Nasdaq Provides Temporary Shareholder Approval Exemptions in Light of COVID-19

May 8, 2020

In response to issues raised by COVID-19, the SEC approved new Nasdaq Listing Rules that provide Nasdaq-listed companies with temporary relief from its shareholder approval requirements for non-public offerings in an effort to streamline companies' access to capital.[1] Effective May 4, 2020 through June 30, 2020, a Nasdaq-listed company may enter into an agreement to issue securities without shareholder approval in (i) non-public offerings otherwise subject to Listing Rule 5635(d) (the "20% rule") and (ii) issuances to officers, directors, employees and consultants under Listing Rule 5635(c), subject to specified conditions.[2]

Transactions Other Than Public Offerings. For transactions other than public offerings, Listing Rule 5635(d) ordinarily requires shareholder approval prior to a 20% issuance at a price that is less than the minimum price.[3] Under new Listing Rule 5636T(b), no prior shareholder approval is necessary for such a transaction if the issuing company can demonstrate that:

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1 SEC Release available here.

2 Nasdaq Listing Rules available here.

3 Listing Rule 5635(d)(1)(B) defines "20% issuance" as a transaction, other than a public offering, involving the sale, issuance or potential issuance by the company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors, or substantial shareholders of the company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. Listing Rule 5635(d)(1)(A) defines "minimum price" as a price that is the lower of: (i) the Nasdaq official closing price immediately preceding the signing of the binding agreement or (ii) the average Nasdaq official closing price of the common stock for the five trading days immediately preceding the signing of the binding agreement.

- the delay in securing shareholder approval would:
  - have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan;
  - result in workforce reductions;
  - adversely impact the company's ability to undertake new initiatives in response to COVID-19; or
  - seriously jeopardize the financial viability of the enterprise;
- the need for the transaction is due to circumstances related to COVID-19;
- the company undertook a process to ensure that the transaction represents the best terms available to the company; and
- the company's audit committee (or a comparable body of the board of directors comprised solely of independent, disinterested directors) expressly approved reliance on this exception and determined that the transaction is in the best interest of shareholders.

In order to rely on this exception, the company must execute a binding agreement governing the issuance of the securities, submit a notification form to Nasdaq (that includes a certification that it complies with the requirements listed above), and obtain Nasdaq approval, as applicable.

The company does not need to obtain Nasdaq approval prior to the issuance of the securities if the transaction (i) involves a maximum issuance of less than 25% of the total shares outstanding and 25% of the total voting power of the company (each, on a pre-transaction basis), (ii) is at a discount to the minimum price of no more than 15% and (iii) does not involve the issuance of warrants.

Equity Compensation Transactions. In limited circumstances, new Listing Rule 5636T(c) provides that, for issuances to officers, directors, employees and consultants under existing Listing Rule 5635(c), no prior shareholder approval is required if:

- the affiliate's participation in the transaction is specifically required by unaffiliated investors;
- no investing affiliates participated in the negotiation of the economic terms of the transaction;

- each affiliate's participation is less than 5% of the transaction; and
- all affiliates' participation (in the aggregate) is less than 10% of the transaction.

Disclosure Obligations. In order to take advantage of the shareholder approval relief in either transaction noted above, the company must make a public announcement of the transaction no later than two business days prior to the issuance of the securities, disclosing, among other things, the terms of the transaction and the company's reliance on the exceptions provided in Listing Rule 5636T.

New Listing Rule 5636T also outlines amended Nasdaq notification requirements and aggregation principles for certain subsequent issuances, in each case, relating to transactions subject to Listing Rule 5636T.

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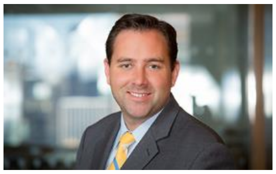
For more information regarding the legal developments related to coronavirus, please visit our Coronavirus Resource Center.

Please do not hesitate to contact us with any questions.



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