

May 19, 2020

COVID-19 Update for Public Companies: NYSE Provides Temporary Relief for the 20% Shareholder Approval Requirement

On May 14, 2020, the SEC approved, with immediate effect, a proposed rule change filed by the NYSE (available [here](#)) that provides NYSE-listed companies with a temporary exception (the “Temporary COVID-19 Exception”) to the shareholder approval requirement for private placements and a related narrow exception for any Affiliated Purchaser’s¹ participation in these placements. This temporary relief, set forth in Section 312.03T, is available through June 30, 2020, and requires a company to submit a supplemental listing application and certification, obtain the NYSE’s approval and sign a binding agreement for the issuance not later than June 30, 2020. This temporary relief is in addition to, and unaffected by, the temporary waivers of certain requirements announced by the NYSE in April.²

The existing NYSE shareholder approval requirements

Section 312.03 of the NYSE Listed Company Manual requires NYSE-listed companies to obtain shareholder approval prior to the issuance of securities in the following situations: (a) equity compensation plans of officers, directors, employees or consultants; (b) issuance to Related Parties 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 (5% for a Related Party that is also a substantial security holder of the company and the transaction meets the Minimum Price³ requirement); (c) an

¹ “Affiliated Purchaser” is defined as (i) a director, officer or substantial security holder of the company (each, a “Related Party”); (ii) a subsidiary, affiliate or other closely-related person of a Related Party; (iii) any company or entity in which a Related Party has a substantial direct or indirect interest; or (iv) an employee or consultant of the company.

² In April, the NYSE waived, on a temporary basis, (i) the provision in Section 312.03(b) limiting a Related Party or other purchaser affiliated with a Related Party to purchasing securities representing no more than 5% of the company’s then-outstanding shares or 5% of the company’s voting power before the issuance in a transaction meeting the Minimum Price Test; and (ii) certain of the requirements for meeting the “bona fide private financing” exception to Section 312.03(c) (i.e., the requirements that there must be multiple purchasers in the transaction and that no purchaser may acquire securities representing more than 5% of the company’s then-outstanding shares or 5% of its voting power before the issuance). See our prior alert (available [here](#)).

³ “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

issuance of 20% of the common stock (by voting power or number) at a price less than the Minimum Price, other than in public offerings for cash; and (d) a change of control (collectively, the “Approval Triggers”). As noted below, the Temporary COVID-19 Exception covers clause (c) and, to a limited extent, clauses (a) and (b).

The Temporary COVID-19 Exception

Scope of the exception

The Temporary COVID-19 Exception allows NYSE-listed companies to issue, without shareholder approval, securities in a private placement notwithstanding the 20% shareholder approval rule. The Temporary COVID-19 Exception is in force through June 30, 2020, and to take advantage of the relief, the company must: (i) submit a supplemental listing application for the transaction, along with a certification certifying that it complies with all the relevant requirements and describing with specificity how it complies; (ii) obtain the NYSE’s approval in advance of issuing any securities in reliance on the Temporary COVID-19 Exception and (iii) sign a binding agreement to issue the securities prior to June 30, 2020. Issuances may occur after June 30, 2020, provided they occur no later than 30 calendar days following the date of the binding agreement.

Key requirements

In order to take advantage of the Temporary COVID-19 Exception, the transaction must satisfy the following requirements:

- the delay in securing shareholder approval would (i) have a material adverse impact on the company’s ability to maintain operations under its pre-COVID-19 business plan; (ii) result in workforce reductions; (iii) adversely impact the company’s ability to undertake new initiatives in response to COVID-19; or (iv) seriously jeopardize the financial viability of the enterprise;
- the need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund any acquisition transaction;
- the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company; and

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 company's audit committee (or a comparable body of the board of directors comprised solely of independent, disinterested directors) has expressly approved the transaction and has determined that the transaction is in the best interest of shareholders.

The NYSE must approve the transaction by countersigning the supplemental listing application prior to the proposed issuance. The NYSE encourages companies to commence discussions with it (and submit the required documentation to it) as far in advance of the proposed issuance as possible to allow time for its "detailed" review.

The company must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release, disclosing as promptly as possible, but no later than two business days before the issuance of the securities: (i) the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received); (ii) that shareholder approval would ordinarily be required under the NYSE rules but for the fact that the company is relying on the Temporary COVID-19 Exception; and (iii) that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

Except for the foregoing and the limited exception described below for an Affiliate Purchaser's participation, the other Approval Triggers remain in effect.

Affiliated Purchaser exception

The NYSE adopted an exception from the shareholder approval requirement for an Affiliate Purchaser's participation in a transaction qualifying for the Temporary COVID-19 Exception that would otherwise be subject to shareholder approval under either Section 312.03(b) or Section 312.03(a) and Section 303A.08,⁴ provided the Affiliated Purchaser's participation has been specifically required by unaffiliated investors and the Affiliated Purchaser has not participated in negotiating the economic terms of the transaction. As a condition to qualifying for the relief, each Affiliated Purchaser's participation must be less than 5% of the transaction and all Affiliated Purchasers' participation collectively must be less than 10% of the transaction.

Aggregation

The NYSE will aggregate issuances of securities made in reliance on the Temporary COVID-19 Exception with any subsequent issuance by the company (other than a public offering for cash) at a discount to the

⁴ Section 303A.08 requires shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees or consultants. Section 312.03(a) incorporates the requirements of Section 303A.08 into Section 312.03.

Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. As a result, if the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required prior to the subsequent issuance.

* * *

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:

Mark S. Bergman
+44-20-7367-1601

mbergman@paulweiss.com

John C. Kennedy
+1-212-373-3025

jkennedy@paulweiss.com

Jean M. McLoughlin
+1-212-373-3135

jmcloughlin@paulweiss.com

Securities practice management attorney Monika G. Kislowska contributed to this Client Alert.