

Clients & Friends Memo

COVID-19 Update: NYSE Temporarily Waives Certain Shareholder Approval Requirements

April 9, 2020

In order to provide temporary relief to listed companies that may have urgent liquidity needs as a result of the market disruption caused by COVID-19, the New York Stock Exchange has (i) partially waived its shareholder approval requirement for issuances of stock to a “related party” when the number of new shares to be issued is more than 1% of total share volume or voting power and (ii) expanded the existing exception to its shareholder approval requirement for transactions involving the issuance of 20% or more of the company’s outstanding common stock or 20% of the voting power outstanding before such issuance, other than a public offering for cash.¹ The waivers are effective immediately and will remain in effect through June 30, 2020.

Related Party Transactions

NYSE Listed Company Manual Section 312.03(b) requires, among other things, shareholder approval of any issuance to “related parties,” including directors, officers or substantial security holders or to an affiliate of a related party, if the number of shares of common stock to be issued (or into which the securities may be convertible or exercisable), exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance (the “Related Party Rule”). There is a limited exception to the Related Party Rule for issuances to parties that are related parties only because they are substantial shareholders. Under this exception, shareholder approval is not required for cash sales of up to 5% of the company’s outstanding stock if such sales meet the “minimum price” test: “a price that is the lower of (i) the Official Closing Price² 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”³ (the “Minimum Price”).

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- ¹ NYSE noted that the proposed waivers will temporarily conform the treatment of transactions benefitting from the waivers to their treatment under the comparable Nasdaq Stock Market rules.
 - ² NYSE Listed Company Manual Section 312.04(j) defines “Official Closing Price” of an issuer’s common stock as the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.
 - ³ NYSE Listed Company Manual Section 312.04(j).

NYSE will waive through June 30, 2020, the 1% and 5% limits on share issuances to related parties for transactions that (i) involve the sale of the company's securities for cash at a price that meets the Minimum Price and (ii) have been reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors.⁴ In its proposal, NYSE explained the effect of this waiver will be "to allow 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,"⁵ as long as the transaction meets the requirements noted above.

This waiver, however, will not apply to any sale to a related party where the proceeds will be used to fund an acquisition of another company in which the related party has an interest. Specifically, the waiver will not apply to any transaction where a related party has a 5% or greater interest (or related parties collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired *and* the issuance of stock (including securities convertible into or exercisable for common stock) could result in an increase of 5% or more in outstanding stock or voting power.

Transactions of 20% or More of Outstanding Common Stock

NYSE Listed Company Manual Section 312.03(c) requires shareholder approval for transactions involving the issuance of 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance, other than a public offering for cash (the "20% Rule"). Section 312.03(c) provides an exception to the 20% Rule for transactions involving a cash sale of the company's securities that comply with the Minimum Price requirement and also meet the definition of a "bona fide private financing," as set forth in Section 312.04(g): A "bona fide private financing" refers to a sale in which either (i) a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers or (ii) the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer's common stock or more than 5% of the issuer's voting power before the sale.

NYSE will waive through June 30, 2020, for purposes of the "bona fide private financing" exception to the 20% Rule, the 5% limitation for any sale to an individual investor in a bona fide private financing and permit companies to undertake a bona fide private financing during that period in which there is only a single purchaser.⁶ Any transaction benefiting from this waiver must be a sale of the company's securities for cash at a price that meets the Minimum Price requirement. NYSE explained that the effect of this waiver will be that "a listed company [will] be exempt from the shareholder approval requirement of Section 312.03(c) in relation to a private placement

⁴ This NYSE waiver is consistent with the application of Nasdaq Marketplace Rule 5635(a).

⁵ Securities Exchange Act Release No. 34-88572 (April 6, 2020).

⁶ This NYSE waiver is consistent with the application of Nasdaq Marketplace Rule 5635(c).

transaction regardless of its size or the number of participating investors or the amount of securities purchased by any single investor, provided that the transaction is a sale of the company's securities for cash at a price that meets the Minimum Price requirement."⁷

Additional Considerations

It is important to note that, as provided by NYSE Listed Company Manual Section 312.03, any transaction benefiting from either of these two waivers is still subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

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

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⁷ See *supra* note 5.