
**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

FORM 8-K

**CURRENT REPORT
Pursuant to Section 13 or 15(d)
of the Securities Exchange Act of 1934**

Date of Report (Date of earliest event reported) June 4, 2020

BENEFITFOCUS, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation)

001-36061
(Commission
File Number)

46-2346314
(IRS Employer
Identification No.)

100 Benefitfocus Way, Charleston, South Carolina 29492
(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code (843) 849-7476

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common Stock, \$0.001 Par Value	BNFT	Nasdaq Global Market

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this Chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this Chapter).

Emerging Growth Company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act.

Item 1.01. Entry into a Material Definitive Agreement.

On June 4, 2020, Benefitfocus, Inc. (the “Company”) completed the previously announced issuance and sale of 1,777,778 shares of a newly created series of its preferred stock, par value \$0.001 per share, designated as “Series A Convertible Preferred Stock” (the “Series A Preferred Stock”) to BuildGroup LLC, a Delaware limited liability company (the “Buyer”), pursuant to the terms of the preferred stock purchase agreement (the “Purchase Agreement”), dated as of May 22, 2020, by and between the Company and the Buyer. A. Lanham Napier, a current member of the Company’s Board of Directors (the “Board”), is the Chief Executive Officer of the Buyer.

The terms of the Series A Preferred Stock have been previously disclosed in Item 1.01 to the Company’s Current Report on Form 8-K filed on May 26, 2020.

The proceeds of this offering were approximately \$80.0 million. The Company intends to use the proceeds for general corporate purposes, including potential acquisitions and repayments of debt.

In connection with the sale of the Series A Preferred Stock, the Company entered into the Registration Rights Agreement and the Voting Agreement, as defined and described below.

Registration Rights Agreement

Pursuant to the Registration Rights Agreement, dated June 4, 2020, by and between the Company and the Buyer (the “Registration Rights Agreement”), the Company agreed to file a registration statement registering for resale the shares of common stock issuable upon conversion of the Series A Preferred Stock within 30 calendar days from the date of the Purchase Agreement.

Co-Sale and Voting Agreement

On June 4, 2020, concurrent with the Company closing the transactions contemplated by the Purchase Agreement, the Company entered into a Co-Sale and Voting Agreement (the “Voting Agreement”) with the Buyer and Mason R. Holland, Jr., the Executive Chairman of the Company’s Board of Directors (the Buyer and Mr. Holland, collectively, the “Stockholders”). Pursuant to the Certificate of Designations (as defined below), as long as not less than 60% of the shares of the Series A Preferred Stock originally issued remain outstanding, the holders of the majority of the then outstanding shares of the Series A Preferred Stock, voting together as a single class, will have the right at any election of directors to elect (A) two directors if the Board consists of nine or fewer directors; or (B) three directors if the Board consists of 10 directors (the “Preferred Stock Directors”). Pursuant to the Voting Agreement, the Stockholders agreed, among other things, to vote their shares in favor of the Preferred Stock Directors (the “Voting Provision”). Mr. Holland and his affiliates are bound by the Voting Provision as long as they continue to beneficially own a majority of the common stock beneficially owned by them on the date of the Voting Agreement.

Pursuant to the Voting Agreement, to the extent permitted by the rules of the NASDAQ Stock Market (or other stock exchange on which the Company's common stock is then listed), the Company will appoint Mr. Napier as Lead Independent Director of the Board.

Pursuant to the Voting Agreement, the Stockholders also agreed that except in the case of Exempted Transfers (as defined therein), which include, among other transfers, sales made pursuant to an effective registration statement, a Stockholder who proposes to transfer any of its shares must give the other Stockholder fourteen (14) days advance written notice of such transfer, and that the other Stockholder, within seven (7) days of receipt of such notice, may elect to participate in such transfer on a pro rata basis based on the number of shares of common stock then beneficially owned by each, on an as-converted basis.

The foregoing descriptions of the Registration Rights Agreement and the Voting Agreement do not purport to be complete and are subject to, and qualified in their entirety by, the full text of the Registration Rights Agreement and the Voting Agreement, which are attached hereto as Exhibit 10.1 and 10.2, and are incorporated herein by reference.

Item 3.02. Unregistered Sales of Equity Securities.

The issuance and sale of the shares of the Series A Preferred Stock pursuant to the Purchase Agreement described above were made in reliance on an exemption from registration under the Securities Act of 1933, as amended (the "Securities Act"), pursuant to Section 4(a)(2) thereof. The information in Item 1.01 above relating to the issuance and sale of the Series A Preferred Stock is incorporated into this Item 3.02 by reference.

Item 3.03. Material Modifications to Rights of Security Holders.

A summary of the rights, preferences and privileges of the Series A Preferred Stock is set forth in Item 1.01 of the Current Report on Form 8-K filed by the Company on May 26, 2020, which is incorporated herein by reference. Each share of the Series A Preferred Stock issued to the Buyer pursuant to the Purchase Agreement has the powers, designations, preferences, and other rights of the Series A Preferred Stock set forth in the Certificate of Designations of the Series A Preferred Stock filed by the Company with the Secretary of State of the State of Delaware on June 4, 2020 (the "Certificate of Designations"), a copy of which is filed as Exhibit 3.1 hereto and is incorporated herein by reference.

Item 5.03. Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

The information set forth in Item 1.01 and Item 3.03 above relating to the issuance and sale of the Series A Preferred Stock and the Certificate of Designations is incorporated herein by reference. The Certificate of Designations establishes the powers, designations, preferences, and other rights of the Series A Preferred Stock and became effective upon filing with the Secretary of State of the State of Delaware on June 4, 2020.

Item 8.01 Other Events.

On June 8, 2020, the Company issued a press release announcing the closing of the issuance and sale of the shares of the Series A Preferred Stock to the Buyer. A copy of the press release is included herewith as Exhibit 99.1.

Item 9.01 Financial Statements and Exhibits.

(d) Exhibits

<u>Exhibit No.</u>	<u>Description</u>
3.1	<u>Certificate of Designations for the Series A Convertible Preferred Stock of Benefitfocus, Inc., as filed with the Delaware Secretary of State on June 4, 2020.</u>
10.1	<u>Registration Rights Agreement, dated June 4, 2020, by and between Benefitfocus, Inc. and BuildGroup LLC.</u>
10.2	<u>Co-Sale and Voting Agreement, dated June 4, 2020, by and among Benefitfocus, Inc., BuildGroup LLC, and Mason R. Holland, Jr.</u>
99.1	<u>Press release dated June 8, 2020.</u>

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: June 8, 2020

BENEFITFOCUS, INC.

/s/ Stephen M. Swad

Stephen M. Swad

Chief Financial Officer

Benefitfocus, Inc.**Certificate of Designations****Series A Convertible Preferred Stock**

On May 21, 2020, the Board of Directors of Benefitfocus, Inc., a Delaware corporation (the “**Company**”), adopted the following resolution designating and creating, out of the authorized and unissued shares of preferred stock of the Company, one million seven hundred seventy seven thousand seven hundred seventy eight (1,777,778) authorized shares of a series of preferred stock of the Company titled the “Series A Convertible Preferred Stock”:

RESOLVED that, pursuant to the Company’s Certificate of Incorporation and Bylaws each as currently in effect, and applicable law, a series of preferred stock of the Company titled the “Series A Convertible Preferred Stock,” and having a par value of \$0.001 per share and an initial number of authorized shares equal to one million seven hundred seventy seven thousand seven hundred seventy eight (1,777,778), is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company, which series has the rights, designations, preferences, voting powers and other provisions set forth below:

SECTION 1. DEFINITIONS.

“**Affiliate**” of any Person means any Person, directly or indirectly, Controlling, Controlled by or under common Control with such Person.

“**Business Day**” means any day on which the Principal Market is open for trading during normal trading hours (*i.e.*, 9:30 a.m. to 4:00 p.m. Eastern Time), including any day on which the Principal Market is open for trading for a period of time less than the customary time.

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

“**Certificate**” means any Physical Certificate or Electronic Certificate.

“**Certificate of Designations**” means this Certificate of Designations, as amended or supplemented from time to time.

“**Certificate of Incorporation**” means the Company’s Restated Certificate of Incorporation, as the same may be further amended, supplemented or restated.

“Change of Control” means any of the following events:

- (a) a “person” or “group” (within the meaning of Section 13(d)(3) of the Exchange Act), other than the Company, its wholly owned Subsidiaries or a Holder (together with its Affiliates), has become the direct or indirect “beneficial owner” (as defined below) of shares of the Company’s Capital Stock representing more than fifty percent (50%) of the voting power of all of the Company’s then-outstanding Capital Stock; or
- (b) the consummation of (i) any sale, lease or other transfer, in one transaction or a series of transactions, of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person; or (ii) any transaction or series of related transactions in connection with which (whether by means of merger, consolidation, share exchange, combination, reclassification, recapitalization, acquisition, liquidation or otherwise) all of the Capital Stock is exchanged for, converted into, acquired for, or constitutes solely the right to receive, other securities, cash or other property; *provided, however*, that any merger, consolidation, share exchange or combination of the Company pursuant to which the Persons that directly or indirectly “beneficially owned” (as defined below) shares of the Company’s Capital Stock representing more than fifty percent (50%) of the voting power of all of the Company’s then-outstanding Capital Stock immediately before such transaction directly or indirectly “beneficially own,” immediately after such transaction, more than fifty percent (50%) of the voting power of the surviving, continuing or acquiring company or other transferee, as applicable, or the parent thereof, in substantially the same proportions vis-à-vis each other as immediately before such transaction will be deemed not to be a Change of Control pursuant to this clause (b).

For the purposes of this definition, (x) any transaction or event described in both clause (a) and in clause (b)(i) or (ii) above (without regard to the proviso in clause (b)) will be deemed to occur solely pursuant to clause (b) above (subject to such proviso); and (y) whether a Person is a “beneficial owner” and whether shares are “beneficially owned” will be determined in accordance with Rule 13d-3 under the Exchange Act.

“Change of Control Redemption” means the redemption of any share of Convertible Preferred Stock by the Company pursuant to **Section 6(h)**.

“Change of Control Redemption Date” means the date fixed, pursuant to **Section 6(h)**, for the redemption of any share of Convertible Preferred Stock by the Company pursuant to a Change of Control Redemption.

“Change of Control Redemption Notice” has the meaning set forth in **Section 6(i)**.

“Change of Control Redemption Notice Date” means the date on which the Change of Control Redemption Notice is delivered.

“**Change of Control Redemption Price**” means the cash price payable by the Company to redeem any share of Convertible Preferred Stock upon its Change of Control Redemption, calculated pursuant to **Section 6(h)**.

“**Close of Business**” means 5:00 p.m., Charleston, South Carolina time.

“**Common Stock**” means the common stock, \$0.001 par value per share, of the Company.

“**Common Stock Participating Dividend**” has the meaning set forth in **Section 4(b)**.

“**Company**” has the meaning set forth in the preamble.

“**Company Redemption**” has the meaning set forth in **Section 6(a)**.

“**Company Redemption Date**” means the date fixed, pursuant to **Section 6(c)**, for the settlement of the redemption of the Convertible Preferred Stock by the Company pursuant to a Company Redemption.

“**Company Redemption Notice**” has the meaning set forth in **Section 6(e)**.

“**Company Redemption Notice Date**” means, with respect to a Company Redemption of the Convertible Preferred Stock, the date on which the Company sends the related Company Redemption Notice pursuant to **Section 6(e)**.

“**Company Redemption Price**” means the consideration payable by the Company to redeem any share of Convertible Preferred Stock upon its Redemption, calculated pursuant to **Section 6(d)**.

“**Company Redemption Price Premium**” means One Hundred Five Percent (105%).

“**Control**” (including its correlative meanings “under common Control with” and “Controlled by”) means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through ownership of securities or partnership or other interests, by contract or otherwise.

“**Conversion**” means the conversion of the Convertible Preferred Stock pursuant to **Section 8** hereof.

“**Conversion Consideration**” means, with respect to the conversion of any share of Convertible Preferred Stock, the type and amount of consideration payable to settle such conversion, determined in accordance with **Section 8**.

“**Conversion Date**” means, with respect to the Conversion of any share of Convertible Preferred Stock, the first Business Day on which the requirements set forth in **Section 8(c)(i)** for such conversion are satisfied.

“**Conversion Price**” means \$15.00 per share, subject to adjustment for stock splits, recapitalizations and the like as set forth in **Section 8(e)**.

“**Convertible Preferred Stock**” has the meaning set forth in **Section 3(a)**.

“**Conversion Share**” means any share of Common Stock issued or issuable upon conversion of any share of Convertible Preferred Stock.

“**Depository**” means The Depository Trust Company or its successor.

“**Dividend**” means any Regular Dividend or Participating Dividend.

“**Dividend Payment Date**” means each Regular Dividend Payment Date with respect to a Regular Dividend and each date on which any declared Participating Dividend is scheduled to be paid on the Convertible Preferred Stock.

“**Electronic Certificate**” means any electronic book-entry maintained by the Transfer Agent that represents any share(s) of Convertible Preferred Stock.

“**Ex-Dividend Date**” means, with respect to an issuance, dividend or distribution on the Common Stock, the first date on which shares of Common Stock trade on the applicable exchange or in the applicable market, regular way, without the right to receive such issuance, dividend or distribution (including pursuant to due bills or similar arrangements required by the relevant stock exchange). For the avoidance of doubt, any alternative trading convention on the applicable exchange or market in respect of the Common Stock under a separate ticker symbol or CUSIP number will not be considered “regular way” for this purpose.

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

“**Holder**” means a person in whose name any share of Convertible Preferred Stock is registered in the Register.

“**Initial Issue Date**” means June 4, 2020.

“**Initial Stated Value**” means forty-five dollars (\$45.00) per share of Convertible Preferred Stock.

“**Last Reported Sale Price**” of the Common Stock for any Trading Day means the closing sale price per share (or, if no closing sale price is reported, the average of the last bid price and the last ask price per share or, if more than one in either case, the average of the average last bid prices and the average last ask prices per share) of the Common Stock on such Trading Day as reported in composite transactions for the principal U.S. national or regional securities exchange on which the Common Stock is then listed. If the Common Stock is not listed on a U.S. national or regional securities exchange on such Trading Day, then the Last Reported Sale Price will be the last quoted bid price per share of Common Stock on such

Trading Day in the over-the-counter market as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock is not so quoted on such Trading Day, then the Last Reported Sale Price will be the average of the mid-point of the last bid price and the last ask price per share of Common Stock on such Trading Day from each of at least three nationally recognized independent investment banking firms the Company selects in good faith.

“**Market Disruption Event**” means, with respect to any date, the occurrence or existence, during the one-half hour period ending at the scheduled close of trading on such date on the principal U.S. national or regional securities exchange or other market on which the Common Stock is listed for trading or trades, of any material suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant exchange or otherwise) in the Common Stock or in any options contracts or futures contracts relating to the Common Stock.

