

ALERTS

SEC Approves Changes to Nasdaq Stockholder Approval Requirement for Discounted Private Offerings

October 3, 2018

On Sept. 26, 2018, the SEC approved a proposal previously filed in January by The Nasdaq Stock Market LLC to amend Nasdaq Listing Rule 5635(d), the shareholder approval rules applicable to discounted private placements. Under the previous version of Nasdaq Listing Rule 5635(d), Nasdaq-listed companies were generally required to obtain shareholder approval prior to the issuance of securities in a nonpublic offering if (1) the number of shares of common stock issued or potentially issuable (including on conversion or exercise of warrants or convertible securities) was equal to 20 percent or more of the common stock outstanding or the voting power prior to the issuance, and (2) the issuance price was less than the greater of the book or market value of the common stock.

Market value for this purpose was previously defined as the last closing bid price of the common stock prior to issuance. The amended rule now applies to the same issuances but only if they are below the “Minimum Price” which is defined as “the lower of: (i) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement.”^[1] The amended rule no longer incorporates the use of book value as a measure of whether the offering will fall within the scope of the shareholder approval requirements.^[2] The amended rule is currently effective.

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If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] Nasdaq Listing Rule 5635(d)(1)(A).

[2] Shareholder approval is required “prior to a 20% Issuance at a price that is less than the Minimum Price.” Nasdaq Listing Rule 5635(d)(2). Under Nasdaq Listing Rule 5635(d)(1)(B), “‘20% Issuance’ means a transaction, other than a public offering as defined in IM-5635-3, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.”

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