)
VX-689	Cancer	Preclinical	Merck (Worldwide)
<b>Immune-Mediated Inflammatory Diseases</b>			
VX-702	Rheumatoid arthritis and other inflammatory diseases	Phase 2	Vertex (Worldwide)
VX-509	IMiD	Preclinical	Vertex (Worldwide)

## Strategy

Our goal is to become a fully integrated pharmaceutical company with industry-leading capabilities in research, development and commercialization of pharmaceutical products. The key elements of our strategy are:

*Develop and commercialize telaprevir.* We believe that telaprevir has advanced further along the clinical development pathway than any other new and potentially competing oral HCV therapy. In order to maintain the time-to-market advantage we believe that we have in relation to drug candidates being developed by our competitors, we have a comprehensive clinical development program for telaprevir consisting of multiple concurrent clinical trials, and we are investing significant resources in the Phase 3 clinical development and preparation for launch of telaprevir.

*Create a leadership position in the treatment of HCV infection.* We believe that treatment of HCV infection will continue to require combination drug therapies in order to achieve high SVR rates. We intend to seek to create a leading multi-drug franchise in HCV. To complement telaprevir, VX-500 and/or VX-813, we are pursuing business development activities with complementary therapies including polymerase inhibitors and novel interferons.

*Expand the value of our portfolio of drug candidates.* We have elected to diversify our research and development activities across a relatively broad array of investment opportunities. In 2008, we intend to progress VX-770 and VX-809, our drug candidates targeting CF, VX-509, our novel JAK3 inhibitor, which targets immune-mediated inflammatory diseases and other promising drug candidates in our pipeline.

*Capitalize on the advances in our telaprevir clinical program to build our general drug development and commercialization capabilities.* In 2008, we plan to continue our investment in key areas—including clinical development, regulatory affairs, safety, quality control, pharmaceutical development, commercial operations and commercial supply chain management—that will be necessary in order to complete development of telaprevir, to seek marketing approval for telaprevir and to commercialize telaprevir if we are successful in obtaining marketing approval. We expect that these capabilities also will support realization of additional drug candidates that may progress through our pipeline.

*Invest in research and development and retain a greater proportion of rights to proprietary drug candidates.* We intend to continue making significant investments in our research and development programs. We direct our research and development activities toward therapies designed to address serious diseases because these therapies have the potential to deliver the greatest value for patients, physicians and the healthcare system. In recent years, we have funded a greater proportion of our research programs using internal funds rather than collaborator funds. We adopted this strategy with the aim of retaining greater development control of, and commercial rights to, those proprietary drug candidates that may meet our strategic internal investment criteria as in effect from time to time.

*Continue existing and establish new collaborations to develop and commercialize selected drug candidates.* Collaborations provide us with financial support and other valuable resources for our development and research programs. We plan to continue to rely on collaborators to support, develop and commercialize a portion of our drug candidates either worldwide or in markets in which we are not concentrating our resources.

*License and acquire technologies, resources, drugs or drug candidates.* We also seek opportunistically to license and acquire technologies, resources and drugs or drug candidates that have the potential to strengthen our drug discovery platform, pipeline and commercial capabilities.

## Telaprevir Clinical Development

### Phase 3 Clinical Trial

In March 2008, we expect to begin a 1,050-patient Phase 3 clinical trial of telaprevir that will evaluate 24-week telaprevir-based treatment regimens compared to current standard treatment in treatment-naïve patients with genotype 1 HCV. The trial will be randomized equally across three treatment arms with approximately 350 patients per arm. The clinical trial will be conducted at approximately 100 centers primarily located in the United States and the European Union. The three planned treatment arms are:

- a 24-week telaprevir-based treatment arm, with telaprevir dosed for 12 weeks in combination with peg-IFN and RBV, followed by treatment with peg-IFN and RBV alone for 12 weeks;
- a 24-week telaprevir-based treatment arm, with telaprevir dosed for 8 weeks in combination with peg-IFN and RBV, followed by treatment with peg-IFN and RBV alone for 16 weeks; and
- a control arm with peg-IFN and RBV treatment, alone, for 48 weeks.

Patients in both telaprevir-based treatment arms who achieve extended rapid viral response, or eRVR, will receive 24 weeks of treatment. Our criteria for eRVR require that the patient have undetectable HCV RNA levels—less than 10 IU/mL—at 4 weeks and again at 12 weeks after the start of treatment, will receive 24 weeks of treatment. Patients in the telaprevir-based treatment arms who have undetectable HCV RNA levels at 24 weeks after the start of treatment but did not achieve eRVR will continue to receive treatment with peg-IFN and RBV for a total duration of 48 weeks. We expect to begin enrolling patients in the Phase 3 clinical trial in March 2008, and we expect to complete enrollment in this trial in the fourth quarter of 2008. We expect to have SVR data from all treatment arms of this clinical trial in the first half of 2010.

### Well-Controlled Clinical Trials

We anticipate that we will need results from at least one additional adequate and well-controlled clinical trial of telaprevir in order to file a New Drug Application, or NDA, with the United States Food and Drug Administration, or FDA. We believe that the planned multi-arm clinical trial of a 48-week telaprevir-based treatment regimen and the PROVE 3 clinical trial have the potential to fulfill this requirement. We expect that the 48-week telaprevir-based clinical trial will enroll approximately 400 treatment-naïve patients with genotype 1 HCV, beginning in the third quarter of 2008. We expect SVR data from all treatment arms of this clinical trial by mid-2010. The PROVE 3 clinical trial is a 440-patient trial that is being conducted in North America and the European Union in treatment-experienced patients. Patient enrollment in PROVE 3 was completed in June 2007, and SVR data from all PROVE 3 treatment arms are expected by the end of 2008.

### PROVE 1 and PROVE 2

The PROVE 1 and PROVE 2 clinical trials are evaluating SVR rates in approximately 580 treatment-naïve patients infected with genotype 1 HCV, including patients who received telaprevir-based treatment, and also patients in standard treatment control arms. Patients achieve SVR if they have undetectable HCV RNA levels—less than 10 IU/mL as measured by the Roche TaqMan® assay—24 weeks after all treatment has ceased.

On an intent-to-treat basis, in the 24-week telaprevir-based treatment arms of our Phase 2b clinical trials PROVE 1 and PROVE 2, 61% and 68%, respectively, of treatment-naïve patients achieved SVR. In the control arm of PROVE 1, on an intent-to-treat basis, 37% of patients achieved undetectable HCV RNA levels at 12 weeks post-treatment. Post-treatment viral response data for the



control arm of PROVE 2 is not yet available. The interim analyses of telaprevir safety from PROVE 1 and PROVE 2, which are discussed below, showed that the most common adverse events, regardless of treatment assignment, were fatigue, rash, headache and nausea. Gastrointestinal disorders, skin adverse events, including rash and pruritus, and anemia were more frequent, and rash more frequently severe, in the telaprevir arms than in the control arms over the dosing period. Collection and analysis of data from the PROVE 1 and PROVE 2 clinical trials is ongoing, and as such all of the interim data, including viral response, SVR, safety, RVR and viral breakthrough data, is subject to change as final data are confirmed.

### Viral Response

Data in the tables below include patients who completed treatment, as well as those who discontinued treatment prior to completion of dosing but who had undetectable HCV RNA levels at the time of measurement. Patients in our Phase 2b clinical trials achieve SVR if they have undetectable HCV RNA levels 24 weeks after completion of treatment.

#### 24-Week Telaprevir-Based Treatment Arms

SVR rates on an intent-to-treat basis for PROVE 1 and PROVE 2 for the 24-week telaprevir-based treatment arms are set forth in the table below.

	Number of Patients	SVR Rate  (% with HCV RNA <10 IU/mL)
24-week telaprevir-based treatment arm (PROVE 1) telaprevir in combination with peg-IFN and RBV for 12 weeks, followed by peg-IFN and RBV alone for 12 weeks	79	61%
24-week telaprevir-based treatment arm (PROVE 2) telaprevir in combination with peg-IFN and RBV for 12 weeks, followed by peg-IFN and RBV alone for 12 weeks	81	68%

#### 48-Week Treatment Arms

SVR data, which require undetectable HCV RNA levels measured 24 weeks after completion of treatment, are not yet available for the 48-week control arms in PROVE 1 and PROVE 2 or the 48-week telaprevir-based treatment arm in PROVE 1. The following table sets forth, on an intent-to-treat basis, the percentage of patients that had undetectable levels of HCV RNA at end of treatment and 12 weeks post-treatment, where available.

	Number of Patients	End of Treatment	12 Weeks Post-Treatment
48-week control arm (PROVE 1) 48-weeks of therapy with peg-IFN and RBV	75	45%	37%
48-week control arm (PROVE 2) 48-weeks of therapy with peg-IFN and RBV	82	55%	Not Available
48-week telaprevir-based treatment arm (PROVE 1) telaprevir in combination with peg-IFN and RBV for 12 weeks, followed by peg-IFN and RBV alone for 36 weeks	79	65%	66%

Typically, following the completion of 48 weeks of treatment with peg-IFN and RBV alone, a portion of patients with undetectable HCV RNA at end of treatment relapse during the following 24 weeks.

## Safety

The types of adverse events that have been commonly observed with peg-IFN and RBV treatment were seen across all treatment arms of PROVE 1 and PROVE 2. The most common adverse events, regardless of treatment assignment, were fatigue, rash, headache and nausea. Gastrointestinal disorders, skin adverse events, including rash and pruritus, and anemia were more frequent, and rash more frequently severe, in the telaprevir arms than in the control arm over the dosing period.

In PROVE 1, the overall discontinuation rate through 12 weeks was 18% across all telaprevir treatment arms and 3% in the control arm. This includes discontinuations due to adverse events, withdrawal of consent and patients lost to follow-up. The incidence of treatment discontinuations through week 12 due to adverse events was 13% and 2% in the telaprevir and control arms, respectively. The most common reason for discontinuation was rash, with 7% of the patients discontinuing for this reason in the telaprevir arms during the first 12 weeks of treatment. After week 12, discontinuations due to adverse events were 8% in each of the telaprevir and control arms. Over the full course of the treatment period for all arms of the trial, the incidence of severe adverse events was 27% in the telaprevir arms and 24% in the control arm.

In PROVE 2, the overall discontinuation rate through 12 weeks of treatment was 14% across all telaprevir treatment arms and 6% in the control arm. This includes discontinuations due to adverse events, withdrawal of consent and patients lost to follow-up. The incidence of treatment discontinuations through week 12 due to adverse events was 10% and 3% in the telaprevir and control arms, respectively. As with PROVE 1, the most common reason for discontinuation was rash, with 7% of the patients in the telaprevir arms discontinuing due to rash, compared to less than 1% in the control arm during the first 12 weeks of treatment. Through to week 12, the incidence of severe adverse events was 17% in the telaprevir arms and 10% in the control arm.

The collection of adverse event and discontinuation data is ongoing in the PROVE clinical program.

### Rapid Viral Response

A rapid viral response, or RVR, is one in which a patient has undetectable levels of HCV RNA—less than 10 IU/mL—at 4 weeks after commencement of treatment. Other third-party clinical trials suggest that patients undergoing standard-of-care treatment with peg-IFN and RBV therapy for 48 weeks who achieve RVR are substantially more likely to achieve SVR than patients on the same treatment who do not achieve RVR. In PROVE 1 and PROVE 2 combined, on an intent-to-treat basis, 77% of patients receiving telaprevir in combination with peg-IFN and RBV achieved RVR—79% in PROVE 1 and 75% in PROVE 2. In the control arms of PROVE 1 and PROVE 2, 12% of patients achieved RVR—11% in PROVE 1 and 13% in PROVE 2. The result of statistical testing is often defined in terms of a "p-value," with a level of 0.05 or less considered to be a statistically significant difference, which means the result is unlikely due to chance. The difference between the RVR rates in the telaprevir arms and the control arms was statistically significant, with a p-value of less than 0.001 in both the PROVE 1 and the PROVE 2 trials.

For those patients in the 24-week telaprevir treatment arms in PROVE 1 and PROVE 2 who achieved RVR, completed 24 weeks of telaprevir-based therapy and for whom data was available for analysis, 91% achieved SVR. We believe these data demonstrate a correlation between RVR and SVR in a 24-week telaprevir-based treatment regimen.

### Viral Breakthrough

In PROVE 1 and PROVE 2, 90% of patients receiving telaprevir in combination with peg-IFN and RBV achieved undetectable HCV RNA on at least one occasion during treatment. The remaining

10% of patients either withdrew from treatment with detectable HCV RNA levels or did not achieve undetectable HCV RNA levels and had HCV RNA levels that increased at least 10-fold from their lowest levels while on treatment.

We consider a patient who first achieves undetectable viral levels—less than 10 IU/mL—and whose viral levels increase to more than 100 IU/mL during treatment to have experienced viral breakthrough. In addition, patients who do not achieve undetectable HCV RNA levels are considered to have experienced viral breakthrough if the patient's HCV RNA level increases by more than 10-fold from its lowest level during therapy. Viral breakthrough is associated with selection of viral variants resistant to the drug regimen being evaluated. In PROVE 1 and PROVE 2 combined, 5% of patients in the telaprevir-based treatment arms experienced viral breakthrough, as described below, in the first 12 weeks of treatment—7% in PROVE 1 and 2% in PROVE 2. Most viral breakthroughs occurred in the first month of treatment, and generally were associated with low interferon blood levels. Less than 2% of patients in the telaprevir-based treatment arms who achieved undetectable HCV RNA levels experienced viral breakthrough while on treatment.

### **Viral Relapse**

A patient who has undetectable HCV RNA at the end of treatment, but whose HCV RNA levels increase and are detectable during the post-treatment follow-up period, is said to have experienced viral relapse. Of the patients who experienced viral relapse in our trials that, most relapsed during the first 12 weeks of follow-up. In PROVE 1 and PROVE 2, the relapse rate for patients who received 24 weeks of telaprevir-based treatment was 9%—2% in PROVE 1 and 14% in PROVE 2. However, the criteria for stopping all treatment after 24 weeks were different in PROVE 2 than in PROVE 1, and some patients who did not achieve an RVR at 4 weeks of treatment are included in the 24-week telaprevir-based treatment group of PROVE 2. If those patients who did not achieve RVR at 4 weeks of treatment are excluded from the calculation of the PROVE 2 viral relapse rate, the resulting relapse rate for patients who stopped all treatment after 24 weeks in that trial is 7%. The rate of viral relapse, measured at 12 weeks after completion of treatment, in the PROVE 1 48-week telaprevir-based treatment arm was 6%. The relapse rate in the PROVE 1 standard-of-care control arm, measured at 12 weeks after completion of treatment, was 23%.

#### *Additional Clinical Trials for Telaprevir*

In addition to the telaprevir clinical trials that we are conducting, Tibotec is conducting:

- a Phase 2 clinical trial in Europe to evaluate twice-daily, or BID, dosing of telaprevir in combination with peg-IFN and RBV;
- a Phase 2 viral kinetics clinical trial in Europe to evaluate telaprevir in patients infected with genotype 2 and genotype 3 HCV; and
- a Phase 2 viral kinetics clinical trial in Europe to evaluate telaprevir in patients infected with genotype 4 HCV.

Mitsubishi Tanabe is also conducting a Phase 1 clinical trial in Japan to assess the safety and pharmacokinetics of telaprevir administered as a monotherapy in patients with genotype 1 HCV.

### **Corporate Information**

We were incorporated in Massachusetts in 1989. Our principal executive offices are located at 130 Waverly Street, Cambridge, Massachusetts 02139, and we have research sites located in San Diego, California, Iowa City, Iowa and Milton Park, U.K. Our telephone number is (617) 444-6100, and our internet address is [www.vrtx.com](http://www.vrtx.com). The information found on our website and on websites linked from it are not incorporated into or a part of this prospectus.

## The Offering

The following is a brief summary of the terms of this offering. For a complete description of the terms of the notes, see "Description of the Notes" in this prospectus.

Issuer	Vertex Pharmaceuticals Incorporated
Notes to be offered	\$250 million aggregate principal amount, or \$287.5 million if the underwriters exercise their option to purchase additional notes in full, of convertible senior subordinated notes due 2013.
Maturity date	February , 2013.
Interest and payment dates	% per year on the outstanding principal amount, payable semiannually in arrears in cash on February and August of each year, beginning August , 2008.
Conversion rights	The notes are convertible, at the option of the holder, at any time on or prior to the close of business on the second business day immediately preceding the stated maturity date, into shares of our common stock at a conversion rate of shares per \$1,000 principal amount of notes, which is equal to a conversion price of approximately \$ per share. The conversion rate is subject to adjustment in certain circumstances.
Redemption at our option	On or after February , 2010, we may redeem the notes, in whole or in part, at our option at any time or from time to time at the redemption prices set forth herein, plus accrued and unpaid interest thereon (if any) to, but excluding, the redemption date.
Make-whole premium upon a fundamental change	<p>If a fundamental change (as described in this prospectus) described under clauses (1) or (2) of the definition of a change in control described below under "Description of the Notes—Repurchase at Option of Holders Upon a Fundamental Change," we will pay a make-whole premium on notes converted in connection with a fundamental change by increasing the conversion rate on such notes.</p> <p>The amount of the make-whole premium, if any, will be based on our common stock price and the effective date of the fundamental change. A description of how the make-whole premium will be determined and a table showing the make-whole premium that would apply at various common stock prices and fundamental change effective dates is set forth under "Description of the Notes—Make-Whole Premium Upon a Fundamental Change."</p>
Repurchase of notes by us at the option of the holders upon a fundamental change	If we undergo a fundamental change, except in certain circumstances, each holder will have the option to require us to repurchase all or any portion of such holder's notes. The fundamental change repurchase price will be 100% of the principal amount of the notes to be repurchased plus accrued and unpaid interest, if any, to, but excluding, the repurchase date.

Ranking	The notes will be unsecured and rank subordinated to future senior debt, equally with any future senior subordinated debt, and senior to any future subordinated debt. Because the notes will be subordinated to any future senior debt, in the event of bankruptcy, liquidation, dissolution or acceleration of payment on the senior debt, holders of the notes will not receive any payment until holders of the senior debt have been paid in full. The indenture under which the notes will be issued will not prevent us or our subsidiaries from incurring additional senior debt or other obligations.
Use of Proceeds	We intend to use the net proceeds from this offering, together with the net proceeds from the concurrent common stock offering, for general corporate purposes, which we expect to include investment in the development and commercialization of telaprevir and the development of our other drug candidates, research expenditures, manufacture and supply of drug substances, repayment of a development loan from a collaborator, and which may include capital expenditures, investments and potentially acquisitions. See "Use of Proceeds."
Denomination	The notes will be issued in minimum denominations of \$1,000 and any integral multiple of \$1,000.
Trading	The notes will not be listed on any securities exchange or included in any automated quotation system. The notes will be new securities for which there is currently no public market.
Nasdaq symbol for common stock	Our common stock is listed on the Nasdaq Global Select Market under the symbol "VRTX."
Risk Factors	See "Risk Factors" and other information included in this prospectus and the documents incorporated by reference in this prospectus for a discussion of factors you should carefully consider before deciding to invest in our notes.
Concurrent common stock offering	Concurrently with this offering, we are offering 6,000,000 shares of our common stock (or a total of 6,900,000 shares if the underwriters exercise their overallocation option in full) pursuant to a separate registration statement and prospectus. This note offering is not contingent upon the common stock offering and the common stock offering is not contingent upon this note offering.

## Summary Consolidated Financial Data

The following unaudited summary consolidated financial data for each of the three years in the period ended December 31, 2007 are derived from our audited consolidated financial statements. These data should be read in conjunction with our audited consolidated financial statements and related notes and "Management's Discussion and Analysis of Financial Condition and Results of Operations" that are incorporated by reference into this prospectus from our Annual Report on Form 10-K for the year ended December 31, 2007, as filed with the SEC on February 11, 2008.

	Year Ended December 31,		
	2007	2006	2005
(In thousands, except per share amounts)			
<b>Consolidated Statements of Operations Data:</b>			
Revenues:			
Royalties	\$ 47,973	\$ 41,208	\$ 32,829
Collaborative and other research and development revenues	151,039	175,148	128,061
<b>Total revenues</b>	<b>199,012</b>	<b>216,356</b>	<b>160,890</b>
Costs and expenses:			
Royalty payments	13,904	12,170	10,098
Research and development expenses	513,054	371,713	248,540
Sales, general and administrative expenses	84,727	57,860	43,990
Restructuring expense	7,119	3,651	8,134
<b>Total costs and expenses</b>	<b>618,804</b>	<b>445,394</b>	<b>310,762</b>
Loss from operations	(419,792)	(229,038)	(149,872)
Other income/(expense)	28,513	21,101	(53,545)
Cumulative effect of a change in accounting principle—SFAS 123(R)	—	1,046	—
<b>Net loss</b>	<b>\$ (391,279)</b>	<b>\$ (206,891)</b>	<b>\$ (203,417)</b>
Basic and diluted net loss per common share	\$ (3.03)	\$ (1.83)	\$ (2.28)
Basic and diluted weighted average number of common shares outstanding	128,986	113,221	89,241

### December 31, 2007

	December 31, 2007	
	Actual	As Adjusted(1)
(In thousands)		
<b>Consolidated Balance Sheet Data:</b>		
Cash, cash equivalents and marketable securities	\$ 467,796	\$ 792,262
Other current assets	35,980	37,655
Restricted cash	30,258	30,258
Property and equipment, net	66,509	66,509
Other non-current assets	934	7,634
<b>Total assets</b>	<b>\$ 601,477</b>	<b>\$ 934,318</b>
Deferred revenues	\$ 126,745	\$ 126,745
Accrued restructuring expense	35,292	35,292
Other liabilities	148,148	148,148
Convertible Subordinated Notes (due 2013)	—	250,000
Collaborator development loan (due 2008)	19,997	—
Stockholders' equity	271,295	374,133
<b>Total liabilities and stockholders' equity</b>	<b>\$ 601,477</b>	<b>\$ 934,318</b>

- (1) Reflects the sale of \$250.0 million in aggregate principal amount of notes offered hereby, after deducting the estimated underwriting discount and offering expenses, the concurrent sale of 6,000,000 shares of common stock at an assumed offering price of \$18.10 per share, after deducting estimated underwriting discount and offering expenses and the use of a portion of the net proceeds to repay a \$20.0 million collaborator development loan.

## RISK FACTORS

*Investing in the notes involves a high degree of risk. You should carefully consider the following risk factors and all other information contained in and incorporated by reference into this prospectus before purchasing the notes. The risks and uncertainties described below are not the only ones facing us. Additional risks and uncertainties that we are unaware of, or that we currently deem immaterial, also may become important factors that affect us. If any of such risks or the risks described below occur, our business, financial condition or results of operations could be materially and adversely affected. In that case, the value of the notes could decline, and you may lose some or all of your investment.*

### Risks Related to Our Business

#### **WE EXPECT TO INCUR FUTURE LOSSES, AND WE MAY NEVER BECOME PROFITABLE.**

We have incurred significant operating losses each year since our inception, including net losses of \$391.3 million, \$206.9 million and \$203.4 million during 2007, 2006 and 2005, respectively, and expect to incur a significant operating loss in 2008. We believe that operating losses will continue beyond 2008, because we are planning to make significant investments in research and development and in building commercial supply of telaprevir to prepare for the potential launch of telaprevir, and because we will incur significant selling, general and administrative expenses in the course of researching, developing and commercializing our drug candidates, particularly telaprevir. We are investing significant research and development resources across a relatively broad array of therapeutic areas, due in part to the high risks associated with the biotechnology and pharmaceutical business and the relatively high potential for failure of any specific effort. This diversification strategy requires more significant financial resources than would be required if we pursued a more limited approach or focused exclusively on telaprevir. In particular, in 2008 we expect to invest significant resources in order to advance the development of VX-770, VX-809, VX-500, VX-813 and VX-509, and to start clinical trials of one or more additional compounds that are currently emerging from our research activities. Our net losses have had and will continue to have an adverse effect on, among other things, our stockholders' equity, total assets and working capital. We expect that losses will fluctuate from quarter to quarter and year to year, and that such fluctuations may be substantial. We cannot predict when we will become profitable, if at all.

#### **WE DEPEND HEAVILY ON THE SUCCESS OF OUR LEAD DRUG CANDIDATE, TELAPREVIR, WHICH IS STILL UNDER DEVELOPMENT. IF WE ARE UNABLE TO COMMERCIALIZE TELAPREVIR, OR EXPERIENCE DELAYS IN DOING SO, WE COULD BE REQUIRED TO SEEK ADDITIONAL FINANCING AND OUR BUSINESS WILL BE MATERIALLY HARMED.**

We are investing a significant portion of our time, personnel and financial resources in the development of telaprevir, and we expect to commence a Phase 3 clinical trial of telaprevir in March 2008. The clinical development and commercial success of telaprevir will depend on several factors, including the following:

- successful completion and favorable outcomes of clinical trials;
- ongoing discussions with the FDA and comparable foreign authorities regarding the scope and design of our clinical trials, the quality of our manufacturing process for telaprevir and our clinical trial results;
- receipt and timing of marketing approvals for telaprevir from the FDA and similar foreign regulatory authorities;
- receipt and timing of marketing approvals from the FDA and similar foreign regulatory authorities for products being developed for the treatment of HCV by our competitors;

- our ability to conduct clinical trials with respect to telaprevir in a timely manner to support a potential application for marketing approval;
- establishing and maintaining commercial manufacturing arrangements for telaprevir with third-party manufacturers that are subject to extensive regulation by the FDA;
- launching commercial sales of telaprevir by us and our collaborators;
- the efficacy and other characteristics of telaprevir relative to existing and future treatments for HCV; and
- our ability to increase awareness of the benefits of early treatment for HCV if telaprevir is approved;
- acceptance of telaprevir, if approved, in the medical community and with third-party payors.

If the data from our ongoing clinical trials or non-clinical studies regarding the safety or efficacy of telaprevir are not favorable, we may be forced to delay or terminate the clinical development of telaprevir, which would materially harm our business. Further, even if we gain marketing approvals from the FDA and comparable foreign regulatory authorities in a timely manner, we cannot be sure that telaprevir will be commercially successful in the pharmaceutical market. Even if we obtain marketing approval and successfully commercialized telaprevir, we are investing significant amounts of cash in the development and commercialization process, and any significant delay in realizing a return on the investment would require us to engage in additional financing activities to recoup that investment, which may not be available on satisfactory terms, if at all. If the results of clinical trials of telaprevir, the anticipated or actual timing of marketing approvals for telaprevir, or the market acceptance of telaprevir, if approved, do not meet the expectations of investors or public market analysts, the market price of our common stock would likely decline.

**WE NEED TO RAISE ADDITIONAL CAPITAL THAT MAY NOT BE AVAILABLE.**

We expect to incur substantial research and development and related supporting expenses as we design and develop existing and future compounds, undertake clinical trials of drug candidates resulting from such compounds, and build our drug supply, regulatory, development and commercial capabilities. We also expect to incur substantial administrative and commercialization expenses in the future. In particular, we expect the continuing development and commercialization of telaprevir to require additional capital beyond our current resources including the net proceeds of this offering and the concurrent common stock offering. We are making significant capital investments in building our drug product supply chain and creating pre-launch inventory and may need to make additional significant capital investments for one or more of our other drug candidates. We anticipate that we will finance these substantial cash needs with:

- public offerings or private placements of our debt or equity securities or other methods of financing;
- cash received from our existing collaborative agreements;
- cash received from new collaborative agreements or from the sale of existing assets, such as royalty streams from drugs and drug candidates being developed and commercialized by third parties;
- existing cash reserves, together with interest earned on those reserves; or
- future product sales to the extent that we market drugs directly.

While we believe that our current cash, cash equivalents and marketable securities, together with amounts we expect to receive from our collaborators under existing contractual agreements, would be sufficient to fund our operations beyond 2008, we will need to raise additional capital after this offering and the concurrent common stock offering through public offerings or private placements of



our debt or equity securities, agreements with third-parties with respect to certain of our assets or through other methods of financing. Any such capital transactions may or may not be similar to transactions in which we have engaged in the past. Any equity financings could result in dilution to our then-existing security holders. Any debt financing may be on terms that, among other things, restrict our ability to pay interest and dividends—although we do not intend to pay dividends for the foreseeable future. If adequate funds are not available on acceptable terms, or at all, we may be required to curtail significantly or discontinue one or more of our research, drug discovery or development programs, including clinical trials, incur significant cash exit costs, or attempt to obtain funds through arrangements with collaborators or others that may require us to relinquish rights to certain of our technologies, drugs or drug candidates. Additional financing may not be available on acceptable terms, if at all.

**MANY OF OUR DRUG CANDIDATES ARE STILL IN THE EARLY STAGES OF DEVELOPMENT, AND ALL OF OUR DRUG CANDIDATES REMAIN SUBJECT TO CLINICAL TESTING AND REGULATORY APPROVAL. IF WE ARE UNABLE TO SUCCESSFULLY DEVELOP AND TEST OUR DRUG CANDIDATES, WE WILL NOT BE SUCCESSFUL.**

The success of our business depends primarily upon our ability, and our collaborators' ability, to develop and commercialize our drug candidates, including telaprevir, successfully. Due to the development efforts of our competitors, in order to develop a successful franchise in a therapeutic area it is often necessary to develop follow-on compounds and/or develop new combination therapies. Our drug candidates are in various stages of development and must satisfy rigorous standards of safety and efficacy before they can be approved by the FDA or other regulatory authorities for sale. To satisfy these standards, we and/or our collaborators must allocate our resources among our various development programs and must engage in expensive and lengthy testing of our drug candidates. These discovery and development efforts for a new pharmaceutical product, including follow-on compounds, are lengthy and resource-intensive, and may take 10 to 15 years or more. Despite our efforts, our drug candidates may not:

- offer therapeutic or other improvement over existing competitive drugs;
- be proven safe and effective in clinical trials;
- meet applicable regulatory standards;
- be capable of being produced in commercial quantities at acceptable costs; or
- if approved for commercial sale, be successfully commercialized.

Positive results in preclinical studies of a drug candidate may not be predictive of similar results in humans during clinical trials, and promising results from earlier clinical trials of a drug candidate may not be replicated in later clinical trials. Findings, including toxicology findings, in nonclinical studies conducted concurrently with clinical trials could result in abrupt changes in our development activities, including the possible cessation of development activities associated with a drug candidate. Furthermore, results from our clinical trials may not meet the level of statistical significance required by the FDA or other regulatory authorities for approval of a drug candidate.

We and many other companies in the pharmaceutical and biotechnology industries have suffered significant setbacks in late-stage clinical trials even after achieving promising results in early-stage development. Accordingly, the results from the completed preclinical studies and clinical trials and ongoing clinical trials for our drug candidates may not be predictive of the results we may obtain in later stage trials, and may not be predictive of the likelihood of approval of a drug candidate for commercial sale. In addition, from time to time, we report interim data from our clinical trials, including the PROVE 1 and PROVE 2 clinical trials of telaprevir. Interim data is subject to change as final data are confirmed, and there can be no assurances that interim data will be confirmed upon the analysis of final data.

**IF WE ARE UNABLE TO OBTAIN UNITED STATES AND/OR FOREIGN REGULATORY APPROVAL, WE WILL BE UNABLE TO COMMERCIALIZE OUR DRUG CANDIDATES.**

Our drug candidates are subject to extensive governmental regulations relating to their development, clinical trials, manufacturing and commercialization. Rigorous preclinical testing and clinical trials and an extensive regulatory approval process are required in the United States and in most other countries prior to the commercial sale of our drug candidates. Satisfaction of these and other regulatory requirements is costly, time consuming, uncertain and subject to unanticipated delays. It is possible that none of the drug candidates we are developing independently, or in collaboration with others, will be approved for marketing.

We have limited experience in conducting and managing the late-stage clinical trials necessary to obtain regulatory approvals, including approval by the FDA. The time required to complete clinical trials and to satisfy the FDA and other countries' regulatory review processes is uncertain and typically takes many years. Our analysis of data obtained from preclinical and clinical activities is subject to confirmation and interpretation by regulatory authorities, which could delay, limit or prevent regulatory approval. We may also encounter unanticipated delays or increased costs due to government regulation from future legislation or administrative action or changes in FDA policy during the period of drug development, clinical trials and FDA regulatory review.

Any delay in obtaining or failure to obtain required approvals could materially adversely affect our ability to successfully commercialize any drug candidate. Furthermore, any regulatory approval to market a drug may be subject to unexpected limitations on the indicated uses for which we may market the drug. These limitations may limit the size of the market for the drug.

We are also subject to numerous foreign regulatory requirements governing the conduct of clinical trials, manufacturing and marketing authorization, pricing and third-party reimbursement. The foreign regulatory approval process includes all of the risks associated with the FDA approval process described above, as well as risks attributable to the satisfaction of foreign requirements. Approval by the FDA does not ensure approval by regulatory authorities outside the United States. Foreign jurisdictions may have different approval procedures than those required by the FDA and may impose additional testing requirements for our drug candidates.

**IF CLINICAL TRIALS FOR OUR DRUG CANDIDATES ARE PROLONGED OR DELAYED, WE MAY BE UNABLE TO COMMERCIALIZE OUR DRUG CANDIDATES ON A TIMELY BASIS, WHICH WOULD REQUIRE US TO INCUR ADDITIONAL COSTS, WOULD DELAY OUR RECEIPT OF ANY PRODUCT REVENUE AND COULD HARM OUR COMPETITIVE POSITION.**

We cannot predict whether or not we will encounter problems with any of our completed, ongoing or planned clinical trials that will cause us or regulatory authorities to delay or suspend clinical trials, or delay the analysis of data from our completed or ongoing clinical trials. Any of the following could delay the clinical development of our drug candidates:

- ongoing discussions with the FDA or comparable foreign authorities regarding the scope or design of our clinical trials and the number of clinical trials we must conduct;
- delays in receiving or the inability to obtain required approvals from IRBs at one or more of the institutions at which a clinical trial is conducted or other reviewing entities at clinical sites selected for participation in our clinical trials;
- delays in enrolling volunteers or patients into clinical trials;
- a lower than anticipated retention rate of volunteers or patients in clinical trials;
- the need to repeat clinical trials as a result of inconclusive results or unforeseen complications in testing;

- inadequate supply or deficient quality of drug candidate materials or other materials necessary for the conduct of our clinical trials;
- unfavorable FDA inspection and review of a manufacturing facility for a drug candidate or its relevant manufacturing records or a clinical trial site or records of any clinical or preclinical investigation;
- serious and unexpected drug-related side effects experienced by participants in our clinical trials; or
- the placement by the FDA of a clinical hold on a trial.

Our ability to enroll patients in our clinical trials in sufficient numbers and on a timely basis will be subject to a number of factors, including the size of the patient population, the nature of the protocol, the proximity of patients to clinical sites, the availability of effective treatments for the relevant disease, the number of other clinical trials competing for patients in the same indication and the eligibility criteria for the clinical trial. In addition, subjects may drop out of our clinical trials or may be lost to follow-up medical evaluation after treatment ends, and this could possibly impair the validity or statistical significance of the trials. Delays in patient enrollment or unforeseen drop-out rates may result in increased costs and longer development times. While all or a portion of these additional costs may be covered by payments under our collaborative agreements, we bear all of the costs for our development candidates for which we have no financial support from a collaborator.

We, our collaborators, the FDA or other applicable regulatory authorities may suspend clinical trials of a drug candidate at any time if we or they believe the subjects or patients participating in such clinical trials are being exposed to unacceptable health risks or for other reasons. In November 2007, Merck suspended enrollment in clinical trials of MK-0457 (VX-680), pending a full analysis of all efficacy and safety data of MK-0457 (VX-680). Any such suspension could materially adversely impact the development of a particular drug candidate and our business.

In addition, it is impossible to predict whether legislative changes will be enacted, or whether FDA regulations, guidance or interpretations will be changed, or what the impact of such changes, if any, may be. If we experience any such problems, we may not have the financial resources to continue development of the drug candidate that is affected or the development of any of our other drug candidates.

**IF OUR COMPETITORS BRING SUPERIOR DRUGS TO MARKET OR BRING THEIR DRUGS TO MARKET BEFORE WE DO, WE MAY BE UNABLE TO FIND A MARKET FOR OUR DRUG CANDIDATES.**

Our drug candidates in development may not be able to compete effectively with drugs that are currently on the market or new drugs that may be developed by others. No assurance can be given that telaprevir will be approved for marketing prior to competing therapies, or at all. There are many other companies developing drugs for the same indications that we are pursuing in development in particular for the treatment of HCV infection. In order to compete successfully in these areas, we must demonstrate improved safety, efficacy and ease of manufacturing and gain market acceptance over competing drugs that may receive regulatory approval before or after our drug candidates, and over those that currently are marketed. Many of our competitors, including major pharmaceutical companies such as GlaxoSmithKline, Wyeth, Pfizer, Roche, Amgen, Novartis, Johnson & Johnson and Schering-Plough possess substantially greater financial, technical and human resources than we possess. In addition, many of our competitors have significantly greater experience than we have in conducting preclinical and nonclinical testing and human clinical trials of drug candidates, scaling up manufacturing operations and obtaining regulatory approvals of drugs and manufacturing facilities. Accordingly, our competitors may succeed in obtaining regulatory approval for drugs more rapidly than we do. If we obtain regulatory approval and launch commercial sales of our drug candidates, we also

will compete with respect to manufacturing efficiency and sales and marketing capabilities, areas in which we currently have limited experience.

We believe that the first company that is able to successfully develop and obtain marketing approval for a new treatment for chronic HCV infection with significant advantages over the current standard of care may have a significant competitive advantage over later-approved therapies for HCV infection. We are aware of a number of companies that are developing new treatments for HCV infection including protease inhibitor compounds like telaprevir, polymerase inhibitor compounds and advanced interferons. Even if we are able to obtain marketing approval for telaprevir, it is possible that one or more of these therapies could be approved prior to or shortly after we obtain such approval for telaprevir, which we believe could negatively impact telaprevir sales.

**IF OUR PROCESSES AND SYSTEMS ARE NOT COMPLIANT WITH REGULATORY REQUIREMENTS, WE COULD BE SUBJECT TO DELAYS IN FILING NDAs OR RESTRICTIONS ON MARKETING OF DRUGS AFTER THEY HAVE BEEN APPROVED.**

We currently are developing drug candidates for regulatory approval for the first time since our inception, and are in the process of implementing regulated processes and systems required to obtain and maintain regulatory approval for our drug candidates. Certain of these processes and systems for conducting clinical trials and manufacturing material must be compliant with regulatory requirements before we can apply for regulatory approval for our drug candidates. These processes and systems will be subject to continual review and periodic inspection by the FDA and other regulatory bodies. If we are unable to achieve compliance in a timely fashion, or if compliance issues are identified at any point in the development and approval process, we may experience delays in filing for regulatory approval for our drug candidates, or delays in obtaining regulatory approval after filing. In addition, any later discovery of previously unknown problems or safety issues with approved drugs or manufacturing processes, or failure to comply with regulatory requirements, may result in restrictions on such drugs or manufacturing processes, withdrawal of drugs from the market, the imposition of civil or criminal penalties or a refusal by the FDA and/or other regulatory bodies to approve pending applications for marketing approval of new drugs or supplements to approved applications, any of which could have a material adverse effect on our business. In addition, we are a party to agreements that transfer responsibility for complying with specified regulatory requirements, such as filing and maintenance of marketing authorizations and safety reporting or compliance with manufacturing requirements, to our collaborators and third-party manufacturers. If our collaborators or third-party manufacturers do not fulfill these regulatory obligations, any drugs for which we or they obtain approval may be withdrawn from the market, which would have a material adverse effect on our business.

**IF WE OBTAIN REGULATORY APPROVALS, OUR DRUG CANDIDATES WILL BE SUBJECT TO ONGOING REGULATORY REVIEW. IF WE FAIL TO COMPLY WITH CONTINUING UNITED STATES AND APPLICABLE FOREIGN REGULATIONS, WE COULD LOSE THOSE APPROVALS, AND OUR BUSINESS WOULD BE SERIOUSLY HARMED.**

If we receive regulatory approval of any drug candidates that we are developing, we will be subject to continuing regulatory review, including the review of clinical results that are reported after our drug candidates become commercially available, approved drugs. Since drugs are more widely used by patients once approval has been obtained, side effects and other problems may be observed after approval that were not seen or anticipated during pre-approval clinical trials. In addition, the manufacturers and the manufacturing facilities we engage to make any of our drug candidates will also be subject to periodic review and inspection by the FDA. The subsequent discovery of previously unknown problems with the drug, manufacturers or manufacturing facilities may result in restrictions on the drug, manufacturers or facilities, including withdrawal of the drug from the market or our inability to use the facilities to make our drug. If we fail to comply with applicable continuing

regulatory requirements, we may be subject to fines, suspension or withdrawal of regulatory approval, product recalls and seizures, operating restrictions and criminal prosecutions.

**OUR DRUG DEVELOPMENT EFFORTS ARE DATA-DRIVEN AND THEREFORE POTENTIALLY SUBJECT TO ABRUPT CHANGES IN EXPECTED OUTCOMES.**

Small molecule drug discovery and development involve, initially, the identification of chemical compounds that may have promise as treatments for specific diseases. Once identified as drug candidates, compounds are subjected to years of testing in a laboratory setting, in animals and in humans. Our ultimate objective is to determine whether the drug candidates have physical characteristics, both intrinsically and in animal and human systems, and a toxicological profile, that are compatible with clinical and commercial success in treatment of the disease being targeted. Throughout this process, experiments are conducted and data are gathered that could reinforce a decision to move to the next step in the investigation process for a particular drug candidate, could result in uncertainty over the proper course to pursue, or could result in the termination of further drug development efforts with respect to the compound being evaluated. We monitor the results of our discovery research and our nonclinical studies and clinical trials and regularly evaluate and re-evaluate our portfolio investments with the objective of balancing risk and potential return in view of new data and scientific, business and commercial insights. This process can result in relatively abrupt changes in focus and priority as new information comes to light and we gain additional insights into ongoing programs and potential new programs.

**WE DEPEND ON OUR COLLABORATORS TO WORK WITH US TO DEVELOP, MANUFACTURE AND COMMERCIALIZE MANY OF OUR DRUG CANDIDATES.**

We have granted development and commercialization rights to telaprevir to Janssen (worldwide other than North America and Far East) and to Mitsubishi Tanabe (Far East). We expect to receive significant financial support under our Janssen collaboration agreement, as well as meaningful technical and manufacturing contributions to the telaprevir program. The success of some of our key in-house programs, such as for telaprevir, is dependent upon the continued financial and other support that our collaborators have agreed to provide.

For some drug candidates on which we are not currently focusing our development efforts, we have granted worldwide rights to a collaborator, as in our collaborations with Merck and Avalon.

The success of our collaborations depends on the efforts and activities of our collaborators. Each of our collaborators has significant discretion in determining the efforts and resources that it will apply to the collaboration. Our existing collaborations may not be scientifically or commercially successful, and we may fail in our attempts to establish further collaborations to develop our drug candidates on acceptable terms.

The risks that we face in connection with these existing and any future collaborations include the following:

- Our collaboration agreements are subject to termination under various circumstances, including, as in the case of our agreements with Janssen and Merck, termination without cause. Any such termination could have an adverse material effect on our financial condition and/or delay the development and commercial sale of our drug candidates, including telaprevir.
- Our collaborators may change the focus of their development and commercialization efforts. Pharmaceutical and biotechnology companies historically have re-evaluated their development and commercialization priorities following mergers and consolidations, which have been common in recent years in these industries. The ability of some of our drug

candidates to reach their potential could be limited if our collaborators decrease or fail to increase development or commercialization efforts related to those drug candidates.

- Our collaboration agreements may have the effect of limiting the areas of research and development that we may pursue, either alone or in collaboration with third parties.
- Our collaborators may develop and commercialize, either alone or with others, drugs that are similar to or competitive with the drugs or drug candidates that are the subject of the collaboration with us.

**IF WE ARE UNABLE TO ATTRACT AND RETAIN COLLABORATORS FOR THE DEVELOPMENT AND COMMERCIALIZATION OF OUR DRUGS AND DRUG CANDIDATES, WE MAY NOT BE ABLE TO FUND OUR DEVELOPMENT AND COMMERCIALIZATION ACTIVITIES.**

Our collaborators have agreed to fund portions of our pharmaceutical development programs and/or to conduct the development and commercialization of specified drug candidates and, if they are approved, drugs. In exchange, we have given them technology, sales and marketing rights relating to those drugs and drug candidates. Some of our corporate collaborators have rights to control the planning and execution of drug development and clinical programs including for our aurora kinase inhibitor drug candidates, including MK-0457 (VX-680) and VX-689, and AVN-944 (VX-944). Our collaborators may exercise their control rights in ways that may negatively affect the timing and success of those programs. Our collaborations are subject to termination rights by the collaborators. If any of our collaborators were to terminate its relationship with us, or fail to meet its contractual obligations, that action could have a material adverse effect on our ability to develop, manufacture and market any drug candidates being developed under the collaboration. We expect to seek additional collaborative arrangements, which may not be available to us on favorable terms, or at all, to develop and commercialize our drug candidates in the future. We plan to seek a collaborator for our oral MAP kinase inhibitor VX-702 for the treatment of rheumatoid arthritis and other inflammatory diseases. No assurance can be given that these efforts will be successful. Even if we are able to establish acceptable collaborative arrangements in the future, these collaborations may not be successful.

**OUR INVESTMENT IN THE CLINICAL DEVELOPMENT AND MANUFACTURE OF A COMMERCIAL SUPPLY OF TELAPREVIR MAY NOT RESULT IN ANY BENEFIT TO US IF TELAPREVIR IS NOT APPROVED FOR COMMERCIAL SALE.**

We are investing significant resources in the clinical development of telaprevir. In 2006 and 2007, we increased our investment in telaprevir to support our Phase 2b clinical development program and in 2008 we will be investing in our global registration program, including our Phase 3 clinical trial. Telaprevir is the first drug candidate for which we expect to perform all activities related to late stage development, drug supply, registration and commercialization in a major market. We are planning for and investing significant resources now in preparation for application for marketing approval, commercial supply and sales and marketing. We also expect to incur significant costs in 2008 to manufacture registration batches and invest in telaprevir commercial supply. Our engagement in these resource-intensive activities could make it more difficult for us to maintain our portfolio focus, and puts significant investment at risk if we do not obtain regulatory approval and successfully commercialize telaprevir in North America. There is no assurance that our development of telaprevir will lead successfully to regulatory approval, or that obtaining regulatory approval will lead to commercial success. If telaprevir is not approved for commercial sale or if its development is delayed for any reason, our full investment in telaprevir may be at risk, we may face significant costs to dispose of unusable inventory, and our business and financial condition could be materially adversely affected.

