

COWEN GROUP, INC.  
Form 424B1  
December 10, 2010

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**Filed Pursuant to Rule 424(b)(1)  
Registration No. 333-170591**

**PROSPECTUS**

**17,085,860 Shares**

**COWEN GROUP, INC.**

**Class A common stock**

This prospectus covers up to 17,085,860 shares of Class A common stock of Cowen Group, Inc. that may be sold, transferred, distributed or otherwise disposed of from time to time by the selling stockholders named herein, or their transferees. Of these shares, 5,642,927 are held by RCG Holdings LLC (our largest shareholder, which holds 37,252,171 shares of our Class A common stock in the aggregate) and are attributable to certain of its members who have requested that RCG Holdings LLC distribute the shares to them, and 178,205 are held by RCG Holdings LLC and are attributable to certain of its members who have requested that RCG Holdings LLC sell the shares on their behalf and distribute the net proceeds to them or distribute the shares to them. Of the remaining 11,264,728 shares covered by this prospectus, 8,550,846 are held by RCG Holdings LLC and are attributable to BA Alpine Holdings, Inc. and 2,713,882 are held directly by HVB Alternative Advisors LLC, an affiliate of BA Alpine Holdings, Inc. This prospectus covers both the distribution of 8,550,846 shares of our Class A common stock from RCG Holdings LLC to BA Alpine Holdings, Inc. (or, at the sole discretion of BA Alpine Holdings, Inc., the sale of such shares by RCG Holdings LLC on behalf of BA Alpine Holdings, Inc.) and the resale by BA Alpine Holdings, Inc. of such shares. We will not receive any of the proceeds from any of such sales or distributions. The selling stockholders will bear all sales commissions and similar expenses.

The selling stockholders, which may include BA Alpine Holdings, Inc. as a transferee of RCG Holdings LLC, may, from time to time, sell, transfer or otherwise dispose of any or all of their shares of common stock on any stock exchange, market or trading facility on which the shares are traded or in private transactions. These dispositions may be at fixed prices, at prevailing market prices at the time of sale, at prices related to the prevailing market price, at varying prices determined at the time of sale, or at negotiated prices.

Our Class A common stock is presently traded on the NASDAQ Global Market under the symbol "COWN". On December 9, 2010, the last reported sale price of our Class A common stock was \$4.75 per share.

**An investment in our Class A common stock involves a high degree of risk. See "Risk Factors" beginning on page 5 of this prospectus to read about factors you should consider before buying shares of our Class A common stock.**

**Neither the Securities and Exchange Commission nor any state securities commission or other regulatory body has approved or disapproved of these securities or passed upon the accuracy or adequacy of this prospectus. Any representation to the contrary is a criminal offense.**

The date of this prospectus is December 10, 2010

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**ABOUT THIS PROSPECTUS**

This prospectus is part of a registration statement we filed with the Securities and Exchange Commission, or the SEC, pursuant to which the selling stockholders may sell, transfer, distribute or otherwise dispose of up to 17,085,860 shares of our Class A common stock from time to time. You should read both this prospectus and any prospectus supplement together with the additional information described in the sections titled "Where You Can Find More Information" and "Incorporation By Reference" below.

You should rely only on the information incorporated by reference or provided in this prospectus or any prospectus supplement. Neither we nor the selling stockholders have authorized anyone to provide you with different information. If anyone provides you with different or inconsistent information, you should not rely on it. The selling stockholders will not make an offer of these securities in any jurisdiction where it is unlawful. You should assume that the information in this prospectus or any prospectus supplement, as well as the information we have previously filed with the SEC and incorporated by reference in this prospectus, is accurate only as of the date of the documents containing the information. Our business, financial condition, results of operations and prospects may have subsequently changed.

**BASIS OF PRESENTATION**

In this prospectus, references to "the Company," "Cowen Group," "we," "our" and "us" are to Cowen Group, Inc. and, except as the context otherwise requires, its consolidated subsidiaries. In this prospectus, references to "Ramius" refer to Ramius LLC, a wholly owned subsidiary of the Company, references to "Cowen Holdings" refer to Cowen Holdings, Inc., a wholly owned subsidiary of the Company, and references to "RCG" refer to RCG Holdings LLC, an entity which holds approximately 49% of our Class A common stock as of the date of this prospectus, in each case unless the context indicates otherwise.

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**CAUTIONARY STATEMENT REGARDING FORWARD-LOOKING STATEMENTS**

This prospectus contains or incorporates by reference a number of forward-looking statements, including statements about the financial condition, results of operations, earnings outlook and prospects of the Company. You can find many of these statements by looking for words such as "plan," "believe," "expect," "intend," "seek," "anticipate," "estimate," "project," "potential," "possible," "would," "could," "should" or other similar expressions.

The forward-looking statements involve particular risks and uncertainties. The ability of the Company to predict results or the actual effects of its plans and strategies is subject to inherent uncertainty. Factors that may cause actual results or earnings to differ materially from such forward-looking statements include those set forth in the section titled "Risk Factors", as well as, among others, the following:

Difficult market conditions, market disruptions and volatility have adversely affected and may in the future continue to adversely affect the Company's businesses, results of operations and financial condition; and

The Company's alternative investment management and investment banking businesses have incurred losses in recent periods and may incur losses in the future.

Our forward-looking statements may include or relate to the following:

the extent and duration of continued economic and market disruptions and governmental regulatory proposals to address these disruptions;

our plans to continue to grow our business through organic growth and integration of previous and any future acquisitions;

the risk of reduction in revenue from the elimination of existing and potential customers due to consolidation in the banking, retail and financial services industries and the impact of such consolidation on the existing respective customer bases of Ramius and Cowen Holdings;

actions that may be taken by our competitors, customers and suppliers that may cause harm to the Company's businesses; and

decisions to restructure, divest or eliminate business units or otherwise change the Company's business mix.

Because these forward-looking statements are subject to assumptions and uncertainties, actual results may differ materially from those expressed or implied by these forward-looking statements. You are cautioned not to place undue reliance on these statements, which speak only as of the date of this prospectus or such other date that may be specified herein. You should not consider any list of such factors to be an exhaustive statement of all of the risks, uncertainties, or potentially inaccurate assumptions that could cause our current expectations or beliefs to change.

All subsequent written and oral forward-looking statements concerning the offering or other matters addressed in this prospectus and attributable to the Company or any person acting on its behalf are expressly qualified in their entirety by the cautionary statements contained or referred to in this prospectus. Except to the extent required by applicable law or regulation, the Company does not undertake any obligation to update these forward-looking statements to reflect events or circumstances after the date of this prospectus or to reflect the occurrence of unanticipated events.

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**PROSPECTUS SUMMARY**

*This summary highlights information contained elsewhere in this prospectus. This summary may not contain all of the information that may be important to you and is qualified in its entirety by, and should be read in conjunction with, the more detailed information contained elsewhere in this prospectus and our financial statements and the related notes appearing elsewhere in this prospectus before you decide to invest in our Class A common stock. This prospectus contains forward-looking statements, which involve risks and uncertainties. Our actual results could differ materially from those anticipated in such forward-looking statements as a result of certain factors, including those discussed in "Risk Factors" and other sections of this prospectus.*

**Our Business**

Cowen Group is a diversified financial services firm providing alternative investment management, investment banking, research, and sales and trading services through its business units, Ramius and Cowen and Company. Its alternative investment management products include hedge funds, fund of funds, real estate funds, healthcare royalty funds, cash management and commodity trading funds, offered primarily under the Ramius name. Cowen and Company offers industry focused investment banking for growth-oriented companies, including advisory and global capital markets origination and execution, domain knowledge-driven research and a sales and trading platform for institutional investors.

On November 2, 2009, the Company consummated certain transactions (which we refer to collectively as the Transactions), including: (1) the merger with Cowen Holdings, pursuant to which each outstanding share of common stock of Cowen Holdings was converted into one share of our Class A common stock and (2) the transfer by RCG of substantially all of its assets and liabilities to Ramius in exchange for the Company's issuance to RCG of 37,536,826 shares of our Class A common stock. In addition, the Company entered into a Registration Rights Agreement (which we hereinafter refer to as the Registration Rights Agreement) pursuant to which the Company agreed to register any shares of our Class A common stock held, either directly or through RCG, by RCG, BA Alpine Holdings, Inc., Bayerische Hypo- Und Vereinsbank AG (which we hereinafter refer to as HVB AG) or HVB Alternative Advisors LLC (an indirect wholly-owned subsidiary of HVB AG, which we hereinafter refer to as HVB).

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The diagram below shows the structure of the Company:

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- (1) Members of our senior management control the managing member of RCG. RCG members also include BA Alpine Holdings, Inc., an affiliate of HVB, and certain of our directors, officers and other employees.
  - (2) This prospectus covers up to 5,642,927 shares of our Class A common stock held by RCG and attributable to certain of its members who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009, and who have requested that RCG distribute the shares to them, and 178,205 shares of our Class A common stock held by RCG and attributable to certain of its members who may withdraw one-third of their capital in RCG in cash as of the end of each calendar year, and who have requested that RCG sell the shares on or prior to December 31, 2010 on their behalf and distribute the net proceeds to them or distribute the shares to them. Of the remaining 11,264,728 shares covered by this prospectus, 8,550,846 are held by RCG and are attributable to BA Alpine Holdings, Inc. This prospectus covers both the distribution of 8,550,846 shares of our Class A common stock from RCG to BA Alpine Holdings, Inc. (or, at the sole discretion of BA Alpine Holdings, Inc., the sale of such shares by RCG on behalf of BA Alpine Holdings, Inc.) and the resale by BA Alpine Holdings, Inc. of such shares.
  - (3) HVB holds 2,713,882 shares of our Class A common stock, all of which are covered by this prospectus.

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**Principal Executive Offices**

Our principal executive offices are located at 599 Lexington Avenue, New York, New York 10022, and our telephone number is (212) 845-7900. Our website address is <http://www.cowen.com>. Our website and the information contained on, or that can be accessed through, the website are not part of this prospectus.

**Shares Covered by this Prospectus**

This prospectus covers up to 5,642,927 shares of our Class A common stock held by RCG and attributable to certain of its members who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009, and who have requested that RCG distribute the shares to them, and 178,205 shares of our Class A common stock held by RCG and attributable to certain of its members who may withdraw one-third of their capital in RCG in cash as of the end of each calendar year, and who have requested that RCG sell the shares on or prior to December 31, 2010 on their behalf and distribute the net proceeds to them or distribute the shares to them. An additional 11,264,728 shares are covered by this prospectus, 8,550,846 of which are held by RCG and are attributable to BA Alpine Holdings, Inc. and 2,713,882 of which are held directly by HVB, an affiliate of BA Alpine Holdings, Inc. This prospectus covers both the distribution of 8,550,846 shares of our Class A common stock from RCG to BA Alpine Holdings, Inc. (or, at the sole discretion of BA Alpine Holdings, Inc., the sale of such shares by RCG on behalf of BA Alpine Holdings, Inc.) and the resale by BA Alpine Holdings, Inc. of such shares. We will not receive any of the proceeds from any of such sales or distributions. The selling stockholders will bear all sales commissions and similar expenses.

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**RISK FACTORS**

*An investment in our Class A common stock involves a high degree of risk. You should carefully consider the following information, together with the other information in this prospectus, prior to making a decision to purchase shares of our Class A common stock. In addition to the following risk factors, you should carefully consider the risks, uncertainties and assumptions discussed in Item 1A. of our annual report on Form 10-K for the year ended December 31, 2009, and in other documents that we subsequently file with the SEC that update, supplement or supersede such information, which documents are incorporated by reference into this prospectus supplement. See "Where You Can Find More Information." This prospectus contains, in addition to historical information, forward-looking statements that involve risks and uncertainties. Our actual results could differ materially from those discussed herein. If any of the following risks occur or if any additional risks and uncertainties not presently known to us or not currently believed to be material occur, our business, results of operations, financial condition or prospects could be materially adversely affected.*

**Risks Related to the Offering**

*The ability of RCG, HVB, BA Alpine Holdings, Inc. and some of the Company's employees to sell Class A common stock could cause the stock price to decrease.*

The sale of a substantial number of shares of Class A common stock by RCG, HVB or the members of RCG who receive distributions of our Class A common stock from RCG within a short period of time, or the possibility of such sales, may adversely affect the price of the Company's Class A common stock and impede the Company's ability to raise capital through the issuance of equity securities.

Approximately 18,159,969 shares of our Class A common stock held by RCG underlie the capital in RCG of those members of RCG who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009. In connection with the withdrawal of capital by certain of these members of RCG, this prospectus covers 5,642,927 shares of our Class A common stock attributable to such members. RCG will distribute these shares to the members as soon as practicable following the date of this prospectus.

Approximately 384,800 shares of our Class A common stock held by RCG underlie the capital in RCG of those members of RCG who may withdraw one-third of their capital in RCG in cash as of the end of each calendar year. In connection with the withdrawal of capital by certain of these non-affiliate members of RCG as of December 31, 2010, this prospectus covers and RCG intends to sell on or prior to December 31, 2010, 178,205 shares of our Class A common stock attributable to these members or distribute the shares to them. If RCG sells such shares, RCG will use the net proceeds of such sales to satisfy the withdrawal requests of these members in cash.

