

Nasdaq Provides Temporary Emergency Relief to Issuers from Shareholder Approval Requirements in Response to COVID-19

May 19, 2020

By: Michael A. Goldstein, Samantha A. Lesser



Due to the dramatic impact that the spread of COVID-19 continues to have on businesses, the SEC approved with immediate effect a rule change proposed by the Nasdaq Stock Market to provide listed companies with a temporary exception to its shareholder approval requirements for certain private placements and a related

limited exception concerning insider participation in those transactions. The temporary rule, adopted as Listing Rule 5636T, became effective on May 4, 2020 and is in force through June 30, 2020. Subject to compliance with the technical conditions of the temporary exception, including execution of binding agreements by June 30, 2020, the rule permits Nasdaq-listed companies to issue securities without shareholder approval until the later date of June 30, 2020 and 30 days following the date of the binding agreement.

The Current Rule - Listing Rule 5635

Nasdaq's listing rules require that companies obtain shareholder approval prior to issuing securities in connection with (i) certain acquisitions of the stock or assets of another company; (ii) a change of control; (iii) equity-based compensation of officers, directors, employees or consultants; and (iv) the issuance of 20% or more of its equity securities (other than in a public offering) at a price less than the lower of (1) the Nasdaq official closing price immediately preceding the signing of the binding agreement and (2) the average Nasdaq official closing price of the common stock for the five trading days immediately preceding the signing of the binding agreement. Notably, Nasdaq interprets this rule as requiring shareholder approval for certain issuers to officers and directors where the issuance may be considered a form of equity compensation, such as where the insider participates in a private

placement and acquires equity securities at a price less than the minimum price. By adopting Listing Rule 5636T, Nasdaq is providing temporary flexibility to listed companies that are seeking to raise equity capital on terms which would otherwise require shareholder approval under Listing Rule 5635.

The Temporary Exception - Listing Rule 5636T

Although Nasdaq already provides listed companies with a “financial viability exception” to the shareholder approval requirements of Listing Rule 5635, Nasdaq’s adoption of Listing Rule 5636T is based on the premise that there are many companies whose financial viability may not be in serious jeopardy but which are otherwise in need of additional capital on an accelerated timeline due to the impacts of COVID-19. In sum, subject to compliance with a number of conditions, the temporary exception allows Nasdaq-listed companies to issue securities, without shareholder approval, in a private placement notwithstanding the 20% shareholder approval rule. The temporary exception is in force through June 30, 2020, and to take advantage of the relief, a binding agreement to issue the securities must be signed, the requisite notices need to be submitted, and Nasdaq approval (unless the rule’s “Safe Harbor”, as described below, is available) must be obtained prior to that date.

Additionally, the temporary rule provides an exception from the shareholder approval requirement for equity compensation arrangements under Listing Rule 5635(c), provided that the affiliates participate in a transaction covered by the Rule 5636T, the affiliates’ participation was specifically required by unaffiliated investors, any single affiliate’s participation is less than 5%, and all affiliates’ participation is for less than 10%, of the transaction. Further, affiliates may not participate in negotiating the economic terms of the transaction.

Procedural Requirements

As a threshold matter, Rule 5636T requires that listed companies seeking relief must demonstrate that (i) its need for capital is due to the impact of COVID-19, (ii) the delay in complying with the shareholder approval requirements would have a material adverse impact on the company’s ability to maintain pre-COVID-19 operations, force workforce reductions, adversely impact the company’s ability to take on new initiatives to combat COVID-19, or seriously jeopardize its financial viability; (iii) it undertook a process to ensure that the transaction represented the best available terms; and (iv) its audit committee (or a committee of independent directors) approved the transaction and determined it to be in the best interests of the shareholders. Further, a company that wishes to take advantage of this temporary exception must, prior to issuing securities in reliance on the temporary rule, (a) execute a binding agreement governing the issuance of the securities, (b) submit the notices required by the Rule 5636T, including a certification of compliance, and (c) unless eligible under the safe harbor, obtain approval from Nasdaq. These conditions must be satisfied by June 30, 2020.

The safe harbor provides an exception to the pre-issuance approval requirement if the maximum issuance of equity securities is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction and the discount to the minimum price is no more than 15%. If these conditions pertain, then the company may issue the securities without waiting for Nasdaq approval, but after submitting its listing notification with Nasdaq.

As mentioned earlier, a company may only rely on the temporary rule until June 30, 2020. If by such date it has satisfied the technical conditions of the temporary rule, it may issue the securities governed by such agreement by the later date of June 30, 2020 and 30 calendar days following the date of the binding agreement. In addition, Rule 5636T requires companies to disclose their reliance on the temporary rule by filing a Form 8-K or issuing a press release no more than two days before the issuance of the securities.

Please contact [Michael A. Goldstein, Esq.](#), [Victor J. DiGioia, Esq.](#), or your regular Becker contact with any questions on these or related topics.