

April 20, 2020

COVID-19 Update: SEC and Nasdaq Response and Updated SEC C&DIs

The SEC as well as the national stock exchanges continue to monitor the impact of the COVID-19 outbreak and related mitigation efforts on reporting companies, investors and global capital markets. In recognition of the difficulties issuers may encounter in meeting certain of their disclosure and listing requirements as a result of the global market and economic disruptions caused by the spread of COVID-19, the SEC and the stock exchanges have published guidance or temporarily waived or suspended certain of their rules to assist companies in remaining compliant during these challenging times.

We summarize in this alert the following guidance and accommodations:

- Nasdaq has published an information memorandum (available [here](#)) that provides Nasdaq-listed companies with guidance on the application of certain Nasdaq rules (including those relating to periodic reporting obligations, annual meetings and proxy statements, and shareholder approval) in light of the continued market disruptions caused by the COVID-19 outbreak.
- The staff of the SEC's Division of Corporation Finance (the "Staff") has published a statement (available [here](#)) regarding filing requirements for Form 144 (submitted for the period from April 10 through June 30, 2020) in light of COVID-19 concerns.
- The SEC has updated its Compliance and Disclosure Interpretations ("C&DIs") with four new questions (available [here](#) and [here](#)) relating to the order that provided a temporary 45-day grace period for filings of SEC reports (the "SEC Order").

Nasdaq's COVID-19 Information Memorandum

Nasdaq has posted an information memorandum aimed at addressing some of the questions that Nasdaq-listed companies may have in relation to the impact of disruptions caused by COVID-19. The memorandum is updated as market conditions develop.

The key themes currently covered by the memorandum are the following:

- *Periodic reporting obligations.* Nasdaq-listed companies affected by COVID-19 that rely on the SEC Order to extend their filing dates for reports required under the Securities Exchange Act of 1934 will not be deemed deficient under Nasdaq Rule 5250(c) for failing to file the required reports by the existing deadlines and will not receive a deficiency letter from Nasdaq. Those listed companies that are

unable to file reports on time but do not rely on the SEC Order can submit a plan to Nasdaq Listing Qualifications describing how to regain compliance and may be granted up to six months to file.

- *Annual meetings and proxy statements.* Nasdaq-listed companies that comply with the conditions in the SEC Order exempting companies from requirements related to furnishing proxy and information statements¹ will satisfy Nasdaq Listing Rule 5250(d), which requires companies to make available their annual, quarterly and interim reports to shareholders, and Nasdaq Rule 5620(b), which requires that companies solicit proxies and provide proxy statements for all meetings of shareholders.

Affected companies should follow the SEC guidance from April 7, 2020 (available [here](#)) as to what to do when encountering delays in the printing and physical delivery of proxy materials as well as regarding the logistics of conducting annual meetings, including “virtual meetings.” Virtual meetings are allowed under Nasdaq rules provided they are permissible under relevant state law and shareholders have an opportunity to ask questions of management.

- *Shareholder approval rules.* Nasdaq requires listed companies to obtain shareholder approval prior to issuing securities in connection with certain acquisitions of the stock or assets of another company; equity-based compensation of officers, directors, employees or consultants; a change of control; and certain private placements at a price less than the specified minimum price. Nasdaq has not proposed a temporary waiver of its shareholder approval rules for any of these types of transactions, but instead has reminded companies of the exception available for companies in financial distress, where the delay in securing shareholder approval would seriously jeopardize the financial viability of the company (the so-called “financial viability exception”). While the standards for meeting the requirements under this exception are generally high, Nasdaq will consider the impact of disruptions caused by COVID-19 in its review of any pending or new requests for the exception.
- *Other Nasdaq listing rules.* While Nasdaq has chosen not to suspend any of its listing rules at this time, it is closely monitoring global markets and their effects on Nasdaq-listed companies. Nasdaq-listed companies that are having difficulties meeting specific listing requirements may be granted additional time to comply. For example, companies that have recently become deficient with respect to the bid price, market value of listed securities or market value of public float requirements generally have 180 days to regain compliance and may be eligible for additional time. Companies that no longer comply with the applicable equity requirement can submit a plan to Nasdaq Listing Qualifications describing how they plan to regain compliance and may be granted up to six months to comply.

¹ Under the SEC Order, the requirement to file or furnish proxy statements, annual reports and other solicitation materials to shareholders with a mailing address is waived where common carrier service has been suspended due to COVID-19, provided the company has made a good faith effort to deliver the materials.

