

Press Release Requirements for NASDAQ Listed Companies Modified

The Securities and Exchange Commission (the “Commission”) recently approved changes to the NASDAQ rules regarding press releases.¹ Since the Commission’s adoption of Regulation FD, increasing acceptance of Regulation FD-compliant public disclosure methods have reduced, to some extent, duplicative Form 8-K filings. Accordingly, NASDAQ modified certain of its rules to permit disclosure either through a press release or by filing a Form 8-K where required by Commission rules. The rule modifications became effective on March 15, 2010.

I. Rule Changes

NASDAQ rules now permit the following to be disclosed by either filing a Form 8-K where required by the Commission or by issuing a press release:

- Receipt of a (i) notice that a company does not meet a listing standard, (ii) notification that the staff has determined to delist a company or (iii) Public Reprimand Letter.² It is important to note however that in the event a company is late in its filing of a required Form 8-K, the company is still required by NASDAQ rules to issue a press release.³ As a point of clarification, companies should notify the NASDAQ MarketWatch Department of disclosures via the electronic disclosure system at least ten minutes prior to the public notification.⁴
- Obtaining an exception to the shareholder approval requirements.⁵ However, companies that receive an exception are still required to mail notice to all shareholders at least ten days before issuing securities under the exception.
- Any change in the terms of a listed security.⁶

The rules were also modified as follows:

- Foreign private issuers are no longer required to issue a press release regarding interim financial results.⁷ However, NASDAQ is retaining the requirement that such issuer must disclose the information on a Form 6-K.

¹ See Commission Release No. 34-61716 (March 15, 2010) available at <http://www.sec.gov/rules/sro/nasdaq/2010/34-61713.pdf>.

² See NASDAQ Rules 5250(b)(2), 5810(b), 5840(k) and IM-5810-1.

³ See NASDAQ Rules 5250(b), 5810(b) and IM-5810-1.

⁴ See Commission Release No. 34-61008 (November 16, 2009) available at <http://www.sec.gov/rules/sro/nasdaq/2009/34-61008.pdf>. See also Cahill Firm Memorandum, NASDAQ Amends Rules to Require 10-Minute Prior Notification of Material Information (December 8, 2009) available at <http://www.cahill.com/news/memoranda/000195>.

⁵ See NASDAQ Rule 5635(f).

⁶ See NASDAQ Rule 5225(a)(3).

⁷ See NASDAQ Rule 5250(c)(2).

- Companies need not issue a press release that an audit opinion expresses doubt about the ability of the company to continue as a going concern.⁸ However, if a company fails to include the audit opinion in its annual filing as required, the filing will be deficient.
- In lieu of notifying various NASDAQ departments before issuing a disclosure, a company will now only be required to notify the MarketWatch Department.⁹

II. Commission Order

In approving the modified rules, the Commission noted that it believes the elimination of duplicative requirements alleviates the administrative difficulty of multiple disclosures while maintaining the requirement of dissemination of material information to the public in a broad, inclusive manner. The Commission noted in its order however that in certain situations, there are benefits to making duplicate disclosures and so a company is permitted to issue press releases in addition to filing Form 8-Ks. Conversely, there may be situations where a Form 8-K is not required and a company is still required by NASDAQ rules to disclose information by issuing a press release.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Julie C. Ledermann at 212.701.3033 or jledermann@cahill.com.

⁸ See NASDAQ Rule 5250(b)(2).

⁹ See NASDAQ Rules 5810(b) and 5840(k).