**WE DEPEND ON THIRD-PARTY MANUFACTURERS, INCLUDING SOLE SOURCE SUPPLIERS, TO MANUFACTURE CLINICAL TRIAL MATERIALS FOR CLINICAL TRIALS AND EXPECT TO CONTINUE TO RELY ON THEM TO MEET OUR COMMERCIAL SUPPLY NEEDS FOR ANY DRUG CANDIDATE THAT IS APPROVED FOR SALE. WE MAY NOT BE ABLE TO ESTABLISH OR MAINTAIN THESE RELATIONSHIPS AND COULD EXPERIENCE DISRUPTIONS OUTSIDE OF OUR CONTROL.**

We currently are relying on a worldwide network of third-party manufacturers to manufacture and distribute our drug candidates for clinical trials, and we expect that we will continue to do so to meet our commercial supply needs for these drugs, including telaprevir, if they are approved for sale. As a result of our reliance on these third-party manufacturers and suppliers, including sole source suppliers of certain components of our drug candidates and drugs, we may be subject to significant supply disruptions outside of our control.

We will be responsible for supplying telaprevir for sale in North America if we are successful in obtaining marketing approval. Establishing the commercial supply chain for telaprevir is a multi-step international endeavor involving the purchase of several raw materials, the application of certain manufacturing processes requiring significant lead times, the conversion of active pharmaceutical ingredient to tablet form and the packaging of tablets for distribution. We expect to source raw materials, drug substance and drug product, including finished packaging, from third parties located in China, the European Union, Japan and the United States, and we currently are establishing and expanding those third-party relationships. Establishing and providing quality assurance for this global supply chain requires a significant financial commitment, experienced personnel and the creation or expansion of numerous third-party contractual relationships. While we believe that there are multiple third parties that are capable of providing the materials and services that we need in order to manufacture and distribute telaprevir, if it is approved for sale, some of these services are in high demand and capacity is constrained. Because of the significant lead times involved in the manufacture and supply of telaprevir, we may have less flexibility to adjust our supply in response to changes in demand than if we had shorter lead times. There can be no assurance that we will be able to establish and maintain this commercial supply chain on commercially reasonable terms in order to support a timely launch of telaprevir or at all.

We plan to identify and enter into commercial relationships with multiple third-party manufacturers in order to reduce the risk of supply chain disruption by limiting our reliance on any one manufacturer. In addition, we are in the process of transferring technical information regarding the manufacture of telaprevir to Janssen so that Janssen will be able to manufacture telaprevir, if approved, for sale in Janssen's territories and as a secondary source for us. There is no assurance, however, that we will be able to establish second sources for each stage of manufacturing of telaprevir, or any other drug or drug candidate, or that any second source will be able to produce sufficient quantities in the required timeframe to avoid a supply chain disruption if there is a problem with one of our suppliers.

Even if we successfully establish arrangements with third-party manufacturers, supply disruptions may result from a number of factors including shortages in product raw materials, labor or technical difficulties, regulatory inspections or restrictions, shipping or customs delays or any other performance failure by any third-party manufacturer on which we rely.

Any supply disruptions could impact the timing of our clinical trials and the commercial launch of any approved pharmaceutical drugs. Furthermore, we may be required to modify our production methods to permit us to economically manufacture our drugs for commercial launch and sale. These modifications may require us to reevaluate our resources and the resources of our third-party manufacturers, which could result in abrupt changes in our production methods and supplies. Upon approval of a pharmaceutical drug for sale, if any, we similarly may be at risk of supply chain disruption for our commercial drug supply. In the course of its services, a contract manufacturer may develop process technology related to the manufacture of our drug candidates that the manufacturer

owns, either independently or jointly with us. This would increase our reliance on that manufacturer or require us to obtain a license from that manufacturer in order to have our products manufactured by other suppliers utilizing the same process.

**WE RELY ON THIRD PARTIES TO CONDUCT OUR CLINICAL TRIALS, AND THOSE THIRD PARTIES MAY NOT PERFORM SATISFACTORILY, INCLUDING FAILING TO MEET ESTABLISHED DEADLINES FOR THE COMPLETION OF SUCH TRIALS.**

We do not have the ability to independently conduct clinical trials for our drug candidates, and we rely on third parties such as contract research organizations, medical institutions and clinical investigators to enroll qualified patients and conduct our clinical trials. Our reliance on these third parties for clinical development activities reduces our control over these activities. Accordingly, these third-party contractors may not complete activities on schedule, or may not conduct our clinical trials in accordance with regulatory requirements or our trial design. If these third parties do not successfully carry out their contractual duties or meet expected deadlines, we may be required to replace them. Although we believe that there are a number of other third-party contractors we could engage to continue these activities, it may result in a delay of the affected trial. Accordingly, our efforts to obtain regulatory approvals for and commercialize our drug candidates could be delayed.

**IF WE ARE UNABLE TO DEVELOP INDEPENDENT SALES AND MARKETING CAPABILITIES OR ESTABLISH THIRD-PARTY RELATIONSHIPS FOR THE COMMERCIALIZATION OF OUR DRUG CANDIDATES, WE WILL NOT BE ABLE TO SUCCESSFULLY COMMERCIALIZE OUR DRUG CANDIDATES EVEN IF WE ARE ABLE TO OBTAIN REGULATORY APPROVAL.**

We currently have limited experience as a company in sales and marketing or with respect to pricing and obtaining adequate third-party reimbursement for drugs. GlaxoSmithKline currently markets Lexiva/Telzir. We will need to either develop marketing capabilities and an independent sales force or enter into arrangements with third parties to sell and market any of our drug candidates if they are approved for sale by regulatory authorities.

In order to market telaprevir in North America if it is approved, we intend to build a marketing organization and a direct sales force, which will require substantial efforts and significant management and financial resources. During 2008, we intend to commit significant personnel and financial resources to this effort, staging our commitments to the extent possible in consideration of the ongoing telaprevir development timeline. We will need to devote significant effort, in particular, to recruiting individuals with experience in the sales and marketing of pharmaceutical products. Competition for personnel with these skills is intense and may be particularly difficult for us since telaprevir is still an investigational drug candidate and we will be competing with companies that are currently marketing successful drugs. As a result, we may not be able to successfully develop our own marketing capabilities or independent sales force for telaprevir in North America in order to support an effective launch of telaprevir if it is approved for sale.

We have granted commercialization rights to other pharmaceutical companies with respect to certain of our drug candidates in specific geographic locations, including telaprevir (Janssen worldwide except for North America and the Far East, and Mitsubishi Tanabe in the Far East), Aurora kinase inhibitors (Merck worldwide) and AVN-944 (VX-944) (Avalon worldwide). To the extent that our collaborators have commercial rights to our drugs, any revenues we receive from any approved drugs will depend primarily on the sales and marketing efforts of others. We do not know whether we will be able to enter into additional third-party sales and marketing arrangements with respect to any of our other drug candidates on acceptable terms, if at all, or whether we will be able to leverage the sales and marketing capabilities we intend to build for telaprevir in order to market and sell any other drug candidate if it is approved for sale.



**WE DO NOT KNOW WHETHER LEXIVA/TELZIR WILL CONTINUE TO BE COMPETITIVE IN THE MARKET FOR HIV PROTEASE INHIBITORS.**

We currently receive royalties from net sales of Lexiva/Telzir under our collaboration with GlaxoSmithKline. Lexiva/Telzir's share of the worldwide protease inhibitor market may decrease due to competitive forces and market dynamics. Other HIV protease inhibitors including Bristol-Myers Squibbs' Reyataz® and Abbott Laboratories' Kaletra®, and a number of other products are on the market for the treatment of HIV infection and AIDS. Other drugs are still in development by our competitors, including Bristol-Myers Squibb, Boehringer Ingelheim Merck, and Johnson & Johnson, which may have better efficacy, fewer side effects, easier administration and/or lower costs than Lexiva/Telzir. Moreover, the growth in the worldwide market for HIV protease inhibitors has, to a certain extent, occurred as a result of early and aggressive treatment of HIV infection with a protease inhibitor-based regimen. Changes in treatment strategy, in which treatment is initiated later in the course of infection, or in which treatment is more often initiated with a regimen that does not include a protease inhibitor, may result in reduced use of HIV protease inhibitors. As a result, the total market for HIV protease inhibitors may decline, decreasing the sales potential of Lexiva/Telzir. Further, GlaxoSmithKline directs the marketing and sales efforts and the positioning of Lexiva/Telzir in the overall market, and we have little control over the direction or success of those efforts. GlaxoSmithKline has the right to terminate its agreement with us without cause upon twelve months' notice, and would have no obligation to pay further royalties to us upon any such termination.

**RISKS ASSOCIATED WITH OUR INTERNATIONAL BUSINESS RELATIONSHIPS COULD MATERIALLY ADVERSELY AFFECT OUR BUSINESS.**

We have manufacturing, collaborative and clinical trial relationships, and we and our collaborators are seeking approval for our drug candidates, outside the United States. In addition, we expect that if telaprevir is approved for commercial sale, a significant portion of our commercial supply chain, including sourcing of raw materials and manufacturing, will be located in China, Japan and European Union. Consequently, we are, and will continue to be, subject to risks related to operating in foreign countries. Risks associated with conducting operations in foreign countries include:

- differing regulatory requirements for drug approvals in foreign countries;
- unexpected changes in tariffs, trade barriers and regulatory requirements;
- economic weakness, including inflation, or political instability in particular foreign economies and markets;
- compliance with tax, employment, immigration and labor laws for employees living or traveling abroad;
- foreign taxes, including withholding of payroll taxes;
- foreign currency fluctuations, which could result in increased operating expenses or reduced revenues, and other obligations incident to doing business or operating a subsidiary in another country;
- workforce uncertainty in countries where labor unrest is more common than in the United States;
- production shortages resulting from any events affecting raw material supply or manufacturing capabilities abroad; and
- business interruptions resulting from geo-political actions, including war and terrorism.

These and other risks associated with our international operations could materially adversely affect our business.

**IF WE ARE UNABLE TO REALIZE THE EXPECTED BENEFITS OF OUR DRUG DISCOVERY CAPABILITIES AND OTHER TECHNOLOGIES, WE MAY NOT BE ABLE TO COMPETE IN THE MARKETPLACE.**

The pharmaceutical research field is characterized by rapid technological progress and intense competition. As a result, we may not realize the expected benefits from our integrated drug discovery capabilities and technologies. For example, a large pharmaceutical company, with significantly more resources than we have, could pursue a systematic approach to the discovery of drugs based on gene families, using proprietary drug targets, compound libraries, novel chemical approaches, structural protein analysis and information technologies. Such a company might identify broadly applicable compound classes faster and more effectively than we do. Further, we believe that interest in the application of structure-based drug design, parallel drug design and related approaches has accelerated as the strategies have become more widely understood. Businesses, academic institutions, governmental agencies and other public and private research organizations are conducting research to develop technologies that may compete with those we use. It is possible that our competitors could acquire or develop technologies that would render our technology obsolete or noncompetitive. For example, a competitor could develop information technologies that accelerate the atomic-level analysis of potential compounds that bind to the active site of a drug target, and predict the absorption, toxicity, and relative ease-of-synthesis of candidate compounds. If we were unable to access the same technologies at an acceptable price, our business could be adversely affected.

**IF WE FAIL TO EXPAND OUR HUMAN RESOURCES AND MANAGE OUR GROWTH EFFECTIVELY, OUR BUSINESS MAY SUFFER.**

We expect that if our clinical drug candidates continue to progress in development, we continue to build our commercial organization and our drug discovery efforts continue to generate drug candidates, we will require significant additional investment in personnel, management systems and resources. For example, the number of our full-time employees increased by 20% in 2007, and we expect to experience significant growth in 2008. Our ability to commercialize our drug candidates, achieve our research and development objectives, and satisfy our commitments under our collaboration agreements depends on our ability to respond effectively to these demands and expand our internal organization to accommodate additional anticipated growth. If we are unable to manage our growth effectively, there could be a material adverse effect on our business.

**THE LOSS OF THE SERVICES OF KEY EMPLOYEES OR THE FAILURE TO HIRE QUALIFIED EMPLOYEES WOULD NEGATIVELY IMPACT OUR BUSINESS AND FUTURE GROWTH.**

Because our drug discovery and development activities are highly technical in nature, we require the services of highly qualified and trained scientists who have the skills necessary to conduct these activities. In addition, as we attempt to grow our capabilities with respect to clinical development, regulatory affairs, quality control and sales and marketing, we will need to attract and retain employees with experience in these fields. Our future success will depend in large part on the continued services of our key scientific and management personnel. We have entered into employment agreements with some individuals and provide compensation-related benefits to all of our key employees that vest over time and therefore induce them to remain with us. However, the employment agreements can be terminated by the employee on relatively short notice. The value to employees of stock-related benefits that vest over time—such as options and restricted stock—will be significantly affected by movements in our stock price that we cannot control, and may at any point in time be insufficient to counteract more lucrative offers from other companies.

We face intense competition for our personnel from our competitors, our collaborators and other companies throughout our industry. Moreover, the growth of local biotechnology companies and the expansion of major pharmaceutical companies into the Boston area have increased competition for

the available pool of skilled employees, especially in technical fields, and the high cost of living in the Boston and San Diego areas makes it difficult to attract employees from other parts of the country to these areas. A failure to retain, as well as hire, train and effectively integrate into our organization a sufficient number of qualified scientists, professionals and sales personnel would negatively affect our business and our ability to grow our business.

**IF OUR PATENTS DO NOT PROTECT OUR DRUGS, OR OUR DRUGS INFRINGE THIRD-PARTY PATENTS, WE COULD BE SUBJECT TO LITIGATION AND SUBSTANTIAL LIABILITIES.**

We have numerous patent applications pending in the United States, as well as foreign counterparts in other countries. Our success will depend, in significant part, on our ability to obtain and maintain United States and foreign patent protection for our drugs, their uses and our processes, to preserve our trade secrets and to operate without infringing the proprietary rights of third parties. We do not know whether any patents will issue from any of our patent applications or, even if patents issue or have issued, that the issued claims will provide us with any significant protection against competitive products or otherwise be valuable commercially. Legal standards relating to the validity of patents and the proper scope of their claims in the pharmaceutical field are still evolving, and there is no consistent law or policy regarding the valid breadth of claims in biopharmaceutical patents or the effect of prior art on them. If we are not able to obtain adequate patent protection, our ability to prevent competitors from making, using and selling similar drugs will be limited. Furthermore, our activities may infringe the claims of patents held by third parties. Defense and prosecution of infringement or other intellectual property claims, as well as participation in other inter-party proceedings, can be expensive and time-consuming, regardless of whether or not the outcome is favorable to us. If the outcome of any such litigation or proceeding were adverse, we could be subject to significant liabilities to third parties, could be required to obtain licenses from third parties or could be required to cease sales of affected drugs, any of which outcomes could have a material adverse effect on our business.

**IF PHYSICIANS, PATIENTS AND THIRD-PARTY PAYORS DO NOT ACCEPT OUR FUTURE DRUGS, WE MAY BE UNABLE TO GENERATE SIGNIFICANT REVENUE, IF ANY.**

Even if our drug candidates obtain regulatory approval, they may not gain market acceptance among physicians, patients and health care payors. Physicians may elect not to recommend our drugs for a variety of reasons including:

- the timing of the market introduction of competitive drugs;
- lower demonstrated clinical safety and efficacy compared to other drugs;
- lack of cost-effectiveness;
- lack of availability of reimbursement from third-party payors;
- convenience and ease of administration;
- prevalence and severity of adverse side effects;
- other potential advantages of alternative treatment methods; and
- ineffective marketing and distribution support.

If our approved drugs fail to achieve market acceptance, we will not be able to generate significant revenue.

**IF THE GOVERNMENT AND OTHER THIRD-PARTY PAYORS FAIL TO PROVIDE COVERAGE AND ADEQUATE PAYMENT RATES FOR OUR FUTURE DRUGS, OUR REVENUE AND PROSPECTS FOR PROFITABILITY WILL BE HARMED.**

In both domestic and foreign markets, our sales of any future drugs will depend in part upon the availability of reimbursement from third-party payors. Such third-party payors include government health programs such as Medicare, managed care providers, private health insurers and other organizations. These third-party payors are increasingly attempting to contain health care costs by demanding price discounts or rebates and limiting both the types and variety of drugs that they will cover and the amounts that they will pay for these drugs. As a result, they may not cover or provide adequate payment for our future drugs. We might need to conduct post-marketing studies in order to demonstrate the cost-effectiveness of any future drugs to such payors' satisfaction. Such studies might require us to commit a significant amount of management time and financial and other resources. Our future drugs might not ultimately be considered cost-effective. Adequate third-party reimbursement might not be available to enable us to maintain price levels sufficient to realize an appropriate return on investment in product development.

Reimbursement rates may vary according to the use of the drug and the clinical setting in which it is used, may be based on payments allowed for lower-cost products that are already reimbursed, may be incorporated into existing payments for other products or services, and may reflect budgetary constraints and/or imperfections in Medicare or Medicaid data used to calculate these rates. Net prices for drugs may be reduced by mandatory discounts or rebates required by government health care programs. In addition, legislation has been introduced in Congress that, if enacted, would permit more widespread importation of drugs from foreign countries into the United States, which may include importation from countries where the drugs are sold at lower prices than in the United States. Such legislation, or similar regulatory changes or relaxation of laws that restrict imports of drugs from other countries, could reduce the net price we receive for our marketed drugs.

**OUR BUSINESS HAS A SUBSTANTIAL RISK OF PRODUCT LIABILITY CLAIMS. IF WE ARE UNABLE TO OBTAIN APPROPRIATE LEVELS OF INSURANCE, A PRODUCT LIABILITY CLAIM COULD ADVERSELY AFFECT OUR BUSINESS.**

Our business exposes us to significant potential product liability risks that are inherent in the development, manufacturing and sales and marketing of human therapeutic products. We currently have clinical trial insurance and will seek to obtain product liability insurance prior to the sales and marketing of any of our drug candidates. However, our insurance may not provide adequate coverage against potential liabilities. Furthermore, clinical trial and product liability insurance is becoming increasingly expensive. As a result, we may be unable to maintain current amounts of insurance coverage or obtain additional or sufficient insurance at a reasonable cost to protect against losses that could have a material adverse effect on us. If a claim is brought against us, we might be required to pay legal and other expenses to defend the claim, as well as uncovered damages awards resulting from a claim brought successfully against us. Furthermore, whether or not we are ultimately successful in defending any such claims, we might be required to direct significant financial and managerial resources to such defense, and adverse publicity is likely to result.

**IF WE DO NOT COMPLY WITH LAWS REGULATING THE PROTECTION OF THE ENVIRONMENT AND HEALTH AND HUMAN SAFETY, OUR BUSINESS COULD BE ADVERSELY AFFECTED.**

Our research and development efforts involve the controlled use of hazardous materials, chemicals and various radioactive compounds. Although we believe that our safety procedures for handling and disposing of these materials comply with the standards prescribed by state and federal regulations, the risk of accidental contamination or injury from these materials cannot be eliminated. If

an accident occurs, we could be held liable for resulting damages, which could be substantial. We are also subject to numerous environmental, health and workplace safety laws and regulations, including those governing laboratory procedures, exposure to blood-borne pathogens and the handling of biohazardous materials. Although we maintain workers' compensation insurance to cover us for costs we may incur due to injuries to our employees resulting from the use of these materials, this insurance may not provide adequate coverage against potential liabilities. Due to the small amount of hazardous materials that we generate, we have determined that the cost to secure insurance coverage for environmental liability and toxic tort claims far exceeds the benefits. Accordingly, we do not maintain any insurance to cover pollution conditions or other extraordinary or unanticipated events relating to our use and disposal of hazardous materials. Additional federal, state and local laws and regulations affecting our operations may be adopted in the future. We may incur substantial costs to comply with, and substantial fines or penalties if we violate, any of these laws or regulations.

**WE HAVE ADOPTED ANTI-TAKEOVER PROVISIONS AND ARE SUBJECT TO MASSACHUSETTS CORPORATE LAWS THAT MAY FRUSTRATE ANY ATTEMPT TO REMOVE OR REPLACE OUR CURRENT MANAGEMENT.**

Our corporate charter and by-law provisions, Massachusetts state laws, and stockholder rights plan may discourage certain types of transactions involving an actual or potential change of control of Vertex that might be beneficial to us or our security holders. Our charter provides for staggered terms for the members of the Board of Directors. Our by-laws grant the directors a right to adjourn annual meetings of stockholders, and certain provisions of the by-laws may be amended only with an 80% stockholder vote. Pursuant to our stockholder rights plan, each share of common stock has an associated preferred share purchase right. The rights will not trade separately from the common stock until, and are exercisable only upon, the acquisition or the potential acquisition through tender offer by a person or group of 15% or more of the outstanding common stock. We may issue shares of any class or series of preferred stock in the future without stockholder approval and upon such terms as our Board of Directors may determine. The rights of the holders of common stock will be subject to, and may be adversely affected by, the rights of the holders of any class or series of preferred stock that may be issued in the future. Massachusetts state law prohibits us from engaging in specified business combinations, unless the combination is approved or consummated in a prescribed manner, and prohibits voting by any stockholder who acquires 20% or more of our voting stock without stockholder approval. As a result, stockholders or other parties may find it more difficult to remove or replace our current management.

**OUR ESTIMATES OF OUR LIABILITY UNDER OUR KENDALL SQUARE LEASE MAY BE INACCURATE.**

We leased a 290,000 square foot facility in Kendall Square, Cambridge, Massachusetts in January 2003 for a 15-year term. We currently are occupying approximately 120,000 square feet of the facility. We have sublease arrangements in place for the remaining rentable square footage of the facility. In determining our obligations under the lease for the portion of the facility that we are not occupying, we have made certain assumptions relating to the time necessary to sublease the space after the expiration of the initial subleases, projected future sublease rental rates and the anticipated durations of future subleases. Our estimates have changed in the past, and may change in the future, resulting in additional adjustments to the estimate of liability, and the effect of any such adjustments could be material.

**GOVERNMENT INVESTIGATIONS OR LITIGATION AGAINST OUR COLLABORATORS COULD ADVERSLY AFFECT OUR BUSINESS.**

The federal government, certain state governments and private payors are investigating and have begun to file actions against numerous pharmaceutical and biotechnology companies alleging that

the reporting of prices for pharmaceutical products has resulted in a false and overstated Average Wholesale Price, or AWP, which in turn is alleged to have improperly inflated the reimbursement paid by Medicare beneficiaries, insurers, state Medicaid programs, medical plans and others to health care providers who prescribed and administered those products. Some payors are also alleging that pharmaceutical and biotechnology companies are not reporting their "best price" to the states under the Medicaid program. In addition, recent government litigation against pharmaceutical companies has focused on allegations of off-label promotion in connection with the filing of false claims for government reimbursement. In any AWP cases or other cases brought by the government where our collaborators or licensees are named as defendants with respect to any products licensed from us, the outcome of the case could have a material adverse effect on our financial results.

**SALES OF ADDITIONAL SHARES OF OUR COMMON STOCK COULD CAUSE THE PRICE OF OUR COMMON STOCK TO DECLINE.**

Sales of substantial amounts of our common stock in the open market, or the availability of such shares for sale, could adversely affect the price of our common stock. In addition, the issuance of restricted common stock or common stock upon exercise of any outstanding option would be dilutive, and may cause the market price for a share of our common stock to decline. As of December 31, 2007, we had approximately 132.9 million shares of common stock issued and outstanding. We also had outstanding options to purchase approximately 15.4 million shares of common stock with a weighted-average exercise price of \$28.70 per share. Outstanding options may be exercised if the market price of our common stock exceeds the applicable exercise price. We may issue additional common stock or restricted securities in the future as part of our financing activities and any such issuances may have a dilutive effect on existing shareholders. Although we and our officers and directors have agreed to lock-up restrictions for a 90-day period following the offering, these restrictions are subject to waiver by the underwriters.

**Risks Related to the Notes, Our Common Stock and This Offering**

**THE NOTES WILL BE UNSECURED AND SUBORDINATED TO OUR EXISTING AND FUTURE SENIOR DEBT.**

The notes will be unsecured and subordinated in right of payment to our existing and future senior debt. In the event of bankruptcy, liquidation or reorganization or upon acceleration of the notes due to an event of default and in specific other events, our assets will be available to pay obligations on the notes only after all senior debt and any secured debt has been paid in full in cash or other payment satisfactory to the holders of such indebtedness has been made. There may not be sufficient assets remaining to pay amounts due on any or all of the notes then outstanding. As a result of these payments, our general creditors may recover less, ratably, than the holders of our senior or secured debt and such general creditors may recover more, ratably, than the holders of our notes or our other subordinated debt. The indenture will not limit the creation of additional senior debt, secured debt or any other indebtedness. Any significant additional senior or secured debt incurred may also materially adversely impact our ability to service our debt, including the notes. In addition, the holders of our senior debt may, under certain circumstances, restrict or prohibit us from making payments on the notes. As of December 31, 2007, after giving effect to the use of proceeds of this offering and the concurrent offering as described in "Use of Proceeds," we would have had no senior debt outstanding.

**THE INDENTURE CONTAINS NO FINANCIAL COVENANTS AND, THEREFORE, THE NOTE HOLDERS WILL NOT HAVE PROTECTION AGAINST ADVERSE CHANGES IN OUR BUSINESS.**

The indenture does not contain any financial covenants, restrict our ability to repurchase our securities, pay dividends or make restricted payments or contain covenants or other provisions to afford holders protection in the event of a transaction that substantially increases the level of our indebtedness. Furthermore, the indenture contains only limited protections in the event of a

fundamental change. We could engage in many types of transactions, such as acquisitions, refinancings or recapitalizations, that could substantially affect our capital structure and the value of the notes and our common stock but would not constitute a "fundamental change" permitting holders to require us to repurchase their notes under the indenture.

**THE NOTES ARE EFFECTIVELY SUBORDINATED TO THE LIABILITIES OF OUR SUBSIDIARIES, WHICH MAY REDUCE OUR ABILITY TO USE THE ASSETS OF OUR SUBSIDIARIES TO MAKE PAYMENTS ON THE NOTES.**

The notes are not guaranteed by our subsidiaries and therefore the notes will be effectively subordinated to all existing and future indebtedness and other liabilities of our subsidiaries. In the event of a bankruptcy, liquidation or dissolution of a subsidiary, following payment by the subsidiary of its liabilities, the subsidiary may not have sufficient assets to make payments to us. As of December 31, 2007, our subsidiaries had no indebtedness outstanding (excluding intercompany debt and liabilities and accounts payable incurred in the ordinary course of business).

**WE MAY NOT HAVE THE ABILITY TO REPURCHASE NOTES FOR CASH PURSUANT TO THEIR TERMS.**

In certain circumstances, you may require us to repurchase all or a portion of your notes in cash. If you were to require us to repurchase your notes, including following certain fundamental changes, we cannot assure you that we will be able to pay the amount required in cash. Our ability to repurchase the notes is subject to our liquidity position at the time, and may be limited by law, by the indenture, and by indebtedness and agreements that we may enter into in the future which may replace, supplement or amend our existing or future debt. In addition, if we did not have sufficient cash to meet our obligations, while we could seek to obtain third-party financing to pay for any amounts due in cash upon such events, we cannot be sure that such third-party financing will be available on commercially reasonable terms, if at all. Our failure to repurchase the notes would constitute an event of default under the indenture under which we issued the notes, which might constitute an event of default under the terms of our other indebtedness at that time.

**THE MAKE-WHOLE PREMIUM THAT MAY BE PAYABLE UPON CONVERSION IN CONNECTION WITH A FUNDAMENTAL CHANGE MAY NOT ADEQUATELY COMPENSATE YOU FOR THE LOST OPTION TIME VALUE OF YOUR NOTES AS A RESULT OF SUCH CHANGE IN CONTROL.**

If you convert notes in connection with a fundamental change, we may be required to pay a make-whole premium by increasing the conversion rate. The make-whole payment is described under "Description of the Notes—Make-Whole Premium Upon a Fundamental Change." While the make-whole premium is designed to compensate you for the lost option time value of your notes as a result of a fundamental change, the make-whole amount is only an approximate of such lost value and may not adequately compensate you for such loss. In addition, in some other cases described below under "Description of the Notes—Make-Whole Premium Upon a Fundamental Change," there will be no such make-whole premium.

**BECAUSE YOUR RIGHT TO REQUIRE US TO REPURCHASE THE NOTES IS LIMITED, THE MARKET PRICE OF THE NOTES MAY DECLINE IF WE ENTER INTO A TRANSACTION THAT IS NOT A FUNDAMENTAL CHANGE UNDER THE INDENTURE.**

The term "fundamental change" is limited and may not include every event that might cause the market price of the notes to decline. The term "fundamental change" does not apply to transactions in which all of the consideration paid for our common stock, excluding cash payments for fractional shares and cash payments made in respect of dissenters' appraisal rights, in a merger or similar transaction is publicly traded common stock. Our obligation to repurchase the notes upon a

fundamental change may not preserve the value of the notes in the event of a highly leveraged transaction, reorganization, merger or similar transaction. See "Description of the Notes—Repurchase at Option of Holders Upon a Fundamental Change."

**SALES OF THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTES COULD ADVERSELY AFFECT OUR STOCK PRICE.**

The common stock issuable upon conversion of the notes represents approximately [ ]% of our outstanding common stock. Any sales in the public market of the common stock issuable upon such conversion could adversely affect prevailing market prices of our common stock. In addition, the existence of the notes may encourage short selling by market participants because the conversion of the notes could depress the price of our common stock. If you convert your notes into shares of common stock, you will be subject to the same dilution as other holders of shares of common stock, including from subsequent conversions by other note holders.

**THE CONVERSION RATE OF THE NOTES MAY NOT BE ADJUSTED FOR ALL DILUTIVE EVENTS.**

The conversion rate of the notes is subject to adjustment for certain events, including, among others, the issuance of stock dividends on our common stock, the issuance of certain rights or warrants to acquire shares of our common stock or securities convertible into or exchangeable for shares of our common stock, subdivisions and combinations of our common stock, dividends of our capital stock, certain cash dividends and certain tender or exchange offers. The conversion rate will not be adjusted for other events, such as an issuance of shares of common stock for cash, that may adversely affect the trading price of the notes or our common stock. We cannot assure you that an event that adversely affects the value of the notes, but does not result in an adjustment to the conversion rate, will not occur.

**IF YOU HOLD NOTES, YOU ARE NOT ENTITLED TO ANY RIGHTS WITH RESPECT TO OUR COMMON STOCK, BUT YOU MAY BE SUBJECT TO ALL CHANGES MADE WITH RESPECT TO OUR COMMON STOCK.**

If you hold notes, you are not entitled to any rights with respect to our common stock, including, without limitation, voting rights and rights to receive any dividends or other distributions on our common stock, but you may be subject to all changes affecting the common stock. You will only be entitled to rights on the common stock if and when we deliver shares of common stock to you in exchange for your notes or in limited cases under the anti-dilution adjustments of the notes. For example, in the event that an amendment is proposed to our restated certificate of incorporation or bylaws requiring stockholder approval and the record date for determining the stockholders of record entitled to vote on the amendment occurs prior to delivery of the common stock, you will not be entitled to vote on the amendment, although you will nevertheless be subject to any changes in the powers or rights of our common stock.

**YOU MAY HAVE TO PAY TAXES WITH RESPECT TO DISTRIBUTIONS ON OUR COMMON STOCK THAT YOU DO NOT RECEIVE.**

The conversion rate of the notes is subject to adjustment for certain events arising from stock splits and combinations, stock dividends and other actions by us that modify our capital structure. See "Description of the Notes—Conversion Rights." If the conversion rate is adjusted, under certain circumstances you may be deemed to have received a constructive dividend from us, resulting in ordinary income to you for U.S. federal income tax purposes, even though you would not receive any cash related to that adjustment and even though you might not exercise your conversion right. Any constructive dividend deemed paid would not be eligible for preferential rates of U.S. federal income tax applicable to certain dividends and corporate holders would not be entitled to claim the dividends



received deduction with respect to any such constructive dividends. Because this deemed income would not give rise to any cash from which any applicable withholding tax could be satisfied, we may offset any such withholding tax applicable to non-U.S. holders against cash payments of interest payable on the notes. See "Material U.S. Federal Income Tax Considerations."

**AN ACTIVE TRADING MARKET FOR THE NOTES MAY NOT DEVELOP, AND YOU MAY NOT BE ABLE TO SELL YOUR NOTES AT ATTRACTIVE PRICES OR AT ALL.**

The notes are a new issue of securities for which there is currently no public market, and no active trading market might ever develop. If the notes are traded after their initial issuance, they may trade at a discount from their initial offering price, depending on prevailing interest rates, the market for similar securities, the price, and volatility in the price, of shares of our common stock, our performance and other factors. In addition, we do not know whether an active trading market will develop for the notes. To the extent that an active trading market does not develop, the liquidity and trading prices for the notes may be harmed.

We have no plans to list the notes on a securities exchange. We have been advised by an underwriter that it presently intends to make a market in the notes. However, the underwriter is not obligated to do so. Any market-making activity, if initiated, may be discontinued at any time, for any reason or for no reason, without notice. If the underwriter ceases to act as the market makers for the notes, we cannot assure you another firm or person will make a market in the notes.

The liquidity of any market for the notes will depend upon the number of holders of the notes, our results of operations and financial condition, the market for similar securities, the interest of securities dealers in making a market in the notes and other factors.

**OUR STOCK PRICE MAY BE VOLATILE, AND AN INVESTMENT IN OUR COMMON STOCK COULD SUFFER A DECLINE IN VALUE.**

Market prices for securities of companies such as Vertex are highly volatile. From January 1, 2007 through February 8, 2008, our common stock traded between \$17.59 and \$41.42 per share. The market for our stock, like that of other companies in the biotechnology field, has from time to time experienced significant price and volume fluctuations that are unrelated to our operating performance.

The future market price of our securities could be significantly and adversely affected by factors such as:

- announcements of results of clinical trials or nonclinical studies relating to our drug candidates or those of our competitors;
- announcements of financial results and other operating performance measures, or capital structuring or financing activities;
- technological innovations or the introduction of new drugs by our competitors;
- government regulatory action;
- public concern as to the safety of drugs developed by others;
- developments in patent or other intellectual property rights or announcements relating to these matters;
- developments in domestic and international governmental policy or regulation, for example, relating to intellectual property rights; and
- developments relating specifically to other companies and market conditions for pharmaceutical and biotechnology stocks or stocks in general.

**WE EXPECT THAT THE TRADING PRICE OF THE NOTES WILL BE SIGNIFICANTLY AFFECTED BY THE TRADING PRICE OF OUR COMMON STOCK.**

Because the notes are convertible into shares of our common stock, volatility or depressed prices of our common stock could have a similar effect on the trading price of the notes. This may result in greater volatility in the trading price of the notes than would be expected for any non-convertible debt securities we may issue. Holders who receive our common stock upon conversion of the notes will also be subject to the risk of volatility and depressed prices of our common stock.

**AN ADVERSE RATING OF THE NOTES MAY CAUSE THEIR TRADING PRICES TO FALL.**

If a rating agency rates the notes, it may assign a rating that is lower than investors' expectations. Rating agencies also may lower ratings on the notes in the future. If rating agencies assign a lower-than-expected rating or reduce, or indicate that they may reduce, their ratings in the future, the trading price of the notes could decline significantly.

**WE ARE OFFERING SHARES OF OUR COMMON STOCK CONCURRENTLY WITH THIS NOTE OFFERING AND THE ISSUANCE OF COMMON STOCK COULD MATERIALLY AND ADVERSELY AFFECT THE PRICE OF THE NOTES.**

Concurrently with this offering, we are offering 6,000,000 shares of our common stock (or a total of 6,900,000 shares if the underwriters exercise their overallotment option in full) pursuant to a separate registration statement and prospectus. The concurrent issuance of common stock may further depress the price of our common stock, and in turn, the price of the notes may decline.

**WE MAY ISSUE ADDITIONAL SHARES OF COMMON STOCK AND/OR SECURITIES CONVERTIBLE INTO OR EXCHANGEABLE OR EXERCISABLE FOR OUR COMMON STOCK AND SUCH ISSUANCES MAY MATERIALLY AND ADVERSELY AFFECT THE PRICE OF OUR NOTES.**

We are not restricted from issuing additional shares of common stock and/or securities convertible into or exchangeable or exercisable for common stock during the term of the notes. When we issue additional such securities, the price of our common stock may be adversely affected, and in turn, the price of the notes may decline.

**WE WILL HAVE BROAD DISCRETION AS TO THE USE OF THE PROCEEDS FROM THIS OFFERING AND THE CONCURRENT COMMON STOCK OFFERING, AND WE MAY NOT USE THE PROCEEDS EFFECTIVELY.**

We have not designated the amount of net proceeds from this offering or the concurrent common stock offering we will use for any particular purpose other than the \$20.0 million we intend to use to repay the development loan from a former collaborator. Accordingly, our management will have broad discretion as to the application of the net proceeds and could use them for purposes other than those contemplated at the time of this offering. Our management may use the net proceeds for corporate purposes that may not yield profitable results or increase our market value.

## SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

This prospectus and the documents incorporated by reference herein contain forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended and Section 21E of the Securities Exchange Act of 1934, as amended. These statements relate to future events and our future financial performance. These statements include but are not limited to statements:

- our expectations regarding clinical trials, development timelines and regulatory authority filings for telaprevir and other drug candidates under development by us and our collaborators;
- our expectations regarding the number of patients that will be evaluated, the trial design that will be utilized, the anticipated date by which enrollment will commence and/or be completed and the expected date by which SVR data and/or interim data will be available for our Phase 3 clinical trial of telaprevir, the planned clinical trial to evaluate 48-week telaprevir-based treatment regimens in approximately 400 patients, the PROVE 1, PROVE 2 and PROVE 3 clinical trials, the Phase 2b clinical trials of telaprevir being conducted by Tibotec, the Phase 2a and planned Phase 2b clinical trial of VX-770, the Phase 1a and planned Phase 1b clinical trial of VX-809, the Phase 1a clinical trial of VX-500, the planned clinical trial of VX-813, and the clinical trials being conducted by our collaborators of drug candidates for the treatment of cancer;
- the data that will be generated by ongoing and planned clinical trials, and the ability to use that data for the design and initiation of further clinical trials and to support regulatory filings, including potentially an NDA for telaprevir;
- our expectations regarding the potential of our ongoing and planned clinical trials of telaprevir to meet the anticipated registration requirements with respect to the number and design of the clinical trials and the number of patients that will be part of the safety database of patients that have received 12 weeks of telaprevir;
- the design of our global clinical program for telaprevir and our ability to potentially register telaprevir across a range of HCV genotypes and patient populations;
- our expectations regarding the future market demand and medical need for telaprevir and our other drug candidates;
- our ability to retain greater development control of, and commercial rights to, drug candidates by funding a greater portion of our research programs;
- our beliefs regarding the support provided by clinical trials and preclinical and nonclinical studies of our drug candidates for further investigation, clinical trials or potential use as an effective treatment;
- our ability to capitalize on the advances in our telaprevir clinical program by building our drug development, supply chain management and commercialization organizations in order to prepare for the potential commercial launch of telaprevir and to support the development of our other drug candidates;
- our business strategy, including: our plan to invest in our development of telaprevir in order to maintain the time-to-market advantage we believe we have in relation to drug candidates being developed by our competitors; our ability to establish a leadership position with respect to treatment of HCV infection; and our ability to expand the value of our portfolio of drug candidates;
- the focus of our drug development efforts;

- the expected uses of the proceeds of this offering and the concurrent common stock offering;
- the establishment, development and maintenance of collaborative relationships;
- our ability to use our research programs to identify and develop new drug candidates to address serious diseases and significant unmet medical needs;
- our ability to increase our headcount and scale up our drug development and commercialization capabilities;
- our estimates regarding obligations associated with a lease of a facility in Kendall Square, Cambridge, Massachusetts;
- the potential for the acquisition of new and complementary technologies, resources and drugs or drug candidates; and
- our liquidity.

In some cases, you can identify forward-looking statements by terminology such as "may," "will," "should," "expects," "anticipates," "believes," "estimates," "predicts," "potential," or "continue" or the negative of such terms or other comparable terminology. These statements are only predictions and involve known and unknown risks, uncertainties and other factors, including the risks outlined above under "Risk Factors," that may cause our or our industry's actual results to differ materially from the results, levels of activity, performance or achievements expressed or implied by such forward-looking statements. Before deciding to purchase our securities you should carefully consider the risks described in the "Risk Factors" section, in addition to the information set forth in this prospectus and in the documents incorporated by reference herein. Although we believe that the expectations reflected in the forward-looking statements are reasonable, we cannot guarantee future results, levels of activity, performance or achievements.

## USE OF PROCEEDS

We estimate that the net proceeds we will receive from this offering, will be approximately \$241.6 million (or \$278.0 million if the underwriters exercise their overallotment option in full), after deducting the estimated underwriting discount and offering expenses. In addition, we estimate that the net proceeds from the concurrent common stock offering will be approximately \$102.8 million (or \$118.4 million if the underwriters exercise their overallotment option in full), after deducting the estimated underwriting discount and offering expenses. It is possible that, based on market conditions, we may increase or decrease the aggregate principal amount of the notes offered hereby and increase or decrease the number of shares of common stock offered in our concurrent common stock offering or complete one offering without the other.

We intend to use the net proceeds from this offering, together with the net proceeds from the concurrent common stock offering, for general corporate purposes, which we expect to include investment in the development and commercialization of telaprevir, clinical trial expenditures and other development expenses for telaprevir and our other drug candidates, investment in our research programs and the manufacture and supply of drug substances, and repayment of the \$20.0 million interest free development loan from Novartis Pharma AG due May 2008, and which may include capital expenditures, investments and potentially acquisitions. We have not determined the amounts we plan to spend on any of the areas listed above or the timing of these expenditures. As a result, our management will have broad discretion to allocate the net proceeds from this offering and the concurrent common stock offering. We have no current commitments or agreements with respect to any acquisitions and may not make any acquisitions. Pending application of the net proceeds as described above, we intend to invest the net proceeds of the offering in short-term, investment-grade, interest-bearing securities.

## PRICE RANGE OF COMMON STOCK

Our common stock is listed on the Nasdaq Global Select Market under the symbol "VRTX." The last reported sale price for our common stock on February 8, 2008 was \$18.10 per share. The table below sets forth closing information on the range of high and low closing prices for our common stock during the periods indicated.

	Price Range of Common Stock	
	High	Low
<b>Fiscal Year ended December 31, 2006</b>		
First quarter	\$ 44.71	\$ 26.50
Second quarter	40.00	29.00
Third quarter	37.10	29.75
Fourth quarter	45.38	32.50
<b>Fiscal Year ended December 31, 2007</b>		
First quarter	\$ 38.95	\$ 26.98
Second quarter	32.51	25.61
Third quarter	41.42	27.55
Fourth quarter	39.48	22.80

## DIVIDEND POLICY

We have never declared or paid any cash dividends on our common stock, and we currently expect that future earnings, if any, will be retained for use in our business. Accordingly, we do not expect to pay cash dividends on our common stock in the foreseeable future.

## CAPITALIZATION

The following table sets forth our cash position and capitalization as of December 31, 2007:

- on an actual basis;
- on an as adjusted basis to give effect to the issuance and sale of \$250.0 million aggregate principal amount of % Convertible Senior Subordinated Notes due 2013 in this offering, after deducting the underwriting discount and our estimated offering expenses; and
- on a pro forma as adjusted basis to give further effect to the issuance and sale of 6,000,000 shares of our common stock in the concurrent common stock offering at an assumed public offering price of \$18.10 per share, after deducting the underwriting discount and our estimated offering expenses and the use of a portion of the net proceeds to repay a \$20.0 million collaborator development loan.

You should read this table with our consolidated financial statements and the notes thereto incorporated by reference into this prospectus.

	December 31, 2007		
	(Unaudited)		
	(In thousands, except share amounts)		
	Actual	As adjusted	Pro forma as adjusted
Cash, cash equivalents and marketable securities	\$ 467,796	\$ 709,421	\$ 792,262
Collaborator development loan	\$ 19,997	\$ 19,997	—
Convertible Senior Subordinated Notes due 2013	—	250,000	250,000
Stockholders' equity(deficit):			
Preferred stock, \$0.01 par value; 1,000,000 shares authorized; none issued and outstanding at December 31, 2007	—	—	—
Common stock, \$0.01 par value; 200,000,000 shares authorized; 132,875,540 shares actual and as adjusted, 138,875,540 shares pro forma as adjusted, issued and outstanding at December 31, 2007	1,312	1,312	1,372
Additional paid-in capital	1,856,856	1,856,856	1,959,634
Accumulated other comprehensive income	881	881	881
Accumulated deficit	(1,587,754)	(1,587,754)	(1,587,754)
Total stockholders' equity	271,295	271,295	374,133
Total capitalization	\$ 291,292	\$ 541,292	\$ 624,133

The table above excludes the following shares:

- 15,357,591 shares of common stock issuable upon the exercise of stock options outstanding as of December 31, 2007 at a weighted average exercise price of \$28.70 per share;
- 1,782,775 shares of common stock issuable upon the exercise of stock options granted to employees after December 31, 2007 and on or before February 8, 2008 at a weighted exercise price of \$18.97 per share, including 537,000 shares of common stock issuable upon the exercise of stock options contingent upon shareholder approval; and
- 425,403 restricted shares of common stock issued to employees after December 31, 2007 and on or before February 8, 2008.

We will evaluate the Convertible Senior Subordinated Notes due 2013 under SFAS No. 133 and other related literature to determine whether any provisions in the notes will be separately accounted for as an embedded derivative financial instrument. If we determine that there is an embedded derivative instrument: it would be reflected separately on the balance sheet as a liability at fair value; and the liability associated with the Convertible Senior Subordinated Notes due 2013 would be reduced by the initial fair value of the embedded derivative and accreted to face value as additional interest expense. The value of the embedded derivative, if any, would be adjusted quarterly for changes in fair values.

## RATIO OF EARNINGS TO FIXED CHARGES

We present below the ratio of our earnings to our fixed charges, which is computed by dividing earnings before taxes adjusted for fixed charges, minority interest and capitalized interest net of amortization by fixed charges. Fixed charges include interest expense and capitalized interest incurred, plus the portion of interest expense under operating leases deemed by us to be representative of the interest factor, plus amortization of the debt issuance costs.

	Year Ended December 31,				
	2007	2006	2005	2004	2003
Ratio of earnings to fixed charges	—(1)	—(1)	—(1)	—(1)	—(1)

(1) Due to our loss from continuing operations for the years ended December 31, 2003, 2004, 2005, 2006 and 2007, earnings were insufficient to cover fixed charges by \$266.4 million, \$166.2 million, \$203.4 million, \$207.9 million and \$391.3 million, respectively.

## DESCRIPTION OF THE NOTES

*This description highlights some information concerning the notes to be sold in this offering. We have included in this description what we believe is the most important information concerning the notes. However, this description may not contain all of the information that is important to you. Important information is incorporated by reference into this prospectus. To understand the notes fully, you should read carefully the entire prospectus, including "Risk Factors," the consolidated financial statements and related notes and the other information incorporated by reference in this prospectus.*

The notes will be issued under an indenture to be dated as of February , 2008 between us and U.S. Bank National Association, as trustee, which we refer to as the "indenture". Copies of the form of indenture and the notes will be made available to prospective investors upon request to us.

