

COVID-19: NYSE AND NASDAQ RELAX LISTING REQUIREMENTS IN RESPONSE TO VOLATILE COVID-19 ECONOMY

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The New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) have recently taken action to assist issuers in remaining compliant with listing requirements during the economic downturn resulting from the novel coronavirus disease (COVID-19). Both the NYSE and Nasdaq implemented temporary rule changes, approved by the Securities and Exchange Commission (SEC), that suspend certain continued listing requirements and afford listed companies that are out of compliance additional time to regain compliance. This alert provides a summary of the temporarily relaxed shareholder approval requirements and the temporary price-based continued listing requirement relief under both the NYSE and Nasdaq rules, the current time frame for these rule changes, and key takeaways for listed companies.

TEMPORARY RELAXED SHAREHOLDER APPROVAL RULES

NYSE: Shareholder Approval for 20 Percent and Related Party Issuances Temporarily Waived

On 14 May 2020 and on 6 April 2020, the SEC approved temporary NYSE rule changes applicable to its shareholder approval requirements. The temporary relief, effective through 30 June 2020, waives certain NYSE requirements applicable to equity issuances in excess of 20 percent of a listed company's outstanding common stock or voting power and, in limited circumstances, for issuances to related parties or other capital-raising issuances that could be considered equity compensation. Shareholder approval may still be required under other applicable NYSE rules, such as the rules requiring shareholder approval for equity compensation plans and change of control transactions.

The NYSE 20 Percent Rule

Generally, an NYSE-listed company must obtain shareholder approval for issuances of 20 percent or more of the company's outstanding common stock or voting power, except for cash sales in excess of 20 percent where the transaction complies with the minimum price requirement under NYSE Section 312.04 (the "Minimum Price")¹ and falls within the definition of "bona fide private financing." A "bona fide private financing" is a sale in which:

- A registered broker-dealer purchases the securities from the issuer with a view to the private sale of the securities to one or more purchasers, or
- The issuer sells the securities to multiple purchasers, and no one purchaser or group of related purchasers acquires, or has the right to acquire, more than five percent of the shares or voting power before the sale.

The temporary NYSE exceptions to the 20 percent rule adopted on 13 May 2020 are modeled on similar Nasdaq rule changes that were approved on 4 May 2020 (discussed below). To permit listed companies to quickly access necessary capital without obtaining shareholder approval, the NYSE adopted Section 312.03T, which is available as an exception to the 20 percent rule in circumstances where:

- The need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund an acquisition,
- The delay in securing shareholder approval would either:
 - The need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund an acquisition,
 - The delay in securing shareholder approval would either:
 - have a material adverse effect on the company's ability to maintain operations under its pre-COVID-19 business plan,
 - result in workforce reductions,
 - adversely impact the company's ability to undertake new initiatives in response to COVID-19, or
 - seriously jeopardize the financial viability of the enterprise,
- The company undertakes a process to ensure that the proposed transaction represents the best terms available for the company, and
- The company's audit committee or a comparable independent board committee expressly approves reliance on the new exemption and determines that the transaction is in the best interest of the shareholders.

To rely on this exception, a listed company must submit a related supplemental listing application and certification, obtain the approval of the NYSE², and enter into a binding agreement no later than 30 June 2020. If a company satisfies these conditions, the issuance of the securities pursuant to the binding agreement may occur after 30 June 2020 so long as the issuance takes place no later than 30 calendar days following the date of the binding agreement. If the company does not issue securities within 30 calendar days, it may no longer rely on the exception in Section 312.03T. Companies availing themselves of the relief must also file a Form 8-K or issue a press release with prescribed disclosures.

The temporary rule permits related party participation in Section 312.03T equity offerings in de *minimis* amounts if participation is specifically required by unaffiliated purchasers and if the related parties did not participate in negotiating the economic terms of the transaction. The participation of related parties in such a transaction might otherwise be considered a form of equity compensation and thus subject to shareholder approval.

The NYSE also adopted temporary waivers to provide NYSE-listed companies more flexibility in raising equity capital in private transactions, which are often referred to as "PIPEs." PIPEs can implicate the NYSE shareholder approval rules if they involve common stock or securities convertible or exercisable into common stock. The NYSE noted that companies in distress often obtain funding most readily in private transactions with a few key investors, including insiders who are already shareholders of the company. The temporary partial waiver

of Section 312.03(c) modifies the bona fide private financing exception by waiving the five percent limitation on ownership and voting power. The effect of this waiver is to permit, without shareholder approval, private placements of securities, regardless of their size, the number of participating investors, or the amount of securities purchased by any single investor so long as the Minimum Price condition is met. Additional requirements apply if the sale is to a related party (as described below).

