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COVID-19 Update: NYSE Shareholder Approval for Related Party and 20% Issuances Temporarily Waived and Minimum Market Capitalization Standard Temporarily Suspended

The SEC as well as the national stock exchanges continue to monitor the impact of the COVID-19 outbreak and related mitigation efforts on reporting companies, investors and global capital markets. In recognition of the difficulties issuers may encounter in meeting certain of their disclosure and listing requirements as a result of the global market and economic disruptions caused by the spread of COVID-19, the SEC and the stock exchanges have published guidance or temporarily waived or suspended certain of their rules to assist companies in remaining compliant during these challenging times.

We summarize in this alert actions relevant to NYSE-listed companies:

- The SEC has approved a rule change (available [here](#)) that temporarily waives certain requirements under the NYSE's shareholder approval rule applicable to equity issuances to related parties and equity issuances in private placements in excess of 20%. The rule change reflects the NYSE's expectation that listed companies will have significant liquidity needs in the coming months, and will need to access additional capital that may not be available in the public equity or credit markets. Shareholder approval is still required under any other applicable rule, such as shareholder approval requirements for certain equity compensation plans and change of control transactions.
- The SEC has approved a rule change (available [here](#)) that temporarily suspends the NYSE's global market capitalization standard in its listing rules (requiring a minimum market capitalization of \$15,000,000 over a consecutive period of 30 trading days).

Temporary waiver of shareholder approval requirements

The NYSE has waived application of certain of its shareholder approval requirements through June 30, 2020. As a result of the waiver, the NYSE rules are consistent with the equivalent Nasdaq Marketplace Rules.

- **Related party transactions.** The NYSE Listed Company Manual (the "NYSE Manual") requires shareholder approval for any issuance to a director, officer or substantial security holder of the company (each, a "Related Party") or to their affiliates if the number of shares of common stock to be issued, or the number of shares of common stock 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. There is a limited exception that permits cash sales to a Related Party *that is also* a substantial security holder¹ of the company without shareholder approval, provided such sales meet a market price test (“Minimum Price”)² and do not involve more than 5% of the company’s outstanding common stock.

Under the NYSE’s temporary waiver, a company is permitted to issue shares of common stock to a Related Party without having to comply with the 1% or 5% limitation, if the issuance is a cash transaction that meets the Minimum Price requirement. Additionally, to qualify for the waiver, any such transaction needs to be reviewed and approved by the company’s audit committee or a comparable committee comprised solely of independent directors.

The waiver is not available in the case of a sale of securities by a listed company to a Related Party in a transaction, or series of transactions, whose proceeds would be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

- **Transaction of 20% or more.** The NYSE Manual also requires shareholder approval for any issuance of 20% or more of a company’s outstanding common stock or 20% or more of the voting power outstanding before such issuance, other than in a public offering for cash.

There is a limited exception that permits cash sales in excess of 20% without shareholder approval, provided the transaction complies with the Minimum Price requirement and falls within the definition of “bona fide private financing.” “Bona fide private financing” is a sale in which: 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 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.

The NYSE waiver modifies the bona fide exception by waiving the 5% limitation for any sale to an individual investor and permitting companies to undertake a bona fide private financing during the period covered by the waiver (through June 30, 2020) even if there is only one purchaser. In other

¹ For purposes of Section 312.03(b), “an interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.”

² “Minimum Price” means a price that is the lower of: (i) the Official Closing Price 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. The “Official Closing Price” of the issuer’s common stock means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

words, a listed company is exempt from the shareholder approval requirement in relation to a private placement transaction regardless of its size or the number of participating investors or the amount of securities purchased by any single investor as long as the transaction is a sale of the company's securities for cash at a price that meets the Minimum Price requirement. Additionally, the company's audit committee or a comparable committee comprised solely of independent directors is required to review and approve the transaction benefitting from the waiver, if any purchaser in the transaction is a Related Party.

Any transaction benefitting from either waiver nonetheless remains subject to shareholder approval if required under any other applicable rule, such as approval requirements for certain equity compensation plans or for change of control transactions.

Temporary suspension of the market capitalization standard

Prompted by the unprecedented declines in trading prices of securities on the U.S. and global equity markets as a result of the COVID-19 outbreak and the increasing number of NYSE-listed companies in danger of immediate suspension or delisting due to the inability to comply with the market capitalization standard, the NYSE proposed to suspend the application of the standard through June 30, 2020. The NYSE Manual provides that the NYSE will initiate suspension and delisting procedures for a listed company if its average global market capitalization over a consecutive period of 30 trading days is less than \$15,000,000, regardless of the original standard under which it listed.

Under the current rules, when an NYSE-listed company is identified as being noncompliant with the market capitalization standard, trading in its securities is immediately suspended and the company is subject to delisting. Any such noncompliant company is not eligible to submit a plan to regain compliance but may appeal its delisting to a Committee of the Board of Directors of the NYSE.

Under the suspension of the market capitalization standard, NYSE-listed companies will not be notified of new events of noncompliance with the standard during the suspension period. Following the temporary rule suspension, any new events of noncompliance with the standard would be determined based on a consecutive period of 30 trading days commencing on or after July 1, 2020. Companies that have already been formally notified of noncompliance with the market capitalization standard and are in the delisting appeal process prior to March 20 (the date of the proposed rule suspension notice) cannot benefit from the proposed rule suspension.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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