We have summarized portions of the indenture and the notes below. This summary is not complete and is subject to, and qualified by references to, all of the provisions of the indenture and the notes. We urge you to read the indenture and the notes because they define your rights as a holder of the notes. Capitalized terms not defined in this description have the meanings given them in the indenture. In this section, "Vertex," "we," "our" and "us" each refers only to Vertex Pharmaceutical Incorporated and not to any existing or future subsidiary.

### General

The notes are our unsecured, senior subordinated obligations and are convertible into our common stock as described under "—Conversion Rights" below. The notes are limited to an aggregate principal amount of \$250.0 million (or \$287.5 million if the underwriter exercises its overallotment option in full) and will mature on February , 2013, unless earlier converted, repurchased or redeemed.

The notes bear interest at the rate of % per year from the date of issuance of the notes, or from the most recent date to which interest had been paid or provided for. Interest is payable semi-annually in arrears on February and August of each year, commencing August , 2008 to holders of record at the close of business on the preceding February and August , respectively. Interest is computed on the basis of a 360-day year comprised of twelve 30-day months. In the event of the maturity, conversion, redemption or purchase by us at the option of the holder of a note, interest ceases to accrue on the note under the terms of, and subject to the conditions of, the indenture.

Principal is payable, and notes may be presented for conversion, registration of transfer and exchange, without service charge, at our office or agency in New York, New York, which is initially the office or agency of the trustee in New York, New York.

The indenture does not contain any financial covenants or any restrictions on the payment of dividends, the incurrence of senior debt (as defined below) or other indebtedness, or the issuance or repurchase of securities by us. The indenture does not contain any covenants or other provisions to protect holders of the notes in the event of a highly leveraged transaction or a change of control, except to the extent described under "—Make-Whole Premium Upon a Fundamental Change" and "—Repurchase at Option of Holders Upon a Fundamental Change" below.

### Ranking

The notes will be unsecured obligations and will be:

- subordinated in right of payment, as provided in the indenture, to the prior payment in full of any future senior debt,
- equal in right of payment with any future senior subordinated debt, and



- senior in right of payment to any future subordinated debt.

The indenture does not restrict the incurrence by us or our existing or future subsidiaries of indebtedness or other obligations, including additional senior debt or additional senior subordinated debt.

At December 31, 2007, we had senior debt outstanding of \$20.0 million, which will be repaid from the proceeds of this offering. The term "senior debt" means all the:

- principal of,
- premium, if any, on,
- interest, including all interest accruing subsequent to the commencement of any bankruptcy or similar proceeding, whether or not a claim for post-petition interest is allowable as a claim in any such proceeding, on,
- rent payable on,
- termination payments with respect to or in connection with, and
- fees, costs, expenses and other amounts accrued or due on or in connection with,

our Indebtedness (as defined below), whether outstanding on the date of the indenture or subsequently created, incurred, assumed, guaranteed or in effect guaranteed by us, including all deferrals, renewals, extensions or refundings of, or amendments, modifications or supplements to, the preceding, except for:

- any Indebtedness that by its terms expressly provides that such Indebtedness shall not be senior in right of payment to the notes or expressly provides that such Indebtedness is equal with or junior in right of payment to the notes, and
- any Indebtedness between or among us or any of our subsidiaries, a majority of the voting stock of which we directly or indirectly own.

At December 31, 2007, we had no senior subordinated debt outstanding. The term "senior subordinated debt" means, with respect to us, the notes and any other Indebtedness of ours that specifically provides that such Indebtedness is to have the same rank as the notes in right of payment and is not subordinated by its terms in right of payment to any Indebtedness or other obligations of ours that is not senior Indebtedness.

The term "Indebtedness" means, with respect to any person:

- all indebtedness, obligations and other liabilities, contingent or otherwise, of that person:
  1. for borrowed money, including obligations in respect of overdrafts and any loans or advances from banks, whether or not evidenced by notes or similar instruments, or
  2. evidenced by bonds, notes or other instruments for the payment of money, or
  3. incurred in connection with the acquisition of any property, services or assets, whether or not the recourse of the lender is to the whole of the assets of such person or to only a portion thereof, other than any account payable or other accrued current liability or obligation to trade creditors incurred in the ordinary course of business in connection with the obtaining of materials or services;
- all reimbursement obligations and other liabilities, contingent or otherwise, of that person with respect to letters of credit, bank guarantees, bankers' acceptances, surety bonds, performance bonds or other guaranty of contractual performance;

- all obligations and liabilities, contingent or otherwise, in respect of:
  1. leases of such person required, in conformity with generally accepted accounting principles, to be accounted for as capitalized lease obligations on the balance sheet of such person, and
  2. any lease or related documents, including a purchase agreement, in connection with the lease of real property which provides that such person is contractually obligated to purchase or cause a third party to purchase the leased property and thereby guarantee a minimum residual value of the leased property to the landlord and the obligations of such person under such lease or related document to purchase or to cause a third party to purchase the leased property;
- all obligations of such person, contingent or otherwise, with respect to an interest rate or other swap, cap or collar agreement or other similar instrument or agreement or foreign currency hedge, exchange, purchase or similar instrument or agreement;
- all direct or indirect guaranties or similar agreements by that person in respect of, and obligations or liabilities, contingent or otherwise, of that person to purchase or otherwise acquire or otherwise assure a creditor against loss in respect of, indebtedness, obligations or liabilities of another person of the kind described in the first four bullet points above;
- any indebtedness or other obligations described in the first four bullet points above secured by any mortgage, pledge, lien or other encumbrance existing on property which is owned or held by such person, regardless of whether the indebtedness or other obligation secured thereby shall have been assumed by such person; and
- any and all deferrals, renewals, extensions, refinancings, replacements, restatements and refundings of, or amendments, modifications or supplements to, any indebtedness, obligation or liability of the kind described in any of the six bullet points above.

Any senior debt will continue to be senior debt and will be entitled to the benefits of the subordination provisions irrespective of any amendment, modification or waiver of any of its terms, unless such amendment, modification or waiver expressly provides that such debt shall not be senior in right of payment to the notes.

The indenture will provide that in the event of any payment or distribution of our assets upon our dissolution, winding up, liquidation or reorganization, the holders of our senior debt shall first be paid in respect of all senior debt in full in cash or other payment satisfactory to the holders of senior debt before we make any payments of principal of, or premium, if any, and interest on the notes. In addition, if the notes are accelerated because of an event of default, the holders of any senior debt would be entitled to payment in full in cash or other payment satisfactory to the holders of senior debt of all obligations in respect of senior debt before the holders of the notes are entitled to receive any payment or distribution. Under the indenture, we must promptly notify holders of senior debt if payment of the notes is accelerated because of an event of default.

The indenture will further provide that if any default by us has occurred and is continuing in the payment of principal of, premium, if any, or interest on, rent or other payment obligations in respect of, any senior debt, then no payment shall be made on account of principal of, premium, if any, or interest on the notes until all such payments due in respect of that senior debt have been paid in full in cash or other payment satisfactory to the holders of that senior debt.

Because of these subordination provisions, if we become insolvent, funds which we would otherwise use to pay the holders of notes will be used to pay the holders of senior debt. As a result of

these payments, holders of the notes in certain circumstances may receive less, ratably, than our general creditors whose claims are not contractually subordinated to senior debt.

The notes are effectively subordinated to all existing and future liabilities of our subsidiaries. Any right we have to receive assets of our existing subsidiaries or any future subsidiaries upon their liquidation or reorganization (and the consequent right of the holders of the notes to participate in those assets) will be effectively subordinated to the claims of that subsidiary's creditors, except to the extent that we are ourselves recognized as a creditor of that subsidiary, in which case our claims would still be subordinate to any security interests in the assets of that subsidiary and any indebtedness of that subsidiary senior to that held by us. There are no restrictions in the indenture on the ability of our existing subsidiaries or any future subsidiaries to incur indebtedness or other liabilities. As of December 31, 2007, our existing subsidiaries had no indebtedness outstanding (excluding intercompany debt and liabilities and accounts payable in the ordinary course of business).

We will be obligated to pay reasonable compensation to the trustee and to indemnify the trustee on terms reasonably satisfactory to it against any losses, liabilities or expenses it incurs in connection with its duties relating to the notes. The trustee's claims for such payments will be senior to those of holders of the notes in respect of all funds collected or held by the trustee.

### **Conversion Rights**

Holders may convert their notes into shares of our common stock at any time prior to the close of business on the second business day immediately preceding the stated maturity date, unless the notes have been previously repurchased or redeemed. For each \$1,000 principal amount of the notes surrendered for conversion, a holder may convert any outstanding notes into our common stock at an initial conversion rate of \_\_\_\_\_ shares of our common stock per note, equal to an initial conversion price of approximately \$ \_\_\_\_\_, subject to adjustments as described below. Upon conversion in connection with a fundamental change, described under clause (1) or (2) of the definition of a change in control described below under "—Repurchase at Option of Holders Upon a Fundamental Change," we will pay a make-whole premium to holders of notes upon the conversion of their notes.

The conversion rate and the equivalent conversion price in effect at any given time are referred to as the "applicable conversion rate" and the "applicable conversion price," respectively, and will be subject to adjustment as described below. A holder may convert fewer than all of such holder's notes so long as the amount of notes converted is an integral multiple of \$1,000 principal amount.

Upon conversion of a note, a holder will not receive any cash payment of interest (unless in certain circumstances such conversion occurs between a regular record date and the interest payment date to which it relates) and we will not adjust the applicable conversion rate to account for accrued and unpaid interest. Our delivery to the holder of the full number of shares of our common stock into which the note is convertible, together with any cash payment for such holder's fractional shares, will be deemed to satisfy our obligation to pay the principal amount of the note and our obligation to pay accrued and unpaid interest. As a result, any accrued but unpaid interest to the conversion date is deemed to be cancelled, extinguished and forfeited upon conversion. For a discussion of the tax treatment to you of receiving our common stock upon conversion, see "Material U.S. Federal Income Tax Considerations."

If a holder converts notes, we will pay any documentary, stamp or similar issue or transfer tax due on the issuance of shares of our common stock upon the conversion, unless the tax is due because the holder requests the shares to be issued or delivered to a person other than the holder, in which case the holder will pay that tax.

If a holder wishes to exercise its conversion right, such holder must deliver an irrevocable duly completed conversion notice (which, if applicable, must comply with the applicable procedures of The

Depository Trust Company, or DTC), together, if the notes are in certificated form, with the certificated security, to the conversion agent along with appropriate endorsements and transfer documents, if required, and pay any transfer or similar tax, if required. The conversion agent will, on the holder's behalf, convert the notes into shares of our common stock. Holders may obtain copies of the required form of the conversion notice from the conversion agent. A certificate, or a book-entry transfer through DTC, for the number of full shares of our common stock into which any notes are converted, together with a cash payment for any fractional shares, will be delivered through the conversion agent as soon as practicable, but no later than the third business day, following the conversion date. The trustee will initially act as the conversion agent.

If a holder has already delivered a purchase notice as described under "—Repurchase at Option of Holders Upon a Fundamental Change" with respect to a note, however, the holder may not surrender that note for conversion until the holder has withdrawn the purchase notice in accordance with the indenture.

Holders may surrender their notes for conversion into shares of our common stock at the applicable conversion rate at any time prior to the close of business on the second business day immediately preceding the stated maturity date. The notes and the shares issuable upon conversion of the notes will be registered under the Securities Act on the date the notes are issued.

Holders of notes at the close of business on a regular record date will receive payment of interest payable on the corresponding interest payment date notwithstanding the conversion of such notes at any time after the close of business on the applicable regular record date. Notes surrendered for conversion by a holder during the period from the close of business on any regular record date to the opening of business on the next interest payment date must be accompanied by payment of an amount equal to the interest that the holder is to receive on the notes; *provided, however*, that no such payment need be made (1) if we have specified a purchase date following a fundamental change or specified a redemption date, in either case, that is after a regular record date and on or prior to the next interest payment date, (2) only to the extent of overdue interest, if any overdue interest exists at the time of conversion with respect to such note, or (3) if conversion occurs after the last regular record date prior to the maturity date.

### **Adjustment of Conversion Rate**

The initial conversion rate will be adjusted for certain events, including:

- the issuance of our common stock as a dividend or distribution on our common stock; certain subdivisions and combinations of our common stock;
- the issuance to all or substantially all holders of our common stock of certain rights or warrants to purchase our common stock (or securities convertible into our common stock) at less than (or having a conversion price per share less than) the current market price of our common stock;
- the dividend or other distribution to all or substantially all holders of our common stock of shares of our capital stock (other than common stock) or evidences of our indebtedness or our assets (including securities, but excluding those rights and warrants referred to above and dividends and distributions in connection with a reclassification, consolidation, merger, combination, sale or conveyance resulting in a change in the conversion consideration pursuant to the sixth succeeding paragraph below or dividends or distributions paid exclusively in cash);
- dividends or other distributions consisting exclusively of cash to all or substantially all holders of our common stock; and

- payments to holders of our common stock above the then-prevailing market price pursuant to a tender or exchange offer made by us or any of our subsidiaries.

In the event that we pay a dividend or make a distribution on shares of our common stock consisting of capital stock of, or similar equity interests in, as described in the third bullet point above, a subsidiary or other business unit of ours, the applicable conversion rate will be adjusted based on the market value of the securities so distributed relative to the market value of our common stock, in each case based on the average sale prices of those securities for the 10 trading days commencing on and including the fifth trading day after the date on which "ex-dividend trading" commences for such dividend or distribution on the Nasdaq Global Select Market or such other national or regional exchange or market on which the securities are then listed or quoted.

If any adjustment of the conversion rate would be less than 1% of the then effective rate, such adjustment shall be carried forward and adjustment with respect thereto made at the time of and together with any subsequent adjustment which, together with the original adjustment shall aggregate at least 1% of the then effective conversion rate; *provided, however*, that any carry forward amount shall be paid to the holder upon conversion regardless of the 1% threshold.

Notwithstanding the foregoing, in no event shall the conversion rate as adjusted in accordance with the foregoing exceed \_\_\_\_\_ shares per \$1,000 principal amount of notes, other than on account of adjustments to the conversion rate in the manner set forth in the five bullets above.

Under the provisions of our stockholder rights plan, holders will receive, and if we implement a new stockholder rights plan, this new rights plan must provide that upon conversion of the existing notes the holders will receive, in addition to the common stock issuable upon such conversion, the rights under such rights plan unless the rights have separated from the common stock before the time of conversion, in which case the applicable conversion rate will be adjusted as if we distributed to all holders of our common stock, shares of our capital stock, evidences of indebtedness or assets as described above, subject to readjustment in the event of the expiration, termination or redemption of such rights.

Except as stated above, the conversion rate will not be adjusted for the issuance of our common stock or any securities convertible into or exchangeable for our common stock or carrying the right to purchase any of the foregoing.

In the case of:

- any recapitalization, reclassification or change of our common stock, other than changes resulting from a subdivision or combination,
- a consolidation, merger or combination involving us,
- a sale, conveyance or lease to another corporation of all or substantially all of our property and assets, or
- any statutory share exchange,

in each case as a result of which holders of our common stock are entitled to receive stock, other securities, other property or assets (including cash or any combination thereof) with respect to or in exchange for our common stock, the holders of the notes then outstanding will be entitled thereafter to convert those notes into the kind and amount of shares of stock, other securities or other property or assets (including cash or any combination thereof) which they would have owned or been entitled to receive upon such business combination had such notes been converted into our common stock immediately prior to such business combination. We may not become a party to any such transaction unless its terms are consistent with the preceding. None of the foregoing provisions shall affect the

right of a holder of notes to convert its notes into shares of our common stock prior to the effective date of such transaction.

In the event holders of our common stock have the opportunity to elect the form of consideration to be received in such business combination, the notes will be convertible into the weighted average of the kind and amount of consideration received by the holders of our common stock that affirmatively make such an election. We may not become a party to any such transaction unless its terms are consistent with the preceding. None of the foregoing provisions shall affect the right of a holder of notes to convert its notes into shares of our common stock prior to the effective date of the business combination.

Holders of the notes may, in certain circumstances, be deemed to have received a taxable distribution if the conversion rate is adjusted with the effect of increasing the holder's proportionate interest in our assets and earnings (including on a taxable distribution to holders of our common stock or other transaction which results in an adjustment of the conversion rate), other than adjustments to the conversion price made pursuant to a bona fide reasonable adjustment formula which has the effect of preventing the dilution of the interest of the holders of the notes. As a result of a deemed distribution, U.S. holders (as defined in "Material U.S. Federal Income Tax Considerations") of the notes would generally realize taxable income and the deemed distribution would generally result in withholding taxes for non-U.S. holders (as defined in "Material U.S. Federal Income Tax Considerations"). Any constructive dividend deemed paid would not be eligible for preferential rates of U.S. federal income tax applicable to certain dividends and corporate holders would not be entitled to claim the dividends received deduction with respect to any constructive dividends. Because this deemed income would not give rise to any cash from which any applicable withholding tax could be satisfied, we may offset any such withholding tax applicable to non-U.S. holders against cash payments of interest payable on the notes. See "Material U.S. Federal Income Tax Considerations—Consequences to U.S. Holders—Constructive Dividends" and "—Consequences to Non-U.S. Holders—Dividends."

We may from time to time, to the extent permitted by law, increase the applicable conversion rate of the notes by any amount for any period of at least 20 days. In that case we will give at least 15 days' notice of such increase. We may make such increase in the applicable conversion rate, in addition to those set forth above, as our board of directors deems advisable to avoid or diminish any income tax to holders of our common stock resulting from any dividend or distribution of stock (or rights to acquire stock) or from any event treated as such for income tax purposes.

### Redemption at Our Option

The notes will not be redeemable at our option prior to \_\_\_\_\_, 2010. Starting on that date, we may redeem all or any portion of the notes, at once or over time, on not more than 60 nor less than 30 days' notice by mail. The notes may be redeemed for cash at the redemption prices set forth below, plus accrued and unpaid interest, if any, to, but excluding, the redemption date. However, if the redemption date occurs after a regular record date and on or prior to the corresponding interest payment date, we will instead make the interest payment to the record holder on the regular record date corresponding to such interest payment date. The following prices are for notes redeemed during the 12-month period commencing on \_\_\_\_\_ of the years set forth below, and are expressed as percentages of principal amount:

Year	Redemption Price
2010	%
2011	%
2012	%

If less than all the notes are to be redeemed at any time, selection of notes for redemption will be made by the trustee on a pro rata basis, by lot or by any other method that the trustee considers fair and appropriate. Notes and portions thereof will be redeemed in the amount of \$1,000 or integral multiples of \$1,000. The trustee will make the selection from notes outstanding and not previously called for redemption; *provided, however*, that if a portion of a holder's notes are selected for partial redemption and such holder thereafter converts a portion of such notes, such converted portion will be deemed to be taken from the portion selected for redemption.

Provisions of the indenture that apply to notes called for redemption also apply to portions of the notes called for redemption. If any note is to be redeemed in part, the notice of redemption will state the portion of the principal amount to be redeemed. In the event of any redemption of less than all the notes, we will not be required to:

- (i) issue or register the transfer or exchange of any note during a period of 15 days before any selection of such notes for redemption, or
- (ii) register the transfer or exchange of any note so selected for redemption, in whole or in part, except the unredeemed portion of any note being redeemed in part, in which case we will execute and the trustee will authenticate and deliver to the holder a new note equal in principal amount to the unredeemed portion of the note surrendered.

On and after the redemption date, unless we default in the payment of the redemption price interest will cease to accrue on the principal amount of the notes or portions of notes called for redemption and for which funds have been set aside for payment. In the case of notes or portions of notes redeemed on a redemption date which is also a regularly scheduled interest payment date, the interest payment due on such date will be paid to the person in whose name the note is registered at the close of business on the relevant regular record date.

#### **Make-Whole Premium Upon a Fundamental Change**

If a fundamental change described under clause (1) or (2) of the definition of a change of control described below under "—Repurchase at Option of Holders Upon a Fundamental Change," occurs, we will pay a make-whole premium upon the conversion of the notes in connection with any such transaction by increasing the applicable conversion rate on such notes. The make-whole premium will be in addition to, and not in substitution for, any cash, securities or other assets otherwise due to holders of notes upon conversion. The make-whole premium will be determined by reference to the table below and is based on the date on which the fundamental change becomes effective, referred to as the "effective date," and the price, referred to as the "stock price" paid, or deemed to be paid, per share of our common stock in the transaction constituting the fundamental change, subject to adjustment as described below. If holders of our common stock receive only cash in the fundamental change, the stock price shall be the cash amount paid per share. In all other cases, the stock price shall be the average closing sale price of our common stock for the 15 trading days immediately prior to but not including the effective date.

The following table shows what the make-whole premium would be for each hypothetical stock price and effective date set forth below, expressed as additional shares of common stock per \$1,000 principal amount of notes.

Stock Price on Effective Date	Effective Date					
	February , 2008	February , 2009	February , 2010	February , 2011	February , 2012	February , 2013

The hypothetical stock prices and additional share amounts set forth above are based on a common stock price of \$            per share on            , 2008 and an initial conversion price of approximately \$            per share.

The actual stock price and effective date may not be set forth on the table, in which case:

- if the actual stock price on the effective date is between two stock prices on the table or the actual effective date is between two effective dates on the table, the make-whole premium will be determined by a straight-line interpolation between the make-whole premiums set forth for the two stock prices and the two effective dates on the table based on a 365-day year, as applicable.
- if the stock price on the effective date exceeds \$            per share, subject to adjustment as described below, no make-whole premium will be paid.
- if the stock price on the effective date is less than \$            per share, subject to adjustment as described below, no make-whole premium will be paid.

The stock prices set forth in the first column of the table above will be adjusted as of any date on which the conversion rate of the notes is adjusted. The adjusted stock prices will equal the stock prices applicable immediately prior to such adjustment multiplied by a fraction, the numerator of which is the applicable conversion rate immediately prior to the adjustment giving rise to the stock price adjustment and the denominator of which is the conversion rate as so adjusted. The number of additional shares set forth in the table above will be adjusted in the same manner as the conversion rate as set forth above under "—Conversion Rights."

A conversion of the notes by a holder will be deemed for these purposes to be "in connection with" a fundamental change if the conversion notice is received by the conversion agent on or subsequent to the date 20 calendar days prior to the date announced by us as the anticipated effective date of the fundamental change but before the close of business on the business day immediately preceding the related repurchase date. We will notify holders of notes of the anticipated effective date of any fundamental change as promptly as practicable following the date we publicly announce such fundamental change, but in no event less than 20 days prior to such date.

Notwithstanding the foregoing, in no event will the applicable conversion rate exceed            per \$1,000 principal amount of notes, subject to adjustments in the same manner as the conversion rate with respect to the events described under "—Conversion Rights—Adjustment of Conversion Rate."

The additional shares will be delivered upon the later of the settlement date for the conversion and promptly following the effective date of the fundamental change transaction.

Our obligation to pay the make-whole premium may constitute a penalty under applicable contract law, and therefore its enforceability cannot be assured.



## Repurchase at Option of Holders Upon a Fundamental Change

If a fundamental change occurs, each holder of notes will have the right to require us to repurchase all or any portion of that holder's notes that is equal to \$1,000 or a whole multiple of \$1,000, on the date that is 45 days after the date we give notice of the occurrence of a fundamental change at a repurchase price, payable in cash, equal to 100% of the principal amount of the notes to be repurchased, together with interest accrued and unpaid to, but excluding, the repurchase date.

As promptly as practicable following the date we publicly announce such transaction, but in no event less than 20 days prior to the anticipated effective date of a fundamental change, we are required to give notice to all holders of notes, as provided in the indenture, of the occurrence of the fundamental change and of their resulting repurchase right. We must also deliver a copy of our notice to the trustee. To exercise the repurchase right, a holder of notes must deliver prior to or on the 30th day after the date of our notice irrevocable written notice to the trustee of the holder's exercise of its repurchase right, together with the notes with respect to which the right is being exercised. We will also disseminate a press release through Dow Jones & Company, Inc. or Bloomberg Business News announcing the occurrence of the fundamental change or publish that information in a newspaper of general circulation in New York City or on our website, or through such other public medium as we deem appropriate at that time.

A "fundamental change" will be deemed to have occurred upon a change of control or a termination of trading, each as defined below.

A "change of control" will be deemed to have occurred at such time after the original issuance of the notes when the following has occurred:

- (1) the acquisition by any person, including any syndicate or group deemed to be a "person" under Section 13(d)(3) of the Securities Exchange Act of 1934, as amended (Exchange Act), of beneficial ownership, directly or indirectly, through a purchase, merger or other acquisition transaction or series of transactions of shares of our capital stock entitling that person to exercise 50% or more of the total voting power of all shares of our capital stock entitled to vote generally in elections of directors, other than any acquisition by us, any of our subsidiaries or any of our employee benefit plans;
- (2) our consolidation or merger with or into any other person, any merger of another person into us, or any conveyance, transfer, sale, lease or other disposition of all or substantially all of our properties and assets to another person, other than:
  - any transaction that does not result in any reclassification, conversion, exchange or cancellation of outstanding shares of our capital stock, and
  - any transaction pursuant to which holders of our capital stock immediately prior to the transaction have the entitlement to exercise, directly or indirectly, 50% or more of the total voting power of all shares of our capital stock entitled to vote generally in the election of directors of the continuing or surviving person immediately after the transaction; or
  - any merger solely for the purpose of changing our jurisdiction of incorporation and resulting in a reclassification, conversion or exchange of outstanding shares of common stock solely into shares of common stock of the surviving entity;

However, a change in control will not be deemed to have occurred if, in the case of a merger or consolidation, at least 90% of the consideration (excluding cash payments for fractional shares and cash payments pursuant to dissenters' appraisal rights) in the merger or consolidation constituting the change in control consists of

common stock traded on a U.S. national securities exchange (or which will be so traded when issued or exchanged in connection with such change in control) and as a result of such transaction or transitions the notes become convertible solely into such common stock.

- (3) during any consecutive two-year period, individuals who at the beginning of that two-year period constituted our board of directors, together with any new directors whose election to our board of directors, or whose nomination for election by our stockholders, was approved by a vote of a majority of the directors then still in office who were either directors at the beginning of such period or whose election or nomination for election was previously so approved, cease for any reason to constitute a majority of our board of directors then in office; or
- (4) our stockholders pass a resolution approving a plan of liquidation or dissolution.

A "termination of trading" will be deemed to have occurred if our common stock or other common stock into which the notes are convertible is neither listed for trading on a U.S. national securities exchange nor approved for listing on any U.S. system of automated dissemination of quotations of securities prices, or traded in over-the-counter securities markets.

The beneficial owner shall be determined in accordance with Rule 13d-3 promulgated by the SEC under the Exchange Act. The term "person" includes any syndicate or group which would be deemed to be a "person" under Section 13(d)(3) of the Exchange Act.

Rule 13e-4 under the Exchange Act requires the dissemination of certain information to security holders if an issuer tender offer occurs and may apply if the repurchase option becomes available to holders of the notes. We will comply with this rule to the extent applicable at that time.

We may, to the extent permitted by applicable law, at any time purchase the notes in the open market or by tender at any price or by private agreement. Any note so purchased by us may, to the extent permitted by applicable law, be reissued or resold or may be surrendered to the trustee for cancellation. Any notes surrendered to the trustee may not be reissued or resold and will be canceled promptly.

The preceding provisions would not necessarily protect holders of the notes if highly leveraged or other transactions involving us occur that may adversely affect holders.

Our ability to repurchase notes upon the occurrence of a fundamental change is subject to important limitations. The occurrence of a fundamental change could cause an event of default under, or be prohibited or limited by, the terms of existing or future senior debt. As a result, any repurchase of the notes would, absent a waiver, be prohibited under the subordination provisions of the indenture until the senior debt is paid in full.

Further, we cannot assure you that we would have the financial resources, or would be able to arrange financing, to pay the repurchase price for all the notes that might be delivered by holders of notes seeking to exercise the repurchase right. Any failure by us to repurchase the notes when required following a fundamental change would result in an event of default under the indenture, whether or not such repurchase is permitted by the subordination provisions of the indenture. Any such default may, in turn, cause a default under existing or future senior debt. See "—Ranking" above.

#### **No Stockholder Rights for Holders of Notes**

Before they convert their notes into common stock, holders of notes, as such, will not have any rights as our stockholders (including, without limitation, voting rights and rights to receive any dividends or other distributions on shares of our common stock), except in limited circumstances described above under "—Adjustment of Conversion Rate."

## Calculations in Respect of the Notes

Except as explicitly specified otherwise herein, we will be responsible for making all calculations required under the notes. These calculations include, but are not limited to, determinations of the conversion price and conversion rate applicable to the notes. We will make all these calculations in good faith and, absent manifest error, our calculations will be final and binding on holders of the notes. We will provide a schedule of our calculations to the trustee, and the trustee is entitled to rely upon the accuracy of our calculations without responsibility for independent verification thereof. The trustee will forward our calculations to any holder of notes upon written request.

## Consolidation, Merger and Sale of Assets

We may, without the consent of the holders of notes, consolidate with, merge into or transfer all or substantially all of our assets to any corporation, limited liability company, partnership or trust organized under the laws of the U.S. or any of its political subdivisions, *provided that*:

- the surviving entity assumes all our obligations under the indenture and the notes, as provided in the indenture;
- at the time of such transaction, no event of default, and no event which, after notice or lapse of time, would become an event of default, shall have happened and be continuing;
- if as a result of such transaction the notes become convertible into common stock or other securities issued by a third party, such third party fully and unconditionally agrees to deliver such common stock or other securities upon conversion under the notes and the indenture; and
- an officers' certificate and an opinion of counsel, each stating that the consolidation, merger or transfer complies with the provisions of the indenture, have been delivered to the trustee.

## Reporting Obligations

We will file in a timely fashion all reports and other information and documents which we are required to file with the SEC pursuant to Section 13 or 15(d) of the Exchange Act, including our Annual Report on Form 10-K and our Quarterly Reports on Form 10-Q, and deliver such reports to the trustee within 15 days after we are required to file such reports with the SEC. In the event we are at any time no longer subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, we shall, if required to do so under rules and regulations prescribed by the SEC, provide the trustee with such reports containing such information as would have been required to be filed with the SEC had we continued to have been subject to such reporting requirements, as may be prescribed in such rules and regulations. We will comply with the other provisions of Section 314(a) of the Trust Indenture Act. Furthermore, within 90 days after the end of each fiscal year, we will deliver to the trustee an officer's certificate stating whether the signatory knows of any default or event of default under the indenture, and describe any default or event of default and the efforts to remedy the same.

## Events of Default

Each of the following will constitute an event of default under the indenture:

- our failure to pay when due the principal of or premium, if any, on any of the notes at maturity, upon redemption or exercise of a repurchase right or otherwise, whether or not such payment is prohibited by the subordination provisions of the indenture;
- our failure to pay an installment of interest on any of the notes for 30 days after the date when due, whether or not such payment is prohibited by the subordination provisions of the indenture;

- our failure to deliver shares of common stock, together with cash instead of fractional shares, when those shares of common stock or cash instead of fractional shares, are required to be delivered following conversion of a note, and that failure continues for 10 days;
- our failure to perform or observe any other term, covenant or agreement contained in the notes or the indenture for a period of 60 days after written notice of such failure, requiring us to remedy the same, shall have been given to us by the trustee or to us and the trustee by the holders of at least 25% in aggregate principal amount of the notes then outstanding;
- our failure to make any payment by the end of the applicable grace period, if any, after the maturity of any indebtedness for borrowed money in an amount in excess of \$5.0 million, or there is an acceleration of indebtedness for borrowed money in an amount in excess of \$5.0 million because of a default with respect to such indebtedness without such indebtedness having been discharged or such acceleration having been cured, waived, rescinded or annulled, in either case, for a period of 30 days after written notice to us by the trustee or to us and the trustee by holders of at least 25% in aggregate principal amount of the notes then outstanding;
- our failure to give you notice of your rights to require us to repurchase your notes upon a fundamental change; and
- certain events of our bankruptcy, insolvency or reorganization.

If an event of default specified in the seventh bullet point above occurs and is continuing, then the principal of all the notes and the interest thereon shall automatically become immediately due and payable. If an event of default occurs and is continuing, other than an event of default specified in the seventh bullet point above, the trustee or the holders, with written notice to the trustee, of at least 25% in aggregate principal amount of the notes then outstanding may declare the notes due and payable at their principal amount together with accrued interest, and thereupon the trustee may, at its discretion, proceed to protect and enforce the rights of the holders of notes by appropriate judicial proceedings. Such declaration may be rescinded and annulled with the written consent of the holders of a majority in aggregate principal amount of the notes then outstanding, subject to the provisions of the indenture.

Notwithstanding the foregoing, the indenture will provide that, to the extent elected by us, the sole remedy for an event of default relating to the failure to comply with the reporting obligations in the indenture with respect to SEC filings that are described above under the caption "—Reporting Obligations," and for any failure to comply with the requirements of Section 314(a)(1) of the Trust Indenture Act, will for the first 180 days after the occurrence of such an event of default consist exclusively of the right to receive special interest on the notes at an annual rate equal to 1.0% of the outstanding principal amount of the notes. This special interest will be paid semi-annually in arrears, with the first semi-annual payment due on the first interest payment date following the date on which the special interest began to accrue on any notes. The special interest will accrue on all outstanding notes from and including the date on which an event of default relating to a failure to comply with the reporting obligations in the indenture first occurs to but not including the 180th day thereafter (or such earlier date on which the event of default shall have been cured or waived). On such 180th day (or earlier, if the event of default relating to the reporting obligations is cured or waived prior to such 180th day), such special interest will cease to accrue and, if the event of default relating to reporting obligations has not been cured or waived prior to such 180th day, the notes will be subject to acceleration as provided above. The provisions of the indenture described in this paragraph will not affect the rights of holders in the event of the occurrence of any other event of default. In the event we do not elect to pay special interest upon an event of default in accordance with this paragraph, the notes will be subject to acceleration as provided above.

The holders of a majority in aggregate principal amount of notes at the time outstanding through their written consent, or the holders of a majority in aggregate principal amount of notes then outstanding represented at a meeting at which a quorum is present by a written resolution, may waive any existing default or event of default and its consequences except any default or event of default:

- in any payment on the notes;
- in respect of the conversion rights of the notes; or
- in respect of the covenants or provisions in the indenture that may not be modified or amended without the consent of the holder of each note affected as described in "—Modification, Waiver and Meetings" below.

Holders of a majority in aggregate principal amount of the notes then outstanding through their written consent, or the holders of a majority in aggregate principal amount of the notes then outstanding represented at a meeting at which a quorum is present by a written resolution, may direct the time, method and place of conducting any proceeding for any remedy available to the trustee or exercising any trust or power conferred upon the trustee, subject to the provisions of the indenture. The indenture contains a provision entitling the trustee, subject to the duty of the trustee during a default to act with the required standard of care, to be indemnified by the holders of notes before proceeding to exercise any right or power under the indenture at the request of such holders. The rights of holders of the notes to pursue remedies with respect to the indenture and the notes are subject to a number of additional requirements set forth in the indenture.

The right of any holder:

- to receive payment of principal, premium, if any, the change of control purchase price, the redemption price or interest, in respect of the notes held by that holder on or after the respective due dates expressed in the notes;
- to convert those notes; or
- to bring suit for the enforcement of any such payment on or after the respective due dates expressed in the notes and the right to convert;

will not be impaired or affected without that holder's consent.

The indenture will provide that the trustee shall, within 90 days of the occurrence of a default, give to the registered holders of the notes notice of all uncured defaults known to it, but the trustee shall be protected in withholding such notice if it, in good faith, determines that the withholding of such notice is in the best interest of such registered holders, except in the case of a default in the payment of the principal of, or premium, if any, or interest on, any of the notes when due or in the payment of any repurchase or redemption obligation.

We are required to furnish annually to the trustee a written statement as to the fulfillment of our obligations under the indenture. In addition, we are required to file with the trustee a written notice of the occurrence of any default or event of default within five business days of our becoming aware of the occurrence of any default or event of default.

#### **Modification, Waiver and Meetings**

The indenture contains provisions for convening meetings of the holders of notes to consider matters affecting their interests.

The indenture (including the terms and conditions of the notes) may be modified or amended by us and the trustee, without the consent of the holder of any note, for the purposes of, among other things:

- adding to our covenants for the benefit of the holders of notes; surrendering any right or power conferred upon us;
- providing for conversion rights of holders of notes if any recapitalization, reclassification or change of our common stock or any consolidation, merger or sale, conveyance or lease of all or substantially all of our assets or a statutory share exchange occurs;
- providing for the assumption of our obligations to the holders of notes in the case of a merger, consolidation, conveyance, transfer or lease;
- providing for the addition of a guaranty of the notes by any other entity;
- increasing the applicable conversion rate, *provided* that the increase will not adversely affect the interests of holders of notes in any material respect;
- complying with the requirements of the SEC in order to effect or maintain the qualification of the indenture under the Trust Indenture Act of 1939, as amended;
- curing any ambiguity or correcting or supplementing any defective provision contained in the indenture, *provided* that such modification or amendment does not, in the good faith opinion of our board of directors and the trustee, adversely affect the interests of the holders of the notes in any material respect; and provided further, that no modification or amendment made to conform the indenture or the notes to this "Description of the Notes," shall be deemed to adversely affect the interests of the holders of the notes; or
- adding or modifying any other provisions which we and the trustee may deem necessary or desirable and which will not adversely affect the interests of the holders of notes in any material respect.

Modifications and amendments to the indenture or to the terms and conditions of the notes may also be made, and non-compliance by us with any provision of the indenture or the notes may be waived, either:

- with the written consent of the holders of at least a majority in aggregate principal amount of the notes at the time outstanding; or
- by the adoption of a resolution at a meeting of holders at which a quorum is present by at least a majority in aggregate principal amount of the notes represented at such meeting.

However, no such modification, amendment or waiver may, without the written consent or the affirmative vote of the holder of each note affected:

- change the maturity of the principal of or any installment of interest on any note; reduce the principal amount of, or any premium, if any, on any note;
- reduce the interest rate or interest on any note;
- change the currency of payment of principal of, premium, if any, or interest on any note;
- impair the right to institute suit for the enforcement of any payment on or with respect to, or the conversion of, any note;
- modify our obligations to maintain an office or agency in New York City;

- except as otherwise permitted or contemplated by provisions of the indenture concerning specified reclassifications or corporate reorganizations, adversely affect the conversion rights of holders of the notes;
- adversely affect the repurchase option of holders upon a fundamental change;
- modify the subordination provisions of the notes in a manner adverse to the holders of notes;
- reduce the percentage in aggregate principal amount of notes outstanding necessary to modify or amend the indenture or to waive any past default; or
- reduce the percentage in aggregate principal amount of notes outstanding required for the adoption of a resolution or the quorum required at any meeting of holders of notes at which a resolution is adopted.

The quorum at any meeting called to adopt a resolution will be persons holding or representing a majority in aggregate principal amount of the notes at the time outstanding.

#### **Unclaimed Money**

If money deposited with the trustee or paying agent for the payment of principal of, premium, if any, or accrued and unpaid interest on the notes remains unclaimed for two years, the trustee and paying agent will pay the money back to us upon our written request. However, the trustee and paying agent have the right to withhold paying the money back to us until they publish in a newspaper of general circulation in New York City, or mail to each holder, a notice stating that the money will be paid back to us if unclaimed after a date no less than 30 days from the publication or mailing. After the trustee or paying agent pays the money back to us, holders of notes entitled to the money must look to us for payment as general creditors, subject to applicable law, and all liability of the trustee and the paying agent with respect to the money will cease.

#### **Book-Entry System**

We will issue the notes in the form of one or more global securities. The global security will be deposited with the trustee as custodian for DTC and registered in the name of a nominee of DTC. Except as set forth below, the global security may be transferred, in whole and not in part, only to DTC or another nominee of DTC. You will hold your beneficial interests in the global security directly through DTC if you have an account with DTC or indirectly through organizations that have accounts with DTC.

Notes in definitive certificated form (called "certificated securities") will be issued only in certain limited circumstances described below.

DTC has advised us that it is:

- a limited purpose trust company organized under the laws of the State of New York; a member of the Federal Reserve System;
- a "clearing corporation" within the meaning of the New York Uniform Commercial Code; and a "clearing agency" registered pursuant to the provisions of Section 17A of the Exchange Act.

DTC was created to hold securities of institutions that have accounts with DTC (called participants) and to facilitate the clearance and settlement of securities transactions among its participants in such securities through electronic book-entry changes in accounts of the participants, thereby eliminating the need for physical movement of securities certificates. DTC's participants include securities brokers and dealers, which may include the underwriters, banks, trust companies,

clearing corporations and certain other organizations. Access to DTC's book-entry system is also available to others such as banks, brokers, dealers and trust companies (called, the indirect participants) that clear through or maintain a custodial relationship with a participant, whether directly or indirectly.

We expect that pursuant to procedures established by DTC upon the deposit of the global security with DTC, DTC will credit, on its book-entry registration and transfer system, the principal amount of notes represented by such global security to the accounts of participants. The accounts to be credited shall be designated by the underwriter. Ownership of beneficial interests in the global security will be limited to participants or persons that may hold interests through participants. Ownership of beneficial interests in the global security will be shown on, and the transfer of those beneficial interests will be effected only through, records maintained by DTC (with respect to participants' interests), the participants and the indirect participants.

The laws of some jurisdictions may require that certain purchasers of securities take physical delivery of such securities in definitive form. These limits and laws may impair the ability to transfer or pledge beneficial interests in the global security. Accordingly, the ability to transfer beneficial interests in the notes represented by the global security to those persons may be limited. In addition, because DTC can act only on behalf of its participants, who in turn act on behalf of persons who hold interests through participants, the ability of a person having a beneficial interest in notes represented by the global security to pledge or transfer those interests to persons or entities that do not participate in DTC's system, or otherwise to take actions in respect of such interest, may be affected by the lack of a physical definitive security in respect of such interest.

Owners of beneficial interests in global securities who desire to convert their interests for common stock should contact their brokers or other participants or indirect participants through whom they hold such beneficial interests to obtain information on procedures, including proper forms and cut-off times, for submitting requests for conversion. So long as DTC, or its nominee, is the registered owner or holder of a global security, DTC or its nominee, as the case may be, will be considered the sole owner or holder of the notes represented by the global security for all purposes under the indenture and the notes. In addition, no owner of a beneficial interest in a global security will be able to transfer that interest except in accordance with the applicable procedures of DTC.

Except as set forth below, as an owner of a beneficial interest in the global security, you will not be entitled to have the notes represented by the global security registered in your name, will not receive or be entitled to receive physical delivery of certificated securities and will not be considered to be the owner or holder of any notes under the global security. We understand that under existing industry practice, if an owner of a beneficial interest in the global security desires to take any action that DTC, as the holder of the global security, is entitled to take, DTC would authorize the participants to take such action. Additionally, in such case, the participants would authorize beneficial owners owning through such participants to take such action or would otherwise act upon the instructions of beneficial owners owning through them.

We will make payments of principal of, premium, if any, and interest on the notes represented by the global security registered in the name of and held by DTC or its nominee to DTC or its nominee, as the case may be, as the registered owner and holder of the global security. Neither we, the trustee nor any paying agent will have any responsibility or liability for any aspect of the records relating to or payments made on account of beneficial interests in the global security or for maintaining, supervising or reviewing any records relating to such beneficial interests.

We expect that DTC or its nominee, upon receipt of any payment of principal of, premium, if any, or interest on the global security, will credit participants' accounts with payments in amounts proportionate to their respective beneficial interests in the principal amount of the global security as shown on the records of DTC or its nominee. We also expect that payments by participants or indirect



participants to owners of beneficial interests in the global security held through such participants or indirect participants will be governed by standing instructions and customary practices and will be the responsibility of such participants or indirect participants. We will not have any responsibility or liability for any aspect of the records relating to, or payments made on account of, beneficial interests in the global security for any note or for maintaining, supervising or reviewing any records relating to such beneficial interests or for any other aspect of the relationship between DTC and its participants or indirect participants or the relationship between such participants or indirect participants and the owners of beneficial interests in the global security owning through such participants.

Transfers between participants in DTC will be effected in the ordinary way in accordance with DTC rules and will be settled in same-day funds.

DTC has advised us that it will take any action permitted to be taken by a holder of notes only at the direction of one or more participants to whose account the DTC interests in the global security is credited and only in respect of such portion of the aggregate principal amount of notes as to which such participant or participants has or have given such direction. However, if DTC notifies us that it is unwilling to be a depository for the global security or ceases to be a clearing agency or there is an event of default under the notes, DTC will convert global security for certificated securities which it will distribute to its participants and which will be legended, if required, as set forth under "Transfer Restrictions." Although DTC is expected to follow the foregoing procedures in order to facilitate transfers of interests in the global security among participants of DTC, it is under no obligation to perform or continue to perform such procedures, and such procedures may be discontinued at any time. Neither we nor the trustee will have any responsibility, or liability for the performance by DTC or the participants or indirect participants of their respective obligations under the rules and procedures governing their respective operations.

### **Satisfaction and Discharge**

We may discharge our obligations under the indenture while notes remain outstanding, subject to certain conditions, if all outstanding notes will become due and payable at their scheduled maturity within one year or all outstanding notes are scheduled for redemption within one year and, in either case, we have deposited with the trustee an amount sufficient to pay and discharge all outstanding notes on the date of their scheduled maturity or such date of redemption.

### **Form, Denomination and Registration**

The notes are being issued in fully registered form, without coupons, in denominations of \$1,000 principal amount and whole multiples of \$1,000.

### **Notices**

Except as otherwise provided in the indenture, notices to holders of notes will be given by mail to the addresses of holders of the notes as they appear in the note register.

### **Governing Law**

The indenture and the notes will be governed by, and construed in accordance with, the law of the State of New York.

### **Information Regarding the Trustee**

U.S. Bank National Association, as trustee under the indenture, has been appointed by us as paying agent, conversion agent, registrar and custodian with regard to the notes. Computershare Investor Services is the transfer agent and registrar for our common stock. The trustee or its affiliates may from time to time in the future provide banking and other services to us in the ordinary course of their business.

## MATERIAL U.S. FEDERAL INCOME TAX CONSIDERATIONS

The following is a summary of certain material U.S. federal income tax considerations relating to the purchase, ownership and disposition of the notes and common stock into which the notes are convertible, but does not purport to be a complete analysis of all the potential tax considerations relating thereto. This summary is based upon the provisions of the Internal Revenue Code of 1986, as amended, or the Code, Treasury Regulations promulgated thereunder, administrative rulings and judicial decisions, all as of the date hereof. These authorities may be changed, possibly retroactively, so as to result in U.S. federal income tax consequences different from those set forth below. We have not sought any ruling from the Internal Revenue Service, or the IRS, with respect to the statements made and the conclusions reached in the following summary, and there can be no assurance that the IRS will agree with such statements and conclusions.

The following discussion of U.S. federal income tax considerations is for general information only. It is not tax advice. Each prospective investor should consult its own tax advisor regarding the particular U.S. federal, state, local and foreign tax consequences of purchasing, holding and disposing of our notes or common stock, including the consequences of any proposed change in applicable laws.

