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New NYSE Rules For Non-IPO Listings

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On February 2, 2018, the SEC approved the New York Stock Exchange's proposal to permit qualifying private companies to use "direct listings" to list their shares on the NYSE and become publicly traded without conducting an initial public offering so long as the direct listing is accompanied by a concurrent Securities Act resale registration statement. Direct listings may provide an attractive alternative to a traditional IPO for private companies that do not need to raise public capital but desire to provide greater liquidity for existing shareholders and/or make their shares a more attractive currency for mergers and acquisitions activity.

Background

Traditionally, a company will list on a national securities exchange in connection with a firm commitment underwritten IPO, upon transfer from another market or in connection with a spin-off.

On a case-by-case basis, the NYSE has used rule-based discretion to permit private companies to list their shares in connection with a registration statement filed solely for the purpose of allowing existing shareholders to sell their shares. Listing generally has been permitted if the company had a $100 million aggregate market value of shares held by persons other than directors, officers or their immediate family members based on both (i) an independent third-party valuation (the Valuation) and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or registered broker-dealer (the Private Placement Market). The lesser of these two values has been used to determine if the $100 million threshold is satisfied.

Amended Listing Standards

Exception to the Private Placement Market Requirement

The amended rules aim to address the obstacle faced by certain private companies that otherwise are clearly large enough to be suitable for listing but (i) do not have their shares traded on a Private Placement Market prior to going public; or (ii) the Private Placement Market trading is too limited to provide a reasonable basis for reaching conclusions about a company's qualification. The amended rules remedy this problem by providing an exception to the Private Placement Market trading requirement for companies where there is a recent Valuation available

indicating at least $250 million in market value of shares held by persons other than directors, officers or their immediate family members. By adopting a requirement that the Valuation be at least two-and-a-half times the $100 million requirement, the NYSE is seeking to provide a significant degree of comfort that the market value of the company's shares will meet the standard upon commencement of trading. The NYSE argued that this rule change was necessary for it to compete with the Nasdaq composite for listings of large private companies, as Nasdaq's initial listing rules do not explicitly address how Nasdaq determines compliance with its initial listing market capitalization requirements for private companies seeking to list upon effectiveness of a selling shareholder registration statement without a concurrent underwritten public offering.

Tightening the Independence Requirement for the Valuation

Any Valuation used must be provided by an entity that has significant experience and demonstrable competence in providing valuations of companies. To ensure the reliability of the Valuation, the amended rules establish new independence criteria, pursuant to which a valuation agent will not be deemed independent if:

- At the time it provides such valuation, the valuation agent or any affiliated person or persons beneficially own in the aggregate—as of the date of the valuation—more than 5 percent 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 listing applicant within the 12 months preceding the date of the valuation. "Investment banking services" includes acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions) or similar investments; serving as placement agent for the issuer; or acting as a member of a selling group in a securities underwriting; or
- The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.

Direct Listing Will Require an Effective Securities Act Registration Statement

The amended rules eliminated a provision that would have allowed a company seeking to make a direct listing to list immediately upon effectiveness of a Securities Exchange Act registration statement only, without any concurrent IPO or Securities Act registration. Thus, under the amended rules, a direct listing will require a company to file a resale registration statement for at least some amount of its outstanding shares, which will be subject to traditional review and comment process of the SEC staff.[1] As is the case with any registered public offering, issuers and their advisers will need to consider the application of the gun-jumping and liability provisions of the Securities Act.

Spin-offs and transfers from another market are not impacted by the new rules.

[1] Public resales by affiliates and nonaffiliates not covered by the resale registration statement must be conducted in accordance with the applicable conditions of Securities Act Rule 144.