
February 15, 2018

SEC Approves NYSE Rule Change to Facilitate Listing Without an Initial Public Offering

On February 2, 2018, the SEC [approved](#) a [proposed rule change](#) to the NYSE listing standards designed to facilitate the direct listing of a company's shares without conducting an initial public offering. The rule change reflects the growing number of highly valued start-ups, including so-called "unicorns," that have tended to delay their IPOs in part because they have sufficient capital and therefore have no need to raise additional capital through a primary offering of their shares. Despite their valuation and name recognition, some of these companies do not have recent and sustained trading of their shares in a private placement market. A direct listing would eliminate the underwriters' discounts and commissions of a traditional IPO, would avoid dilution of existing shareholders (as there would be no new issuance) and would eliminate the contractual restrictions (lock-ups) on resales imposed by underwriters (though the securities law restrictions under Rule 144 are unaffected).

Background

A company generally lists on a stock exchange as part of an underwritten IPO, in connection with a transfer from another market or secondary listing (following a listing on another, typically offshore, exchange) or as a result of a spin-off/demerger.

Prior to the rule change, a company that had not previously had its common equity securities registered under the Exchange Act could list without conducting an IPO, at the discretion of the NYSE, if the value of its publicly held shares was at least \$100 million, based on the lesser of an independent third-party valuation of the company and the most recent trading price for the company's common stock in a private placement market. The rule change eliminates the requirement to have a private placement market trading price if there is a valuation from an independent third party of at least \$250 million in market value of publicly held shares. The rule also sets forth several factors indicating when the independent third party providing the valuation would not be deemed independent and amends NYSE rules to address the opening procedures on the first day of trading such securities.

Under the amended rule, a direct listing will require a company to file a resale registration statement for its outstanding shares sold in earlier private placements, which will be subject to SEC review and comment. Accordingly, as with listings in connection with IPOs, companies making a direct listing will be subject to restrictions on publicity and the liability provisions of the Securities Act.

Exception to the Private Placement Market Requirement

The rule as amended eliminates the requirement in Section 102.01B of the NYSE Listed Company Manual to have a private placement market trading price in order to list on the NYSE. Instead, the NYSE may determine that a company has met the market value of publicly held shares requirement if the company provides a recent valuation evidencing a market value of publicly held shares of at least \$250 million. In proposing this change, the NYSE expressed its view that the current requirement to rely on recent private placement market trading in addition to a valuation could cause difficulties for certain companies that are otherwise qualified for listing. The NYSE stated that some companies that are clearly large enough to be suitable for listing do not have their securities traded at all on a private placement market prior to going public and, in other cases, the private placement market trading is too limited to provide a reasonable basis for reaching conclusions about a company's qualification.

Independence of Third Party Providing Valuation

The rule change establishes certain criteria that would preclude a valuation agent from being considered "independent." Specifically, a valuation agent will not be deemed to be independent if:

- the valuation agent or any affiliated person or persons beneficially own in the aggregate as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days;
- the valuation agent or any affiliated entity has provided any investment banking services to the applicant within the 12 months preceding the date of the valuation; or
- the valuation agent or any affiliated entity has been engaged to provide investment banking services to the applicant in connection with the proposed listing or any related financings or other related transactions.

Related Trading Rule Amendments

The NYSE also amended certain of its rules governing the opening of trading to specify procedures for the opening trade on the day of initial listing of a company that lists under the new amendments and did not have any recent trading in a private placement market.

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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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