

# Client Alert

May 2020

## Nasdaq Facilitates Equity Financings with Temporary Waiver of Shareholder Approval Requirement

Effective through June 30, 2020, Nasdaq has issued a conditional exception to the listing rule requiring shareholder approval for a listed company to issue shares equal to 20% or more of its common stock or voting power. The exception applies to listed companies needing to raise capital due to circumstances related to COVID-19 where the delay in obtaining shareholder approval would adversely affect the company. Listed companies must certify to Nasdaq that they qualify for the exception and, in some cases, obtain Nasdaq's approval. Listed companies must also promptly disclose their reliance on the exception.

### Requirements for the Exception to the Shareholder Approval Rule

Under the temporary Rule 5636T, the listed company is not required to obtain shareholder approval under Rule 5635(d) (i.e., the 20% share issuance rule) if the following conditions are met:

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

The temporary rule also provides that an affiliate's participation in the equity offering will not require shareholder approval under Rule 5635(c) if certain conditions are met, including a requirement that "the affiliates must not have participated in negotiating the economic terms of the transaction."

## **Certification to Nasdaq; Approval Requirement**

The listed company must certify to Nasdaq that it complies with the requirements. Nasdaq must then approve the company's reliance on the exception; however, Nasdaq's approval is not required if (i) the maximum issuance of common stock (or securities convertible into common stock) is less than 25% of the total shares outstanding and 25% of the voting power outstanding before the transaction and (ii) the maximum discount to the "minimum price" (as defined by Nasdaq) at which the shares could be issued is 15%.

Nasdaq's supplemental instructions to the temporary rule state that listed companies must provide "specific details" on why they qualify for the exception. For example, if delaying the share issuance would jeopardize the company's financial viability, Nasdaq indicates that the company should address the following questions:

- How long will the company be able to meet its current obligations, such as payroll, lease payments, and debt service, if it does not complete the proposed transaction?
- What is the company's cash position and burn rate, both current and projected?
- Would the company be required to file for bankruptcy protection due to the time that it would take to get shareholder approval?
- What would be the impact on the company's operations due to the time that it would take to get shareholder approval?

## **Public Announcement**

A listed company relying on the exception must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the share issuance. The disclosure must include the terms of the transaction, the fact that shareholder approval would have been required but for the exception, and that the audit committee or a comparable body of the board of directors expressly approved reliance on the exception and determined that the transaction was in the best interest of shareholders.

## **Timing**

The temporary rule is in effect through and including June 30, 2020. It also exempts securities issued after June 30, 2020, if the issuance takes place pursuant to a binding agreement entered into on or prior to June 30, and occurs no later than 30 calendar days following the date of such agreement.

## **Conclusion**

Nasdaq's exception to the shareholder approval requirement will significantly accelerate the time in which qualifying listed companies can raise potentially large amounts of capital. Listed companies wishing to take advantage of the exception should give careful consideration to how they document and communicate their eligibility to Nasdaq and investors. Among other things, Nasdaq is requesting specific details on the company's financial condition. In addition, companies should focus on the requirements that "the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company" and that the audit or comparable committee "determined that the transaction is in the best interest of shareholders."

## **Contacts**

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