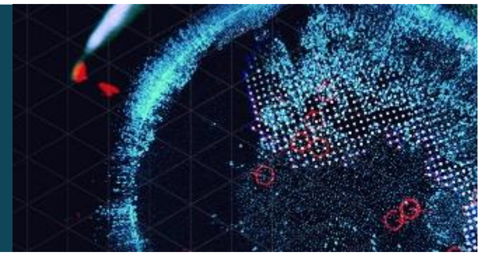
Coronavirus/COVID-19

Managing COVID-19: Nasdaq Temporary Shareholder Approval Relief



May 7, 2020

In response to the ongoing impact of the COVID-19 outbreak, Nasdaq has adopted temporary relief through June 30, 2020 from shareholder approval requirements pertaining to the so-called "20% rule." The relief is effective immediately and intended to give Nasdaq-listed companies additional flexibility to raise capital through private placements in situations where the need for the transaction is due to circumstances related to COVID-19. This alert discusses this temporary relief.

1

Relief Under the Shareholder Approval Rules

- On May 4, 2020, Nasdaq adopted temporary rules 5636T(a)-(f), providing a limited, temporary exception from the Listing Rule 5635(d). That rule requires shareholder approval prior to an offering (other than a public offering) in excess of 20% of the company's total shares or the voting power outstanding at a price below the "minimum price."[1]

- The new rules allow an issuer to forego shareholder approval in instances where the delay to obtain 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.

2

Requirements

- To take advantage of the rules, a company must demonstrate, in a supplement to its Listing of Additional Shares notification form, that:

  - the transaction meets one of the four requirements set out above;
  - the need for the transaction is due to circumstances related to COVID-19;
  - the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company; and
  - the company's audit committee, or a comparable body of the board of directors consisting solely of independent, disinterested directors, has expressly approved reliance on this exception and determined that the transaction is in the best interest of shareholders.

[1] "Minimum price" is defined as the lower of: (i) official Nasdaq closing price immediately preceding the signing of the binding agreement; or (ii) the average official Nasdaq closing price of the common stock for the five trading days immediately preceding the signing of the binding agreement.

- In addition, a company relying on this exception must make a public announcement by Form 8-K or press release at least two business days prior to the issuance of the securities. This announcement must disclose:
    - the terms of the transaction;
    - that the transaction would ordinarily require shareholder approval but that the company is relying on this temporary exception; and
    - that the audit committee, or a comparable body of the board of directors consisting solely of independent, disinterested directors, expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.
- Finally, except where a transaction fits within the safe harbor described below, a company must receive approval from Nasdaq prior to relying on this exemption from obtaining shareholder approval.

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3 The Safe Harbor

- Companies do not need prior approval from Nasdaq to rely on this exemption for transactions that meet the following "safe harbor" requirements:
    - the maximum issuance of common stock (or securities convertible into common stock) is less than 25% of the total shares and voting power outstanding before the transaction; and
    - the maximum discount to the "minimum price" at which shares could be issued is 15%.
- Where these conditions are satisfied, a company may proceed with the transaction after certifying to Nasdaq in a supplement to its Listing of Additional Shares notification form that the transaction complies with the requirements of the exemption.
- Significantly, Nasdaq has noted that transactions that include warrants exercisable for equity are not eligible for the safe harbor.

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4 Further Relief

- As part of this temporary exemption, Nasdaq is also providing a limited exemption to the equity compensation shareholder approval rule in Listing Rule 5635(c). Listing Rule 5635(c) requires shareholder approval prior to sales to officers, directors, employees, or consultants when such issuances could be considered a form of "equity compensation." This is the case where sales (other than in a public offering) will be made at a discount to the current market price of the company's stock, which could preclude affiliate participation in a private offering absent shareholder approval.
- As part of its relief, Nasdaq will permit sales to affiliates without shareholder approval where:
    - the sales are made as part of a transaction that satisfies the requirements for Nasdaq's temporary exemption from shareholder approval under 5636T(a)-(f);
    - the affiliate's participation in the transaction was specifically required by unaffiliated investors;
    - each affiliate's participation represents less than 5% of the transaction;

- all affiliates' participation collectively represents less than 10% of the transaction; and
- any affiliate investing in the transaction has participated in negotiating the economic terms of the transaction.

5

Key Additional Considerations

- **Timing**. A company may rely on these temporary rules for offerings for which the company has signed a binding definitive agreement by June 30, 2020. The issuance of the securities under such agreement may occur after June 30, 2020, provided that the issuance takes place no later than 30 calendar days following the date of the binding agreement.
- **Listing of Additional Shares**. In connection with offerings relying on this exception, Nasdaq will require a Listing of Additional Shares notification form to be submitted not later than two business days prior to the issuance of the securities (Nasdaq usually requires 15 days advance notice).
- **Change of Control**. Nasdaq's temporary rules do not affect the change of control shareholder approval rule in Listing Rule 5635(b). Therefore transactions that could result in a change of control will continue to be subject to shareholder approval, regardless of whether the transaction would otherwise meet the requirements of the temporary exception.[2] This is particularly relevant for strategic transactions with one or few investor(s), such as investments in connection with collaborations.
- **Aggregation**. Nasdaq has noted that it will aggregate any issuance made in reliance on this temporary exception with any subsequent issuance (other than public offerings) within 90 days of the initial issuance, if the subsequent issuance is made at a discount to the "minimum price." If such a subsequent issuance, when aggregated with the prior issuance, would exceed 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required for the subsequent issuance.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Capital Markets and Securities and Mergers & Acquisitions practices:

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[2] Nasdaq generally considers a transaction to involve a change in control where a transaction may result in an investor owning, or having the right to own, more than 20% of the company's outstanding shares or voting power after the transaction, and where such ownership or voting power would be the largest position in the company.