

NASDAQ AMENDS RULES REQUIRING PRIOR NOTICE OF MATERIAL DEVELOPMENTS

December 11, 2009

The NASDAQ Stock Market LLC (“Nasdaq”) recently amended its rules to (i) require Nasdaq-listed companies to notify Nasdaq at least ten minutes prior to the public release of certain material information and (ii) modify rules on the use of company websites to publicly disclose material information.¹ These changes became operative on December 7, 2009.

Nasdaq’s exchange notification rules now require (rather than merely recommend, as was previously the case)² that all Nasdaq-listed companies notify Nasdaq’s MarketWatch Department at least ten minutes³ prior to the public announcement of any material information included in the following list of events prior to the release of such information to the public: (i) financial-related disclosures, including quarterly or yearly earnings, earnings restatements, pre-announcements or “guidance”; (ii) corporate reorganizations and acquisitions, including mergers, tender offers, asset transactions and bankruptcies or receiverships; (iii) 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); (iv) senior management changes of a material nature or a change in control; (v) resignation or termination of independent auditors, or withdrawal of a previously issued audit report; (vi) 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); (vii) significant legal or regulatory developments; or (viii) any event requiring the filing of a Form 8-K. Except in emergency situations, this notification must be made through Nasdaq’s electronic disclosure submission system available at www.nasdaq.net. In addition to these specified events, Nasdaq also encourages companies to utilize the MarketWatch pre-notification process in situations where they believe that a temporary trading halt may be necessary or appropriate. Nasdaq may issue a Public Reprimand Letter or a Staff Delisting Determination if a company repeatedly fails to (i) notify Nasdaq’s MarketWatch Department at least ten minutes prior to the distribution of material news, or (ii) use the electronic disclosure submission system.

Nasdaq has also amended its website posting requirements in order to make them more consistent with SEC guidance. Previously, IM-5250-1 indicated that a website posting alone would not by itself satisfy the public disclosure requirements of Regulation FD. However, in an effort to conform Nasdaq rules to SEC guidance on the use of company websites to satisfy Regulation FD compliance obligations,⁴ NASDAQ has modified IM-5250-1 to provide that the posting of material information on a company’s website may not by itself be considered a sufficient method of public disclosure.

¹ SEC Release No. 34-61008 (November 16, 2009), available at <http://www.sec.gov/rules/sro/nasdaq/2009/34-61008.pdf>.

² Prior to these rule changes, Nasdaq required companies to notify it prior to release of such material information but did not mandate the minimum 10-minute notice period.

³ This ten-minute pre-notification requirement is consistent with the existing notification requirement of the New York Stock Exchange (the “NYSE”), which is set forth in Section 202.06(B) of the NYSE Listing Company Manual.

⁴ SEC Release No. 34-58288 (August 1, 2008), available at <http://www.sec.gov/rules/interp/2008/34-58288.pdf>.

Nasdaq-listed companies should take steps immediately to ensure they have proper procedures in place to comply with these pre-notification and website posting requirements. If you have any questions regarding these recent Nasdaq rule changes, please contact Elizabeth C. Southern, <http://www.wcsr.com/elizabethsouthern>, the principal drafter of this alert, or you may contact the Womble Carlyle attorney with whom you usually work or one of our Corporate and Securities attorneys at the following link: <http://www.wcsr.com/corporateandsecurities>.

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