

Clients&Friends Memo

COVID-19 Update: NYSE and Nasdaq Adopt Temporary Exceptions to Certain Shareholder Approval Requirements

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The NYSE and Nasdaq continue to provide temporary relief from certain of their listing and corporate governance requirements amid the market disruption caused by COVID-19. In March and April, the NYSE suspended its minimum market capitalization requirement and provided relief from its shareholder approval requirements for 20% issuances and for transactions with related persons, in each case through June 30, 2020. In March, Nasdaq announced that it would consider the effects of COVID-19 in its review of requests for financial viability exceptions to Nasdaq's shareholder approval requirements.¹ Both exchanges have since adopted new rules that create broader temporary exceptions to certain shareholder approval requirements. On May 1, 2020, Nasdaq filed a proposed rule change with the SEC to adopt a new listing rule for shareholder approval of 20% issuances and insider participation in certain financings. On May 14, 2020, the NYSE followed by filing a proposed rule change that was largely the same.² Both temporary rules have been approved by the SEC and are effective through June 30, 2020.

The purpose of the temporary rules is to support the urgent liquidity needs of companies caused by severe limitations on the ability to operate their businesses, significant market declines, volatility in the U.S. and global equity markets, and severe disruption in the credit markets. The exchanges responded to these needs by providing a straightforward set of criteria that streamline their listed companies' access to capital.

20% Issuances

The NYSE and Nasdaq require shareholder approval of certain transactions (other than public offerings) that involve the issuance of 20% or more of a company's outstanding common stock or voting power before the transaction.

1 The relief measures taken by the exchanges in March and April are discussed in our previous COVID-19 Updates, which are available [here](#) and [here](#).

2 See Nasdaq Listing Rule 5636T and Section 312.03T of the NYSE Listed Company Manual.

The temporary rules provide an exception to this stockholder approval requirement if certain conditions are met. Under the rules, a company may issue securities without shareholder approval upon submitting an application to the listing exchange that demonstrates that the transaction satisfies the following requirements:

- the need for the transaction is due to circumstances related to COVID-19;
- the delay in securing shareholder approval would (a) have a material adverse impact 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 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 committee comprised solely of independent, disinterested directors expressly approved reliance on this exception and determined that the transaction is in the best interest of shareholders.

The NYSE rule also includes a condition that proceeds of the transaction will not be used to fund an acquisition. The supplemental listing application submitted to the listing exchange for the transaction must include a certification that details how the transaction complies with the applicable exception.

In order for the exception to apply, the company must execute a binding agreement for the issuance prior to June 30, 2020. The issuance of the securities governed by the agreement in reliance on the exception may occur after June 30, 2020, provided it takes place no longer than 30 calendar days following the date of the agreement.

Under the NYSE rule, the exchange must also approve a company's reliance on the exception prior to the company making the issuance. Under the Nasdaq rule, no approval is required for issuances of less than 25% of the company's common stock or voting power if the maximum discount at which shares could be issued is 15% of the lower of (1) the Nasdaq Official Closing Price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (2) the average Nasdaq Official Closing Price of the common stock for the five trading days immediately preceding the signing of the binding agreement. In all other cases, Nasdaq must approve a company's reliance on the exception prior to the company making the issuance.

Issuances of stock in reliance on these temporary rules will be aggregated with any subsequent issuances by the company (not including public offerings) at a discount to the minimum price if the binding agreement governing the subsequent issuances is executed within 90 days of the prior issuance. If following the subsequent issuance, the aggregate issuance (including any shares issued in reliance on the exception) equals or exceeds 20% of the total shares or voting power

outstanding before the initial issuance, then shareholder approval will be required prior to the subsequent issuance.

Insider Participation and Equity Compensation

Nasdaq requires shareholder approval for certain issuances of securities when an equity compensation plan or arrangement pursuant to which stock may be acquired by officers, directors, employees or consultants is to be established or materially amended. This has long been interpreted to require shareholder approval for certain sales to officers, directors, employees, or consultants when such issuance could be considered a form of "equity compensation." The NYSE also requires shareholder approval for equity compensation plans, including material revisions to existing compensation plans, with limited exceptions. In addition, the NYSE has a separate requirement for shareholder approval prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions to a related party, a subsidiary, affiliate or other closely related person to a related party, or any company or entity in which a related party has a substantial direct or indirect interest. A "related party" is defined as a director, officer or substantial securityholder of the company. The temporary rules provide an exception to these requirements provided:

- the participation of any affiliate is less than 5% of the transaction;
- the participation of all affiliates are collectively less than 10% of the transaction;
- the participation of any affiliate was specifically required by unaffiliated investors; and
- the affiliates did not participate in negotiating the economic terms of the transaction.

This narrow exception only applies to situations where an unaffiliated investor requires a company's senior management to put their personal capital at risk and participate in a capital raising transaction alongside the unaffiliated investors. The exchanges believe that listed companies seeking to raise capital may face such requests as a result of uncertainty related to the ongoing spread of COVID-19.

Public Disclosure Requirements

The temporary rules require the company relying on these exceptions to make a public announcement by filing a Form 8-K, where required by the SEC, or issue a press release as promptly as possible, but no later than two business days before the issuance of securities. This public announcement must disclose:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under the applicable exchange rules but for the fact that the company is relying on the temporary exception; and

- that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the temporary exception and determined that the transaction is in the best interest of shareholders.

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Questions regarding this COVID-19 Update can be directed to your Cadwalader contact or to any of the following attorneys.

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