

MEMO TO THE PARTNER
**PROPOSED ANTIDILUTION PROVISION FOR SERIES A PREFERRED
STOCK**

RYAN D. FRANKLIN*

TO: Law Office Partner
FROM: Associate
RE: Proposed Antidilution Provision for the Certificate of Designations, Rights, and Preferences of Convertible Preferred Stock, Series A, of Halo Tech, Inc.

I. INTRODUCTION

As requested, I have drafted one of the key antidilution provisions to be included in the Certificate of Designations establishing the Convertible Preferred Stock, Series A, par value \$0.01 per share (the “Series A Preferred Stock”), of Halo Tech, Inc. (“Halo Tech”), which will be issued to our client, AdVenture Capital (“AdVenture”).

Attached to this memorandum is a draft of the requested antidilution provisions and a list of relevant defined terms. The remaining terms and provisions of the Certificate of Designations have been drafted by other associates at our firm and by opposing counsel and are included in the draft previously circulated among the parties and their counsel. Subject to your approval, the antidilution and accompanying defined terms contained in Exhibit A should be incorporated into the appropriate sections of the draft Certificate of Designations. Capitalized terms not defined in this memorandum have the meanings ascribed to such terms on Exhibit A.

This Memorandum sets forth: (1) the transactional context in which the issuance of the Series A Preferred Stock of Halo Tech is expected occur; (2) the authority for the designation and issuance of the Preferred Stock and a review of the applicable regulatory issues; (3) the key substantive issues I encountered in drafting the attached antidilution provisions; and (4) an analysis of the specific drafting choices I made to address those issues.

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II. TRANSACTIONAL CONTEXT

Our client, AdVenture, is an up-and-coming venture capital firm organized under the laws of the State of Tennessee. AdVenture is limited partnership with assets of approximately twenty million dollars.¹

AdVenture identified Halo Tech, a startup healthcare technology company organized under the laws of the State of Delaware, as meeting the investment criteria for its portfolio. Halo Tech is close to completing software that speeds up the digital transmission of lab tests to hospitals. A beta version of the software is in use by a few small hospitals in Knoxville, Tennessee, but financing is needed to market and overhaul the platform for widespread circulation. Halo Tech's business plan estimates that they will need approximately three million dollars to update the software for regional expansion. AdVenture wants to move quickly because several suitors are waiting in the wings.

This is Halo Tech's first round of venture capital financing, and it desires to designate a new series of convertible preferred stock—the Series A Preferred Stock—in order to raise the desired capital. Halo Tech currently has one issued and outstanding class of common stock, which is held by the founders and employees. Of note, employees have been granted stock options as incentive compensation. Halo Tech's Certificate of Incorporation authorizes the issuance of up to 50,000,000 shares of common stock, of which 7,000,000 are currently outstanding, and 10,000,000 shares of preferred stock. No shares of preferred stock have been issued to date. Halo Tech does not have any outstanding indebtedness (other than current and ordinary course trade indebtedness).

AdVenture trusts Halo Tech's management team and believes that an investment in the company has significant upside. However, AdVenture is concerned about future dilutive equity offerings if Halo Tech needs more financing to expand beyond East and Middle Tennessee. Any future financing arrangements that involve the issuance of additional common stock or securities convertible into common stock at certain per-share values will dilute AdVenture's financial interest in Halo Tech. Accordingly, AdVenture is primarily concerned with future equity financings that would be offered at a price per share below the per-share value of the Series A Preferred Stock on an actual or as-converted basis. This is commonly referred to as “down-round” financing,² which has two costly effects.

¹ Most venture capital firms are organized as limited partnerships and have over twenty million dollars in assets. J. Paul Stouse, *Venture Capital Financing*, 49 LA. B.J. 308 (2002).

² Robert P. Bartlett, III, *Understanding Price-Based Antidilution Protection: Five Principles to Apply When Negotiating A Down-Round Financing*, 59 BUS. LAW. 23, 23 (2003).