This summary is limited to holders who purchase notes upon their initial issuance at their initial issue price and who hold the notes and the common stock into which such notes are convertible as capital assets. This summary also does not address the tax considerations arising under the laws of any foreign, state or local jurisdiction or any federal estate or gift tax rules. In addition, this discussion does not address tax considerations applicable to an investor's particular circumstances or to investors that may be subject to special tax rules, including, without limitation:

- banks, insurance companies or other financial institutions;
- regulated investment companies or real estate investment trusts;
- persons subject to the alternative minimum tax;
- tax-exempt organizations;
- dealers in securities or currencies;
- traders in securities that elect to use a mark-to-market method of accounting for their securities holdings;
- foreign persons or entities, except to the extent specifically set forth below;
- persons who hold the notes or common stock through S-corporations, partnerships or other passthrough entities;
- certain former citizens or former long-term residents of the United States;
- U.S. holders, as defined below, whose functional currency is not the U.S. dollar;
- persons who hold the notes or common stock as a position in a hedging transaction, straddle, conversion transaction or other risk reduction transaction; or
- persons deemed to sell the notes or common stock under the constructive sale provisions of the Code.

**You are urged to consult your tax advisor with respect to the application of the U.S. federal income tax laws to your particular situation, as well as any tax consequences of the purchase, ownership and disposition of the notes and common stock arising under the federal estate or gift tax rules or under the laws of any state, local, foreign or other taxing jurisdiction or under any applicable tax treaty.**

## Consequences to U.S. Holders

The following is a summary of certain material U.S. federal income tax consequences that will apply to you if you are a U.S. holder of the notes or the common stock. Certain consequences to non-U.S. holders of the notes or common stock are described under "—Consequences to Non-U.S. Holders" below. "U.S. holder" means a beneficial owner of our notes or our common stock that is:

- an individual citizen or resident of the United States;
- a corporation or other entity taxable as a corporation for U.S. federal income tax purposes, created or organized in the United States or under the laws of the United States, any state thereof, or the District of Columbia;
- an estate, the income of which is subject to U.S. federal income taxation regardless of its source; or
- a trust that (i) is subject to the primary supervision of a U.S. court and the control of one or more U.S. persons or (ii) has a valid election in effect under applicable Treasury Regulations to be treated as a U.S. person.

If a partnership holds our notes or common stock, the tax treatment of a partner will generally depend upon the status of the partner and the activities of the partnership. If you are a partner in a partnership (or member of a limited liability company) holding the notes, you should consult your own tax advisor.

### *Payment of Interest*

You will be required to include interest paid on the notes as ordinary income at the time it is paid or accrued, depending upon your regular method of accounting for U.S. federal income tax purposes.

### *Sale, Exchange, Repurchase or Redemption of the Notes*

Upon the sale, exchange, repurchase or redemption of a note, you generally will recognize capital gain or loss equal to the difference between the amount you receive (including the amount of cash and the fair market value of any property) and your adjusted tax basis in the notes. A portion of the proceeds may be attributable to accrued interest and should not be taken into account when computing capital gain or loss. Instead, that portion should be recognized as ordinary interest income to the extent such accrued interest has not been previously included in income. Any gain you recognize generally will be treated as long-term capital gain or loss if you held the notes for more than one year. The deductibility of capital losses is subject to limitations.

Special rules apply in determining the tax basis of a note. Your basis in a note will generally equal your original purchase price for the notes.

### *Conversion of the Notes*

You generally will not recognize gain or loss upon conversion of the notes into our common stock, except with respect to any cash received in lieu of fractional shares. The receipt of cash for fractional shares generally will result in the recognition of gain or loss equal to the difference between the cash received and your adjusted tax basis in the fractional share.

Your tax basis in common stock received upon conversion of a note will generally equal your adjusted tax basis in the note at the time of the conversion, reduced by any basis allocable to a fractional share. Your holding period for the common stock received will generally include the holding period for the note converted.

Holders of convertible debt instruments such as the notes may, in certain circumstances, be deemed to have received distributions of stock if the conversion price of such instruments is adjusted with the effect of increasing your proportionate interest in our assets and earnings (including on payment of the make-whole premium). However, adjustments to the conversion price made pursuant to a bona fide reasonable adjustment formula which has the effect of preventing the dilution of the interest of the holders of the debt instruments will generally not be deemed to result in a constructive distribution of stock. Certain of the possible adjustments provided in the notes, including, without limitation, adjustments in respect of taxable dividends to our stockholders, may not qualify as being pursuant to a bona fide reasonable adjustment formula. If such adjustments are made, you will be deemed to have received constructive distributions (in an amount equal to the value of the additional shares issuable upon conversion) includible in your income in the manner described under "—Dividends" below even though you have not received any cash or property as a result of such adjustments. In certain circumstances, the failure to provide for such an adjustment may also result in a constructive distribution to you. Any constructive dividend deemed paid would not be eligible for the lower capital gains rate applicable to certain dividends for tax years beginning prior to January 1, 2011 and corporate holders would not be entitled to claim the dividends received deduction with respect to any constructive dividends.

*Dividends*

Distributions, if any, made on our common stock held by you in connection with the conversion of the notes generally will be included in your income as ordinary dividend income to the extent of our current or accumulated earnings and profits as determined for U.S. federal income tax purposes. With respect to non-corporate taxpayers for taxable years beginning before January 1, 2011, such dividends are generally taxed at the lower applicable capital gains rate provided certain holding period requirements are satisfied. Distributions in excess of our current and accumulated earnings and profits will be treated as a return of capital to the extent of your adjusted tax basis in the common stock and thereafter as capital gain from the sale or exchange of such common stock. Dividends received by a corporate U.S. holder may be eligible for a dividends received deduction, subject to applicable limitations.

*Sale, Exchange, Redemption of Common Stock*

Upon the sale, exchange or redemption of our common stock held by you in connection with the conversion of the notes, you generally will recognize capital gain or loss equal to the difference between (i) the amount of cash and the fair market value of any property received upon the sale, exchange or redemption and (ii) your adjusted tax basis in the common stock. Such capital gain or loss will be long-term capital gain or loss if your holding period in the common stock is more than one year at the time of the sale, exchange or redemption. Your adjusted tax basis and holding period in common stock received in connection with the conversion of notes are determined as discussed above under "—Conversion of the Notes." Long-term capital gains recognized by certain non-corporate U.S. holders, including individuals, will generally be subject to a reduced rate of U.S. federal income tax. The deductibility of capital losses is subject to limitations.

*Backup Withholding and Information Reporting*

Certain noncorporate U.S. holders may be subject to IRS information reporting and backup withholding (which is currently imposed at a 28% rate through December 31, 2010) on payments of interest on the notes, dividends on common stock (including constructive dividends) and proceeds from

the sale or other disposition of the notes or common stock. Backup withholding should only be imposed where the noncorporate U.S. holder is not otherwise exempt and:

- fails to furnish its taxpayer identification number, or TIN;
- furnishes an incorrect TIN;
- is notified by the IRS that he or she has failed to properly report payments of interest or dividends; or
- under certain circumstances, fails to certify, under penalties of perjury, that he or she has furnished a correct TIN and has not been notified by the IRS that he or she is subject to backup withholding.

You generally will be entitled to credit any amounts withheld under the backup withholding rules against your U.S. federal income tax liability provided that the required information is furnished to the IRS in a timely manner.

### **Consequences to Non-U.S. Holders**

The following is a summary of certain material U.S. federal income tax consequences that will apply to you if you are a non-U.S. holder of the notes. For purposes of this discussion, a "non-U.S. holder" means a beneficial owner of our notes that is not a U.S. holder.

Special rules may apply to certain non-U.S. holders such as "controlled foreign corporations," "passive foreign investment companies," corporations that accumulate earnings to avoid federal income tax or, in certain circumstances, individuals who are U.S. expatriates. Such non-U.S. holders should consult their own tax advisors to determine the U.S. federal, state, local and other tax consequences that may be relevant to them in their particular circumstances.

#### *Payments of Interest*

Generally, all payments of interest made to you on the notes will be subject to a 30% U.S. federal withholding tax. However, the interest may be exempt from withholding tax if it qualifies as "portfolio interest." You may be entitled to the exemption if:

- you do not own, actually or constructively, 10% or more of the total combined voting power of all classes of our stock entitled to vote;
- you are not a "controlled foreign corporation" with respect to which we are, directly or indirectly, a "related person"; and
- you provide your name and address, and certify, under penalties of perjury, that you are not a U.S. person, which certification may be made on an IRS Form W-8BEN or successor form, or that you hold your notes through certain intermediaries, and you and the intermediaries satisfy the certification requirements of applicable Treasury Regulations.

Prospective investors should consult their tax advisors regarding the certification requirements for non-U.S. holders.

If you cannot satisfy the requirements described above, you will be subject to the 30% U.S. federal withholding tax with respect to payments of interest, or payments treated as interest, on the notes, unless you provide us with a properly executed (1) IRS Form W-8BEN or successor form claiming an exemption from or reduction in withholding under the benefit of an applicable U.S. income tax treaty or (2) IRS Form W-8ECI or successor form stating that interest paid on the note is not subject to withholding tax because it is effectively connected with the conduct of a U.S. trade or business.

If you are engaged in a trade or business in the United States and interest on a note is effectively connected with your conduct of that trade or business, you generally will be subject to U.S. federal income tax on that interest in the same manner as if you were a U.S. person as defined under the Code, although you will be exempt from the 30% withholding tax, provided the certification requirements described above are satisfied. In addition, if you are a foreign corporation, you may be subject to a branch profits tax equal to 30%, or lower rate as may be prescribed under an applicable U.S. income tax treaty, of your earnings and profits for the taxable year, subject to adjustments, that are effectively connected with your conduct of a trade or business in the United States. For this purpose, interest will be included in your earnings and profits.

#### *Conversion of the Notes*

A non-U.S. holder will generally not recognize any gain or loss on the conversion of the notes into common stock. To the extent you receive cash upon conversion of a note in lieu of fractional shares, you generally will be subject to the rules described under "—Sale, Exchange, Repurchase of Other Disposition of Notes or Common Stock" below.

#### *Sale, Exchange, Repurchase or Other Disposition of Notes or Common Stock*

Any gain that a non-U.S. holder realizes upon the sale, exchange, repurchase or other disposition of our notes (except to the extent a portion is attributable to accrued interest) or our common stock generally will not be subject to U.S. federal income tax unless:

- the gain is effectively connected with your conduct of a trade or business in the United States; or
- you are an individual who is present in the United States for 183 days or more in the taxable year of sale, exchange, repurchase or other disposition and certain conditions are met.

If your gain is described in the first bullet point above, you generally will be subject to U.S. federal income tax on the net gain derived from the sale. If you are a corporation, then any such effectively connected gain received by you may also, under certain circumstances, be subject to the branch profits tax at a 30% rate, or such lower rate as may be prescribed under an applicable U.S. income tax treaty. If you are an individual described in the second bullet point above, you will be subject to a flat 30% U.S. federal income tax on the gain derived from the sale, which may be offset by U.S. source capital losses, even though you are not considered a resident of the United States. Such holders are urged to consult their tax advisors regarding the tax consequences of the acquisition, ownership and disposition of the notes or the common stock.

#### *Constructive Dividends*

Under certain circumstances, a non-U.S. holder may be deemed to have received a constructive dividend. See "Consequences to U.S. Holders—Constructive Dividends" above. Any constructive dividend deemed paid to a non-U.S. holder will be subject to withholding tax at a 30% rate or such lower rate as may be specified by an applicable income tax treaty. A non-U.S. holder who wishes to claim the benefit of an applicable treaty rate is required to satisfy applicable certification and other requirements. It is possible that U.S. federal tax on the constructive dividend would be withheld from interest paid to the non-U.S. holder of the notes. A non-U.S. holder who is subject to withholding tax under such circumstances should consult its own tax advisor as to whether it can obtain a refund for all or a portion of the withholding tax.

In general, dividends, if any, received by a non-U.S. holder with respect to our common stock will be subject to withholding of U.S. federal income tax at a 30% rate, unless such rate is reduced by an applicable U.S. income tax treaty. Dividends that are effectively connected with your conduct of a trade or business in the United States, and, where a tax treaty applies, are attributable to a U.S. permanent establishment or fixed base, are not subject to the withholding tax, but instead are subject to U.S. federal income tax on a net income basis at applicable individual or corporate rates. As discussed above, certain certification and disclosure requirements must be complied with in order for effectively connected income to be exempt from withholding. Any such effectively connected dividends received by a non-U.S. holder that is a corporation may also, under certain circumstances, be subject to the branch profits tax at a 30% rate or such lower rate as may be prescribed under an applicable U.S. income tax treaty.

A non-U.S. holder of shares of common stock who wishes to claim the benefit of an applicable treaty rate is required to satisfy applicable certification and other requirements. If you are eligible for a reduced rate of U.S. withholding tax pursuant to an income tax treaty, you may obtain a refund of any excess amounts withheld by filing an appropriate claim for refund with the IRS.

### **Backup Withholding and Information Reporting**

In general, you will not be subject to backup withholding and information reporting with respect to payments that we make to you, provided that we do not have actual knowledge or reason to know that you are a U.S. person and you have given us an appropriate statement certifying, under penalties of perjury, that you are not a U.S. person. In addition, you will not be subject to backup withholding or information reporting with respect to the proceeds of the sale of a note or of a share of common stock within the United States or conducted through certain U.S.-related financial intermediaries, if the payor receives the statement described above and does not have actual knowledge or reason to know that you are a U.S. person or you otherwise establish an exemption. However, we may be required to report annually to the IRS and to you the amount of, and the tax withheld with respect to, any dividends paid to you, regardless of whether any tax was actually withheld. Copies of these information returns may also be made available under the provisions of a specific treaty or agreement to the tax authorities of the country in which you reside.

You generally will be entitled to credit any amounts withheld under the backup withholding rules against your U.S. federal income tax liability provided that the required information is furnished to the IRS in a timely manner.

## CONCURRENT COMMON STOCK OFFERING

Concurrently with this offering, we are offering 6,000,000 shares of our common stock (or a total of 6,900,000 shares if the underwriters exercise their overallotment option in full) pursuant to a separate registration statement and prospectus. This note offering is not contingent upon the common stock offering and the common stock offering is not contingent upon this note offering. We currently anticipate raising approximately \$358.6 million in aggregate gross proceeds from the two offerings (up to \$412.4 million if the underwriters' exercise their overallotment option for each offering in full). However, amounts sold in each offering may increase or decrease based on market conditions relating to that particular security. We cannot assure you that we will complete the concurrent common stock offering.



## UNDERWRITING

We intend to offer the notes through the underwriters named below. Merrill Lynch, Pierce, Fenner & Smith Incorporated is acting as representative of the underwriters named below. Subject to the terms and conditions described in an underwriting agreement among us and the underwriters, we have agreed to sell to the underwriters and the underwriters severally have agreed to purchase from us the principal amount of the notes listed opposite their names below.

Underwriter	Principal Amount
Merrill Lynch, Pierce, Fenner & Smith Incorporated	\$
Total	\$ 250,000,000

The underwriters have agreed to purchase all of the notes sold under the underwriting agreement if any of the notes are purchased. If an underwriter defaults, the underwriting agreement provides that the purchase commitments of the non-defaulting underwriters may be increased or the underwriting agreement may be terminated.

We have agreed to indemnify the underwriters against certain liabilities, including liabilities under the Securities Act of 1933, as amended, or to contribute to payments the underwriters may be required to make in respect of those liabilities.

The underwriters are offering the notes, subject to prior sale, when, as and if issued to and accepted by them, subject to approval of legal matters by their counsel, including the validity of the notes, and other conditions contained in the underwriting agreement, such as the receipt by the underwriters of officers' certificates and legal opinions. The underwriters reserve the right to withdraw, cancel or modify offers to the public and to reject orders in whole or in part.

### Commissions and Discounts

The representative has advised us that the underwriters propose initially to offer the notes to the public at the public offering price on the cover page of this prospectus, and to dealers at the price less a concession not in excess of \_\_\_\_\_ % of the principal amount of the notes. After the offering, the public offering price, concession and discount may be changed.

The following table shows the public offering price, underwriting discount and proceeds before expenses to us. The information assumes either no exercise or full exercise by the underwriters of their overallotment option.

	Per Note	Without Option	With Option
Public offering price	\$	\$	\$
Underwriting discount	\$	\$	\$
Proceeds, before expenses, to Vertex	\$	\$	\$

The expenses of the offering, not including the underwriting discount (and assuming no exercise of the overallotment option), are estimated at \$875,000 and are payable by us.

### Overallotment Option

We have granted an option to the underwriters to purchase up to an additional \$37,500,000 principal amount of the notes at the public offering price listed on the cover page of this prospectus,

less the underwriting discount. The underwriters may exercise this option for 30 days from the date of this prospectus solely to cover any overallocments. If the underwriters exercise this option, each will be obligated, subject to conditions contained in the underwriting agreement, to purchase an additional principal amount proportionate to that underwriter's initial amount reflected in the above table.

### **No Sale of Similar Securities**

We, our directors and our executive officers have agreed, with certain exceptions, not to sell or transfer any common stock for 90 days after the date of the underwriting agreement (the "lock-up period") without first obtaining the written consent of the representative. Specifically, we and these directors and officers have agreed, subject to such exceptions, not to directly or indirectly:

- offer, pledge, sell or contract to sell any common stock or any securities convertible into or exchangeable or exercisable for our common stock (the "lock-up securities");
- sell any option or contract to purchase any lock-up securities;
- purchase any option or contract to sell any lock-up securities;
- grant any option, right or warrant for the sale of any lock-up securities;
- otherwise dispose of or transfer any lock-up securities;
- file, or cause to be filed, any registration statement under the Securities Act of 1933, as amended, with respect to any lock-up securities; or
- enter into any swap or any other agreement or any transaction that transfers, in whole or in part, directly or indirectly, the economic consequence of ownership of any lock-up securities, whether any such swap or transaction is to be settled by delivery of common stock or other securities, in cash or otherwise.

### **New Issue of Notes**

The notes are a new issue of securities with no established trading market. We do not intend to apply for listing of the notes on any national securities exchange or for quotation of the notes on any automated dealer quotation system. The representative has advised us that it presently intends to make a market in the notes after completion of this offering. However, it is under no obligation to do so and may discontinue any market-making activities at any time without notice. We cannot assure the liquidity of the trading market for the notes or that an active public market for the notes will develop. If an active public trading market for the notes does not develop, the market price and liquidity of the notes may be adversely affected. If the notes are traded, they may trade at a discount from their initial offering price, depending on prevailing interest rates, the market for similar securities, our performance and other factors. Our shares of common stock are traded on the Nasdaq Global Select Market under the symbol "VRTX."

### **Price Stabilization and Short Positions**

In connection with the offering, the underwriters are permitted to engage in transactions that stabilize the market price of the notes. Such transactions consist of bids or purchases to peg, fix or maintain the price of the notes. If the underwriters create a short position in the notes in connection with the offering, i.e., if they sell more notes than are listed on the cover page of this prospectus, the representative may reduce that short position by purchasing notes in the open market. Purchases of a security to stabilize the price or to reduce a short position may cause the price of the security to be higher than it might be in the absence of such purchases.

Neither we nor any of the underwriters make any representation or prediction as to the direction or magnitude of any effect that the transactions described above may have on the price of the notes. In addition, neither we nor the underwriters make any representation that the underwriters will engage in these transactions or that these transactions, once commenced, will not be discontinued without notice.

### **Electronic Distribution**

A prospectus in electronic format may be made available on the website maintained by the representative. Other than the electronic prospectus, the information on the website of the representative is not part of this prospectus. The representative may agree to allocate a number of notes to itself for sale to its online brokerage account holders.

### **Other Relationships**

The underwriters and their affiliates have provided investment and commercial banking and financial advisory services from time to time to us in the ordinary course of business, for which they have received customary fees. Any of the underwriters or their respective affiliates may in the future engage in investment banking or other transactions of a financial nature with us or our affiliates, including the provision of advisory services and the making of loans to us or our affiliates, for which they would receive customary fees or other payments.

## LEGAL MATTERS

Certain legal matters relating to the issuance of the notes offered hereby will be passed upon for us by Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Massachusetts. Certain legal matters will be passed upon for the underwriters by Cleary Gottlieb Steen & Hamilton LLP, New York, New York.

## EXPERTS

The consolidated financial statements of Vertex Pharmaceuticals Incorporated appearing in Vertex Pharmaceuticals Incorporated's Annual Report (Form 10-K) for the year ended December 31, 2007, have been audited by Ernst & Young LLP, independent registered public accounting firm, as set forth in their report thereon, included therein, and incorporated herein by reference. Such consolidated financial statements are incorporated herein by reference in reliance upon such report given on the authority of such firm as experts in accounting and auditing.

## WHERE YOU CAN FIND MORE INFORMATION

We are a public company and are required to file annual, quarterly and current reports, proxy statements and other information with the SEC pursuant to the Securities Exchange Act of 1934, as amended (hereinafter referred to as the "Exchange Act"). You may read and copy any document we file at the SEC's Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549. You can request copies of these documents by writing to the SEC and paying a fee for the copying cost. Please call the SEC at 1-800-SEC-0330 for more information about the operation of the public reference room. Our SEC filings are also available to the public at the SEC's web site at "<http://www.sec.gov>."

We filed a registration statement on Form S-3 under the Securities Act of 1933, as amended (hereinafter referred to as the "Securities Act"), with the SEC with respect to the securities being offered pursuant to this prospectus. This prospectus is only part of the registration statement and omits certain information contained in the registration statement, as permitted by the SEC. You should refer to the registration statement, including the exhibits, for further information about us and the securities being offered pursuant to this prospectus. Statements in this prospectus regarding the provisions of certain documents filed with, or incorporated by reference in, the registration statement are not necessarily complete and each statement is qualified in all respects by that reference. You may:

- inspect a copy of the registration statement, including the exhibits and schedules, without charge at the public reference room;
- obtain a copy from the SEC upon payment of the fees prescribed by the SEC; or
- obtain a copy from the SEC web site.

## INCORPORATION BY REFERENCE

The SEC allows us to "incorporate by reference" information that we file with them. Incorporation by reference allows us to disclose important information to you by referring you to those other documents. The information incorporated by reference is an important part of this prospectus, and any information incorporated by reference is considered part of this prospectus. Any reports filed by us with the SEC after the date of this prospectus and before the date that offering of securities by means of this prospectus is terminated will automatically update and, where applicable, supersede any information contained in this prospectus or incorporated by reference in this prospectus. We incorporate by reference into this prospectus the following documents or information filed with the SEC (other than, in each case, documents or information therein deemed to have been furnished and not filed in accordance with SEC rules):

- (a) Our Annual Report on Form 10-K for the fiscal year ended December 31, 2007 (filing date February 11, 2008; Commission File No. 000-19319);
- (b) The portions of our definitive proxy statement on Schedule 14A that are deemed "filed" with the SEC under the Exchange Act (filing date April 12, 2007; Commission File No. 000-19319); and
- (c) The description of our common stock and the outstanding series A junior participating preferred stock purchase rights contained in our Registration Statement on Form 8-A, including any amendment or report filed for the purpose of updating such description (filing date May 30, 1991; Commission File No. 000-19319).

In addition, all documents filed by us pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act on or after the date of this prospectus and before the termination of offering under this prospectus are deemed to be incorporated by reference into, and to be a part of, this prospectus.

Our SEC filings are available to the public at the SEC's website at <http://www.sec.gov>. You may also request, orally or in writing, a copy of these documents, which will be provided to you at no cost, by contacting us at:

Vertex Pharmaceuticals Incorporated  
130 Waverly Street  
Cambridge, Massachusetts 02139  
Attn: Investor Relations  
(617) 444-6100

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**\$250,000,000**



**VERTEX PHARMACEUTICALS INCORPORATED**

**% Convertible Senior Subordinated Notes  
due 2013**

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**PROSPECTUS**

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**Merrill Lynch & Co.**

**, 2008**

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**PART II**

**INFORMATION NOT REQUIRED IN PROSPECTUS**

**Item 14. Other Expenses of Issuance and Distribution**

The following table sets forth the Company's estimates of the expenses in connection with the issuance and distribution of the securities being registered, other than underwriting discounts and commissions.

SEC registration fee	\$	*
Legal fees and expenses		250,000
Accounting fees and expenses		75,000
Printing Fees		200,000
Miscellaneous fees and expenses		350,000
		<hr/>
Total	\$	875,000*
		<hr/>

\* Omitted because the registration fee is being deferred pursuant to Rule 456(b).

**Item 15. Indemnification of Directors and Officers.**

Part D of Article 6 of the Articles of Organization of the Registrant provides that no director of the Registrant shall be personally liable to the Registrant or its stockholders for monetary damages for any breach of fiduciary duty as a director. Such paragraph provides further, however, that to the extent provided by applicable law it will not eliminate or limit the liability of a director "(i) for any breach of the director's duty of loyalty to the Registrant or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 61 or 62 of the Massachusetts Business Corporation Law, or (iv) for any transactions from which the director derived an improper personal benefit."

Article V of the Registrant's By-laws provides that the Registrant shall indemnify each of its directors and officers (including persons who serve at the Registrant's request as a director, officer, or trustee of another organization in which the Registrant has any interest, direct or indirect, as a stockholder, creditor, or otherwise or who serve at the Registrant's request in any capacity with respect to any employee benefit plan) against all liabilities and expenses, including amounts paid in satisfaction of judgments, in compromise, or as fines and penalties, and counsel fees reasonably incurred by such director or officer in connection with the defense or disposition of any action, suit, or other proceeding, whether civil or criminal, in which such director or officer may be involved or with which such person may be threatened, while in office or thereafter, by reason of such person's being or having been such a director, officer, or trustee, except with respect to any matter as to which such director or officer shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that such director's or officer's action was in the best interest of the Registrant or, to the extent that such matter relates to service with respect to an employee benefit plan, in the best interest of the participants or beneficiaries of such employee benefit plan.

As to any matter disposed of by a compromise payment by any such person, pursuant to a consent decree or otherwise, Article V of the Registrant's By-laws provides that no indemnification shall be provided to such person for such payment or for any other expenses unless such compromise has been approved as in the best interests of the Registrant, after notice that it involves such indemnification (i) by a disinterested majority of the directors then in office or (ii) by a majority of the disinterested directors then in office provided there has been obtained an opinion in writing of independent legal counsel to the effect that such director or officer appeared to have acted in good faith in the reasonable belief that such person's action as in the best interest of the Registrant, or

(iii) by the holders of a majority of the outstanding stock at the time entitled to vote for directors, voting as a single class, exclusive of any stock owned by any interested director or officer.

Article V of the Registrant's By-laws provides that expenses, including counsel fees, reasonably incurred by any director or officer in connection with the defense or disposition of any such action, suit or other proceeding may be paid from time to time by the Registrant at the discretion of a majority of the disinterested directors then in office, in advance of the final disposition thereof, upon receipt of an undertaking by such director or officer to repay the Registrant the amounts so paid if it is ultimately determined that indemnification for such expenses is not authorized under Article V of the By-laws, which undertaking may be accepted by the Registrant without reference to the financial ability of such director or officer to make repayment.

Article V of the Registrant's By-laws gives the Board of Directors of the Registrant the power to authorize the purchase and maintenance of insurance, in such amounts as the Board of Directors may from time to time deem appropriate, on behalf of any person who is or was a director, officer, or agent of the Registrant, or who is or was serving at the request of the Registrant as a director, officer or agent of another organization in which the Registrant has any interest, direct or indirect, as a shareholder, creditor or otherwise, or with respect to any employee benefit plan, against any liability incurred by such person in any such capacity, or arising out of such person's status as such agent, whether or not such person is entitled to indemnification by the Registrant pursuant to Article V of otherwise and whether or not the Registrant would have the power to indemnify the person against such liability.

Subdivision E of Part 8 of the Massachusetts Business Corporation Act (the "MBCA") authorizes the provisions, described above, contained in Part D Article 6 of the Articles of Organization of the Registrant.

Sections 8.30 and 8.92 of the MBCA provide that if an officer or director discharges his duties in good faith and with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the officer or director reasonably believes to be in the best interests of the corporation, he or she will not be liable for such actions.



## Item 16. Exhibits

(a) Exhibits.

Exhibit Number	Description of Document
1.1	Form of Underwriting Agreement.*
4.1	Form of Indenture for the Convertible Senior Subordinated Notes due 2013.
4.2	Form of Convertible Senior Subordinated Notes due 2013 (see exhibit 4.1).
5.1	Opinion of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
12.1	Computation of Ratio of Earnings to Fixed Charges.
23.1	Consent of Ernst & Young LLP.
23.2	Consent of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (included in the opinion filed as Exhibit 5.1).
24.1	Power of Attorney (included on signature page).
25.1	Form T-1 Statement of Eligibility under the Trust Indenture Act of 1939, as amended, of U.S. Bank National Association, as Trustee under the Indenture for the Convertible Senior Subordinated Notes due 2013.

\* To be filed as an exhibit to a Current Report on Form 8-K.

## Item 17. Undertakings

The undersigned Registrant hereby undertakes:

- (1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:
  - (i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;
  - (ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or any decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement; and
  - (iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

*provided, however,* that paragraphs (1)(i), (1)(ii) and (1)(iii) do not apply if the information required to be included in a post-effective amendment by those

paragraphs is contained in reports filed with or furnished to the Commission by the Registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or is contained in a form of prospectus filed pursuant to Rule 424(b) that is part of the registration statement.

- (2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.
- (3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.
- (4) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser:
  - (i) Each prospectus filed by the Registrant pursuant to Rule 424(b)(3) shall be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement; and
  - (ii) Each prospectus required to be filed pursuant to Rule 424(b)(2), (b)(5) or (b)(7) as part of a registration statement in reliance on Rule 430B relating to an offering made pursuant to Rule 415(a)(1)(i), (vii) or (x) for the purpose of providing the information required by Section 10(a) of the Securities Act of 1933 shall be deemed to be part of and included in the registration statement as of the earlier of the date such form of prospectus is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus. As provided in Rule 430B, for liability purposes of the issuer and any person that is at that date an underwriter, such date shall be deemed to be a new effective date of the registration statement relating to the securities in the registration statement to which the prospectus relates, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof. *Provided, however*, that no statement made in a registration statement or prospectus that is part of the registration statement or made in a document incorporated or deemed incorporated by reference into the registration statement or prospectus that is part of the registration statement will, as to a purchaser with a time of contract of sale prior to such effective date, supersede or modify any statement that was made in the registration statement or prospectus that was part of the registration statement or made in any such document immediately prior to such effective date.
- (5) That, for the purpose of determining liability of a Registrant under the Securities Act of 1933 to any purchaser in the initial distribution of the securities, the undersigned Registrant undertakes that in a primary offering of securities of an undersigned Registrant pursuant to this registration statement, regardless of the underwriting method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned Registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:
  - (i) Any preliminary prospectus or prospectus of an undersigned Registrant relating to the offering required to be filed pursuant to Rule 424;

- (ii) Any free writing prospectus relating to the offering prepared by or on behalf of an undersigned Registrant or used or referred to by an undersigned Registrant;
  - (iii) The portion of any other free writing prospectus relating to the offering containing material information about an undersigned Registrant or its securities provided by or on behalf of an undersigned Registrant; and
  - (iv) Any other communication that is an offer in the offering made by an undersigned Registrant to the purchaser.
- (6) That, for purposes of determining any liability under the Securities Act of 1933, each filing of the Registrant's annual report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act of 1934) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.
- (7) To file an application for the purpose of determining the eligibility of the trustee to act under subsection (a) of Section 310 of the Trust Indenture Act in accordance with the rules and regulations prescribed by the Commission under Section 305(b)(2) of the Trust Indenture Act.
- (8) Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the Registrant pursuant to the foregoing provisions, or otherwise, the Registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act of 1933 and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by a Registrant of expenses incurred or paid by a director, officer or controlling person of a Registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, that Registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it against public policy as expressed in the Securities Act of 1933 and will be governed by the final adjudication of such issue.



By:	/s/ ERIC K. BRANDT	Director	February 11, 2008
	<hr/>		
	<b>Eric K. Brandt</b>		
By:	/s/ ROGER W. BRIMBLECOMBE	Director	February 11, 2008
	<hr/>		
	<b>Roger W. Brimblecombe</b>		
By:	/s/ STUART J.M. COLLINSON	Director	February 11, 2008
	<hr/>		
	<b>Stuart J.M. Collinson</b>		
By:	/s/ EUGENE H. CORDES	Director	February 11, 2008
	<hr/>		
	<b>Eugene H. Cordes</b>		
By:	/s/ MATTHEW W. EMMENS	Director	February 11, 2008
	<hr/>		
	<b>Matthew W. Emmens</b>		
By:	/s/ BRUCE I. SACHS	Director	February 11, 2008
	<hr/>		
	<b>Bruce I. Sachs</b>		
By:	/s/ ELAINE S. ULLIAN	Director	February 11, 2008
	<hr/>		
	<b>Elaine S. Ullian</b>		

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**INDENTURE**  
**BETWEEN**  
**VERTEX PHARMACEUTICALS INCORPORATED,**  
**AS ISSUER**  
**AND**  
**U.S. BANK NATIONAL ASSOCIATION,**  
**AS TRUSTEE**  
**[ ]% CONVERTIBLE SENIOR SUBORDINATED NOTES DUE 2013**  
**DATED AS OF FEBRUARY [ ], 2008**

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<u>Trust Indenture Act Section</u>	<u>Indenture Section</u>
310(a)(1)	9.11
(a)(2)	9.11
(a)(3)	n/a
(a)(4)	n/a
(a)(5)	9.11
(b)	9.03; 9.11
(c)	n/a
311(a)	9.12
(b)	9.12

(c)	n/a
312(a)	2.08
(b)	13.03
(c)	13.03
313(a)	5.7
(b)(1)	n/a
(b)(2)	9.07
(c)	9.07; 13.02
(d)	9.07
314(a)(1), (2), (3).	6.06; 13.06
(a)(4)	6.06; 6.07; 13.06
(b)	n/a
(c)(1)	13.05
(c)(2)	13.05
(c)(3)	n/a
(d)	n/a
(e)	13.06
(f)	n/a
315(a)	9.01(a)
(b)	9.06; 13.02
(c)	9.01(b)
(d)	9.01(c)
(e)	8.14
316(a)(last sentence)	2.12
(a)(1)(A)	8.05
(a)(1)(B)	8.04
(a)(2)	n/a
(b)	8.07
(c)	10.04
317(a)(1).	8.08
(a)(2)	8.09

<u>Trust Indenture Act Section</u>	<u>Indenture Section</u>
(b)	2.04
318(a)	13.01
(b)	n/a
(c)	13.01

“n/a” means not applicable.

\*This Cross-Reference Table shall not, for any purpose, be deemed to be a part of the Indenture.

INDENTURE, dated as of February [ ], 2008, between VERTEX PHARMACEUTICALS INCORPORATED, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having its principal office at 130 Waverly Street, Cambridge, Massachusetts 02139 (the “Company”), and U.S. BANK NATIONAL ASSOCIATION, as trustee (the “Trustee”), having its principal corporate trust office at One Federal Street, Boston, Massachusetts 02110.

#### RECITALS

The Company has duly authorized the creation of an issue of its [ ]% Convertible Senior Subordinated Notes due [ ], 2013 (herein called the “Securities”) of substantially the tenor and amount hereinafter set forth, and to provide therefor the Company has duly authorized the execution and delivery of this Indenture.

All things necessary to make the Securities, when the Securities are executed by the Company and authenticated and delivered hereunder and duly issued by the Company, the valid obligations of the Company, and to make this Indenture a valid agreement of the Company, in accordance with their and its terms, have been done.

#### NOW, THEREFORE, THIS INDENTURE WITNESSETH:

For and in consideration of the premises and the purchase of the Securities by the Holders thereof, it is mutually covenanted and agreed, for the equal and proportionate benefit of all Holders of the Securities, as follows:

#### Article 1

##### Definitions and Incorporation by Reference

“**Affiliate**” of any specified person means any other person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified person. For the purposes of this definition, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such person, whether through the ownership of voting securities or by agreement or otherwise.

“**Agent**” means any Registrar, Paying Agent, co-agent, co-registrar or Service Agent.

“**Applicable Procedures**” means, with respect to any conversion, transfer or exchange of beneficial ownership interests in a Global Security, the rules and procedures of the Depository, to the extent applicable to such transfer or exchange.

“**Board of Directors**” means the board of directors of the Company.

“**Board Resolution**” means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Company to have been adopted by the Board of Directors or pursuant to authorization by the Board of Directors and to be in full force and effect on the date of the certificate and delivered to the Trustee.

“**Business Day**” means, unless otherwise provided by Board Resolution, Officers’ Certificate or supplemental indenture hereto, any day except a Saturday, Sunday or a legal holiday in The City of New York or the City of Boston, Massachusetts on which banking institutions are authorized or required by law, regulation or executive order to close.

“**Capital Stock**” of any Person means any and all shares, interests, rights to purchase, warrants, options, participations or other equivalents of or interests in (however designated) equity of such Person, but excluding any debt securities convertible into such equity.

“**cash**” means such coin or currency of the United States as at any time of payment is legal tender for the payment of public and private debts.

“**Certificated Security**” means a Security that is in substantially the form attached as Exhibit A but that does not include the information called for by footnote 1 thereof or the attached schedule of exchanges.

“**Change in Control**” means the occurrence of any of the following events from and after the Issue Date:

(i) any “person” or “group” (as such terms are used in Section 13(d)(3) of the Exchange Act or any successor provision to the foregoing), including any group acting for the purpose of acquiring, holding or disposing of securities within the meaning of Rule 13d—5(b)(1) under the Exchange Act, other than the Company, any of its Subsidiaries or any of its employee benefit plans, is or becomes the “beneficial owner” (as defined in Rule 13d—3 under the Exchange Act), directly or indirectly, through a purchase, merger or other acquisition transaction

or series of transactions, of 50% or more of the total voting power of all classes of the Company’s Voting Stock;

(ii) the Company consolidates with, or merges with or into, another person (as such term is used in Sections 13(d)(3) of the Exchange Act) or any person consolidates or merges with or into the Company, or the Company conveys, transfers, leases or otherwise disposes of all or substantially all of its assets to any person, other than (x) any transaction that (A) does not result in any reclassification, conversion, exchange or cancellation of outstanding shares of the Company’s Capital Stock, and (B) pursuant to which holders of the Company’s Capital Stock immediately prior to the transaction have the entitlement to exercise, directly or indirectly, 50% or more of the total voting power of all shares of the Voting Stock of the continuing or surviving entity of such transaction; or (y) any merger solely for the purpose of changing the Company’s jurisdiction of formation and resulting in a reclassification, conversion or exchange of outstanding shares of Common Stock solely into shares of common stock of the surviving entity; notwithstanding anything to the contrary set forth herein, a Change in Control will be deemed not to have occurred if, in the case of a merger or consolidation, at least 90% of the consideration (excluding cash payments for fractional shares and cash payments made in respect of dissenters’ appraisal rights) in a transaction or transactions otherwise constituting a Change in Control consists of shares of common stock traded on a U.S. national securities exchange, or which will be so traded when issued or exchanged in connection with the transaction or transactions, and as a result of the transaction or transactions the Securities become convertible solely into such common stock.

(iii) during any consecutive two-year period, individuals who at the beginning of that two-year period constituted the Board of Directors (together with any new directors whose election to such Board of Directors, or whose nomination for election by stockholders of the Company, was approved by a vote of a majority of the directors then still in office who were either directors at the beginning of such period or whose election or nomination for election was previously so approved) cease for any reason (other than death) to constitute a majority of the Board of Directors then in office; or

(iv) the Company’s stockholders approve a plan of liquidation or dissolution.

“**Closing Price**” means, on any Trading Day, the reported last sale price per share of the Company’s Common Stock (or if no last sale price is reported, the average of the bid and ask prices per share or, if more than one in either case, the average of the average bid and the average ask prices per share) on such date reported by the Nasdaq Global Market or, if the Company’s Common Stock (or the applicable security) is not quoted on the Nasdaq Global Market, as reported by the principal national securities exchange on which the Company’s Common Stock (or such other security) is listed, or if no such prices are available, the Closing Price per share shall be the fair value of a share of Common Stock (or such other security) as reasonably determined by the Board of Directors (which determination shall be conclusive and shall be evidenced by an Officers’ Certificate delivered to the Trustee).

“**Common Stock**” means the common stock of the Company, par value \$0.01 per share, as it exists on the date of this Indenture and any shares of any class or classes of Capital Stock of the Company resulting from any reclassification or reclassifications thereof, or, in the event of a

merger, consolidation or other similar transaction involving the Company that is otherwise permitted hereunder in which the Company is not the surviving corporation the common stock, common equity interests, ordinary shares or depository shares or other certificates representing common equity interests of such surviving corporation or its direct or indirect parent corporation, and which have no preference in respect of dividends or of amounts payable in the event of any voluntary or involuntary liquidation, dissolution or winding-up of the Company and which are not subject to redemption by the Company; *provided, however*, that if at any time there shall be more than one such resulting class, the shares of each such class then so issuable on conversion of Securities shall be substantially in the proportion which the total number of shares of such class resulting from all such reclassifications bears to the total number of shares of all such classes resulting from all such reclassifications.

“**Company**” means the party named as such in the first paragraph of this Indenture until a successor replaces it pursuant to the applicable provisions of the Indenture, and thereafter “Company” shall mean such successor Company.

“**Company Order**” means a written order signed in the name of the Company by two Officers, one of whom must be the Company’s principal executive officer, principal financial officer or principal accounting officer.

“**Conversion Agent**” means any Person authorized by the Company to convert Securities in accordance with Article 4 hereof.

“**Conversion Price**” per share of Common Stock as of any day means the result obtained by dividing (i) \$1,000 by (ii) the then applicable Conversion Rate.

“**Conversion Rate**” means the rate at which shares of Common Stock shall be delivered upon conversion, which rate shall be initially [ ] shares of Common Stock for each \$1,000 principal amount of Securities, as adjusted from time to time pursuant to the provisions of this Indenture.

“**Corporate Trust Office**” means the office of the Trustee at the address specified in Section 13.02 hereof or such other address as to which the Trustee may give notice to the Company.

“**Default**” means, when used with respect to the Securities, any event that is or, after notice or passage of time, or both, would be, an Event of Default.

“**Defaulted Interest**” has the meaning specified in Section 2.15 hereof.

“**Depository**” means The Depository Trust Company, its nominees and their respective assigns.

“**Exchange Act**” means the Securities Exchange Act of 1934, as amended.

“**Final Maturity Date**” means [ ], 2013.

“**Final Prospectus**” means the prospectus of the Company, dated as of February 14, 2008, with respect to the Securities, including the base prospectus attached thereto.

“**Fundamental Change**” means the occurrence of either a Change in Control or a Termination of Trading.

“**Fundamental Change Effective Date**” means the date on which any Fundamental Change becomes effective.

“**Fundamental Change Repurchase Price**” of any Security means 100% of the principal amount of the Security to be repurchased plus unpaid interest, including Special Interest, if any, accrued and unpaid to, but excluding, the Fundamental Change Repurchase Date.

“**GAAP**” means generally accepted accounting principles in the United States of America as in effect from time to time, including those set forth in (1) the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants, (2) the statements and pronouncements of the Financial Accounting Standards Board, and (3) such other statements by such other entity as approved by a significant segment of the accounting profession.

“**Global Security**” means a Security in global form that is in substantially the form attached as Exhibit A and that includes the information called for in footnote 1 thereof and the schedule of exchanges and which is deposited with the Depository or its custodian and registered in the name of the Depository or its nominee.

“**Holder**” or “**Holder of a Security**” means the person in whose name a Security is registered on the Registrar’s books.

“**Indebtedness**,” when used with respect to any Person, and without duplication means:

(i) all indebtedness, obligations and other liabilities (contingent or otherwise) of such Person for borrowed money (including obligations of such person in respect of overdrafts and any loans or advances from banks, whether or not evidenced by notes or similar instruments) or evidenced by bonds, notes or other instruments for the payment of money, or incurred in connection with the acquisition of any property, services or assets (whether or not the recourse of the lender is to the whole of the assets of such Person or to only a portion thereof), other than any account payable or other accrued current liability or obligation to trade creditors incurred in the ordinary course of business in connection with the obtaining of materials or services;

(ii) all reimbursement obligations and other liabilities (contingent or otherwise) of such Person with respect to letters of credit, bank guarantees, bankers’ acceptances, surety bonds, performance bonds or other guaranty of contractual performance;

(iii) all obligations and liabilities (contingent or otherwise) in respect of (a) leases of such Person required, in conformity with GAAP, to be accounted for as capitalized lease obligations on the balance sheet of such Person and (b) any lease or related documents, including a purchase agreement, in connection with the lease of real property which provides that such Person is contractually obligated to purchase or cause a third party to purchase the leased

property and thereby guarantee a minimum residual value of the leased property to the landlord and the obligations of such Person under such lease or related document to purchase or to cause a third party to purchase the leased property;

(iv) all obligations of such Person (contingent or otherwise) with respect to an interest rate or other swap, cap or collar agreement or other similar instrument or agreement or foreign currency hedge, exchange, purchase or similar instrument or agreement;

(v) all direct or indirect guaranties or similar agreements by such Person in respect of, and obligations or liabilities (contingent or otherwise) of such Person to purchase or otherwise acquire or otherwise assure a creditor against loss in respect of, indebtedness, obligations or liabilities of another Person of the kind described in clauses (i) through (iv);

(vi) any indebtedness or other obligations described in clauses (i) through (iv) secured by any mortgage, pledge, lien or other encumbrance existing on property which is owned or held by such Person, regardless of whether the indebtedness or other obligation secured thereby shall have been assumed by such Person; and

(vii) any and all deferrals, renewals, extensions, refinancings, replacements, restatements and refundings of, or amendments, modifications or supplements to, any indebtedness, obligation or liability of the kind described in clauses (i) through (vi).

**“Interest Payment Date”** means [ ] and [ ] of each year, commencing [ ], 2008.

**“Issue Date”** of any Security means the date on which the Security was originally issued or deemed issued as set forth on the face of the Security.

**“Maturity”** means the date on which the principal of such Security becomes due and payable as therein or herein provided, whether at the Final Maturity Date or by acceleration, conversion, exercise of a repurchase right or otherwise.

**“Officer”** means the Chairman of the Board, any President, any Vice-President, the Treasurer, the Secretary, any Assistant Treasurer or any Assistant Secretary of the Company.

**“Officers’ Certificate”** means a certificate signed by two Officers, one of whom must be the Company’s principal executive officer, principal financial officer or principal accounting officer.

**“Opinion of Counsel”** means a written opinion of legal counsel who is reasonably acceptable to the Trustee. The counsel may be an employee of or counsel to the Company.

**“Person”** or **“person”** means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any syndicate or group that would be deemed to be a “person” under Section 13(d)(3) of the Exchange Act or any other entity.

**“Regular Record Date”** means, with respect to each Interest Payment Date, the April 8 or October 8, as the case may be, next preceding such Interest Payment Date.