“**Officer**” means the Chief Executive Officer, the President, the Chief Financial Officer, the Treasurer, any Assistant Treasurer, the Controller or the Secretary of the Company.

“**Open of Business**” means 9:00 a.m., Charleston, South Carolina time.

“**Ownership Limitation**” has the meaning set forth in **Section 8(f)(i)**.

“**Participating Dividend**” has the meaning set forth in **Section 4(b)**.

“**Person**” or “**person**” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or other agency or political subdivision thereof. Any division or series of a limited liability company, limited partnership or trust will constitute a separate “person” under this Certificate of Designations.

“**Physical Certificate**” means any certificate (other than an Electronic Certificate) representing any share(s) of Convertible Preferred Stock registered in the name of the Holder of such share(s) and duly executed by the Company and countersigned by the Transfer Agent.

“**Preferred Stock Directors**” has the meaning set forth in **Section 7(a)(i)**.

“**Preferred Stock Director Designation Right Condition**” has the meaning set forth in **Section 7(a)(i)**.

“**Principal Market**” means the Nasdaq Global Market; *provided, however*, that in the event the Company’s Common Stock is ever listed or traded on the New York Stock Exchange, the NYSE MKT, the Nasdaq Global Select Market, the Nasdaq Capital Market, the OTC Bulletin Board or either of the OTCQB Marketplace or the OTCQX marketplace of the OTC Markets Group, then the “Principal Market” shall mean such other market or exchange on which the Company’s Common Stock is then listed or traded.

“**Record Date**” means, with respect to any dividend or distribution on, or issuance to holders of, Convertible Preferred Stock or Common Stock, the date fixed (whether by law, contract or the Board of Directors or otherwise) to determine the Holders or the holders of Common Stock, as applicable, that are entitled to such dividend, distribution or issuance.

“**Redemption**” means a Company Redemption or a Change of Control Redemption.

“**Redemption Notice Date**” means a Change of Control Redemption Date or Company Redemption Date, as applicable.

“**Register**” has the meaning set forth in **Section 3(e)**.

“**Regular Dividend Payment Date**” means, with respect to any share of Convertible Preferred Stock, each March 31st, June 30th, September 30th, and December 31st of each year, beginning on June 30, 2020 (or beginning on such other date specified in the Certificate representing such share).

“**Regular Dividend Period**” means each period from, and including, a Regular Dividend Payment Date (or, in the case of the first Regular Dividend Period, from, and including, the Initial Issue Date) to, but excluding, the next Regular Dividend Payment Date.

“**Regular Dividend Rate**” means eight percent (8.0%) per annum.

“**Regular Dividends**” has the meaning set forth in **Section 4(a)(i)**.

“**Requisite Stockholder Approval**” means any stockholder approval contemplated by NASDAQ Listing Standard Rule 5635 with respect to the issuance of shares of Common Stock upon conversion of the Convertible Preferred Stock in contravention of the limitations imposed by such rule; *provided, however*, that the Requisite Stockholder Approval will be deemed to be obtained if, due to any amendment or binding change in the interpretation of the applicable listing standards of The NASDAQ Stock Market, any such stockholder approval is no longer required for the Company to settle all conversions of the Convertible Preferred Stock in shares of Common Stock without regard to **Section 8(f)**.

“**Stated Value**” means, with respect to the Convertible Preferred Stock, an amount initially equal to the Initial Stated Value per share of Convertible Preferred Stock as adjusted for any stock splits, stock dividends, recapitalizations or similar transactions with respect to the Convertible Preferred Stock as set forth in **Section 8(e)** and, if applicable, as adjusted pursuant to **Section 4**.

“**Trading Day**” means any day on which (a) trading in the Common Stock generally occurs on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded; and (b) there is no Market Disruption Event. If the Common Stock is not so listed or traded, then “Trading Day” means a Business Day.

“**Transfer Agent**” means the Company or its successor or assignee in that capacity.

SECTION 2. RULES OF CONSTRUCTION. For purposes of this Certificate of Designations:

(a) “or” is not exclusive;

(b) “will” expresses a command;

(c) the “average” of a set of numerical values refers to the arithmetic average of such numerical values;

(d) a merger involving, or a transfer of assets by, a limited liability company, limited partnership or trust will be deemed to include any division of or by, or an allocation of assets to a series of, such limited liability company, limited partnership or trust, or any unwinding of any such division or allocation;

(e) words in the singular include the plural and in the plural include the singular, unless the context requires otherwise;

(f) “herein,” “hereof” and other words of similar import refer to this Certificate of Designations as a whole and not to any particular Section or other subdivision of this Certificate of Designations, unless the context requires otherwise; and

(g) references to currency mean the lawful currency of the United States of America, unless the context requires otherwise.

SECTION 3. THE CONVERTIBLE PREFERRED STOCK.

(a) *Designation; Par Value*. A series of stock of the Company titled the “Series A Convertible Preferred Stock” (the “**Convertible Preferred Stock**”) is hereby designated and created out of the authorized and unissued shares of preferred stock of the Company. The par value of the Convertible Preferred Stock is \$0.001 per share.

(b) *Number of Authorized Shares*. The total authorized number of shares of Convertible Preferred Stock is one million seven hundred seventy seven thousand seven hundred seventy eight (1,777,778).

(c) *Form, Dating and Certificates*.

(i) *Form and Date of Certificates Representing Convertible Preferred Stock*. Each Certificate representing any share of Convertible Preferred Stock may bear notations, legends or endorsements required by law, stock exchange rule or usage or the Depository.

(ii) *Certificates.*

(1) *Generally.* The Convertible Preferred Stock will be originally issued initially in the form of one or more Physical Certificates. Physical Certificates may be exchanged for Electronic Certificates, and Electronic Certificates may be exchanged for Physical Certificates upon request by the Holder thereof pursuant to customary procedures.

(2) *Electronic Certificates; Interpretation.* For purposes of this Certificate of Designations, (A) any reference in this Certificate of Designations to the “delivery” of any Electronic Certificate will be deemed to be satisfied upon the registration of the electronic book-entry representing such Electronic Certificate in the name of the applicable Holder; and (B) upon satisfaction of any applicable requirements of the Delaware General Corporation Law, the Certificate of Incorporation and the Bylaws of the Company, and any related requirements of the Transfer Agent, in each case for the issuance of Convertible Preferred Stock in the form of one or more Electronic Certificates, such Electronic Certificates will be deemed to be executed by the Company and countersigned by the Transfer Agent.

(iii) *No Bearer Certificates.* The Convertible Preferred Stock will be issued only in registered form.

(d) *Method of Payment; Delay When Payment Date is Not a Business Day.*

(i) *Method of Payment.* The Company will pay all cash amounts due on any share of Convertible Preferred Stock (whether by reason of an accrued dividend, as a result of a liquidation, by reason of the Ownership Limitation, or otherwise) by check issued in the name of the Holder thereof; *provided, however,* that if such Holder has delivered to the Company, no later than the time set forth in the next sentence, a written request to receive payment by wire transfer to an account of such Holder within the United States, then the Company will pay all such cash amounts by wire transfer of immediately available funds to such account. To be timely, such written request must be delivered no later than the Close of Business on the following date: (x) with respect to the payment of any declared cash Dividend due on a Dividend Payment Date for the Convertible Preferred Stock, the date that is fifteen (15) calendar days immediately prior to the Regular Dividend Payment Date in the case of Regular Dividends, and the related Record Date with respect to Participating Dividends; and (y) with respect to any other payment, the date that is fifteen (15) calendar days immediately before the date such payment is due. For the avoidance of doubt, any wire instructions provided by a Holder to the Company pursuant to this **Section 3(d)(i)** shall remain in full force and effect for any future payments to be made to such Holder until a revocation notice of such wire instructions is provided by such Holder to the Company in writing.

(ii) *Delay of Payment when Payment Date is Not a Business Day.* If the due date for a payment on any share of Convertible Preferred Stock as provided in this Certificate of Designations is not a Business Day, then, notwithstanding anything to the contrary in this Certificate of Designations, such payment may be made on the immediately following Business Day and no additional interest, dividend or other amount will accrue or accumulate on such payment as a result of the related delay. Solely for purposes of the immediately preceding sentence, a day on which the applicable place of payment is authorized or required by law or executive order to close or be closed will be deemed not to be a “Business Day.”

(e) *Transfer Agent; Register.* The Company or any of its Subsidiaries may act as the Transfer Agent. The Company will, or will retain another Person (who may be the Transfer Agent) to act as registrar, who will keep a record (the “**Register**”) of the names and addresses of the Holders, the number of shares of Convertible Preferred Stock held by each Holder and the transfer, exchange, repurchase, Redemption and Conversion of the Convertible Preferred Stock. Absent manifest error, the entries in the Register will be conclusive and the Company and the Transfer Agent may treat each Person whose name is recorded as a Holder in the Register as a Holder for all purposes. The Register will be in written form or in any form capable of being converted into written form reasonably promptly. The Company will promptly provide a copy of the Register to any Holder upon its request.

(f) *Transfers and Exchanges; Transfer Taxes; Certain Transfer Restrictions.*

(i) *Provisions Applicable to All Transfers and Exchanges.*

(1) *Generally.* Subject to this **Section 3(f)**, shares of Convertible Preferred Stock represented by any Certificate may be transferred or exchanged from time to time, and the Company, or any other Person retained by the Company to act as registrar, will cause each such transfer or exchange to be recorded in the Register.

(2) *No Services Charge; Transfer Taxes.* The Company will not impose any service charge on any Holder for any transfer, exchange or conversion of any share of Convertible Preferred Stock, but the Company may require payment of a sum sufficient to cover any transfer tax or similar governmental charge that may be imposed in connection with any transfer or exchange of shares of Convertible Preferred Stock, *provided*, that for the avoidance of doubt, any transfer tax or similar governmental charge that may be imposed with any conversion of .shares of Convertible Preferred Stock shall be governed pursuant to **Section 9(d)** herein.

(3) *Settlement of Transfers and Exchanges.* Upon satisfaction of the requirements of this Certificate of Designations to effect a transfer or exchange of any share of Convertible Preferred Stock as well as the delivery of all documentation reasonably required by the Transfer Agent or the Company in order to effect any transfer or exchange, the Company will cause such transfer or exchange to be effected as soon as reasonably practicable but in no event later than the fifth (5th) Business Day after the date of such satisfaction.

(ii) *Transfers of Shares Subject to Redemption or Conversion.* Notwithstanding anything to the contrary in this Certificate of Designations, the Company will not be required to register the transfer of or exchange any share of Convertible Preferred Stock:

- (1) that has been surrendered for Conversion; or
- (2) that has been called for Redemption pursuant to a Redemption Notice, except to the extent that the Company fails to pay the related Redemption Price, as applicable, when due.

(g) *Outstanding Shares.*

(i) *Generally.* The shares of Convertible Preferred Stock that are outstanding at any time will be deemed to be those shares of Convertible Preferred Stock that, at such time, have been duly executed by the Company and countersigned by the Transfer Agent, excluding those shares of Convertible Preferred Stock that have theretofore been (1) cancelled by the Transfer Agent or delivered to the Transfer Agent for cancellation; (2) paid in full upon their conversion or redemption in accordance with this Certificate of Designations; or (3) deemed to cease to be outstanding to the extent provided in, and subject to **Section 3(g)(ii)**.

(ii) *Shares to Be Converted.* If any share of Convertible Preferred Stock is to be converted, then, at the Close of Business on the Conversion Date for such conversion (unless there occurs a default in the delivery of the Conversion Consideration due pursuant to **Section 8** upon such conversion): (1) such Convertible Preferred Stock will be deemed to cease to be outstanding (without limiting the Company's obligations pursuant to **Section 4(c)**); (2) Regular Dividends will cease to accumulate on such Convertible Preferred Stock from and after such Conversion Date; and (3) the rights of the Holders of such Convertible Preferred Stock, as such, will terminate with respect to such Convertible Preferred Stock, other than the right to receive such Conversion Consideration as provided in **Section 8** (and, if applicable, declared Dividends as provided in **Section 4(c)**).

Section 4. DIVIDENDS.

(a) *Generally.*

(i) *Regular Dividends.*

(1) *Accumulation and Payment of Regular Dividends.* Each share of Convertible Preferred Stock will accrue dividends quarterly in arrears at a rate per annum equal to the Regular Dividend Rate on the Stated Value with respect to such share deemed to be in effect commencing on the day immediately following the most recent Regular Dividend Payment Date, regardless of whether or not declared or funds are legally available for their payment (such dividends that accumulate on the Convertible Preferred Stock pursuant to this sentence, "**Regular Dividends**"). Subject to the other provisions of this **Section 4**, such Regular Dividends will be payable in cash on each Regular Dividend Payment Date, *provided*, that if not paid in cash by the respective Regular Dividend

Payment Date, such accrued Regular Dividends will be deemed to have been paid in kind, and the Stated Value with respect to each share of Preferred Stock shall be increased as of the applicable Regular Dividend Payment Date by an amount equal to the accrued but unpaid Regular Dividend with respect thereto for the immediately prior Regular Dividend Period (or, if there is not a preceding Regular Dividend Payment Date as to which such share of Convertible Preferred Stock was outstanding, on the Initial Stated Value of each such share of Convertible Preferred Stock). Accrued Regular Dividends will be computed on the basis of a 360-day year.

(b) Participating Dividends. No dividend or other distribution on the Common Stock (whether in cash, securities or other property, or any combination of the foregoing) will be declared or paid on the Common Stock unless, at the time of such declaration and payment, an equivalent dividend or distribution is declared and paid, respectively, on each outstanding share of Convertible Preferred Stock (such a dividend or distribution on such share of Convertible Preferred Stock, a **“Participating Dividend,”** and such corresponding dividend or distribution on the Common Stock, the **“Common Stock Participating Dividend”**), such that (1) the Record Date and the payment date for such Participating Dividend occur on the same dates as the Record Date and payment date, respectively, for such Common Stock Participating Dividend; and (2) the kind and amount of consideration payable per share of Convertible Preferred Stock in such Participating Dividend is the same kind and amount of consideration that would be payable in the Common Stock Participating Dividend in respect of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with **Section 8** but without regard to **Section 8(d)(ii)** and **Section 8(f)**) in respect of one (1) share of Convertible Preferred Stock that is converted with a Conversion Date occurring on such Record Date (subject to the same arrangements, if any, in such Common Stock Participating Dividend not to issue or deliver a fractional portion of any security or other property, but with such arrangement applying separately to each Holder and computed based on the total number of shares of Convertible Preferred Stock held by such Holder on such Record Date).

