

Client Alert

Corporate Department

November 2009

NASDAQ Amends Rules Regarding Advance Notice of Material Information

On November 16, 2009, the Securities and Exchange Commission (the “SEC”) approved amendments to NASDAQ Rule 5250 and IM-5250-1 that will **require** (1) NASDAQ-listed issuers to notify NASDAQ’s MarketWatch Department at least 10 minutes prior to the initial public release of material information that involves any of the events listed in IM-5250-1 and (2) that such advance notice to the MarketWatch Department be made through the electronic disclosure submission system available at www.nasdaq.net, except in emergency situations. Previously, the NASDAQ rule did not mandate a time frame for the required prior notification, but **recommended** that it be provided 10 minutes before release through its electronic submission system. This rule change is effective immediately and will become operative on December 7, 2009.

Disclosure of the events set forth in IM-5250-1 that require advance notice, involves, in essence, material information that would reasonably be expected to affect the value of the securities or influence investors’ decisions. The events set forth in IM-5250-1 remain unchanged by these amendments and are:

- (a) Financial-related disclosures, including quarterly or yearly earnings, earnings restatements, preannouncements or “guidance”;
- (b) Corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies or receiverships;
- (c) New products or discoveries, or developments regarding customers or suppliers (e.g., significant developments in clinical or customer trials, and receipt or cancellation of a material contract or order);
- (d) Senior management changes of a material nature or a change in control;
- (e) Resignation or termination of independent auditors, or withdrawal of a previously issued audit report;
- (f) Events regarding the Company’s securities — e.g., defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, or public or private sales of additional securities;
- (g) Significant legal or regulatory developments; and
- (h) Any event requiring the filing of a Form 8-K.

Under unusual circumstances companies may not be required to make public disclosure of material events, for example where it is possible to maintain confidentiality of those events and immediate public disclosure would prejudice the ability of the company to pursue its legitimate corporate objectives. However, NASDAQ-listed companies remain obligated to disclose this information to NASDAQ upon request pursuant to Rule 5250(a).

As stated above, disclosure through NASDAQ's electronic disclosure submission system will be **required**, except in emergency situations. Examples of emergency situations include lack of computer or Internet access, technical problems on either the company or NASDAQ system or an incompatibility between those systems, and a material development where no draft disclosure document exists, but immediate notification to MarketWatch is important based on the nature of the material event.

These amendments do not change NASDAQ's stated position that companies that repeatedly fail to provide timely notice or repeatedly fail to use the electronic disclosure submission system when NASDAQ finds no emergency situation existed may be subject to reprimand or even delisting.

The rule change also modifies language in IM-5250-1 that, as written prior to this change, may be inconsistent with an interpretive release published by the SEC in August 2008 that provided guidance on the use of company websites to satisfy public disclosure requirements under Regulation FD. The SEC's guidance provides that posting of information on a company website could be considered a sufficient method of public disclosure under Regulation FD. The language currently contained in NASDAQ's IM-5250-1 indicates that a website posting alone does not by itself satisfy the public disclosure requirements of Regulation FD. Accordingly, NASDAQ has modified this language to instead provide that a website posting alone **may not** (as opposed to **does not**) by itself satisfy those requirements.

Please feel free to contact either of the partners listed below or any corporate partner with whom you work if you would like to discuss the amendments to the NASDAQ rules and their potential ramifications.

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