

Securities Alert

SEC Approves Modifications to Nasdaq's Press Release Requirements

March 26, 2010

On March 15, 2010, the Securities and Exchange Commission (SEC) approved proposed changes to Nasdaq rules that modify the press release requirements for companies listed on Nasdaq. Under the prior rules, Nasdaq required listed companies to disclose certain information through a press release or the news media. The amendments modify these requirements by eliminating the need to file a press release in certain situations where the company is already required to disclose the information in a filing with the SEC. The amendments are effective immediately.

Form 8-K Disclosures. The amended rules allow companies to make the following disclosures by either filing a Form 8-K, where required by SEC rules, or issuing a press release. In situations where a Form 8-K is not required to be filed under SEC rules, Nasdaq still requires a company to make public disclosures through a press release.

- Receipt of a notice that the company does not meet a listing standard or that Nasdaq intends to delist the company, or receipt of a public reprimand letter.¹ A company that receives notice of a late filing of a periodic report with the SEC is still, however, required to issue a press release.
- Receipt of an exception to the shareholder approval requirements because compliance would jeopardize the company's financial viability.² A company that receives such an exception is still, however, required to also mail this notice to all shareholders at least 10 days before issuing securities in reliance on the exception.
- Any changes in the terms of a listed unit.³
- The amendments did not change the requirement that a company file a press release regarding the voluntary delisting of such company.⁴ And Nasdaq also continues to require a company that is relying on the inducement exception to the requirement to obtain shareholder approval for equity awards to disclose in a press release specific information about the equity award.⁵

Interim Financial Results of Foreign Private Issuers. The prior rules required foreign private issuers to disclose interim financial results in a press release and Form 6-K. The amended rules eliminate the requirement that foreign private issuers publish their interim financial results in a press release, but still require them to publish the results in a Form 6-K filed with the SEC.⁶

¹ See Nasdaq Marketplace Rules 5250(b)(3), 5810(b), 5840(k) and IM-5810-1.

² See Nasdaq Marketplace Rule 5635(f).

³ See Nasdaq Marketplace Rule 5225(a)(3).

⁴ See Nasdaq Marketplace Rule 5840(j). This press release requirement is required by Rule 12d2-2(c) of the Securities Exchange Act of 1934, as amended.

⁵ See Nasdaq Marketplace Rule 5635(c)(4) and IM-5635-1. Pursuant to this rule, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

⁶ See Nasdaq Marketplace Rule 5250(c)(2).



Audit Opinion – Going Concern. The amended rules also eliminate the requirement that a company issue a press release announcing its receipt of an audit opinion expressing doubt about its ability to continue as a going concern.⁷ Nasdaq has determined this press release is not necessary because the SEC already requires that this disclosure be included in a company’s annual report, which is filed with the SEC and distributed to shareholders. If a company fails to include the audit opinion in its annual report, however, Nasdaq will consider the filing deficient and move to delist the company.

Notification Procedures. The amended rules also streamline Nasdaq’s notification procedures by requiring companies to notify Nasdaq’s MarketWatch Department before issuing certain disclosures, rather than having them notify multiple Nasdaq departments as required under the prior rules.⁸ Nasdaq has confirmed that the MarketWatch Department will serve as a gatekeeper and notify other Nasdaq departments as necessary.

CONTACT INFORMATION

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⁷ See Nasdaq Marketplace Rule 5250(b)(2).

⁸ See Nasdaq Marketplace Rules 5810(b) and 5840(k).