(c) Treatment of Dividends Upon Redemption or Conversion. If the Redemption Date or Conversion Date of any share of Convertible Preferred Stock is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then the Holder of such share at the Close of Business on such Record Date will be entitled, notwithstanding the related Redemption or Conversion, as applicable, to receive, on or, at the Company’s election, before such Dividend Payment Date, such declared Dividend on such share in cash; *provided*, that to the extent such dividend is not paid in cash, the amount of such dividend shall be added to the Stated Value with respect to such share in effect on such Redemption Date or Conversion Date. Except as provided in this **Section 4(c)** or **Section 6(d)**, Regular Dividends on any share of Convertible Preferred Stock will cease to accumulate from and after the Redemption Date or Conversion Date, as applicable, for such share, unless the Company defaults in the payment of the related Redemption Price or Conversion Consideration, as applicable.

Section 5. RIGHTS UPON LIQUIDATION, DISSOLUTION OR WINDING UP.

(a) *Generally.* If the Company liquidates, dissolves or winds up, whether voluntarily or involuntarily, then, subject to the rights of any of the Company's creditors and the Change of Control Redemption required by **Section 6(g)** below, each share, or fraction thereof, of Convertible Preferred Stock, as applicable, will entitle the Holder thereof to receive payment for the greater of the amounts set forth in **clause (i)** and **(ii)** below out of the Company's assets or funds legally available for distribution to the Company's stockholders, before any such assets or funds are distributed to, or set aside for the benefit of, the Common Stock:

(i) the sum of:

(1) the Stated Value per share (or fraction thereof) of Convertible Preferred Stock; and

(2) all unpaid Regular Dividends that will have accumulated on such share (or fraction thereof) from the immediately preceding Regular Dividend Payment Date to, but excluding, the date of such payment; or

(ii) the amount such Holder would have received in respect of the number of shares of Common Stock that would be issuable (determined in accordance with **Section 8** but without regard to **Section 8(d)(ii)** and **Section 8(f)**) upon conversion of such share (or fraction thereof) of Convertible Preferred Stock assuming the Conversion Date of such conversion occurs on the date of such payment.

Upon payment of such amount in full on the outstanding Convertible Preferred Stock, Holders of the Convertible Preferred Stock will have no rights to the Company's remaining assets or funds, if any. If such assets or funds are insufficient to fully pay such amount on all outstanding shares of Convertible Preferred Stock, then, subject to the rights of any of the Company's creditors, such assets or funds will be distributed ratably on the outstanding shares of Convertible Preferred Stock in proportion to the full respective distributions to which such shares would otherwise be entitled.

(b) *Certain Business Combination Transactions Deemed to Be a Liquidation.* For purposes of **Section 5(a)**, the Company's consolidation or combination with, or merger with or into, or the sale, lease or other transfer of all or substantially all of the Company's assets (other than a sale, lease or other transfer in connection with the Company's liquidation, dissolution or winding up) to, another Person will constitute the Company's liquidation, dissolution or winding up.

SECTION 6. RIGHT OF THE COMPANY TO REDEEM THE CONVERTIBLE PREFERRED STOCK.

(a) *Right to Redeem.* Subject to the terms of this **Section 6**, the Company has the right, at its election, to redeem, subject to the right of the Holders to convert the Convertible Preferred Stock pursuant to **Section 8** after receipt of the Company Redemption Notice but prior to such redemption, all, or any number of shares or fraction thereof that is less than all, of the Convertible Preferred Stock, at any time and from time to time, on a Company Redemption Date, for a cash purchase price equal to the Company Redemption Price (such redemption, a "**Company Redemption**").

(b) *Redemption Prohibited in Certain Circumstances.* The Company will not call for Company Redemption, or otherwise send a Company Redemption Notice in respect of the Company Redemption of, any share of Convertible Preferred Stock pursuant to this **Section 6** unless (i) the Company has sufficient funds legally available, and is permitted under the terms of its indebtedness for borrowed money, to fully pay the Company Redemption Price in cash in respect of all shares of Convertible Preferred Stock called for Company Redemption and (ii) the Last Reported Sale Price of the Common Stock has been at least 150% of the Conversion Price then in effect for at least 20 Trading Days (whether or not consecutive) during any 30 consecutive Trading Day period (including the last Trading Day of such period) ending on, and including, the Trading Day immediately preceding the date on which the Company provides a Company Redemption Notice in accordance with **Section 6(e)**.

(c) *Company Redemption Date.* The Company Redemption Date for any Company Redemption will be a Business Day of the Company's choosing that is no less than thirty (30) calendar days after the Company Redemption Notice Date for such Company Redemption, but in no event prior to the fourth year anniversary of the Initial Issue Date.

(d) *Company Redemption Price.* The Company Redemption Price for any share of Convertible Preferred Stock to be repurchased pursuant to a Company Redemption is an amount in cash equal to (1) the product of (x) the Company Redemption Price Premium and (y) the Initial Stated Value of such share at the Close of Business on the Company Redemption Date for such Redemption plus (2) the difference between the Stated Value then in effect with respect to such share and the Initial Stated Value, if any, plus (3) accumulated and unpaid Regular Dividends on such share from the immediately preceding Regular Dividend Payment Date to, but excluding, such Company Redemption Date (to the extent such accumulated and unpaid Regular Dividends are not included in the Stated Value set forth in subclause (2) above). In the event of any fractional shares, the Company Redemption Price shall be calculated on a *pro rata* basis.

(e) *Company Redemption Notice.* To call any share of Convertible Preferred Stock for Company Redemption, the Company must send to the Holder of such share a notice of such Company Redemption (a "**Company Redemption Notice**"). Such Company Redemption Notice must state:

(1) that such share has been called for Company Redemption, briefly describing the Company's Company Redemption right under this Certificate of Designations;

(2) the Company Redemption Date for such Company Redemption;

(3) the Company Redemption Price per share of Convertible Preferred Stock;

(4) if the Company Redemption Date is after a Record Date and on or before the next Dividend Payment Date, that such Dividend will be paid in accordance with **Section 4(c)**;

(5) that such share of Convertible Preferred Stock called for Company Redemption may be converted at any time before the Close of Business on the Business Day immediately before the Company Redemption Date (or, if the Company fails to pay the Company Redemption Price due on such Company Redemption Date in full, at any time until such time as the Company pays such Company Redemption Price in full);

(6) the Conversion Price in effect with respect to such share on the Company Redemption Notice Date for such Company Redemption; and

(7) the CUSIP numbers, if any, of the Convertible Preferred Stock.

(f) *Selection and Conversion of Convertible Preferred Stock Subject to Partial Redemption.* If less than all shares of Convertible Preferred Stock then outstanding are called for Company Redemption, then:

(1) the shares of Convertible Preferred Stock to be subject to such Company Redemption will be redeemed by the Company *pro rata*; and

(2) if only a portion of the Convertible Preferred Stock is called for Company Redemption and a portion of such Convertible Preferred Stock is converted, then the converted portion of such Convertible Preferred Stock will be deemed to be from the portion of such Convertible Preferred Stock that was called for Company Redemption.

(g) *Payment of the Company Redemption Price.* Subject to **Section 4(c)**, the Company will cause the Company Redemption Price for each share of Convertible Preferred Stock subject to Company Redemption to be paid to the Holder thereof on or before the applicable Company Redemption Date.

(h) *Redemption of Convertible Preferred Stock upon a Change of Control.* Subject to the other terms of this **Section 6**, if a Change of Control occurs, then the Company will redeem, contingent upon and contemporaneously with the consummation of the Change of Control, but subject to the right of the Holders to convert the Convertible Preferred Stock pursuant to **Section 8** after receipt of the Change of Control Redemption Notice but prior to such redemption, all of the Convertible Preferred Stock on the Change of Control Redemption Date for such Change of Control for a cash purchase price equal to the Change of Control Redemption Price. The Change of Control Redemption Date for any Change of Control will be the effective date of the Change of Control and Change of Control Redemption Price for any share of Convertible Preferred Stock to be redeemed upon a Change of Control Redemption following a Change of Control is an amount in cash equal to the greater of (x) the sum of (1) One Hundred and Five Percent (105%) of the Initial Stated Value of such share at the Close of Business on the Change of Control Redemption Date for such Change of Control plus (2) the difference between the Stated Value then in effect with respect to such share and the Initial Stated Value, if any, plus (3) accumulated and unpaid Regular Dividends on such share from the immediately preceding Regular Dividend Payment Date to, but excluding, such Change of Control Redemption Date (to the extent such accumulated and unpaid Regular Dividends are not included in the Stated Value set forth in subclause (2) above) and (y) the amount such Holder would have received in respect of the number of shares of Common Stock that would be issuable upon conversion of such share of

Convertible Preferred Stock (determined in accordance with **Section 8** but without regard to **Section 8(d)(ii)** and **Section 8(f)**) assuming the Conversion Date of such conversion occurs on the date of such payment. The Company will cause the Change of Control Redemption Price for each share of Convertible Preferred Stock to be redeemed pursuant to a Change of Control Redemption to be paid to the Holder thereof on or before the later of (i) the applicable Change of Control Redemption Date and (ii) the date such share is tendered to the Transfer Agent or the Company.

- (i) *Change of Control Redemption Notice.* On or before the twentieth (20th) Business Day before the effective date of a Change of Control, the Company shall send to each Holder a notice of such Change of Control (a “**Change of Control Redemption Notice**”) containing the information set forth in this **Section 6(i)**. Such Change of Control Redemption Notice must state: (1) a brief description of the events causing such Change of Control; (2) the effective date of such Change of Control; (3) the Change of Control Redemption Date for such Change of Control; (4) the Change of Control Redemption Price per share of Convertible Preferred Stock; (5) if the Change of Control Redemption Date is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, that such Dividend will be paid in accordance with **Section 4(c)**; (6) the Conversion Price in effect on the date of such Change of Control Redemption Notice and a description and quantification of any adjustments to the Conversion Price that may result from such Change of Control; and (7) that shares of Convertible Preferred Stock for which a Change of Control Redemption Notice has been duly tendered and not duly withdrawn must be delivered to the Company for the Holder thereof to be entitled to receive the Change of Control Redemption Price. If the underlying Change of Control has been terminated or cancelled and the Company has delivered a Change of Control Redemption Notice with respect to any share(s) of the Convertible Preferred Stock, the Company shall withdraw such Change of Control Redemption Notice by delivering a written notice of withdrawal to the Holders at any time before the Close of Business on Change of Control Redemption Date. Such withdrawal notice must state: (1) if such share(s) are represented by one or more Physical Certificates, the certificate number(s) of such Physical Certificates(s); and (2) the number of shares of Convertible Preferred Stock to be withdrawn, which, for the avoidance of doubt, shall be no less than all of the outstanding shares of Convertible Preferred Stock.

SECTION 7. VOTING RIGHTS. The Convertible Preferred Stock will have no voting rights except as set forth in this **Section 7** or as provided in the Certificate of Incorporation or required by the Delaware General Corporation Law.

(a) Right to Designate Directors.

- (i) *Generally.* For so long as not less than 60% of the shares of Convertible Preferred Stock originally issued remain outstanding (the “**Preferred Stock Director Designation Right Condition**”), the holders of a majority of the then outstanding shares of Convertible Preferred Stock, voting together as a single class, shall have the right at any election of directors to elect (A) two (2) of the

authorized directors on the Board of Directors of the corporation if the authorized number of directors on the Board of Directors is nine (9) directors or fewer, or (B) three (3) of the authorized directors on the Board of Directors if the authorized number of directors on the Board of Directors is ten (10) directors (the “**Preferred Stock Directors**”).

(ii) *Removal of the Preferred Stock Directors.* At any time, a Preferred Stock Director may be removed with or without cause only by the affirmative vote or written consent of a majority of the holders of Convertible Preferred Stock entitled to elect such director.

(iii) *The Right to Call A Special Meeting to Elect Preferred Stock Directors.* At all times when the Preferred Stock Director Designation Right Condition is satisfied, the Holders representing at least twenty five percent (25%) of the voting power of the Convertible Preferred Stock will have the right to call a special meeting of stockholders for the election of Preferred Stock Directors (including an election to fill any vacancy in the office of Preferred Stock Directors). Such right may be exercised by written notice, executed by such Holders delivered to the Company at its principal executive offices. Notwithstanding anything to the contrary in this **Section 7(a)(iii)**, if the Company’s next annual or special meeting of stockholders is scheduled to occur within ninety (90) days after such right is exercised, and the Company is otherwise permitted to conduct such election at such next annual or special meeting, then such election will instead be included in the agenda for, and conducted at, such next annual or special meeting.

(b) *Voting.*

(i) *Generally.* The Holders will have the right to vote together as a single class with the holders of the Common Stock on each matter submitted for a vote or consent by the holders of the Common Stock, and, for these purposes, (i) the Convertible Preferred Stock of each Holder will entitle such Holder to be treated as if such Holder were the holder of record, as of the record or other relevant date for such matter, of a number of shares of Common Stock equal to the number of shares of Common Stock that would be issuable (determined in accordance with **Section 8(d)**, including **Section 8(d)(ii)**) upon conversion of such Convertible Preferred Stock assuming such Convertible Preferred Stock were converted with a Conversion Date occurring on such record or other relevant date; and (ii) the Holders will be entitled to notice of all matters to be submitted to a vote of the stockholders in accordance with the Certificate of Incorporation, the Bylaws of the Company, and the Delaware General Corporation Law as if the Holders were holders of Common Stock. For the avoidance of doubt, the voting rights set forth in this **Section 7(b)** will be limited or eliminated, as applicable, to the same extent to which the right to convert the Convertible Preferred Stock is limited or eliminated pursuant to **Section 8(f)**.

(ii) *As a Separate Class.* While any share of Convertible Preferred Stock is outstanding, each following event by the Company will require, and cannot be effected without, the affirmative vote or consent of Holders, representing a majority of the outstanding shares of Convertible Preferred Stock, if any:

(1) effect any authorization, creation, or issuance of (or any obligation to authorize, create, or issue) any securities of the Company having rights, preferences, or privileges senior to or on a parity with any of the rights, preferences, or privileges of the Convertible Preferred Stock, whether by merger, reclassification or otherwise;

(2) effect any alteration, repeal, change, or amendment of the rights, privileges, or preferences of the Convertible Preferred Stock;

(3) amend, modify, or repeal any provision of the Company's Certificate of Incorporation (including this Certificate of Designations) or bylaws in a manner adverse to the Convertible Preferred Stock;

(4) effect any change in the authorized number of directors of the Company to a number greater than ten (10);

(5) effect any transactions between the Company, on the one hand, and any of its Affiliates, on the other hand (excluding (A) any transaction between the Company and any of its Subsidiaries, (B) any compensation that has been approved by the Compensation Committee (or any successor committee) of the Board of Directors, or (C) any transaction approved by either the Audit Committee (or any successor committee) of the Board of Directors or by a majority of the directors who do not have an interest adverse to the Company in the relevant transaction);

(6) except as provided herein, declare or pay dividends or make any distribution with respect to any Capital Stock of the Company at any time the Company has any indebtedness outstanding;

(7) incur any indebtedness (including any existing indebtedness as of the filing date of this Certificate of Designations) in excess of \$500 million (it being understood that lease obligations are not considered indebtedness for purposes hereof), or encumber or grant a security interest in all or substantially all of the assets of the Company in connection with any such indebtedness of the Company, excepting such security interests existing on the date of the filing of this Certificate of Designations; or

(8) agree or consent to any of the actions prohibited by this **Section 7(b)(ii)**;

Section 8. CONVERSION.