Approximately 8,550,846 shares of our Class A common stock held by RCG are currently allocated to BA Alpine Holdings, Inc. in respect of its ownership in RCG, all of which are covered by this prospectus. BA Alpine Holdings, Inc. may withdraw its capital from RCG at anytime. In connection with a withdrawal of capital from RCG by BA Alpine Holdings, Inc., at the option of BA Alpine Holdings, Inc., RCG will either (1) distribute to BA Alpine Holdings, Inc. the shares of our common stock underlying the withdrawn capital or (2) sell the shares of our common stock underlying the withdrawn capital and distribute the proceeds to BA Alpine Holdings, Inc. in cash. In the event that, in connection with a withdrawal of its capital from RCG, RCG distributes shares of our Class A common stock to BA Alpine Holdings, Inc., BA Alpine Holdings, Inc. may request that RCG, in order to comply with certain regulatory requirements applicable to BA Alpine Holdings, Inc., first convert the shares of our Class A common stock that are attributable to BA Alpine Holdings, Inc. into shares of our Class B common stock. Our Class B common stock is generally identical to our Class A common stock, except that it is non-voting, and is convertible into our Class A common stock, on a one-for-one

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basis, at any time at the option of the holder. This prospectus also covers the resale by BA Alpine Holdings, Inc. of any shares of our Class A common stock it receives (i) in a distribution from RCG or (ii) upon conversion of any shares of our Class B common stock it receives in a distribution from RCG.

***The Company does not intend to pay dividends on shares of its Class A common stock for the foreseeable future.***

The Company intends to use earnings in the future to fund and develop the Company's business and does not anticipate paying any cash dividends on Class A common stock. Your potential gain from your investment in Class A common stock, therefore, will be solely the capital appreciation, if any, of Class A common stock.

***Under the amended and restated certificate of incorporation of the Company, the Company is able to issue more shares of common stock than are currently outstanding. As a result, such future issuances of common stock could have a dilutive effect on the earnings per share and voting power of the Company stockholders.***

The amended and restated certificate of incorporation of the Company authorizes a greater number of shares of common stock than are currently outstanding. If the board of directors of the Company elects to issue additional shares of common stock in the future, whether in public offerings, in connection with mergers and acquisitions or otherwise, such additional issuances could dilute the earnings per share and voting power of the Company stockholders.

***Certain provisions of the Company's amended and restated certificate of incorporation, amended and restated bylaws and Delaware law may have the effect of delaying or preventing an acquisition by a third party.***

The Company's amended and restated certificate of incorporation and amended and restated bylaws contain several provisions that may make it more difficult for a third party to acquire control of the Company, even if such acquisition would be financially beneficial to the Company's stockholders. These provisions also may delay, prevent or deter a merger, acquisition, tender offer, proxy contest or other transaction that might otherwise result in the Company's stockholders receiving a premium over the then-current trading price of Class A common stock. For example, the Company's amended and restated certificate of incorporation authorizes its board of directors to issue up to 10,000,000 shares of "blank check" preferred stock. Without stockholder approval, the board of directors has the authority to attach special rights, including voting and dividend rights, to this preferred stock. With these rights, preferred stockholders could make it more difficult for a third party to acquire the Company. In addition, the Company's amended and restated bylaws provide for an advance notice procedure with regard to the nomination of candidates for election as directors and with regard to business to be brought before a meeting of stockholders. The Company is also subject to the anti-takeover provisions of Section 203 of the Delaware General Corporation Law, or DGCL. Under these provisions, if anyone becomes an "interested stockholder," the Company may not enter into a "business combination" with that person for three years without special approval, which could discourage a third party from making a takeover offer and could delay or prevent a change of control. For the purposes of Section 203, "interested stockholder" means, generally, someone owning 15% or more of the Company's outstanding voting stock or an affiliate of the Company that owned 15% or more of our outstanding voting stock during the past three years, subject to certain exceptions as described in Section 203.



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**USE OF PROCEEDS**

Any proceeds from the sale, transfer, distribution or other disposition of the shares of common stock covered hereby will be solely for the account of the selling stockholders. We will not receive any proceeds from the sale, transfer, distribution or other disposition of the shares by the selling stockholders.

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**SELLING STOCKHOLDERS**

This prospectus covers up to 17,085,860 shares of Class A common stock of Cowen Group, Inc. that may be sold, transferred, distributed or otherwise disposed of from time to time by the selling stockholders named herein and their successors and assigns, including those selling stockholders who receive such shares after the date of this prospectus from a selling stockholder as a gift, pledge, distribution or other transfer. Of these shares, 5,642,927 are held by RCG (our largest shareholder, which holds 37,252,171 shares of our Class A common stock in the aggregate) and are attributable to certain of its members who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009, and who have requested that RCG distribute the shares to them, and 178,205 shares of our Class A common stock held by RCG and attributable to certain of its members who may withdraw one-third of their capital in RCG in cash as of the end of each calendar year, and who have requested that RCG sell the shares on or prior to December 31, 2010 on their behalf and distribute the net proceeds to them or distribute the shares to them. Of the remaining 11,264,728 shares covered by this prospectus, 8,550,846 are held by RCG and are attributable to BA Alpine Holdings, Inc. and 2,713,882 are held directly by HVB, an affiliate of BA Alpine Holdings, Inc. This prospectus covers both the distribution of 8,550,846 shares of our Class A common stock from RCG to BA Alpine Holdings, Inc. (or, at the sole discretion of BA Alpine Holdings, Inc., the sale of such shares by RCG on behalf of BA Alpine Holdings, Inc.) and the resale by BA Alpine Holdings, Inc. of such shares. We will not receive any of the proceeds from any of such sales or distributions. The selling stockholders will bear all sales commissions and similar expenses.

Approximately 18,159,969 shares of our Class A common stock held by RCG underlie the capital in RCG of those members of RCG who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009. In connection with the withdrawal of capital by certain of these members of RCG, this prospectus covers 5,642,927 shares of our Class A common stock attributable to these members. RCG will distribute these shares to the members as soon as practicable following the date of this prospectus.

Approximately 384,800 shares of our Class A common stock held by RCG underlie the capital in RCG of those members of RCG who may withdraw one-third of their capital in RCG in cash as of the end of each calendar year. In connection with the withdrawal of capital by certain of these non-affiliate members of RCG as of December 31, 2010, this prospectus covers and RCG intends to sell on or prior to December 31, 2010, 178,205 shares of our Class A common stock attributable to these members or distribute the shares to them. If RCG sells such shares, RCG will use the net proceeds of such sales to satisfy the withdrawal requests of these members in cash.

Approximately 8,550,846 shares of our Class A common stock held by RCG are currently allocated to BA Alpine Holdings, Inc. in respect of its ownership in RCG, all of which are covered by this prospectus. BA Alpine Holdings, Inc. may withdraw its capital from RCG at anytime. In connection with a withdrawal of capital from RCG by BA Alpine Holdings, Inc., at the option of BA Alpine Holdings, Inc., RCG will either (1) distribute to BA Alpine Holdings, Inc. the shares of our common stock underlying the withdrawn capital or (2) sell the shares of our common stock underlying the withdrawn capital and distribute the proceeds to BA Alpine Holdings, Inc. in cash. In the event that, in connection with a withdrawal of its capital from RCG, RCG distributes shares of our Class A common stock to BA Alpine Holdings, Inc., BA Alpine Holdings, Inc. may request that RCG, in order to comply with certain regulatory requirements applicable to BA Alpine Holdings, Inc., first convert the shares of our Class A common stock that are attributable to BA Alpine Holdings, Inc. into shares of our Class B common stock. Our Class B common stock is generally identical to our Class A common stock, except that it is non-voting, and is convertible into our Class A common stock, on a one-for-one basis, at any time at the option of the holder. This prospectus also covers the resale by BA Alpine

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Holdings, Inc. of any shares of our Class A common stock it receives (i) in a distribution from RCG or (ii) upon conversion of any shares of our Class B common stock it receives in a distribution from RCG.

The table below presents certain information as of December 1, 2010 regarding the beneficial ownership of our common stock by the selling stockholders.

Selling Stockholder Name	Shares owned Prior to any Offering under this Prospectus		Maximum Number of Shares Being Sold Under this Prospectus	Shares Owned After the Completion of the Offering(s) under this Prospectus(1)	
	Number	Percentage(2)		Number	Percentage(2)
RCG Holdings LLC	37,252,171(3)	49.37%	14,371,978(3)	22,880,193	30.32%
UniCredit S.p.A.	11,264,728(4)	14.93%	11,264,728(4)	0	0.0%

- (1) Assumes that each selling stockholder sells, transfers, distributes or otherwise disposes of all the shares that it holds or are attributable to it covered hereby.
- (2) The number and percentage of shares beneficially owned is determined in accordance with Rule 13d-3 of the Securities Exchange Act of 1934, as amended, and the information is not necessarily indicative of beneficial ownership for any other purpose. Under such rule, beneficial ownership includes any shares as to which each selling stockholder has sole or shared voting power or investment power and also any shares that each selling stockholder has the right to acquire within 60 days after December 1, 2010 through the exercise of any stock options or other rights. To our knowledge, the selling stockholders have sole voting and investment power with respect to the shares shown as beneficially owned. The percentages of beneficial ownership are based on 75,452,527 shares of our common stock outstanding as of December 1, 2010 (assuming no exercise of outstanding stock options after that date). We do not know when or in what amounts the selling stockholders may sell, transfer, distribute or otherwise dispose of the shares covered hereby. The selling stockholders might not sell, transfer, distribute or otherwise dispose of any or all of the shares covered hereby. Because each selling stockholder may sell, transfer, distribute or otherwise dispose of none, some or all of the shares covered by this prospectus, we cannot estimate the number of the shares that will be held by each selling stockholder after completion of any offering. For purposes of this table only, we have assumed that, after completion of the offering, none of the shares covered by this prospectus will be held by any of the selling stockholders.
- (3) Includes those shares held by RCG Holdings LLC attributable to BA Alpine Holdings, Inc. This prospectus covers up to 5,642,927 shares of our Class A common stock held by RCG Holdings LLC and attributable to certain of its members who may withdraw one-third of their capital in RCG in shares of our Class A common stock as of each of the first, second and third anniversaries of the closing of the Transactions, which were consummated on November 2, 2009, and who have requested that RCG Holdings LLC distribute the shares to them, and 178,205 shares of our Class A common stock held by RCG Holdings LLC and attributable to certain of its members who may withdraw one-third of their capital in RCG Holdings LLC in cash as of the end of each calendar year, and who have requested that RCG Holdings LLC sell the shares on or prior to December 31, 2010 on their behalf and distribute the net proceeds to them or distribute the shares to them. Of the remaining 11,264,728 shares covered by this prospectus, 8,550,846 are held by RCG and are attributable to BA Alpine Holdings, Inc.
- (4) Represents those 8,550,846 shares of our Class A common stock held by RCG Holdings LLC attributable to BA Alpine Holdings, Inc., a subsidiary of UniCredit S.p.A., and those 2,713,882 shares of our Class A common stock held by HVB Alternative Advisors LLC, a subsidiary of UniCredit S.p.A. This prospectus covers (i) both the distribution of 8,550,846 shares of our Class A common stock from RCG Holdings LLC to BA Alpine Holdings, Inc. (or, at the sole discretion of BA Alpine Holdings, Inc., the sale of such shares by RCG Holdings LLC on behalf of

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BA Alpine Holdings, Inc.) and the resale by BA Alpine Holdings, Inc. of such shares, and (ii) all of the shares of our Class A common stock held by HVB Alternative Advisors LLC.

**Transactions with the Selling Stockholders**

RCG is our largest shareholder and holds 37,252,171 shares of our Class A common stock in the aggregate. Under RCG's operating agreement, the members of RCG (with the exception of BA Alpine Holdings, Inc.) generally will not be entitled to receive any distributions of those shares of our Class A common stock or other capital attributable to them, and RCG's managing member has agreed in RCG's operating agreement not to make any distributions of shares of our Class A common stock or other capital to these members for specified periods of time. In addition, RCG is party to the Registration Rights Agreement.

BA Alpine Holdings, Inc., HVB AG and HVB (each of which is a subsidiary of UniCredit S.p.A. and which we hereinafter refer to collectively as the HVB Parties) are also parties to the Registration Rights Agreement. In addition, HVB and Alpine Cayman Islands Limited, an affiliate of BA Alpine Holdings, Inc., are party to certain investment agreements with affiliates of the Company, pursuant to which HVB and Alpine Cayman Islands Limited have made investments in certain RCG funds, and the Company is party to a secured revolving credit agreement with HVB AG (as administrative agent and lender), that provides for a secured revolving loan facility of up to \$25 million, including a \$7 million letter of credit sub-facility, with a maturity date of September 29, 2011.

In addition, pursuant to certain agreements entered into by the Company in connection with the Transactions, the Company has agreed to nominate a designee of BA Alpine Holdings, Inc. as part of the slate of directors proposed by the Company in connection with any vote to elect the board of directors of the Company, so long as BA Alpine Holdings, Inc. and certain of its affiliates own more than 4.9% of our outstanding common stock (including shares held by RCG that are attributable to BA Alpine Holdings, Inc.) at any point during any consecutive ninety-day period, and, unless and until BA Alpine Holdings, Inc. and its affiliates beneficially own, in the aggregate, less than 10% of our common stock (including shares held by RCG that are attributable to BA Alpine Holdings, Inc.) throughout any consecutive ninety-day period following the closing of the Transactions, which occurred on November 2, 2009, the Company is obligated to use its reasonable best efforts to cause the director designated by BA Alpine Holdings, Inc. to be a member of each committee of the Company's board of directors.

Following the closing of the Transactions on November 2, 2009 and unless and until BA Alpine Holdings, Inc. and its affiliates no longer beneficially own any shares of our common stock, RCG has agreed with BA Alpine Holdings, Inc. (1) not to vote the shares of our Class A common stock held by RCG in favor of an amendment to the terms of our Class B common stock without the prior consent of BA Alpine Holdings, Inc. and (2) to vote the shares of our Class A common stock held by RCG as directed by BA Alpine Holdings, Inc. with respect to an amendment to the terms of our certificate of incorporation or by-laws which is intended to discriminate against BA Alpine Holdings, Inc. relative to the other members of RCG.

