May 8, 2020

Nasdaq Adopts Temporary COVID-19 Exception to Shareholder Approval Rules

Responding to the urgent need of many companies to raise capital as a result of the COVID-19 pandemic, Nasdaq has temporarily exempted, through June 30, 2020, certain private placements from its shareholder approval rules.

Nasdaq Rule 5635(d) requires shareholder approval prior to an issuance, other than a public offering, of common stock (or securities convertible into or exercisable for common stock) which equals 20% or more of the common stock or voting power outstanding before the issuance, at less than the "Minimum Price," defined as the lower of (i) the official closing price immediately preceding the signing of the binding agreement or (ii) the average official closing price of the common stock for the five trading days immediately preceding the signing of the binding agreement. While there is an exception where the delay in securing stockholder approval would seriously jeopardize the financial viability of the company, Nasdaq recognized that it may not be available in the current environment. For example, a company may need additional cash to pay employees during a period of decreased or no revenue, but its viability may not be in jeopardy.

Nasdaq therefore adopted rule 5635T, to provide additional flexibility to raise capital without shareholder approval. To rely on the new exception, the company must execute a binding agreement governing the issuance, submit the required notices and obtain Nasdaq approval (if required) by June 30, 2020, and issue the securities within 30 calendar days of the date of the binding agreement. The exception is limited to circumstances 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; or (iv) seriously jeopardize the financial viability of the enterprise. The company must also demonstrate 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. The exception is not available for the shareholder approval requirements related to equity compensation (except to allow senior management to participate in the transaction in limited circumstances), changes of control and acquisitions of stock or assets of another company.

The temporary Nasdaq rule goes further than the New York Stock Exchange's recent waivers to its shareholder approval rules, by allowing private placements that exceed the 20% threshold even if they do not meet the Minimum Price requirement. The new rule should facilitate time-critical capital raising by Nasdaq-listed companies affected by the COVID-19 pandemic.

Victor Goldfeld