**“Responsible Officer”** means any officer of the Trustee in its Corporate Trust Office and also means, with respect to a particular corporate trust matter, any other officer to whom any corporate trust matter is referred because of his or her knowledge of and familiarity with a particular subject.

**“Rights”** means any common stock or preferred stock purchase right or warrant, as the case may be, that all or substantially all shares of Common Stock are entitled to receive under a Rights Plan.

**“Rights Plan”** means the Company’s preferred shares rights plan in connection with the Rights Agreement, dated as of July 1, 1991, and any preferred shares rights plan or any similar plan adopted by the Company after the date hereof.

**“SEC”** means the Securities and Exchange Commission.

**“Securities”** means the up to \$28,750,000 aggregate principal amount of [ ]% Senior Subordinated Convertible Notes due 2013, or any of them (each a **“Security”**), as amended or supplemented from time to time, that are issued under this Indenture.

**“Securities Act”** means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, as in effect from time to time.

**“Securities Custodian”** means the Trustee, as custodian with respect to the Securities in global form, or any successor thereto.

**“Senior Debt”** means the principal of, premium, if any, interest (including interest, to the extent allowable, accruing subsequent to the filing of a petition initiating any proceeding under any state, federal or foreign bankruptcy law, whether or not a claim for post-petition interest is allowable as a claim in any such proceeding) and rent payable on or termination payments with respect to or in connection with, and all fees, costs, expenses and other amounts accrued or due on or in connection with, Indebtedness of the Company, whether outstanding on the date of this Indenture or thereafter created, incurred, assumed, guaranteed or in effect guaranteed by the Company (including all deferrals, renewals, extensions or refundings of, or amendments, modifications or supplements to, the foregoing), except for:

(i) Indebtedness that by its terms expressly provides that it shall not be senior in right of payment to the Securities or expressly provides that such Indebtedness is equal with or junior to the Securities; and

(ii) Indebtedness between or among the Company or any of the Subsidiaries of the Company.

“**Significant Subsidiary**” means (i) any direct or indirect Subsidiary of the Company that would be a “significant subsidiary” as defined in Article 1, Rule 1-02 of Regulation S-X, promulgated pursuant to the Securities Act, as such regulation is in effect on the date hereof, or (ii) any group of direct or indirect Subsidiaries of the Company that, taken together as a group, would be a “significant subsidiary” as defined in Article 1, Rule 1-02 of Regulation S-X, promulgated pursuant to the Securities Act, as such regulation is in effect on the date hereof.

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“**Special Record Date**” for the payment of any Defaulted Interest means a date fixed by the Company pursuant to Section 2.15 hereof.

“**Stated Maturity**” when used with respect to any Security or any installment of principal thereof or interest thereon, means the date specified in such Security as the fixed date on which the principal of such Security or such installment of principal or interest is due and payable.

“**Stock Price**” means the price paid per share of the Company’s Common Stock in connection with a Fundamental Change as determined pursuant to Section 4.01(i).

“**Subsidiary**” means a corporation or other entity more than 50% of the outstanding Voting Stock of which is owned, directly or indirectly, by the Company or by one or more other Subsidiaries of the Company, or by the Company and one or more other Subsidiaries of the Company.

“**Termination of Trading**” means the occurrence of the Company’s Common Stock (or other common stock for which the Securities are then convertible) not being listed for trading on a United States national securities exchange nor approved for on any United States system of automated dissemination of quotations of securities prices or approved for trading on an established automated over-the-counter trading market in the United States.

“**TIA**” means the Trust Indenture Act of 1939 (15 U.S. Code §§ 77aaa-77bbb) as in effect on the date of this Indenture; provided, however, that in the event the Trust Indenture Act of 1939 is amended after such date, “TIA” means, to the extent required by any such amendment, the Trust Indenture Act as so amended.

“**Trading Day**” means any day on which the Nasdaq Global Market or, if the Company’s Common Stock is not traded on the Nasdaq Global Select Market, the principal national securities exchange on which the Company’s Common Stock is listed, is open for trading or, if the Company’s Common Stock is listed on the New York Stock Exchange, a day on which trades may be made on such market or, if the applicable Security is not so listed, admitted for trading or quoted, any Business Day. A Trading Day only includes those days that have a scheduled closing time of 4:00 p.m. (New York City time) or the then-standard closing time for regular trading on the relevant exchange or trading system.

“**Trust Officer**” means, with respect to the Trustee, any officer assigned to the Corporate Trust Office, and also, with respect to a particular matter, any other officer to whom such matter is referred because of such officer’s knowledge of and familiarity with the particular subject.

“**Trustee**” means the party named as such in the first paragraph of this Indenture until a successor replaces it in accordance with the provisions of the Indenture, and thereafter means the successor.

“**Underwriters**” means underwriters named in Schedule A of the Underwriting Agreement.

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“**U.S. Government Obligations**” means securities which are (i) direct obligations of The United States of America for the payment of which its full faith and credit is pledged or (ii) obligations of a person controlled or supervised by and acting as an agency or instrumentality of The United States of America the payment of which is unconditionally guaranteed as a full faith and credit obligation by The United States of America, and which in the case of (i) and (ii) are not callable or redeemable at the option of the issuer thereof, and shall also include a depository receipt issued by a bank or trust company as custodian with respect to any such U.S. Government Obligation or a specific payment of interest on or principal of any such U.S. Government Obligation.

“**Voting Stock**” of a Person means all classes of Capital Stock or other interests (including partnership interests) of such Person then outstanding and normally entitled (without regard to the occurrence of any contingency within the control of such person to satisfy) to vote in the election of directors, managers or trustees thereof.

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Section 1.02

Other Definitions.

<u>Term</u>	<u>Defined in Section</u>
“ <b>Agent Members</b> ”	2.07(g)
“ <b>Bankruptcy Law</b> ”	8.01
“ <b>Conversion Agent</b> ”	2.04
“ <b>Conversion Date</b> ”	4.02(a)
“ <b>Current Market Price</b> ”	4.07(a)(9)
“ <b>Drop Agent’s Office</b> ”	2.04

“ <u>Event of Default</u> ”	8.01
“ <u>Expiration Time</u> ”	4.07(a)(7)
“ <u>Fundamental Change Company Notice</u> ”	3.08(b)
“ <u>Fundamental Change Repurchase Date</u> ”	3.08(a)
“ <u>Fundamental Change Repurchase Notice</u> ”	3.08(c)
“ <u>Indenture</u> ”	Recitals
“ <u>Make-Whole Premium</u> ”	4.01(e)
“ <u>Measurement Period</u> ”	4.07(a)(4)
“ <u>Paying Agent</u> ”	2.04
“ <u>Purchased Shares</u> ”	4.07(a)(7)(i)
“ <u>record date</u> ”	4.07(a)(9)(C)
“ <u>Receiver</u> ”	8.01
“ <u>Redemption Price</u> ”	3.01
“ <u>Redemption Date</u> ”	3.01
“ <u>Registrar</u> ”	2.04
“ <u>Special Interest</u> ”	8.02
“ <u>Service Agent</u> ”	2.04
“ <u>Spin-off</u> ”	4.07(a)(4)
“ <u>Trigger Event</u> ”	4.07(a)(4)
“ <u>Trustee</u> ”	Preamble
“ <u>Underwriting Agreement</u> ”	2.01

## Article 2 The Securities

### Section 2.01            Designation, Form and Dating.

There is hereby authorized a series of senior subordinated unsecured Securities designated as “[ ]% Senior Subordinated Convertible Notes due 2013.” The Securities are being offered and sold pursuant to an Underwriting Agreement, dated February 11, 2008 (the “Underwriting Agreement”), between the Company and the Underwriters.

The Securities and the Trustee’s certificate of authentication to be borne by such Securities shall be substantially in the form set forth in Exhibit A. The terms and provisions contained in the form of Securities attached as Exhibit A hereto shall constitute, and are hereby expressly made, a part of this Indenture and, to the extent applicable, the Company and the Trustee, by their execution and delivery of this Indenture, expressly agree to such terms and provisions and to be bound thereby.

Any of the Securities may have such letters, numbers or other marks of identification and such notations, legends, endorsements or changes as the Officers executing the same may approve (execution thereof to be conclusive evidence of such approval) and as are not inconsistent with the provisions of this Indenture, or as may be required by the Trustee, the Depositary, or as may be required to comply with any applicable law or with any rule or regulation made pursuant thereto or with any rule or regulation of any securities exchange or automated quotation system on which the Securities may be listed, or to conform to usage, or to indicate any special limitations or restrictions to which any particular Securities are subject.

Subject to Section 2.07 hereof, so long as the Securities are eligible for book-entry settlement with the Depositary, or unless otherwise required by law, all of the Securities will be represented by one or more Global Securities. The transfer and exchange of beneficial interests in any such Global Security shall be effected through the Depositary in accordance with this Indenture and the Applicable Procedures.

Each Global Security shall represent such of the outstanding Securities as shall be specified therein and each shall provide that it shall represent the aggregate principal amount of outstanding Securities from time to time endorsed thereon and that the aggregate principal amount of outstanding Securities represented thereby may from time to time be reduced or increased, as appropriate, to reflect exchanges, redemptions, purchases or conversions of such Securities.

### Section 2.02            Final Maturity Date; Interest.

The Final Maturity Date of the Securities shall be [ ], 2013.

The rate or rates at which the Securities shall bear interest, including Special Interest, if any, the date or dates from which such interest shall accrue, the Interest Payment Dates on which such interest shall be payable and the Regular Record Date for any interest payable on any Interest Payment Date, in each case, shall be as set forth in the form of Security set forth as Exhibit A hereto.

### Section 2.03.            Execution and Authentication.

Two Officers shall sign the Securities for the Company by manual or facsimile signature.

If an Officer whose signature is on a Security no longer holds that office at the time the Security is authenticated, the Security shall nevertheless be valid.

A Security shall not be valid until authenticated by the manual signature of the Trustee or an authenticating agent. The signature shall be conclusive evidence that the Security has been authenticated under this Indenture.

The Trustee shall authenticate Securities for original issue in the aggregate principal amount up to \$250,000,000 aggregate principal amount (\$287,500,000 aggregate principal amount if the Underwriters exercise their over-allotment option in full by executing an over-allotment exercise notice and delivering such executed over-allotment exercise notice to the Trustee and the Company), upon receipt by the Trustee of a Company Order. Such Company Order may authorize authentication and delivery pursuant to oral or electronic instructions from the Company or its duly authorized agent or agents, which oral instructions shall be promptly confirmed in writing. Each Security shall be dated the date of its authentication unless otherwise provided by a Board Resolution, a supplemental indenture hereto or an Officers' Certificate.

Prior to the issuance of Securities of any Series, the Trustee shall have received and (subject to Section 9.02) shall be fully protected in relying on: (a) the Board Resolution or Officers' Certificate establishing the form of the Securities and the terms of the Securities, (b) an Officers' Certificate complying with Section 13.05, and (c) an Opinion of Counsel complying with Section 13.05.

The Trustee shall have the right to decline to authenticate and deliver any Securities of such Series: (a) if the Trustee, being advised by counsel, determines that such action may not lawfully be taken; or (b) if the Trustee in good faith shall determine that such action would expose the Trustee to personal liability to Holders of any then outstanding Securities.

The Trustee may appoint an authenticating agent reasonably acceptable to the Company to authenticate Securities. An authenticating agent may authenticate Securities whenever the Trustee may do so. Each reference in this Indenture to authentication by the Trustee includes authentication by such agent. An authenticating agent has the same rights as an Agent to deal with the Company or an Affiliate.

Section 2.04            Registrar, Paying Agent, Conversion Agent and Trustee.

The Company shall maintain an office or agency where Securities of such Series may be presented or surrendered for payment ("**Paying Agent**"), where the Securities may be surrendered for registration of transfer or exchange ("**Registrar**") and where notices and demands to or upon the Company in respect of the Securities and this Indenture may be served ("**Service Agent**"). The Registrar shall keep a register with respect to the Securities and to their transfer and exchange. The Company will give prompt written notice to the Trustee of the name and address, and any change in the name or address, of each Registrar, Paying Agent or Service

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Agent. If at any time the Company shall fail to maintain any such required Registrar, Paying Agent or Service Agent or shall fail to furnish the Trustee with the name and address thereof, such presentations, surrenders, notices and demands may be made or served at the Corporate Trust Office of the Trustee, and the Company hereby appoints the Trustee as its agent to receive all such presentations, surrenders, notices and demands.

The Company may also from time to time designate one or more co-registrars, additional paying agents or additional service agents and may from time to time rescind such designations; *provided, however*, that no such designation or rescission shall in any manner relieve the Company of its obligations to maintain a Registrar, Paying Agent and Service Agent in each place for the Securities for such purposes. The Company will give prompt written notice to the Trustee of any such designation or rescission and of any change in the name or address of any such co-registrar, additional paying agent or additional service agent. The term "Registrar" includes any co-registrar; the term "Paying Agent" includes any additional paying agent; and the term "Service Agent" includes any additional service agent.

The Company hereby appoints the Trustee the initial Registrar, Paying Agent and Service Agent for the Securities unless another Registrar, Paying Agent or Service Agent, as the case may be, is appointed prior to the time the Securities are first issued.

The rights, privileges, protections, immunities and benefits given to the Trustee under this Indenture including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each Agent acting hereunder.

The Company shall maintain an office or agency where Securities may be presented for conversion (the "**Conversion Agent**"). The Company hereby initially designates the Trustee as the Conversion Agent. The Company further designates the office of the Trustee's drop agent in New York City (U.S. Bank National Association, 100 Wall Street, New York, New York 10005) (the "**Drop Agent's Office**") as its office in The City of New York where Securities may be:

- (1) presented or surrendered for payment;
- (2) surrendered for registration of transfer or exchange; or
- (3) surrendered for conversion;

and where notices and demands to or upon the Company in respect of the Securities and this Indenture may be served.

The Company may at any time and from time to time vary or terminate the appointment of any such office or appoint any additional offices for any or all of such purposes; *provided, however*, that until all of the Securities have been delivered to the Trustee for cancellation, or moneys sufficient to pay the principal of and premium, if any, and interest, including Special Interest, if any, on the Securities have been made available for payment and either paid or returned to the Company pursuant to the provisions of Section 11.02 hereof, the Company will maintain in The City of New York an office or agency where Securities may be presented or surrendered for payment, where Securities may be surrendered for registration of transfer or

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exchange, where Securities may be surrendered for conversion and where notices and demands to or upon the Company in respect of the Securities and this Indenture may be served. The Company will give prompt written notice to the Trustee, and notice to the Holders, of the appointment or termination of any such agents and of the location and any change in the location of any such office or agency.



If at any time the Company shall fail to maintain any such required office or agency in The City of New York, or shall fail to furnish the Trustee with the address thereof, presentations and surrenders may be made at, and notices and demands may be served on, the Drop Agent's Office.

The Company may also from time to time designate one or more Conversion Agents and from time to time rescind such designations. The Company will give prompt written notice to the Trustee of any such designation or rescission and of any change in the name or address of such Conversion Agent.

The rights, privileges, protections, immunities and benefits given to the Trustee under the Indenture and this Indenture, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each Conversion Agent or other Agent acting hereunder.

Section 2.05 Paying Agent to Hold Money in Trust.

The Company shall require each Paying Agent other than the Trustee to agree in writing that the Paying Agent will hold in trust, for the benefit of Holders of Securities, or the Trustee, all money held by the Paying Agent for the payment of principal or interest on the Securities, and will notify the Trustee of any default by the Company in making any such payment. While any such default continues, the Trustee may require a Paying Agent to pay all money held by it to the Trustee. The Company at any time may require a Paying Agent to pay all money held by it to the Trustee. Upon payment over to the Trustee, the Paying Agent (if other than the Company or a Subsidiary) shall have no further liability for the money. If the Company or a Subsidiary acts as Paying Agent, it shall segregate and hold in a separate trust fund for the benefit of Holders of the Securities all money held by it as Paying Agent.

Section 2.06 Conversion Agent to Hold Shares in Trust.

The Company shall require each Conversion Agent other than the Trustee to agree in writing that the Conversion Agent will hold in trust for the benefit of Holders or the Trustee all shares of Common Stock held by the Conversion Agent for the delivery of Common Stock when due upon conversion, and will notify the Trustee in writing of any default by the Company in making any such delivery. While any such default continues, the Trustee may require a Conversion Agent to deliver all shares of Common Stock held by it to the Trustee. The Company at any time may require a Conversion Agent to pay all money held by it to the Trustee. Upon such acknowledgement by the Trustee of its receipt of any such payment, the Conversion Agent (if other than the Company or a Subsidiary) shall have no further liability for such money. If the Company or a Subsidiary acts as Conversion Agent, it shall segregate and hold in a separate trust fund for the benefit of the Holders all shares held by it as Conversion Agent. Upon any

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bankruptcy or reorganization proceedings relating to the Company, the Trustee shall serve as Conversion Agent for the Securities.

Section 2.07 Global Securities.

(a) Each Global Security authenticated under this Indenture shall be registered in the name of the Depository or a nominee thereof and delivered to such Depository or a nominee thereof or custodian therefor, and each such Global Security shall constitute a single Security for purposes of this Indenture.

(b) Notwithstanding any other provisions of this Indenture or the Securities, transfers of a Global Security, in whole or in part, shall be made only in accordance with Sections 2.09 and this Section 2.07. A Global Security may not be transferred, in whole or in part, to any Person other than the Depository or a nominee or any successor thereof, and no such transfer to any such other Person may be registered; *provided* that this clause (b) shall not prohibit any transfer of a Security that is issued in exchange for a Global Security but is not itself a Global Security. No transfer of a Security to any Person shall be effective under this Indenture unless and until such Security has been registered in the name of such Person.

(c) Notwithstanding any other provisions of this Indenture or the Securities, a Global Security shall not be exchanged in whole or in part for a Security registered in the name of any Person other than the Depository or one or more nominees thereof; *provided* that a Global Security may be exchanged for Securities registered in the names of any Person designated by the Depository in the event that (i) the Depository has notified the Company that it is unwilling or unable to continue as depository for such Global Security or the Depository ceases to be a clearing agency registered under the Exchange Act and a successor depository is not appointed by the Company within 90 days, (ii) the Company by written notice to the Trustee elects to issue the Securities in definitive registered form in exchange for all or any part of the Securities represented by the Global Security, or (iii) there is or continues to be an Event of Default and the Registrar receives notice from the Depository for the issuance of definitively registered Securities in exchange for the Global Security. Any Global Security exchanged pursuant to clause (a) above shall be so exchanged in whole and not in part. Any Security issued in exchange for a Global Security or any portion thereof shall be a Global Security; *provided* that any such Security so issued that is registered in the name of a Person other than the Depository or a nominee thereof shall not be a Global Security.

(d) Securities issued in exchange for a Global Security or any portion thereof shall be issued in definitive, fully registered form, without interest coupons, shall have a principal amount equal to that of such Global Security or portion thereof to be so exchanged, and shall be registered in such names and be in such authorized denominations as the Depository shall designate. Any Global Security to be exchanged in whole shall be surrendered by the Depository to the Trustee or the Registrar. With regard to any Global Security to be exchanged in part, either such Global Security shall be so surrendered for exchange or, if the Trustee is acting as custodian for the Depository or its nominee with respect to such Global Security, the principal amount thereof shall be reduced, by an amount equal to the portion thereof to be so exchanged, by means of an appropriate adjustment made on the records of the Trustee. Upon any such surrender or

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adjustment, the Trustee shall authenticate and deliver the Security issuable on such exchange to or upon the order of the Depository or an authorized representative thereof.

(e) Subject to the provisions of Section 2.07(g) below, the registered Holder may grant proxies and otherwise authorize any Person, including Agent Members (as defined below) and Persons that may hold interests through Agent Members, to take any action which a Holder is entitled to take under this Indenture or the Securities.

(f) In the event of the occurrence of any of the events specified in Section 2.07(c) above, the Company will promptly make available to the Trustee a reasonable supply of certificated Securities in definitive, fully registered form, without interest coupons.

(g) Neither any members of, or participants in, the Depository (collectively, the “**Agent Members**”) nor any other Persons on whose behalf Agent Members may act shall have any rights under this Indenture with respect to any Global Security registered in the name of the Depository or any nominee thereof, or under any such Global Security, and the Depository or such nominee, as the case may be, may be treated by the Company, the Trustee and any agent of the Company or the Trustee as the absolute owner and Holder of such Global Security for all purposes whatsoever. Notwithstanding the foregoing, nothing herein shall prevent the Company or the Trustee or any agent of the Company or the Trustee from giving effect to any written certification, proxy or other authorization furnished by the Depository or such nominee, as the case may be, or impair, as between the Depository, its Agent Members and any other person on whose behalf an Agent Member may act, the operation of customary practices of such Persons governing the exercise of the rights of a holder of any Security.

(h) At such time as all interests in a Global Security have been repurchased, converted, cancelled or exchanged for Securities in certificated form, such Global Security shall, upon receipt thereof, be cancelled by the Trustee in accordance with standing procedures and instructions existing between the Depository and the Securities Custodian, subject to Section 2.14 of the Indenture. At any time prior to such cancellation, if any interest in a Global Security is repurchased, converted, cancelled or exchanged for Securities in certificated form, the principal amount of such Global Security shall, in accordance with the standing procedures and instructions existing between the Depository and the Securities Custodian, be appropriately reduced, and an endorsement shall be made on such Global Security, by the Trustee or the Securities Custodian, at the direction of the Trustee, to reflect such reduction.

Section 2.08      Holder Lists.

The Trustee shall preserve in as current a form as is reasonably practicable the most recent list available to it of the names and addresses of Holders of the Securities and shall otherwise comply with TIA § 312(a). If the Trustee is not the Registrar, the Company shall furnish to the Trustee at least ten days before each interest payment date and at such other times as the Trustee may request in writing a list, in such form and as of such date as the Trustee may reasonably require, of the names and addresses of Holders of the Securities which list may be conclusively relied upon by the Trustee.

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Section 2.09      Transfer and Exchange.

Where the Securities are presented to the Registrar or a co-registrar with a request to register a transfer or to exchange them for an equal principal amount of Securities of the same series, the Registrar shall register the transfer or make the exchange if its requirements for such transactions are met. To permit registrations of transfers and exchanges, the Trustee shall authenticate Securities at the Registrar’s request. No service charge shall be made for any registration of transfer or exchange (except as otherwise expressly permitted herein), but the Company may require payment of a sum sufficient to cover any transfer tax or similar governmental charge payable in connection therewith (other than any such transfer tax or similar governmental charge payable upon exchanges pursuant to Sections 2.12, 3.07 or 10.05).

Neither the Company nor the Registrar shall be required (a) to issue, register the transfer of, or exchange the Securities for the period beginning at the opening of business fifteen days immediately preceding the mailing of a notice of redemption of the Securities selected for redemption and ending at the close of business on the day of such mailing, or (b) to register the transfer of or exchange the Securities selected, called or being called for redemption as a whole or the portion being redeemed of any such Securities selected, called or being called for redemption in part.

Section 2.10      Mutilated, Destroyed, Lost and Stolen Securities.

If any mutilated Security is surrendered to the Trustee, the Company shall execute and the Trustee shall authenticate and deliver in exchange therefor a new Security and of like tenor and principal amount and bearing a number not contemporaneously outstanding.

If there shall be delivered to the Company and the Trustee (i) evidence to their satisfaction of the destruction, loss or theft of any Security and (ii) such security or indemnity as may be required by them to save each of them and any agent of either of them harmless, then, in the absence of notice to the Company or the Trustee that such Security has been acquired by a bona fide purchaser, the Company shall execute and upon its written request the Trustee shall authenticate and make available for delivery, in lieu of any such destroyed, lost or stolen Security, a new Security and of like tenor and principal amount and bearing a number not contemporaneously outstanding.

In case any such mutilated, destroyed, lost or stolen Security has become or is about to become due and payable, the Company in its discretion may, instead of issuing a new Security, pay such Security.

Upon the issuance of any new Security under this Section, the Company may require the payment of a sum sufficient to cover any tax or other governmental charge that may be imposed in relation thereto and any other expenses (including the fees and expenses of the Trustee) connected therewith.

Every new Security issued pursuant to this Section in lieu of any destroyed, lost or stolen Security shall constitute an original additional contractual obligation of the Company, whether or not the destroyed, lost or stolen Security shall be at any time enforceable by anyone, and shall be entitled to all the benefits of this Indenture equally and proportionately with any and all other Securities duly issued hereunder.

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The provisions of this Section are exclusive and shall preclude (to the extent lawful) all other rights and remedies with respect to the replacement or payment of mutilated, destroyed, lost or stolen Securities.

Section 2.11      Outstanding Securities.

The Securities outstanding at any time are all the Securities authenticated by the Trustee except for those canceled by it, those delivered to it for cancellation, those reductions in the interest on a Global Security effected by the Trustee in accordance with the provisions hereof and those described in this

Section as not outstanding.

If a Security is replaced pursuant to Section 2.10, it ceases to be outstanding until the Trustee receives proof satisfactory to it that the replaced Security is held by a bona fide purchaser.

If the Paying Agent (other than the Company, a Subsidiary or an Affiliate of any thereof) holds on the Maturity of the Securities money sufficient to pay such Securities payable on that date, then on and after that date such Securities cease to be outstanding and interest on them ceases to accrue.

A Security does not cease to be outstanding because the Company or an Affiliate holds the Security.

In determining whether the Holders of the requisite principal amount of outstanding Securities have given any request, demand, authorization, direction, notice, consent or waiver hereunder, the principal amount of a Security that shall be deemed to be outstanding for such purposes shall be the amount of the principal thereof that would be due and payable as of the date of such determination upon a declaration of acceleration of the Maturity thereof pursuant to Section 8.02.

Section 2.12      Treasury Securities.

In determining whether the Holders of the required principal amount of the Securities have concurred in any request, demand, authorization, direction, notice, consent or waiver the Securities owned by the Company or an Affiliate shall be disregarded, except that for the purposes of determining whether the Trustee shall be protected in relying on any such request, demand, authorization, direction, notice, consent or waiver only Securities that the Trustee knows are so owned shall be so disregarded.

Section 2.13      Temporary Securities.

Until definitive Securities are ready for delivery, the Company may prepare and the Trustee shall authenticate temporary Securities upon a Company Order. Temporary Securities shall be substantially in the form of definitive Securities but may have variations that the Company considers appropriate for temporary Securities. Without unreasonable delay, the Company shall prepare and the Trustee upon request shall authenticate definitive Securities and date of maturity in exchange for temporary Securities. Until so exchanged, temporary securities shall have the same rights under this Indenture as the definitive Securities.

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Section 2.14      Cancellation.

The Company at any time may deliver Securities to the Trustee for cancellation. The Registrar and the Paying Agent shall forward to the Trustee any Securities surrendered to them for registration of transfer, exchange or payment. The Trustee shall cancel all Securities surrendered for transfer, exchange, payment, replacement or cancellation in accordance with its customary procedure. The Company may not issue new Securities to replace Securities that it has paid or delivered to the Trustee for cancellation.

Section 2.15      Defaulted Interest.

If the Company defaults in a payment of interest on the Securities, it shall pay the defaulted interest, plus, to the extent permitted by law, any interest payable on the defaulted interest (the "**Defaulted Interest**"), to the persons who are Holders of the Securities on a subsequent Special Record Date. The Company shall fix the Special Record Date and payment date. At least 30 days before the record date, the Company shall mail to the Trustee and to each Holder of the Securities a notice that states the record date, the payment date and the amount of interest to be paid. The Company may pay defaulted interest in any other lawful manner.

Section 2.16      CUSIP Numbers.

The Company in issuing the Securities may use "CUSIP" numbers (if then generally in use), and, if so, the Trustee shall use "CUSIP" numbers in notices of redemption as a convenience to Holders; *provided* that any such notice may state that no representation is made as to the correctness of such numbers either as printed on the Securities or as contained in any notice of a redemption and that reliance may be placed only on the other elements of identification printed on the Securities, and any such redemption shall not be affected by any defect in or omission of such numbers.

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### Article 3 Redemption and Repurchase of Securities

Section 3.01      Company's Right to Redeem. The Securities will be subject to redemption at the option of the Company, in whole or in part, on the terms and at the redemption prices (expressed as percentages of principal amount) set forth in paragraph 5 on the reverse of the form of Security (each a "**Redemption Price**"), plus accrued and unpaid interest thereon (if any) to the date of redemption (the "**Redemption Date**"). However, if a Redemption Date occurs after a Regular Record Date or a Special Record Date but on or prior to the corresponding Interest Payment Date or Defaulted Interest payment date, the Company will instead pay the applicable interest payment to the record Holder on the Regular Record Date or Special Record Date corresponding to such Interest Payment Date or Defaulted Interest payment date.

Section 3.02      Notices to Trustee. If the Company elects to redeem Securities pursuant to the optional redemption provisions of paragraph 5 of the Securities, it shall furnish to the Trustee, at least 30 days but not more than 60 days before a Redemption Date (unless a shorter period shall be satisfactory to the Trustee), an Officers' Certificate setting forth (i) the Section of this Indenture pursuant to which the redemption shall occur, (ii) the Redemption Date, (iii) the principal amount of Securities (if less than all) to be redeemed, (iv) the Redemption Price and the amount of any accrued and unpaid interest, if any, payable on the Redemption Date and (v) the CUSIP number of the Securities being redeemed.

Section 3.03 Selection of Securities To Be Redeemed. If less than all the Securities are to be redeemed, the Trustee shall select the Securities to be redeemed by a method that complies with the requirements of the principal national securities exchange, if any, on which the Securities are listed or quoted or, if the Securities are not so listed, on a pro rata basis, by lot or by any other method that the Trustee considers fair and appropriate. The Trustee shall make the selection not more than 60 days and not less than 30 days before the Redemption Date from Securities outstanding and not previously called for redemption. The Trustee may select for redemption a portion of the principal of any Securities that has a denomination larger than \$1,000. Securities and portions thereof will be redeemed in the amount of \$1,000 or integral multiples of \$1,000.

Provisions of this Indenture that apply to Securities called for redemption also apply to portions of Securities called for redemption. The Trustee shall notify the Company promptly of the Securities or portions of Securities to be called for redemption.

If any Security selected for partial redemption is converted in part after such selection, the converted portion of such Security shall be deemed (so far as possible) to be the portion to be selected for redemption. The Securities (or portion thereof) so selected shall be deemed duly selected for redemption for all purposes hereof, notwithstanding that any such Security is converted in whole or in part before the mailing of the notice of redemption. Upon any redemption of less than all the Securities, the Company and the Trustee may treat as outstanding any Securities surrendered for conversion during the period of 15 days immediately preceding

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the mailing of a notice of redemption and need not treat as outstanding any Security authenticated and delivered during such period in exchange for the unconverted portion of any Security converted in part during such period.

In the event of any redemption of less than all the Securities, the Company will not be required to (i) issue or register the transfer or exchange of any Security during a period of 15 days immediately preceding the mailing of a notice of redemption for such Securities for redemption, or (ii) register the transfer or exchange of any Security so selected for redemption, in whole or in part, except the unredeemed portion of any Security being redeemed in part, in which case the Company will execute and the Trustee will authenticate and deliver to the Holder a new Security or Securities equal in principal amount to the unredeemed portion of the Security surrendered.

Section 3.04 Notice of Redemption. At least 30 days but not more than 60 days before a Redemption Date, the Company shall mail by first class mail a notice of redemption to each Holder whose Securities are to be redeemed, at such Holder's registered address.

The notice shall identify the Securities to be redeemed and shall state:

- (1) the Redemption Date;
- (2) the Redemption Price and any accrued and unpaid interest payable on the Redemption Date;
- (3) if any Security is being redeemed in part, the portion of the principal amount of such Security to be redeemed and that, after the Redemption Date, upon surrender of such Security, a new Security or Securities in principal amount equal to the unredeemed portion will be issued in the name of the Holder thereof;
- (4) that Securities called for redemption must be surrendered to the Paying Agent to collect the Redemption Price and any accrued and unpaid interest;
- (5) that interest on Securities called for redemption and for which funds have been set apart for payment, ceases to accrue on and after the Redemption Date (unless the Company defaults in the payment of the Redemption Price or any accrued and unpaid interest);
- (6) the aggregate principal amount of Securities (if less than all) that are being redeemed;
- (7) the CUSIP number of the Securities (*provided* that any such notice may state that no representation is made as to the correctness or accuracy of the CUSIP numbers printed in the notice or on the Securities and that reliance may be placed only on the other identification numbers printed on the Securities);
- (8) the name and address of the Paying Agent;

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(9) that Securities called for redemption may be converted at any time prior to the close of business on the last Trading Day immediately preceding the Redemption Date and if not converted prior to the close of business on such date, the right of conversion will be lost; and

(10) that in the case of Securities or portions thereof called for redemption on a date that is also an Interest Payment Date or a Defaulted Interest payment date, the interest due on such date shall be paid to the Holder of such Security at the close of business on the relevant Regular Record Date or Special Record Date.

The notice, if mailed in the manner herein provided, shall be conclusively presumed to have been given, whether or not the Holder receives such notice. In any case, failure to give such notice by mail or any defect in the notice to any Holder designated for redemption as a whole or in part shall not affect the validity of the proceedings for the redemption of any Security.

At the Company's request, the Trustee shall give notice of redemption in the Company's name and at the Company's expense.

Section 3.05 Effect of Notice of Redemption. Once notice of redemption is mailed, Securities called for redemption become due and payable on the Redemption Date at the Redemption Price set forth in the Security.

Section 3.06            Deposit of Redemption Price. On or before 11:00 a.m. New York City time on the Redemption Date, the Company shall deposit with the Trustee or with the Paying Agent money in immediately available funds sufficient to pay the Redemption Price of and accrued interest, if any, on all Securities to be redeemed on that date. The Trustee or the Paying Agent shall return to the Company any money not required for that purpose.

On and after the Redemption Date, unless the Company shall default in the payment of the Redemption Price or any accrued and unpaid interest, interest will cease to accrue on the principal amount of the Securities or portions thereof called for redemption and for which funds have been set apart for payment, and such Securities, or portions thereof, shall cease after the close of business on the Business Day immediately preceding the Redemption Date to be convertible into Common Stock and, except as provided in this Section 3.06, to be entitled to any benefit or security under the Indenture, and the Holders thereof shall have no right in respect of such Securities, or portions thereof, except the right to receive the Redemption Price thereof and unpaid interest to (but excluding) the Redemption Date. In the case of Securities or portions thereof redeemed on a Redemption Date which is after a Regular Record Date or a Special Record Date and on or prior to the corresponding Interest Payment Date or Defaulted Interest payment date, the interest due on such date shall be paid to the Person in whose name the Security is registered at the close of business on the relevant Regular Record Date or Special Record Date.

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Section 3.07            Securities Redeemed in Part. Upon surrender of a Security that is redeemed in part only, the Company shall issue and the Trustee shall authenticate and deliver to the Holder of such Security a new Security or Securities equal in principal amount to the unredeemed portion of the Security surrendered, at the expense of the Company.

Section 3.08            Repurchase of Securities at Option of the Holder upon a Fundamental Change.

(a) If a Fundamental Change occurs prior to the Final Maturity Date, each Holder of a Security shall have the right, at the option of the Holder, to require the Company to repurchase for cash all or any portion of the Securities of such Holder equal to \$1,000 principal amount (or an integral multiple thereof) at the Fundamental Change Repurchase Price, on the date specified by the Company that is 45 days after the date of the Fundamental Change Company Notice pursuant to subsection 3.08(b) (the “**Fundamental Change Repurchase Date**”).

(b) As promptly as practicable following the date on which the Company publicly announces a Fundamental Change, but in no event less than 20 days prior to the anticipated effective date of a Fundamental Change, the Company shall mail a written notice of the Fundamental Change and of the resulting repurchase right to the Trustee, Paying Agent and to each Holder (and to beneficial owners as required by applicable law) (the “**Fundamental Change Company Notice**”). The Fundamental Change Company Notice shall include the form of a Fundamental Change Repurchase Notice to be completed by the Holder and shall state:

- (1) the events causing such Fundamental Change;
- (2) the date (or expected date) of such Fundamental Change;
- (3) the last date by which the Fundamental Change Repurchase Notice must be delivered to elect the repurchase option pursuant to this Section 3.08;
- (4) the Fundamental Change Repurchase Date;
- (5) the Fundamental Change Repurchase Price;
- (6) the Holder’s right to require the Company to purchase the Securities;
- (7) the name and address of each Paying Agent and Conversion Agent;
- (8) the then-effective Conversion Rate and any adjustments to the Conversion Rate resulting from such Fundamental Change;
- (9) whether a Make-Whole Premium shall be payable by the Company upon conversion;
- (10) the procedures that the Holder must follow to exercise rights under Article 4;
- (11) the procedures that the Holder must follow to exercise rights under this Section 3.08;

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(12) that, unless the Company fails to pay such Fundamental Change Repurchase Price, Securities covered by any Fundamental Change Repurchase Notice will cease to be outstanding and interest, including Special Interest, if any, will cease to accrue on and after the Fundamental Change Repurchase Date, subject to Section 3.10 hereof; and

- (13) the CUSIP number of the Securities.

At the Company’s written request, the Trustee shall give such Fundamental Change Company Notice in the Company’s name and at the Company’s expense; *provided that*, in all cases, the Company makes such request at least three (3) Business Days prior to the date by which such Fundamental Change Company Notice must be given to the Holders in accordance with this Section 3.08; *provided, further*, that the text of such Fundamental Change Company Notice shall be prepared by the Company. In connection with the delivery of the Fundamental Change Company Notice to the Holders, the Company shall disseminate a press release through Dow Jones & Company, Inc. or Bloomberg Business News, or publish a notice containing substantially the same information that is required in the Fundamental Change Company Notice in a newspaper of general circulation in The City of New York, or publish information on a website of the Company or through such other public medium the Company may use at that time. If any of the Securities is in the form of a Global Security, then the Company shall modify such notice to the extent necessary to accord with the Applicable Procedures relating to the purchase of Global Securities.

No failure of the Company to give the foregoing notices or defect therein shall limit any Holder's right to exercise its right to cause the Company to repurchase such Holder's Securities pursuant to this Section 3.08.

(c) A Holder may exercise its rights specified in Section 3.08(a) upon delivery of a written notice (which shall be in substantially the form attached as Exhibit A under the heading "Fundamental Change Repurchase Notice" and which may be delivered by letter, overnight courier, hand delivery, facsimile transmission or in any other written form and, in the case of Global Securities, may be delivered electronically or by other means in accordance with the Depository's Applicable Procedures) of the exercise of such rights (a "**Fundamental Change Repurchase Notice**") to the Paying Agent at any time prior to the close of business on the 30th day following the date of the Fundamental Change Company Notice, subject to extension to comply with applicable law.

(1) The Fundamental Change Repurchase Notice shall state: (A) the certificate number (if such Security is held other than in global form) of the Security which the Holder will deliver to be repurchased (or, if the Security is held in global form, any other items required to comply with the Applicable Procedures), (B) the portion of the principal amount of the Security which the Holder will deliver to be repurchased and, (C) that such Security shall be repurchased as of the Fundamental Change Repurchase Date pursuant to the terms and conditions specified in the Securities and in this Indenture.

(2) The delivery of a Security for which a Fundamental Change Repurchase Notice has been timely delivered to any Paying Agent on or after the Fundamental Change Repurchase Date

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(together with all necessary endorsements) at the office of such Paying Agent shall be a condition to the receipt by the Holder of the Fundamental Change Repurchase Price therefor.

(3) The Company shall only be obliged to purchase, pursuant to this Section 3.08, a portion of a Security if the principal amount of such portion is \$1,000 or an integral multiple of \$1,000 (provisions of this Indenture that apply to the purchase of all of a Security also apply to the purchase of such portion of such Security).

(4) A Paying Agent shall promptly notify the Company of the receipt by it of any Fundamental Change Repurchase Notice.

(5) Anything herein to the contrary notwithstanding, in the case of Global Securities, any Fundamental Change Repurchase Notice may be delivered and such Securities may be surrendered or delivered for purchase in accordance with the Applicable Procedures as in effect from time to time.

(6) A Fundamental Change Repurchase Notice shall be irrevocable, except that the right of the Holder to convert the Securities that are the subject of the Fundamental Change Repurchase Notice shall continue until the close of business on the second Business Day immediately preceding the Fundamental Change Repurchase Date.

(d) The Company shall deposit cash, at the time and in the manner as provided in Section 3.10, sufficient to pay the aggregate Fundamental Change Repurchase Price of all Securities to be purchased pursuant to this Section 3.08.

Section 3.09            Effect of Fundamental Change Repurchase Notice.

Upon receipt by any Paying Agent of a properly completed Fundamental Change Repurchase Notice from a Holder, the Holder of the Security in respect of which such Fundamental Change Repurchase Notice was given shall thereafter be entitled to receive the Fundamental Change Repurchase Price with respect to such Security, subject to the occurrence of the Fundamental Change Effective Date. Such Fundamental Change Repurchase Price shall be paid to such Holder promptly, but no later than two Business Days, following the later of (1) the Fundamental Change Repurchase Date (*provided* that the conditions in Section 3.08 have been satisfied), and (2) the time of delivery of such Security to a Paying Agent by the Holder thereof in the manner required by Section 3.08(c).

Section 3.10            Deposit of Fundamental Change Repurchase Price.

(a) On or before 10:00 a.m. New York City time on the Business Day following the applicable Fundamental Change Repurchase Date, the Company shall deposit with the Paying Agent (or, if the Company or an Affiliate of the Company is acting as the Paying Agent, shall segregate and hold in trust as provided in Section 2.05 of this Indenture) an amount of money (in immediately available funds if deposited on or after such Fundamental Change Repurchase Date) sufficient to pay the aggregate Fundamental Change Repurchase Price of all the Securities or portions thereof that are to be purchased as of the Fundamental Change Repurchase Date.

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(b) If a Paying Agent holds on the Business Day following the Fundamental Change Repurchase Date, in accordance with the terms hereof, money sufficient to pay the Fundamental Change Repurchase Price of any Security for which a Fundamental Change Repurchase Notice has been tendered and not withdrawn in accordance with this Indenture then, immediately following the applicable Fundamental Change Repurchase Date, whether or not the Security is delivered to the Paying Agent, each such Security will cease to be outstanding, interest, including Special Interest, if any, shall cease to accrue, and the rights of the Holder in respect of the Security shall terminate (other than the right to receive the Fundamental Change Repurchase Price upon delivery of the Security as aforesaid).

(c) If a Fundamental Change Repurchase Date falls after a Regular Record Date and on or before the related Interest Payment Date, then interest on the Securities payable on such Interest Payment Date will be payable to the Holders in whose names the Securities are registered at the close of business on such Regular Record Date.

Section 3.11            Repayment to the Company.

To the extent that the aggregate amount of cash deposited by the Company pursuant to Section 3.10 exceeds the aggregate Fundamental Change Repurchase Price of the Securities or portions thereof that the Company is obligated to purchase, then promptly after the Fundamental Change Repurchase

Date the Paying Agent shall return any such excess cash to the Company.

Section 3.12            [Reserved].

Section 3.13            Securities Purchased in Part.

Any Security that is to be purchased only in part shall be surrendered at the office of a Paying Agent, and, promptly after the Fundamental Change Repurchase Date, the Company shall execute and the Trustee shall authenticate and deliver to the Holder of such Security, without service charge, a new Security or Securities, of such authorized denomination or denominations as may be requested by such Holder (which must be equal to \$1,000 principal amount or any integral thereof), in aggregate principal amount equal to, and in exchange for, the portion of the principal amount of the Security so surrendered that is not purchased.

Section 3.14            Compliance with Securities Laws upon Purchase of Securities.

In connection with any offer to purchase Securities under Section 3.08, the Company shall (a) comply with Rule 13e-4 and Rule 14e-1 (or any successor to either such Rule), and any other tender offer rules, if applicable, under the Exchange Act, (b) file the related Schedule TO (or any successor or similar schedule, form or report) if required under the Exchange Act, and (c) otherwise comply with all federal and state securities laws in connection with such offer to purchase or purchase of Securities, all so as to permit the rights of the Holders and obligations of the Company under Sections 3.08 through 3.11 to be exercised in the time and in the manner specified therein. To the extent that compliance with any such laws, rules and regulations would result in a conflict with any of the terms hereof, this Indenture is hereby modified to the extent required for the Company to comply with such laws, rules and regulations.

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Section 3.15            Purchase of Securities in Open Market.

The Company shall surrender any Security repurchased by the Company pursuant to this Article 3 to the Trustee for cancellation. Any Securities surrendered to the Trustee for cancellation may not be reissued or resold by the Company and will be cancelled promptly in accordance with Section 2.14 of this Indenture. The Company may purchase Securities in the open market, by tender at any price or pursuant to private agreements.

#### **Article 4 Conversion**

Section 4.01            Conversion Privilege and Conversion Rate.

(a) The conversion rights pursuant to this Article 4 shall commence on the Issue Date of the Securities and expire at the close of business on the second Business Day immediately preceding the Final Maturity Date, subject, in the case of conversion of any Global Security, to any Applicable Procedures. If a Security is submitted or presented for purchase or redemption pursuant to Article 3, such conversion right shall terminate at the close of business on the second Business Day immediately preceding the Fundamental Change Repurchase Date or Redemption Date for such Security (unless the Company shall fail to make the Fundamental Change Repurchase Price or Redemption Price payment when due in accordance with Article 3, in which case the conversion right shall terminate at the close of business on the date such failure is cured and such Security is purchased or redeemed).

(b) Provisions of this Indenture that apply to conversion of all of a Security also apply to conversion of a portion of a Security.

(c) A Holder of Securities is not entitled to any rights of a holder of Common Stock until such Holder has converted its Securities into Common Stock, and only to the extent such Securities are deemed to have been converted into Common Stock pursuant to this Article 4.

(d) The Conversion Rate shall be adjusted in certain instances as provided in Section 4.01(e) and Section 4.07.

(e) If there shall have occurred a transaction described in clause (i) or (ii) of the definition of a Change in Control, the Company shall pay a "**Make-Whole Premium**" to the Holders of the Securities who convert their Securities during the period beginning 20 days before the anticipated Fundamental Change Effective Date until the close of business on the Business Day immediately preceding the Fundamental Change Repurchase Date by increasing the Conversion Rate for such Securities. The number of additional shares of Common Stock per \$1,000 principal amount of Securities constituting the Make-Whole Premium shall be determined by reference to the table below, based on the Fundamental Change Effective Date of such Fundamental Change and the Stock Price; *provided* that if the Stock Price or Fundamental Change Effective Date are not set forth on the table: (i) if the actual Stock Price on the Fundamental Change Effective Date is between two Stock Prices on the table or the actual Fundamental Change Effective Date is between two Fundamental Change Effective Dates on the table, the Make-Whole Premium will be determined by a straight-line interpolation between the Make-Whole Premiums set forth for the two Stock Prices and the two Fundamental Change

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Effective Dates on the table based on a 365-day year, as applicable, (ii) if the Stock Price on the Fundamental Change Effective Date exceeds \$[ ] per share, subject to adjustment as set forth herein, no Make-Whole Premium will be paid, and (iii) if the Stock Price on the Fundamental Change Effective Date is less than \$[ ] per share, subject to adjustment as set forth herein, no Make-Whole Premium will be paid. If Holders of the Company's Common Stock receive only cash in the transaction, the Stock Price shall be the cash amount paid per share of the Company's Common Stock in connection with the Fundamental Change. Otherwise, the Stock Price shall be equal to the average Closing Price of the Company's Common Stock over the 15 Trading Day period ending on the Trading Day immediately preceding, and excluding, the applicable Fundamental Change Effective Date.

