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## A Legal Update From Dechert's Corporate Finance and Capital Markets Practice

### Revised NASDAQ Rules Relating to Public Disclosure by Listed Issuers Following Receipt of Notification of Non-compliance with NASDAQ Listing Standards Becomes Effective

The U.S. Securities and Exchange Commission (“SEC” or the “Commission”) has approved a NASDAQ proposed rule change that revises disclosure requirements following a listed issuer’s receipt of notification from NASDAQ that the issuer is not in compliance with a NASDAQ continuing listing standard. The revisions to various sections within the NASDAQ Rule 5800 Series modify disclosure requirements as follows:

- Not more than four business days following the receipt of a deficiency notification, issuers must make a public announcement either by filing a form 8-K (where otherwise required by SEC rules<sup>1</sup>) or by issuing a press release. Under the new rule, the public announcement must disclose the specific basis and concern cited in the NASDAQ determination. Previously, rules required only that issuers disclose the receipt of the NASDAQ notification and the title of the rule on which it was based;
- If the issuer does not make the public announcement or does not include in the announcement all of the requisite information, NASDAQ may halt trading of the issuer’s securities or issue its own public announcement regarding the deficiency notification. Further, the modified rule allows NASDAQ to make public announcements regarding an action involving an issuer’s listing or trading; and
- An issuer may include in its public announcement its own analysis of the issues and concerns raised in the NASDAQ determination. However, should the issuer’s announcement include inaccurate, misleading or fraudulent information, NASDAQ may use its own public announcement authority to issue a clarifying statement.

By implementing this rule change, NASDAQ and the SEC hope to improve the quality of disclosure following issuers’ receipt of notification of a deficiency in meeting NASDAQ continued listing standards. In its order approving the proposed rule, the Commission notes the intent behind the original disclosure requirement: “to ensure adequate disclosure to the public and investors on the deficiency.”<sup>2</sup> The Commission believes that “[t]he proposal will help to ensure that this purpose cannot be avoided by minimal disclosure.”<sup>3</sup> By requiring issuers to provide a more fulsome explanation of the circumstances and concerns surrounding the deficiency, and not merely a description of the rule on which the deficiency is based, NASDAQ and the Commission believe the rule change will ensure that investors receive adequate information regarding an issuer’s NASDAQ deficiency, helping to better inform trading decisions.

Further, by vesting in NASDAQ independent public announcement authority, the modified rule allows NASDAQ to provide updated information to investors regarding ongoing actions and appeals stemming from an issuer’s initial notice of deficiency.

The SEC issued an order approving this proposed rule change on December 3, 2012, and the NASDAQ Stock Market Rules have been updated pursuant thereto. Listed issuers should modify the contents of disclosures following the receipt of NASDAQ deficiency notifications effective immediately.

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## Footnotes

1 See generally, [U.S. Securities and Exchange Commission, Form 8-K](#) (Aug. 10, 2012) (SEC Form 8-K summary listing triggering events that require an issuer to file a Form 8-K). 3 *Id.*

2 Securities Exchange Act Release No. 34-68343 (December 3, 2012), 77 FR 73104, at p. 6.

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