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**PLAN OF DISTRIBUTION**

We are registering 17,085,860 shares of Class A common stock on behalf of the selling stockholders. The selling stockholders, which as used herein includes donees, pledgees, transferees or other successors-in-interest selling shares of common stock received after the date of this prospectus from a selling stockholder as a gift, pledge, limited partnership distribution or other transfer, may, from time to time, sell, transfer or otherwise dispose of any or all of their shares of common stock on any stock exchange, market or trading facility on which the shares are traded or in private transactions. These dispositions may be at fixed prices, at prevailing market prices at the time of sale, at prices related to the prevailing market price, at varying prices determined at the time of sale, or at negotiated prices.

Of these shares, 5,642,927 are held by RCG and are attributable to certain of its members who have requested that RCG distribute the shares to them so that they may hold them directly and 178,205 are held by RCG and are attributable to certain of its members who have requested that RCG sell the shares on their behalf and distribute the net proceeds to them or distribute the shares to them. Of the remaining shares being registered hereby, 8,550,846 are held by RCG and are attributable to BA Alpine Holdings, Inc. and 2,713,882 are held directly by HVB, an affiliate of BA Alpine Holdings, Inc.

The selling stockholders may use any one or more of the following methods when disposing of shares:

ordinary brokerage transactions and transactions in which the broker-dealer solicits purchasers;

block trades in which the broker-dealer will attempt to sell the shares as agent, but may position and resell a portion of the block as principal to facilitate the transaction;

purchases by a broker-dealer as principal and resale by the broker-dealer for its account;

an exchange distribution in accordance with the rules of the applicable exchange;

privately negotiated transactions;

short sales effected after the date the registration statement of which this Prospectus is a part is declared effective by the SEC;

through the writing or settlement of options or other hedging transactions, whether through an options exchange or otherwise;

broker-dealers may agree with the selling stockholders to sell a specified number of such shares at a stipulated price per share; and

a combination of any such methods of sale.

The selling stockholders may, from time to time, pledge or grant a security interest in some or all of the shares of common stock owned by them and, if they default in the performance of their secured obligations, the pledgees or secured parties may offer and sell the shares of common stock, from time to time, under this prospectus, or under an amendment to this prospectus under Rule 424(b)(3) or other applicable provision of the Securities Act amending the list of selling stockholders to include the pledgee, transferee or other successors in interest as selling stockholders under this prospectus. The selling stockholders also may transfer the shares of common stock in other circumstances, in which case the transferees, pledgees or other successors in interest will be the selling beneficial owners for purposes of this prospectus.

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In connection with the sale of our common stock, the selling stockholders may enter into hedging transactions with broker-dealers or other financial institutions, which may in turn engage in short sales of the common stock in the course of hedging the positions they assume. The selling stockholders may also sell shares of our common stock short and deliver these securities to close out their short

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positions, or loan or pledge the common stock to broker-dealers that in turn may sell these securities. The selling stockholders may also enter into option or other transactions with broker-dealers or other financial institutions or the creation of one or more derivative securities which require the delivery to such broker-dealer or other financial institution of shares offered by this prospectus, which shares such broker-dealer or other financial institution may resell pursuant to this prospectus (as supplemented or amended to reflect such transaction).

The aggregate proceeds to the selling stockholders from the sale of the common stock offered by them will be the purchase price of the common stock less discounts or commissions, if any. Each of the selling stockholders reserves the right to accept and, together with their agents from time to time, to reject, in whole or in part, any proposed purchase of common stock to be made directly or through agents. We will not receive any of the proceeds from this offering.

The selling stockholders also may resell all or a portion of the shares in open market transactions in reliance upon Rule 144 under the Securities Act of 1933, provided that they meet the criteria and conform to the requirements of that rule.

The selling stockholders and any underwriters, broker-dealers or agents that participate in the sale of the common stock may be "underwriters" within the meaning of Section 2(11) of the Securities Act. Any discounts, commissions, concessions or profit they earn on any resale of the shares may be underwriting discounts and commissions under the Securities Act. Selling stockholders who are "underwriters" within the meaning of Section 2(11) of the Securities Act will be subject to the prospectus delivery requirements of the Securities Act.

To the extent required, the shares of our common stock to be sold, the names of the selling stockholders, the respective purchase prices and public offering prices, the names of any agents, dealer or underwriter, any applicable commissions or discounts with respect to a particular offer will be set forth in an accompanying prospectus supplement or, if appropriate, a post-effective amendment to the registration statement that includes this prospectus.

In order to comply with the securities laws of some states, if applicable, the common stock may be sold in these jurisdictions only through registered or licensed brokers or dealers. In addition, in some states the common stock may not be sold unless it has been registered or qualified for sale or an exemption from registration or qualification requirements is available and is complied with.

We have advised the selling stockholders that the anti-manipulation rules of Regulation M under the Exchange Act may apply to sales of shares in the market and to the activities of the selling stockholders and their affiliates. In addition, to the extent applicable we will make copies of this prospectus (as it may be supplemented or amended from time to time) available to the selling stockholders for the purpose of satisfying the prospectus delivery requirements of the Securities Act. The selling stockholders may indemnify any broker-dealer that participates in transactions involving the sale of the shares against certain liabilities, including liabilities arising under the Securities Act.

We have agreed to indemnify certain of the selling stockholders against liabilities, including liabilities of any violation by the Company of the Securities Act and the Exchange Act applicable to the Company and relating to the registration of the shares offered by this prospectus.

We have agreed with the selling stockholders to keep the registration statement of which this prospectus constitutes a part effective until the earlier of such time as all of the shares covered by this prospectus have been disposed of pursuant to and in accordance with the registration statement, provided that Rule 415 of the Securities Act, or any successor rule under the Securities Act permits an offering on a continuous or delayed basis.

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**LEGAL MATTERS**

The validity of the issuance of the common stock offered by this prospectus and certain other legal matters are being passed upon for us by our counsel, Willkie Farr & Gallagher LLP, New York, New York.

**EXPERTS**

The consolidated financial statements incorporated in this Prospectus by reference to the Annual Report on Form 10-K for the year ended December 31, 2009 have been so incorporated in reliance on the report of PricewaterhouseCoopers LLP, an independent registered public accounting firm, given on the authority of said firm as experts in auditing and accounting.

**WHERE YOU CAN FIND MORE INFORMATION**

We file annual, quarterly and current reports, proxy statements and other information with the SEC. We have also filed with the SEC a registration statement on Form S-3 to register the common stock being offered pursuant to this prospectus. This prospectus, which forms part of the registration statement, does not contain all of the information included in the registration statement. For further information about us or the selling stockholders and the shares of common stock offered pursuant to this prospectus, you should refer to the registration statement and its exhibits.

Our annual reports on Form 10-K, along with all other reports and amendments filed with or furnished to the SEC are publicly available free of charge on the investor relations section of our website as soon as reasonably practicable after we file such materials with, or furnish them to, the SEC. Our website is located at <http://www.responsegenetics.com>. The information on our website is not part of this or any other report that we file with, or furnish to, the SEC. The SEC maintains an Internet site (<http://www.sec.gov>) that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC. You may also read and copy any documents we file with the SEC at its Public Reference Room at 100 F Street, N.E., Room 1580, Washington D.C. 20549. You may obtain information on the operations of the Public Reference Room by calling the SEC at 1-800-SEC-0330.

**INCORPORATION BY REFERENCE**

We file annual, quarterly and current reports, proxy statements and other information with the SEC. The SEC allows us to incorporate by reference the information we file with it, which means that we can disclose important information to you by referring to those documents. The information incorporated by reference is an important part of this prospectus. Any statement contained in a document which is incorporated by reference in this prospectus is automatically updated and superseded if information contained in this prospectus, or information that we later file with the SEC, modifies or replaces this information. All documents we file pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, after the initial filing of this registration statement and prior to effectiveness of this registration statement and after the date of this prospectus and until we sell all the securities shall be deemed to be incorporated by reference into this prospectus. We incorporate by reference the following previously filed documents:

- (1) Our Current Reports on Form 8-K (in all cases other than information furnished rather than filed pursuant to any Form 8-K) filed with the SEC on February 11, 2010, March 2, 2010, May 3, 2010, May 12, 2010, June 10, 2010, July 22, 2010, August 13, 2010, August 24, 2010, October 28, 2010 and November 10, 2010;
- (2) Our Quarterly Report on Form 10-Q for the fiscal quarters ended March 31, 2010, June 30, 2010 and September 30, 2010;



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- (3) Our Annual Report on Form 10-K for the year ended December 31, 2009;
- (4) Our Definitive Proxy Statement on Schedule 14A, filed with the SEC on April 30, 2010; and
- (5) The description of our common stock set forth in our registration statement filed under the Exchange Act on Form S-1 (File No. 333-163372) as filed with the SEC on November 25, 2010, as amended, including any amendment or report for the purpose of updating such description.

To receive a free copy of any of the documents incorporated by reference in this Prospectus (other than exhibits) call or write us at the following address Cowen Group, Inc., 599 Lexington Avenue, New York, NY 10022, (212) 845-7900.

**You should rely only on the information incorporated by reference or provided in this prospectus. Neither we nor the selling stockholders have authorized anyone else to provide you with different information. The selling stockholders are not making an offer of these securities in any state where the offer is not permitted. You should not assume that the information in this prospectus is accurate as of any date other than the date on the front of those documents.**

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FOR  AGAINST  ABSTAIN

b. one-for-thirty

FOR  AGAINST  ABSTAIN

c. one-for-forty

FOR  AGAINST  ABSTAIN

Approving our Amended and Restated Certificates of Incorporation will increase the percentage of authorized but unissued shares of common stock in relation to our outstanding shares of common stock. Please see Proposal 2 of the proxy statement.

3. To ratify our Certificate of Designation of Series B Preferred Stock.

FOR  AGAINST  ABSTAIN

4. To ratify the appointment of PricewaterhouseCoopers LLP as the Company's independent auditors for the fiscal year ending June 30, 2003:

FOR  AGAINST  ABSTAIN

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5. To transact such other business as may properly come before the meeting or any adjournment thereof.

Either of such Proxies or substitutes shall have and may exercise all of the powers of said Proxies hereunder.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name (Please Print)

\_\_\_\_\_  
Signature

Dated: \_\_\_\_\_

\_\_\_\_\_  
Name (Please Print)

\_\_\_\_\_  
Signature

This Proxy should be marked, dated and signed by the stockholder or stockholders exactly as the stockholder's or stockholders' name appear hereon, and returned promptly in the enclosed envelope. Person's signing in a fiduciary or representative capacity should so indicate. If shares are held by joint tenants, as community property or otherwise by more than one person, all should sign.

**This Proxy will be voted as directed or, if no direction is indicated, will be voted for each of the proposals listed above, and as said Proxies deem advisable on such other matters as may properly come before the meeting.**

**APPENDIX B**

**AUDIT COMMITTEE CHARTER**

**CHARTER FOR THE AUDIT COMMITTEE**

**PURPOSE:**

The Audit Committee will make such examinations as are necessary to monitor the corporate financial reporting and the internal and external audits of Evolve Software, Inc. and its subsidiaries (the "COMPANY"), to provide to the Board of Directors the results of its examinations and recommendations derived therefrom, to outline to the Board improvements made, or to be made, in internal accounting controls, to nominate independent auditors, and to provide to the Board such additional information and materials as it may deem necessary to make the Board aware of significant financial matters that require Board attention.

In addition, the Audit Committee will undertake those specific duties and responsibilities listed below and such other duties as the Board of Directors from time to time prescribe.

**MEMBERSHIP:**

The Audit Committee will consist of at least two (2) members of the Board, all of whom shall be independent directors, in accordance with the rules of the Nasdaq National Market. The members of the Audit Committee will be appointed by and will serve at the discretion of the Board of Directors.

**RESPONSIBILITIES:**

The responsibilities of the Audit Committee shall include:

1. Reviewing on a continuing basis the adequacy of the Company's system of internal controls.
  2. Reviewing on a continuing basis the activities, organizational structure and qualifications of the Company's internal audit function.
  3. Approving the independent auditors' proposed audit scope and approach.
  4. Conducting a post-audit review of the financial statements and audit findings, including any significant suggestions for improvements provided to management by the independent auditors.
  5. Reviewing the performance of the independent auditors.
  6. Recommending the appointment of independent auditors to the Board of Directors.
  7. Reviewing fee arrangements with the independent auditors.
  8. Reviewing before release the audited financial statements and Management's Discussion and Analysis in the Company's annual report on Form 10-K;
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9. Reviewing before release the unaudited quarterly operating results in the Company's quarterly earnings release;
  10. Overseeing compliance with SEC requirements for disclosure of auditor's services and audit committee members and activities;
  11. Reviewing management's monitoring of compliance with the Company's Standards of Business Conduct and with the Foreign Corrupt Practices Act;

12. Reviewing, in conjunction with counsel, any legal matters that could have a significant impact on the Company's financial statements;
13. Providing oversight and review of the Company's asset management policies, including an annual review of the Company's investment policies and performance for cash and short-term investments;
14. If necessary, instituting special investigations and, if appropriate, hiring special counsel or experts to assist;
15. Reviewing related party transactions for potential conflicts of interest; and
16. Performing other oversight functions as requested by the full Board of Directors.

In addition to the above responsibilities, the Audit Committee will undertake such other duties as the Board of Directors delegates to it, and will report, at least annually, to the Board regarding the Committee's examinations and recommendations.

**MEETINGS:**

The Audit Committee will meet at least four (4) times each year. The Audit Committee may establish its own schedule which it will provide to the Board of Directors in advance.

The Audit Committee will meet separately with the Chief Executive Officer and separately with the Chief Financial Officer of the Company at least annually to review the financial affairs of the Company. The Audit Committee will meet with the independent auditors of the Company, at such times as it deems appropriate, to review the independent auditor's examination and management report.

**REPORTS:**

The Audit Committee will record its summaries of recommendations to the Board in written form which will be incorporated as a part of the minutes of the Board of Directors meeting at which those recommendations are presented.