#### **Make-Whole Premium Upon a Fundamental Change (Number of Additional Shares)**

Stock Price on Effective Date

Effective Date

The Stock Prices set forth in the first column of the table above will be adjusted as of any date on which the Conversion Rate of the Securities is adjusted other than an adjustment pursuant to the Make-Whole Premium described above. The adjusted Stock Prices will equal the Stock Prices applicable immediately prior to such adjustment multiplied by a fraction, the numerator of which is the Conversion Rate immediately prior to the adjustment giving rise to the Stock Price adjustment and the denominator of which is the Conversion Rate as so adjusted. The number of additional shares set forth in the table above will be adjusted in the same manner as the Conversion Rate as set forth in Section 4.07 hereof.

Notwithstanding the foregoing paragraph, in no event will the total number of shares of Common Stock issuable upon conversion of a Security exceed [ ] per \$1,000 principal amount, subject to proportional adjustment in the same manner as the Conversion Rate as set forth in clauses (1) through (7) of Section 4.07(a) hereof.

(f) By delivering the number of shares of Common Stock issuable on conversion to the Trustee plus a cash payment for a fractional share, the Company will be deemed to have satisfied its obligation to pay the principal amount of the Securities so converted and its obligation to pay accrued and unpaid interest, including Special Interest, if any, attributable to the period from the most recent Interest Payment Date through the Conversion Date (which amount will be deemed cancelled, extinguished and forfeited).

(g) A conversion of the Securities by a Holder will be deemed for purposes of Section 4.01(e) to be “in connection with” certain Fundamental Change transactions if the conversion notice is received by the Conversion Agent on or subsequent to the date 20 calendar days prior to the date announced by the Company as the anticipated Fundamental Change Effective Date of the related Fundamental Change but before the close of business on the Business Day immediately preceding the related Fundamental Repurchase Date. The Company will notify Holders of Securities of the anticipated Fundamental Change Date as promptly as practicable following the date the Company publicly announces such Fundamental Change, but in no event less than 20 days prior to such date.

#### Section 4.02 Conversion Procedure.

(a) To convert a Security, a Holder must (1) complete and manually sign the conversion notice on the back of the Security and deliver such notice to the Conversion Agent, (2) surrender the Security to the Conversion Agent, which shall become irrevocable upon receipt by the Conversion Agent, (3) furnish appropriate endorsements and transfer documents if required by the Registrar or the Conversion Agent, (4) pay an amount equal to the interest, including Special Interest, if any, as required by Section 4.02(c), and (5) pay all transfer or similar taxes, if required pursuant to Section 4.04. The date on which the Holder satisfies all of those requirements is the “**Conversion Date.**” Upon the conversion of a Security, the Company will deliver the shares of Common Stock, without service charge, as promptly as practicable after the Conversion Date, but in no event later than third Business Days after the Conversion Date. Anything herein to the contrary notwithstanding, in the case of Global Securities, conversion notices may be delivered and such Securities may be surrendered for conversion in accordance with clauses (3), (4) and (5) of this Section 4.02(a) and the Applicable Procedures as in effect from time to time.

(b) The person in whose name the shares of Common Stock are issuable upon conversion shall be deemed to be a holder of record of such Common Stock on the Conversion Date; *provided, however*, that no surrender of a Security on any Conversion Date when the stock transfer books of the Company shall be closed shall be effective to constitute the person or persons entitled to receive the shares of Common Stock upon conversion as the record holder or holders of such shares of Common Stock on such date, but such surrender shall be effective to constitute the person or persons entitled to receive such shares of Common Stock as the record holder or holders thereof for all purposes at the close of business on the next succeeding day on which such stock transfer books are open; *provided, further*, that such conversion shall be at the Conversion Rate in effect on the Conversion Date as if the stock transfer books of the Company had not been closed. Upon conversion of a Security, such person shall no longer be a Holder of such Security. Except as set forth in this Indenture, no payment or adjustment will be made for dividends or distributions declared or made on shares of Common Stock issued upon conversion of a Security prior to the issuance of such shares.

(c) Holders of Securities surrendered for conversion (in whole or in part) during the period from the close of business on any Regular Record Date to the opening of business on the next succeeding Interest Payment Date will receive the semi-annual interest and Special Interest, if any, payable on the principal amount of such Securities being surrendered for conversion on the corresponding Interest Payment Date notwithstanding the conversion. Upon surrender of any such Securities for conversion, such Securities shall also be accompanied by payment in funds to the Conversion Agent acceptable to the Company of an amount equal to the interest, including Special Interest, if any, payable on such corresponding Interest Payment Date (but excluding any overdue interest on the principal amount of such Security so converted that exists at the time such Holder surrenders such Security for conversion). Notwithstanding the foregoing, any such Holder which surrenders for conversion any Security (a) with respect to which the Company has specified a Fundamental Change Repurchase Date or a Redemption Date, in either case, that is after such Regular Record Date and on or prior to the next succeeding Interest Payment Date, or (b) after the last Regular Record Date prior to the Final Maturity Date, in either case, need not pay the Company an amount equal to the interest, including Special Interest, if any, on the principal amount of such Security so converted at the time such Holder surrenders such Security for conversion. Except as otherwise provided in this Section 4.02(c), no payment or adjustment will be made for accrued interest, including Special Interest, if any, on a converted Security.

(d) Subject to Section 4.02(c), nothing in this Section shall affect the right of a Holder in whose name any Security is registered at the close of business on a Regular Record Date to receive the interest payable on such Security on the related Interest Payment Date in accordance with the terms of this Indenture and the Securities. If a Holder converts more than one Security at the same time, the number of shares of Common Stock issuable upon the conversion (and the amount of any cash in lieu of fractional shares pursuant to Section 4.03) shall be based on the aggregate principal amount of all Securities so converted.

(e) In the case of any Security which is converted in part only, upon such conversion the Company shall execute and the Trustee shall authenticate and deliver to the Holder thereof, without service charge, a new Security or Securities of authorized denominations in an aggregate principal amount equal to,



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part is an integral multiple of \$1,000 and the principal amount of such Security to remain outstanding after such conversion is equal to \$1,000 or any integral multiple of \$1,000 in excess thereof.

Section 4.03            Fractional Shares.

No fractional shares of Common Stock shall be issued upon conversion of any Security or Securities. If more than one Security shall be surrendered for conversion at one time by the same Holder, the number of full shares which shall be issued upon conversion thereof shall be computed on the basis of the aggregate principal amount of the Securities (or specified portions thereof) so surrendered. Instead of any fractional share of Common Stock which would otherwise be issued upon conversion of any Security or Securities (or specified portions thereof), the Company shall pay a cash adjustment in respect of such fraction (calculated to the nearest one-100th of a share) in an amount equal to the same fraction of the Closing Price of the Common Stock as of the Trading Day preceding the date of conversion.

Section 4.04            Taxes on Conversion.

Except as provided in the next sentence, the Company will pay any and all taxes (other than taxes on income) and duties that may be payable in respect of the issue or delivery of shares of Common Stock on conversion of Securities pursuant hereto. A Holder delivering a Security for conversion shall be liable for and will be required to pay any tax or duty which may be payable in respect of any transfer involved in the issue and delivery of shares of Common Stock in a name other than that of the Holder of the Security or Securities to be converted, and no such issue or delivery shall be made unless the Person requesting such issue has paid to the Company the amount of any such tax or duty, or has established to the satisfaction of the Company that such tax or duty has been paid.

Section 4.05            [Reserved].

Section 4.06            Company to Provide Common Stock.

(a) The Company shall, prior to issuance of any Securities hereunder, and from time to time as may be necessary, reserve, out of its authorized but unissued Common Stock, a sufficient number of shares of Common Stock to permit the conversion of all outstanding Securities into shares of Common Stock.

(b) All shares of Common Stock delivered upon conversion of the Securities shall be newly issued shares, shall be duly authorized, validly issued, fully paid and nonassessable and shall be free from preemptive or similar rights and free of any lien or adverse claim as the result of any action by the Company.

(c) The Company will endeavor promptly to comply with all federal and state securities laws regulating the offer and delivery of shares of Common Stock upon conversion of Securities.

(d) The Company will use its best efforts to ensure that the shares of Common Stock to be issued upon conversion of the Securities will be registered under the Securities Act of 1933, as amended. In the event that despite the Company's best efforts it is unable to deliver shares that

have been so registered, upon conversion of the Securities, the Company may deliver shares of Common Stock that have not been registered.

Section 4.07            Adjustment of Conversion Rate.

(a) The Conversion Rate shall be adjusted from time to time by the Company, without duplication, as follows:

(1) If the Company shall pay a dividend or make a distribution to all holders of outstanding Common Stock in shares of Common Stock, the Conversion Rate in effect immediately prior to the record date for the determination of shareholders entitled to receive such dividend or other distribution shall be increased so that the same shall equal the rate determined by multiplying the Conversion Rate in effect immediately prior to such record date by a fraction of which the numerator shall be the sum of the number of shares of Common Stock outstanding at the close of business on such record date plus the total number of shares of Common Stock constituting such dividend or other distribution and of which the denominator shall be the number of shares of Common Stock outstanding at the close of business on such record date. Such adjustment shall be made successively whenever any such dividend or distribution is made and shall become effective immediately after such record date. For the purpose of this clause (1), the number of shares of Common Stock at any time outstanding shall not include shares held in the treasury of the Company. The Company will not pay any dividend or make any distribution on Common Stock held in the treasury of the Company. If any dividend or distribution of the type described in this clause is declared but not so paid or made, the Conversion Rate shall again be adjusted to the Conversion Rate that would then be in effect as if such dividend or distribution had not been declared.

(2) If the Company shall subdivide its outstanding Common Stock into a greater number of shares, or combine its outstanding Common Stock into a smaller number of shares, the Conversion Rate in effect immediately prior to the day upon which such subdivision or combination becomes effective shall be, in the case of a subdivision of Common Stock, proportionately increased and, in the case of a combination of Common Stock, proportionately reduced. Such adjustment shall be made successively whenever any such subdivision or combination of the Common Stock occurs and shall become effective immediately after the date upon which such subdivision or combination becomes effective.

(3) If the Company shall issue any rights or warrants (other than rights or warrants referred to in Section 4.07(a)(4)) to all or substantially all holders of its outstanding Common Stock entitling them to subscribe for or purchase shares of Common Stock (or securities convertible into or exchangeable for Common Stock) at a price per share (or having a Conversion Price per share) less than the Current Market Price per share of Common Stock (as determined

in accordance with clause (9) of this Section 4.07(a)) on the record date for the determination of shareholders entitled to receive such rights or warrants, the Conversion Rate in effect immediately prior thereto shall be increased so that the same shall equal the rate determined by multiplying the Conversion Rate in effect at the opening of business on the date immediately prior to such record date by a fraction of which the numerator shall be the number of shares of Common Stock outstanding at the close of business on such record date plus the number of additional shares of Common Stock so offered for subscription or purchase (or into or

for which the convertible or exchangeable securities so offered are convertible or exchangeable) and of which the denominator shall be the number of shares of Common Stock outstanding at the close of business on such record date plus the number of shares which the aggregate offering price of the total number of shares of Common Stock so offered for subscription or purchase (or the aggregate conversion price of the convertible or exchangeable securities so offered for subscription or purchase, which shall be determined by multiplying the number of shares of Common Stock issuable upon conversion or exchange of such convertible or exchangeable securities by the conversion price per share of Common Stock pursuant to the terms of such convertible or exchangeable securities) would purchase at the Current Market Price per share of Common Stock on such record date. Such adjustment shall be made successively whenever any such rights or warrants are issued, and shall become effective immediately after such record date. To the extent that shares of Common Stock (or securities convertible into or exchangeable for Common Stock) are not delivered pursuant to such rights or warrants, upon the expiration or termination of such rights or warrants, the Conversion Rate shall be readjusted to the Conversion Rate that would then be in effect had the adjustments made upon the issuance of such rights or warrants been made on the basis of delivery of only the number of shares of Common Stock (or securities convertible into or exchangeable for Common Stock) actually delivered. If such rights or warrants are not so issued, the Conversion Rate shall again be adjusted to be the Conversion Rate that would then be in effect if the record date for the determination of shareholders entitled to receive such rights or warrants had not been fixed. In determining whether any rights or warrants entitle the shareholders to subscribe for or purchase shares of Common Stock at a price less than the Current Market Price per share of Common Stock and in determining the aggregate offering price of the total number of shares of Common Stock so offered, there shall be taken into account any consideration received by the Company for such rights or warrants and any amount payable on exercise or conversion thereof, the value of such consideration, if other than cash, to be determined by the Board of Directors.

(4) In case the Company shall, by dividend or otherwise, distribute to all or substantially all holders of its Common Stock shares of any class of Capital Stock of the Company (other than any dividends or distributions to which Section 4.07(a)(1) applies) or evidences of its indebtedness, cash or other assets, including securities, but excluding (x) any rights or warrants referred to in Section 4.07(a)(3), (y) any stock, securities or other property or assets (including cash) distributed in connection with a reclassification, change, merger, consolidation, statutory share exchange, combination, sale, conveyance or lease to which Section 4.11 hereof applies, and (z) dividends and distributions paid exclusively in cash (the securities described in foregoing clauses (x), (y) and (z) hereinafter in this Section 4.07(a)(4) called the "securities"), then, in each such case, subject to the third succeeding paragraph of this Section 4.07(a)(4), the Conversion Rate shall be increased so that the same shall be equal to the rate determined by multiplying the Conversion Rate in effect immediately prior to the close of business on the record date (as defined in Section 4.07(a)(9)(C)) with respect to such distribution by a fraction, the numerator of which shall be the Current Market Price (determined as provided in Section 4.07(a)(9)) on such date, and the denominator of which shall be such Current Market Price on such date less the fair market value (as determined by the Board of Directors (except as described below), whose determination shall be conclusive and set forth in a Board Resolution) on such date of the portion of the shares of capital stock, evidences of indebtedness, cash or other assets, including securities, so distributed applicable to one share of Common Stock (determined on the basis of the number of shares of the Common Stock outstanding on the record date).

Such increase shall become effective immediately prior to the opening of business on the day following the record date, or in the case of a Spin-off (as described below), immediately prior to the opening of business on the day following the last Trading Day of the Measurement Period. However, in the event that the then fair market value (as so determined) of the portion of the securities so distributed applicable to one share of Common Stock is equal to or greater than the Current Market Price on the record date, in lieu of the foregoing adjustment, adequate provision shall be made so that each Holder shall have the right to receive upon conversion of a Security (or any portion thereof) the amount of shares of capital stock, evidences of indebtedness, cash or other assets, including securities, such Holder would have received had such Holder converted such Security (or portion thereof) immediately prior to such record date. In the event that such dividend or distribution is not so paid or made, the Conversion Rate shall again be adjusted to be the Conversion Rate which would then be in effect as if such dividend or distribution had not been declared.

If the Board of Directors determines the fair market value of any distribution for purposes of this Section 4.07(a)(4) by reference to the actual or when issued trading market for any securities comprising all or part of such distribution, it must in doing so consider the prices in such market over the same period (the "**Reference Period**") used in computing the Current Market Price pursuant to Section 4.07(a)(9) to the extent possible, unless the Board of Directors in a Board Resolution determines in good faith that determining the fair market value during the Reference Period would not be in the best interest of the Holder.

In the event the Company distributes shares of capital stock of a Subsidiary or other business unit of the Company, the Conversion Rate will be adjusted, if at all, so that the same shall be equal to the rate determined by multiplying the Conversion Rate in effect immediately prior to the close of business on the record date (as defined in Section 4.07(a)(9)) with respect to such distribution by a fraction, (i) the numerator of which shall be the Current Market Price (determined as described below) on such date plus the fair market value on such date of the portion of the shares of capital stock of such Subsidiary or other business unit of the Company so distributed applicable to one share of Common Stock (determined on the basis of the number of shares of the Common Stock outstanding on the record date), and (ii) the denominator of which shall be such Current Market Price on such date (determined as described below).

In respect of a dividend or other distribution of shares of capital stock of a class or series, or similar equity interest, of or relating to a Subsidiary or other business unit of the Company which has a Subsidiary Closing Price (a "**Spin-off**"), the fair market value of the securities to be distributed shall equal the average of the daily Subsidiary Closing Price of such securities for the 10 consecutive Trading Days commencing on and including the fifth Trading Day of such securities after the effectiveness of the Spin-off (the "**Measurement Period**") and the Current Market Price shall be calculated over the same Measurement Period; *provided, however*, that in the event that an underwritten initial public offering of the securities in the Spin-off occurs simultaneously with the Spin-off, the fair market value of the securities distributed in the Spin-off shall be the initial public offering price of such securities and the market price per share of the Common Stock shall mean the Closing Price for the Common Stock on the same Trading Day.

Rights or warrants distributed by the Company to all holders of Common Stock entitling the holders thereof to subscribe for or purchase shares of the Company's capital stock (either initially or under certain circumstances), which rights or warrants, until the occurrence of a specified event or events ("**Trigger Event**"):

- (i) are deemed to be transferred with such shares of Common Stock,
- (ii) are not exercisable, and
- (iii) are also issued in respect of future issuances of Common Stock

shall be deemed not to have been distributed for purposes of this Section 4.07(a)(4) (and no adjustment to the Conversion Rate under this Section 4.07(a)(4) will be required) until the occurrence of the earliest Trigger Event. If such right or warrant is subject to subsequent events, upon the occurrence of which such right or warrant shall become exercisable to purchase different securities, evidences of indebtedness or other assets or entitle the holder to purchase a different number or amount of the foregoing or to purchase any of the foregoing at a different purchase price, then the occurrence of each such event shall be deemed to be the date of issuance and record date with respect to a new right or warrant (and a termination or expiration of the existing right or warrant without exercise by the holder thereof). In addition, in the event of any distribution (or deemed distribution) of rights or warrants, or any Trigger Event or other event (of the type described in the preceding sentence) with respect thereto, that resulted in an adjustment to the Conversion Rate under this Section 4.07(a)(4):

(A) in the case of any such rights or warrants which shall all have been redeemed or repurchased without exercise by any holders thereof, the Conversion Rate shall be readjusted upon such final redemption or repurchase to give effect to such distribution or Trigger Event, as the case may be, as though it were a cash distribution, equal to the per share redemption or repurchase price received by a holder of Common Stock with respect to such rights or warrants (assuming such holder had retained such rights or warrants), made to all holders of Common Stock as of the date of such redemption or repurchase; and

(B) in the case of such rights or warrants all of which shall have expired or been terminated without exercise, the Conversion Rate shall be readjusted as if such rights and warrants had never been issued.

For purposes of this Section 4.07(a)(4) and Sections 4.07(a)(1), 4.07(a)(2) and 4.07(a)(3), any dividend or distribution to which this Section 4.07(a)(4) is applicable that also includes shares of Common Stock, a subdivision or combination of Common Stock to which Section 4.07(a)(2) applies, or rights or warrants to subscribe for or purchase shares of Common Stock to which Section 4.07(a)(3) applies (or any combination thereof), shall be deemed instead to be:

(A) a dividend or distribution of the evidences of indebtedness, assets, shares of capital stock, rights or warrants other than such shares of Common Stock, such subdivision or combination or such rights or warrants to which Sections 4.07(a)(1), 4.07(a)(2) and 4.07(a)(3) apply, respectively (and any Conversion Rate increase required

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by this Section 4.07(a)(4) with respect to such dividend or distribution shall then be made); immediately followed by

(B) a dividend or distribution of such shares of Common Stock, such subdivision or combination or such rights or warrants (and any further Conversion Rate increase required by Sections 4.07(a)(1), 4.07(a)(2) and 4.07(a)(3) with respect to such dividend or distribution shall then be made); except:

(i) the record date of such dividend or distribution shall be substituted as (x) "the date fixed for the determination of stockholders entitled to receive such dividend or other distribution", "record date fixed for such determination" and "record date" within the meaning of Section 4.07(a)(1), (y) "the day upon which such subdivision becomes effective" and "the day upon which such combination becomes effective" within the meaning of Section 4.07(a)(2), and (z) "the record date fixed for the determination of stockholders entitled to receive such rights or warrants," such "record date," "the record date fixed for the determination of stockholders entitled to receive such rights or warrants" and "such date fixed for the determination of stockholders entitled to receive such rights or warrants" within the meaning of Section 4.07(a)(3); and

(ii) any shares of Common Stock included in such dividend or distribution shall not be deemed "outstanding at the close of business on the record date fixed for such determination" within the meaning of Section 4.07(a)(1) and any reduction or increase in the number of shares of Common Stock resulting from such subdivision or combination shall be disregarded in connection with such dividend or distribution.

(5) To the extent the Company has a Rights Plan in effect upon conversion of the Securities pursuant to this Article 4: (i) if such Rights have not separated from the Common Stock prior to the conversion of the Securities, each share of Common Stock issued upon conversion of the Securities pursuant to this Article 4 shall be entitled to receive the appropriate number of Rights, if any, and the certificates representing the Common Stock issued upon such conversion shall bear such legends, if any, in each case as may be provided by the terms of any Rights Plan; or (ii) if such Rights have separated from the Common Stock prior to the conversion of the Securities, the Conversion Rate will be adjusted as though the Rights were being distributed to all holders of Common Stock on the date of such separation. If such an adjustment is made and the Rights are later redeemed, invalidated or terminated, then a corresponding reversing adjustment will be made to the Conversion Rate on an equitable basis.

(6) In case the Company shall, by dividend or otherwise, distribute to all or substantially all holders of its Common Stock cash (excluding any cash that is distributed upon a reclassification, change, merger, consolidation, statutory share exchange, combination, sale, conveyance or lease to which Section 4.11 hereof applies or as part of a distribution referred to in Section 4.07(a)(4) hereof), then, and in each such case, immediately after the close of business on such date, the Conversion Rate shall be increased so that the same shall equal the rate determined by multiplying the Conversion Rate in effect immediately prior to the close of business on such record date by a fraction:

- (i) the numerator of which shall be equal to the Current Market Price on the record date, and
- (ii) the denominator of which shall be equal to the Current Market Price on such date less an amount equal to the quotient of (x) the sum of the aggregate amount of cash so distributed, and (y) the number of shares of Common Stock outstanding on the record date.

In the event that such dividend or distribution is not so paid or made, the Conversion Rate shall again be adjusted to be the Conversion Rate which would then be in effect as if such dividend or distribution had not been declared.

(7) In case a tender or exchange offer made by the Company or any of its subsidiaries for all or any portion of the Common Stock shall expire, to the extent that the cash and value of any other consideration included in the payment per share of Common Stock in such offer exceeds Closing Price per share of Common Stock on the day after the date of the last time (the “**Expiration Time**”) tenders could have been made pursuant to such tender or exchange offer, the Conversion Rate shall be adjusted so that the same shall equal the rate determined by multiplying the Conversion Rate in effect immediately prior to close of business on the date of the Expiration Time by a fraction:

- (i) the numerator of which shall be the sum of (x) the fair market value (determined as set forth in Section 4.07(a)(9)) of the aggregate consideration payable to stockholders based on the acceptance (up to any maximum specified in the terms of the tender or exchange offer) of all shares validly tendered or exchanged and not withdrawn as of the Expiration Time (the shares deemed so accepted, up to any such maximum, being referred to as the “**Purchased Shares**”) and (y) the product of the number of shares of Common Stock outstanding (less any Purchased Shares) at the Expiration Time and the Current Market Price of the Common Stock on the Trading Day next succeeding the Expiration Time, and
- (ii) the denominator shall be (x) the number of shares of Common Stock outstanding (including any tendered or exchanged shares) at the Expiration Time multiplied by (y) the Current Market Price of the Common Stock on the Trading Day next succeeding the Expiration Time.

Such increase (if any) shall become effective immediately prior to the opening of business on the day following the Expiration Time. In the event that the Company is obligated to purchase shares pursuant to any such tender offer, but the Company is permanently prevented by applicable law from effecting any such purchases or all such purchases are rescinded, the Conversion Rate shall again be adjusted to be the Conversion Rate which would then be in effect as if such tender or exchange offer had not been made. If the application of this Section 4.07(a)(7) to any tender or exchange offer would result in a decrease in the Conversion Rate, no adjustment shall be made for such tender or exchange offer under this Section 4.07(a)(7).

(8) [Reserved].

(9) For purposes of this Section 4.07(a), the following terms shall have the meanings indicated:

(A) “**Current Market Price**” shall mean the average of the daily Closing Prices per share of Common Stock for the 10 consecutive Trading Days immediately prior to the date in question; *provided, however*, that if:

(i) the “ex” date (as hereinafter defined) for any event (other than the issuance or distribution requiring such computation) that requires an adjustment to the Conversion Rate pursuant to Section 4.07(a)(1), (2), (3), (4), (6) or (7) occurs during such 10 consecutive Trading Days, the Closing Price for each Trading Day prior to the “ex” date for such other event shall be adjusted by dividing such Closing Price by the same fraction by which the Conversion Rate is so required to be adjusted as a result of such other event;

(ii) the “ex” date for any event (other than the issuance or distribution requiring such computation) that requires an adjustment to the Conversion Rate pursuant to Section 4.07(a)(1), (2), (3), (4), (6) or (7) occurs on or after the “ex” date for the issuance or distribution requiring such computation and prior to the day in question, the Closing Price for each Trading Day on and after the “ex” date for such other event shall be adjusted by dividing such Closing Price by the reciprocal of the fraction by which the Conversion Rate is so required to be adjusted as a result of such other event; and

(iii) the “ex” date for the issuance or distribution requiring such computation is prior to the day in question, after taking into account any adjustment required pursuant to clause (i) or (ii) of this proviso, the Closing Price for each Trading Day on or after such “ex” date shall be adjusted by adding thereto the amount of any cash and the fair market value (as determined by the Board of Directors in a manner consistent with any determination of such value for purposes of Section 4.07(a)(4) or (7), whose determination shall be conclusive and set forth in a Board Resolution) of the evidences of indebtedness, shares of capital stock or assets being distributed applicable to one share of Common Stock as of the close of business on the day before such “ex” date.

For purposes of any computation under Section 4.07(a)(7), the Current Market Price of the Common Stock on any date shall be deemed to be the average of the daily Closing Prices per share of Common Stock for such day and the next two succeeding Trading Days; *provided, however*, that if the “ex” date for any event (other than the tender offer requiring such computation) that requires an adjustment to the Conversion Rate pursuant to Section 4.07(a)(1), (2), (3), (4), (6) or (7) occurs on or after the Expiration Time for the tender or exchange offer requiring such computation and prior to the day in question, the Closing Price for each Trading Day on and after the “ex” date for such other event shall be adjusted by dividing such Closing Price by the reciprocal of the fraction by which the Conversion Rate is so required to be adjusted as a result of such other event. For purposes of this paragraph, the term “ex” date, when used:

(x) with respect to any issuance or distribution, means the first date on which the Common Stock trades regular way on the relevant exchange or in the relevant market from which the Closing Price was obtained without the right to receive such issuance or distribution;

(y) with respect to any subdivision or combination of shares of Common Stock, means the first date on which the Common Stock trades regular way on such exchange or in such market after the time at which such subdivision or combination becomes effective; and

(z) with respect to any tender or exchange offer, means the first date on which the Common Stock trades regular way on such exchange or in such market after the Expiration Time of such offer.

Notwithstanding the foregoing, whenever successive adjustments to the Conversion Rate are called for pursuant to this Section 4.07(a), such adjustments shall be made to the Current Market Price as may be necessary or appropriate to effectuate the intent of this Section 4.07(a) and to avoid unjust or inequitable results as determined in good faith by the Board of Directors.

(B) “fair market value” shall mean the amount which a willing buyer would pay a willing seller in an arm’s length transaction.

(C) For purposes of this Section 4.07, “**record date**” shall mean, with respect to any dividend, distribution or other transaction or event in which the holders of Common Stock have the right to receive any cash, securities or other property or in which the Common Stock (or other applicable security) is exchanged or converted into any combination of cash, securities or other property, the date fixed for determination of shareholders entitled to receive such cash, security or other property (whether or not such date is fixed by the Board of Directors or by statute, contract or otherwise).

(b) In any case in which this Section 4.07 shall require that an adjustment be made following a record date or Expiration Time, as the case may be, established for the purposes specified in this Section 4.07, the Company may elect to defer (but only until five Business Days following the filing by the Company with the Trustee of the certificate described in Section 4.09) issuing to the Holder of any Security converted after such record date or Expiration Time the shares of Common Stock and other Capital Stock of the Company issuable upon such conversion over and above the shares of Common Stock and other Capital Stock of the Company (or other cash, property or securities, as applicable) issuable upon such conversion only on the basis of the Conversion Rate prior to adjustment; and, in lieu of any cash, property or securities the issuance of which is so deferred, the Company shall issue or cause its transfer agents to issue due bills or other appropriate evidence prepared by the Company of the right to receive such cash, property or securities. If any distribution in respect of which an adjustment to the Conversion Rate is required to be made as of the record date or Expiration Time therefore is not thereafter made or paid by the Company for any reason, the Conversion Rate shall be readjusted to the Conversion Rate which would then be in effect if such record date had not been fixed or such record date or Expiration Time had not occurred.

(c) If one or more events occur requiring an adjustment be made to the Conversion Rate for a particular period, adjustments to the Conversion Rate shall be determined by the Company’s Board of Directors to reflect the combined impact of such Conversion Rate adjustment events, as set out in this Section 4.07, during such period.

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(d) In no event shall the total number of shares of Common Stock issuable upon conversion of a Security exceed [ ] shares per \$1,000 principal amount of Securities, other than adjustments to Conversion Rate as set forth in clauses (1) through (7) of Section 4.07(a).

Section 4.08            No Adjustment.

(a) No adjustment in the Conversion Rate shall be required if Holders may participate in the transactions set forth in Section 4.07 above (to the same extent as if the Securities had been converted into Common Stock immediately prior to such transactions) without converting the Securities held by such Holders.

(b) No adjustment in the Conversion Rate shall be required unless such adjustment would require an increase or decrease of at least 1% in the Conversion Rate as last adjusted; *provided, however*, that any adjustments which would be required to be made but for this Section 4.08(b) shall be carried forward and taken into account in any subsequent adjustment; *provided, further*, that any carry forward amount shall be paid to a Holder of Securities upon conversion of such Securities, regardless of the 1% threshold. All calculations under this Article 4 shall be made to the nearest cent or to the nearest one-tenth thousandth of a share, as the case may be, with one half cent and 0.00005 of a share, respectively, being rounded upward.

(c) No adjustment in the Conversion Rate shall be required for issuances of Common Stock pursuant to a Company plan for reinvestment of dividends or interest or for a change in the par value or a change to no par value of the Common Stock.

(d) To the extent that the Securities become convertible into the right to receive cash, no adjustment need be made thereafter as to the cash.

(e) No adjustment in the Conversion Rate shall be required with respect to accrued and unpaid interest, including Special Interest, on the Securities.

Section 4.09            Notice of Adjustment.

Whenever the Conversion Rate or conversion privilege is required to be adjusted pursuant to this Indenture, the Company shall promptly mail to Holders a notice of the adjustment and file with the Trustee an Officers’ Certificate briefly stating the facts requiring the adjustment, the adjusted Conversion Rate and the manner of computing it. Failure to mail such notice or any defect therein shall not affect the validity of any such adjustment. Unless and until the Trustee shall receive an Officers’ Certificate setting forth an adjustment of the Conversion Rate, the Trustee may assume without inquiry that the Conversion Rate has not been adjusted and that the last Conversion Rate of which it has knowledge remains in effect.

Section 4.10            Notice of Certain Transactions.

In the event that there is a dissolution or liquidation of the Company, the Company shall mail to Holders and file with the Trustee a notice stating the proposed effective date. The Company shall mail such notice at least 20 days before such proposed effective date. Failure to mail such notice or any defect therein shall not affect the validity of any transaction referred to in this Section 4.10.

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Section 4.11 Effect of Reclassification, Consolidation, Merger or Sale on Conversion Privilege.

If any of the following events occur:

- (i) any recapitalization, reclassification or change of the outstanding shares of Common Stock (other than a change in par value, or from par value to no par value, or from no par value to par value, or as a result of a subdivision or combination);
- (ii) any merger, consolidation, statutory share exchange or combination of the Company with another corporation as a result of which holders of Common Stock shall be entitled to receive stock, securities or other property or assets (including cash) with respect to or in exchange for such Common Stock;
- (iii) any sale, conveyance or lease of the properties and assets of the Company as, or substantially as, an entirety to any other corporation; or
- (iv) any statutory share exchange,

in each case, as a result of which holders of Common Stock shall be entitled to receive stock, securities or other property or assets (including cash) with respect to or in exchange for such Common Stock, the Company or the successor or purchasing corporation, as the case may be, shall execute with the Trustee a supplemental indenture (which shall comply with the TIA as in force at the date of execution of such supplemental indenture if such supplemental indenture is then required to so comply) providing that each Security shall be convertible into the kind and amount of shares of stock and other securities or property or assets (including cash) which such Holder would have been entitled to receive upon such recapitalization, reclassification, change, merger, consolidation, statutory share exchange, combination, sale, conveyance or lease. In the event holders of the Common Stock have the opportunity to elect the form of consideration to be received in such business combination, the Securities will be convertible into the weighted average of the kind and amount of consideration received by the holders of the Common Stock that affirmatively make such an election. The Company may not become a party to any such transaction unless its terms are consistent with the preceding. None of the foregoing provisions shall affect the right of a Holder of Securities to convert its Securities into shares of the Common Stock prior to the effective date of the business combination.

Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article 4. If, in the case of any such recapitalization, reclassification, change, merger, consolidation, statutory share exchange, combination, sale, conveyance or lease, the stock or other securities and assets receivable thereupon by a holder of shares of Common Stock includes shares of stock or other securities and assets of a corporation other than the successor or purchasing corporation, as the case may be, in such recapitalization, reclassification, change, merger, consolidation, statutory share exchange, combination, sale or conveyance, then such supplemental indenture shall also be executed by such other corporation and shall contain such additional provisions to protect the interests of the Holders of the Securities as the Board of Directors shall reasonably consider

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necessary by reason of the foregoing, including to the extent practicable the provisions providing for the repurchase rights set forth in Article 3 hereof.

In the event the Company shall execute a supplemental indenture pursuant to this Section 4.11, the Company shall promptly file with the Trustee an Officers' Certificate briefly stating the reasons therefor, the kind or amount of shares of stock or other securities or property (including cash) that a holder of shares of Common Stock equal to the Conversion Rate immediately prior to such transaction would have owned or been entitled to receive after any such transaction, and any adjustment to be made with respect thereto. The Company shall cause notice of the execution of such supplemental indenture to be mailed to each Holder, at the address of such Holder as it appears on the register of the Securities, within 20 days after execution thereof. Failure to deliver such notice shall not affect the legality or validity of such supplemental indenture.

The above provisions of this Section shall similarly apply to successive recapitalizations, reclassifications, mergers, consolidations, statutory share exchanges, combinations, sales and conveyances.

If this Section 4.11 applies to any event or occurrence, Section 4.07(a) hereof shall not apply.

Section 4.12 Trustee's Disclaimer.

(a) The Trustee shall have no duty to determine when an adjustment under this Article 4 should be made, how it should be made or what such adjustment should be, but may accept as conclusive evidence of that fact or the correctness of any such adjustment, and shall be protected in relying upon, an Officers' Certificate and Opinion of Counsel, including the Officers' Certificate with respect thereto which the Company is obligated to file with the Trustee pursuant to Section 4.09. Unless and until the Trustee receives such Officers' Certificate delivered pursuant to Section 4.09, the Trustee may assume without inquiry that no such adjustment has been made and the last Conversion Rate of which the Trustee has knowledge remains in effect. The Trustee makes no representation as to the validity or value of any securities or assets issued upon conversion of Securities, and the Trustee shall not be responsible for the Company's failure to comply with any provisions of this Article 4.

(b) The Trustee shall not be under any responsibility to determine the correctness of any provisions contained in any supplemental indenture executed pursuant to Section 4.11, but may accept as conclusive evidence of the correctness thereof, and shall be fully protected in relying upon, the Officers' Certificate and Opinion of Counsel with respect thereto which the Company is obligated to file with the Trustee pursuant to Section 4.11 and Section 9.01, respectively.

Section 4.13 Voluntary Increase.

The Company from time to time may increase the Conversion Rate, to the extent permitted by law, by any amount for any period of time if the period is at least 20 days, the increase is irrevocable during the period and the Board of Directors determines that such increase would be in the best interests of the Company or to avoid or diminish income tax to holders of shares of Common Stock in connection with a dividend or distribution of stock, or rights to

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acquire stock, or similar event, and the Company provides 15 days' prior written notice of any increase in the Conversion Rate to the Trustee and the Holders; *provided, however*, that in no event may the Company increase the Conversion Rate such that it causes the Conversion Price to be less than the par value of a share of Common Stock.

## **Article 5 Subordination**

### Section 5.01      Securities Subordinated to Senior Debt.

The Company covenants and agrees, and each Holder of Securities, by such Holder's acceptance thereof, likewise covenants and agrees, that the Indebtedness represented by the Securities and the payment of the principal of and premium, if any, and interest, including Special Interest, if any, on each and all of the Securities is hereby expressly subordinated and junior, to the extent and in the manner set forth in this Section 5.01, in right of payment to the prior payment in full of all Senior Debt; *provided, however*, that the Securities, the Indebtedness represented thereby and the payment of the principal of and premium, if any, and interest, including Special Interest, if any, on the Securities in all respects shall rank equally with, or prior to, all existing and future Indebtedness of the Company that is expressly subordinated to any Senior Debt.

(a) In the event of any payment or distribution of assets of the Company upon any dissolution, winding-up, liquidation or reorganization of the Company, whether in bankruptcy, insolvency, reorganization or receivership proceedings or upon an assignment for the benefit of creditors or any other marshalling of the assets and liabilities of the Company or otherwise, the holders of all Senior Debt shall first be entitled to receive payment of the full amount due thereon in respect of all such Senior Debt and all other amounts due or provision shall be made for such amount in cash, or other payments satisfactory to the holders of Senior Debt, before the Holders of any of the Securities are entitled to receive any payment or distribution of any character, whether in cash, securities or other property, on account of the principal of or premium, if any, or interest, including Special Interest, if any, on the Securities.

(b) In the event of any acceleration of Maturity of the Securities because of an Event of Default, unless the full amount due in respect of all Senior Debt is paid in cash or other form of payment satisfactory to the holders of Senior Debt, no payment shall be made by the Company with respect to the principal of, premium, if any, or interest, including Special Interest, if any, on the Securities or to acquire any of the Securities (including any conversion, redemption or cash repurchase pursuant to the exercise of the Fundamental Change Repurchase Right or otherwise), and the Company shall give prompt written notice of such acceleration to such holders of Senior Debt.

(c) In the event of and during the continuance of any default in payment of the principal of or premium, if any, or interest on, rent or other payment obligations in respect of, any Senior Debt, unless all such payments due in respect of such Senior Debt have been paid in full in cash or other payments satisfactory to the holders of Senior Debt, no payment shall be made by the Company with respect to the principal of, premium, if any, or interest, including Special Interest, if any, on the Securities or to acquire any of the Securities (including any conversion,

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redemption, or cash repurchase pursuant to the exercise of the Fundamental Change Repurchase Right). The Company shall give prompt written notice to the Trustee of any default under any Senior Debt or under any agreement pursuant to which Senior Debt may have been issued.

(d) In the event that, notwithstanding the foregoing provisions of Sections 5.01(a), 5.01(b) and 5.01(c), any payment on account of principal, premium, if any, or interest, including Special Interest, if any, on the Securities shall be made by or on behalf of the Company and received by the Trustee, by any Holder or by any Paying Agent (or, if the Company is acting as its own Paying Agent, money for any such payment shall be segregated and held in trust):

(1) after the occurrence of an event specified in Section 5.01(a) or 5.01(b), then, unless all Senior Debt is paid in full in cash, or provision shall be made therefor; or

(2) after the happening of an event of default of the type specified in Section 5.01(c) above, then, unless the amount of such Senior Debt then due shall have been paid in full, or provision made therefor or such event of default shall have been cured or waived, such payment (subject, in each case, to the provisions of Section 5.07 hereof) shall be held in trust for the benefit of, and shall be immediately paid over to, the holders of Senior Debt or their representative or representatives or the trustee or trustees under any indenture under which any instruments evidencing any of the Senior Debt may have been issued, as their interests may appear.

### Section 5.02      Subrogation.

Subject to the payment in full of all Senior Debt to which the Indebtedness evidenced by the Securities is in the circumstances subordinated as provided in Section 5.01 hereof, the Holders of the Securities shall be subrogated to the rights of the holders of such Senior Debt to receive payments or distributions of cash, property or securities of the Company applicable to such Senior Debt until all amounts owing on the Securities shall be paid in full, and, as between the Company, its creditors other than holders of such Senior Debt, and the Holders of the Securities, no such payment or distribution made to the holders of Senior Debt by virtue of this Article which otherwise would have been made to the holders of the Securities shall be deemed to be a payment by the Company on account of such Senior Debt; *provided, however*, that the provisions of this Article are and are intended solely for the purpose of defining the relative rights of the Holders of the Securities, on the one hand, and the holders of Senior Debt, on the other hand.

### Section 5.03      Obligation of the Company Is Absolute and Unconditional.

Nothing contained in this Article or elsewhere in the Indenture or in the Securities is intended to or shall impair, as between the Company, its creditors other than the holders of Senior Debt, and the Holders of the Securities, the obligation of the Company, which is absolute and unconditional, to pay to the Holders of the Securities the principal of and premium, if any, and interest, including Special Interest, if any, on the Securities as and when the same shall become due and payable in accordance with their terms, or is intended to or shall affect the relative rights of the Holders of the Securities and creditors of the Company other than the holders of Senior Debt, nor shall anything contained herein or therein prevent the Trustee or the

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Holder of any Security from exercising all remedies otherwise permitted by applicable law upon default under the Indenture, subject to the rights, if any, under this Article of the holders of Senior Debt in respect of cash, property or securities of the Company received upon the exercise of any such remedy.

Section 5.04            Maturity of or Default on Senior Debt.

Upon the maturity of any Senior Debt by lapse of time, acceleration or otherwise, all principal of or premium, if any, or interest on, rent or other payment obligations in respect of all such matured Senior Debt shall first be paid in full, or such payment shall have been duly provided for, before any payment on account of principal, or premium, if any, or interest, including Special Interest, if any, is made upon the Securities.

Section 5.05            Payments on Securities Permitted.

Except as expressly provided in this Article, nothing contained in this Article shall affect the obligation of the Company to make, or prevent the Company from making, payments of the principal of, or premium, if any, or interest, including Special Interest, if any, on the Securities in accordance with the provisions hereof and thereof, or shall prevent the Trustee or any Paying Agent from applying any moneys deposited with it hereunder to the payment of the principal of, or premium, if any, or interest, including Special Interest, if any, on the Securities.

Section 5.06            Effectuation of Subordination by Trustee.

Each Holder of Securities, by such Holder's acceptance thereof, authorizes and directs the Trustee on such Holder's behalf to take such action as may be necessary or appropriate to effectuate the subordination provided in this Article and appoints the Trustee such Holder's attorney-in-fact for any and all such purposes. Upon any payment or distribution of assets of the Company referred to in this Article, the Trustee and the Holders of the Securities shall be entitled to rely upon any order or decree made by any court of competent jurisdiction in which any such dissolution, winding-up, liquidation or reorganization proceeding affecting the affairs of the Company is pending or upon a certificate of the trustee in bankruptcy, receiver, assignee for the benefit of creditors, liquidating trustee or agent or other Person making any payment or distribution, delivered to the Trustee or to the Holders of the Securities, for the purpose of ascertaining the Persons entitled to participate in such payment or distribution, and as to other facts pertinent to the right of such Persons under this Article, and, if such evidence is not furnished, the Trustee may defer any payment to such Persons pending judicial determination as to the right of such Persons to receive such payment.

Section 5.07            Knowledge of Trustee.

Notwithstanding the provisions of this Article or any other provisions of this Indenture, the Trustee shall not be charged with knowledge of the existence of any facts that would prohibit the making of any payment or distribution by the Trustee, and the Trustee and Paying Agent may continue to make payments on the Securities, unless a Responsible Officer of the Trustee having responsibility for the administration of the trust established by the Indenture shall have received written notice thereof from the Company expressly directing the Trustee that such payment cannot be made and, prior to the receipt of any such written notice, the Trustee shall be entitled

in all respects to assume that no such default or facts exist; *provided, however*, that unless on the third Business Day prior to the date upon which by the terms hereof any such moneys may become payable for any purpose the Trustee shall have received the notice provided for in this Section 5.07, then, anything herein contained to the contrary notwithstanding, the Trustee shall have full power and authority to receive such moneys and apply the same to the purpose for which they were received, and shall not be affected by any notice to the contrary which may be received by it on or after such date.

Section 5.08            Trustee's Relation to Senior Debt.

The Trustee shall be entitled to all the rights set forth in this Article with respect to any Senior Debt at the time held by it, to the same extent as any other holder of Senior Debt and nothing in the Indenture shall deprive the Trustee of any of its rights as such holder. Nothing contained in this Article shall apply to claims of or payments to the Trustee under or pursuant to Section 9.08 of this Indenture. With respect to the holders of Senior Debt, the Trustee undertakes to perform or to observe only such of its covenants and obligations as are specifically set forth in this Article (which covenant and obligation is limited solely to withhold payment to the Holders if the Trustee has actually received the written notice from the Company described in Section 5.07 above to the effect that a payment should not be made to the Holders), and no implied covenants or obligations with respect to the holders of Senior Debt shall be read into the Indenture against the Trustee. The Trustee shall not be deemed to owe any duties (including, without limitation, any fiduciary duty) to the holders of Senior Debt and the Trustee shall not be liable to any holder of Senior Debt if it shall pay over or deliver to Holders, the Company or any other Person moneys or assets to which any holder of Senior Debt shall be entitled by virtue of this Article or otherwise.

Section 5.09            Rights of Holders of Senior Debt Not Impaired.

No right of any present or future holder of any Senior Debt to enforce the subordination herein shall at any time or in any way be prejudiced or impaired by any act or failure to act on the part of the Company or by any noncompliance by the Company with the terms, provisions and covenants of the Indenture, regardless of any knowledge thereof any such holder may have or be otherwise charged with.

Section 5.10            Modification of Terms of Senior Debt.

