Update: NASDAQ Provides Temporary Relief from Certain Shareholder Approval Requirements During COVID-19 Pandemic

Article By
Alexandra Clark Layfield
Thomas D. Kimball
Jones Walker LLP
Disaster Prep and Recovery Blog

Friday, May 8, 2020

On May 4, 2020, the Securities and Exchange Commission (SEC) approved the Nasdaq Stock Market’s (NASDAQ) request to temporarily modify certain shareholder approval requirements during the COVID-19 pandemic to make it easier for NASDAQ-listed companies to access capital.

As we previously reported here, in April, the New York Stock Exchange similarly adopted temporary modifications to certain of its shareholder approval requirements.

To address the capital needs of its listed companies, NASDAQ has adopted a temporary exception to the shareholder approval requirements for 20% issuances.

NASDAQ rules generally require shareholder approval prior to security issuances in connection with:

(i) Certain acquisitions of the securities or assets of another company pursuant to
Listing Rule 5635(a)

(ii) A change of control pursuant to Listing Rule 5635(b)

(iii) Equity-based compensation of officers, directors, employees, or consultants pursuant to Listing Rule 5635(c)

(iv) Any nonpublic issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20% or greater of its common stock outstanding or outstanding voting power, in each case prior to the issuance, that does not meet certain minimum price requirements, pursuant to Listing Rule 5635(d)

NASDAQ-listed companies typically may seek an exception from the shareholder approval requirements when the delay in obtaining shareholder approval would seriously jeopardize the financial viability of the enterprise and reliance on the exception is approved by a company’s audit committee (or comparable governing body composed solely of independent, disinterested directors). However, NASDAQ acknowledged that the typical process for obtaining the “financial viability” exception would not help most companies negatively impacted by the COVID-19 pandemic.

To streamline access to capital, effective through June 30, 2020, NASDAQ Listing Rule 5636T provides a temporary exception to the shareholder approval requirements for 20% issuances under Listing Rule 5635(d).[1]

To use the temporary exception to the shareholder approval requirements, a NASDAQ-listed company must execute a binding agreement covering the issuance of the securities; submit the required notices (as described below); and, if required, obtain NASDAQ approval for the transaction no later than June 30, 2020. Under the temporary exception, the issuance of securities may occur after June 30, 2020, as long as the issuance takes place no more than 30 calendar days following the date a binding agreement is executed.

The temporary exception to the shareholder approval requirements will be available for issuances where the delay in securing shareholder approval would:

(i) Have a material adverse impact on the company’s ability to maintain operations under its pre-COVID-19 business plan.

(ii) Result in workforce reductions.

(iii) Adversely impact the company’s ability to undertake new initiatives in response to COVID-19.

(iv) Seriously jeopardize the financial viability of the enterprise.

A company relying on the temporary exception would also be required to show “that the need for the transaction is due to circumstances related to COVID-19 and that the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company.” Furthermore, the company’s audit committee (or comparable body of independent, disinterested directors) would need to expressly approve reliance on the exception and determine that the issuance
is in the best interest of shareholders.

NASDAQ’s prior approval is not required in order to use the temporary exception to the shareholder approval requirements, as long as the maximum number of shares of common stock (or securities convertible into common stock issuable in the transaction) is less than 25% of the company’s common stock outstanding and its total voting power, in each case prior to the transaction, and the maximum discount to the minimum price at which shares may be issued in the transaction is not greater than 15% (Safe Harbor Provision) — provided that the Safe Harbor Provision does not apply to transactions involving the issuance of warrants exercisable for shares of common stock without prior NASDAQ approval.\[2\] NASDAQ’s prior approval is required for all issuances that do not fall under the Safe Harbor Provision.

The temporary exception requires companies to promptly make a public announcement by filing a Form 8-K or by issuing a press release prior to the issuance, disclosing:

- The transaction terms, including the total number of shares that may be issued and the consideration received
- That shareholder approval typically would be required but for the reliance on the temporary exception
- That the audit committee (or comparable body of independent, disinterested directors) expressly approved reliance on the exception and determined the transaction was in the best interests of the company’s shareholders

Additionally, NASDAQ-listed companies relying on the temporary exception will not be required to notify the exchange 15 days prior to the issuances as typically would be required by Listing Rule 5250(e)(2). Instead, companies relying on the exception will be required to provide notice to NASDAQ as promptly as possible (no later than the public announcement described above), certifying that, and describing with specificity how, the company complied with all requirements of the temporary rule. Companies undertaking issuances that require NASDAQ’s prior approval under the temporary exception are required to submit the required notice with enough time to allow NASDAQ to complete its review.

Lastly, issuances of securities in reliance on the temporary exception will be aggregated with any subsequent issuances of securities at a discount to the minimum price if the binding agreement governing such subsequent issuance is executed within 90 days of the issuance relying on the temporary exception (except for public offerings under IM-5645-3). Therefore, if the aggregate issuances (i.e., shares issued in reliance on the exception and any subsequent issuance(s) meeting the above criteria) equal 20% or more of the total shares of common stock outstanding or voting power, in each case before the first issuance, shareholder approval will be required prior to such subsequent issuance.

For reference, the text of temporary NASDAQ Listing Rule 5636T can be found here.

© 2020 Jones Walker LLP

Source URL: https://www.natlawreview.com/article/update-nasdaq-provides-temporary-relief-certain-shareholder-approval-requirements