



# Listing of Additional Shares Notification Form

COVID-19 Supplemental Instructions



04 May 2020

## 1 General Instructions

A Company may issue securities without shareholder approval upon reliance on the COVID-19 exception set forth in Rule 5636T. A Company must submit an application to Nasdaq's Listing Qualifications Department demonstrating that the transaction satisfies the requirements in Rule 5636T and must provide the [Notification Form: Listing of Additional Shares](#) ("LAS Form") required by Rules 5250(e)(2) and 5636T(b)(5)(A) as promptly as possible, but no later than the time of the public announcement required by Rule 5636T(d) and in no event later than June 30, 2020.<sup>1</sup>

Please carefully read and follow these Supplemental Instructions when preparing and filing the Company's LAS Form. Any failure to provide the information required by these instructions will delay Staff's review of the Company's LAS Form. Companies are reminded that issuances must comply with all other requirements of the Nasdaq Listing Rules, including Rule 5640 (the Voting Rights Rule), except as exempted under Rule 5636T.

## 2 Supporting Documentation

In the supporting documentation section of the LAS Form, the Company should attach a letter addressing all of the following factors:

1. **The need for the transaction is due to circumstances related to COVID-19.** Please provide specific details of the facts and circumstances related to COVID-19 that led to the company's predicament, including, as applicable, the impact of COVID-19 on the Company's operations, workforce, new initiatives or financial viability.
2. **The delay in securing shareholder approval would: (A) have a material adverse impact on the Company's ability to maintain operations under its pre-COVID-19 business plan; (B) result in workforce reductions; (C) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (D) seriously jeopardize the financial viability of the enterprise.** Please provide specific details on how a delay resulting from seeking shareholder approval would impact the Company in one of the foregoing ways. If the delay would jeopardize the financial viability of the Company, the submission should address at least the following issues:
  - a. How long will the Company be able to meet its current obligations, such as payroll, lease payments, and debt service, if it does not complete the proposed transaction?
  - b. What is the Company's cash position and burn rate, both current and projected?
  - c. Would the Company be required to file for bankruptcy protection due to the time that it would take to get shareholder approval?
  - d. What would be the impact on the Company's operations due to the time that it would take to get shareholder approval?
3. **The Company undertook a process designed to ensure that the proposed transaction represents the best terms available to the Company.** Please provide an overview of all meetings, consultations and inquiries conducted by the Company and its outside advisors when structuring the proposed transaction, and any other factors the Company considered when reaching its decision that the proposed transaction represents the best terms available to the Company.

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<sup>1</sup> Rule 5636T is operative until, and including, June 30, 2020. To rely on the rule, the Company must execute a binding agreement governing the issuance of the securities, submit the notices required by Rule 5636T(b)(5)(A) and (e), and obtain the approval under Rule 5636T(b)(5)(B)(ii) (if applicable) no later than June 30, 2020. The issuance of the securities governed by such agreement may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement.

4. The Company's audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has: (A) expressly approved reliance on this exception; and (B) determined that the transaction is in the best interest of shareholders. Please attach resolutions approving the transaction that satisfy the foregoing criteria.

### 3 Terms of the Transaction

After submitting the information described above, a Company **does not** need to obtain approval from Nasdaq prior to issuing shares in the transaction if the maximum issuance of common stock (or securities convertible into common stock) is less than 25% of the total shares outstanding **and** less than 25% of the voting power outstanding before the transaction **and** the maximum discount to the Minimum Price at which shares could be issued is 15% ("Fast Track Notification").

Please note that transactions that include securities exercisable for common stock (i.e. warrants) are not eligible for a Fast Track Notification. For all transactions that are not eligible for a Fast Track Notification due to the maximum issuance equaling or exceeding 25%, or the maximum discount equaling or exceeding 15%, the Nasdaq Listing Qualifications Department must approve the Company's reliance on the exception in Rule 5636T(b) before the Company can issue any securities in the transaction ("Nasdaq Approval").

**Please note that if a transaction requires Nasdaq Approval, the Company may not issue any securities until it receives the approval from the Nasdaq Listing Qualifications Department, which may take more than two days.**

To describe the terms of the transaction, please complete the following questions on the LAS Form:

#### Question 1: Please describe the terms of the transaction in detail, including the following:

1. Which provisions of the COVID-19 exception the Company is seeking to rely upon including whether the transaction satisfied the requirements of Rule 5636T(b)(i) (Fast Track Notification) and whether there is affiliate participation as described in Rule 5636T(c);
2. Whether the securities issued are common stock or convertible into (or exercisable for) common stock;
3. The maximum discount to the Minimum Price at which shares could be issued;
4. Whether a security convertible into (or exercisable for) shares of common stock contains anti-dilution adjustments, price protection, reset or another similar provision, other than equitable adjustment provisions;
5. Whether a security convertible into shares of common stock contains voting rights to elect directors and if so, whether it complies with Nasdaq's Voting Rights Rule (see FAQ [290](#)); and
6. Whether the transaction documents contain any contractual limitations on the maximum number of shares issuable, voting power or beneficial ownership.

#### Question 3: List all filings made or expected to be made with the SEC related to the transaction, including the form type and the date filed on EDGAR.

Any Company that relies on the exception in Rule 5636T must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing: (1) the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received); (2) that shareholder approval would ordinarily be required under Nasdaq rules but for the fact that the Company is relying on the temporary exception to the shareholder approval rules provided by Rule 5636T; and (3) that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

For Fast Track Notification, please provide a link to the public announcement satisfying the above requirements.

For Nasdaq Approval, please provide a draft of the public announcement satisfying the above requirements. You can submit this additional documentation to your form at any time during the LAS review process.

**Question 4: Please include the maximum number of shares to be offered by the Company (including shares underlying convertible securities and/or warrants).** If not yet known, please provide an estimate.

**Questions 5-9:** Please respond yes or no to each question.

If the response to **Question 7 or 8** is yes, please explain whether the transaction satisfies the requirements of Rule 5636T(c), which requires that (1) any affiliate's participation must be less than 5% of the transaction; (2) all affiliates' participation collectively must be less than 10% of the transaction; (3) any affiliate's participation must have been specifically required by unaffiliated investors; and (4) the affiliates must not have participated in negotiating the economic terms of the transaction.

If the response to **Question 9** is yes (including if any party will receive board observer rights), please describe the board nomination or designation rights, including the duration of time these rights will be in place and the "step-down" threshold at which such nomination or designation rights will no longer continue (see FAQ [292](#)).

Please also complete **Questions 10-13** and, under the heading "Private Placement/Public Offerings," provide the date and time (or expected date) of the definitive agreement, the sale price per share or conversion price of the securities to be issued, and the use of proceeds.

## 4 Certification

In the supporting documentation section of the LAS Form, please attach a certification to Nasdaq from a duly authorized officer of the Company that the Company complies with all requirements of Rule 5636T(b) and 5636T(c), if applicable.