(a) *Generally.* The Convertible Preferred Stock may be converted only pursuant to the provisions of this **Section 8**.

(b) Conversion at the Option of the Holders.

(i) *Conversion Right; When Shares May Be Submitted for Conversion.* Holders will have the right to submit all, or any number of shares or fraction thereof that is less than all, of their shares of Convertible Preferred Stock for Conversion at any time; *provided, however,* that, notwithstanding anything to the contrary in this Certificate of Designations, shares of Convertible Preferred Stock that are called for (a) Company Redemption may not be submitted for Conversion after the Close of Business on the Business Day immediately before the related Company Redemption Date or (b) Change of Control Redemption may not be submitted for Conversion after the Close of Business on the Business Day immediately before the related Change of Control Redemption Date; *provided,* that, in either case, if the Company fails to pay the Company Redemption Price or the Change of Control Redemption Price (as applicable) due on such Company Redemption Date or Change of Control Redemption Date (as applicable) in full, Holders shall have the right to submit such shares of Convertible Preferred Stock called for Company redemption for Conversion at any time until such time as the Company pays such Company Redemption Price or Change of Control Redemption Price (as applicable) in full.

(ii) A Holder delivering a conversion notice hereunder may specify in such conversion notice that its election to effect such conversion is contingent upon the consummation of a Change of Control, in which case such Conversion shall not occur until such time as such Change of Control has been consummated, and if such Change of Control is terminated or cancelled, such conversion notice shall be deemed to be duly withdrawn. For the avoidance of doubt, any such contingent Conversion shall occur prior to the Change of Control Redemption that would have otherwise been effected in connection with such Change of Control.

(c) Conversion Procedures.

(i) Requirements for Holders to Exercise Conversion Right.

(1) *Generally.* To convert any share or fraction thereof of Convertible Preferred Stock, the Holder of such share must (w) complete, sign and deliver to the Company a conversion notice; (x) deliver any Physical Certificate(s) representing such Convertible Preferred Stock to the Company (at which time, subject to **Section 8(b)(ii)**, such Conversion will become irrevocable); (y) furnish any endorsements and transfer documents that the Company may require; and (z) if applicable, pay any documentary or other taxes required pursuant to **Section 9(d)**.

(2) *Conversion Permitted only During Business Hours.* Convertible Preferred Stock may be surrendered for Conversion only after the Open of Business and before the Close of Business on a day that is a Business Day.

(ii) Treatment of Accumulated Regular Dividends upon Conversion.

(1) *No Adjustments for Accumulated Regular Dividends.* Without limiting the operation of **Sections 4(a)** and **8(d)(i)**, the Conversion Price will not be adjusted to account for any accumulated and unpaid Regular Dividends on any share of Convertible Preferred Stock being converted.

(2) *Conversions Between A Record Date and a Dividend Payment Date.* If the Conversion Date of any share of Convertible Preferred Stock to be converted is after a Record Date for a declared Dividend on the Convertible Preferred Stock and on or before the next Dividend Payment Date, then such Dividend will be paid pursuant to **Section 4(c)** notwithstanding such conversion. In the event of any fractional shares, such Dividends shall be calculated on a *pro rata* basis.

(iii) *When Holders Become Stockholders of Record of the Shares of Common Stock Issuable Upon Conversion.* The Person in whose name any share of Common Stock is issuable upon conversion of any share of Convertible Preferred Stock will be deemed to become the holder of record of such share as of the Close of Business on the Conversion Date for such conversion.

(d) *Settlement upon Conversion.*

(i) *Generally.* Subject to **Section 4(c)**, **Section 8(d)(ii)**, **Section 8(f)** and **Section 10(b)**, the number of shares due upon settlement of the conversion of each share (or fraction thereof) of Convertible Preferred Stock will consist of a number of shares of Common Stock equal to the quotient obtained by dividing (I) the sum of (x) the Stated Value of such share (or fraction thereof) of Convertible Preferred Stock immediately before the Close of Business on the Conversion Date for such conversion and (y) an amount equal to accumulated and unpaid Regular Dividends on such share (or fraction thereof) of Convertible Preferred Stock to, but excluding, such Conversion Date (but only to the extent such accumulated and unpaid Regular Dividends are not included in the Stated Value referred to in the preceding clause (x)); by (II) the Conversion Price. By way of example, on the Initial Issue Date, each share of Convertible Preferred Stock shall convert into three (3) shares of Common Stock.

(ii) *Payment of Cash in Lieu of any Fractional Share of Common Stock.* Subject to **Section 10(b)**, in lieu of delivering any fractional share of Common Stock otherwise due upon conversion of any share of Convertible Preferred Stock, the Company will, to the extent it is legally able to do so and permitted under the terms of its indebtedness for borrowed money, pay cash in lieu of any fractional shares of Common Stock resulting from the calculation described in **clause (d)(i)** above.

(iii) *Delivery of Conversion Consideration.* The Company will pay or deliver, as applicable, the cash or Conversion Shares due upon conversion of any share of Convertible Preferred Stock on or before the fifth (5th) Business Day immediately after the Conversion Date for such conversion.

(e) Conversion Price Adjustments.

(i) *Events Requiring an Adjustment to the Conversion Price.* The Conversion Price will be adjusted from time to time if the Company issues solely shares of Common Stock as a dividend or distribution on all or substantially all shares of the Common Stock, or if the Company effects a stock split or a stock combination of the Common Stock, then the Conversion Price will be adjusted based on the following formula:

$$CP_1 = CP_0 \times \frac{OS_0}{OS_1}$$

where:

- CP_0 = the Conversion Price in effect immediately before the Close of Business on the Record Date for such dividend or distribution, or immediately before the Close of Business on the effective date of such stock split or stock combination, as applicable;
- CP_1 = the Conversion Price in effect immediately after the Close of Business on such Record Date or effective date, as applicable;
- OS_0 = the number of shares of Common Stock outstanding immediately before the Close of Business on such Record Date or effective date, as applicable, without giving effect to such dividend, distribution, stock split or stock combination; and
- OS_1 = the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, stock split or stock combination.

If any dividend, distribution, stock split or stock combination of the type described in this **Section 8(e)(i)** is declared or announced, but not so paid or made, then the Conversion Price will be readjusted, effective as of the date the Board of Directors, or any Officer acting pursuant to authority conferred by the Board of Directors, determines not to pay such dividend or distribution or to effect such stock split or stock combination, to the Conversion Price that would then be in effect had such dividend, distribution, stock split or stock combination not been declared or announced.

(ii) *Stockholder Rights Plans.* If any shares of Common Stock are to be issued upon conversion of any share of Convertible Preferred Stock and, at the time of such conversion, the Company has in effect any stockholder rights plan, then the Holder of such share of Convertible Preferred Stock will be entitled to receive, in addition to, and concurrently with the delivery of, the consideration otherwise due upon such conversion, the rights set forth in such stockholder rights plan.

(iii) *Determination of the Number of Outstanding Shares of Common Stock.* For purposes of **Section 8(e)(i)**, the number of shares of Common Stock outstanding at any time will (1) include shares issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock; and (2) exclude shares of Common Stock held in the Company's treasury (unless the Company pays any dividend or makes any distribution on shares of Common Stock held in its treasury).

(iv) *Notice of Conversion Price Adjustments.* Upon the effectiveness of any adjustment to the Conversion Price pursuant to **Section 8(e)(i)**, the Company will, as soon as reasonably practicable, but in no event later than ten (10) Business Days after the date of such effectiveness, send notice to the Holders containing (1) a brief description of the transaction or other event on account of which such adjustment was made; (2) the Conversion Price in effect immediately after such adjustment; and (3) the effective time of such adjustment.

(f) *Restriction on Conversions.*

- (i) *Limitation on Conversion Right.* Notwithstanding anything to the contrary in this Certificate of Designations, unless and until the Requisite Stockholder Approval is obtained, or is not, in the opinion of counsel to the corporation, required, no shares of Common Stock will be issued or delivered upon conversion of any share of Convertible Preferred Stock of any Holder, and no share of Convertible Preferred Stock of any Holder will be convertible, in each case to the extent, and only to the extent, that such issuance, delivery, conversion or convertibility would result in such Holder or a “person” or “group” (within the meaning of Section 13(d)(3) of the Exchange Act) beneficially owning in excess of nineteen and nine-tenths percent (19.9%) of the then-outstanding shares of Common Stock (the restrictions set forth in this sentence, the “**Ownership Limitation**”). For these purposes, beneficial ownership and calculations of percentage ownership will be determined in accordance with Rule 13d-3 under the Exchange Act. If any Conversion Consideration otherwise due upon the conversion of any share of Convertible Preferred Stock is not delivered as a result of the Ownership Limitation, then the Company shall pay all such amounts in cash to the Holder in accordance with the procedures set forth in **Section 3(d)** above. Any purported delivery of shares of Common Stock upon conversion of any share of Convertible Preferred Stock will be void and have no effect to the extent, and only to the extent, that such delivery would contravene the Ownership Limitation. The satisfaction, by a Holder of any share of Convertible Preferred Stock, of the requirements set forth in **Section 8(c)(i)** to convert such Convertible Preferred Stock will be deemed to be a representation, by such Holder to the Company, that the settlement of such conversion in full and without regard to this **Section 8(f)(i)** will not contravene the Ownership Limitation.
- (ii) *Covenant to Seek the Requisite Stockholder Approval.* The Company will use its reasonable best efforts to obtain, at the next meeting of its stockholders held following its Annual Meeting of Stockholders in 2020, but in no event later than July 1, 2021, the Requisite Stockholder Approval, including by endorsing its approval in the related proxy materials. The Company will promptly notify the Holders if the Requisite Stockholder Approval is obtained.

SECTION 9. CERTAIN PROVISIONS RELATING TO THE ISSUANCE OF COMMON STOCK.

(a) *Equitable Adjustments to Prices.* Whenever this Certificate of Designations requires the Company to calculate the average of the Last Reported Sale Prices, or any function thereof, over a period of multiple days (including to calculate an adjustment to the Conversion Price), the Company will make appropriate adjustments, if any, to those calculations to account for any adjustment to the Conversion Price pursuant to **Section 8(e)(i)** that becomes effective, or any event requiring such an adjustment to the Conversion Price where the Ex-Dividend Date, effective date or Expiration Date, as applicable, of such event occurs, at any time during such period.

(b) *Reservation of Shares of Common Stock.* The Company will reserve, out of its authorized, unreserved and not outstanding shares of Common Stock, for delivery upon conversion of the Convertible Preferred Stock, a number of shares of Common Stock that would be sufficient to settle the conversion of all shares of Convertible Preferred Stock then outstanding, if any. To the extent the Company delivers shares of Common Stock held in the Company's treasury in settlement of any obligation under this Certificate of Designations to deliver shares of Common Stock, each reference in this Certificate of Designations to the issuance of shares of Common Stock in connection therewith will be deemed to include such delivery.

(c) *Status of Shares of Common Stock.* Each share of Common Stock delivered upon conversion of any share of Convertible Preferred Stock will be a newly issued or treasury share and will be duly and validly issued, fully paid, non-assessable, free from preemptive rights and free of any lien or adverse claim (except to the extent of any lien or adverse claim created by the action or inaction of such Holder or the Person to whom such share of Common Stock will be delivered). If the Common Stock is then listed on any securities exchange, or quoted on any inter-dealer quotation system, then the Company will cause each such share of Common Stock, when so delivered, to be admitted for listing on such exchange or quotation on such system.

(d) *Taxes Upon Issuance of Common Stock.* The Company will pay any documentary, stamp or similar issue or transfer tax or duty due on the issue of any shares of Common Stock upon conversion of the Convertible Preferred Stock of any Holder, except any tax or duty that is due because such Holder requests those shares to be registered in a name other than such Holder's name.

SECTION 10. CALCULATIONS.

(a) *Responsibility; Schedule of Calculations.* Except as otherwise provided in this Certificate of Designations, the Company will be responsible for making all calculations called for under this Certificate of Designations or the Convertible Preferred Stock, including determinations of the Conversion Price, Stated Value and accumulated Regular Dividends on the Convertible Preferred Stock. The Company will make all calculations in good faith, and, absent manifest error, its calculations will be final and binding on all Holders. The Company will provide a schedule of such calculations to any Holder upon written request.

(b) *Calculations Aggregated for Each Holder.* The composition of the Conversion Consideration due upon conversion of the Convertible Preferred Stock of any Holder will be computed based on the total number of shares of Convertible Preferred Stock of such Holder being converted with the same Conversion Date. For these purposes, any cash amounts due to such Holder in respect thereof will be rounded to the nearest cent.

(c) *Fractional Shares.* Any calculation with respect to Dividends on, Redemption of or Conversion of any fractional shares shall be made on a *pro rata* basis.

SECTION 11. NOTICES. The Company will send all notices or communications to Holders pursuant to this Certificate of Designations in writing and delivered personally, by facsimile or e-mail (with confirmation of receipt from the recipient, in the case of e-mail), or sent by nationally recognized overnight courier service to the Holder's respective addresses shown on the Register. Notwithstanding anything in the Certificate of Designations to the contrary, any defect in the delivery of any such notice or communication will not impair or affect the validity of such notice or communication and the failure to give any such notice or communication to all the Holders will not impair or affect the validity of such notice or communication to whom such notice is sent.

SECTION 12. NO OTHER RIGHTS. The Convertible Preferred Stock will have no rights, preferences or voting powers except as provided in this Certificate of Designations or the Certificate of Incorporation or as required by applicable law.

[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]

IN WITNESS WHEREOF, the Company has caused this Certificate of Designations to be duly executed as of the date first written above.

BENEFITFOCUS, INC.

By: /s/ Stephen M. Swad

Name: Stephen M. Swad

Title: Chief Financial Officer

[Signature Page to Certificate of Designations]

REGISTRATION RIGHTS AGREEMENT

REGISTRATION RIGHTS AGREEMENT (this “**Agreement**”), dated as of June 4, 2020, by and between Benefitfocus, Inc., a Delaware corporation (the “**Company**”), and BuildGroup LLC (the “**Buyer**”).