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**MINUTES**

The Audit Committee will maintain written minutes of its meetings, which minutes will be filed with the minutes of the meetings of the Board of Directors.

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**APPENDIX C**

**AMENDED AND RESTATED**

**CERTIFICATE OF INCORPORATION**

**OF**

**EVOLVE SOFTWARE, INC.**

Evolve Software, Inc. a corporation organized and existing under the laws of the State of Delaware, does hereby certify:

1. The name of the corporation is Evolve Software, Inc. (the "Corporation"). The Corporation was originally incorporated under the name "Cortez Software International, Inc.," and the original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on February 24, 1995.

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2. The amendments and restatement set forth in this Amended and Restated Certificate of Incorporation have been duly approved by the Board of Directors and stockholders of Evolve Software, Inc. in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware.

3. Pursuant to Section 245 of the General Corporation Law of the State of Delaware, the text of this Amended and Restated Certificate of Incorporation restates and integrates and amends the provisions of the Corporation's certificate of incorporation and reads in its entirety as follows:

### FIRST

The name of the Corporation is Evolve Software, Inc. (the "Corporation").

### SECOND

The address of the corporation's registered office in the State of Delaware is 2711 Centerville Road, Wilmington, Delaware 19808. The name of its registered agent at such address is The Prentice-Hall Corporation System, Inc. in New Castle County.

### THIRD

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

### FOURTH

A. The total number of shares that the Corporation shall have authority to issue is 110,000,000 shares of capital stock. Of such authorized shares, 100,000,000 shares shall be designated "Common Stock", and have a par value of \$0.001. Of such authorized shares, 10,000,000 shares shall be designated "Preferred Stock", and have a par value of \$0.001. The Preferred Stock may be issued from time to time in one or more series. The Board of Directors of the Corporation is authorized to determine or alter the powers, preferences and rights and the qualifications, limitations or restrictions granted to or imposed upon any wholly unissued series of Preferred Stock, and within the limitations or restrictions stated in any resolution or resolutions of the Board of Directors originally fixing the number of shares constituting any series, to increase or decrease (but not below the number of shares of any such series then outstanding) the number of shares of any such series subsequent to the issuance of shares of that series, to determine the designation of any series, and to fix the number of shares of any series. In case the number of shares of any series shall be so decreased, the shares constituting such decrease shall resume the status that they had prior to the adoption of the resolution originally fixing the number of shares of such series.

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B. Effective 12:01 a.m. Eastern Time on \_\_\_\_\_, 200\_ (the "Effective Time") each one (1) share of Common Stock of the Corporation issued and outstanding immediately prior to the Effective Time ("Old Common Stock") shall automatically be combined, converted, reclassified and changed without any action on the part of the holder thereof, into [one-twentieth / one-thirtieth / one-fortieth] of one (1) share of fully paid and nonassessable Common Stock of the Corporation ("New Common Stock"), subject to the treatment of fractional shares interests described below.

C. Following the Effective Time, each holder of Old Common Stock shall be entitled to receive upon surrender of such holder's certificate(s) representing Old Common Stock (whether one or more, "Old Certificates") for cancellation pursuant to procedures adopted by the Corporation, a certificate(s) representing the number of whole shares of New Common Stock (whether one or more, "New Certificates") into which and for which the shares of Old Common Stock formerly represented by such Old Certificates so surrendered are combined under the terms hereof. From and after the Effective Time, Old Certificates shall represent only the right to receive New Certificates and, where applicable, cash in lieu of fractional shares, as provided below.

D. No fractional shares of Common Stock of the Corporation shall be issued. No stockholder of the Corporation shall transfer any fractional shares of Common Stock of the Corporation. The Corporation shall not recognize on its stock record books any purported transfer of any fractional share of Common Stock of the Corporation. A holder of Old Certificates at the Effective Time who would otherwise be entitled to a fraction of a share of New Common Stock (after aggregating all fractions of a share to which such stockholder would otherwise be entitled) shall, in lieu thereof, be entitled to receive a cash payment in an amount equal to the fraction to which the stockholder would otherwise be entitled multiplied by the per share closing sales price of the Common Stock on the day immediately prior to the Effective Time, as reported on the Nasdaq National Market or Nasdaq SmallCap Market (or if such price is not available, then such other price as determined by the Board of Directors).

E. Two series of Preferred Stock of the Corporation be and hereby are created. 1,875,000 shares of Preferred Stock shall be designated as Series A Preferred Stock (the "Series A Preferred Stock"). 750,000 shares of Preferred Stock shall be designated as Series B Preferred Stock (the "Series B Preferred Stock"). The designations and amounts thereof and the preferences and relative, optional and other special rights of the shares of the Series A Preferred Stock and the Series B Preferred Stock (collectively, the "Issued Preferred Stock"), and the qualifications, limitations or restrictions thereof are as set forth herein.

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For purposes of this Amended and Restated Certificate of Incorporation, (i) any series of Preferred Stock of the Corporation entitled to dividends, liquidation and redemption preference on a parity with the Series B Preferred Stock shall be referred to as "Series B Parity Preferred Stock," (ii) any series of Preferred Stock ranking senior to the Series B Preferred Stock and Series B Parity Preferred Stock with respect to dividends, liquidation preference or redemption shall be referred to as "Senior Stock," (iii) the Common Stock and any series of Preferred Stock ranking junior to the Series B Preferred Stock with respect to dividends, liquidation preference and redemption shall be referred to as "Series B Junior Stock," (iv) any series of Preferred Stock of the Corporation entitled to dividends, liquidation and redemption preference on a parity with the Series A Preferred Stock shall be referred to as "Series A Parity Preferred Stock," and (v) the Common Stock and any series of Preferred Stock ranking junior to the Series A Preferred Stock with respect to dividends, liquidation preference and redemption shall be referred to as "Series A Junior Stock." The Series A Preferred Stock of the Corporation shall be Series B Junior Stock with respect to liquidation for purposes hereof. The Series A Preferred Stock of the Corporation shall be Series B Parity Preferred Stock with respect to dividend and redemption rights. As of the date of this Amended and Restated Certificate of Incorporation there is not outstanding any Series B Parity Preferred Stock with respect to liquidation, or Senior Stock.

The rights, privileges and other terms of the Issued Preferred Stock shall be as follows:

(1) Dividends. (a) In the event that the Corporation shall declare a distribution on the Common Stock payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (including cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then in each such case the holders of Issued Preferred Stock shall be entitled to a proportionate share of any such distribution as though such holders of Issued Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Issued Preferred Stock are convertible pursuant to Section 3(a) hereof as of the record date fixed for the determination of the holders of Common Stock of the Corporation entitled to receive such distribution; provided that if such distribution is made with respect to the Series A Preferred stock, then the proportionate shares of such distribution attributable to shares of the Issued Preferred Stock shall be determined on an as-converted to Common Stock basis. (b) In the event that the Corporation shall declare a distribution on the Series A Preferred Stock payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (including cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then in each such case the holders of Series B Preferred Stock shall be entitled to a proportionate share of any such distribution as though such holders of Issued Preferred Stock were the holders of the number of shares of Common Stock of the Corporation into which their respective shares of Issued Preferred Stock are convertible pursuant to Section 3(a) hereof as of the record date fixed for the determination of the holders of Series A Preferred Stock of the Corporation entitled to receive such distribution.

(2) Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary:

(i) After setting apart or paying in full the preferential amounts due to any holders of Senior Stock, the holders of the Series B Preferred Stock and any Series B Parity Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Series B Junior Stock, by reason of their ownership thereof, an amount equal to their full liquidation preference, which in the case of the Series B Preferred Stock shall be \$10.00 per share (as adjusted for any stock splits, reverse stock splits, recapitalizations, dividends in kind or similar events with respect to such stock, which amount shall increase at a rate of 8.00% per annum, compounded quarterly, commencing on the date of issuance of each such share, plus any declared but unpaid dividends on such shares (the "Series B Liquidation Preference"). If, upon occurrence of such event the assets and funds thus distributed among the holders of the Series B Preferred Stock and any Series B Parity Stock shall be insufficient to permit the payment to such holders of the full preferential amount, then after setting apart or paying in full the preferential amounts due to holders of Senior Stock, the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Series B Preferred Stock and Series B Parity Stock in proportion to the number of shares and the respective liquidation preferences of Series B Preferred Stock and Series B Parity Stock held by each such holder.

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(ii) After setting apart or paying in full the preferential amounts due to any holders of Senior Stock, Series B Preferred Stock and Series B Parity Preferred Stock, the holders of Series A Preferred Stock and any Series A Parity Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of Series A Junior Stock, by reason of their ownership thereof, an amount equal to their full liquidation preference, which in the case of the Series A Preferred Stock shall be \$10.00 per share (as adjusted for any stock splits, reverse stock splits, recapitalizations, dividends in kind or similar events with respect to such stock, which amount shall increase at a rate of 8.00% per annum, compounded quarterly, commencing on the date of issuance of each such share, plus any declared but unpaid dividends on such shares (the "Series A Liquidation Preference"). If, upon occurrence of such event and after payment of the amounts in accordance with paragraph (i) the remaining assets and funds thus distributed among the holders of the Series A Preferred Stock and any Series A Parity Stock shall be insufficient to permit the payment to such holders of the full preferential amount, then after setting apart or paying in full the preferential amounts due to holders of Senior Stock, Series B Preferred Stock and Series B Parity Stock, the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Series A Preferred Stock and Series A Parity Stock in proportion to the number of shares and the respective liquidation preferences of Series A Preferred Stock and Series A Parity Stock held by each such holder.

(iii) After payment has been made to the holders of Senior Stock, the Series B Preferred Stock, any Series B Parity Stock, the Series A Preferred Stock and any Series A Parity Stock of their respective Liquidation Preferences, the holders of the Series A Junior Stock shall be entitled to receive the remaining assets of the Corporation as set forth in the Certificate of Incorporation or any certificate of designation defining the liquidation preference of any such Series A Junior Stock, or otherwise in proportion to the number of shares of Series A Junior Stock held by each such holder.

For purposes of this Amended and Restated Certificate of Incorporation, the term "Liquidation Preference" shall mean the liquidation preference that is applicable to the Series A Preferred Stock with respect to shares of Series A Preferred Stock and shall mean the liquidation preference that is applicable to the Series B Preferred Stock with respect to shares of Series B Preferred Stock.

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(b) For purposes of this paragraph 2, a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by, and to include, (i) the Corporation's sale of all or substantially all of its business, assets or property (including intellectual property), or (ii) any transaction or series of related transactions resulting in a reorganization, merger, or consolidation (whether or not the Corporation is the entity surviving such transaction) in which holders of all voting equity securities of the Corporation immediately prior to such transaction will hold (by reason of their holdings in the Corporation) less than 50% of the voting equity securities of the Corporation or other entity surviving such transaction, (in each case, a "Change of Control Transaction"); provided however that in the event of a Change of Control Transaction which occurs prior to the fifth anniversary of the issuance of any share of Issued Preferred Stock, the Liquidation Preference associated with such share of Issued Preferred Stock shall be computed as if such Change of Control Transaction occurred on the fifth anniversary of the issuance of such share of Issued Preferred Stock; and, provided further, that in the event of a Change of Control Transaction, if the amount that would have been received by holders of Issued Preferred Stock had the full amount of the applicable Liquidation Preference per share with respect to Issued Preferred Stock (calculated in accordance with this paragraph) been converted into Common Stock prior to the Change of Control Transaction (the "As-Converted Amount") exceeds the applicable amount which would have been received in respect of each share of Issued Preferred Stock absent such conversion, then each holder of Issued Preferred Stock will be entitled to receive the applicable As-Converted Amount of each share of Issued Preferred Stock.

(c) In any of such events, if the consideration received by the Corporation is other than cash, its value will be deemed its fair market value as determined by the Board of Directors in the good faith exercise of its reasonable business judgment. Any securities shall be valued as follows:

(i) Securities not subject to restrictions on free marketability:

(1) If traded on a securities exchange or on the Nasdaq National Market System or the Nasdaq SmallCap Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange over the 30-day period ending three (3) days prior to the closing;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the 30-day period ending three (3) days prior to the closing; and

(3) If there is no active public market, the value shall be the fair market value thereof, as determined (x) by agreement between the Corporation and the holders of a majority of the outstanding shares of the Series A Preferred Stock and the Series B Preferred Stock or (y) in the absence of such agreement, by the Board of Directors in the good faith exercise of its reasonable business judgment (after consultation with a mutually acceptable financial advisor in the event such fair market value is expected in good faith to exceed \$1,000,000 by a majority of the Board of Directors or a majority of the Preferred Directors (as defined hereafter).

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(ii) The method of valuation of securities subject to restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (i)(1), (2) or (3) to reflect the approximate fair market value thereof, as determined (x) by agreement between the Corporation and the holders of a majority of the outstanding shares of each of the Series A Preferred Stock and the Series B Preferred Stock, or (y) in the absence of such agreement, by the Board of Directors in the good faith exercise of its reasonable business judgment (after consultation with a mutually acceptable financial advisor in the event such fair market value is expected in good faith to exceed \$1,000,000 by a majority of the Board of Directors or a majority of the Preferred Directors.

(3) Conversion. The holders of Issued Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert and Automatic Conversion.

(i) Each share of Issued Preferred Stock shall be convertible, at the option of the holder thereof, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the applicable Liquidation Preference of such share (computed as of the date of conversion), by the applicable conversion price determined as hereinafter provided, in effect at the time of conversion. The Series A Conversion Price, after taking into account all adjustments made prior to the date hereof, shall initially be equal to \$0.37. The Series B Conversion Price shall initially be equal to \$0.19. The Conversion Price shall be subject to adjustment as hereinafter provided. For purposes of this Amended and Restated Certificate of Incorporation, the term "Conversion Price" shall mean, with respect to shares of Series A Preferred Stock, the Series A Conversion Price, and, with respect to shares of Series B Preferred Stock, the Series B Conversion Price.