Related Party Issuances

Section 312.03(b) of the NYSE Listed Company Manual requires shareholder approval of any issuance of more than one percent of either the pre-issuance outstanding common stock or voting power of a listed company to a director, officer, or five percent or greater security holder. If the issuance is to a related party who meets the definition solely by virtue of common stock holdings or voting power and no other insider status, so long as the issuance is for cash at a price at least as great as the Minimum Price, shareholder approval is only required if the issuance is for common stock (or for securities convertible into common stock) that exceeds five percent of the outstanding shares or voting power.

The temporary waiver permits sales of securities to related parties regardless of the number of shares issued, thus eliminating the one percent and five percent sale limitations, so long as:

- The sale is for cash at a price no less than the Minimum Price,
- The transaction is reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors, and
- Proceeds from the sale of securities to the related party will not be used to fund an acquisition of stock or assets of another company in which the related person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid.

The NYSE noted that the effect of the above-described proposed waiver would be to allow listed companies to sell their securities to related parties and other persons subject to Section 312.03(b) without complying with the numerical limitations of that rule. The NYSE further noted that "as a result of the proposed waiver, the NYSE application of Section 312.03(b) will be consistent with the application of Nasdaq Marketplace Rule 5635(a) to sales of a listed company's securities to related parties" thus furthering the overall goal of providing NYSE-listed companies with flexibility on a temporary basis to consummate, without shareholder approval, transactions that would not require shareholder approval under Nasdaq rules.

Any transaction benefitting from either waiver nonetheless remains subject to shareholder approval if otherwise required under any other applicable rule, such as approval requirements for certain equity compensation plans or for change of control transactions.

Nasdaq: Shareholder Approval for 20 Percent and Equity Compensation Plans Issuances Temporarily Waived

On 4 May 2020, the SEC approved a Nasdaq rule change that provides listed companies with a temporary exception from certain shareholder approval requirements through 30 June 2020 in order to facilitate access to capital for Nasdaq-listed companies. Nasdaq rules generally require shareholder approval prior to security issuances in connection with private placements of 20 percent or more of the company's common stock or voting power at less than market price, pursuant to Listing Rule 5635(d), and in connection with equity-based

compensation of officers, directors, employees, or consultants pursuant to Listing Rule 5635(c). While Nasdaq Rule 5636T (discussed below) has temporarily relaxed those requirements, Nasdaq-listed companies are still required to comply with the shareholder approval rules under Nasdaq Listing Rule 5635 relating to change of control and certain acquisitions of the stock or assets of another company.

The Nasdaq 20 Percent Rule

Nasdaq Listing Rule 5636T allows a company to issue 20 percent or more of its common stock at a price below the market price without shareholder approval in certain circumstances. In order to rely on the exception under the temporary rule, a company must execute a binding agreement for the issuance of stock and, if required, obtain approval from Nasdaq prior to 30 June 2020. The issuance of stock by listed company's relying on this exception may take place after 30 June 2020 so long as the issuance occurs within 30 calendar days following the date of the binding agreement.

In order to qualify for the exception under the temporary rule, a company must submit to Nasdaq certifications almost identical to those described under "The NYSE 20 Percent Rule" above, although no certification is required that the proceeds will not be used to fund an acquisition.

After submitting the certification, a company need not wait for Nasdaq's prior approval in order to use the temporary exception to the shareholder approval requirements (unless issuing warrants), as long as the maximum number of shares of common stock (or securities convertible into common stock) is less than 25 percent of the total shares and voting power outstanding, and the maximum discount to the "minimum price" at which shares may be issued in the transaction is not greater than 15 percent (the "Safe Harbor Provision"). Companies that fit within this Safe Harbor Provision must notify Nasdaq as promptly as possible, and at least two business days before issuing shares, but are not required to wait the generally required 15 calendar days after filing the listing of additional shares notification. Nasdaq's prior approval is required for all other issuances that do not fall under the Safe Harbor Provision.

The temporary exception requires companies to make a public announcement by filing a Form 8-K or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

- The transaction terms, including the total number of shares that may be issued and the consideration received,
- Shareholder approval typically would be required but for the reliance on the temporary exception, and
- The audit committee (or comparable body of independent, disinterested directors) expressly approved reliance on the exception and determined the transaction was in the best interests of the company's shareholders.

Issuances of stock in reliance on the rule will be aggregated with any subsequent issuance by a company, other than a public offering, at a discount to the minimum price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. Therefore, if the total issuances (including those issued in reliance on the exception) equal 20 percent or more of the total shares or voting power of the company before the issuance, shareholder approval will be required prior to a subsequent issuance.