First, the lower price of the new stock relative to the shares held by the existing stockholder indicates that the monetary value of its investment has decreased since the closing of the previous financing. Second, the lower price of the new stock will cause the company to sell a greater number of shares of preferred stock than the existing investor could have purchased with its own investment, thereby significantly diluting the investor's ownership interest in the enterprise.³

AdVenture and Halo Tech have agreed to terms on almost all the provisions to be included in the Certificate of Designations. However, the two parties have yet to iron out the specific antidilution protection to be afforded AdVenture in the case of a future down-round issuance of additional shares of common stock or securities convertible into common stock. Accordingly, AdVenture has asked us to draft the antidilution provision necessary to protect it from the future issuance or sale of additional shares of common stock or securities convertible or exchangeable into common stock at a price below the then applicable Conversion Price after the Original Issue Date. Exhibit A represents this draft. Note that Exhibit A does not address other conversion price adjustments caused by corporate actions such as dividends, stock splits, recapitalizations, business combinations, etc. These antidilution events have already been addressed separately in the existing draft of the Certificate of Designations.

III. TRANSACTIONAL AUTHORITY AND REGULATIONS

The board of directors of Halo Tech has the authority to establish and issue the Series A Preferred Stock under Delaware law and its organizational documents. In addition, Halo Tech is authorized to offer and sell shares of the Series A Preferred Stock to AdVenture under the U.S. federal securities laws, which preempt state securities regulation of the contemplated offering. This Part summarizes the basis for those elements of legal authority in the context of the transactions described *supra* Part II. The terms and provisions of the Series A Preferred Stock, including the provisions attached as Exhibit A, are included in a Certificate of Designations because DGCL § 151(g) provides, in pertinent part, that when a corporation desires to issue a class or series of stock with characteristics that are not already set forth in the certificate of incorporation (or an amendment thereto) but are instead provided for “in a resolution or resolutions adopted by the board of directors pursuant to authority expressly vested in it by the certificate of incorporation,” a certificate of designation must

³ *Id.* at 25.

be filed with the Delaware Secretary of State “setting forth a copy of such resolution or resolutions and the number of shares of stock of such class or series as to which the resolution or resolutions apply.”⁴

Delaware General Corporation Law (“DGCL”) § 151(a) provides that a “corporation may issue 1 or more classes of stock or 1 or more series of stock . . . which classes or series may have such voting powers . . . and such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions” as set forth “in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation.”⁵ In accordance with DGCL § 151, Halo Tech’s Certificate of Incorporation contains a “blank check” preferred stock provision, which authorizes the board of directors to issue preferred stock by resolution without additional stockholder approval.⁶

DGCL § 151(e) expressly states that any class or series of stock “may be made convertible into” any other class or series of the corporation’s stock “at such price or prices . . . or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors.”⁷ Therefore, pursuant to DGCL § 151(e) and the blank check authority granted by Halo Tech’s Certificate of Incorporation, the directors of Halo Tech have the authority to include in the resolution designating a series of preferred stock the provisions necessary to make the preferred stock convertible into common stock and establish the conversion price or rate and any antidilution or other adjustments to that price or rate as they see fit.

Therefore, under both the DGCL and Halo Tech’s Certificate of Incorporation the board of directors has the authority to, by resolution and the filing of a Certificate of Designations, to establish the Series A Preferred Stock.

⁴ DEL. CODE ANN. tit. 8, § 151(g).

⁵ DEL. CODE ANN. tit. 8, § 151(a).

⁶ The blank check provision provides: “The Board of Directors is authorized, subject to limitations prescribed by law, to provide by resolution or resolutions for the issuance of shares of Preferred Stock in one or more series, and by filing a certificate pursuant to the DGCL, to establish the number of shares to be included in each such series, and to fix the voting powers (if any), designations, powers, preferences, and relative, participating, optional or other rights, if any, of the shares of each such series, and any qualifications, limitations or restrictions thereof. Within the limitations or restrictions stated in any series of Preferred Stock, the Board of Directors may increase or decrease (but not below the number of shares of any such series of Preferred Stock then outstanding) by resolution the number of shares of any such series of Preferred Stock.”