(ii) Each share of Issued Preferred Stock shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price at the earlier of (i) the delivery of notice of automatic conversion by the Company to all holders of the applicable series of Issued Preferred Stock, provided that such notice may not be given (A) prior to the fifth anniversary of the first date of issuance of such series of Issued Preferred Stock, and (B) unless the closing sales price of the Corporation's Common Stock during regular trading hours was \$5.00 or more (as adjusted for stock-splits, stock dividends and similar events) for thirty (30) consecutive trading days ending not more than ten (10) days prior to the date of such notice, or (ii) at the election of the holders of a majority of the outstanding shares of the applicable series of Issued Preferred Stock.

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(b) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Issued Preferred Stock. In lieu of any fractional share to which a holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of a share of the Common Stock as determined by the Board of Directors in accordance with Section 2 (c) hereof. Before any holder of Issued Preferred Stock shall be entitled to convert the same into full shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such Issued Preferred Stock and shall give written notice to the Corporation at such office that he elects to convert the same. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Issued Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into a fractional share of Common Stock. Except as set forth in the following sentence, such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Issued Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date. In the event of an automatic conversion pursuant to Section 3(a)(ii), the outstanding shares of Issued Preferred Stock shall be converted automatically without any further action by the holder of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or the transfer agent for such Issued Preferred Stock; and the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such automatic conversion unless the certificates evidencing such Issued Preferred Stock are either delivered to the Corporation or the transfer agent for such Issued Preferred Stock as provided above, or the holder notifies the Corporation or the transfer agent for such Issued Preferred stock that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the corporation to indemnify the corporation from any loss incurred by it in connection with such certificates. The Corporation shall, as soon as practicable thereafter, issue and deliver to such



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address as the holder may direct, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled.

(c) Adjustments to Conversion Price for Diluting Issues.

(i) Special Definitions. For purposes of this Section 3, the following definitions shall apply:

(1) "Options" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities.

(2) "Convertible Securities" shall mean any evidences of indebtedness, shares (other than Common Stock, Series A Preferred Stock and Series B Preferred Stock) or other securities convertible into or exchangeable for Common Stock.

(3) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section 3(c)(iii), deemed to be issued) by the Corporation after the first issuance of shares of Series B Preferred Stock (the "Original Issue Date") other than shares of Common Stock issued or issuable:

(A) upon conversion of shares of Issued Preferred Stock, upon the issuance of Options, including exercise or conversion of Convertible Securities subject to such Options, issued or issuable pursuant to the terms of the agreement or agreements governing initial issuance and sale of Series A Preferred Stock, or upon exercise or conversion of Options or Convertible Securities outstanding as of the date hereof;

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(B) to officers, directors or employees of, or consultants to, the Corporation pursuant to a stock grant, option plan or purchase plan or other stock incentive program, including without limitation sales of shares to such persons pursuant to restricted stock purchase agreements (collectively, the "Plans") approved by the Board of Directors;

(C) as a dividend or distribution on the Issued Preferred Stock or in connection with any stock split, stock dividend or similar transaction;

(D) in connection with (1) equipment lease financing transactions with institutions regularly engaged in equipment leasing or (2) bank lending, if such transactions are approved by the Board of Directors, and such issuance is not principally for the purpose of raising additional equity capital for the Corporation; provided however that the number of shares of Common Stock so excluded in any fiscal year of the Company shall not exceed 0.5% of the number of shares of Common Stock outstanding (determined as of the date of issuance of such shares of Common Stock), after giving effect to the conversion of all outstanding shares of Preferred Stock and other "in-the-money" (as such term is defined in paragraph 3(c)(iv) below) securities convertible into Common Stock unless such grants are approved by a majority of the directors of the Corporation elected by holders of Preferred Stock (the "Preferred Directors") present and voting;

(E) securities issued to customers or joint venture partners or in connection with other strategic alliances approved by the Board of Directors including a majority of the Preferred Directors present and voting, which involve the grant of licenses or localization, distribution, OEM, bundling, manufacturing or resale rights with respect to the Corporation's products or technology; and

(F) securities issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets of the other corporation, or other reorganization approved by the Board of Directors including a majority of the Preferred Directors present and voting, and

(G) by way of dividend or other distribution on shares of Common Stock excluded from the definition of Additional Shares of Common Stock by the foregoing clauses (A), (B), (C), (D), (E) or (F) or on shares of Common Stock so excluded, provided that such issuance is made (x) pursuant to obligations of the Corporation established in connection with the original issuance of such securities or (y) to all holders of the Corporation's capital stock in proportion to the number of shares held.

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(ii) No Adjustment of Conversion Price: No adjustment in the Conversion Price of a series of Issued Preferred Stock shall be made in respect of the issuance or deemed issuance (pursuant to Section 3(c)(iii) below) of Additional Shares of Common Stock unless the consideration per share (determined in accordance with paragraph 3(c)(v) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is or would be less than the Conversion Price for such series of Issued Preferred Stock in effect on the date of, and immediately prior to such issue or deemed issue. No adjustment in the Series A Conversion Price or the Series B Conversion Price shall be made pursuant to paragraph (iv) below as a result of any stock dividend or subdivision which causes an adjustment in the applicable Conversion Price pursuant to Section 3(d) below.

(iii) Deemed Issue of Additional Shares of Common Stock. In the event the Corporation at any time or from time to time after the Original Issue Date shall issue any Options or Convertible Securities which are excisable for or convertible into Additional Shares of Common Stock or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any case in which Additional Shares of Common Stock are deemed to be issued:

(A) no further adjustment in the Series A Conversion Price or the Series B Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(B) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase or decrease in the consideration payable to the Corporation, or increase or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Series A Conversion Price or the Series B Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities; and

(C) no readjustment pursuant to clause (B) above shall have the effect of increasing the Series A Conversion Price or the Series B Conversion Price to an amount which exceeds the lower of (i) such Conversion Price on the original adjustment date, or (ii) the Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

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(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock. Except as set forth in (e) below, in the event the Corporation shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to paragraph 3(c)(iii)) without consideration or for a consideration per share less than the applicable Conversion Price of Issued Preferred Stock in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) which shall be determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the sum of (i) the number of shares of Common Stock issued and outstanding immediately prior to such issue, (ii) the number of shares of Common Stock issuable upon conversion of the Preferred Stock outstanding immediately prior to such issue, (iii) the number of shares of Common Stock issuable upon exercise of outstanding in-the-money Options and conversion of outstanding in-the-money Convertible Securities and (iv) the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at such Conversion Price; and the denominator of which shall be the sum of (1) the number of shares of Common Stock issued and outstanding immediately prior to such issue, (2) the number of shares of Common Stock issuable upon conversion of the Preferred Stock outstanding immediately prior to such issue, (3) the number of shares of Common Stock issuable upon exercise of outstanding in-the-money Options and conversion of outstanding in-the-money Convertible Securities and (4) the number of such Additional Shares of Common Stock so issued. "In-the-money" Options and Convertible Securities shall be deemed to include all securities exercisable for or convertible into shares of Common Stock with a fair market value equal to or greater than the fair market value of the consideration which must be paid or which must be foregone to effect such exercise or conversion.

(v) Determination of Consideration. For purposes of this paragraph 3(c), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(1) Cash and Property. Such consideration shall:

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(A) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation excluding amounts paid or payable for accrued interest or accrued dividends;

(B) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment; and

(C) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (A) and (B) above, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment.

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(2) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to paragraph 3(c)(iii), relating to Options and Convertible Securities, shall be determined by dividing

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(y) the maximum number of shares of Common Stock (as set forth in the instrument relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(vi) Notwithstanding anything in this Section 3(c) to the contrary, no adjustment to the Series B Conversion Price provided for in this Section 3(c) shall be given effect upon the conversion of any shares of Series B Preferred Stock unless, prior to the date of such conversion, the holders of a majority of the outstanding shares of the Common Stock and Series A Preferred Stock, voting together on an as-converted to Common Stock basis in accordance with the provisions of this Certificate of Incorporation, approve or ratify the provisions of this Section 3(c).

(d) Adjustments for Stock Dividends, Subdivisions, Combinations, or Consolidations. In the event the Corporation shall pay a stock dividend on the Common Stock, or the outstanding shares of Common Stock shall be subdivided, combined or consolidated, by reclassification or otherwise, into a greater or lesser number of shares of Common Stock, the applicable Conversion Price of the Issued Preferred Stock in effect immediately prior to such subdivision or combination shall, concurrently with the effectiveness of such subdivision, combination or consolidation, be proportionately adjusted.

(e) Additional Adjustments.

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(i) Adjustment of Conversion Price Upon Payment of Certain Amounts. In the event this Corporation shall pay, directly or indirectly, consideration of more than \$1,000,000 in the aggregate (such amount, including the initial \$1,000,000, an "Excess Payment") (A) pursuant to a settlement agreement or a final and binding award of damages by a court or arbitrator with respect to an Eligible Claim (as defined below) involving payment of consideration by the Corporation (net of any consideration received by the Corporation in connection with such Eligible Claim from third parties including insurance carriers, co-defendants and adverse parties) in excess of \$100,000 but not more than \$1,000,000, (B) pursuant to a settlement agreement or a final and binding award of damages by a court or arbitrator with respect to an Eligible Claim involving payment by the Corporation of consideration (net of any consideration received by the Corporation in connection with such Eligible Claim from third parties including insurance carriers, co-defendants and adverse parties) in an amount in excess of \$1,000,000 (a "Major Damage Award"), (C) all out-of-pocket fees and expenses (including out-of-pocket expenses of investigation and attorneys fees and expenses) paid by the Company in connection with the defense of an Eligible Claim which results in a Major Damage Award and (D) in payment by the Corporation of any federal or state taxes arising out of the forgiveness of indebtedness of employees or former employees of the Company that was incurred in connection with the acquisition of any of the Company's securities, then and in such event the Series A Conversion Price shall be reduced as set forth in paragraph (iii) hereof. For purposes hereof, "Eligible Claim" shall mean any action, suit, or proceeding threatened in writing or commenced prior to or

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within 12 months following the initial filing of the Certificate of Designation of Series A Preferred Stock based on a claim relating to or arising out of either (a) the conduct of the Company's business, which claim is based on alleged facts and circumstances that would constitute a breach of the representations and warranties of the Corporation set forth in Section 3 of that certain Series A Preferred Stock Purchase Agreement dated as of September 23, 2001 among the Corporation and certain purchasers of shares of Series A Preferred Stock (the "Series A Agreement") disregarding the qualifications or modifications to such representations and warranties contained in Sections 3.7 and 3.13 of the Schedule of Exceptions to the Series A Agreement, or (b) a misstatement or alleged misstatement of a material fact, or omission or alleged omission to state a material fact, in connection with the purchase or sale, or failure to purchase or sell, any of the Corporation's securities; provided that the material facts or circumstances of the claims described in paragraphs (a) and (b) occurred prior to the initial date of the filing of the Certificate of Designation of Series A Preferred Stock.

(ii) Adjustment Formula. In each event that adjustment to the Series A Conversion Price is required under Paragraph (i) above, the Series A Conversion Price then in effect shall be reduced, concurrently with such event, to a price (calculated to the nearest cent) which shall be determined by multiplying such Conversion Price by a fraction, the numerator of which shall be one, and the denominator of which shall be the sum of one plus a fraction, the numerator of which shall be the New Share Number and the denominator of which shall be the sum of (1) the number of shares of Common Stock issued and outstanding immediately prior to such issue and (2) the number of shares of Common Stock issuable upon exercise of outstanding Options and conversion of outstanding Convertible Securities, but excluding all shares of Common Stock issuable upon conversion of Series A Preferred Stock outstanding or issuable upon conversion of outstanding warrants therefor and shares of Common Stock issuable upon exercise of Warrants therefor that were issued in connection with the issuance of shares of Series A Preferred Stock. For purposes hereof, the New Share Number shall equal (A) in the case of any adjustment required under paragraph (i) the number of shares of Common Stock so issued, and (B) in the case of any adjustment required by paragraph (ii) the sum of (x) the number of shares of Common Stock actually issued, to the extent the Excess Payment is made in Common Stock, and (y) the value of the Excess Payment, to the extent it is not paid in Common Stock, divided by the value of the Corporation's Common Stock on the date of payment (determined in accordance with Paragraph 2(c)(i)).

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(f) No Impairment. Unless approved in accordance with Section 5 hereof, the Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation but will at all times in good faith assist in the carrying out of all the provisions of this Section 3 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Issued Preferred Stock against impairment.

(g) Notices of Record Date. In the event that the Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights;

(iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(iv) to merge with any other corporation (other than a merger in which the Company is the surviving entity and the holders of the outstanding voting equity securities of the Corporation immediately prior to such merger hold more than fifty percent (50%) of the voting power of the surviving entity immediately following such merger), or sell, lease or convey all or substantially all its property or business, or to liquidate, dissolve or wind up;

then, in connection with each such event, the Corporation shall send to the holders of the Issued Preferred Stock:

(1) at least twenty (20) days' prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (iii) and (iv) above; and

(2) in the case of the matters referred to in (iii) and (iv) above, at least twenty (20) days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

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Each such written notice shall be given by first class mail, postage prepaid, addressed to the holders of the Issued Preferred Stock at the address for each such holder as shown on the books of the Corporation and shall be deemed given when so mailed.

