

July 8, 2020

COVID-19 Update for Public Companies: Status of Temporary Relief

On July 2, the U.S. Securities and Exchange Commission (“SEC”) approved, with immediate effect, the NYSE’s rule proposal (available [here](#)) to extend until September 30, 2020, the temporary waiver of 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%. See our prior Client Alert (available [here](#)).

The Extension

Related party transactions. The NYSE requires shareholder approval for any issuance to a director, officer or substantial security holder (in effect, a holder of 5% or more of the shares or voting power) 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 holder of the company without shareholder approval, provided such sales meet a market price test (“Minimum Price”)¹ and do not involve more than 5% of the company’s outstanding common stock.

Under the extended 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, the 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 for sales of securities 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.

¹ “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. The requirement means that sales of common stock must be at a cash price at least as great as the Minimum Price, and securities convertible into or exercisable for common stock must be sold for cash and must have a conversion price at least as great as the Minimum Price.

Transactions of 20% or more. The NYSE 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 extended 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 September 30, 2020) even if there is only one purchaser. In other words, a 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.

Status of Relief

We list below the status of other temporary relief under SEC or stock exchange rules (all with June 30 expiration dates).

Type of Relief	Extension	Source
SEC order providing reporting companies and others with SEC filing obligations with a 45-day extension to file reports that otherwise would have been due between March 1 and July 1, 2020 (issued March 4; extended March 25)	Affirmatively not extended ²	Link to our alert available here
NYSE rule temporarily suspending the global market capitalization standard in its listing rules (requiring a minimum market capitalization of \$15,000,000 over a consecutive 30-trading day period) (approved March 20)	None provided to date	Link to our alert available here

² See a joint public statement ("Joint Statement") by Chairman Jay Clayton, Director of Division of Corporation Finance, William Hinman, Director of Division of Investment Management, Dalia Blass, and Director of Division of Trading and Markets, Brett Redfearn, entitled "An Update on the Commission's Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of Our Markets" (available [here](#)).

SEC Staff statement advising that it will not recommend enforcement action against filers that submit Form 144 via email instead of mailing or delivering the paper form to the SEC, provided a complete Form 144 is included as a PDF attachment in an email sent to SEC (issued June 25)	Extended until a date to be specified in a public notice, which date will be at least two weeks from the date of the notice	Link to our alert available here
SEC Staff statement advising that it will not recommend enforcement action if certain documents are submitted via email in lieu of mailing or delivering the paper document to the SEC if the filer attaches a complete document, including any required exhibits, as PDF attachments to an email sent to SEC (issued June 25)	Extended until a date to be specified in a public notice, which date will be at least two weeks from the date of the notice	Link to SEC Staff statement available here
Nasdaq rule change providing a longer period of time for listed companies to regain compliance with listing requirements related to bid price and market value of publicly held shares by tolling compliance periods until June 30, 2020 (approved April 17)	None provided to date	Link to our alert available here
NYSE rule change providing a longer period of time for listed companies to regain compliance with listing requirements related to the applicable market capitalization standard and the \$1.00 price requirement for capital and common stock by tolling compliance periods until June 30, 2020 (approved April 21)	None provided to date	Link to our alert available here
Nasdaq rule change providing Nasdaq-listed companies with a limited temporary exception to the shareholder approval requirement for private placements and a narrow related exception for an affiliate's participation in these placements (approved May 8)	None provided to date	Link to our alert available here
NYSE rule change providing NYSE-listed companies with a temporary exception to the shareholder approval requirement for private placements and a related narrow exception for any affiliated purchaser's participation in these placements (approved May 14)	None provided to date	Link to our alert available here

Additionally, the SEC has indicated³ that the following temporary relief will continue in effect:

- SEC staff statement (available [here](#)) regarding registrants' ability to change the dates and locations of their shareholder meetings, switch from an in-person shareholder meeting to a "virtual" or "hybrid" meeting, and furnish proxy soliciting materials through the "notice-only" e-proxy delivery option; and

³ See Joint Statement.

- SEC staff statement (available [here](#)) concerning authentication and document retention requirements under Rule 302(b) of Regulation S-T (specifically, the creation and retention of manual signatures in electronically filed documents).

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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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