Issuances Under Equity Compensation Plans

Nasdaq Listing Rule 5635(c), requires shareholder approval prior to the issuance of securities when an equity compensation plan or arrangement is established or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants. The temporary rule provides an exception to the requirements for an affiliate's participation in a transaction that satisfies the certification requirements described under the Nasdaq 20 percent rule discussion above, plus the following requirements:

- Any affiliate's individual participation must be less than five percent of the transaction,
- All affiliates' participation collectively must be less than 10 percent of the transaction,
- Any affiliate's participation must have been specifically required by unaffiliated investors, and
- The affiliates must not have participated in negotiating the economic terms of the transaction.

In circumstances that do not meet the above requirements, listed companies must continue to comply with the current shareholder approval requirements under Rule 5635(c).

TEMPORARY PRICE-BASED CONTINUED LISTING REQUIREMENT RELIEF NYSE

Generally, all NYSE-listed companies must maintain an average closing price of at least \$1.00/share for all common and capital stock over a consecutive 30-trading-day period. If a company receives a notice of noncompliance, it must cure the non-compliance within six months (subject to extension in certain situations where corporate action to cure requires shareholder approval). Additionally, an NYSE-listed company must maintain a stockholders' equity/average market capitalization of at least \$50 million over a consecutive 30-trading-day period and is subject to a maximum 18-month cure period to rectify any noncompliance.

On 21 April 2020, the NYSE received SEC approval to temporarily toll compliance with the \$1.00 minimum price and the \$50 million stockholders' equity/average market capitalization continued listing standards through 30 June 2020. During the NYSE tolling period, the NYSE will continue to add a ".BC" indicator to noncompliant companies' ticker symbols and will continue to list noncompliant companies on its website. Further, the rule change does not toll any of the applicable notice, press release, or compliance plan development obligations set forth in the NYSE Listed Company Manual.

If a company receives notice of its noncompliance with either standard described above, it must still (i) publicly disclose the fact by issuing a press release within four business days after receiving notice and, where applicable, file an 8-K, and (ii) contact the NYSE within ten business days after notice to confirm receipt of the notification. If a company is noncompliant with the \$50 million market capitalization standard, it must also submit a compliance plan to the NYSE within 45 days after receiving a notice that describes the definitive actions taken, or to be taken, to regain compliance. The rule change does not limit the NYSE's authority to commence delisting procedures prior to the expiration of the 18-month cure period, including during the tolling period, if a company fails to meet any material aspect of the compliance plan or any quarterly milestones set forth in that plan.

Additionally, on 20 March 2020, the NYSE received SEC approval to temporarily suspend the \$15 million 30-trading-day average market capitalization requirement imposed by NYSE Rule 802.01B through 30 June 2020. Typically, violating the \$15 million average market capitalization mandate results in immediate suspension and delisting for NYSE-listed companies as there is no cure period for noncompliance.

Nasdaq

All Nasdaq-listed companies must maintain a minimum bid price of \$1.00/share for all listed securities and certain market values of publicly held shares. On 17 April 2020, Nasdaq received SEC approval to temporarily toll until 30 June 2020 the period for any non-compliant company to regain compliance with:

- The requirement to maintain a minimum closing bid price of \$1 for at least 30 consecutive business days, and
- The requirement to maintain a market value of publicly held securities for at least 30 consecutive business days of at least \$1 million (on the Nasdaq Capital Market) or at least \$5 million or \$15 million (on the Nasdaq Global Market).

Nasdaq typically provides non-compliant companies 180 days to regain compliance by meeting the applicable standard for a minimum of 10 consecutive business days during the applicable compliance period. The effect of the temporary relief is to toll until 1 July 2020 the 180-day compliance period for listed companies that received notices of deficiency prior to 17 April 2020 and to delay the commencement of the 180-day compliance period until 1 July 2020 for any listed companies that become non-compliant during the tolling period. Starting on 1 July 2020, when the tolling period is over, companies will still have available the balance of any pending compliance period that remained at the start of the tolling period.

Companies receiving a notice of noncompliance will continue to be required to file a Form 8-K, where required by SEC rules, or to issue a press release. During the tolling period, Nasdaq will continue to monitor securities and notify companies of any new instances of noncompliance as well as instances of regaining compliance.

FOOTNOTES

¹ Minimum Price is defined as a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement.

² The NYSE did not follow Nasdaq's lead in exempting from the advance approval requirement transactions where the maximum number of shares to be issued is less than 25 percent of the shares outstanding and the discount to current market prices is not more than 15 percent. The NYSE will instead require advance written approval for all transactions falling within the scope of the rule.

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