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(h) Recapitalization. If at any time or from time to time there shall be a merger, consolidation, recapitalization (including the reverse stock split effected hereby) or similar transaction of the Corporation (other than a transaction treated as a liquidation for purposes of Section 2 or a subdivision or combination as set forth in Section 3(d)) provision shall be made so that the holders of the Issued Preferred Stock shall thereafter be entitled to receive upon conversion of the Issued Preferred Stock the number of shares of stock or other securities or property of the Corporation or any successor thereto to which a holder of Common Stock deliverable upon conversion of each share of such series would have been entitled on such transaction. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights of the holders of the Issued Preferred Stock after the such transaction to the end that the provisions of this Section 3 (including adjustment of the Series A Conversion Price and the Series B Conversion Price then in effect and the number of shares purchasable upon conversion of the Series A Preferred Stock and the Series B Preferred Stock) shall be applicable after such transaction as nearly equivalent as may be practicable.

(i) Adjustments for Other Distributions. In the event the Corporation at any time, or from time to time, makes or fixes a record date for the determination of holders of Common Stock entitled to receive any distribution payable in securities of the Corporation other than shares of Common Stock and other than as otherwise adjusted in this Section 3, then and in each such event provision shall be made so that the holders of the Issued Preferred Stock shall receive upon the date of such distribution, the amount of securities of the Corporation which they would have received had their Issued Preferred Stock been converted into Common Stock on such date.

(j) Certificates as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Series A Conversion Price or the Series B Conversion Price pursuant to this Section 3, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such Issued Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Issued Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (1) such applicable adjustments and readjustments, (2) the applicable Conversion Price for such series at the time in effect, and (3) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such holder's Preferred Stock. Any certificate sent to the holders of the Issued Preferred Stock pursuant to this Section 3(j) shall be signed by an officer of the Corporation.

(k) Reservation of Shares Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Issued Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Issued Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Issued Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

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(k) Issue and Transfer Taxes. The Corporation will pay any and all documentary stamp or similar issue or transfer taxes payable in respect of the issue or delivery of shares of Common Stock on conversion of the Issued Preferred Stock pursuant hereto; provided that the Corporation shall not be required to pay any tax which may be payable in respect of any transfer involved in the issue or delivery of shares of Common Stock in a name other than that of the holder of the Issued Preferred Stock to be converted and no such issue or delivery will be made unless and until the person requesting such issue or delivery has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid.

(4) Voting Rights and Directors.

(a) Except as otherwise required by law, or as otherwise set forth herein, the holders of Issued Preferred Stock, and the holders of Common Stock shall be entitled to notice of any stockholders' meeting and to vote upon any matter submitted to the stockholders for a vote, as follows: (i) each holder of Issued Preferred Stock shall have one vote for each full share of Common Stock into which the Issued Preferred Stock would have been convertible (assuming that such shares were issued on and as of such dates) as of the Original Issue Date (with respect to the Series B Preferred Stock) or October 9, 2001 (with respect to the Series A Preferred Stock), subject to adjustment for stock dividends, subdivisions, combinations or consolidations pursuant to Section 3(d) hereof, and (ii) the holders of Common Stock shall have one (1) vote per share of Common Stock.

(b) As long as the number of outstanding shares of Series A Preferred Stock is not less than 75% of the aggregate number of shares of Series A Preferred Stock issued by the Corporation, the holders of such shares of Series A Preferred Stock shall vote as a separate class to elect three (3) directors of the Corporation. The foregoing number of directors to be elected by holders of the Series A Preferred Stock voting as a separate class (the "Series A Directors") shall be reduced as follows: (i) to two (2) directors if the number of outstanding shares of Series A Preferred Stock is less than 75%, but not less than 50%, of the aggregate number of shares of Series A Preferred Stock issued by the Corporation, (ii) to one (1) director if the number of outstanding shares of Series A Preferred Stock is less than 50%, but not less than 25%, of the aggregate number of shares of Series A Preferred Stock issued by the Corporation, and (iii) to zero (0) if the number of outstanding shares of Series A Preferred Stock is less than 25% of the aggregate number of shares of Series A Preferred Stock issued by the Corporation. Immediately upon any event causing such a reduction in the number of Series A Directors, the term of the Series A Director with the shortest remaining term of office shall thereupon automatically cease and such resulting vacancy shall be filled by a new director appointed by a majority of the directors who are not Series A Directors. One of the three initial Series A Directors shall be appointed to each of the three classes of directors of the Corporation (Class I, Class II and Class III). In the case of a vacancy (other than a vacancy caused by a reduction in the number of Series A Directors as set forth above) in the office of a director occurring among directors elected by the holders of Series A Preferred Stock pursuant to this Section 4(b), the remaining directors so elected by Series A Preferred Stock (or if there is no such director remaining, the holders of a majority of the Series A Preferred Stock), may elect a successor or successors to hold office for the unexpired term of the director or directors whose places shall be vacant. Any director who shall have been elected by the holders of Series A Preferred Stock or by any directors so elected as provided in the immediately preceding sentence may be removed during the aforesaid term of office, with or without cause, by the affirmative vote of holders of the Series A Preferred Stock, given either at a special meeting of such stockholders duly called for that purpose or pursuant to a written consent of stockholders, and any vacancy thereby created may be filled by an affirmative vote of holders of Series A Preferred Stock represented at the meeting or pursuant to the written consent.

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(c) As long as any shares of Series B Preferred Stock remain outstanding, the holders of Series B Preferred Stock shall vote as a separate class to elect such number of directors of the Corporation (the "Series B Directors"), which, when added to the number of the Series A Directors, will be in as close a proportion as is possible to the total number of directors of the Corporation as the proportion of the number of shares of Common Stock issuable upon the conversion of all shares of Series A Preferred Stock and Series B Preferred Stock is to the total number of shares of Common Stock then outstanding (after giving effect to the conversion of all shares of Preferred Stock then outstanding), rounded down to the nearest whole number; provided, however, that the foregoing right shall be superseded in the event, to the extent, and for so long as the appointment of any such Series B Director would cause the Corporation to fail to comply with applicable laws or regulations or the rules of the Nasdaq Stock Market. Any such Series B Director may be removed during the term of office of such Series B Director, with or without cause, by the affirmative vote of the holders of Series B Preferred Stock, given either at a special meeting duly called for that purpose or pursuant to a written consent, and any vacancy thereby created may be filled by an affirmative vote represented at the meeting or pursuant to the written consent. All directors other than the Preferred Directors shall be elected by the holders of Common Stock, the holders of Series A Preferred Stock and the holders of Series B Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis.

(d) Any action which the holders of Issued Preferred Stock are authorized to take at a duly called annual or special meeting of stockholders may in lieu thereof be taken by means of a written consent of such holders.

(5) Protective Provisions.

(a) In addition to any other rights provided by law, the Corporation and its subsidiaries shall not, without first obtaining the affirmative vote or written consent of (A) the holders of not less than a majority of the outstanding shares of Series A Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis, provided that at least 50% of the shares of Series A Preferred Stock issued by the Corporation remain outstanding, and (B) the holders of not less than a majority of the outstanding shares of Series A Preferred Stock and Series B Preferred stock, voting together as a single class, on an as-converted to Common Stock basis, provided that at least 50% of the shares of Series B Preferred Stock issued by the Corporation remain outstanding:

- (i) amend or repeal any provision of, or add any provision to, this Certificate of Incorporation;
- (ii) issue any bonds, debentures or notes or incur similar debt obligations, other than trade debt in the ordinary course of business;

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(iii) consummate a Change of Control Transaction, unless the aggregate value received for, or realizable in respect of, all outstanding shares of Issued Preferred Stock, determined in accordance with Section 2(c) hereof, as a result of such sale or other transaction or series of transactions exceeds an amount equal to \$10.00 per share (as adjusted for stock splits and dividends in kind) multiplied by the number of outstanding shares of Issued Preferred Stock (the "Aggregate Cash Purchase Price"), plus an amount sufficient to result in an overall internal rate of return (IRR) on the Aggregate Cash Purchase Price of 50%, taking into account for purposes of calculating such overall IRR any differences in the dates of issuance of such outstanding shares;

(iv) repurchase any outstanding shares of stock of the Corporation, except for (i) repurchase of shares held by employees of the Corporation pursuant to repurchase agreements approved by the Board of Directors and (ii) redemption of shares of Preferred Stock;

(v) amend the Bylaws of the Corporation to increase the authorized number of directors of the Corporation to more than eight (8);

(b) In addition to any other rights provided by law, the Corporation and its subsidiaries shall not without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of Series A Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis, provided that at least 50% of the shares of Series A Preferred Stock issued by the Corporation remain outstanding:

(i) pay any dividend on any shares of Series A Junior Stock, or repurchase or redeem any such shares of Series A Junior Stock except for repurchases of unvested shares of Series A Junior Stock at cost from employees, directors, consultants and other service providers.

(ii) authorize or issue any shares of any class or series of Senior Stock or Series A Parity Preferred Stock or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of Senior Stock or Series A Parity Preferred Stock.

(c) In addition to any other rights provided by law, the Corporation and its subsidiaries shall not without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of Series A Preferred Stock and Series B Preferred stock, voting together as a single class, on an as-converted to Common Stock basis, provided that at least 50% of the shares of Series B Preferred Stock issued by the Corporation remain outstanding:

(i) pay any dividend on any shares of Series B Junior Stock, or repurchase or redeem any such shares of Series B Junior Stock except for repurchases of unvested shares of Series B Junior Stock at cost from employees, directors, consultants and other service providers;

(ii) authorize or issue any shares of any class or series of Senior Stock or Series B Parity Preferred Stock or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of Senior Stock or Series B Parity Preferred Stock of the Corporation.

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(6) Status of Converted Stock. In the event any shares of Series A Preferred Stock or Series B Preferred Stock shall be converted pursuant to Section 3 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation.

(7) Residual Rights. All rights accruing to the outstanding shares of the Corporation not expressly provided for to the contrary herein shall be vested in the Common Stock.

FIFTH

The Corporation is to have perpetual existence.

SIXTH

Elections of directors need not be by written ballot unless a stockholder demands election by written ballot at the meeting and before voting begins.

SEVENTH

The number of directors that constitute the whole Board of Directors of the Corporation shall be designated in the Bylaws of the Corporation.

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EIGHTH

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the Corporation.

NINTH

To the fullest extent permitted by the Delaware General Corporation Law as the same exists or as it may hereafter be amended, no director of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

Neither any amendment nor repeal of this Article, nor the adoption of any provision of this Certificate of Incorporation inconsistent with this Article, shall eliminate or reduce the effect of this Article in respect of any matter occurring, or any cause of action, suit or claim that, but for this Article, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

TENTH

Section 1. At each annual meeting of stockholders, directors of the Corporation shall be elected to hold office until the expiration of the term for which they are elected, and until their successors have been duly elected and qualified; except that if any such election shall be not so held, such election shall take place at stockholders' meeting called and held in accordance with the Delaware General Corporation Law. The directors of the Corporation shall be divided into three classes as nearly equal in size as is practicable, hereby designed Class I, Class II and Class III. The term of office of the initial Class I directors shall expire at the next succeeding annual meeting of stockholders, the term of office of the initial Class II directors shall expire at the second succeeding annual meeting of stockholders and the term of office of the initial Class III directors shall expire at the third succeeding annual meeting of the stockholders. For the purposes hereof, the initial Class I, Class II and Class III directors shall be those directors so designated by the incorporator. At each annual meeting of stockholders, directors to replace those of a Class whose terms expire at such annual meeting shall be elected to hold office until the third succeeding annual meeting and until their respective successors shall have been duly elected and qualified. If the number of directors is hereafter changed, any newly created directorships or decrease in directorships shall be so apportioned among the classes as to make all classes as nearly equal in number as if practicable.

Section 2. The number of directors that constitute the whole Board of Directors of the Corporation shall be designated in the Bylaws of the Corporation.

Section 3. Vacancies occurring on the Board of Directors for any reason may be filled by vote of a majority of the remaining members of the Board of Directors, although less than a quorum, at any meeting of the Board of Directors. A person so elected by the Board of Directors to fill a vacancy shall hold office until the next succeeding annual meeting of stockholders of the Corporation and until his or her successor shall have been duly elected and qualified.

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ELEVENTH

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside of the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

TWELFTH

The stockholders of the Corporation may not take action by written consent in lieu of a meeting but must take any actions at a duly called annual or special meeting, except that the holders of the Corporation's Preferred Stock may take action by written consent in lieu of a meeting on matters for which the Preferred Stock is entitled to a separate class vote.



THIRTEENTH

Notwithstanding any other provisions of this Certificate of Incorporation or any provision of law which might otherwise permit a lesser vote or no vote, but in addition to any affirmative vote of the holders of the capital stock required by law or this Certificate of Incorporation, the affirmative vote of the holders of at least two-thirds (2/3) of the combined voting power of all of the then outstanding shares of the Corporation entitled to vote shall be required to alter, amend or repeal Articles TENTH, TWELFTH or THIRTEENTH or any provision thereof, unless such amendment shall be approved by a majority of the directors of the Corporation not affiliated or associated with any person or entity holding (or which has announced an intention to obtain) 20% or more of the voting power of the Corporation's outstanding capital stock.

FOURTEENTH

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

4. This Amended and Restated Certificate of Incorporation Shall become effective at 12:01 a.m. Eastern Time on \_\_\_\_ , 200\_\_.

IN WITNESS WHEREOF, Evolve Software, Inc., has caused this Amended and Restated Certificate of Incorporation to be executed by Linda Zecher, in her capacity as its President and Chief Executive Officer, this \_\_ day of \_\_\_\_\_, 2002.