⁷ DEL. CODE ANN. tit. 8, § 151(e).

However, the offer and sale of the Series A Preferred Stock also is subject to the federal securities laws. Specifically, Section 5 of the Securities Act of 1933, as amended (the “Securities Act”), regulates the offer and sale of securities and requires the registration of all securities offerings with the Securities and Exchange Commission (the “SEC”), unless an exemption applies.⁸ Section 4(a)(2) of the Securities Act exempts “transactions by an issuer not involving any public offering.”⁹ The SEC has adopted Rule 506 as a safe harbor for private placements of securities conducted under Section 4(a)(2). Because Halo Tech is advertising and soliciting investment in the Series A Preferred Stock via its website, it must rely on Rule 506(c) of Regulation D. The private offering exemption under Section 4(a)(2) and Rule 506 does not permit general advertising or solicitation, except in accordance with Rule 506(c).¹⁰

New Rule 506(c) permits an issuer to use general solicitation and advertising in an exempt offering if all purchasers are “accredited investors” and the issuer takes “reasonable steps” to verify that the purchasers are accredited investors.¹¹ Here, our securities practice group has determined that Halo Tech qualifies as an accredited investor¹² and Halo Tech has taken reasonable steps¹³ to verify Halo Tech’s accredited investor status. Halo Tech will file a Form D with the SEC within fifteen days of the close of the transaction.¹⁴ The securities

⁸ 15 U.S.C. § 77e.

⁹ 15 U.S.C. 77d(a)(2).

¹⁰ Non-Public Offering Exemption, Securities Act Release No. 33-4552, 1962 WL 69540 (Nov. 6, 1962); *see also* Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 916 (2011).

¹¹ *Id.* In addition to these specific conditions, the sales must also satisfy the general conditions of Rule 501 and Rule 502(a) and (d). *Id.* Also, Rule 506 is subject to a “bad boy” disqualifier for issuers (and certain related parties) who have committed certain crimes or securities violations. 17 C.F.R. § 230.506(d).

¹² Because AdVenture is a limited partnership with assets of twenty million dollars, it qualifies. 17 C.F.R. § 230.501(a)(3)

¹³ AdVenture has provided bank statements, other documentation, and a written confirmation from our firm to ensure compliance with the verification of accredited investor status set forth in Regulation D. *See* 17 C.F.R. § 230.506(c)(ii).

¹⁴ 17 C.F.R. § 230.503. Notably, at the time of this writing, the SEC is considering proposed rules that would require issuers using the Rule 506(c) to file a Form D fifteen days in advance of the first use of general solicitation. Amendments to Regulation D, Form D and Rule 156 Under the Securities Act, Securities Act Release No. 33-9416, Exchange Act Release No. 34-69960, Investment Company Act Release No. IC-30595, 2013 WL 3476787 (CCH) (July 10, 2013).

practice group is working with the client on this and other compliance issues and attentiveness to the relevant anti-fraud provisions of the federal securities laws.¹⁵

IV. PRINCIPAL DRAFTING ISSUES

A. Which of the two principal types of antidilution provisions—full-ratchet or weighted-average—used to protect an investor from a future issuance at a price per share below the Conversion Price is most appropriate in light of the transactional context?

B. How broad or narrow should the definitions of “Common Stock Deemed Outstanding” and “Additional Shares of Common Stock”—the main factors in determining the variability of the antidilution provisions—be in light of the transactional context?

V. ANALYSIS OF SPECIFIC DRAFTING CHOICES

1. Type of Antidilution Provision

Price-based antidilution provisions are designed using either a full-ratchet or weighted-average approach.¹⁶ In light of the transactional context, a weighted-average conversion price adjustment is the more appropriate provision for use in the Certificate of Designations establishing the Series A Preferred Stock for the reasons set forth below. Exhibit A reflects that drafting choice.

