



# Nasdaq

## 2017 Transparency Report

Nasdaq Listing Rule 5101 provides that Nasdaq may impose “additional and more stringent criteria” in order to protect investors and the public interest even in cases where a company otherwise complies with applicable quantitative requirements. To provide transparency to when we apply this rule, Nasdaq publishes a report each year describing instances where Nasdaq Staff and Hearings Panels relied upon that authority as the basis for a delisting decision. In addition, this report describes instances where Nasdaq shortened time frames within which a company could submit a compliance plan. Finally, the report also describes certain instances where companies made significant changes to transactions based on comments received during Nasdaq Staff’s review of Listing of Additional Shares notification forms. Nasdaq believes that these summaries will help companies understand the application of these rules and remain compliant with the listing requirements. These reports will be available in the Nasdaq Reference Library.

This January 2019 report describes events in 2017. Nasdaq delays publication of this report to allow for applicable appeal and call for review procedures under the Listing Rules to expire and for any transactions involved to be finalized and publicly disclosed.

### **Exercise of Discretionary Authority under Listing Rule 5101**

#### **1. Delist Determinations**

In 2017, there was one instance where Listing Qualifications relied upon its discretionary authority provided in Listing Rule 5101 as a basis for delisting. In that matter, Listing Qualifications cited concerns about the accuracy of representations made to Nasdaq by the company related to its compliance with the minimum shareholder requirements for both initial and continued listing compliance as raising public interest concerns that warranted issuing a Delist Determination.

Following receipt of the Delist Determination, the company submitted additional evidence in support of its prior representations. Based on this additional information, Listing Qualifications subsequently withdrew the Delist Determination and the company remained listed.

## **2. Shortening the Time Period for Companies to Submit Compliance Plans**

The Listing Rules prescribe the timelines within which companies may submit plans to regain compliance. For example, a plan to regain compliance with the minimum stockholders' equity requirement is due within 45 calendar days from notification and a plan to regain compliance with the periodic filing requirement is due within 60 calendar days. In certain circumstances, Listing Qualifications will exercise discretionary authority to shorten these timelines when there are exigent circumstances, such as a company presenting a significant degree of non-compliance, evidence that a company is unlikely to regain compliance within the time period Listing Qualifications is permitted to grant, or multiple concurrent rule violations.

During 2017, Listing Qualifications shortened the timelines for submission of plans to regain compliance on three occasions under these circumstances:

- when a company's independent auditor and a number of its directors resigned, resulting in the company's failure to file its periodic report and failure to comply with Nasdaq's majority independent board and independent committee composition requirements;
- when all independent directors of a company resigned at the same time, causing that company to fail to meet the majority independent board and independent committee composition requirements; and
- when all but one independent director resigned following a company announcement that it was liquidating, causing that company to fail to meet the majority independent board and independent committee composition requirements.

## **3. Summary of Modifications to Company Share Issuances Following Review by Listing Qualifications Review of Listing of Additional Shares Notification Forms**

In 2017, following Nasdaq Listing Qualifications' review of Listing of Additional Shares ("LAS") notification forms, companies significantly modified 42 transactions. In addition Listing Qualifications identified two shareholder approval violations. In one case, the company amended the transaction so that it complied with applicable shareholder approval rules. In the other case, based on unique facts and circumstances of that case, Nasdaq accepted shareholders' subsequent ratification of the violative transaction as a remedy.

Of the 42 modified transactions, three transactions included issuances of "Future Priced" securities where the number of shares that could potentially be issued by the company would increase as the share price of the listed common stock decreased. Listing Qualifications requested that these transactions be modified to include a minimum conversion or exercise price ("floor price") in the

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adjustment provision to protect investors by mitigating the dilution caused by the potential for an excessively large issuance of shares. These transactions otherwise complied with the shareholder approval rules, but Nasdaq believed the potential for substantial future dilution, and related potential non-compliance with the price-based listing requirements, warranted the application of additional and more stringent criteria.

In another 39 transactions, following dialog with Listing Qualifications, companies revised the proposed terms prior to issuing securities to comply with the shareholder approval rules. Of these:

- 19 transactions were amended to either eliminate potential discounts to market price or change or add a share cap to limit the maximum number of shares that could be issued to an amount below the 20% threshold that would require shareholder approval;
- one reduced the number of shares issuable to comply with the 20% threshold for shares issued in an acquisition;
- three were revised to comply with the equity compensation requirements, including increasing to market price the amount paid by an officer or director in a transaction so that there was not a discount and, thus, no equity compensation;
- five were modified or withdrawn after Listing Qualifications advised the companies that the transaction at issue would be aggregated with previously completed transactions and require shareholder approval;
- two amended equity compensation plans to be exempt from shareholder approval requirements because they were a convenient way to purchase shares from the Company at market value;
- two were modified because these transactions provided for an alternative outcome based upon whether shareholder approval is obtained, including, but not limited to a "penalty" or a "sweetener"; and
- one transaction would otherwise have resulted in a change of control of the Company and, thus, required shareholder approval.

In addition, another two transactions reviewed by Staff were amended to comply with Nasdaq's voting rights rule, including to eliminate provisions that would allow preferred stock to vote at a heavier rate than the existing class of common stock.<sup>1</sup>

Finally, in another four cases, companies revised board designation rights to assure they were proportional to share ownership of the investors holding such rights.

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<sup>1</sup> This most frequently arises when the preferred stock converts at a discount to the market price and votes accordingly. These potential violations were addressed by limiting the voting power, such that the preferred shares would vote as if converted at market value on the date of issuance.

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