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Linda Zecher  
*President and Chief Executive Officer*

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**APPENDIX D**

**CERTIFICATE OF DESIGNATION OF SERIES B  
PREFERRED STOCK**

Pursuant to Section 151 of the General Corporation Law of the State of Delaware

I, the undersigned duly authorized officer of Evolve Software, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware (the "Corporation"), in accordance with the provisions of Section 103 thereof, and pursuant to Section 151 thereof, do hereby certify:

That pursuant to the authority conferred upon the Board of Directors by the Certificate of Incorporation of the Corporation (the "Certificate of Incorporation"), the Board of Directors of the Corporation on August 20, 2002, adopted the following resolution creating a series of 625,000 shares of Series B Preferred Stock, par value \$0.001 per share:

RESOLVED, that pursuant to the authority vested in the Board of Directors of the Corporation in accordance with the provisions of its Certificate of Incorporation, a series of Preferred Stock of the Corporation ("Preferred Stock") be and it hereby is created, that the shares of such series shall be designated as Series B Preferred Stock (the "Series B Preferred Stock"), that the number of shares constituting such series shall be 625,000 and that the designation and amount thereof and the preferences and relative, optional and other special rights of the shares of such series, and the qualifications, limitations or restrictions thereof are as set forth herein.

For purposes hereof, (i) any series of Preferred Stock of the Corporation entitled to dividends, liquidation and redemption preference on a parity with the Series B Preferred Stock shall be referred to as "Parity Preferred Stock," (ii) any series of Preferred Stock ranking senior to the Series B Preferred Stock and Parity Preferred Stock with respect to dividends, liquidation preference or redemption

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shall be referred to as "Senior Stock," and (iii) the Common Stock of the Corporation ("Common Stock") and any series of Preferred Stock ranking junior to the Series B Preferred Stock and Parity Preferred Stock with respect to dividends, liquidation preference and redemption shall be referred to as "Junior Stock." The Series A Preferred Stock of the Corporation (the "Series A Preferred Stock") shall be Junior Stock with respect to liquidation for purposes hereof. As of the date of this Certificate of Designation there is not outstanding any Senior Stock.

The rights, privileges and other terms of the Series B Preferred Stock shall be as follows:

1. Dividends. In the event that the Corporation shall declare a distribution on the Common Stock or the Series A Preferred Stock payable in securities of other persons, evidences of indebtedness issued by the Corporation or other persons, assets (including cash dividends) or options or rights to purchase any such securities or evidences of indebtedness, then in each such case the holders of Series B Preferred Stock shall be entitled to a proportionate share of any such distribution as though such holders of Series B Preferred Stock were the holders of the number of shares of Common Stock into which their respective shares of Series B Preferred Stock are convertible pursuant to Section 3(a) hereof as of the record date fixed for the determination of the holders of Common Stock or Series A Preferred Stock entitled to receive such distribution; provided that if such distribution is made with respect to the Series A Preferred Stock, then the proportionate shares of such distribution attributable to shares of Series A Preferred Stock and Series B Preferred Stock shall be determined on an as-converted to Common Stock basis.

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### 2. Liquidation Preference.

(a) In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary:

(i) After setting apart or paying in full the preferential amounts due to any holders of Senior Stock, the holders of the Series B Preferred Stock and any Parity Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets or surplus funds of the Corporation to the holders of the Junior Stock, by reason of their ownership thereof, an amount equal to their full liquidation preference, which in the case of the Series B Preferred Stock shall be \$10.00 per share (as adjusted for any stock-splits or dividends in kind), which amount shall increase at a rate of 8.00% per annum, compounded quarterly, commencing on the date of issuance of each such share, plus any declared but unpaid dividends on such shares (the "Series B Liquidation Preference"). If, upon occurrence of such event the assets and funds thus distributed among the holders of the Series B Preferred Stock and any Parity Stock shall be insufficient to permit the payment to such holders of the full preferential amount, then after setting apart or paying in full the preferential amounts due to holders of Senior Stock the entire assets and funds of the Corporation legally available for distribution shall be distributed among the holders of the Series B Preferred Stock and Parity Stock in proportion to the number of shares and the respective liquidation preferences of Series B Preferred Stock and Parity Stock held by each such holder.

After payment has been made to the holders of the Series B Preferred Stock and any Parity Stock of their respective Liquidation Preferences, the holders of the Junior Stock shall be entitled to receive the remaining assets of the Corporation as set forth in the Certificate of Incorporation or any certificate of designation defining the liquidation preference of any such Junior Stock, or otherwise in proportion to the number of shares of Junior Stock held by each such holder.

(b) For purposes of this Section 2, a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by, and to include, (i) the Corporation's sale of all or substantially all of its business, assets or property (including intellectual property) or (ii) any transaction or series of related transactions (other than in connection with the issuance of the Series B Preferred Stock) resulting in a reorganization, merger, or consolidation (whether or not the Corporation is the entity surviving such transaction) in which holders of all voting equity securities of the Corporation immediately prior to such transaction will hold (by reason of their holdings in the Corporation) less than 50% of the voting equity securities of the Corporation or other entity surviving such transaction (in each case, a "Change of Control Transaction"); provided however that in the event of a Change of Control Transaction which occurs prior to the fifth anniversary of the issuance of any share of Series B Preferred Stock, the Series B Liquidation Preference associated with such share shall be computed as if such Change of Control Transaction occurred on the fifth anniversary of the issuance of such share; and, provided further, that in the event of a Change of Control Transaction, if the amount that would have been received by holders of Series B Preferred Stock had the full amount of the Series B Liquidation Preference per share (calculated in accordance with this paragraph) been converted into Common Stock prior to the Change of Control Transaction (the "As-Converted Amount") exceeds the amount which would have been received in respect of each share of Series B Preferred Stock absent such conversion, then each holder of Series B Preferred will be entitled to receive the As-Converted Amount of each share of Series B Preferred Stock.

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(c) In any of such events, if the consideration received by the Corporation is other than cash, its value will be deemed its fair market value as determined by the Board of Directors in the good faith exercise of its reasonable business judgment. Any securities shall be valued as follows:

(i) Securities not subject to restrictions on free marketability:

(1) If traded on a securities exchange or through the Nasdaq National Market or the Nasdaq SmallCap Market, the value shall be deemed to be the average of the closing prices of the securities on such exchange over the 30-day period ending three (3) days prior to the closing;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or sale prices (whichever is applicable) over the 30-day period ending three (3) days prior to the closing; and

(3) If there is no active public market, the value shall be the fair market value thereof, as determined (x) by agreement between the Corporation and the holders of a majority of the outstanding shares of Series B Preferred Stock or (y) in the absence of such agreement, by the Board of Directors in the good faith exercise of its reasonable business judgment (after consultation with a mutually acceptable financial advisor in the event that such fair market value is expected in good faith by a majority of the Board of Directors, or a majority of the directors elected by the Series A Preferred Stock pursuant to Section (4)(b) of Article IV of the Certificate of Incorporation and the Series B Preferred Stock pursuant to Section 4(b) of this Certificate of Designation, to exceed \$1,000,000).

(ii) The method of valuation of securities subject to restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (i)(1), (2) or (3) to reflect the approximate fair market value thereof, as determined (x) by agreement between the Corporation and the holders of a majority of the outstanding shares of Series B Preferred Stock or (y) in the absence of such agreement, by the Board of Directors in the good faith exercise of its reasonable business judgment (after consultation with a mutually acceptable financial advisor in the event that such fair market value is expected in good faith by a majority of the Board of Directors, or a majority of the directors elected by the Series A Preferred Stock pursuant to Section (4)(b) of Article IV of the Certificate of Incorporation and the Series B Preferred Stock pursuant to Section 4(b) of this Certificate of Designation, to exceed \$1,000,000).

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3. Conversion. The holders of the Series B Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert and Automatic Conversion.

(i) Each share of Series B Preferred Stock shall be convertible, at the option of the holder thereof, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing the Series B Liquidation Preference of such share (computed as of the date of conversion), by the Series B Conversion Price, determined as hereinafter provided, in effect at the time of conversion. The Series B Conversion Price shall initially be equal to \$0.19. The Conversion Price shall be subject to adjustment as hereinafter provided.

(ii) Each share of Series B Preferred Stock shall automatically be converted into shares of Common Stock at the then effective applicable Conversion Price at the earlier of (i) the delivery of notice of automatic conversion by Company to all holders of Series B Preferred Stock, provided that such notice may not be given (A) prior to the fifth anniversary of the first date of issuance of Series B Preferred Stock, and (B) unless the closing sales price of the Corporation's Common Stock during regular trading hours was \$5.00 or more (as adjusted for stock-splits, stock dividends and similar events occurring after the date of the filing of this Certificate of Designation with the Secretary of State of the State of Delaware) for 30 consecutive trading days ending not more than ten (10) days prior to the date of such notice, or (ii) at the election of the holders of a majority of the outstanding shares of the Series B Preferred Stock.

(b) Mechanics of Conversion. No fractional shares of Common Stock shall be issued upon conversion of Series B Preferred Stock. In lieu of any fractional share to which a holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of a share of the Common Stock as determined by the Board of Directors in accordance with Section 2(c) hereof. Before any holder of Series B Preferred Stock shall be entitled to convert the same into full shares of Common Stock, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Series B Preferred Stock and shall give written notice to the Corporation at such office that he elects to convert the same. The Corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Series B Preferred Stock, a

certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into a fractional share of Common Stock. Except as set forth in the following sentence, such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Series B Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date. In the event of an automatic conversion pursuant to Section 3(a)(ii), the outstanding shares of Series B Preferred Stock shall be converted automatically without any further action by the holder of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or the transfer agent for such Series B Preferred Stock; and the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such automatic conversion unless the certificates evidencing such Series B Preferred stock are either delivered to the Corporation or the transfer agent for such Series B Preferred Stock as provided above, or the holder notifies the Corporation or the transfer agent for such Series B Preferred stock that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. The Corporation shall, as soon as practicable thereafter, issue and deliver to such address as the holder may direct, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled.

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(c) Adjustments to Conversion Price for Diluting Issues.

(i) Special Definitions. For purposes of this Section 3, the following definitions shall apply:

(1) "Options" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities.

(2) "Convertible Securities" shall mean any evidences of indebtedness, shares (other than Common Stock and Series B Preferred Stock) or other securities convertible into or exchangeable for Common Stock.

(3) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section 3(c)(iii), deemed to be issued) by the Corporation after the first issuance of shares of Series B Preferred Stock (the "Original Issue Date") other than shares of Common Stock issued or issuable:

(A) upon conversion of shares of Series B Preferred Stock, upon the issuance of Options, including exercise or conversion of Convertible Securities subject to such Options, issued or issuable pursuant to the terms of the agreement or agreements governing initial issuance and sale of Series A Preferred Stock, or upon exercise or conversion of Options or Convertible Securities outstanding as of the date hereof;

(B) to officers, directors or employees of, or consultants to, the Corporation pursuant to a stock grant, option plan or purchase plan or other stock incentive program, including without limitation sales of shares to such persons pursuant to restricted stock purchase agreements (collectively, the "Plans") approved by the Board of Directors;

(C) as a dividend or distribution on the Series B Preferred Stock or in connection with any stock split, stock dividend or similar transaction;

(D) in connection with (1) equipment lease financing transactions with institutions regularly engaged in equipment leasing or (2) bank lending, if such transactions are approved by the Board of Directors, and such issuance is not principally for the purpose of raising additional equity capital for the Corporation; provided however that the number of shares of Common Stock so excluded in any fiscal year of the Corporation shall not exceed 0.5% of the number of shares of Common Stock outstanding (determined as of the date of issuance of such shares of Common Stock), after giving effect to the conversion of all outstanding shares of Preferred Stock and other "in-the-money" (as such term is defined in Section 3(c)(iv) below) securities convertible into Common Stock unless such grants are approved by a majority of the directors of the Corporation elected by holders of Preferred Stock (the "Preferred Directors") present and voting;

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(E) securities issued to customers or joint venture partners or in connection with other strategic alliances approved by the Board of Directors including a majority of the Preferred Directors present and voting which involve the grant of licenses or localization, distribution, OEM, bundling, manufacturing or resale rights with respect to the Corporation's products or

technology; and

(F) securities issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets of the other corporation, or other reorganization approved by the Board of Directors including a majority of the Preferred Directors present and voting; and

(G) by way of dividend or other distribution on shares of Common Stock or Preferred Stock excluded from the definition of Additional Shares of Common Stock by the foregoing clauses (A), (B), (C), (D), (E), or (F) or on shares of Common Stock so excluded, provided that such issuance is made (x) pursuant to obligations of the Corporation established in connection with the original issuance of such securities or (y) to all holders of the Corporation's capital stock in proportion to the number of shares held.

(ii) No Adjustment of Conversion Price: No adjustment in the Series B Conversion Price shall be made in respect of the issuance or deemed issuance (pursuant to Section 3(c)(iii) below) of Additional Shares of Common Stock unless the consideration per share (determined in accordance with paragraph 3(c)(v)) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is or would be less than the Series B Conversion Price in effect on the date of, and immediately prior to, such issue or deemed issue. No adjustment in the Series B Conversion Price shall be made pursuant to paragraph (iv) below as a result of any stock dividend or subdivision which causes an adjustment in the Conversion Price pursuant to Section 3(d) below.

(iii) Deemed Issue of Additional Shares of Common Stock. In the event the Corporation at any time or from time to time after the Original Issue Date shall issue any Options or Convertible Securities which are excisable for or convertible into Additional Shares of Common Stock or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any case in which Additional Shares of Common Stock are deemed to be issued:

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(A) no further adjustment in the Series B Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(B) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase or decrease in the consideration payable to the Corporation, or increase or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Series B Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities; and

(C) no readjustment pursuant to clause (B) above shall have the effect of increasing the Series A Conversion Price to an amount which exceeds the lower of (i) such Conversion Price on the original adjustment date, or (ii) the Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(iv) Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock. In the event the Corporation shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 3(c)(iii)) without consideration or for a consideration per share less than the Series B Conversion Price in effect on the date of and immediately prior to such issue, then and in such event, such Conversion Price shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) which shall be determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the sum of (i) the number of shares of Common Stock issued and outstanding immediately prior to such issue, (ii) the number of shares of Common Stock issuable upon conversion of the Preferred Stock outstanding immediately prior to such issue, (iii) the number of shares of Common Stock issuable upon exercise of outstanding in-the-money Options and conversion of outstanding in-the-money Convertible Securities and (iv) the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at such Conversion Price; and the denominator of which shall be the sum of (1) the number of shares of Common Stock issued and outstanding immediately prior to such issue, (2) the number of shares of Common Stock issuable upon conversion of the Preferred Stock outstanding immediately

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prior to such issue, (3) the number of shares of Common Stock issuable upon exercise of outstanding in-the-money Options and conversion of outstanding in-the-money Convertible Securities and (4) the number of such Additional Shares of Common Stock so issued. "In-the-money" Options and Convertible Securities shall be deemed to include all securities exercisable for or convertible into shares of Common Stock with a fair market value equal to or greater than the fair market value of the consideration which must be paid or which must be foregone to effect such exercise or conversion.