RECITALS

- A. Upon the terms and subject to the conditions of the Purchase Agreement (as defined below), the Company has agreed to issue to the Buyer, and the Buyer has agreed to purchase from the Company, 1,777,778 shares of Preferred Stock (as defined below) (the “**Purchase Shares**”).
- B. To induce the Buyer to enter into the Purchase Agreement, the Company has agreed to provide certain registration rights with respect to the Purchase Shares under the Securities Act of 1933, as amended, and the rules and regulations thereunder, or any similar successor statute (collectively, the “**Securities Act**”), and applicable state securities laws.
- C. **NOW, THEREFORE**, in consideration of the promises and the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Buyer hereby agree as follows:

1. DEFINITIONS.

All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Purchase Agreement. As used in this Agreement, the following terms shall have the following meanings:

- a. “**Affiliate**” means, with respect to a specified Person, a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the Person specified.
- b. “**Common Stock**” means the common stock of the Company, par value \$0.001 per share.
- c. “**Conversion Shares**” means any shares of Common Stock issued or issuable upon the conversion of Preferred Stock.
- d. “**Person**” means any person or entity including any corporation, a limited liability company, an association, a partnership, an organization, a business, an individual, a governmental or political subdivision thereof or a governmental agency.
- e. “**Preferred Stock**” means the Series A convertible preferred stock of the Company, par value \$0.001 per share.
- f. “**Prospectus**” means the base prospectus, including all documents incorporated therein by reference, included in any Registration Statement (as hereinafter defined), as it may be supplemented by a prospectus supplement, together with any then-issued “issuer free writing prospectus(es),” as defined in Rule 433 of the Securities Act, relating to the Registrable Securities.
- g. “**Purchase Agreement**” means the Preferred Stock Purchase Agreement by and between the parties hereto, dated as of the date hereof.
- h. “**Register,**” “**registered,**” and “**registration**” refer to a registration effected by preparing and filing one or more registration statements of the Company in compliance with the Securities Act, and the declaration or ordering of effectiveness of such registration statement(s) by the U.S. Securities and Exchange Commission (the “**SEC**”).
- i. “**Registrable Securities**” means the Conversion Shares and any shares of capital stock issued or issuable with respect to the Purchase Shares as a result of any stock split, stock dividend, recapitalization, reclassification, merger, consolidation, exchange or similar event.

- j. **“Registration Statement”** means one or more registration statements of the Company covering the sale of the Registrable Securities.

2. REGISTRATION.

- a. **Mandatory Registration.** The Company shall, within thirty (30) calendar days from the date of the Purchase Agreement, prepare and file with the SEC a Registration Statement covering the resale of all of the Registrable Securities so as to permit the resale of such Registrable Securities by the Buyer, including but not limited to under Rule 415 under the Securities Act (**“Rule 415”**). Each Registration Statement filed hereunder shall be on Form S-3, or if Form S-3 is not then available to the Company, on Form S-1 or such other form of registration statement as is then available to effect a registration for resale of such Registrable Securities. The Buyer and its counsel shall have had a reasonable opportunity to review and comment upon such Registration Statement or any amendment to such Registration Statement and any related prospectus prior to its filing with the SEC. The Buyer shall furnish all information reasonably requested by the Company for inclusion therein. The Company shall use its reasonable best efforts to (a) cause the Registration Statement to be declared effective as soon as practicable after the filing thereof, and (b) if applicable, keep the Registration Statement effective pursuant to Rule 415 and available for sales of all of the Registrable Securities at all times until the earlier of (i) the date on which the Buyer shall have sold, either publicly pursuant to the Registration Statement or pursuant to Rule 144 under the Securities Act (**“Rule 144”**), all the Registrable Securities, or (ii) the date on which the Buyer can sell all of its Registrable Securities under Rule 144 without restriction during any ninety (90) day period (collectively, the **“Registration Period”**). When effective, each Registration Statement (including the documents incorporated therein by reference) will comply as to form in all material respects with all applicable requirements of the Securities Act and the Exchange Act and shall not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein, or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading.
- b. **Rule 424 Prospectus.** The Company shall, as required by applicable securities regulations, from time to time file with the SEC, pursuant to Rule 424 promulgated under the Securities Act, a prospectus, including any amendments or prospectus supplements thereto, to be used in connection with sales of the Registrable Securities under any Registration Statement. The Buyer and its counsel shall have five (5) business days to review and comment upon such prospectus prior to its filing with the SEC, and the Company shall give due consideration to all such comments. If the Buyer has comments on such prospectus, the Buyer shall use its reasonable best efforts to provide such comments within five (5) business days from the date the Buyer receives the final version of such prospectus.
- c. **Sufficient Number of Shares Registered.** In the event the number of shares available under the Registration Statement filed by the Company pursuant to Section 1(a) (the **“Initial Registration Statement”**) is insufficient to cover all of the Registrable Securities outstanding from time to time, the Company shall amend the Initial Registration Statement or file a new Registration Statement (a **“New Registration Statement”**), so as to cover all of such Registrable Securities as soon as practicable, but in any event not later than ten (10) business days after the necessity therefor arises and the Company’s financial statements as filed with the SEC are current as would be required by such New Registration Statement, subject to any limits that may be imposed by the SEC pursuant to Rule 415 under the Securities Act. The Company shall use its reasonable best efforts to cause such amendment and/or New Registration Statement to become effective as soon as practicable following the filing thereof.

3. RELATED OBLIGATIONS.

With respect to any Registration Statement and whenever any Registrable Securities are to be registered pursuant to Section 2(a), the Company shall use its reasonable best efforts to effect the registration of the Registrable Securities in accordance with the intended method of disposition thereof and, pursuant thereto, the Company shall have the following obligations:

- a. The Company shall prepare and file with the SEC such amendments (including post-effective amendments) and supplements to any Registration Statement and any prospectus used in connection with such Registration Statement, as may be necessary to keep such Registration Statement effective at all times during the Registration Period, subject to Permitted Delays (as defined below) and Section 3(e) hereof and, during the Registration Period, comply with the provisions of the Securities Act with respect to the disposition of all Registrable Securities of the Company covered by such Registration Statement until such time as all of such Registrable Securities shall have been disposed of in accordance with the intended methods of disposition by the seller or sellers thereof as set forth in such Registration Statement. Should the Company file a post-effective amendment to any Registration Statement, the Company will use its reasonable best efforts to have such filing declared effective by the SEC within thirty (30) consecutive business days following the date of filing, which such period shall be extended for an additional thirty (30) business days if the Company receives a comment letter from the SEC in connection therewith. If, beyond normal quarterly closed trading windows under the Company's Insider Trading Policy, as amended from time to time, there is (i) material non-public information regarding the Company which the Company's Board of Directors reasonably determines not to be in the Company's best interest to disclose and which the Company is not otherwise required to disclose or (ii) a significant business opportunity (including, but not limited to, the acquisition or disposition of assets (other than in the ordinary course of business) or any merger, consolidation, tender offer or other similar transaction) available to the Company which the Company's Board of Directors reasonably determines not to be in the Company's best interest to disclose and which the Company would be required to disclose under a Registration Statement, then the Company may postpone or suspend filing or effectiveness of such Registration Statement or use of the prospectus under such Registration Statement for a period not to exceed thirty (30) consecutive days, provided that the Company may not postpone or suspend its obligation under this Section 3(a) for more than sixty (60) days in the aggregate during any twelve (12) month period (each, a "**Permitted Delay**").
- b. The Company shall submit to the Buyer for review and comment any disclosure in any Registration Statement, and all amendments and supplements thereto, containing information provided by the Buyer for inclusion in such document and any descriptions or disclosure regarding the Buyer, the Purchase Agreement, including the transaction contemplated thereby, or this Agreement at least five (5) business days prior to their filing with the SEC, and not file any document in a form to which any of the Buyer reasonably and timely objects. Upon request of the Buyer, the Company shall provide to the Buyer all disclosure in any Registration Statement and all amendments and supplements thereto, at least five (5) business days prior to their filing with the SEC, and not file any document in a form to which the Buyer reasonably and timely objects. If the Buyer has comments on any Registration Statement and any amendments or supplements thereto, the Buyer shall use its reasonable best efforts to comment thereon within five (5) business days from the date the Buyer receives the final version thereof. The Company shall furnish to the Buyer, without charge, any correspondence from the SEC or the staff of the SEC to the Company or its representatives relating to any Registration Statement, except if such notice and the contents thereof shall be deemed to constitute material non-public information.
- c. The Company shall furnish to the Buyer, (i) promptly after the same is prepared and filed with the SEC, at least one copy of any Registration Statement and any amendment(s) thereto, including all financial statements and schedules, all documents incorporated therein by reference and all exhibits, (ii) upon the effectiveness of any amendment(s) to a Registration Statement, a copy of the prospectus included in such Registration Statement and all amendments and supplements thereto (or such other number of copies as the Buyer may reasonably request) and (iii) such other documents, including copies of any preliminary or final prospectus, as a Buyer may reasonably request from time to time in order to facilitate the disposition of the Registrable Securities owned by the Buyer. The filing by the Company of any Registration Statement and Prospectus and any amendment or supplement thereto with the SEC shall be deemed to be delivery to the Buyer under this Section 3(c).

- d. The Company shall use reasonable best efforts to (i) register and qualify, unless an exemption from registration and qualification is available, the Registrable Securities covered by a Registration Statement under such other securities or “blue sky” laws of such jurisdictions in the United States as the Buyer reasonably requests, (ii) subject to Permitted Delays, prepare and file in those jurisdictions, such amendments (including post-effective amendments) and supplements to such registrations and qualifications as may be necessary to maintain the effectiveness thereof during the Registration Period, (iii) take such other actions as may be necessary to maintain such registrations and qualifications in effect at all times during the Registration Period, and (iv) take all other actions reasonably necessary or advisable to qualify the Registrable Securities for sale in such jurisdictions; provided, however, that the Company shall not be required in connection therewith or as a condition thereto to (x) qualify to do business in any jurisdiction where it would not otherwise be required to qualify but for this Section 3(d), (y) subject itself to general taxation in any such jurisdiction, or (z) file a general consent to service of process in any such jurisdiction. The Company shall promptly notify the Buyer or any transferee permitted by Section 9 who holds Registrable Securities of the receipt by the Company of any notification with respect to the suspension of the registration or qualification of any of the Registrable Securities for sale under the securities or “blue sky” laws of any jurisdiction in the United States or its receipt of actual notice of the initiation or threat of any proceeding for such purpose.
- e. As promptly as reasonably practicable after becoming aware of such event or facts, the Company shall notify the Buyer in writing (a) when a Registration Statement has become effective and when any post-effective amendments and supplements thereto become effective, (b) of any request by the SEC or any state securities authority for post-effective amendments and supplements to a Registration Statement and prospectus or for additional information after such Registration Statement has become effective, (c) of the issuance by the SEC or any state securities authority of any stop order suspending the effectiveness of a Registration Statement or the initiation of any proceedings for that purpose, (d) of the receipt by the Company of any notification with respect to the suspension of the qualification of the Registrable Securities, for sale in any jurisdiction or the initiation or threatening of any proceeding for such purpose, (e) of the filing of a post-effective amendment to such Registration Statement, or (f) if the Company has determined that the Prospectus included in any Registration Statement, as then in effect, includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. As promptly as reasonably practical (taking into account the Company’s good faith assessment of any adverse consequences to the Company and its stockholders of premature disclosure of such event or facts) prepare a prospectus supplement or amendment to such Registration Statement to correct such untrue statement or omission, and, upon the Buyer’s request, deliver a copy of such prospectus supplement or amendment to the Buyer. In providing this notice to the Buyer, the Company shall not include any other information about the facts underlying the Company’s determination and shall not in any way communicate any material nonpublic information about the Company or the Common Stock to the Buyer. The Company shall also promptly notify the Buyer in writing (i) when a prospectus or any prospectus supplement or post-effective amendment has been filed, and when a Registration Statement or any post-effective amendment has become effective (notification of such effectiveness shall be delivered to the Buyer by facsimile or e-mail on the same day of such effectiveness), (ii) of any request by the SEC for amendments or supplements to any Registration Statement or related prospectus or related information, and (iii) of the Company’s reasonable determination that a post-effective amendment to a Registration Statement would be appropriate. In no event shall the delivery of a notice under this Section 3(e), or the resulting unavailability of a Registration Statement, without regard to its duration, for disposition of securities by the Buyer be considered a breach by the Company of its obligations under this Agreement.
- f. The Company shall use its reasonable best efforts to prevent the issuance of any stop order or other suspension of effectiveness of any Registration Statement, or the suspension of the qualification of any Registrable Securities for sale in any jurisdiction and, if such an order or suspension is issued, to obtain the withdrawal of such order or suspension at the earliest practical time and to notify the Buyer of the issuance of such order and the resolution thereof or its receipt of actual notice of the initiation or threat of any proceeding for such purpose.

- g. The Company shall (i) cause all the Registrable Securities to be listed on each securities exchange on which securities of the same class or series issued by the Company are then listed, if any, if the listing of such Registrable Securities is then permitted under the rules of such exchange, or (ii) secure designation and quotation of all the Registrable Securities if the Principal Market (as such term is defined in the Purchase Agreement) is an automated quotation system. The Company shall pay all fees and expenses in connection with satisfying its obligation under this Section.
- h. The Company shall cooperate with the Buyer to facilitate the timely preparation and delivery of certificates (not bearing any restrictive legend) representing the Registrable Securities disposed of pursuant to any Registration Statement and enable such certificates to be in such denominations or amounts as the Buyer may reasonably request and registered in such names as the Buyer may request.
- i. If reasonably requested by the Buyer, the Company shall (i) promptly incorporate in a prospectus supplement or post-effective amendment to any Registration Statement such information as the Buyer believes should be included therein relating to the sale and distribution of Registrable Securities, including, without limitation, information with respect to the number of Registrable Securities being sold, the purchase price being paid therefor and any other terms of the offering of the Registrable Securities; (ii) make all required filings of such prospectus supplement or post-effective amendment as promptly as practicable once notified of the matters to be incorporated in such prospectus supplement or post-effective amendment; and (iii) supplement or make amendments to any Registration Statement (including by means of any document incorporated therein by reference).
- j. The Company shall use its reasonable best efforts to cause the Registrable Securities covered by any Registration Statement to be registered with or approved by such other governmental agencies or authorities in the United States as may be necessary to consummate the disposition of such Registrable Securities.
- k. If reasonably requested by the Buyer at any time, the Company shall deliver to the Buyer a written confirmation from the Company's counsel of whether or not the effectiveness of any Registration Statement has lapsed at any time for any reason (including, without limitation, the issuance of a stop order) and whether or not such Registration Statement is currently effective and available to the Company for sale of all of the Registrable Securities.
- l. The Company agrees to take all other actions reasonably requested by Buyer to expedite and facilitate disposition by the Buyer of Registrable Securities pursuant to any Registration Statement.

