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NYSE Follows NASDAQ in Temporarily Exempting Some Private Offerings From Shareholder Approval

WRITTEN BY

Eugene W. McDermott, Jr.

On May 14, 2020, the NYSE adopted temporary rules that will permit its listed companies to issue more than 20% of their presently outstanding common stock in a private placement at a discount without the shareholder approval that such a transaction would normally require. Designed to address liquidity needs of COVID-19-affected companies, the new rules are nearly identical to those adopted by Nasdaq on May 4, 2020, which we described here. Unlike Nasdaq, however, the NYSE has not adopted a “safe harbor” that relieves offerings within defined size and pricing ranges from the need to receive further written approval from the exchange.

Specifically, the temporary rule under new Section 312.03T of the Listed Company Manual will be limited to circumstances where:

- the need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund any acquisition transaction;
- the delay in securing shareholder approval would either (a) have a material adverse effect on the company’s ability to maintain operations under its pre-COVID-19 business plan, (b) result in workforce reductions, (c) adversely impact the company’s ability to undertake new initiatives in response to COVID-19, or (d) seriously jeopardize the financial viability of the enterprise.
- the company undertakes a process designed 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.

The temporary rule represents a more streamlined approach compared to the NYSE’s existing exception for companies whose financial viability would be jeopardized by any delay to seek shareholder approval, in part because it does not require a mailing to shareholders 10 days in advance of the issuance. But like the Nasdaq rule, it also may be helpful to companies in less dire circumstances who nevertheless need immediate capital to address liquidity and operational challenges associated with the COVID-19 pandemic, to minimize workforce reductions, or to undertake new initiatives such as those for the treatment or prevention of the virus.

A company using this temporary relief will need to submit a supplemental listing application along with a certification describing with specificity how it meets these requirements. The NYSE will review each application to confirm whether the company has established compliance. The NYSE’s written approval must be obtained before the company signs a binding agreement, all of which must occur by June 30, 2020. The issuance of securities may occur after that date, so long as it is within 30 days of the signed agreement.

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

Similar to the Nasdaq rules, the temporary NYSE rules will let related parties participate in such an equity offering in *de minimis* amounts, if their participation is specifically required by unaffiliated purchasers. The participation of related parties in such a transaction might otherwise be considered a form of "equity compensation" subject to shareholder approval.

Finally, like the Nasdaq rules, the temporary NYSE rules outline (a) public disclosure requirements applicable to companies availing themselves of the relief, and (b) aggregation rules for private placements within 90 days after a transaction using the temporary rule.

The NYSE has previously provided relief from certain other limited aspects of its shareholder approval rules relating to private placements, which we described here. The other shareholder approval requirements of the exchange, including those relating to change of control transactions, continue to apply.

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