Venture capitalists, such as AdVenture, almost always seek antidilution provisions for protection from the dilutive effect of down-round financing. These provisions are critically necessary in order to protect the investment of venture capital firms because preferred stockholders rights and preferences are primarily contractual in nature and such rights must be explicitly drafted because preferred stockholders do not enjoy the full protection of the board’s fiduciary duties as common stockholders do.¹⁷ This is because the directors’ fiduciary duties are typically owed to the corporation whereas preferred stockholders can provide for their rights in a contract—making fiduciary duty protections for preferred stockholders less necessary as a means of assuring equitable treatment.

¹⁵ Securities issued under Rule 506 are deemed “covered securities,” which are not subject to state blue sky regulation. See 15 U.S.C. §§ 77r(a)(1), (b)(4); Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 201(a)(1), 126 Stat. 306 (2012). However, the general anti-fraud provisions of the federal securities laws are still applicable.

¹⁶ Michael A. Woronoff & Jonathan A. Rosen, *Understanding Antidilution Provisions In Convertible Securities*, 74 FORDHAM L. REV. 129, 134 (2005).

¹⁷ C. Stephen Bigler & Jennifer Veet Barrett, *Words that Matter: Considerations in Drafting Preferred Stock Provisions*, BUSINESS LAW TODAY (Jan. 23, 2012) http://www.americanbar.org/publications/blt/2014/01/04_bigler.html.

For example, even though Delaware courts have indicated that directors may owe fiduciary duties to preferred stockholders when a right shared with common stockholders is at issue, if there is a conflict of interest between the two classes, the board should favor the common stockholder or risk breaching its fiduciary duties.¹⁸ Thus, because directors generally have no fiduciary duty when it comes to diluting preferred stockholders' convertible security interests, such preferred investors must include this type of protection in the contract—the certificate of incorporation or designations—to make it a part of the benefit of the bargain they struck.

Full-ratchet antidilution provisions reduce the conversion price of the convertible security to equal the exact price per share of the newly issued common stock or common stock equivalent—securities convertible into or exchangeable for common stock—in the event of a dilutive issuance.¹⁹ An issuer will rarely agree to this type of provision. It heavily favors investors in the convertible securities class because of the potential to substantially dilute the financial value of common stockholders without regard to the size of the dilutive issuance.²⁰

Weighted-average antidilution provisions utilize a formula to reduce the conversion price by taking into account the relative “weights” of the total value and pricing of the preexisting convertible securities and the newly issued securities.²¹ These provisions operate by multiplying the old conversion rate by a fraction that is less than one.²² This fraction is a function of the amount of money invested in the new round of financing, the number of shares outstanding prior to the new round, and the number of new shares issued.²³ Thus, while weighted-average provisions do not provide as much protection to new investors as full-ratchet provisions, the weighted-average approach is viewed as a reasonable middle ground between the interests of the two parties because the

¹⁸ *Id.*

¹⁹ CARLA YOUNG GARRETT ET AL., *LAWYERS GUIDE TO FORMULAS IN DEAL DOCUMENTS AND SEC FILINGS* § 3.03 (2013), available at <https://advance.lexis.com/api/document/collection/analytical-materials/id/59N9-CK31-JD6P-22V5-00000-00?context=1000516>.

²⁰ Woronoff & Rosen, *supra* note 16, at 145-46. “Issuers can and do resist ratchet antidilution unless they have not thought through the consequences or unless they literally have no other alternatives.” GARRETT ET AL., *supra* note 19.

²¹ CARLA YOUNG GARRETT ET AL., *supra* note 19.

²² *Id.*

²³ Joseph L. Lemon, Jr., *Don't Let Me Down (Round): Avoiding Illusory Terms in Venture Capital Financing in the Post-Internet Bubble Era*, 39 TEX. J. BUS. L. 1, 14 (2003).

adjustment to the conversion price is more “proportionate to the size of the percentage-ownership and economic dilution that the subsequent issue would otherwise entail.”²⁴