4. OBLIGATIONS OF THE BUYER.

- a. The Buyer will furnish to the Company such information regarding itself, the Registrable Securities held by it and the intended method of disposition of the Registrable Securities held by it as reasonably requested by the Company in order to effect the registration of such Registrable Securities. The Company shall notify the Buyer in writing of any other information the Company reasonably requires from the Buyer in connection with any Registration Statement hereunder. The Buyer will as promptly as practicable notify the Company of any material change in that information, other than changes in its ownership of Common Stock, unless such ownership information is reasonably requested by the Company to amend or supplement any Registration Statement or Prospectus.
- b. The Buyer agrees to cooperate with the Company as reasonably requested by the Company in connection with the preparation and filing of any amendments and supplements to any Registration Statement hereunder.

5. EXPENSES OF REGISTRATION.

All reasonable expenses of the Company, other than sales or brokerage commissions incurred by the Buyer, including fees and disbursements of one counsel for the Buyer (not to exceed \$25,000), incurred in connection with registrations, filings or qualifications pursuant to Sections 2 and 3, including, without limitation, all registration, listing and qualifications fees, printers and accounting fees, and fees and disbursements of counsel for the Company, shall be paid by the Company.

6. INDEMNIFICATION.

- a. To the fullest extent permitted by law, the Company will, and hereby does, indemnify, hold harmless and defend the Buyer, each Person, if any, who controls the Buyer, the members, the directors, officers, partners, employees, agents, representatives of the Buyer and each Person, if any, who controls the Buyer within the meaning of the Securities Act or the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”) (each, an “**Indemnified Person**”), against any losses, claims, damages, liabilities, judgments, fines, penalties, charges, costs, reasonable attorneys’ fees, amounts paid in settlement (with the prior consent of the Company, such consent not to be unreasonably withheld) or expenses, joint or several (collectively, “**Claims**”), incurred in investigating, preparing or defending any action, claim, suit, inquiry, proceeding, investigation or appeal taken from the foregoing by or before any court or governmental, administrative or other regulatory agency or body or the SEC, whether pending or threatened, whether or not an indemnified party is or may be a party thereto (“**Indemnified Damages**”), to which any of them may become subject insofar as such Claims (or actions or proceedings, whether commenced or threatened, in respect thereof) arise out of or are based upon: (i) any untrue statement or alleged untrue statement of a material fact in any Registration Statement, final Prospectus (as amended or supplemented, if the Company files any amendment thereof or supplement thereto with the SEC) or any post-effective amendment thereto or in any filing made in connection with the qualification of the offering under the securities or other “blue sky” laws of any jurisdiction in which Registrable Securities are offered, or the omission or alleged omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, (ii) any violation or alleged violation by the Company of the Securities Act, the Exchange Act, any other law, including, without limitation, any state securities law, or any rule or regulation thereunder relating to the offer or sale of the Registrable Securities pursuant to any Registration Statement, or (iii) any material violation by the Company of this Agreement (the matters in the foregoing clauses (i) through (iii) being, collectively, “**Violations**”). The Company shall reimburse each Indemnified Person promptly as such expenses are incurred and are due and payable, for any reasonable legal fees or other reasonable expenses incurred by them in connection with investigating or defending any such Claim. Notwithstanding anything to the contrary contained herein, the indemnification agreement contained in this Section 6(a): (A) shall not apply to a Claim by an Indemnified Person arising out of or based upon a Violation which occurs in reliance upon and in conformity with information about the Buyer furnished in writing to the Company by the Buyer or such Indemnified Person expressly for use in connection with the preparation of any Registration Statement, Prospectus or any such amendment thereof or supplement thereto, if such prospectus was timely made available by the Company; (B) with respect to any superseded prospectus, shall not inure to the benefit of any such person from whom the person asserting any such Claim purchased the Registrable Securities that are the subject thereof (or to the benefit of any other Indemnified Person) if the untrue statement or omission of material fact contained in the superseded prospectus was corrected in the revised prospectus, as then amended or supplemented, if such revised prospectus was timely made available by the Company pursuant to Section 3(c) or Section 3(e), and the Indemnified Person was promptly advised in writing not to use the incorrect prospectus prior to the use giving rise to a violation and such Indemnified Person, notwithstanding such advice, used it; (C) shall not be available to the extent such Claim is based on a failure of the Buyer to deliver, or to cause to be delivered, the prospectus made available by the Company, if such prospectus was theretofore made available by the Company pursuant to Section 3(c) or Section 3(e); and (D) shall not apply to amounts paid in settlement of any Claim if such settlement is effected without the prior written consent of the Company, which consent shall not be unreasonably withheld, conditioned or delayed. Such indemnity shall remain in full force and effect regardless of any investigation made by or on behalf of the Indemnified Person and shall survive the transfer of the Registrable Securities by the Buyer pursuant to Section 9.

- b. In connection with any Registration Statement or Prospectus, the Buyer and any transferee permitted by Section 9, severally and not jointly, agrees to indemnify, hold harmless and defend, to the same extent and in the same manner as is set forth in Section 6(a), the Company, each of its directors, each of its officers who signed such Registration Statement and each Person, if any, who controls the Company within the meaning of the Securities Act or the Exchange Act (collectively and together with an Indemnified Person, an “**Indemnified Party**”), against any Claim or Indemnified Damages to which any of them may become subject, under the Securities Act, the Exchange Act or otherwise, insofar as such Claim or Indemnified Damages arise out of or are based upon any Violation, in each case to the extent, and only to the extent, that such Violation occurs in reliance upon and in conformity with written information about the Buyer provided by the Buyer and furnished to the Company by the Buyer expressly for inclusion in such Registration Statement (which, for the avoidance of doubt, shall consist solely of the name of the Buyer, the number of shares to be sold pursuant to such Registration Statement, and the expected plan of distribution) or from the failure of the Buyer to deliver or to cause to be delivered the prospectus made available by the Company, if such prospectus was timely made available by the Company pursuant to Section 3(c) or Section 3(e); and, subject to Section 6(d), the Buyer will reimburse any legal or other expenses reasonably incurred by it in connection with investigating or defending any such Claim; provided, however, that the indemnity agreement contained in this Section 6(b) and the agreement with respect to contribution contained in Section 7 shall not apply to amounts paid in settlement of any Claim if such settlement is effected without the prior written consent of the Buyer, which consent shall not be unreasonably withheld, conditioned or delayed; provided, further, however, that the Buyer shall be liable under this Section 6(b) for only that amount of a Claim or Indemnified Damages as does not exceed the net amount of proceeds actually received by the Buyer as a result of the sale of Registrable Securities pursuant to such registration statement. Such indemnity shall remain in full force and effect regardless of any investigation made by or on behalf of such Indemnified Party and shall survive the transfer of the Registrable Securities by the Buyer pursuant to Section 9.
- c. Promptly after receipt by an Indemnified Person or Indemnified Party under this Section 6 of notice of the commencement of any action or proceeding (including any governmental action or proceeding) involving a Claim, such Indemnified Person or Indemnified Party shall, if a Claim in respect thereof is to be made against any indemnifying party under this Section 6, deliver to the indemnifying party a written notice of the commencement thereof, and the indemnifying party shall have the right to participate in, and, to the extent the indemnifying party so desires, jointly with any other indemnifying party similarly noticed, to assume control of the defense thereof with counsel mutually satisfactory to the indemnifying party and the Indemnified Person or the Indemnified Party, as the case may be, and upon such notice, the indemnifying party shall not be liable to the Indemnified Person or Indemnified Party for any legal or other expenses subsequently incurred by the Indemnified Person or Indemnified Party in connection with the defense thereof; provided, however, that an Indemnified Person or Indemnified Party (together with all other Indemnified Persons and Indemnified Parties that may be represented without conflict by one counsel) shall have the right to retain its own counsel with the fees and expenses to be paid by the indemnifying party, if, in the reasonable opinion of counsel retained by the indemnifying party, the representation by such counsel of the Indemnified Person or Indemnified Party and the indemnifying party would be inappropriate due to actual or potential differing interests between such Indemnified Person or Indemnified Party and any other party represented by such counsel in such proceeding. The Indemnified Party or Indemnified Person shall cooperate fully with the indemnifying party in connection with any negotiation or defense of any such action or claim by the indemnifying party and shall furnish to the indemnifying party all information reasonably available to the Indemnified Party or Indemnified Person which relates to such action or claim. The indemnifying party shall keep the Indemnified Party or Indemnified Person fully apprised at all times as to the status of the defense or any settlement negotiations with respect thereto. No indemnifying party shall be liable for any settlement of any action, claim or

proceeding effected without its written consent, provided, however, that the indemnifying party shall not unreasonably withhold, delay or condition its consent. No indemnifying party shall, without the consent of the Indemnified Party or Indemnified Person, consent to entry of any judgment or enter into any settlement or other compromise which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Indemnified Party or Indemnified Person of a release from all liability in respect to such claim or litigation. Following indemnification as provided for hereunder, the indemnifying party shall be subrogated to all rights of the Indemnified Party or Indemnified Person with respect to all third parties, firms or corporations relating to the matter for which indemnification has been made. The failure to deliver written notice to the indemnifying party within a reasonable time of the commencement of any such action shall not relieve such indemnifying party of any liability to the Indemnified Person or Indemnified Party under this Section 6, except to the extent that the indemnifying party is prejudiced in its ability to defend such action.

- d. The indemnification required by this Section 6 shall be made by payments at least as frequently as every thirty (30) days of the amount thereof during the course of the investigation or defense, as and when bills are received or Indemnified Damages are incurred. Any person receiving a payment pursuant to this Section 6 which person is later determined to not be entitled to such payment shall return such payment (including reimbursement of expenses) as promptly as practicable to the person making it.
- e. The indemnity agreements contained herein shall be in addition to (i) any cause of action or similar right of the Indemnified Party or Indemnified Person against the indemnifying party or others, and (ii) any liabilities the indemnifying party may be subject to pursuant to the law.

7. CONTRIBUTION.

To the extent any indemnification by an indemnifying party is prohibited or limited by law, the indemnifying party agrees to make the maximum contribution with respect to any amounts for which it would otherwise be liable under Section 6 to the fullest extent permitted by law; provided, however, that: (i) no seller of Registrable Securities guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Securities Act) shall be entitled to contribution from any party who was not guilty of fraudulent misrepresentation; and (ii) contribution by any seller of Registrable Securities shall be limited in amount to the net amount of proceeds actually received by such seller from the sale of such Registrable Securities.

8. REPORTS AND DISCLOSURE UNDER THE SECURITIES ACT

With a view to making available to the Buyer the benefits of Rule 144 or any other similar rule or regulation of the SEC that may at any time permit the Buyer to sell securities of the Company to the public without registration, the Company agrees, at the Company's sole expense, to:

- a. use its reasonable best efforts to make and keep public information available, as those terms are understood and defined in Rule 144;
- b. use its reasonable best efforts to file with the SEC in a timely manner all reports and other documents required of the Company under the Securities Act and the Exchange Act so long as the Company remains subject to such requirements and the filing of such reports and other documents is required to satisfy the current public information requirements of Rule 144;
- c. furnish to the Buyer so long as the Buyer owns Registrable Securities, as promptly as practicable at Buyer's request, (i) a written statement by the Company that it has complied in all material respects with the requirements of Rule 144(c)(1)(i) and (ii), and (ii) such other information, if any, as may be reasonably requested to permit the Buyer to sell such securities pursuant to Rule 144 without registration; and

- d. take such additional action as is reasonably requested by the Buyer to enable the Buyer to sell the Registrable Securities pursuant to Rule 144, including, without limitation, delivering all such legal opinions, consents, certificates, resolutions and instructions to the Company's Transfer Agent as may be reasonably requested from time to time by the Buyer and otherwise provide reasonable cooperation to the Buyer and the Buyer's broker to effect such sale of securities pursuant to Rule 144.

The Company agrees that damages may be an inadequate remedy for any breach of the terms and provisions of this Section 8 and that Buyer shall, whether or not it is pursuing any remedies at law, be entitled to seek equitable relief in the form of a preliminary or permanent injunctions, without having to post any bond or other security, upon any breach or threatened breach of any such terms or provisions.

9. ASSIGNMENT OF REGISTRATION RIGHTS.

The Company shall not assign this Agreement or any rights or obligations hereunder without the prior written consent of the Buyers holding a majority of the Registrable Securities; provided, however, that the Company may assign this Agreement at any time in connection with the sale or acquisition of the Company, whether by merger, reorganization, restructuring, consolidation, financing or otherwise, without the consent of the Buyer, provided that the successor or acquiring Person agrees in writing to assume all of the Company's rights and obligations under this Agreement. Any transaction, whether by merger, reorganization, restructuring, consolidation, financing or otherwise, whereby the Company remains the surviving entity immediately after such transaction shall not be deemed an assignment. The Buyer may assign its rights under this Agreement to any transferee or holder of the Registrable Securities without the prior written consent of the Company; *provided* that such transferee or holder of the Registrable Securities executes and delivers an additional counterpart signature page to this Agreement, and thereafter such transferee or holder shall be deemed a "Buyer" and a party hereunder.

10. AMENDMENT OF REGISTRATION RIGHTS.

Provisions of this Agreement may be amended and the observance thereof may be waived (either generally or in a particular instance and either retroactively or prospectively) only with the written consent of the Company and the holders of a majority of the then-outstanding Registrable Securities.

11. ADDITIONAL REGISTRATION STATEMENTS.

During the period beginning on the date hereof and ending on the last day of the Registration Period, if at any time there is not an effective Registration Statement available for the resale of the Registrable Securities under the Securities Act, the Company shall not file a registration statement or an offering statement under the Securities Act relating to securities that are not the Registrable Securities (other than a registration statement on Form S-8, or such supplements or amendments to registration statements that are outstanding and have been declared effective by the SEC as of the date hereof, solely to the extent necessary to keep such registration statements effective and available).

12. MISCELLANEOUS.

- a. Any notices, consents, waivers or other communications required or permitted to be given under the terms of this Agreement must be in writing and will be deemed to have been delivered: (i) upon receipt, when delivered personally; (ii) upon receipt, when sent by facsimile (provided confirmation of transmission is mechanically or electronically generated and kept on file by the sending party); (iii) upon receipt, when sent by electronic message (provided the recipient responds to the message and confirmation of both electronic messages are kept on file by the sending party); or (iv) one (1) business day after timely deposit with a nationally recognized overnight delivery service, in each case properly addressed to the party to receive the same. The addresses and facsimile numbers for such communications shall be:

If to the Company:

Benefitfocus, Inc.
100 Benefitfocus Way

Charleston, South Carolina 29492
Attention: Steve Swad, Chief Financial Officer
Facsimile No.:
Telephone No.:
E-Mail:

With a copy (which shall not constitute notice) to:

Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27607
Attention: Donald R. Reynolds
Facsimile No.:
Telephone No.:
E-Mail:

If to the Buyer:

BuildGroup LLC
3500 Jefferson, Suite 303
Austin, Texas 78731
Attention: Lanham Napier, Chief Executive Officer
Telephone No.:
E-Mail:

With a copy to (which shall not constitute delivery to the Buyer):

Shearman & Sterling LLP
1460 El Camino Real 2nd floor,
Menlo Park, CA 94025
Attention: Christopher Forrester
Telephone No:
E-Mail:

or at such other address and/or facsimile number and/or to the attention of such other person as the recipient party has specified by written notice given to each other party at least one (1) business day prior to the effectiveness of such change. Written confirmation of receipt (A) given by the recipient of such notice, consent, waiver or other communication, (B) mechanically or electronically generated by the sender's facsimile machine containing the time, date, and recipient facsimile number, (C) electronically generated by the sender's electronic mail containing the time, date and recipient email address or (D) provided by a nationally recognized overnight delivery service, shall be rebuttable evidence of receipt in accordance with clause (i), (ii), (iii) or (iv) above, respectively.