Any renewal or extension of the time of payment of any Senior Debt or the exercise by the holders of Senior Debt of any of their rights under any instrument creating or evidencing Senior Debt, including, without limitation, the waiver of default thereunder, may be made or done all without notice to or assent from the Holders of the Securities or the Trustee. No compromise, alteration, amendment, modification, extension, renewal or other change of, or waiver, consent or other action in respect of, any liability or obligation under or in respect of, or of any of the terms, covenants or conditions of any indenture or other instrument under which any Senior Debt is outstanding or of such Senior Debt, whether or not such compromise, alteration, amendment, modification, extension, renewal or other change of, or waiver, consent or other action is in accordance with the provisions or any applicable document, shall in any way



alter or affect any of the provisions of this Article or of the Securities relating to the subordination thereof.

Section 5.11 Certain Conversions Not Deemed Payment.

For the purposes of this Article 5 only:

(a) the issuance and delivery of junior securities upon conversion of Securities in accordance with Article 4 hereof shall not be deemed to constitute a payment or distribution on account of the principal of, premium, if any, or interest, including Special Interest, if any, on Securities or on account of the purchase or other acquisition of Securities; and

(b) the payment, issuance or delivery of cash (except in satisfaction of fractional shares pursuant to Section 4.03 hereof), property or securities (other than junior securities) upon conversion of a Security shall be deemed to constitute payment on account of the principal, premium, if any, or interest, including Special Interest, if any, of such Security. For the purposes of this Section 5.11, the term "junior securities" means:

- (1) shares of any Company Common Stock; or
- (2) other securities of the Company that are subordinated in right of payment to all Senior Debt that may be outstanding at the time of issuance or delivery of such securities to substantially the same extent as, or to a greater extent than, the Securities are so subordinated as provided in this Article. Nothing contained in this Article 5 or elsewhere in the Indenture or in the Securities is intended to or shall impair, as among the Company, its creditors (other than holders of Senior Debt) and the Holders of Securities, the right, which is absolute and unconditional, of the Holder of any Security to convert such Security in accordance with Article 4 hereof.

Section 5.12 No Layering of Debt. The Company will not incur, create, issue, assume, guarantee or otherwise become liable for any Indebtedness that is contractually subordinate or junior in right of payment to any Senior Debt of the Company and senior in right of payment to the Securities.

## Article 6 Covenants

Section 6.01 Payment of Securities.

(a) The Company shall promptly make all payments in respect of the Securities on the dates and in the manner provided in the Securities and this Indenture. A payment of principal or interest, including Special Interest, if any, shall be considered paid on the date it is due if the Paying Agent (other than the Company) holds by 10:00 a.m., New York City time, on that date money, deposited by or on behalf of the Company, sufficient to make the payment. Subject to

Section 4.02 and Section 3.11, accrued and unpaid interest, including Special Interest, if any, on any Security that is payable, and is punctually paid or duly provided for, on any Interest Payment Date shall be paid to the Person in whose name that Security is registered at the close of business on the Regular Record Date for such interest at the office or agency of the Company maintained for such purpose. Principal, Redemption Price, Fundamental Change Repurchase Price, interest and Special Interest, in each case if payable, shall be considered paid on the applicable date due if on such date (or, in the case of Fundamental Change Repurchase Price, on the Business Day following the applicable Fundamental Change Repurchase Date) the Trustee or the Paying Agent holds, in accordance with this Indenture, money sufficient to pay all such amounts then due. The Company shall, to the fullest extent permitted by law, pay interest in immediately available funds on overdue principal amount and interest, including Special Interest, if any, at the annual rate borne by the Securities compounded semi-annually, which interest shall accrue from the date such overdue amount was originally due to the date payment of such amount, including interest thereon, has been made or duly provided for. All such interest shall be payable on demand.

(b) Payment of the principal of and interest, including Special Interest, if any, on the Securities shall be made at the office or agency of the Company maintained for that purpose, which shall initially be at the Drop Agent's Office, in such coin or currency of the United States of America as at the time of payment is legal tender for payment of public and private debts; *provided, however*, that the Company may pay principal, interest and Special Interest, in respect of any Certificated Security by check or wire transfer payable in such money; *provided, further*, that at the option of the Company payment of interest and Special Interest may be made by check mailed to the address of the Person entitled thereto as such address appears in the register of the Securities; *provided, further*, that a Holder with an aggregate principal amount in excess of \$5,000,000 will be paid by wire transfer in immediately available funds at the election of such Holder if such Holder has provided wire transfer instructions to the Trustee at least 10 Business Days prior to the payment date. Any wire transfer instructions received by the Trustee will remain in effect until revoked by the Holder. Notwithstanding the foregoing, so long as the Securities are registered in the name of a Depository or its nominee, all payments thereon shall be made by wire transfer of immediately available funds to the account of the Depository or its nominee.

Section 6.02 Corporate Existence.

Subject to Article 7 hereof, the Company will do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence, rights (charter and statutory) and franchises; *provided, however*, that the Company shall not be required to preserve any such right or franchise if the Company determines that the preservation thereof is no longer desirable in the conduct of the business of the Company and that the loss thereof is not disadvantageous in any material respect to the Holders.

Section 6.03 Maintenance of Properties.

The Company will maintain and keep its properties and every part thereof in such repair, working order and condition, and make or cause to be made all such needful and proper repairs, renewals and replacements thereof, as in the judgment of the Company are necessary in the interests of the Company;

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the Company from selling, abandoning or otherwise disposing of any of its properties or discontinuing a part of its business from time to time if, in the judgment of the Company, such sale, abandonment, disposition or discontinuance is advisable and does not materially adversely affect the interests or business of the Company.

Section 6.04            Payment of Taxes and Other Claims.

The Company will, and will cause any Significant Subsidiary to, promptly pay and discharge or cause to be paid and discharged all material taxes, assessments and governmental charges or levies lawfully imposed upon it or upon its income or profits or upon any of its property, real or personal, or upon any part thereof, as well as all material claims for labor, materials and supplies which, if unpaid, might by law become a lien or charge upon its property; *provided, however*, that neither the Company nor any Significant Subsidiary shall be required to pay or discharge or cause to be paid or discharged any such tax, assessment, charge, levy or claim if the amount, applicability or validity thereof shall currently be contested in good faith by appropriate proceedings and if the Company or such Significant Subsidiary, as the case may be, shall have set aside on its books reserves deemed by it adequate with respect thereto.

Section 6.05            Reports.

The Company shall timely file all reports and other information and documents which it is required to file with the SEC pursuant to Section 13 or 15(d) of the Exchange Act, and, within 15 days after it is required to file them with the SEC, the Company shall file copies of all such reports, information and other documents with the Trustee; *provided* that any such reports, information and documents filed with the SEC pursuant to its Electronic Data Gathering, Analysis and Retrieval (or EDGAR) system shall be deemed to be filed with the Trustee. The Company shall inform the Trustee by electronic mail or other written means that it has filed with the SEC an annual report on Form 10-K or quarterly report on Form 10-Q. The Company also shall at all times comply with the provisions of Section 314(a) of the TIA. In the event the Company is no longer subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, the Company shall, if required to do so under rules and regulations prescribed by the SEC, provide the trustee with such reports containing such information as would have been required to be filed with the SEC had we continued to have been subject to such reporting requirements, as may be prescribed in such rules and regulations. Delivery of such reports, information and documents to the Trustee is for informational purposes only and the Trustee's receipt of such shall not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of its covenants hereunder (as to which the Trustee is entitled to rely exclusively on Officers' Certificates).

Section 6.06            Compliance Certificate.

The Company shall deliver to the Trustee, within 90 days after the end of each fiscal year of the Company, an Officers' Certificate stating whether or not to the knowledge of the signer thereof the Company is in default in the performance and observance of any of the terms, provisions and conditions of this Indenture (without regard to any period of grace or requirement of notice provided hereunder) and, if the Company shall be in Default, specifying all such

Defaults and the nature and the status thereof of which the signer may have knowledge. Within five Business Days of an Officer of the Company coming to have actual knowledge of a Default, regardless of the date, the Company shall deliver an Officers' Certificate to the Trustee specifying such Default and the nature and status thereof.

**Article 7**  
**Consolidation; Merger; Conveyance; Transfer or Lease**

Section 7.01            Company May Consolidate, Etc., Only on Certain Terms.

(a) The Company may not, without the consent of the Holders, consolidate with, merge into or convey, transfer or lease all or substantially all of the property and assets of the Company and its Subsidiaries, taken as a whole, to another Person unless:

(1) either (A) the Company shall be the resulting or surviving corporation, or (B) the Person (if other than the Company) formed by such consolidation or into which the Company is merged, or the Person which acquires by transfer or lease all or substantially all of the properties and assets of the Company, shall (i) be a corporation incorporated and existing under the laws of the United States of America or any State thereof or the District of Columbia, and (ii) expressly assume, by an indenture supplemental hereto, executed and delivered to the Trustee, in form satisfactory to the Trustee, the obligations of the Company under the Securities, this Indenture and the performance or observance of every covenant and provision of this Indenture and the Securities required on the part of the Company to be performed or observed and the conversion rights shall be provided for in accordance with Article 4, by supplemental indenture satisfactory in form to the Trustee, executed and delivered to the Trustee, by the Person (if other than the Company) formed by such consolidation or into which the Company shall have been merged or by the Person which shall have acquired the Company's assets;

(2) after giving effect to such transaction, no Event of Default, and no event which, after notice or lapse of time or both, would become an Event of Default, shall have occurred and be continuing;

(3) if, as a result of such transaction, the Securities became convertible into Common Stock or other securities issued by a third party, such third party agrees to deliver such common stock or other securities upon conversion under the Securities and the Indenture; and

(4) if the Company will not be the resulting or surviving corporation, the Company shall have, at or prior to the effective date of such consolidation, merger or transfer, delivered to the Trustee an Officers' Certificate and an Opinion of Counsel, each stating that such consolidation, merger or transfer complies with this Article and, if a supplemental indenture is required in connection with such transaction, such supplemental indenture complies with this Article, and that all conditions precedent herein provided for relating to such transaction have been complied with.

(b) For purposes of the foregoing, the transfer (by lease, assignment, sale or otherwise) of the properties and assets of one or more Subsidiaries of the Company (other than to the

Company or another Subsidiary of the Company), which, if such assets were owned by the Company, would constitute all or substantially all of the properties and assets of the Company and its Subsidiaries, taken as a whole, shall be deemed to be the transfer of all or substantially all of the properties and assets of the Company.

Section 7.02            Successor Substituted.

Upon any consolidation of the Company with, or merger of the Company into, any other Person or any conveyance, transfer or lease of all or substantially all of the properties and assets of the Company and its Subsidiaries, taken as a whole, in accordance with Section 7.01, the successor Person formed by such consolidation or into which the Company is merged or to which such conveyance, transfer or lease is made shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture with the same effect as if such successor Person had been named as the Company herein, and thereafter, except in the case of a lease, and except for obligations the predecessor Person may have under a supplemental indenture, the predecessor Person shall be relieved of all obligations and covenants under the Indenture and the Securities.

**Article 8**  
**Default and Remedies**

Section 8.01            Events of Default.

An “**Event of Default**” shall occur when any of the following occurs (whatever the reason for such Event of Default and whether it shall be occasioned by the provisions of Article 5 hereof or be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):

(a) the Company shall fail to pay when due the principal, Redemption Price or any Fundamental Change Repurchase Price of any Security, including any Make-Whole Premium, when the same becomes due and payable whether at the Final Maturity Date, upon redemption, repurchase, acceleration or otherwise whether or not such payment is prohibited by Article 5 hereof; or

(b) the Company shall fail to pay an installment of interest, including Special Interest, if any, on any of the Securities, which failure continues for 30 days after the date when due whether or not such payment is prohibited by Article 5 hereof; or

(c) the Company shall fail to deliver when due all shares of Common Stock, together with cash instead of fractional shares deliverable upon conversion of the Securities, which failure continues for 10 days; or

(d) the Company fails to perform or observe any other term, covenant or agreement contained in the Securities, this Indenture and the failure continues for a period of 60 days after written notice of such failure, requiring the Company to remedy the same, shall have been given to the Company by the Trustee or to the Company and the Trustee by the Holders of at least 25% in aggregate principal amount of the then-outstanding Securities; or

(e) (i) the Company fails to make any payment by the end of the applicable grace period, if any, after the maturity of any Indebtedness for borrowed money in an amount in excess of \$5,000,000, or (ii) there is an acceleration of any Indebtedness for borrowed money in an amount in excess of \$5,000,000 because of a default with respect to such Indebtedness without such Indebtedness having been discharged or such acceleration having been cured, waived, rescinded or annulled, in the case of either (i) or (ii) above, for a period of 30 days after written notice to the Company by the Trustee or to the Company and the Trustee by Holders of at least 25% in aggregate principal amount of the then-outstanding Securities; or

(f) the Company fails to provide a Fundamental Change Company Notice in accordance with Section 3.08; or

(g) a court having jurisdiction enters (i) a decree or order for relief in respect of the Company in an involuntary case or proceeding under any Bankruptcy Law, or (ii) a decree or order adjudging the Company a bankrupt or insolvent, or approves as properly filed a petition seeking reorganization, arrangement, adjustment or composition of or in respect of the Company under any applicable U.S. federal or state law, or appoints a Receiver of the Company or of any substantial part of its property, or orders the winding-up or liquidation of its affairs, and the continuance of any such decree or order for relief or any such other decree or order unstayed and in effect for a period of 60 consecutive days; or

(h) the Company pursuant to or within the meaning of any Bankruptcy Law:

(1) commences as a debtor a voluntary case or proceeding;

(2) consents to the entry of an order for relief against it in an involuntary case or proceeding or the commencement of any case against it;

(3) consents to the appointment of a Receiver of it or for all or substantially all of its property;

(4) makes a general assignment for the benefit of its creditors;

(5) files a petition in bankruptcy or answer or consent seeking reorganization or relief; or

(6) consents to the filing of such a petition or the appointment of or taking possession by a Receiver;

The term “**Bankruptcy Law**” means Title 11 of the United States Code (or any successor thereto) or any similar federal or state law for the relief of debtors. The term “**Receiver**” means any receiver, trustee, assignee, liquidator, sequestrator or similar official under any Bankruptcy Law.

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Section 8.02            Acceleration of Maturity; Rescission and Annulment.

If an Event of Default with respect to outstanding Securities (other than an Event of Default specified in Section 8.01(g) or 8.01(h) hereof) occurs and is continuing, the Trustee or the Holders of at least 25% in aggregate principal amount of the then-outstanding Securities, by written notice to the Company and the Trustee, may declare due and payable 100% of the principal amount of all outstanding Securities plus any accrued and unpaid interest, including Special Interest, if any, to the date of payment. Upon a declaration of acceleration, such principal and accrued and unpaid interest to the date of payment shall be immediately due and payable.

If an Event of Default specified in Section 8.01(g) or 8.01(h) hereof occurs, all unpaid principal of and accrued and unpaid interest, including Special Interest, if any, on the outstanding Securities shall become and be immediately due and payable, without any declaration or other act on the part of the Trustee or any Holder.

Notwithstanding the foregoing or anything to the contrary set forth in this Indenture, to the extent elected by the Company, the sole remedy for an Event of Default relating to the failure to comply with the reporting obligations set forth in Section 6.05 herein, and for any failure to comply with the requirements of Section 314(a)(1) of the Trust Indenture Act, will for the first 180 days after the occurrence of such an Event of Default consist exclusively of the right to receive special interest on the Securities at an annual rate equal to 1.0% of the principal amount of the Securities (“**Special Interest**”). The Special Interest will accrue on all outstanding Securities from and including the date on which an Event of Default relating to a failure to comply with the reporting obligations set forth in Section 6.05 herein first occurs to but not including the 180th day thereafter (or such earlier date on which the Event of Default shall have been cured or waived). On such 180th day (or earlier, if the Event of Default relating to the reporting obligations is cured or waived prior to such 180th day), such Special Interest will cease to accrue and, if the Event of Default relating to reporting obligations has not been cured or waived prior to such 180th day, the Securities will be subject to acceleration as provided above in this Section 8.02. In the event the Company does not elect to pay Special Interest upon an Event of Default in accordance with this paragraph, the Securities will be subject to acceleration as provided above. If the Company elects to pay Special Interest as the sole remedy for an Event of Default relating to the failure to comply with the reporting obligations in Section 6.05 or for any failure to comply with the requirements of Section 314(a)(1) of the TIA, the Company will notify all Holders, the Trustee and Paying Agent of such election on or before the close of business on the date on which such Event of Default first occurs.

The Holders of a majority in aggregate principal amount of the then-outstanding Securities by written notice to the Trustee may rescind and annul an acceleration and its consequences if:

- (1) all existing Events of Default, other than the nonpayment of principal of or interest, including Special Interest, if any, on the Securities which has become due solely because of the acceleration, have been remedied, cured or waived; and
- (2) the rescission would not conflict with any judgment or decree of a court of competent jurisdiction;

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*provided, however*, that in the event such declaration of acceleration has been made based on the existence of an Event of Default under Section 8.01(e) hereof and such Event of Default has been remedied, cured or waived in accordance with Section 8.01(e) hereof, then, without any further action by the Holders, such declaration of acceleration shall be rescinded automatically and the consequences of such declaration shall be annulled. No such rescission or annulment shall affect any subsequent Default or impair any right consequent thereon.

Section 8.03            Other Remedies.

If an Event of Default with respect to outstanding Securities occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in equity to collect the payment of principal of or interest, including Special Interest, if any, on the Securities or to enforce the performance of any provision of the Securities.

Section 8.04            Waiver of Past Defaults.

The Holders, either (a) through the written consent of not less than a majority in aggregate principal amount of the then-outstanding Securities, or (b) by the adoption of a resolution, at a meeting of Holders of the then-outstanding Securities at which a quorum is present, by the Holders of at least a majority in aggregate principal amount of the outstanding Securities represented at such meeting, may, on behalf of the Holders of all of the Securities, waive an existing Default or Event of Default, except a Default or Event of Default:

- (1) in the payment of the principal of or premium, if any, or interest, including Special Interest, if any, on any Security (*provided, however*, that subject to Section 8.07 hereof, the Holders of a majority in aggregate principal amount of the then-outstanding Securities may rescind an acceleration and its consequences, including any related payment default that resulted from such acceleration);
- (2) in respect of the right to convert any Security in accordance with Article 4; or
- (3) in respect of a covenant or provision hereof which, under Section 10.02 hereof, cannot be modified or amended without the consent of the Holder of each outstanding Security affected.

Upon any such waiver, such Default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every purpose of this Indenture; *provided, however*, that no such waiver shall extend to any subsequent or other Default or impair any right consequent thereon.

Section 8.05            Control by Majority.

The Holders, either (a) through the written consent of not less than a majority in aggregate principal amount of the Securities then outstanding, or (b) by the adoption of a resolution, at a meeting of Holders of the Securities then outstanding at which a quorum is present, by the Holders of at least a majority in aggregate principal amount of the outstanding Securities represented at such meeting, shall have the right to direct the time, method and place

of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on the Trustee. However, the Trustee may refuse to follow any direction that:

- (a) conflicts with any law or with this Indenture;
- (b) the Trustee determines may be unduly prejudicial to the rights of the Holders not joining therein; or
- (c) in the Trustee's reasonable judgment may expose the Trustee to personal liability.

The Trustee may take any other action deemed proper by the Trustee which is not inconsistent with such direction.

Section 8.06 Limitation on Suit.

No Holder of any Security shall have any right to pursue any remedy with respect to this Indenture or the Securities (including instituting any proceeding, judicial or otherwise, with respect to this Indenture or for the appointment of a receiver or trustee) unless:

- (a) such Holder has previously given written notice to the Trustee of an Event of Default that is continuing;
- (b) the Holders of at least 25% in aggregate principal amount of the Securities then outstanding shall have made written request to the Trustee to pursue the remedy;
- (c) such Holder or Holders have offered to the Trustee indemnity satisfactory to it against any costs, expenses and liabilities incurred in complying with such request;
- (d) the Trustee has failed to comply with the request for 60 days after its receipt of such notice, request and offer of indemnity; and
- (e) during such 60-day period, no direction inconsistent with such written request has been given to the Trustee by the Holders of a majority in aggregate principal amount of the Securities then outstanding (or such amount as shall have acted at a meeting pursuant to the provisions of this Indenture).

Section 8.07 Unconditional Rights of Holders to Receive Payment and to Convert.

Notwithstanding any other provision in this Indenture, the Holder of any Security shall have the right, which is absolute and unconditional, to receive payment of the principal amount, Redemption Price, Fundamental Change Repurchase Price, interest, including Special Interest, if any, or Make-Whole Premium, if any, in respect of the Securities held by such Holder, on or after the respective due dates expressed in the Securities and this Indenture, and to convert such Security in accordance with Article 4, and to bring suit for the enforcement of any such payment on or after such respective due dates or for the right to convert in accordance with Article 4, and shall not be impaired or affected without the consent of such Holder.

Section 8.08 Collection of Indebtedness and Suits for Enforcement by the Trustee.

The Company covenants that if:

- (a) a Default or Event of Default occurs in the payment of any interest, including Special Interest, on any Security when such interest becomes due and payable and such Default or Event of Default continues for a period of 30 days; or
- (b) a Default or Event of Default occurs in the payment of the principal of or premium, if any, on any Security at the Maturity thereof, the Company shall, upon demand of the Trustee, pay to it, for the benefit of the Holders of such Securities, the whole amount then due and payable (as expressed therein or as a result of any acceleration effected pursuant to Section 8.02 hereof) on such Securities for principal and premium, if any, and interest, including Special Interest, and, to the extent that payment of such interest shall be legally enforceable, interest on any overdue principal and premium, if any, and on any overdue interest, including Special Interest, in each case at the Interest Rate, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

If the Company fails to pay such amounts forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, may prosecute such proceeding to judgment or final decree and may enforce the same against the Company and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Company, wherever situated.

If an Event of Default occurs and is continuing, the Trustee may in its discretion proceed to protect and enforce its rights and the rights of the Holders of Securities by such appropriate judicial proceedings as the Trustee shall deem most effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy.

Section 8.09 Trustee May File Proofs of Claim.

In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to the Company or the property of the Company or its creditors, the Trustee (irrespective of whether the principal of the Securities shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand on the Company for the payment of overdue principal or interest, including Special Interest, if any) shall be entitled and empowered, by intervention in such proceeding or otherwise, (1) to file and prove a claim for the whole amount of principal and premium, if any, and interest, including Special Interest, if any, owing and unpaid in respect of the Securities and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due to the Trustee hereunder) and of the Holders of Securities allowed in such judicial proceeding, and (2) to collect and receive any moneys or other property payable or deliverable on any such claim and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceedings is hereby authorized by each Holder of Securities to make such payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders of Securities, to pay to the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel and any other amounts due the Trustee under Section 9.08 of this Indenture.

Nothing contained herein shall be deemed to authorize the Trustee to authorize or consent to or accept, or adopt on behalf of any Holder of a Security, any plan of reorganization, arrangement, adjustment or composition affecting the Securities or the rights of any Holder thereof or to authorize the Trustee to vote in respect of the claim of any Holder of a Security in any such proceeding.

Section 8.10            Restoration of Rights and Remedies.

If the Trustee or any Holder of a Security has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Holder, then, and in every such case, subject to any determination in such proceeding, the Company, the Trustee and the Holders of Securities shall be restored severally and respectively to their former positions hereunder and thereafter all rights and remedies of the Trustee and the Holders shall continue as though no such proceeding had been instituted.

Section 8.11            Rights and Remedies Cumulative.

Except as otherwise provided with respect to the replacement or payment of mutilated, destroyed, lost or stolen Securities in the last paragraph of Section 2.11 of this Indenture, no right or remedy conferred in this Indenture upon or reserved to the Trustee or to the Holders of Securities is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 8.12            Delay or Omission Not Waiver.

No delay or omission of the Trustee or of any Holder of any Security to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or any acquiescence therein. Every right and remedy given by this Article or by law to the Trustee or to the Holders of Securities may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the Holders of Securities, as the case may be.

Section 8.13            Application of Money Collected.

Subject to Article 5, any money and property collected by the Trustee pursuant to this Article shall be applied in the following order, at the date or dates fixed by the Trustee and, in case of the distribution of such money and property on account of principal or premium, if any,

or interest, including Special Interest, if any, upon presentation of the Securities and the notation thereon of the payment if only partially paid and upon surrender thereof if fully paid:

FIRST: To the payment of all amounts due the Trustee;

SECOND: To the payment of the amounts then due and unpaid for principal of and premium, if any, and interest, including Special Interest, if any, on the Securities and coupons in respect of which or for the benefit of which such money has been collected, ratably, without preference or priority of any kind, according to the amounts due and payable on such Securities for principal and premium, if any, and interest, including Special Interest, if any, respectively; and

THIRD: Any remaining amounts shall be repaid to the Company.

Section 8.14            Undertaking for Costs.

All parties to this Indenture agree, and each Holder of any Security by such Holder's acceptance thereof shall be deemed to have agreed, that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken, suffered or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; but the provisions of this Section shall not apply to any suit instituted by the Company, to any suit instituted by the Trustee, to any suit instituted by any Holder, or group of Holders, holding in the aggregate more than 10% in aggregate principal amount of the Securities then outstanding, or to any suit instituted by any Holder of any Security for the enforcement of the payment of the principal of or premium, if any, or interest, including Special Interest, if any, on any Security on or after the Stated Maturity expressed in such Security (or, in the case of exercise of a

repurchase right in connection with a Fundamental Change, on or after the Fundamental Change Repurchase Date) or for the enforcement of the right to convert any Security in accordance with Article 4.

Section 8.15 Waiver of Stay or Extension Laws.

The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim to take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Indenture; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

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**Article 9**  
**The Trustee**

Section 9.01 Certain Duties and Responsibilities.

(a) Except during the continuance of an Event of Default,

(1) The Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Indenture or the TIA, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture; provided, however, that in the case of any such certificates or opinions which by any provision hereof are specifically required to be furnished to the Trustee, the Trustee shall examine the certificates or opinions to determine whether or not, on their face, they conform to the requirements to this Indenture (but need not investigate or confirm the accuracy of any facts stated therein).

(b) In case an Event of Default actually known to a Responsible Officer of the Trustee has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs.

(c) No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(1) This paragraph (c) shall not be construed to limit the effect of paragraph (a) of this Section 9.01;

(2) The Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts; and

(3) The Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with a direction received by it of the Holders of a majority in principal amount of the outstanding Securities (or such lesser amount as shall have acted at a meeting pursuant to the provisions of this Indenture) relating to the time, method and place of conducting any proceeding for any remedy available to the

Trustee, or exercising any trust or power conferred upon the Trustee, under this Indenture.

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(d) Whether or not herein expressly so provided, every provision of this Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee shall be subject to the provisions of this Section 9.01.

(e) No provision of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties hereunder, or in the exercise of any of its rights or powers. The Trustee may refuse to perform any duty or exercise any right or power unless it receives indemnity satisfactory to it against any loss, liability, cost or expense (including, without limitation, reasonable fees of counsel).

(f) The Trustee shall not be obligated to pay interest on any money or other assets received by it unless otherwise agreed in writing with the Company. Assets held in trust by the Trustee need not be segregated from other funds except to the extent required by law.

(g) The Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, Security, coupon, other evidence of indebtedness or other paper or document, but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Company, personally or by agent or attorney at the sole cost of the Company and shall incur no liability or additional liability of any kind by reason of such inquiry or investigation.

(h) The Trustee shall not be deemed to have notice or actual knowledge of any Event of Default unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact a Default is received by the Trustee pursuant to Section 13.02 hereof, and such notice references the Securities and this Indenture.

(i) The rights, privileges, protections, immunities and benefits given to the Trustee hereunder, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each Paying Agent, authenticating agent,

Section 9.02 Certain Rights of Trustee.

Subject to the provisions of Section 9.01 hereof and subject to Sections 315(a) through (d) of the TIA:

(1) The Trustee may rely on any document believed by it to be genuine and to have been signed or presented by the proper person. The Trustee need not investigate any fact or matter stated in the document.

(2) Before the Trustee acts or refrains from acting, it may require an Officers' Certificate or an Opinion of Counsel, or both. The Trustee shall not be liable for any action it takes or omits to take in good faith in reliance on the Officers' Certificate or Opinion of Counsel.

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(3) The Trustee may act through attorneys and agents and shall not be responsible for the misconduct or negligence of any attorney or agent appointed with due care.

(4) The Trustee shall not be liable for any action taken or omitted to be taken by it in good faith, which it believed to be authorized or within the discretion or rights or powers conferred upon it by this Indenture, unless the Trustee's conduct constitutes negligence.

(5) The Trustee may consult with counsel of its selection and the advice of such counsel as to matters of law shall be full and complete authorization and protection in respect of any action taken, omitted or suffered by it hereunder in good faith and in accordance with the advice or opinion of such counsel.

(6) Unless otherwise specifically provided in this Indenture, any demand, request, direction or notice from the Company shall be sufficient if signed by an Officer of the Company.

(7) The permissive rights of the Trustee to do things enumerated in this Indenture shall not be construed as a duty unless so specified herein.

Section 9.03 Individual Rights of Trustee.

The Trustee in its individual or any other capacity may become the owner or pledgee of Securities and may otherwise deal with the Company or any Affiliate of the Company with the same rights it would have if it were not Trustee. However, in the event that the Trustee acquires any conflicting interest (as such term is defined in Section 310(b) of the TIA), it must eliminate such conflict within 90 days, apply to the SEC for permission to continue as trustee (to the extent permitted under Section 310(b) of the TIA) or resign. Any agent may do the same with like rights and duties. The Trustee is also subject to Sections 9.11 and 9.12 hereof.

Section 9.04 Money Held in Trust.

Money held by the Trustee in trust hereunder need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any money received by it hereunder except as otherwise expressly agreed with the Company.

Section 9.05 Trustee's Disclaimer.

The recitals contained herein and in the Securities (except for those in the certificate of authentication) shall be taken as the statements of the Company, and the Trustee assumes no responsibility for their correctness. The Trustee makes no representations as to the validity, sufficiency or priority of this Indenture or of the Securities. The Trustee shall not be accountable for the use or application by the Company of Securities or the proceeds thereof.

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Section 9.06 Notice of Defaults.

Within 90 days after the occurrence of any Default or Event of Default hereunder of which the Trustee has received written notice, the Trustee shall give notice to Holders pursuant to Section 13.02 hereof, unless such Default or Event of Default shall have been cured or waived; provided, however, that, except in the case of a Default or Event of Default in the payment of the principal of or premium, if any, or interest, or in the payment of any redemption or repurchase obligation on any Security, the Trustee shall be protected in withholding such notice if and so long as Responsible Officers of the Trustee in good faith determine that the withholding of such notice is in the interest of the Holders.

Section 9.07 Reports by Trustee to Holders.

The Trustee shall transmit to holders as provided in Section 313 of the TIA such reports concerning the Trustee and its actions under this Indenture as may be required by Section 313 of the TIA at the times and in the manner provided by the TIA.

A copy of each report at the time of its mailing to Holders shall be filed with the SEC, if required by Section 313 of the TIA, and each stock exchange, if any, on which the Securities are listed. The Company shall promptly notify the Trustee when the Securities become listed on any stock exchange.

Section 9.08 Compensation and Indemnification.

The Company covenants and agrees to pay to the Trustee from time to time, and the Trustee shall be entitled to, reasonable compensation (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) and the Company covenants and agrees to pay or



reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by or on behalf of it in accordance with any of the provisions of this Indenture (including the reasonable compensation and the expenses and disbursements of its counsel and of all agents and other persons not regularly in its employ), except to the extent that any such expense, disbursement or advance is due to its negligence or bad faith. When the Trustee incurs expenses or renders services in connection with an Event of Default specified in Section 8.01 hereof, the expenses (including the reasonable charges and expenses of its counsel) and the compensation for the services are intended to constitute expenses of administration under any Bankruptcy Law. The Company also covenants to indemnify the Trustee and its officers, directors, employees and agents for, and to hold such Persons harmless against, any loss, liability or expense incurred by them, arising out of or in connection with the acceptance or administration of this Indenture or the trusts hereunder or the performance of their duties hereunder, including the costs and expenses of defending themselves against or investigating any claim of liability in the premises, except to the extent that any such loss, liability or expense was due to the negligence or willful misconduct of such Persons. The obligations of the Company under this Section 9.08 to compensate and indemnify the Trustee and its officers, directors, employees and agents and to pay or reimburse such Persons for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall survive the satisfaction and discharge of this Indenture or the earlier resignation or removal of the Trustee. Such additional indebtedness shall be a senior claim to that of the Securities upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the Holders of particular Securities, and the Securities are hereby subordinated to such

senior claim. "Trustee" for purposes of this Section 9.08 shall include any predecessor Trustee, but the negligence or willful misconduct of any Trustee shall not affect the indemnification of any other Trustee.

Section 9.09            Replacement of Trustee.

A resignation or removal of the Trustee and appointment of a successor Trustee shall become effective only upon the successor Trustee's acceptance of appointment as provided in this Section 9.09.

The Trustee may resign and be discharged from the trust hereby created by so notifying the Company in writing. The Holders of at least a majority in aggregate principal amount of Outstanding Securities may remove the Trustee by so notifying the Trustee and the Company in writing. The Company must remove the Trustee if:

- (a) the Trustee fails to comply with Section 9.11 hereof or Section 310 of the TIA;
- (b) the Trustee becomes incapable of acting.
- (c) the Trustee is adjudged a bankrupt or an insolvent or an order for relief is entered with respect to the Trustee under any Bankruptcy Law; or
- (d) a custodian or public officer takes charge of the Trustee or its property.

If the Trustee resigns or is removed or if a vacancy exists in the office of the Trustee for any reason, the Company shall promptly appoint a successor Trustee. The Trustee shall be entitled to payment of its fees and reimbursement of its expenses while acting as Trustee. Within one year after the successor Trustee takes office, the Holders of at least a majority in aggregate principal amount of outstanding Securities may appoint a successor Trustee to replace the successor Trustee appointed by the Company.

Any Holder may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee if the Trustee fails to comply with Section 9.11 hereof.

If an instrument of acceptance by a successor Trustee shall not have been delivered to the Trustee within 30 days after the giving of such notice of resignation or removal, the resigning or removed Trustee, as the case may be, may petition, at the expense of the Company, any court of competent jurisdiction for the appointment of a successor Trustee.

A successor Trustee shall deliver a written acceptance of its appointment to the retiring Trustee and to the Company. Thereupon the resignation or removal of the retiring Trustee shall become effective, and the successor Trustee shall have all the rights, powers and duties of the Trustee under this Indenture. The Company shall mail a notice of the successor Trustee's succession to the Holders. The retiring Trustee shall promptly transfer all property held by it as Trustee to the successor Trustee. Notwithstanding replacement of the Trustee pursuant to this Section 9.09, the Company's obligations under Section 9.08 hereof shall continue for the benefit

of the retiring Trustee with respect to expenses, losses and liabilities incurred by it prior to such replacement.

Section 9.10            Successor Trustee by Merger, Etc.

Subject to Section 9.11 hereof, if the Trustee consolidates with, merges or converts into, or transfers or sells all or substantially all of its corporate trust business to, another corporation or national banking association, the successor entity without any further act shall be the successor Trustee as to the Securities.

Section 9.11            Corporate Trustee Required; Eligibility.

The Trustee shall at all times satisfy the requirements of Sections 310(a)(1), (2) and (5) of the TIA. The Trustee shall at all times have (or, in the case of a corporation included in a bank holding company system, the related bank holding company shall at all times have), a combined capital and surplus of at least \$100 million as set forth in its (or its related bank holding company's) most recent published annual report of condition. The Trustee is subject to Section 310(b) of the TIA.

The Trustee is subject to Section 311(a) of the TIA, excluding any creditor relationship listed in Section 311(b) of the TIA. A Trustee who has resigned or been removed shall be subject to Section 311(a) of the TIA to the extent indicated therein.

## Article 10

### Amendments; Supplements and Waivers

#### Section 10.01 Without Consent of Holders.

The Company and the Trustee may amend or supplement this Indenture or the Securities without notice to or consent of any Holder of a Security for any of the following purposes:

- (a) add to the covenants of the Company for the benefit of the Holders of Securities;
- (b) surrender any right or power herein conferred upon the Company;
- (c) make provision with respect to the conversion rights of Holders of Securities pursuant to Section 4.11 hereof;
- (d) provide for the assumption of the Company's obligations to the Holders of Securities in the case of a merger, consolidation, conveyance, transfer or lease pursuant to Article 7 hereof;
- (e) increase the Conversion Rate; *provided, however*, that such increase in the Conversion Rate shall not adversely affect the interest of the Holders of Securities (after taking into account tax and other consequences of such increase) in any material respect;

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- (f) comply with the requirements of the SEC in order to effect or maintain the qualification of this Indenture under the TIA;

(g) cure any ambiguity, correct or supplement any provision herein which may be inconsistent with any other provision herein or which is otherwise defective; *provided, however*, that such action pursuant to this clause (g) does not, in the good faith opinion of the Board of Directors and the Trustee, adversely affect the interests of the Holders of Securities in any material respect; and *provided, further*, that no modification or amendment made to conform this Indenture or the Securities to the section of the Final Prospectus entitled "Description of the Notes" shall be deemed to adversely affect the interests of the Holders of the Securities;

(h) add or modify any other provisions with respect to matters or questions arising under this Indenture which the Company and the Trustee may deem necessary or desirable and which shall not be inconsistent with the provisions of this Indenture, *provided, however*; that such action pursuant to this clause (h) does not adversely affect the interests of the Holders of Securities in any material respect;

- (i) to comply with Article 7;

- (j) to provide for uncertificated Securities in addition to or in place of Certificated Securities;

- (k) to provide for the issuance of and establish the form and terms and conditions of additional series of Securities;

(l) to evidence and provide for the acceptance of appointment hereunder by a successor Trustee with respect to the Securities and to add to or change any of the provisions of this Indenture as shall be necessary to provide for or facilitate the administration of the trusts hereunder by more than one Trustee; or

- (m) to provide for the addition of a guaranty of the notes by any other entity.

#### Section 10.02 With Consent of Holders.

Except as provided below in this Section 10.02, this Indenture or the Securities may be amended or supplemented, and noncompliance by the Company in any particular instance with any provision of this Indenture or the Securities may be waived, in each case (i) with the written consent of the Holders of at least a majority in aggregate principal amount of the then-outstanding Securities, or (ii) by the adoption of a resolution, at a meeting of Holders of the Securities then outstanding at which a quorum is present, by the Holders of a majority in aggregate principal amount of the then-outstanding Securities represented at such meeting.

Without the written consent or the affirmative vote of each Holder of Securities affected, an amendment or waiver under this Section 10.02 may not:

- (a) change the Stated Maturity of the principal of, or any installment of interest, including Special Interest, on, any Security;

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- (b) reduce the principal amount of or premium, if any, on any Security;

- (c) reduce the interest rate or interest, including Special Interest, on any Security;

- (d) change the currency of payment of principal of, premium, if any, or interest, including Special Interest, on any Security;

- (e) impair the right of any Holder to institute suit for the enforcement of any payment on or with respect to, or the conversion of, any Security;

- (f) modify the obligation of the Company to maintain an office or agency in The City of New York pursuant to Section 2.04 hereof;
- (g) except as permitted by Section 4.11 hereof, adversely affect the right to convert any Security as provided in Article 4 hereof;
- (h) adversely affect the right of Holders to require the Company to repurchase the Securities in the event of a Fundamental Change;
- (i) modify the subordination provisions of the Securities in a manner adverse to the Holders of Securities;
- (j) modify any of the provisions of this Section, Section 8.04 or Section 8.11, except to increase any percentage contained herein or therein or to provide that certain other provisions of this Indenture cannot be modified or waived without the consent of the Holder of each outstanding Security affected thereby; or
- (k) reduce the requirements of Section 12.04 hereof for quorum or voting, or reduce the percentage in aggregate principal amount of the outstanding Securities the consent of whose Holders is required for any such amendment or the consent of whose Holders is required for any waiver provided for in this Indenture.

It shall not be necessary for any act of Holders of Securities under this Section to approve the particular form of any proposed supplemental indenture, but it shall be sufficient if such act shall approve the substance thereof.

After an amendment, supplement or waiver under this Section 9.02 becomes effective, the Company shall promptly mail to the Holders affected thereby a notice briefly describing the amendment, supplement or waiver. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such amendment, supplement or waiver.

Section 10.03. Compliance with Trust Indenture Act.

Every amendment to this Indenture or the Securities of one or more Series shall be set forth in a supplemental indenture hereto that complies with the TIA as then in effect.

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Section 10.04. Revocation and Effect of Consents.

Until an amendment or waiver becomes effective, a consent to it by a Holder of a Security is a continuing consent by the Holder and every subsequent Holder of a Security or portion of a Security that evidences the same debt as the consenting Holder's Security, even if notation of the consent is not made on any Security. However, any such Holder or subsequent Holder may revoke the consent as to his Security or portion of a Security if the Trustee receives the notice of revocation before the date the amendment or waiver becomes effective.

Any amendment or waiver once effective shall bind every Holder of each Series affected by such amendment or waiver unless it is of the type described in any of clauses (a) through (g) of Section 9.3. In that case, the amendment or waiver shall bind each Holder of a Security who has consented to it and every subsequent Holder of a Security or portion of a Security that evidences the same debt as the consenting Holder's Security.

The Company may, but shall not be obligated to, fix a record date for the purpose of determining the Holders entitled to give their consent or take any other action described above or required or permitted to be taken pursuant to this Indenture. If a record date is fixed, then notwithstanding the immediately preceding paragraph, those Persons who were Holders at such record date (or their duly designated proxies), and only those persons, shall be entitled to give such consent or to revoke any consent previously given or to take any such action, whether or not such Persons continue to be Holders after such record date.

Section 10.05. Notation on or Exchange of Securities.

The Trustee may place an appropriate notation about an amendment or waiver on any Security of any Series thereafter authenticated. The Company in exchange for Securities of that Series may issue and the Trustee shall authenticate upon written request new Securities of that Series that reflect the amendment or waiver.

Section 10.06. Trustee Protected.

In executing, or accepting the additional trusts created by, any supplemental indenture permitted by this Article or the modifications thereby of the trusts created by this Indenture, the Trustee shall be entitled to receive, and (subject to Section 7.1) shall be fully protected in relying upon, an Opinion of Counsel stating that the execution of such supplemental indenture is authorized or permitted by this Indenture. The Trustee shall sign all supplemental indentures, except that the Trustee need not sign any supplemental indenture that adversely affects its rights.

**Article 11**  
**Satisfaction and Discharge**

Section 11.01 Satisfaction and Discharge of Indenture.

When:

- (a) The Company shall deliver to the Trustee for cancellation all Securities previously authenticated (other than any Securities which have been destroyed, lost or stolen and in

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lieu of or in substitution for which other Securities shall have been authenticated and delivered) and not previously cancelled; or

(b) (1) All the Securities not previously canceled or delivered to the Trustee for cancellation shall have become due and payable, or are by their terms to become due and payable within one year; and

(2) The Company shall deposit with the Trustee, in trust, cash in U.S. dollars and/or U.S. Government Obligations which through the payment of interest, including Special Interest, if any, and principal in respect thereof, in accordance with their terms, will provide (and without reinvestment), not later than one day before the due date of any payment of money, an amount in cash, sufficient, in the opinion of a nationally recognized firm of independent public accountants expressed in a written certification thereof delivered to the Trustee, to pay principal of, premium, if any, or interest, including Special Interest, if any, on all of the Securities (other than any securities which shall have been mutilated, destroyed, lost or stolen and in lieu of or in substitution for which other Securities shall have been authenticated and delivered) not previously cancelled or delivered to the Trustee for cancellation, on the dates such payments of principal, premium, if any, or interest are due to such date of maturity, redemption or repurchase, as the case may be, and if, in the case of either clause (a) or (b), the Company shall also pay or cause to be paid all other sums payable hereunder by the Company, then this Indenture shall cease to be of further effect (except as to: (i) remaining rights of registration of transfer, substitution and exchange and conversion of Securities, (ii) rights hereunder of Holders to receive payments of principal of and premium, if any, and interest, including Special Interest, if any, on the Securities and the other rights, duties and obligations of Holders, as beneficiaries hereof with respect to the amounts, if any, so deposited with the Trustee, and (iii) the rights, obligations and immunities of the Trustee hereunder), and the Trustee, on demand of the Company accompanied by an Officers' Certificate and an Opinion of Counsel and at the cost and expense of the Company, shall execute proper instruments acknowledging satisfaction of and discharging this Indenture; *provided, however*, that the Company shall promptly reimburse the Trustee for all amounts due the Trustee under Section 9.08 of this Indenture and for any costs or expenses thereafter reasonably and properly incurred by the Trustee and to compensate the Trustee for any services thereafter reasonably and properly rendered by the Trustee in connection with this Indenture or the Securities.

Section 11.02      Deposited Monies To Be Held in Trust.

Subject to Section 11.03 hereof, all monies deposited with the Trustee pursuant to Section 11.01 hereof shall be held in trust and applied by it to the payment, notwithstanding the provisions of Article 5 hereof, either directly or through any Paying Agent (including the Company if acting as its own Paying Agent), to the Holders of the particular Securities for the payment, redemption or repurchase of which such monies have been deposited with the Trustee, of all sums due and to become due thereon for principal, premium, if any, and interest, including Special Interest, if any. All monies deposited with the Trustee pursuant to Section 11.01 hereof (and held by it or any Paying Agent) for the payment of Securities subsequently converted shall be returned to the Company upon request of the Company.

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Section 11.03      Return of Unclaimed Monies.

The Trustee and the Paying Agent shall pay to the Company upon written request any money held by them for the payment of principal or premium, if any, or interest that remains unclaimed for two years after the date upon which such payment shall have become due. Notwithstanding the foregoing, the Trustee and Paying Agent shall have the right to withhold payment of such money to the Company until the Trustee or Paying Agent at the expense of the Company publishes in a newspaper of general circulation in New York City, or mails to each Holder, a notice stating that such money shall be repaid to the Company if unclaimed after a date no less than 30 days from the publication of such press release or mailing of such notice. After payment to the Company, all liability of the Trustee and the Paying Agent with respect to such money shall cease, and Holders entitled to the money must look to the Company for payment as general creditors unless an applicable abandoned property law designates another Person.

**Article 12**  
**Meeting of Holders of Securities**

Section 12.01      Purposes for Which Meetings May Be Called.

A meeting of Holders of Securities may be called at any time and from time to time pursuant to this Article to make, give or take any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be made, given or taken by Holders of Securities.

Notwithstanding anything contained in this Article 12, the Trustee may, during the pendency of a Default or an Event of Default, call a meeting of Holders of Securities in accordance with its standard practices.

Section 12.02      Call Notice and Place of Meetings.

The Trustee may at any time call a meeting of Holders of Securities for any purpose specified in Section 11.02 hereof, to be held at such time and at such place in The City of New York. Notice of every meeting of Holders of Securities, setting forth the time and the place of such meeting, in general terms the action proposed to be taken at such meeting and the percentage of the principal amount of the then-outstanding Securities which shall constitute a quorum at such meeting, shall be given, in the manner provided in the Indenture hereof, not less than 21 nor more than 180 days prior to the date fixed for the meeting.

