

Nasdaq Temporarily Permits Certain COVID-Related Private Offerings Without Shareholder Approval

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On May 4, 2020, the Nasdaq Stock Exchange [adopted](#) a new temporary rule that permits listed companies to issue more than 20% of their presently outstanding common stock at a discount from current market prices without the shareholder approval that such a transaction would normally require.

To qualify, a listed company will need to submit the normal Listing of Additional Shares (LAS) notification along with a supplement in which it certifies that:

- the need for the transaction is due to circumstances related to COVID-19;
- delaying the transaction to obtain shareholder approval would either (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;
- 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 independent board committee has expressly approved reliance on the new exemption and determined that the transaction is in the best interest of the shareholders.

If the maximum number of shares that can be issued is less than 25% of the outstanding shares or voting power prior to the transaction, and if the purchase price per share is not below a 15% discount from the Minimum Price as defined in the Nasdaq rules (generally, the market price at the time the purchase agreement is signed), then the transaction will not require further approval by Nasdaq after the company submits its LAS notification and supplemental certification. Transactions outside of this "safe harbor" will need the written approval of the Nasdaq Listing Qualifications Department before any securities can be issued. Transactions involving warrants will not be eligible for the safe harbor.

For companies whose eligibility is subject to Nasdaq review, neither the adopting release nor the temporary rule gives much indication how Nasdaq will evaluate whether a company qualifies under the standards above. For example, it is unclear what sort of process the company will need to undertake in order to ensure that the proposed transaction represents the best terms available. The required company certification addresses the process and not the outcome – i.e., the company does not certify that the terms are in fact the best available, only that its process was designed to achieve that result. Although companies meeting the safe harbor conditions will not undergo Nasdaq review, they should still carefully consider their certification and be prepared to defend it.

The temporary rule was accompanied by a narrow exception to the listing rule that requires shareholder approval

of equity compensation arrangements in which directors, officers and employees participate. Nasdaq interprets sales of stock to such persons in capital-raising transactions to require shareholder approval where they may be considered a form of equity compensation. In an offering under the temporary rule, if unaffiliated purchasers require affiliates to put their personal capital at risk, those affiliates' participation will not require shareholder approval so long as they are not involved in negotiations and they are limited to a *de minimis* amount.

To use the temporary rule, a company would need to execute a binding agreement, submit the LAS notification and supplemental certification to Nasdaq and obtain any required approvals of the Listing Qualifications Department by June 30, 2020. Companies should give Nasdaq enough time to review their submission. The issuance of securities under the binding agreement may occur after June 30, 2020 so long as it is within 30 days after the date of the agreement.

A company using this exception will need to file a Form 8-K or press release at least two days before the issuance of the shares noting, among other things, that shareholder approval would have been required but for the company's reliance on the temporary rule. Companies will not need to give the 15 days' advance notice normally required for a Listing of Additional Shares notification.

Nasdaq has recognized that its existing "financial viability" exception to its shareholder approval requirements may not adequately address the needs of listed companies impacted by COVID-19. Some companies will not qualify for that exception despite being dramatically affected by the pandemic, while others will be unable to mail notice to all shareholders ten days prior to issuing securities. As an alternative, the temporary rule represents a streamlined approach. Beyond companies whose financial viability is jeopardized, the temporary rule may be useful for other companies in need of immediate capital to address liquidity and operational challenges arising from the COVID-19 pandemic or to minimize workforce reductions. The adopting release makes clear that the temporary rule also could be used to fund new initiatives relating to COVID-19, giving as examples a company raising funds to develop a test for the virus or a vaccine.

The temporary rule has no effect on the Nasdaq rules requiring shareholder approval of transactions resulting in a change of control or, other than in the narrow circumstance described above, transactions involving equity compensation arrangements for officers, directors and employees.

Visit our [COVID-19 Resource Center](#) often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

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