- b. No provision of this Agreement may be amended other than by a written instrument signed by the Company and the Buyer. No provision of this Agreement may be waived other than in a written instrument signed by the party against whom enforcement of such waiver is sought. No failure or delay in the exercise of any power, right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such power, right or privilege preclude other or further exercise thereof or of any other right, power or privilege.

- c. The corporate laws of the State of Delaware shall govern all issues concerning the relative rights of the Company and its stockholders. All other questions concerning the construction, validity, enforcement and interpretation of this Agreement shall be governed by the internal laws of the State of Delaware, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of Delaware or any other jurisdictions) that would cause the application of the laws of any jurisdictions other than the State of Delaware. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of Wilmington, for the adjudication of any dispute hereunder or in connection herewith, or with any transaction contemplated hereby or discussed herein, and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is brought in an inconvenient forum or that the venue of such suit, action or proceeding is improper. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof to such party at the address for such notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof. Nothing contained herein shall be deemed to limit in any way any right to serve process in any manner permitted by law. If any provision of this Agreement shall be invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall not affect the validity or enforceability of the remainder of this Agreement in that jurisdiction or the validity or enforceability of any provision of this Agreement in any other jurisdiction. **EACH PARTY HEREBY IRREVOCABLY WAIVES ANY RIGHT IT MAY HAVE, AND AGREES NOT TO REQUEST, A JURY TRIAL FOR THE ADJUDICATION OF ANY DISPUTE HEREUNDER OR IN CONNECTION HEREWITH OR ARISING OUT OF THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY.**
- d. This Agreement, the Purchase Agreement, and the Voting Agreement (the "Transaction Documents") supersede all other prior oral or written agreements between the Buyer, the Company, their Affiliates and Persons acting on their behalf with respect to the matters discussed herein, and this Agreement, the other Transaction Documents and the instruments referenced herein contain the entire understanding of the parties with respect to the matters covered herein and therein and, except as specifically set forth herein or therein, neither the Company nor the Buyer makes any representation, warranty, covenant or undertaking with respect to such matters. Each of the Company and the Buyer acknowledges and agrees that it has not relied on, in any manner whatsoever, any representations or statements, written or oral, other than as expressly set forth in this Agreement.
- e. Subject to the requirements of Section 9, this Agreement shall be binding upon and inure to the benefit of the parties and their respective successors. Neither party may assign this Agreement or any rights or obligations hereunder without the prior written consent of the other, which shall not be unreasonably withheld or delayed.
- f. Notwithstanding anything to the contrary contained herein, if the Company shall issue Purchase Shares to persons other than the Buyer pursuant to the Purchase Agreement, any purchaser of such Purchase Shares shall become a party to this Agreement by executing and delivering an additional counterpart signature page to this Agreement and shall be deemed a "Buyer" and a party hereunder.
- g. The headings of this Agreement are for convenience of reference and shall not form part of, or affect the interpretation of, this Agreement.
- h. This Agreement may be executed in two or more identical counterparts, all of which shall be considered one and the same agreement and shall become effective when counterparts have been signed by each party and delivered to the other party; provided that a facsimile or pdf (or other electronic reproduction) signature shall be considered due execution and shall be binding upon the signatory thereto with the same force and effect as if the signature were an original, not a facsimile or pdf (or other electronic reproduction) signature.

- i. Each party shall do and perform, or cause to be done and performed, all such further acts and things, and shall execute and deliver all such other agreements, certificates, instruments and documents, as the other party may reasonably request in order to carry out the intent and accomplish the purposes of this Agreement and the consummation of the transactions contemplated hereby.
- j. The language used in this Agreement will be deemed to be the language chosen by the parties to express their mutual intent, and no rules of strict construction will be applied against any party.
- k. This Agreement is intended for the benefit of the parties hereto and their respective permitted successors and assigns, and is not for the benefit of, nor may any provision hereof be enforced by, any other Person.

IN WITNESS WHEREOF, the parties have caused this Registration Rights Agreement to be duly executed as of day and year first above written.

THE COMPANY:

BENEFITFOCUS, INC.

By: /s/ Stephen M. Swad

Name: Stephen M. Swad

Title: Chief Financial Officer

[Signature Page to the Registration Rights Agreement]

IN WITNESS WHEREOF, the parties have caused this Registration Rights Agreement to be duly executed as of day and year first above written.

THE BUYER:

BUILDGROUP LLC

**By: BuildGroup Management, LLC, its investment
manager**

By: /s/ A. Lanham Napier

Name: A. Lanham Napier

Title: Chief Executive Officer

[Signature Page to the Registration Rights Agreement]

CO-SALE AND VOTING AGREEMENT

THIS CO-SALE AND VOTING AGREEMENT (the “**Agreement**”) is made and entered into as of this 4th day of June, 2020, by and among Benefitfocus, Inc., a Delaware corporation (the “**Company**”), BuildGroup LLC, a Delaware limited liability company (“**BuildGroup**”), and Mason R. Holland, Jr. (“**Holland**” and, together with BuildGroup, the “**Stockholders**”).

RECITALS

WHEREAS, BuildGroup desires to purchase Series A Convertible Preferred Stock of the Company, and as a condition and inducement to that transaction, the parties hereto desire to enter into this Agreement to set forth their agreements and understandings with respect to, among other things, how shares of the Company’s capital stock held by such parties will be voted in connection with the election for directors to the Company’s board of directors (the “**Board**”).

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, and certain other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Voting Provisions Regarding Board of Directors.

1.1. General. Each Stockholder agrees to vote, or cause to be voted, all Shares (as defined below) beneficially owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to carry into effect the intent of this Agreement. For purposes of this Agreement, the term “**Shares**” shall mean and include any securities of the Company the holders of which are entitled to vote for members of the Board, including without limitation, all shares of common stock and preferred stock, by whatever name called, now owned or subsequently acquired by a Stockholder, however acquired, whether through stock splits, stock dividends, reclassifications, recapitalizations, similar events or otherwise.

1.2. Board Composition. Each Stockholder agrees to (A) nominate, or cause to be nominated, and (B) vote, or cause to be voted, all Shares over which such Stockholder has voting control, in favor of the following persons for election to the Board from time to time and at all times, at each annual or special meeting of stockholders at which an election of directors is held, or in connection with any other action (including the execution of written consents of the stockholders) taken for the purpose of electing directors to the Board:

(a) As long as BuildGroup and its Affiliates own beneficially at least 60% of the Company’s outstanding Series A Convertible Preferred Stock originally purchased by it (or the common stock issuable upon conversion thereof), (A) two (2) of the authorized directors on the Board of Directors of the corporation if the Board consists of nine (9) directors or fewer, or (B) three (3) of the authorized directors on the Board of Directors if the Board consists of ten (10) directors, it being agreed that the Board shall initially consist of seven (7) directors and the two (2) individuals designated by BuildGroup shall initially be A. Lanham Napier (“**Napier**”) and vacant (any such designee other than Napier to be reasonably acceptable to Holland); and

(b) As long as Holland and his Affiliates continue to beneficially own a majority of the common stock beneficially owned by them on the date of this Agreement, Holland or his designee (such designee to be reasonably acceptable to BuildGroup). For the avoidance of doubt, the total number of common stock Holland and his Affiliates beneficially own on the date of this Agreement is 2,756,586 shares of common stock.

1.3. Failure to Nominate a Board Member; Vacancies. In the absence of any nomination from the persons or groups with the right to nominate a director as specified above, the director previously nominated by them and then serving shall be renominated if still eligible to serve as provided herein. Any vacancy for a director position to be nominated by the persons or groups set forth above shall be filled by the vote of the Board immediately following delivery by such persons or groups of a notice of nomination.

1.4. Removal of Board Members. Any Stockholder having the right to designate a director pursuant to Section 1.2 hereof shall have the right to request the resignation or, if permitted by the Bylaws of the Company (“Bylaws”), removal of such director so designated in writing, reasonably prior to any such election, to any other Stockholder party hereto. In such event, each of the Stockholders shall vote all Shares held by such Stockholder, or over which such Stockholder has the power to vote, in whatever manner as shall be necessary, as permitted by the Bylaws, to cause the removal of such director, whether at any annual or special meeting called at which an election of directors is held, or in connection with any other action (including the execution of written consents) taken for the purpose of removing such director. In the event of the resignation, death, removal, or disqualification of a director, the Stockholder which had the right to designate such director pursuant to Section 2 shall promptly designate a new director and, after written notice of the nomination has been given by such Stockholder to each of the parties hereto, each Stockholder will vote all Shares held by such Stockholder, or over which such Stockholder has the power to vote, in whatever manner as shall be necessary to elect such designee to the Board.

1.5. Vote to Increase Authorized Common Stock. Each Stockholder shall vote or cause to be voted all Shares owned by such Stockholder, or over which such Stockholder has voting control, from time to time and at all times, in whatever manner as shall be necessary to increase the number of authorized shares of common stock from time to time to ensure that there will be sufficient shares of common stock available for conversion of all of the shares of Series A Convertible Preferred Stock outstanding at any given time.

1.6. No Liability for Election of Recommended Directors. No party, nor any Affiliate of any such party, makes any representation or warranty as to the fitness or competence of the designee of any party hereunder to serve on the Board and shall have any liability as a result of nominating a person for election as a director for any act or omission by such nominee in his or her capacity as a director of the Company, nor shall any party have any liability as a result of voting for any such nominee in accordance with the provisions of this Agreement.

1.7. Fiduciary Duties; Director Qualifications.

(a) Each Stockholder is entering into this Agreement in his or its capacity as the holder of capital stock of the Company. Any other provision of this Agreement notwithstanding, to the extent a Stockholder or one of its Affiliates serves as an officer or director of the Company, nothing contained herein shall limit the ability of such Stockholder or one of its Affiliates to exercise ordinary and customary duties as an officer or director of the Company, including, without limitation, the exercise of fiduciary obligations to the Company and its stockholders.

(b) Any other provision of this Agreement notwithstanding, the Company’s and each Stockholder’s obligations under this Agreement is subject in all respects to the applicable law (including, without limitation, the directors’ fiduciary duties), the rules and regulations of the Securities and Exchange Commission and the listing requirements or standards of the NASDAQ Stock Market LLC or the requirements or standards of any other exchange, system or market on which the stock of the Company is listed. The Company’s obligation to nominate the designees of the Stockholders set forth in Section 1.2 is conditioned upon such designee meeting the director qualifications standards set forth in the Company’s Bylaws, the charter of the Nominating and Corporate Governance Committee of the Board, and any other qualification standards the Board adopts. If a director designee of a Stockholder fails to meet these qualification standards, the Company must provide a prompt notice thereof and the Stockholder may designate another person to serve as a director that does meet these qualification standards.

1.8. Stockholder Approval of Transactions. At any annual or special meeting of stockholders of the Company or in connection with any other action (including the execution of written consent of the stockholders) taken for the purpose of approving the issuance of shares of common stock (the “**Issuance**”) upon conversion of the Series A Convertible Preferred Stock in excess of the limitations imposed by NASDAQ Listing Standard Rule 5635 (or any successor rule thereto), each Stockholder shall vote, or cause to be voted all Shares owned by such Stockholder in favor of the Issuance.

1.9. Board Size. Each Stockholder shall vote, or cause to be voted, at any regular or special meeting of stockholders (or by any applicable written consent) at which the size of the Board is set, all Shares owned by such Stockholder (or as to which such Stockholder has voting power) to ensure that the size of the Board shall be no more than ten (10) directors (including, for the avoidance of doubt, any director positions designated as remaining vacant pursuant to the provisions set forth herein); provided, however, that such Board size may be subsequently increased or decreased pursuant to an amendment of this Agreement in accordance with Section 5.6 hereof.

2. **Covenants.** The parties hereto covenant and agree that so long as Holland serves as a director of the Company pursuant hereto, and to the extent permitted by the rules of the stock exchange on which the common stock of the Company is then listed, Holland shall be appointed as Executive Chair of the Board. So long as Napier serves as a director of the Company pursuant hereto, (i) to the extent permitted by the rules of the stock exchange on which the common stock of the Company is then listed, Napier shall be appointed as Lead Independent Director of the Board and (ii) to the extent Napier is not a member of any committee of the Board, Napier shall be entitled to notice of, and to attend, any meeting of any such committee; provided, that for purposes of this clause (ii), Napier agrees to recuse himself for any portion of any committee meeting for which such committee reasonably determines that he has a conflict of interest. The Executive Chair and Napier, whether in his role as Lead Independent Director or otherwise, shall collectively set the agenda for any meeting of the Board.

3. Right of Co-Sale.

3.1. **Exercise of Right.** If a Stockholder proposes to transfer any of its Shares, whether in exchange for cash or other securities, including in a transaction as a result of which the Company would no longer be a publicly traded entity, or for other or no consideration (a “**Transfer**”), other than pursuant to an Exempted Transfer as described in Section 3.3 hereto or in an Exempted Offering as described in Section 3.4 hereto, that Stockholder (the “**Transferring Stockholder**”) must give the other Stockholder 14 calendar days advance written notice thereof describing the proposed terms of the Transfer in detail. Within seven (7) calendar days of receipt of such Transferring Stockholder’s notice, the other Stockholder may elect to participate in the Transfer on a pro rata basis with the Transferring Stockholder based on the number of shares of common stock then beneficially owned by each, on as-converted basis, on the same terms and conditions specified in the Transferring Stockholder’s notice.

3.2. Effect of Failure to Comply.

(a) **Transfer Void; Equitable Relief.** Any transfer not made in compliance with the requirements of this Agreement shall be null and void *ab initio*, shall not be recorded on the books of the Company or its transfer agent and shall not be recognized by the Company. Each party hereto acknowledges and agrees that any breach of this Agreement would result in substantial harm to the other parties hereto for which monetary damages alone could not adequately compensate. Therefore, the parties hereto unconditionally and irrevocably agree that any non-breaching party hereto shall be entitled to seek protective orders, injunctive relief and other remedies available at law or in equity (including, without limitation, seeking specific performance or the rescission of purchases, sales and other transfers of Shares not made in strict compliance with this Agreement).

