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## Nasdaq Modifies Public Announcement Requirements for Listed Companies

### Overview

On March 15, 2010, The Nasdaq Stock Market's proposed changes to its rules requiring a listed company to disclose certain information in a press release or through the news media were approved by the Securities and Exchange Commission.<sup>1</sup> The amendments, effective immediately, will allow listed companies to make the required disclosure either through a press release or by filing a Form 8-K where required by the SEC rules.

### Rule Amendments

The Nasdaq public disclosure requirements mandate that listed companies disclose certain material information in a press release or through the news media. The SEC's adoption of Regulation FD in 2002, which requires issuers to file a Form 8-K or use a similar method in making a public disclosure, has led to broad acceptance of Regulation FD compliant means of disclosure, such as use of Form 8-K, and the expansion of the Form 8-K disclosure requirements has resulted in a significant overlap with the Nasdaq rules in certain areas. In light of the overlap, Nasdaq proposed modifying its rules to allow companies to choose between issuing a press release and filing a Form 8-K, where required, in making a disclosure. Under the amended Nasdaq rules, the following disclosures requiring public announcement may be made either by filing a Form 8-K, where required by the SEC rules, or by issuing a press release:

- **Rules 5250(b)(3), 5810(b), 5840(k) and IM-5810-1:** these rules require a company to make a public announcement, within a specified time frame, disclosing the receipt of a notice from Nasdaq staff or the Hearings Panel, the Nasdaq Listing and Hearing Review Council, or the Nasdaq Board, or a member thereof, that it does not meet a listing standard, that staff has determined to delist the company or that the company has received a public reprimand letter. However, companies who are in non-compliance because they are late with their SEC periodic reporting filings will be required to issue a press release and may not use the Form 8-K alternative. Notification of the disclosures should be made to the Nasdaq MarketWatch Department through Nasdaq's electronic disclosure submission system at least ten minutes prior to the notification to the public;
- **Rule 5635(f):** this rule requires a company to make a public announcement when it receives an exception to the shareholder approval requirements because compliance would jeopardize its

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<sup>1</sup> SEC Release No. 34-61713; File No. SR-NASDAQ-2010-006. A copy of the release is available on the SEC's website at [www.sec.gov/rules/sro/nasdaq/2010/34-61713.pdf](http://www.sec.gov/rules/sro/nasdaq/2010/34-61713.pdf).

financial viability. However, those companies will still be required to mail this notice to all shareholders at least ten days before issuing securities in reliance on the exception; and

- **Rule 5225(a)(3)**: this rule requires a company to publicize through a public announcement through the news media any change in the terms of a listed unit composed of more than one security.

In addition, the following rules relating to public disclosure were also amended:

- **Rule 5250(c)(2)**: this rule previously required a foreign private issuer to disclose interim financial results in a press release and a Form 6-K. The press release requirement has now been eliminated, and the Form 6-K will be the sole requirement, although issuers are still free to make a press release if they choose;
- **Rule 5250(b)(2)**: the amendments eliminate the requirement that a company issue a press release upon receipt of an audit opinion expressing doubt about the ability of the company to continue as a going concern. However, if a company fails to include the audit opinion in its annual filing, as required by the SEC, Nasdaq would consider the filing deficient and would move to delist the company; and
- **Rules 5810(b) and 5840(k)**: these rules previously required companies to notify multiple Nasdaq departments before making certain disclosures. Under the amended rules, companies will be required to notify only the MarketWatch Department using the electronic disclosure submission system accessible at [www.nasdaq.net](http://www.nasdaq.net).

It must be noted that, in cases where a Form 8-K is not required to be filed under the SEC rules, Nasdaq rules still require an issuer to make public disclosures through a press release.

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