



NASDAQ Requires Ten Minutes Notice of Release of Material Information; Makes its Rule on Website Disclosure Consistent with SEC Rules

Starting December 7, 2009, The NASDAQ Stock Market LLC (“Nasdaq”) requires ten minutes prior notification of the release of material information by Nasdaq-listed companies. Nasdaq has also modified its rule on use of company websites to comply with disclosure obligations.

On November 5, 2009, Nasdaq filed with the Securities and Exchange Commission proposed changes to Rule 5250 and related IM-5250-1, which govern disclosure of material information by Nasdaq companies. These changes were effective immediately and operative on December 7, 2009.

Prior to the Rule change, Nasdaq only recommended ten minutes prior notification. Now, consistent with New York Stock Exchange requirements, Nasdaq mandates ten minutes prior notification using Nasdaq’s electronic disclosure submission system of any material information that would reasonably be expected to affect the value of the companies’ securities or influence investors’ decisions. The requirement of prior notification is to allow Nasdaq to determine whether a trading halt is appropriate. IM 5250-1 sets forth a non-exclusive list of material information:

- Financial disclosures, including quarterly or yearly earnings, earnings restatements, pre-announcements or “guidance.”
- Corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies or receiverships.
- 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).
- Senior management changes of a material nature or a change in control.
- Resignation or termination of independent auditors, or withdrawal of a previously issued audit report.
- 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.
- Significant legal or regulatory developments.
- Any event requiring the filing of a Form 8-K.

Repeated failure to comply with the notice requirement could result in reprimands or even delisting for a company.

Rule 5250 also requires a company to make material information public in any “Regulation FD compliant” manner. In light of the SEC’s recent Release¹ on the use of company websites to satisfy Regulation FD compliance obligations, Nasdaq has also amended Rule 5250 to indicate that use of a company’s website “may not by itself be considered” sufficient for Regulation FD purposes (previous language was “is not by itself considered”). Rule 5250 already requires a company to discuss with Nasdaq any release of material information other than by means of a press release or Form 8-K filing.

These rule changes are unlikely to require significant changes in a company’s disclosure process but a timing obligation should be added to the company’s standard disclosure checklist.

Contacts

Nilene R. Evans
(212) 468-8088
nevans@mof.com

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

¹ See Securities Exchange Act Release No. 58288 (August 1, 2008), 73 FR 45862 (August 7, 2008) (Commission Guidance on the Use of Company Web Sites).