

Nasdaq Provided Limited Discretion to Allow Cure Periods for Non-Compliance with Annual Meeting Requirements

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The SEC has [approved rule changes](#) to allow the staff of Nasdaq's listing qualifications department limited discretion to grant a listed company time to comply with the requirement to hold an annual meeting.

Nasdaq standards require companies to hold an annual meeting no later than one year after the end of the company's fiscal year. If a company fails to comply, Nasdaq must issue a delisting determination, subjecting the company to immediate suspension and delisting unless the company requests a hearing. In many other instances of non-compliance with listing standards, a listed company is allowed 45 calendar days to submit a plan of compliance, and the Nasdaq staff may permit up to 180 days to fix the issue.

Nasdaq asserted in its rule proposal that the rule change was necessary because a listed company may need to reschedule the annual meeting in order to provide shareholders more time to review materials during a proxy contest, or a company may not be able to hold a timely meeting because it was delinquent in filing periodic reports.

In determining whether to grant a company an extension to comply with the annual meeting requirement of up to 180 days, Nasdaq must consider factors such as the likelihood that the company would be able to hold an annual meeting within the specified period, the company's past compliance history, the reasons for the failure to timely hold a meeting, corporate events that may occur, the company's general financial status and the company's disclosures to the market.

In this environment of intense focus on corporate governance, the SEC was careful to note in approving the changes that the development and enforcement of "meaningful corporate governance listing standards" is "of substantial importance to financial markets and the investing public." Ensuring that listed companies hold annual meetings is of "critical importance to allow shareholders the ability to exercise their rights to participate in corporate governance matters."

The SEC decided to approve the rule change after determining that listed companies generally appealed the immediate suspension in order to receive an automatic stay from the hearings panel. That essentially amounted to allowing a company to remain listed while not in compliance with the annual meeting requirement for the same amount of time as it would under these revised rule changes. It warned, however, that "the Commission expects [Nasdaq][staff] to exercise this discretion carefully and discerningly."

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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