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BLOG

SEC Approves Amendments to Nasdaq Phase-in and Cure Periods

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THE NEW RULES

On August 26, 2024, the Securities and Exchange Commission (SEC) issued an order approving amendments to Nasdaq rules related to phase-in periods (the Phase-In Amendments) and cure periods (the Cure Period Amendments, and, together with the Phase-In Amendments, the Amendments). The Amendments are consistent with the NYSE’s previously approved amendments to its corporate governance requirements and were described as “reasonable” by the SEC. The Amendments modify some phase-in periods as described below but are largely intended to clarify, codify, and restate existing requirements.

PHASE-IN PERIOD MODIFICATIONS

The Phase-In Amendments modify and clarify phase-in periods related to independent director and committee requirements for companies newly listing on Nasdaq or those companies becoming subject to certain corporate governance listing requirements due to a change in status.

Notably, the Phase-In Amendments do not grant an exemption or phase-in period to companies with respect to Nasdaq Rule 5605(c) or Rule 10A-3 under the Exchange Act. Nasdaq Rule 5605(c) requires every listed company’s audit committee to have at least one member who has past accounting, finance or other comparable experience. Rule 10A-3 under the Exchange Act requires at least one member of the listed company’s audit committee to be independent as of the date that company‘s securities first trade on Nasdaq (the “Listing Date”). Further, the Amendments clarify that the phase-in period currently contained in Rule 5615(b)(3) (which refers to companies transferring from a national securities exchange or other market) applies only to companies that transfer securities registered pursuant to Section 12(b) of the Act from another national securities exchange to Nasdaq.

The modified Nasdaq phase-in periods are set forth below in tabular format.

RULE	IPOS	CARVE-OUTS AND SPIN-OFFS	LISTING SECURITIES PREVIOUSLY REGISTERED

			UNDER SECTION 12(G)
	Phase-in Period		
Majority independent board requirement set forth in Rule 5605(b)	12 months from the Listing Date. The Amendments modify the old rule to clarify the definition of Listing Date.	12 months from the Listing Date. The Amendments adopt new rules similar to those applicable to IPOs codifying Nasdaq's current policies regarding carve-outs and spin-offs.	12 months from the Listing Date. The Amendments adopt new subsection (B) to Rule 5615(b)(3) to address the phase-in structure for companies previously registered pursuant to Exchange Act Section 12(g).
Audit committee requirements set forth in Rule 5605(c)	One member must satisfy the requirements by the Listing Date; a majority of members within 90 days of the effective date of the registration statement; and all members within one year of the effective date of the registration statement. The Amendments modify the old rule to restate the phase-in periods from Exchange Act Rule 10A-3(b)(1)(iv)(A).	One member must satisfy the requirements by the Listing Date; a majority of members within 90 days of the effective date of the registration statement; and all members within one year of the effective date of the registration statement.	All members must satisfy the requirements by the Listing Date, unless an exemption is available under Rule 10A-3 under the Exchange Act.
Audit Committee Size Requirement set forth in Rule 5605(c)(2)(A)	At least one member by the Listing Date, two members within 90 days of the Listing Date and three members within one year of the Listing Date.	At least one member by the Listing Date, two members within 90 days of the Listing Date and three members within one year of the Listing Date.	At least one member by the Listing Date, two members within 90 days of the Listing Date and three members within one year of the Listing Date.

	The Amendments modify the old rule, which required three members at the time of listing, to provide for a phase-in period.		
Independent compensation and nominations committee composition requirements set forth in Rules 5605(d)(2) and (e)(1)(B)	At least one independent member no later than the earlier of the date the IPO closes or five business days from the Listing Date, a majority within 90 days of the Listing Date, and a fully independent committee within one year of the Listing Date. The Amendments modify the old rule to accommodate the common practice of holding a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date the IPO closes.	At least one independent member by the date the transaction closes, a majority within 90 days of the Listing Date, and a fully independent committee within one year of the Listing Date.	At least one independent member by the Listing Date, a majority within 90 days of the Listing Date and a fully independent committee within one year of the Listing Date.
Compensation Committee Size Requirement set forth in Rule 5605(d)(2)(A)	At least one member by the Listing Date and two members within one year of the Listing Date. The Amendments created a new rule that codifies Nasdaq's current policy	At least one member by the date the transaction closes and at least two members within one year of the Listing Date.	At least one member by the Listing Date and two members within one year of the Listing Date.

regarding the phasing in of Compensation Committee size requirements.

COMPANIES EMERGING FROM BANKRUPTCY

Amended Rule 5615(b)(2) specifically requires a company emerging from bankruptcy to comply with the audit committee requirements set forth in Rule 5605(c)(2) by the Listing Date unless an exemption is available pursuant to Rule 10A-3 under the Exchange Act.

COMPANIES CEASING TO QUALIFY AS A FOREIGN PRIVATE ISSUER

Under the Amendments, companies that cease to qualify as a foreign private issuer have a six-month phase-in period to comply with domestic company requirements, except that, upon no longer qualifying as a foreign private issuer, the company must have an audit committee that satisfies Rule 5605(c)(3) and members of such audit committee must meet the independence criteria set forth by Rule 10A-3(b)(1) under the Exchange Act, subject to any exemptions pursuant to Rule 10A-3(c) under the Exchange Act. The phase-in period is calculated from the date on which the company determines that it has ceased to qualify as a foreign private issuer.

COMPANIES CEASING TO BE A CONTROLLED COMPANY

Rule 5615(c)(3) is amended to state that the applicable phase-in periods for companies ceasing to be a controlled company will commence on the date on which the company ceases to be a controlled company.

NONCOMPLIANCE DURING THE PHASE-IN PERIOD

The Amendments codify Nasdaq's current policy that a company will not be considered deficient with respect to a requirement that is subject to a phase-in period until the end of the phase-in period if the company demonstrated compliance with the requirement but subsequently falls out of compliance before the phase-in period ends.

UNAVAILABILITY OF CURE PERIODS FOLLOWING END OF PHASE-IN PERIOD

The Cure Period Amendments codify certain of Nasdaq's current positions related to the applicability of cure periods.

The Amendments codify Nasdaq's current position that a company relying on any phase-in period is not eligible for a cure period immediately following the end of the phase-in period, unless the company was in compliance with the relevant requirements but fell out of compliance before the end of the phase-in period.

The Amendments also codify Nasdaq's position that, if the company fails to meet the compensation committee composition requirement under Rule 5605(d)(2)(A) due to (i) one vacancy or (ii) one compensation committee member ceasing to be independent due to circumstances beyond the member's reasonable control, the company will have until the earlier of its next annual shareholders meeting or one year from the date of the event that brought the company out of compliance to cure. If the company's next annual meeting is within 180 days of the event bringing the company out of compliance, then the company has 180 days to cure.

For more information about Nasdaq's new rules, please contact a member of the Winston & Strawn Capital Markets Practice or your Winston relationship attorney.

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