(b) **Violation of Co-Sale Right.** If any Stockholder purports to sell any Shares in contravention of this right of co-sale (a “**Prohibited Transfer**”), the other Stockholders may, in addition to such remedies as may be available by law, in equity or hereunder, require the Transferring Stockholder to purchase from the other Stockholder the Shares that he or it would have been entitled to sell had the Prohibited Transfer been effected in compliance with the terms hereof, on the same terms and subject to the same conditions as would have applied, and the non-compliant Stockholder shall also reimburse the other Stockholder for any and all reasonable and documented out-of-pocket fees and expenses, including reasonable legal fees and expenses, incurred in connection therewith.

3.3 **Exempted Transfers.** Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 3 shall not apply to (a) a transfer to an Affiliate of the transferring Stockholder, (b) a market transaction in compliance with Rule 144 under the Securities Act of 1933, as amended (the “**Securities Act**”), (c) a pledge that creates a mere security interest in the pledged Shares; (d) in the case of a Stockholder that is a natural person, a transfer made for bona fide estate planning purposes, either during his or her lifetime or on death by will or intestacy to his or her spouse, child (natural or adopted), or any other direct lineal descendant (or his or her spouse) (all of the foregoing collectively referred to as “family members”), or any custodian or trustee of any trust, partnership or limited liability company for the benefit of, or the ownership interests of which are owned wholly by such Stockholder or any such family members; or (e) any bona fide gift to any charitable organization described in Section 501(c)(3) of the Internal Revenue Code (an “**Exempted Transfer**”); provided that in the case of clause (a), (c) or (d), the Stockholder shall deliver prior written notice to the other Stockholder and the Shares transferred shall at all times remain subject to the terms and restrictions set forth in this Agreement and such transferee shall, as a

condition to such issuance, deliver a counterpart signature page to this Agreement as confirmation that such transferee shall be bound by all the terms and conditions of this Agreement as a Stockholder (but only with respect to the securities so transferred to the transferee); and provided further in the case of any transfer pursuant to clause (a) or (d) above, that such transfer is made pursuant to a transaction in which there is no consideration actually paid for such transfer.

3.4 Exempted Offerings. Notwithstanding the foregoing or anything to the contrary herein, the provisions of Section 3 shall not apply to the sale of any Shares to the public in an offering pursuant to an effective registration statement under the Securities Act.

3.5 Legended Certificates. Each certificate representing any of the Shares shall be marked by the Company with a legend reading as follows:

“THE SHARES EVIDENCED HEREBY ARE SUBJECT TO A CO-SALE AND VOTING AGREEMENT (A COPY OF WHICH MAY BE OBTAINED FROM THE ISSUER) AND BY ACCEPTING ANY INTEREST IN SUCH SHARES THE PERSON HOLDING SUCH INTEREST SHALL BE DEEMED TO AGREE TO AND SHALL BECOME BOUND BY ALL THE PROVISIONS OF SAID CO-SALE AND VOTING AGREEMENT.”

4. Remedies.

4.1. Covenants of the Company. The Company agrees to use its best efforts, within the requirements of applicable law, to ensure that the rights granted under this Agreement are effective and that the parties enjoy the benefits of this Agreement. Such actions include, without limitation, the use of the Company's best efforts to cause the nomination of the directors as provided in this Agreement.

4.2. Irrevocable Proxy. Each party to this Agreement hereby constitutes and appoints the President and Treasurer of the Company, and each of them, with full power of substitution, as the proxies of such party with respect to the matters set forth herein, including without limitation, election of persons as members of the Board in accordance with Section 1 hereto, and hereby authorizes each of them to represent and to vote, if and only if the party (i) fails to vote or (ii) attempts to vote (whether by proxy, in person or by written consent), in a manner which is inconsistent with the terms of this Agreement, all of such party's Shares in favor of the election of persons as members of the Board determined pursuant to and in accordance with the terms and provisions of this Agreement. The proxy granted pursuant to the immediately preceding sentence is given in consideration of the agreements and covenants of the Company and the parties in connection with the transactions contemplated by this Agreement and, as such, is coupled with an interest and shall be irrevocable unless and until this Agreement terminates or expires in accordance herewith. Each party hereto hereby revokes any and all previous proxies with respect to the Shares and shall not hereafter, unless and until this Agreement terminates or expires in accordance herewith, purport to grant any other proxy or power of attorney with respect to any of the Shares, deposit any of the Shares into a voting trust or enter into any agreement (other than this Agreement), arrangement or understanding with any person, directly or indirectly, to vote, grant any proxy or give instructions with respect to the voting of any of the Shares, in each case, with respect to any of the matters set forth herein.

4.3. Specific Enforcement. Each party acknowledges and agrees that each party hereto will be irreparably damaged and will not have an adequate remedy at law in the event any of the provisions of this Agreement are not performed by the parties in accordance with their specific terms or are otherwise breached. Accordingly, it is agreed that each of the Company and the Stockholders shall be entitled to injunctive relief to prevent breaches of this Agreement, and to specific enforcement of this Agreement and its terms and provisions in any action instituted in any court of the United States or any state having subject matter jurisdiction, including, but not limited to, seeking specific performance or the rescission of purchases, sales and other transfers of Shares not made in strict compliance with this Agreement. If any action shall be brought in equity to enforce any of the provisions of this Agreement, none of the parties hereto shall raise the defense that there is an adequate remedy at law.

4.4. Remedies Cumulative. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

5. Miscellaneous.

5.1. Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties. Nothing in this Agreement, express or implied, is intended to confer upon any party other than the parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement.

5.2. Governing Law. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of law.

5.3. Counterparts; Facsimile. This Agreement may be executed and delivered by facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, e.g., www.docusign.com), or other transmission method and in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

5.4. Titles and Subtitles. The titles and subtitles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

5.5. Notices. All notices and other communications given or made pursuant to this Agreement shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient, and if not so confirmed, then on the next business day, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) business day after the business day of deposit with a nationally recognized overnight courier, specifying next business day delivery, with written verification of receipt. All communications shall be sent to the respective parties at their address as set forth on the signature page hereto, or to such email address, facsimile number or address as subsequently modified by written notice given in accordance with this Section 5.5. If notice is given to the Company, a copy shall also be sent to Wyrick Robbins Yates & Ponton LLP, 4101 Lake Boone Trail, Suite 300, Raleigh, NC 27607, Attn: Donald R. Reynolds. If a notice is given to BuildGroup, a copy shall also be sent to BuildGroup LLC, 3500 Jefferson St., Suite 303, Austin, Texas 78731, Attn: Kenneth Herz, General Counsel.

5.6. Consent Required to Amend, Terminate or Waive. This Agreement may be amended or modified only by a written instrument executed by the Stockholders and the Company. Any provision hereof may be waived by the waiving party on such party's own behalf, without the consent of any other parties.

5.7. Delays or Omissions. No delay or omission to exercise any right, power or remedy accruing to any party under this Agreement, upon any breach or default of any other party under this Agreement, shall impair any such right, power or remedy of such non-breaching or non-defaulting party nor shall it be construed to be a waiver of any such breach or default, or an acquiescence therein, or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default previously or thereafter occurring. Any waiver, permit, consent or approval of any kind or character on the part of any party of any breach or default under this Agreement, or any waiver on the part of any party of any provisions or conditions of this Agreement, must be in writing and shall be effective only to the extent specifically set forth in such writing. All remedies, either under this Agreement or by law or otherwise afforded to any party, shall be cumulative and not alternative.

5.8. Severability. The invalidity, illegality or unenforceability of any provision hereof shall in no way affect the validity or enforceability of any other provision. Such provision will be enforced to the maximum extent possible and such invalidity, illegality or unenforceability will not affect any other provision of this Agreement. In such event, the parties shall negotiate, in good faith, a legal, valid, and enforceable substitute provision, which most nearly effects the intent of the parties in entering into this Agreement.

5.9. Entire Agreement. This Agreement constitutes the full and entire understanding and agreement between the parties with respect to the subject matter hereof, and any other written or oral agreement relating to the subject matter hereof existing between the parties are expressly canceled.

5.10. Stock Splits, Stock Dividends, etc. In the event of any issuance of Shares of the Company's voting securities hereafter to any of the Stockholders (including, without limitation, in connection with any stock split, stock dividend, recapitalization, reorganization, or the like), such Shares shall become subject to this Agreement with the same force and effect as the Shares subject to such rights immediately before such event.

5.11. Manner of Voting. The voting of Shares pursuant to this Agreement may be effected in person, by proxy, by written consent or in any other manner permitted by applicable law.

5.12. Further Assurances. At any time or from time to time after the date hereof, the parties agree to cooperate with each other, and at the request of any other party, to execute and deliver any further instruments or documents and to take all such further action as the other party may reasonably request in order to evidence or effectuate the consummation of the transactions contemplated hereby and to otherwise carry out the intent of the parties hereunder.

5.13. Advice of Counsel. EACH PARTY TO THIS AGREEMENT ACKNOWLEDGES THAT, IN EXECUTING THIS AGREEMENT, SUCH PARTY HAS HAD THE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT LEGAL COUNSEL, AND HAS READ AND UNDERSTOOD ALL OF THE TERMS AND PROVISIONS OF THIS AGREEMENT. THIS AGREEMENT SHALL NOT BE CONSTRUED AGAINST ANY PARTY BY REASON OF THE DRAFTING OR PREPARATION HEREOF.

5.14. Construction. For purposes of this Agreement, an individual, firm, corporation, partnership, association, limited liability company, trust or any other entity (collectively, a "**Person**") shall be deemed an "**Affiliate**" of another Person who, directly or indirectly, controls, is controlled by or is under common control with such Person, including, without limitation, any general partner, officer, director, stockholder, employee or manager of such Person and any venture capital fund now or hereafter existing that is controlled by one or more general partners of or shares the same management company with such Person, and the holdings of any Person shall include the holdings of its Affiliates.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties have executed this Co-Sale and Voting Agreement as of the date first written above.

THE COMPANY:

BENEFITFOCUS, INC.

By: /s/ Stephen M. Swad
Name: Stephen M. Swad
Title: Chief Financial Officer
Address: 100 Benefitfocus Way
Charleston, SC 29492
Attn: Steve Swad, CFO

STOCKHOLDERS:

/s/ Mason R. Holland, Jr.
Name: Mason R. Holland, Jr.
Address:

BUILDGROUP, LLC

By: BuildGroup Management, LLC, its investment manager

By: /s/ A. Lanham Napier
Name: A. Lanham Napier
Title: Chief Executive Officer
Address: 3500 Jefferson Street, Suite 303
Austin, Texas 78731

[Signature Page to Co-Sale and Voting Agreement]

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Benefitfocus Announces Closing of \$80 Million Investment by BuildGroup LLC

Investment Bolsters Balance Sheet and Accelerates Transformation of Industry-Leading, AI-driven Benefits Platform

Charleston, S.C. – June 8, 2020 – Benefitfocus, Inc. (NASDAQ: BNFT), the technology platform driving rapid innovation for employers, health plans and consumers, today announced it has closed the previously announced \$80 million preferred stock investment from BuildGroup LLC. BuildGroup is an operator-led, permanent capital investment company for enhanced software-as-a-service (SaaS) business models.

In conjunction with the closing, the Benefitfocus Board appointed Lanham Napier as its lead independent director. Mr. Napier has served as a company director since 2014. He is Co-Founder and CEO of BuildGroup and was previously the CEO of Rackspace, which he helped grow from a startup to \$1.5 billion in revenue and a global leader in the managed hosting industry. During this growth period Mr. Napier was recognized by Forbes as one of America's Most Powerful CEOs 40 and Under and was named one of the Top 100 Most Influential Executives by CRN.

Ray August, President and CEO of Benefitfocus, commented, "This investment is very exciting news for Benefitfocus and all of our stakeholders. Lanham has been an active member of our board and BuildGroup's financial commitment and business expertise will further accelerate our full potential as the benefits industry's leading SaaS platform with a growing AI-driven marketplace. In addition, this transaction substantially enhances our financial flexibility and we have never been better positioned to deliver on our mission to improve lives through personalized, consumer-focused benefits."

As previously announced, the company intends to use the proceeds from the investment to accelerate ongoing initiatives, including the potential reduction of debt, potential acquisitions to extend the company's market or technology leadership and other general corporate purposes. Further details of the preferred stock and related agreements will be filed on Form 8-K with the Securities and Exchange Commission today.

Mr. Napier said, "Through my board service over the past six years I have developed a deep appreciation for the opportunity Benefitfocus has to lead its market. We believe our investment, coupled with our team's operational expertise, will help the company monetize the strong recurring revenue of its SaaS offerings with a marketplace that leverages artificial intelligence. For the over 25 million lives on the Benefitfocus platform, this translates into high performance benefits plans and reduced healthcare costs."

About Benefitfocus

Benefitfocus (NASDAQ: BNFT) unifies the entire U.S. benefits industry on a single technology platform to protect consumers' health, wealth, property and lifestyle. Our powerful cloud-based software, data-driven insights and thoughtfully-designed services, enable employers, insurance brokers, carriers and suppliers to simplify the complexity of benefits administration and deliver a world-class benefits experience. Learn more at www.benefitfocus.com, [LinkedIn](#) and [Twitter](#).

About BuildGroup

BuildGroup is the first operator-led, permanent capital investment company for modern business models. Headquartered in Austin, Texas, the firm invests in companies that include SaaS-based subscription revenues, significant data assets that leverage AI to create high volume and targeted offers, and multifaceted platforms that serve large, connected networks of buyers, sellers, users and partners. BuildGroup targets fast-growing private companies and small-cap public companies through PIPEs. For more information on BuildGroup, its investment strategy and portfolio companies, visit www.buildgroup.com.

Safe Harbor Statement

Except for historical information, all of the statements, expectations, and assumptions contained in this press release are forward-looking statements. Actual results might differ materially from those explicit or implicit in the forward-looking statements. Important factors that could cause actual results to differ materially include: risks related to the Company's ongoing transformation; volatility and uncertainty in the global economy and financial markets in light of the evolving COVID-19 pandemic; our continuing losses and need to achieve GAAP profitability and generate sufficient cash to pay our debt and dividend obligations; fluctuations in our financial results; our ability to maintain our culture, retain and motivate qualified personnel; the immature and volatile market for our products and services; risks related to changing healthcare and other applicable regulations; risks associated with acquisitions; cyber-security risks; the need to innovate and provide useful products and services; our ability to compete effectively; privacy, security and other risks associated with our business; and the other risk factors set forth from time to time in our SEC filings, copies of which are available free of charge within the Investor Relations section of the Benefitfocus website at <http://investor.benefitfocus.com/sec-filings> or upon request from our Investor Relations Department. Benefitfocus assumes no obligation and does not intend to update these forward-looking statements, except as required by law.

Source: Benefitfocus, Inc.