Nasdaq Proposes to Modify Shareholder Approval Rule

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Nasdaq is **proposing** to change the requirements in Listing Rule 5635(d) for shareholder approval when a company issues common stock (or securities convertible into or exercisable for common stock) in a non-public offering that equals or exceeds 20% or more of the common stock or voting power outstanding prior to the issuance. Under the **proposed rule amendment**, a 20% issuance priced below the lower of the closing price (as reported on Nasdaq.com) at the time of the transaction and the five-day trailing average of the closing price would require shareholder approval. This would replace the pricing test in the current rule, which requires shareholder approval for 20% issuances below the greater of book value or the closing bid price. The proposed rule amendment defines the lower of the closing price and the five-day trailing average as the "Minimum Price." The proposed rule amendment does not change the way in which the conversion price for convertible securities is calculated for purposes of the pricing test in Listing Rule 5635(d).

The proposal responds to market input received by Nasdaq after it solicited comments to modernize the rule and enhance capital formation while maintaining the intended investor safeguards. Nasdaq received feedback that book value was not an appropriate measure for shareholder approval because it is an accounting measure based on historic costs of assets, and it can be a trap for the unwary under the current rule when the market price of a security is below book value. Market participants also expressed concerns about using a closing bid price, which may not be transparent to the market, rather than an executed trade, as an indicator of market value.

Nasdaq explained that both the closing price and the five-day trailing average reasonably approximate the value of listed securities, and designating the lower of the two values as the Minimum Price would allow companies to use either measure to price transactions and would provide greater certainty and flexibility.

The rule amendment requires approval of the Securities and Exchange Commission. The SEC is soliciting comments through mid-March.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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