In case at any time the Company, pursuant to a resolution of the Board of Directors, or the Holders of at least 10% in principal amount of the Securities then outstanding shall have requested the Trustee to call a meeting of the Holders of Securities for any purpose specified in Section 12.01 hereof, by written request setting forth in reasonable detail the action proposed to be taken at the meeting, and the Trustee shall not have made the first publication of the notice of such meeting within 21 days after receipt of such request or shall not thereafter proceed to cause the meeting to be held as provided herein, then the Company or the Holders of Securities in the amount specified, as the case may be, may determine the time and the place in The City of New York for such meeting and may call such meeting for such purposes by giving notice thereof as provided in paragraph (a) of this Section.

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Section 12.03 Persons Entitled to Vote at Meetings.

To be entitled to vote at any meeting of Holders of Securities, a Person shall be (a) a Holder of one or more outstanding Securities, or (b) a Person appointed by an instrument in writing as proxy for a Holder or Holders of one or more outstanding Securities by such Holder or Holders. The only Persons who shall be entitled to be present or to speak at any meeting of Holders shall be the Persons entitled to vote at such meeting and their counsel, any representatives of the Trustee and its counsel and any representatives of the Company and its counsel.

Section 12.04 Quorum; Action.

The Persons entitled to vote a majority in principal amount of the then-outstanding Securities shall constitute a quorum. In the absence of a quorum within 30 minutes of the time appointed for any such meeting, the meeting shall, if convened at the request of Holders of Securities, be dissolved. In any other case, the meeting may be adjourned for a period of not less than 10 days as determined by the chairman of the meeting prior to the adjournment of such meeting. In the absence of a quorum at any such adjourned meeting, such adjourned meeting may be further adjourned for a period of not less than 10 days as determined by the chairman of the meeting prior to the adjournment of such adjourned meeting. Notice of the reconvening of any adjourned meeting shall be given as provided in Section 12.02(a) hereof, except that such notice need be given only once and not less than five days prior to the date on which the meeting is scheduled to be reconvened.

At a meeting or an adjourned meeting duly reconvened and at which a quorum is present as aforesaid, any resolution and all matters (except as limited by the third paragraph of Section 9.02 hereof) shall be effectively passed and decided if passed or decided by the Persons entitled to vote not less than a majority in principal amount of Securities then outstanding represented and voting at such meeting.

Any resolution passed or decisions taken at any meeting of Holders of Securities duly held in accordance with this Section shall be binding on all the Holders of Securities, whether or not present or represented at the meeting.

Section 12.05 Determination of Voting Rights; Conduct and Adjournment of Meetings.

Notwithstanding any other provisions of this Indenture, the Trustee may make such reasonable regulations as it may deem advisable for any meeting of Holders of Securities in regard to proof of the holding of Securities and of the appointment of proxies and in regard to the appointment and duties of inspectors of votes, the submission and examination of proxies, certificates and other evidence of the right to vote, and such other matters concerning the conduct of the meeting as it shall deem appropriate.

The Trustee shall, by an instrument in writing, appoint a temporary chairman (which may be the Trustee) of the meeting, unless the meeting shall have been called by the Company or by Holders of Securities as provided in Section 12.02(b) hereof, in which case the Company or the Holders of Securities calling the meeting, as the case may be, shall in like manner appoint a

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temporary chairman. A permanent chairman and a permanent secretary of the meeting shall be elected by vote of the Persons entitled to vote a majority in principal amount of the outstanding Securities represented at the meeting.

At any meeting, each Holder of a Security or proxy shall be entitled to one vote for each \$1,000 principal amount of Securities held or represented by him; *provided, however*, that no vote shall be cast or counted at any meeting in respect of any Security challenged as not outstanding and ruled by the chairman of the meeting to be not outstanding. The chairman of the meeting shall have no right to vote, except as a Holder of a Security or proxy.

Any meeting of Holders of Securities duly called pursuant to Section 12.02 hereof at which a quorum is present may be adjourned from time to time by Persons entitled to vote a majority in principal amount of the then-outstanding Securities represented at the meeting, and the meeting may be held as so adjourned without further notice.

Section 12.07 Counting Votes and Recording Action of Meetings.

The vote upon any resolution submitted to any meeting of Holders of Securities shall be by written ballots on which shall be subscribed the signatures of the Holders of Securities or of their representatives by proxy and the principal amounts and serial numbers of the outstanding Securities held or represented by them. The permanent chairman of the meeting shall appoint two inspectors of votes who shall count all votes cast at the meeting for or against any resolution and who shall make and file with the secretary of the meeting their verified written reports in duplicate of all votes cast at the meeting. A record, at least in duplicate, of the proceedings of each meeting of Holders of Securities shall be prepared by the secretary of the meeting and there shall be attached to said record the original reports of the inspectors of votes on any vote by ballot taken thereat and affidavits by one or more Persons having knowledge of the facts setting forth a copy of the notice of the meeting and showing that said notice was given as provided in Section 12.02 hereof and, if applicable, Section 12.04 hereof. Each copy shall be signed and verified by the affidavits of the permanent chairman and secretary of the meeting and one such copy shall be delivered to the Company and another to the Trustee to be preserved by the Trustee, the latter to have attached thereto the ballots voted at the meeting. Any record so signed and verified shall be conclusive evidence of the matters therein stated.

**Article 13**  
**Miscellaneous**

Section 13.01 Trust Indenture Act Controls.

This Indenture is subject to the provisions of the TIA which are required to be part of this Indenture, and shall, to the extent applicable, be governed by such provisions.

Section 13.02 Notices.

Any notice or communication to the Company or the Trustee is duly given if in writing and delivered in person or mailed by first-class mail to the address set forth below:

if to the Company:

Vertex Pharmaceuticals Incorporated  
130 Waverly Street  
Cambridge, MA 02139  
Attention: Investor Relations

with a copy to:

Mintz, Levin, Cohn, Ferris, Glovsky  
and Popeo, P.C.  
One Financial Center  
Boston, MA 02111  
Attention: Michael L. Fantozzi, Esq.

if to the Trustee:

U.S. Bank National Association  
Corporate Trust Department  
One Federal Street, Boston, MA 02110  
Attention: Andrew M. Sinasky

The Company or the Trustee by notice to the other may designate additional or different addresses for subsequent notices or communications.

Any notice or communication to a Holder shall be mailed by first-class mail to his address shown on the Register kept by the Registrar. Failure to mail a notice or communication to a Holder or any defect in such notice or communication shall not affect its sufficiency with respect to other Holders.

If a notice or communication is mailed or sent in the manner provided above within the time prescribed, it is duly given as of the date it is mailed, whether or not the addressee receives it, except that notice to the Trustee shall only be effective upon receipt thereof by the Trustee.

If the Company mails a notice or communication to Holders, it shall mail a copy to the Trustee at the same time.

Section 13.03      Communication by Holders With Other Holders.

Holders may communicate pursuant to Section 312(b) of the TIA with other Holders with respect to their rights under the Securities or this Indenture. The Company, the Trustee, the Registrar and anyone else shall have the protection of Section 312(c) of the TIA.

Section 13.04      Acts of Holders of Securities.

- (a) Any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be given or taken by Holders of Securities may be embodied in and evidenced by:

- (1) one or more instruments of substantially similar tenor signed by such Holders in person or by agent or proxy duly appointed in writing;
- (2) the record of Holders of Securities voting in favor thereof, either in person or by proxies duly appointed in writing, at any meeting of Holders of Securities duly called and held in accordance with the provisions of Article 12; or
- (3) a combination of such instruments and any such record.

Except as herein otherwise expressly provided, such action shall become effective when such instrument or instruments or record or both are delivered to the Trustee and, where it is hereby expressly required, to the Company. Such instrument or instruments and record (and the action embodied therein and evidenced thereby) are herein sometimes referred to as the "Act" of the Holders of Securities signing such instrument or instruments and so voting at such meeting. Proof of execution of any such instrument or of a writing appointing any such agent or proxy, or of the holding by any Person of a Security, shall be sufficient for any purpose of this Indenture and (subject to Section 9.01 hereof) conclusive in favor of the Trustee and the Company if made in the manner provided in this Section. The record of any meeting of Holders of Securities shall be proved in the manner provided in Section 12.06 hereof.

- (b) The fact and date of the execution by any Person of any such instrument or writing may be provided in any manner which the Trustee reasonably deems sufficient.
- (c) The principal amount and serial numbers of Securities held by any Person, and the date of such Person holding the same, shall be proved by the Register.
- (d) Any request, demand, authorization, direction, notice, consent, election, waiver or other Act of the Holders of any Security shall bind every future Holder of the same Security and the Holder of every Security issued upon the registration of transfer thereof or in exchange therefor or in lieu thereof in respect of anything done, omitted or suffered to be done by the Trustee or the Company in reliance thereon, whether or not notation of such action is made upon such Security.

Section 13.05      Certificate and Opinion as to Conditions Precedent.

In any case where several matters are required to be certified by, or covered by an opinion of, any specified Person, it is not necessary that all such matters be certified by, or covered by the opinion of, only one such Person, or that they be so certified or covered by only one document, but one such Person may certify or give an opinion with respect to some matters and one or more other such Persons as to other matters, and any such Person may certify or give an opinion as to such matters in one or several documents.

Any certificate or opinion of an officer of the Company may be based, insofar as it relates to legal matters, upon an Opinion of Counsel, unless such officer knows, or in the exercise of reasonable care should know, that the Opinion of Counsel with respect to the matters upon which such certificate or opinion is based is erroneous. Any such Opinion of Counsel may be based, insofar as it relates to factual matters, upon a certificate or representations by, an officer or officers of the Company stating that the information with respect to such factual matters is in the

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possession of the Company, unless such counsel knows, or in the exercise of reasonable care should know, that the certificate or representations with respect to such matters are erroneous.

Where any Person is required to make, give or execute two or more applications, requests, consents, certificates, statements, opinions or other instruments under this Indenture, they may, but need not, be consolidated and form one instrument.

Upon any application or request by the Company to the Trustee to take any action under any provision of this Indenture, the Company shall furnish to the Trustee an Officers' Certificate stating that all conditions precedent, if any, provided for in this Indenture relating to the proposed action have been complied with and an Opinion of Counsel stating that in the opinion of such Counsel all such conditions precedent, if any, have been complied with, except that in the case of any such application or request as to which the furnishing of such documents is specifically required by any provision of this Indenture relating to such particular application or request, no additional certificate or opinion need be furnished.

Section 13.06      Statements Required in Certificate or Opinion.

Each certificate or opinion with respect to compliance with a condition or covenant provided for in this Indenture shall include:

- (a) a statement that each individual signing such certificate or opinion on behalf of the Company has read such covenant or condition and the definitions herein relating thereto;
- (b) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;
- (c) a statement that, in the opinion of each such individual, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and
- (d) a statement as to whether, in the opinion of each such individual, such condition or covenant has been complied with.

Section 13.07      Effect of Headings and Table of Contents.

The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof.

Section 13.08      Successors and Assigns.

All covenants and agreements in this Indenture by the Company shall bind its successors and assigns, whether so expressed or not.

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Section 13.09      Separability Clause.

In case any provision in this Indenture or the Securities shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

Section 13.10      Benefits of Indenture.

Nothing contained in this Indenture or in the Securities, express or implied, shall give to any Person, other than the parties hereto and their successors hereunder, the holders of Senior Debt and the Holders of Securities, any benefit or legal or equitable right, remedy or claim under this Indenture.

Section 13.11      Governing Law.

THIS INDENTURE AND THE SECURITIES SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK.

Section 13.12      Counterparts.

This instrument may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original but all such counterparts shall together constitute but one and the same instrument.

Section 13.13      Legal Holidays.

In any case where any Interest Payment Date, Redemption Date or Stated Maturity of any Security or the last day on which a Holder of a Security has a right to convert such Security shall not be a Business Day at any place of payment or place of conversion, then (notwithstanding any other provision of this Indenture or of the Securities) payment of interest or principal or premium, if any, or conversion of the Securities, need not be made at such place of payment or place of conversion on such day, but may be made on the next succeeding Business Day at such place of payment or place of conversion with the same force and effect as if made on the Interest Payment Date or redemption date or at the Stated Maturity or on such last day for conversion, provided, that in the case that payment is made on such succeeding Business Day, no interest shall accrue on the amount so payable for the period from and after such Interest Payment Date, Redemption Date or Stated Maturity, as the case may be.

Section 13.14      Recourse Against Others.

No recourse for the payment of the principal of or premium, if any, or interest on any Security, or for any claim based thereon or otherwise in respect thereof, shall be had against any incorporator, shareholder, officer or director, as such, past, present or future, of the Company or of any successor corporation, whether by virtue of any constitution, statute or rule of law or by the enforcement of any assessment or penalty or otherwise, all such liability being, by the acceptance thereof and as part of the consideration for the issue thereof, expressly waived and released.

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Section 13.15      Calculations in Respect of Securities.

Except as explicitly stated herein, the Company will be responsible for making all calculations required pursuant to this Indenture, including, without limitation, calculations with respect to determinations of the Conversion Price and Conversion Rate. The Company shall make all such calculations in good faith and, absent manifest error, the Company's calculations shall be binding on the Holders. The Company shall provide a written schedule of such calculations to the Trustee, and the Trustee shall be entitled to rely upon the accuracy of the Company's calculations without responsibility for independent verification thereof. The Trustee shall forward a copy of such calculations to any Holder upon such Holder's written request.

Section 13.16      No Security Interest Created.

Nothing in this Indenture or in the Securities, express or implied, shall be construed to constitute a security interest under the Uniform Commercial Code or similar legislation, now in effect or hereafter enacted and made effective, in any jurisdiction.

**[SIGNATURE PAGE FOLLOWS]**

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IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed all as of the day and year first above written.

**VERTEX PHARMACEUTICALS  
INCORPORATED**

By: \_\_\_\_\_  
Name:  
Title:

**U.S. BANK NATIONAL  
ASSOCIATION, AS TRUSTEE**

By: \_\_\_\_\_  
Name:  
Title:

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**EXHIBIT A  
[FORM OF FACE OF SECURITY]**

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN. THIS SECURITY IS A GLOBAL SECURITY WITHIN THE MEANING OF THE INDENTURE HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF A DEPOSITARY OR A NOMINEE THEREOF. THIS SECURITY IS EXCHANGEABLE FOR SECURITIES REGISTERED IN THE NAME OF A PERSON OTHER THAN THE DEPOSITARY OR ITS NOMINEE ONLY IN THE LIMITED CIRCUMSTANCES DESCRIBED IN THE INDENTURE AND, UNLESS AND UNTIL IT IS EXCHANGED IN WHOLE OR IN PART FOR SECURITIES IN DEFINITIVE FORM, THIS SECURITY MAY NOT BE TRANSFERRED EXCEPT AS A WHOLE BY THE DEPOSITARY TO A NOMINEE OF THE DEPOSITARY OR BY A NOMINEE OF THE DEPOSITARY TO THE DEPOSITARY OR ANOTHER NOMINEE OF THE



(1) This paragraph should be included only if the Security is a Global Security.

A-1

**VERTEX PHARMACEUTICALS INCORPORATED**

[ ] Convertible Senior Subordinated Notes due 2013

**CUSIP NO. [ ]**

No. \_\_\_\_\_ \$

VERTEX PHARMACEUTICALS INCORPORATED, a Massachusetts corporation (the "Company", which term includes any successor corporation under the Indenture hereinafter referred to), for value received, hereby promises to pay to Cede & Co., or its registered assigns, the principal sum of U.S. Dollars (\$ ) on [ ], 2013.

Interest Payment Dates: [ ] and [ ], commencing [ ], 2008.

Regular Record Dates: [ ] and [ ].

Reference is hereby made to the further provisions of this Security set forth on the reverse hereof, which further provisions shall for all purposes have the same effect as if set forth at this place.

**[SIGNATURE PAGE FOLLOWS]**

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IN WITNESS WHEREOF, the Company has caused this Security to be duly executed manually or by facsimile by its duly authorized officers.

Dated: \_\_\_\_\_

VERTEX PHARMACEUTICALS INCORPORATED

By: \_\_\_\_\_  
Name:  
Title:

By: \_\_\_\_\_  
Name:  
Title:

Trustee's Certificate of Authentication

This is one of the [ ]% Convertible Senior Subordinated Notes due 2013 described in the within-named Indenture.

**U.S. BANK NATIONAL ASSOCIATION,**  
as Trustee

By: \_\_\_\_\_  
Authorized Signatory

Dated:

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**[FORM OF REVERSE SIDE OF SECURITY]**

**VERTEX PHARMACEUTICALS INCORPORATED**

[ ] Convertible Senior Subordinated Notes due 2013

1. INTEREST

The Company promises to pay interest on the principal amount of this Security at the rate of [ ]% per annum. The Company shall pay interest semi-annually in arrears on [ ] and [ ] of each year (each, an “**Interest Payment Date**”), commencing on [ ], 2008. Interest on the Securities shall accrue from the most recent date to which interest has been paid or, if no interest has been paid, from [ ], 2008. Interest will be computed on the basis of a 360-day year composed of twelve 30-day months.

If the Company redeems this Security pursuant to Section 5 of this Security, on a date that is after the Regular Record Date and prior to the corresponding Interest Payment Date, interest, including Special Interest, if any, accrued and unpaid hereon to, but not including, the applicable Redemption Date, will be paid to the Holder in whose name the Securities are registered as of the close of business on the Regular Record Date immediately preceding the applicable Redemption Date.

If the Holder elects to require the Company to repurchase this Security pursuant to Section 6 of this Security, on a date that is after the Regular Record Date and prior to the corresponding Interest Payment Date, interest, including Special Interest, if any, accrued and unpaid hereon to, but not including, the applicable Fundamental Change Repurchase Date, will be paid to the Holder in whose name the Securities are registered as of the close of business on the Regular Record Date immediately preceding the applicable Fundamental Change Repurchase Date.

A Holder of any Security at the close of business on a Regular Record Date shall be entitled to receive interest, including Special Interest, if any, on such Security on the corresponding Interest Payment Date. A Holder of any Security which is converted after the close of business on a Regular Record Date and prior to the corresponding Interest Payment Date (other than any Security whose Maturity is prior to such Interest Payment Date) shall be entitled to receive interest, including Special Interest, if any, on the principal amount of such Security, notwithstanding the conversion of such Security prior to such Interest Payment Date. However, any such Holder which surrenders any such Security for conversion during the period between the close of business on such Regular Record Date and ending with the opening of business on the corresponding Interest Payment Date shall be required to pay the Company an amount equal to the interest, including Special Interest, if any, on the principal amount of such Security so converted (but excluding any overdue interest, including Special Interest, if any, on the principal amount of such Security so converted that exists at the time such Holder surrenders such Security for conversion), which is payable by the Company to such Holder on such Interest Payment Date, at the time such Holder surrenders such Security for conversion. Notwithstanding the foregoing, any such Holder which surrenders for conversion any Security (a) with respect to

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which the Company has specified a Fundamental Change Repurchase Date or a Redemption Date, in either case, that is after such Regular Record Date and on or prior to the next succeeding Interest Payment Date, or (b) after the last Regular Record Date prior to the Final Maturity Date, in either case, shall be entitled to receive (and retain) such interest, including Special Interest, if any, and need not pay the Company an amount equal to the interest, including Special Interest, if any, on the principal amount of such Security so converted at the time such Holder surrenders such Security for conversion.

## 2. METHOD OF PAYMENT

The Company shall pay interest, including Special Interest, if any, on this Security (except defaulted interest) to the person who is the Holder of this Security at the close of business on [ ] and [ ], as the case may be (each, a “**Regular Record Date**”) immediately preceding the related Interest Payment Date. The Holder must surrender this Security to a Paying Agent to collect payment of principal. The Company will pay principal and interest and Special Interest, if any, in money of the United States that at the time of payment is legal tender for payment of public and private debts. The Company may pay principal and interest, including Special Interest, if any, in respect of any Certificated Security by check or wire transfer payable in such money; *provided, however*, that a Holder with an aggregate principal amount in excess of \$5,000,000 will be paid by wire transfer in immediately available funds at the election of such Holder if such Holder has provided wire transfer instructions to the Trustee at least 10 Business Days prior to the Interest Payment Date. The Company may mail an interest check to the Holder’s registered address. Notwithstanding the foregoing, so long as this Security is registered in the name of a Depository or its nominee, all payments hereon shall be made by wire transfer of immediately available funds to the account of the Depository or its nominee.

Any wire transfer instructions received by the Trustee will remain in effect until revoked by the Holder.

## 3. PAYING AGENT, REGISTRAR AND CONVERSION AGENT

Initially, U.S. Bank National Association (the “**Trustee**,” which term shall include any successor trustee under the Indenture hereinafter referred to) will act as Paying Agent, Registrar and Conversion Agent. The Company may change any Paying Agent, Registrar or Conversion Agent without notice to the Holder. The Company or any of its Subsidiaries may, subject to certain limitations set forth in the Indenture, act as Paying Agent or Registrar.

## 4. INDENTURE, LIMITATIONS

This Security is one of a duly authorized issue of Securities of the Company designated as its [ ]% Senior Subordinated Convertible Notes Due 2013 (the “**Securities**”), issued under an Indenture dated as of February [ ], 2008 (the “**Indenture**”), between the Company and the Trustee. The terms of this Security include those stated in the Indenture and those required by or made part of the Indenture by reference to the TIA, as in effect on the date of the Indenture. This Security is subject to all such terms, and the Holder of this Security is referred to the Indenture and TIA for a statement of them.

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The Securities are senior subordinated unsecured obligations of the Company up to \$[282,500,000] in aggregate principal amount at maturity. The Indenture does not limit the incurrence of other debt of the Company or its existing or future Subsidiaries, secured or unsecured.

## 5. OPTIONAL REDEMPTION.

Prior to [ ], 2010, the Company cannot redeem the Securities. The Company may, on or after [ ], 2010, at its option, redeem the Securities in whole or in part on any date from time to time, upon notice to the Holders as provided in the Indenture, at a redemption prices set forth below, plus accrued and unpaid interest, if any, to but excluding the Redemption Date.

Year	Redemption Price
2010	[·]%
2011	[·]%
2012	[·]%

If fewer than all the Securities are to be redeemed, the Trustee shall select the particular Securities to be redeemed from the outstanding Securities by the methods as provided in the Indenture. If any Security selected for partial redemption is converted in part before termination of the conversion right with respect to the portion of the Security so selected, the converted portion of such Security shall be deemed to be the portion selected for redemption (provided, however, that the Holder of such Security so converted and deemed redeemed shall not be entitled to any additional interest payment as a result of such deemed redemption than such Holder would have otherwise been entitled to receive upon conversion of such Security). Securities which have been converted during a selection of Securities to be redeemed may be treated by the Trustee as Outstanding for the purpose of such selection.

On and after the Redemption Date, interest ceases to accrue on Securities or portions of Securities called for redemption, unless the Company defaults in the payment of the redemption price and accrued and unpaid interest.

#### 6. PURCHASE OF SECURITIES AT OPTION OF HOLDER UPON A FUNDAMENTAL CHANGE

If a Fundamental Change occurs, at the option of the Holder and subject to the terms and conditions of the Indenture, the Company shall become obligated to purchase for cash, subject to certain exceptions described in the Indenture all or any part specified by the Holder (so long as the principal amount of such part is \$1,000 or an integral multiple of \$1,000) of the Securities held by such Holder on a date specified by the Company that is no later than 30 days after the date of the Fundamental Change Company Notice, at a purchase price equal to 100% of the principal amount thereof together with unpaid interest, including Special Interest, if any, accrued to, but excluding, the Fundamental Change Repurchase Date. A Fundamental Change Company Notice shall be given by the Company to the Holders as provided in the Indenture. To exercise

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such repurchase right, a Holder must deliver to the Trustee a Fundamental Change Repurchase Notice as provided in the Indenture.

#### 7. CONVERSION

Subject to and upon compliance with the provisions of the Indenture, a Holder may surrender for conversion any Security that is \$1,000 principal amount or integral multiples thereof.

Subject to certain conditions provided for in the Indenture, in certain circumstances, a Holder may receive an amount in Common Stock equal to the Make-Whole Premium, in addition to the shares of Common Stock issuable upon conversion of such Security.

The Conversion Rate shall be initially equal to [ ] shares of Common Stock per \$1,000 principal amount of Securities. The Conversion Rate shall be adjusted under certain circumstances as provided in the Indenture.

No fractional share of Common Stock shall be issued upon conversion of a Security. Instead, the Company shall pay a cash adjustment as provided in the Indenture.

#### 8. SUBORDINATION

The Indebtedness evidenced by this Security is, to the extent and in the manner provided in the Indenture, subordinated and subject in right of payment to the prior payment in full of all amounts then due on all Senior Debt of the Company; *provided, however*, that the Securities, the Indebtedness represented thereby and the payment of the principal of and premium, if any, and interest on the Securities in all respects shall rank equally with, or prior to, all existing and future Indebtedness of the Company that is expressly subordinated to any Senior Debt, and this Security is issued subject to such provisions of the Indenture with respect thereto. Each Holder of this Security, by accepting the same, (a) agrees to and shall be bound by such provisions, (b) authorizes and directs the Trustee on such Holder's behalf to take such action as may be necessary or appropriate to effectuate the subordination so provided, and (c) appoints the Trustee such Holder's attorney-in-fact for any and all such purposes.

#### 9. DENOMINATIONS, TRANSFER, EXCHANGE

The Securities are in registered form, without coupons, in denominations of \$1,000 principal amount and integral multiples of \$1,000 principal amount. A Holder may register the transfer of or exchange Securities in accordance with the Indenture. The Registrar may require a Holder, among other things, to furnish appropriate endorsements and transfer documents and to pay any taxes or other governmental charges that may be imposed in relation thereto by law or permitted by the Indenture.

#### 10. PERSONS DEEMED OWNERS

The Holder of a Security may be treated as the owner of it for all purposes.

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#### 11. UNCLAIMED MONEY

If money for the payment of principal or interest, including Special Interest, if any, remains unclaimed for two years, the Trustee and any Paying Agent will pay the money back to the Company at its written request, subject to applicable unclaimed property law and the provisions of the Indenture. After that, Holders entitled to money must look to the Company for payment as general creditors unless an applicable abandoned property law designates another person.

12. DISCHARGE PRIOR TO MATURITY.

Subject to certain conditions contained in the Indenture, the Company may discharge its obligations under the Securities and the Indenture if (1) all of the Securities then outstanding shall become due and payable at their scheduled Maturity within one year, and (2) the Company shall have deposited with the Trustee money and/or U.S. Government Obligations sufficient to pay the principal of, and premium, if any, and interest, including Special Interest, if any, on all of the outstanding Securities on the date of Maturity.

13. AMENDMENT, SUPPLEMENT AND WAIVER

The Indenture permits, with certain exceptions as therein provided, the amendment thereof and the modification of the rights and obligations of the Company and the rights of the Holders of the Securities under the Indenture at any time by the Company and the Trustee with the consent of the Holders of a majority in aggregate principal amount of the Securities then outstanding (or such lesser amount as shall have acted at a meeting pursuant to the provisions of the Indenture). The Indenture also contains provisions permitting the Holders of specified percentages in principal amount of the Securities at the time outstanding, on behalf of the Holders of all the Securities, to waive compliance by the Company with certain provisions of the Indenture and certain past defaults under the Indenture and their consequences. Any such consent or waiver by the Holder of this Security shall be conclusive and binding upon such Holder and upon all future Holders of this Security and of any Security issued upon registration of transfer hereof or in exchange hereof or in lieu hereof, whether or not notation of such consent or waiver is made upon this Security or such other Security.

No reference herein to the Indenture and no provision of this Security or of the Indenture shall alter or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of and premium, if any, and interest, including Special Interest, if any, on this Security at the times, places and rate, and in the coin or currency, herein prescribed or to convert this Security as provided in the Indenture.

14. SUCCESSOR ENTITY

When a successor corporation assumes all the obligations of its predecessor under the Securities and the Indenture in accordance with the terms and conditions of the Indenture, the predecessor corporation (except in certain circumstances specified in the Indenture) shall be released from those obligations.

15. DEFAULTS AND REMEDIES

Under the Indenture, an Event of Default shall occur if:

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(a) the Company shall fail to pay when due the principal, Redemption Price or any Fundamental Change Repurchase Price of any Security, including any Make-Whole Premium, when the same becomes due and payable whether at the Final Maturity Date, upon repurchase, redemption, acceleration or otherwise whether or not such payment is prohibited by Article 5 of the Indenture; or

(b) the Company shall fail to pay an installment of interest, including Special Interest, if any, on any of the Securities, which failure continues for 30 days after the date when due whether or not such payment is prohibited by Article 5 hereof; or

(c) the Company shall fail to deliver when due all shares of Common Stock, together with cash instead of fractional shares deliverable upon conversion of the Securities, which failure continues for 10 days; or

(d) the Company fails to perform or observe any other term, covenant or agreement contained in the Securities or the Indenture and the failure continues for a period of 60 days after written notice of such failure, requiring the Company to remedy the same, shall have been given to the Company by the Trustee or to the Company and the Trustee by the Holders of at least 25% in aggregate principal amount of the then-outstanding Securities; or

(e) (i) the Company fails to make any payment by the end of the applicable grace period, if any, after the maturity of any Indebtedness for borrowed money in an amount in excess of \$5,000,000, or (ii) there is an acceleration of any Indebtedness for borrowed money in an amount in excess of \$5,000,000 because of a default with respect to such Indebtedness without such Indebtedness having been discharged or such acceleration having been cured, waived, rescinded or annulled, in the case of either (i) or (ii) above, for a period of 30 days after written notice to the Company by the Trustee or to the Company and the Trustee by Holders of at least 25% in aggregate principal amount of the then-outstanding Securities; or

(f) the Company fails to provide a Fundamental Change Company Notice in accordance with Section 3.08 of the Indenture; or

(g) certain events of bankruptcy, insolvency or reorganization as specified in the Indenture.

If an Event of Default shall occur and be continuing, the principal of all the Securities may be declared due and payable in the manner and with the effect provided in the Indenture.

Notwithstanding the foregoing or anything to the contrary set forth in the Indenture, to the extent elected by the Company, the sole remedy for an Event of Default relating to the failure to comply with the reporting obligations set forth in Section 6.05 of the Indenture and for any failure to comply with the requirements of Section 314(a)(1) of the Trust Indenture Act will for the first 180 days after the occurrence of such an Event of Default consist exclusively of the right to receive special interest on the Securities at an annual rate equal to 1.0% of the principal amount of the Securities (“**Special Interest**”). The Special Interest will accrue on all outstanding Securities from and including the date on which an Event of Default relating to a failure to comply with the reporting obligations set forth in Section 6.05 of the Indenture first occurs to but not including the 180th day thereafter (or such earlier date on which the Event of Default shall

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have been cured or waived). On such 180th day (or earlier, if the Event of Default relating to the reporting obligations is cured or waived prior to such 180th day), such Special Interest will cease to accrue and, if the Event of Default relating to reporting obligations has not been cured or waived prior to such 180th day, the Securities will be subject to acceleration as provided for in Section 8.02 of the Indenture. In the event the Company does not elect to pay Special Interest upon an Event of Default in accordance with this paragraph, the Securities will be subject to acceleration as provided for above. If the Company elects to pay Special Interest as the sole remedy for an Event of Default relating to the failure to comply with reporting obligations in Section 6.05 of the Indenture or for any failure to comply with the requirements of Section 314(a)(1) of the TIA in, the Company will notify all Holders, the Trustee and Paying Agent of such election on or before the close of business on the date on which such Event of Default first occurs.

16. NO RECOURSE AGAINST OTHERS

A director, officer, employee or shareholder, as such, of the Company shall not have any liability for any obligations of the Company under the Securities or the Indenture nor for any claim based on, in respect of or by reason of such obligations or their creation. The Holder of this Security by accepting this Security waives and releases all such liability. The waiver and release are part of the consideration for the issuance of this Security.

17. AUTHENTICATION

This Security shall not be valid until the Trustee or an authenticating agent manually signs the certificate of authentication on the other side of this Security.

18. ABBREVIATIONS AND DEFINITIONS

Customary abbreviations may be used in the name of the Holder or an assignee, such as: TEN COM (= tenants in common), TEN ENT (= tenants by the entireties), JT TEN (= joint tenants with right of survivorship and not as tenants in common), CUST (= Custodian) and UGMA (= Uniform Gifts to Minors Act).

All terms defined in the Indenture and used in this Security but not specifically defined herein are defined in the Indenture and are used herein as so defined.

19. CUSIP NUMBERS.

Pursuant to a recommendation promulgated by the Committee on Uniform Security Identification Procedures, the Company has caused CUSIP numbers to be printed on this Security. No representation is made as to the accuracy of such numbers either as printed on this Security and reliance may be placed only on the other identification numbers placed thereon.

20. INDENTURE TO CONTROL; GOVERNING LAW

In the case of any conflict between the provisions of this Security and the Indenture, the provisions of the Indenture shall control. This Security and the Indenture shall be governed by, and construed in accordance with, the laws of the State of New York.

The Company will furnish to any Holder, upon written request and without charge, a copy of the Indenture. Requests may be made to: Vertex Pharmaceuticals Incorporated, 130 Waverly Street, Cambridge, MA 02139 Attention: Investor Relations.

**ASSIGNMENT FORM**

To assign this Security, fill in the form below:

I or we assign and transfer this Security to

\_\_\_\_\_  
(Insert assignee's soc. sec. or tax I.D. no.)

\_\_\_\_\_  
(Print or type assignee's name, address and zip code) and irrevocably appoint

\_\_\_\_\_  
Agent to transfer this Security on the books of the Company. The Agent may substitute another to act for him or her.

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_  
(Sign exactly as your name appears on the other side of this Security)

\*Signature guaranteed by:

By: \_\_\_\_\_

\* The signature must be guaranteed by an institution which is a member of one of the following recognized signature guaranty programs: (i) the Securities Transfer Agent Medallion Program (STAMP); (ii) the New York Stock Exchange Medallion Program (MSP); (iii) the Stock Exchange Medallion Program (SEMP); or (iv) such other guaranty program acceptable to the Trustee.

**CONVERSION NOTICE**

To convert this Security, check the box:

To convert only part of this Security, state the principal amount to be converted (must be \$1,000 or an integral multiple of \$1,000): \$ \_\_\_\_\_ .

If you want the cash paid to another person or the stock certificate made out in another person's name, fill in the form below:

\_\_\_\_\_  
(Insert assignee's soc. sec. or tax I.D. no.)

\_\_\_\_\_  
(Print or type assignee's name, address and zip code) and irrevocably appoint

Agent to transfer this Security on the books of the Company. The Agent may substitute another to act for him or her.

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_  
(Sign exactly as your name appears on the other side of this Security)

\*Signature guaranteed by:

By: \_\_\_\_\_

\* The signature must be guaranteed by an institution which is a member of one of the following recognized signature guaranty programs: (i) the Securities Transfer Agent Medallion Program (STAMP); (ii) the New York Stock Exchange Medallion Program (MSP); (iii) the Stock Exchange Medallion Program (SEMP); or (iv) such other guaranty program acceptable to the Trustee.

**FUNDAMENTAL CHANGE REPURCHASE NOTICE**

**TO: VERTEX PHARMACEUTICALS INCORPORATED**  
130 Waverly Street  
Cambridge, Massachusetts 02139

The undersigned registered owner of this Security hereby irrevocably acknowledges receipt of a notice from **VERTEX PHARMACEUTICALS INCORPORATED** (the "**Company**") as to the occurrence of a Fundamental Change with respect to the Company and requests and instructs the Company to purchase the entire principal amount of this Security, or the portion thereof (which is \$1,000 or an integral multiple thereof) below designated, in accordance with the terms of the Indenture referred to in this Security at the Fundamental Change Repurchase Price to the registered Holder hereof.

Date: \_\_\_\_\_

Your Signature: \_\_\_\_\_

Signature(s) must be guaranteed by a qualified guarantor institution with membership in an approved signature guarantee program pursuant to Rule 17Ad-15 under the Securities Exchange Act of 1934.

\_\_\_\_\_  
Signature Guaranty

Principal amount to be repurchased (in an integral multiple of \$1,000, if less than all):

NOTICE: The signature to the foregoing Election must correspond to the Name as written upon the face of this Security in every particular, without any alteration or change whatsoever.

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**SCHEDULE OF EXCHANGES OF SECURITIES**

The following exchanges, purchase, repurchases, redemption or conversions of a part of this Global Security have been made:

<b>Date of Exchange</b>	<b>Amount of Decrease in Principal Amount of this Security</b>	<b>Amount of Increase in Principal Amount of this Security</b>	<b>Principal Amount of this Global Security following Each Increase of Decrease</b>	<b>Signature of Authorized Officer of Trustee</b>



One Financial Center  
 Boston, MA 02111  
 617-542-6000  
 617-542-2241 fax  
 www.mintz.com

February 11, 2008

Vertex Pharmaceuticals Incorporated  
 130 Waverly Street  
 Cambridge, MA 02139

Re: Automatic Registration Statement on Form S-3 for Convertible Senior Subordinated Notes and Shares of Common Stock Exercisable upon Conversion thereof

Ladies and Gentlemen:

We have acted as counsel to Vertex Pharmaceuticals Incorporated, a Massachusetts corporation (the "Company"), in connection with the preparation and filing with the Securities and Exchange Commission (the "Commission") of a Registration Statement on Form S-3 (the "Registration Statement"), pursuant to which the Company is registering under the Securities Act of 1933, as amended (the "Securities Act"), convertible senior subordinated notes (the "Notes") and the underlying shares of the Company's common stock, \$0.01 par value per share, issuable upon conversion of the Notes (the "Shares"), which may be issued and sold from time to time on a delayed or continuous basis pursuant to Rule 415 under the Securities Act. The Notes will be issued pursuant to an indenture (the "Indenture"), proposed to be entered into by the Company and U.S. Bank National Association, as trustee (the "Trustee"), in the form filed as Exhibit 4.1 to the Registration Statement.

In connection with this opinion, we have examined the form of Indenture referred to above, including all exhibits and schedules thereto, the Company's Restated Articles of Organization, and the Company's Amended and Restated By-laws, both as currently in effect, such other records of the corporate proceedings of the Company and certificates of the Company's officers as we have deemed relevant; and the Registration Statement and the exhibits thereto.

In our examination, we have assumed the genuineness of all signatures, the legal capacity of natural persons, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified or photostatic copies and the authenticity of the originals of such copies.

Members of our firm are admitted to the Bar of the Commonwealth of Massachusetts, and we do not express any opinion as to the laws of any other jurisdiction other than the United States Federal Laws and the reported judicial decisions interpreting those laws. To the extent that any applicable document is stated to be governed by the laws of another jurisdiction, we have assumed for purposes of this opinion that the laws of such jurisdiction are identical to the state laws of the Commonwealth of Massachusetts. No opinion is expressed herein with respect to the

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

BOSTON | WASHINGTON | NEW YORK | STAMFORD | LOS ANGELES | PALO ALTO | SAN DIEGO | LONDON

qualification of the Notes or the Shares under the securities or blue sky laws of any state or any foreign jurisdiction. The Notes and the Shares may be issued from time to time on a delayed or continuous basis, but this opinion is limited to the laws, including the rules and regulations thereunder, as in effect on the date hereof. We disclaim any obligation to advise you of any change in any of these sources of law or subsequent legal or factual developments which might affect any matters or opinions set forth herein.

We are basing this opinion on our understanding that, prior to issuing any of the Notes or Shares, the Company will advise us in writing of the terms thereof and other information material thereto, will afford us an opportunity to review the operative documents pursuant to which such Notes or Shares are to be issued (including the Registration Statement, the prospectus prepared in connection with the Registration Statement, and any supplement or amendment thereto) and will file such supplement or amendment to this opinion (if any) as we may reasonably consider necessary or appropriate with respect to such Notes or Shares. However, we undertake no responsibility to monitor the Company's future compliance with applicable laws, rules or regulations of the Commission or other governmental body.

Based upon and subject to the foregoing, we are of the opinion that (a) the Notes to be issued and sold by the Company, assuming (i) when issued, will only be issued pursuant to the underwriting agreement and the Indenture, the forms of which are filed as exhibits to the Registration Statement, (ii) that, at the time of the offer, issuance and sale of any Notes, no stop order suspending the Registration Statement's effectiveness will have been issued and remain in effect and no proceedings for that purpose are pending before or contemplated by the Commission, (iii) that there will not have occurred any change in law affecting the validity or enforceability of the Notes, (iv) when duly authorized by appropriate corporate action of the Company (including the Board of Directors of the Company or a committee thereof), (v) when issued, sold and delivered in the manner and for the consideration stated in the Registration Statement and in accordance with the resolutions adopted by the Board of Directors of the Company or a committee thereof, will constitute valid and binding obligations of the Company, enforceable against the Company in accordance with their terms, except as the enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law), and (b) the Shares when issued (assuming at such time, no stop order suspending the Registration Statement's effectiveness will have been issued and remain in effect and no proceedings for that purpose are pending before or contemplated by the Commission) upon conversion of the Notes (assuming such Notes are issued in accordance with the assumptions set forth in clause (a)) in accordance with the terms of the Notes and the Indenture (assuming the due authorization, execution and delivery of the Indenture by the Company and the Trustee), will be validly issued, fully paid and nonassessable.



It is understood that this opinion is to be used only in connection with the offer and sale of the Notes and the underlying Shares while the Registration Statement is in effect.

Please note that we are opining only as to the matters expressly set forth herein, and no opinion should be inferred as to any other matters.

We hereby consent to (i) the reference to this firm under the caption "Legal Matters" in the Prospectus forming a part of the Registration Statement and (ii) the filing of this opinion as an exhibit to the Registration Statement.

Very truly yours,

*/s/ Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

**Vertex Pharmaceuticals Incorporated**

*Computation of Ratio of Earnings to Fixed Charges*  
(Amounts in thousands)

	2003	2004	2005	2006	2007
Loss from continuing operations before cumulative effect of a change in accounting principle	\$ (266,413)	\$ (166,247)	\$ (203,417)	\$ (207,937)	\$ (391,279)
Fixed Charges:					
Interest expense and amortization of deferred issuance costs	17,298	18,317	17,326	7,955	2,285
Appropriate rental obligations	8,204	11,963	11,164	12,074	10,243
Total fixed charges	\$ 25,502	\$ 30,280	\$ 28,490	\$ 20,029	\$ 12,528
Loss from continuing operations before cumulative effect of a change in accounting principle, plus fixed charges	\$ (240,911)	\$ (135,967)	\$ (174,927)	\$ (187,908)	\$ (378,751)
Ratio of earnings to fixed charges	*	*	*	*	*

\* Due to the Company's loss from continuing operations for the years ended December 31, 2003, 2004, 2005, 2006 and 2007 earnings were insufficient to cover fixed charges by \$266,413,000, \$166,247,000, \$203,417,000, \$207,937,000 and \$391,279,000.

## QuickLinks

[Exhibit 12.1](#)

[Vertex Pharmaceuticals Incorporated Computation of Ratio of Earnings to Fixed Charges \(Amounts in thousands\)](#)

**Consent of Independent Registered Public Accounting Firm**

We consent to the reference to our firm under the caption "Experts" in the Registration Statement (Form S-3) and related Prospectus of Vertex Pharmaceuticals Incorporated for the registration of \$250,000,000 Convertible Subordinated Notes due 2013 and to the incorporation by reference therein of our reports dated February 11, 2008, with respect to the consolidated financial statements of Vertex Pharmaceuticals Incorporated and the effectiveness of internal control over financial reporting of Vertex Pharmaceuticals Incorporated, included in its Annual Report (Form 10-K) for the year ended December 31, 2007, filed with the Securities and Exchange Commission.

/s/ Ernst & Young LLP

Boston, Massachusetts  
February 11, 2008

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## QuickLinks

[Exhibit 23.1](#)

[Consent of Independent Registered Public Accounting Firm](#)

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# SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

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## FORM T-1

STATEMENT OF ELIGIBILITY UNDER  
THE TRUST INDENTURE ACT OF 1939 OF A  
CORPORATION DESIGNATED TO ACT AS TRUSTEE

Check if an Application to Determine Eligibility of  
a Trustee Pursuant to Section 305(b)(2)

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### U.S. BANK NATIONAL ASSOCIATION

(Exact name of Trustee as specified in its charter)

**31-0841368**

I.R.S. Employer Identification No.

**800 Nicollet Mall**  
**Minneapolis, Minnesota**  
(Address of principal executive offices)

**55402**  
(Zip Code)

**Andrew M. Sinasky**  
**U.S. Bank National Association**  
**One Federal Street, 3rd Floor**  
**Boston, MA 02110**  
**(617) 603-6564**  
(Name, address and telephone number of agent for service)

**Issuer's Name**  
**VERTEX PHARMACEUTICALS INCORPORATED**

**Massachusetts**  
(State or other jurisdiction of incorporation or organization)

**04-3039129**  
(I.R.S. Employer Identification No.)

**130 Waverly Street**  
**Cambridge, Massachusetts**  
(Address of Principal Executive Offices)

**02139**  
(Zip Code)

**Convertible Senior Subordinated Notes due 2013**  
**(Title of the Indenture Securities)**

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**Item 1. GENERAL INFORMATION.** *Furnish the following information as to the Trustee.*

- a) *Name and address of each examining or supervising authority to which it is subject.*

Comptroller of the Currency  
Washington, D.C.

- b) *Whether it is authorized to exercise corporate trust powers.*

Yes

**Item 2. AFFILIATIONS WITH OBLIGOR.** *If the obligor is an affiliate of the Trustee, describe each such affiliation.*

None

**Items 3-15** *Items 3-15 are not applicable because to the best of the Trustee's knowledge, the obligor is not in default under any Indenture for which the Trustee acts as Trustee.*

**Item 16. LIST OF EXHIBITS:** *List below all exhibits filed as a part of this statement of eligibility and qualification.*

1. A copy of the Articles of Association of the Trustee.\*
2. A copy of the certificate of authority of the Trustee to commence business.\*
3. A copy of the certificate of authority of the Trustee to exercise corporate trust powers.\*
4. A copy of the existing bylaws of the Trustee.\*
5. A copy of each Indenture referred to in Item 4. Not applicable.
6. The consent of the Trustee required by Section 321(b) of the Trust Indenture Act of 1939, attached as Exhibit 6.
7. Report of Condition of the Trustee as of March 31, 2006 published pursuant to law or the requirements of its supervising or examining authority, attached as Exhibit 7.

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\* Incorporated by reference to Exhibit 25.1 to Amendment No. 2 to registration statement on S-4, Registration Number 333-128217 filed on November 15, 2005.

**SIGNATURE**

Pursuant to the requirements of the Trust Indenture Act of 1939, as amended, the Trustee, U.S. BANK NATIONAL ASSOCIATION, a national banking association organized and existing under the laws of the United States of America, has duly caused this statement of eligibility and qualification to be signed on its behalf by the undersigned, thereunto duly authorized, all in the City of Boston, Commonwealth of Massachusetts, on the 8th day of February, 2008.

By: /s/ Andrew M. Sinasky

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Andrew M. Sinasky  
Vice President

By: /s/ David J. Ganss

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Name: David J. Ganss  
Title: Vice President







## QuickLinks

[Exhibit 25.1](#)