SEC Staff Statement on Filing Requirements for Form 144

Cognizant of logistical difficulties that filers may encounter when submitting Form 144 in paper due to ongoing health and safety concerns associated with COVID-19, the Staff advises that it will not recommend enforcement action against filers that submit a Form 144 via email instead of mailing or delivering the paper form to the SEC, provided a complete Form 144 is included as a PDF attachment in an email sent to PaperForms144@SEC.gov.

The Staff also will not recommend enforcement action if a typed signature instead of a manual signature is provided on the Form 144 submitted via email, as long as: (i) the signatory retains a manually signed signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in typed form within the electronic submission and provides such document, as promptly as practicable, upon request by the Staff; (ii) such document indicates the date and time when the signature was executed and (iii) the filer (with the exception of natural persons) establishes and maintains policies and procedures governing this process. Filers can continue to submit Form 144 in paper; however, the processing of paper copies of Form 144 may be delayed. The relief applies to any Form 144 submitted for the period from April 10 to June 30, 2020.

The Staff reminds signatories of the penalties for false and misleading statements. Form 144 has its own representation by the signatory that it “does not know of any material adverse information in regard to the current and prospective operations of the Issuer of the securities to be sold which has not been publicly disclosed. If such person has adopted a written trading plan or given trading instructions to satisfy Rule 10b5-1 under the Exchange Act, by signing the form and indicating the date that the plan was adopted or the instruction given, that person makes such representation as of the plan adoption or instruction date.”

C&DIs Relating to the SEC Order

The SEC has issued the following C&DIs to address interpretive questions relating to the SEC Order.

- **Question 135.12** clarifies that where a reporting company concludes that due to COVID-19 it will not be able to timely file a report covered by Rule 12b-25 (historically available to extend filing deadlines by 15 days for annual reports and five days for quarterly reports) and it is uncertain whether the required report could be filed within the applicable Rule 12b-25(b)(2)(ii) period, the reporting company should rely on the SEC Order to obtain an extension for the filing of the report. To do so, it would be required to comply with all conditions of the SEC Order. If it only files a Form 12b-25 by the original due date of the required report, the 45-day relief provided in the SEC Order will not be available.
- **Question 135.13** provides that where a reporting company has initially filed a Form 12b-25, it will only be able to subsequently rely on the SEC Order to further extend the filing deadline for the report if it has also furnished a Form 8-K or Form 6-K by the later of March 16, 2020 and the original due date

of the report. This is because a Form 12b-25 filing does not extend the original due date of a report. On the other hand, a reporting company that applies for extension under the SEC Order will be considered to have a due date 45 days after the original filing deadline for the report and will be permitted to subsequently rely on Rule 12b-25 if it is unable to file the report on or before the extended due date.

- **Question 104.18** clarifies that a reporting company that is unable to file the information required under Part III of Form 10-K by the 120-day deadline may avail itself of the relief provided by the SEC Order as long as the 120-day deadline falls within the relief period specified in the SEC Order and all conditions of the SEC Order are met.

A registrant that timely files its Form 10-K without relying on the SEC Order should furnish a Form 8-K with the disclosures required in the SEC Order by the 120-day deadline. The registrant would then need to provide the Part III information within 45 days of the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

A registrant may rely on the SEC Order with respect to both the Form 10-K and the Part III information by furnishing a single Form 8-K by the original deadline for the Form 10-K that provides the disclosures required by the SEC Order, indicates that the registrant will incorporate the Part III information by reference and provides the estimated date by which the Part III information will be filed. The Part III information must then be filed no later than 45 days following the 120-day deadline.

A registrant that properly relies on the SEC Order with respect to its Form 10-K by furnishing a Form 8-K but was silent on its ability to timely file the Part III information may include the Part III information in its Form 10-K filed within 45 days of the original Form 10-K deadline, or furnish a second Form 8-K with the disclosures required in the SEC Order by the original 120-day deadline and then file the Part III information no later than 45 days following the 120-day deadline by including it in a Form 10-K/A or definitive proxy or information statement.

- **Question 112.02** clarifies that while an MJDS filer normally is required to file its Form 40-F on the same day the information included in the Form 40-F is due to be filed with the applicable securities commission or equivalent regulatory authority in Canada, if the MJDS filer applies for an extension of the filing deadline in Canada under applicable Canadian COVID-19-related relief, it will not need to comply with the conditions of the SEC Order on the original due date of the Form 40-F. The MJDS filer should, however, consider promptly disclosing its reliance on the Canadian COVID-19-related relief.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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