

Clients & Friends Memo

COVID-19 Update: NYSE and Nasdaq Consider Impact of COVID-19

March 31, 2020

In light of the market-wide declines caused by the COVID-19 pandemic, on March 19, 2020, the New York Stock Exchange filed with the Securities and Exchange Commission a proposed suspension of its listing requirement that companies must maintain an average global market capitalization over a consecutive 30 trading-day period of at least \$15 million (the "Market Cap Standard"). On March 20, 2020, the SEC granted NYSE's proposed suspension of the Market Cap Standard until June 30, 2020, and also designated the suspension operative upon NYSE's filing, thereby waiving the standard 30-day operative delay of proposed rule changes. Additionally, on March 26, 2020, the Nasdaq Stock Market announced that it will consider the effects of COVID-19 in its review of requests for financial viability exceptions to Nasdaq's shareholder approval rules.

NYSE's Market Capitalization Standard

NYSE Listed Company Manual Section 802.01B provides that NYSE will initiate suspension and delisting procedures if a company is determined to have average global market capitalization over a consecutive 30 trading-day period of less than \$15,000,000. Since the last week of February 2020, an "unusually high number"¹ of NYSE-listed companies have faced immediate suspension and delisting for their failure to comply with the Market Cap Standard. In response, NYSE proposed, and the SEC granted, the suspension of the Market Cap Standard until June 30, 2020, in order to provide temporary relief to those companies and their shareholders.

When a company is noncompliant with the Market Cap Standard, trading in such company's securities is immediately suspended and the company is subject to delisting. The suspension of the Market Cap Standard does not affect the status of a company that had been formally notified of its noncompliance prior to March 19, 2020. During the suspension period, companies will not be notified of new events of noncompliance with the Market Cap Standard. After the suspension period, new events of noncompliance with the Market Cap Standard will be determined based on a consecutive 30 trading-day period beginning on or after July 1, 2020.

¹ Securities Exchange Act Release No. 34-88441 (March 20, 2020).

NYSE has also indicated that it is exercising flexibility with respect to its “abnormally low share price” standard during this time of market volatility and is continuing to work with the SEC on other forms of relief. However, for NYSE to suspend or waive any of its other continued listing standards, it would need to obtain formal SEC approval, as was done for the suspension of the Market Cap Standard.

Nasdaq’s Financial Viability Exception

On March 26, 2020, Nasdaq issued guidance to its listed companies regarding the impact of COVID-19. While Nasdaq has not sought to suspend any of its listing rules, Nasdaq announced that it will consider the impact of disruptions caused by COVID-19 in its review of any pending or new requests for a financial viability exception to its shareholder approval rules.

Nasdaq Listing Rule 5365 sets forth the circumstances under which shareholder approval is required prior to an issuance of securities in connection with: (i) the acquisition of the stock or assets of another company; (ii) equity-based compensation of officers, directors, employees or consultants; (iii) a change of control; and (iv) transactions other than public offering.

Nasdaq Listing Rule 5365(f) provides an exception to the shareholder approval rules for companies in financial distress where the delay in securing shareholder approval would seriously jeopardize the financial viability of the company (the “Financial Viability Exception”). Reliance by a company on the Financial Viability Exception must be expressly approved by such company’s audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors.

In order to request the Financial Viability Exception, a company must complete a Rule Interpretation Request form, attached with a letter addressing how a delay resulting from seeking shareholder approval would seriously jeopardize its financial viability and how the proposed transaction would benefit the company. Nasdaq announced that, in its review of pending or new requests for the Financial Viability Exception, it will consider the effect of the disruptions caused by COVID-19.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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