

NYSE Modifies Additional Shareholder Approval Rules

May 19, 2020

Temporary waiver of 20% rule and narrow waiver of related party rule mirrors recent Nasdaq waivers

Recognizing that the urgent need to access capital during the COVID-19 pandemic might require companies to issue securities in private transactions at less than the market price, the NYSE has adopted new, temporary exceptions to its shareholder approval rules. New [Section 312.03T](#) of the NYSE Listed Company Manual closely mirrors the recent temporary rule enacted by Nasdaq (discussed [here](#)) and expands its previous waiver of certain shareholder approval rules (discussed [here](#)). The new rule provides a limited temporary exception to its shareholder approval rule by allowing for private issuances of 20% or more of a company's common stock or voting power at less than market price, subject to satisfying certain requirements described below. The new rule also provides a narrow exception for investments by affiliates at less than the current market price, including under equity compensation plans.

The rule is effective immediately and will remain in place through June 30, 2020.

Waiver of 20% Rule

The new waiver allows a company to issue 20% or more of its common stock at a price below the market price without shareholder approval in certain circumstances. Under the current rules, shareholder approval is generally required prior to any sale of 20% or more of the company's common stock or voting power, unless the issuance is either a public offering for cash or a "bona fide private financing" at a price not less than the "minimum price" (defined as a price that is the lower of: (i) the last closing price before the signing of the agreement to issue stock and (ii) the average of the closing prices over the last five trading days immediately before signing the agreement). An exception to this rule allows a company to apply to the NYSE for a waiver when a delay in securing shareholder approval would seriously jeopardize the financial viability of the company. The NYSE's temporary accommodation in April waived certain of the limitations for a bona fide private financing, but kept the general requirement of shareholder approval for any issuance of more than 20% of the outstanding stock in a private placement below the minimum price. The new temporary rule would provide an additional exception to the rule besides financial viability that would allow companies to issue securities *below* the minimum price without receiving shareholder approval. The waiver is substantially similar to Nasdaq's temporary waiver of its 20% rule enacted earlier in May.

In order to qualify for the exception under the temporary rule, a company must submit a supplemental listing application to the NYSE along with a certification that:

- the need for the transaction is due to circumstances related to COVID-19;
- the delay in securing shareholder approval would:
 - have a material adverse impact 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 proceeds would not be used to fund any acquisition transaction;

- the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company; and
- the company's audit committee (or a comparable body of the board of directors comprised solely of independent, disinterested directors) has expressly approved reliance on the exception and has determined that the transaction is in the best interest of shareholders.

The certification should describe “with specificity” how the company complies with the requirements of the new rule.

In addition, a company relying on the exemption in all cases must receive approval from the NYSE and thereafter sign a binding agreement for the issuance no later than June 30, 2020.

Waiver of De Minimis Issuances to Affiliates (including under Equity Compensation Plans)

The temporary rule also provides a limited exception for issuances of securities to affiliates, including certain issuances under equity compensation plans. Under the current NYSE rules, shareholder approval is required when the company sells stock to certain “related parties” if the stock to be issued exceeds 1% of either the number of shares or voting power outstanding before the issuance. In addition, shareholder approval is generally required prior to certain sales to employees, directors and other service providers (together with related parties, “affiliates”) when such sales could be considered a form of equity compensation (e.g., when the issuance occurs at a price less than the fair market value of the stock). NYSE’s April waiver permits sales of stock, without stockholder approval, to existing investors that exceed the 1% and 5% limits for cash at a price no less than the current market price. The new NYSE waiver expands the April waiver by allowing sales to related parties, including sales at less than the current market price, without shareholder approval in a transaction that satisfies: (1) all of the requirements described for the 20% waiver above, *plus* (2) the following requirements:

- any affiliate’s individual participation must be less than 5% of the transaction;
- all affiliates’ participation collectively must be less than 10% 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.

This narrow exception is directed at providing relief from the shareholder approval requirements in circumstances where, for example, unaffiliated investors require a company’s senior executives to put their own capital “at risk” by participating in capital raising transactions in light of the uncertainty due to COVID-19. However, this exception will not provide relief for companies seeking to increase the share capacity under their equity compensation plans.

Public Announcement Requirement

In order to rely on any of the waivers in the new rule, a company must file a Form 8-K (where required) or issue a press release, as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

- the terms of the transaction (including the number of shares that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under NYSE rules but for the fact that the company is relying on this temporary exception to the shareholder approval rules; and
- that the audit committee (or a comparable body of the board of directors) expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

Other Shareholder Approval Requirements Apply

Listed companies must continue to comply with the NYSE's current shareholder approval requirements including, for the issuance of securities in connection with a change of control and an increase in the share capacity under a company's equity compensation plans.

Aggregation of Issuances

Issuances of stock in reliance on the rule will be aggregated with any subsequent issuance by the company, other than a public offering, at a discount to the current market price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. If, following the subsequent issuance, the aggregate amount of shares issued (including those issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power of the company before the initial issuance, then shareholder approval will be required under the current rules prior to the subsequent issuance.

Timing

In order to rely on the rule, a company must obtain approval from the NYSE and execute a binding agreement for the issuance of stock prior to June 30, 2020. The issuance of stock relying on this exception may take place after June 30, 2020 so long as the issuance occurs within 30 calendar days following the date of the binding agreement.

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

Maurice Blanco	212 450 4086	maurice.blanco@davispolk.com
Michael Davis	212 450 4184	michael.davis@davispolk.com
Mark J. DiFiore	212 450 4882	mark.difiore@davispolk.com
Joseph A. Hall	212 450 4565	joseph.hall@davispolk.com
Michael Kaplan	212 450 4111	michael.kaplan@davispolk.com
James C. Lin	+852 2533 3368	james.lin@davispolk.com
Kyoko Takahashi Lin	212 450 4706	kyoko.lin@davispolk.com
Richard D. Truesdell, Jr.	212 450 4674	richard.truesdell@davispolk.com
Travis Triano	212 450 3096	travis.triano@davispolk.com
Elizabeth Weinstein	212 450 3889	elizabeth.weinstein@davispolk.com

© 2020 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy notice](#) for further details.