(v) Determination of Consideration. For purposes of this Section 3(c), the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

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(1) Cash and Property. Such consideration shall:

(A) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation excluding amounts paid or payable for accrued interest or accrued dividends;

(B) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment; and

(C) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (A) and (B) above, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment.

(2) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 3(c)(iii), relating to Options and Convertible Securities, shall be determined by dividing

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(y) the maximum number of shares of Common Stock (as set forth in the instrument relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(vi) Notwithstanding anything in this Section 3(c) to the contrary, no adjustment to the Series B Conversion Price provided for in this Section 3(c) shall be given effect upon the conversion of any shares of Series B Preferred Stock unless, prior to the date of such conversion, the holders of a majority of the outstanding shares of the Common Stock and Series A Preferred Stock, voting together on an as-converted to Common Stock basis in accordance with the provisions of the Certificate of Incorporation, approve or ratify the provisions of this Section 3(c).

(d) Adjustments for Stock Dividends, Subdivisions, Combinations, or Consolidations. In the event the Corporation shall pay a stock dividend on the Common Stock, or the outstanding shares of Common Stock shall be subdivided, combined or consolidated, by reclassification or otherwise, into a greater or lesser number of shares of Common Stock, the Series B Conversion Price in effect immediately prior to such subdivision or combination shall, concurrently with the effectiveness of such subdivision, combination or consolidation, be proportionately adjusted.

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(e) No Impairment. Unless approved in accordance with Section 5 hereof the Corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, transfer of assets, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation but will at all times in good faith assist in the carrying out of all the provisions of this Section 3 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Series B Preferred Stock

against impairment.

(f) Notices of Record Date. In the event that the Corporation shall propose at any time:

(i) to declare any dividend or distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to offer for subscription pro rata to the holders of any class or series of its stock any additional shares of stock of any class or series or other rights;

(iii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(iv) to merge with any other corporation (other than a merger in which the Corporation is the surviving entity and the holders of the outstanding voting equity securities of the Corporation immediately prior to such merger hold more than fifty percent (50%) of the voting power of the surviving entity immediately following such merger), or sell, lease or convey all or substantially all its property or business, or to liquidate, dissolve or wind up;

then, in connection with each such event, the Corporation shall send to the holders of the Series B Preferred Stock:

(1) at least 20 days' prior written notice of the date on which a record shall be taken for such dividend, distribution or subscription rights (and specifying the date on which the holders of Common Stock shall be entitled thereto) or for determining rights to vote in respect of the matters referred to in (iii) and (iv) above; and

(2) in the case of the matters referred to in (iii) and (iv) above, at least 20 days' prior written notice of the date when the same shall take place (and specifying the date on which the holders of Common Stock shall be entitled to exchange their Common Stock for securities or other property deliverable upon the occurrence of such event).

Each such written notice shall be given by first class mail, postage prepaid, addressed to the holders of Series B Preferred Stock at the address for each such holder as shown on the books of the Corporation and shall be deemed given when so mailed.

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(g) Recapitalization. If at any time or from time to time there shall be a merger, consolidation, recapitalization or similar transaction of the Corporation (other than a transaction treated as a liquidation for purposes of Section 2 or a subdivision or combination as set forth in Section 3(d)) provision shall be made so that the holders of the Series B Preferred Stock shall thereafter be entitled to receive upon conversion of the Series B Preferred Stock the number of shares of stock or other securities or property of the Corporation or any successor thereto to which a holder of Common Stock deliverable upon conversion of each share of such series would have been entitled on such transaction. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights of the holders of the Series B Preferred Stock after the such transaction to the end that the provisions of this Section 3 (including adjustment of the Series B Conversion Price then in effect and the number of shares purchasable upon conversion of the Series B Preferred Stock) shall be applicable after such transaction as nearly equivalent as may be practicable.

(h) Adjustments for Other Distributions. In the event the Corporation at any time, or from time to time, makes or fixes a record date for the determination of holders of Common Stock entitled to receive any distribution payable in securities of the Corporation other than shares of Common Stock and other than as otherwise adjusted in this Section 3, then and in each such event provision shall be made so that the holders of the Series B Preferred Stock shall receive upon the date of such distribution, the amount of securities of the Corporation which they would have received had their Series B Preferred Stock, been converted into Common Stock on such date.

(i) Certificates as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Series B Conversion Price pursuant to this Section 3, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of such Series B Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of the Series B Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (1) such applicable adjustments and readjustments, (2) the applicable Series B Conversion Price at the time in effect, and (3) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such holder's Preferred Stock. Any certificate sent to the holders of the Series B Preferred Stock pursuant to this

Section 3(i) shall be signed by an officer of the Corporation.

(j) Reservation of Shares Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series B Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of Series B Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series B Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

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(k) Issue and Transfer Taxes. The Corporation will pay any and all documentary stamp or similar issue or transfer taxes payable in respect of the issue or delivery of shares of Common Stock on conversion of the Series B Preferred Stock pursuant hereto; provided that the Corporation shall not be required to pay any tax which may be payable in respect of any transfer involved in the issue or delivery of shares of Common Stock in a name other than that of the holder of the Series B Preferred Stock to be converted and no such issue or delivery will be made unless and until the person requesting such issue or delivery has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid.

4. Voting Rights and Directors.

(a) Except (i) as otherwise required by law or (ii) as otherwise set forth herein or in the Certificate of Incorporation, the holders of Series B Preferred Stock shall be entitled to notice of any stockholders' meeting and to vote upon any matter submitted to the stockholders for a vote, and each holder of Series B Preferred Stock shall have one vote for each full share of Common Stock into which the Series B Preferred Stock would be convertible as of the Original Issue Date, subject to adjustment for stock dividends, subdivisions, combinations or consolidations pursuant to Section 3(d) hereof.

(b) As long as any shares of Series B Preferred Stock remain outstanding, the holders of Series B Preferred Stock shall vote as a separate class to elect such number of directors of the Corporation (the "Series B Directors"), which, when added to the number of directors elected by the holders of Series A Preferred Stock pursuant to Section (4)(b) of Article IV of the Certificate of Incorporation (the "Series A Directors"), will be in as close a proportion as is possible to the total number of directors of the Corporation as the proportion of the number of shares of Common Stock issuable upon the conversion of all shares of Series A Preferred Stock and Series B Preferred Stock is to total number of shares of Common Stock then outstanding (after giving effect to the conversion of all shares of Preferred Stock then outstanding), rounded down to the nearest whole number; provided, however, that the foregoing right shall be superseded in the event, to the extent, and for so long as the appointment of any such Series B Director would cause the Corporation to fail to comply with applicable laws or regulations or the rules of the Nasdaq Stock Market. Any such Series B Director may be removed during the term of office of such Series B Director, with or without cause, by the affirmative vote of the holders of Series B Preferred Stock, given either at a special meeting duly called for that purpose or pursuant to a written consent, and any vacancy thereby created may be filled by an affirmative vote represented at the meeting or pursuant to the written consent. All directors other than the Preferred Directors shall be elected by the holders of Common Stock, the holders of Series A Preferred Stock and the holders of Series B Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis.

(c) Any action which the holders of Series B Preferred Stock are authorized to take at a duly called annual or special meeting of stockholders may in lieu thereof be taken by means of a written consent of such holders.

5. Protective Provisions. In addition to any other rights provided by law, so long as at least 50% of the shares of Series B Preferred Stock issued by the Corporation remain outstanding, the Corporation and its subsidiaries shall not without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of Series A Preferred Stock and Series B Preferred Stock, voting together as a single class, on an as-converted to Common Stock basis:

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(i) amend or repeal any provision of, or add any provision to, this Certificate of Designation;

(ii) authorize or issue any shares of any class or series of Senior Stock or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of Senior Stock of the Corporation;



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(iii) issue any bonds, debentures or notes or incur similar debt obligations, other than trade debt in the ordinary course of business;

(iv) consummate a Change of Control Transaction, unless the aggregate value received for, or realizable in respect of, all outstanding shares of Series B Preferred Stock, determined in accordance with Section 2(c) hereof, as a result of such sale or other transaction or series of transactions exceeds an amount equal to \$10.00 per share (as adjusted for stock splits and dividends in kind) multiplied by the number of shares of Series B Preferred outstanding (the "Aggregate Cash Purchase Price"), plus an amount sufficient to result in an overall internal rate of return ("IRR") on the Aggregate Cash Purchase Price of 50%, taking into account for purposes of calculating such overall IRR any differences in the dates of issuance of such outstanding shares;

(v) pay any dividend on any shares of Junior Stock, or repurchase or redeem any such shares of Junior Stock except for repurchases of unvested shares of Junior Stock at cost from employees, directors, consultants and other service providers;

(vi) repurchase any outstanding shares of capital stock of the Corporation, except for (i) repurchase of shares held by employees of the Corporation pursuant to repurchase agreements approved by the Board of Directors and (ii) redemption of shares of Preferred Stock;

(vii) amend the Bylaws of the Corporation to increase the authorized number of directors of the Corporation to more than eight (8); or

(viii) authorize or issue any shares of any class or series of Parity Preferred Stock or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of Parity Preferred Stock of the Corporation.

6. Status of Converted Stock. In the event any shares of Series B Preferred Stock shall be converted pursuant to Section 3 hereof, the shares so converted shall be canceled and shall not be issuable by the Corporation.

7. Residual Rights. All rights accruing to the outstanding shares of the Corporation not expressly provided for to the contrary herein shall be vested in the Common Stock.

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IN WITNESS WHEREOF, Evolve Software, Inc. has caused this Certificate of Designation to be executed by Linda Zecher, its President and Chief Executive Officer, this 20th day of August, 2002.

EVOLVE SOFTWARE, INC.

By: /s/ Linda Zecher

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Name: Linda Zecher  
Title: President and Chief Executive Officer

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**CERTIFICATE OF AMENDMENT OF  
CERTIFICATE OF DESIGNATION OF SERIES B PREFERRED STOCK**

**OF**

**EVOLVE SOFTWARE, INC.**

It is hereby certified that:

1. The name of the corporation is Evolve Software, Inc. (the "Corporation").

2. The Certificate of Designation of Series B Preferred Stock of the Corporation as filed on August 20, 2002 (the "Certificate of Designation") is hereby amended by deleting in its entirety the second and the third paragraph on the first page thereof and by substituting in lieu of said paragraphs the following new paragraphs:

"That pursuant to the authority conferred upon the Board of Directors by the Certificate of Incorporation of the Corporation (the "Certificate of Incorporation"), the Board of Directors of the Corporation on August 20, 2002, adopted the following resolution creating a series of 700,000 shares of Series B Preferred Stock, par value \$0.001 per share:

RESOLVED, that pursuant to the authority vested in the Board of Directors of the Corporation in accordance with the provisions of its Certificate of Incorporation, a series of Preferred Stock of the Corporation ("Preferred Stock") be and it hereby is created, that the shares of such series shall be designated as Series B Preferred Stock (the "Series B Preferred Stock"), that the number of shares constituting such series shall be 700,000 and that the designation and amount thereof and the preferences and relative, optional and other special rights of the shares of such series, and the qualifications, limitations or restrictions thereof are as set forth herein."

3. The amendment of the Certificate of Designation herein certified has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

Signed this 20th day of August, 2002.

/s/ Art Taylor

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Art Taylor  
Vice President

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**CERTIFICATE OF AMENDMENT OF  
CERTIFICATE OF DESIGNATION OF SERIES B PREFERRED STOCK**

**OF**

**EVOLVE SOFTWARE, INC.**

It is hereby certified that:

1. The name of the corporation is Evolve Software, Inc. (the "Corporation").

2. The Certificate of Designation of Series B Preferred Stock of the Corporation as filed on August 20, 2002, as amended on August 20, 2002, (the "Certificate of Designation") is hereby amended by deleting in its entirety the second and the third paragraph on the first page thereof and by substituting in lieu of said paragraphs the following new paragraphs:

"That pursuant to the authority conferred upon the Board of Directors by the Certificate of Incorporation of the Corporation (the "Certificate of Incorporation"), the Board of Directors of the Corporation on August 22, 2002, adopted a resolution increasing the number of shares designated Series B Preferred Stock, par value \$0.001 per share, to 750,000 shares and amended the following resolution adopted by the Board of Directors of the Corporation on August 20, 2002 to reflect the increased number of shares of Series B Preferred Stock of the Corporation:

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RESOLVED, that pursuant to the authority vested in the Board of Directors of the Corporation in accordance with the provisions of its Certificate of Incorporation, a series of Preferred Stock of the Corporation ("Preferred Stock") be and it hereby is created, that the shares of such series shall be designated as Series B Preferred Stock (the "Series B Preferred Stock"), that the number of shares constituting such series shall be 750,000 and that the designation and amount thereof and the preferences and relative, optional and other special rights of the shares of such series, and the qualifications, limitations or restrictions thereof are as set forth herein."

3. The amendment of the Certificate of Designation herein certified has been duly adopted in accordance with the provisions of Section 242 of the General Corporation Law of the State of Delaware.

Signed this 23rd day of August, 2002.

/s/ Art Taylor

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Art Taylor  
Vice President