To Our Clients and Friends

Memorandum

Nasdaq Proposes Shareholder Approval Rule Modification

On January 30, 2018, The Nasdaq Stock Market LLC ("Nasdaq") filed with the U.S. Securities and Exchange Commission (the "SEC") a proposed amendment to Nasdaq Listing Rule 5635(d) (the "20% Rule"), which requires an issuer to seek shareholder approval for non-public offerings of its securities that equals or exceeds 20% or more of the common stock or voting power outstanding prior to the issuance.

Proposed Amendment

Should the SEC accept Nasdaq's proposal to change the 20% Rule, non-public offerings priced below the lower of (x) the closing price at the time of the offering and (y) the trailing five-day average of the closing price would require shareholder approval. Under the revised 20% Rule, market value would be defined as the lower of (i) the closing trading price (as reflected on Nasdaq.com) and (ii) the average closing trading price (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. The revised 20% Rule would replace the pricing test in the current 20% Rule, which requires shareholder approval for 20% non-public offerings below the greater of book value or the closing bid price.

Market Value and Book Value

Nasdaq Listing Rule 5005 currently defines "market value" as the closing bid price. Nasdaq's proposal suggests that the use of closing bid price is not transparent to issuers and investors and does not always reflect the actual price at which a security has traded. Market input to Nasdaq suggests that the price of an executed trade or the average price over a prescribed period of time are more reliable indicators of a security's value. For purposes of the 20% Rule, Nasdaq proposes to amend the definition of "market value" to the lower of the closing trading price and the five-day trailing average of the closing price. Nasdaq believes that both the closing price and the five-day trailing average are reasonable approximations of the value of listed securities, and applying the lower of the two measures will increase certainty and flexibility for Nasdaq listed companies.

Additionally, Nasdaq has proposed the elimination of the requirement for shareholder approval of 20% non-public offerings at a price less than book value but greater than market value. Market input provided to Nasdaq notes that book value is an accounting measure that is based on the historic cost of the issuer's assets and not the current value. Nasdaq therefore believes that book value is not an appropriate measure of whether a transaction is dilutive.

The SEC is currently soliciting comments through mid-March on Nasdaq's proposal to change the 20% Rule.

Copyright © 2018 Fried, Frank, Harris, Shriver & Jacobson LLP
A Delaware Limited Liability Partnership

* * *

Authors:

Stuart H. Gelfond

Meredith L. Mackey

Joshua Wechsler

Charles Stern

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts:

New York

Andrew B. Barkan	+1.212.859.8468	andrew.barkan@friedfrank.com
Lee T. Barnum	+1.212.859.8883	lee.barnum@friedfrank.com
Daniel J. Bursky	+1.212.859.8428	daniel.bursky@friedfrank.com
Joshua Thomas Coleman	+1.212.859.8633	joshua.coleman@friedfrank.com
Stuart H. Gelfond	+1.212.859.8272	stuart.gelfond@friedfrank.com
Mark S. Hayek	+1.212.859.8890	mark.hayek@friedfrank.com
Meredith L. Mackey	+1.212.859.8974	meredith.mackey@friedfrank.com
Joshua Wechsler	+1.212.859.8689	joshua.wechsler@friedfrank.com