The decision to include a weighted-average conversion price adjustment provision in the Certificate of Designations is based primarily on the current trends in the marketplace and ultimately because “[w]eighted-average antidilution provisions are the norm in venture capital transactions.”²⁵ While our client certainly preferred a full-ratchet conversion price adjustment provision, such a provision was simply unobtainable because of the relatively equal bargaining power of the two parties. The recent federal healthcare overhaul has not only increased demand for healthcare services but also demand for improvements in health technology, and venture capitalists do not want to miss out on the potentially unlimited upside to such an investment. Also, Halo Tech’s website solicitation generated even more interest in the company than was already anticipated

2. Critical Definitions

Two definitions are critical to a weighted-average antidilution provision. Although the terminology varies, Exhibit A uses the terms “Common Stock Deemed Outstanding” and “Additional Shares of Common Stock.” Special attention must be paid when drafting these defined terms because a certificate of designations “is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms,”²⁶ and the terms typically will be strictly construed by the courts.²⁷ Many provisions in corporate finance agreements and instruments, including those in preferred stock documents, have been litigated because of the omission of a term or the failure to properly define a term.²⁸ Complete definitions of the defined terms used in the subsections below can be found in the attached Exhibit A.

a. “Common Stock Deemed Outstanding”

When negotiating the Common Stock Deemed Outstanding definition, the issuer/common stockholders want to maximize the breadth to diminish the

²⁴ CARLA YOUNG GARRETT ET AL., *supra* note 19.

²⁵ *Id.* Garrett also states that “Cooley Godward Kronish LLP’s 2005-2009 database of 1,887 transactions showed over 85% of the deals included weighted-average provisions.” *Id.*

²⁶ *Rothschild Int’l Corp. v. Liggett Corp.*, 474 A.2d 133, 136 (Del. 1984).

²⁷ *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990).

²⁸ *See e.g., Lohnes v. Level 3 Commc’ns, Inc.*, 272 F.3d 49 (1st Cir. 2001).

formula's dilutive capacity, while the new investors seek the opposite.²⁹ The precedent transaction documents and secondary literature I reviewed regarding this definition describes a wide variety of categories of outstanding/issuable common shares that could be included in the Common Stock Deemed Outstanding definition. I settled on a relatively standard definition of Common Stock Deemed Outstanding based on my review of these sources. My definition includes: Common Stock actually outstanding and the number of shares of Common Stock that would be issuable upon the exercise of any Options or Convertible Securities.

Although a narrower definition would be preferred by AdVenture because the dilutive effect of a future down round would be spread out over fewer existing securities—resulting in a greater proportionate reduction in the Conversion Price—broader based definitions have become the industry norm in these types of transactions.³⁰ Furthermore, AdVenture knew of the stock options issued to the employees, which are the only currently outstanding Options. Thus, the inclusion of the Options and Convertible Securities is reasonable because AdVenture took these securities into account when valuing Halo Tech and determining the original price per share and Conversion Price of the Series A Preferred Stock investment.³¹

With regard to the Options and Convertible Securities, the provision includes a statement that these securities are included “regardless of whether the Options or Convertible Securities are actually exercisable or convertible or exchangeable at such time.” This clause is intended to add clarity in case of a dispute. Also, the Options and Convertible Securities, although commonly known terms in corporate finance circles, are routinely defined to include and exclude certain items in order to avoid disputes.

b. “Additional Shares of Common Stock”

When negotiating the Additional Shares of Common Stock definition, the issuer and existing common stockholders seek to minimize the breadth of the definition, and the new investors want the opposite.³² The Additional Shares of Common Stock definition not only is included in the weighted-average formula, but also triggers the Conversion Price adjustment mechanism. My definition

²⁹ CARLA YOUNG GARRETT ET AL., *supra* note 19

³⁰ *See id.*

³¹ Although not discussed in this Memorandum, counsel would want to consider and determine how to handle the effects of subsequently issued Options.

³² *Id.*

includes shares of Common Stock deemed to be issued by Halo Tech. Therefore, the antidilution formula is triggered if Halo Tech issues or is deemed to issue Additional Shares of Common Stock. A separate section in the Certificate of Designations establishes the circumstances in which additional shares are deemed to be issued or sold, as is the case with most of the precedent transaction documents I reviewed. Generally, certain Options and Convertible Securities issuances are deemed to be issuances of Additional Common Stock. The separate provision also sets forth how to calculate the aggregate consideration received (typically on a fully diluted basis) and the effect of the expiration of any expired and unexercised Options or Convertible Securities.

