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Nasdaq Facilitates Quick Capital Raises In Light of Pandemic

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On May 4, 2020, The Nasdaq Stock Market LLC ("Nasdaq") adopted a temporary rule waiving until June 30, 2020 key shareholder approval requirements for certain private investments in public equity ("PIPE") and similar transactions by companies impacted by COVID-19. The temporary waiver operates by creating a new "COVID-19 exception" to the so-called "20% rule" that is significantly broader than the existing "financial viability exception." The temporary relief continues a trend of both major exchanges[1] providing incremental additional flexibility to companies that require an immediate cash infusion to weather the COVID-19 pandemic.

Nasdaq's 20% rule requires shareholder approval of PIPEs and other privately negotiated transactions that involve issuances of common stock (or securities convertible into or exercisable for common stock) equal to, following issuance, more than 20% of the outstanding shares of common stock or voting power existing before the issuance if the price is below a "minimum price" equal to the lower of (i) the most recent closing price at the time the purchase agreement is signed, or (ii) the average of the five most recent closing prices.

The financial viability exception can act to exempt companies in severe financial distress from the 20% rule, but may be too limiting to help many companies materially impacted by the COVID-19 pandemic. That existing financial viability exception allows a company to avoid prior shareholder approval if it can demonstrate to Nasdaq that delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise. This exception imposes a high standard, and requires providing a detailed written analysis to Nasdaq covering matters such as the company's current cash position and ability to meet current obligations, as well as whether or not the company would be rescued or forced to file for bankruptcy if it did not take advantage of the new relief.

By contrast, the new COVID-19 exemption is available to companies that are materially impacted by COVID-19 and the governmental responses to it, but that may not meet the financial viability test. For example, in Nasdaq's proposal to adopt the new rule, it indicated that a company that needs additional cash so that it can continue to pay employees during a period of decreased or no revenue could qualify for the COVID-19 exception even if the company's viability may not otherwise be in jeopardy.

For a transaction to qualify for the COVID-19 exception, the delay in securing shareholder approval must:

- have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan;
- result in workforce reductions;
- adversely impact the company's ability to undertake new initiatives in response to COVID-19; or
- seriously jeopardize the financial viability of the enterprise.

The company must also demonstrate to Nasdaq 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. As with the financial viability exception, the company's audit committee (or a comparable body comprised solely of independent, disinterested directors) must also approve the transaction and determine that it is in the best interest of shareholders.

Unlike the financial viability exception, reliance on the COVID-19 exception does not necessarily require prior approval by Nasdaq. Under the COVID-19 exception, prior approval by Nasdaq is not required to be obtained if:

- the maximum issuance of common stock (or securities convertible into common stock[2]) issuable in the transaction is less than 25% of the total shares outstanding and less than 25% of the voting power outstanding before the transaction; and
- the maximum discount to the minimum price at which shares could be issued is 15%.

Another advantage of the COVID-19 exception is that the prior public notice required for reliance on the exception is two business days as compared to 10 days for the financial viability exception.

However, unlike the financial viability exception, the COVID-19 exception does not also apply to Nasdaq's other shareholder approval rules in relation to acquisition of stock or assets of another company, change of control and equity compensation (except to the limited extent necessary to facilitate, subject to conditions, the participation in the transaction by officers, directors and other affiliates under circumstances that would otherwise require shareholder approval in a qualifying transaction). In structuring any transaction intended to qualify for the COVID-19 exception, close attention should be paid to these other rules, particularly the change of control rule which effectively requires prior approval of, among other potential issuances, any issuance that would result in an investor (or group) actually or potentially acquiring more than 20% of the outstanding shares of common stock or voting power *after* the issuance, particularly when the investor (or group) would then also have the largest ownership position.

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For a listed company facing urgent liquidity needs, from an imminent debt maturity to working capital necessary to continue operating, a PIPE or similar transaction, if structured appropriately, is a fast, precise and flexible tool to address those needs. This new rule should facilitate even more PIPEs and similar transactions that can create lifelines for companies impacted by the pandemic.

For more information, please see our recent articles here and here, providing an overview and answers to a few of the initial questions that may be on the minds of companies and investors considering PIPEs and other alternative equity offerings in these volatile markets.

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Proskauer's market leading Global Capital Markets Practice has experience acting for issuers, investment banks and investors in a wide variety of capital markets financing transactions, including PIPEs, both in the U.S. and in Europe. Please contact us if we can be of assistance.

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[1] The NYSE recently waived the rules related to certain differences that made Nasdaq more flexible in this area than the NYSE through June 30, 2020 on a temporary emergency basis in light of COVID-19 (for further details, please see our recent memo on the subject).

[2] Nasdaq’s prior approval is still required for a transaction involving issuance of warrants exercisable for shares of common stock.

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