Including shares of Common Stock deemed to be issued provides protection against AdVenture's primary concern—later down-round financings that would likely be accomplished through the issuance of another series of preferred stock convertible into Halo Tech Common Stock. Also, my definition benefits AdVenture because it increases the instances in which the antidilution provisions are triggered. Additionally, the more expansive definition maximizes the relative size of the denominator in the weighted-average adjustment provision, further amplifying the potential Conversion Price reduction in the event of a dilutive issuance.

VI. ANALYSIS OF MINOR DRAFTING CHOICES

- I determined to express the antidilution adjustment provision in text rather than as a formula. A few of the precedent transaction documents I encountered expressed the antidilution mechanism as a formula. This boils down to personal choice; I opted to express the formula in text as that is likely viewed as more traditional.
- I included a defined terms section in the Certificate of Designations. The precedent transaction documents I reviewed were mixed between defining terms in the provisions themselves and including a defined terms section. I ultimately determined that it was more convenient to have a defined terms section for easy access when reading through the complexities of the antidilution formula and other sections.³³

³³ “In text” definitions are appropriate to use, but they are most useful in situations where the definitions are going to be used in a few adjacent sentences or paragraphs and they do not create clutter in the text of the provision.

- Empty brackets (“[]”) have been inserted in place of section and subsection references in the provisions in Exhibit A and such references and cross-references will be added after the document is finalized.
- As you requested, Exhibit A is drafted in plain English to the greatest extent possible.

EXHIBIT A**CERTIFICATE OF DESIGNATIONS, RIGHTS, AND PREFERENCES
OF
CONVERTIBLE PREFERRED STOCK, SERIES A,
OF
HALO TECH, INC.**

....

SECTION []. DEFINED TERMS

For the purposes hereof, the following terms shall have the following meanings:

“Additional Shares of Common Stock” means all shares of Common Stock issued or deemed to be issued under Section [] by the Company after the Original Issue Date.

“Common Stock” means the common stock of the Company, par value \$0.01 per share.

“Common Stock Deemed Outstanding” means, at any given time, the sum of (i) the number of shares of Common Stock actually outstanding; and (ii) the number of shares of Common Stock issuable upon exercise of all outstanding Options and conversion or exchange of all outstanding Convertible Securities, in each case regardless of whether the Options or Convertible Securities are actually exercisable or convertible or exchangeable at such time.

“Convertible Securities” means any securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

“Company” means Halo Tech, Inc., a Delaware corporation.

“Options” means any options, warrants, or other rights to subscribe for or purchase Common Stock or Convertible Securities.

“Original Issue Date” means the date on which the first share of Series A Preferred Stock was issued.

....

SECTION []. CONVERSION

....

[] Adjustments to Conversion Price for Diluting Issues. If at any time or from time to time after the Original Issue Date the Company issues or sells, or is deemed to have issued or sold, Additional Shares of Common Stock without consideration or for consideration per share less than the Conversion Price in effect immediately before the issuance or sale (or deemed issuance or sale), then the Conversion Price shall be reduced concurrently with the issuance or sale (or deemed issuance or sale) to a price equal to the quotient obtained by dividing:

(i) the sum of (A) the Conversion Price in effect immediately before the issuance or sale (or deemed issuance or sale) multiplied by the Common Stock Deemed Outstanding immediately before the issuance or sale (or deemed issuance or sale); plus (B) the aggregate consideration, if any, received by the Company from the issuance or sale (or deemed issuance or sale); by

(ii) the sum of (A) the Common Stock Deemed Outstanding immediately before the issuance or sale (or deemed issuance or sale); plus (B) the total number of shares of Additional Common Stock issued or sold (or deemed issued or sold) by the Company from the issuance or sale (or deemed issuance or sale).