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SEC Stays NYSE Rules on Primary Direct Listings

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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On August 26, 2020, the Securities and Exchange Commission (SEC) approved a proposal from the New York Stock Exchange (NYSE) that would allow companies going public via a direct listing to issue and sell new shares on their own behalf in the listing. On August 31, 2020, however, the SEC stayed this approval until further notice due to objections from the Council of Institutional Investors (CII), which announced an intention to petition for review of the new rule on the same day. The CII is expected to submit its petition in the coming days. While it is unclear how long the SEC will take to conduct its review, and the NYSE is urging that the process be completed quickly, similar reviews have lasted several months.

If ultimately effective, the NYSE proposal would bolster direct listings as an alternative to traditional underwritten initial public offerings (IPOs). Direct listings offer potential advantages when compared with traditional IPOs, including reduced transaction costs due to the absence of underwriters and corresponding underwriter advisory fees. Direct listings also may result in fewer restrictions on key executives and other insiders in selling their shares, due to the absence of underwriter-imposed lockup periods.

Prior to the NYSE proposal, direct listings were not available to companies seeking to raise new capital. Instead, direct listings were limited to companies seeking to provide liquidity to preexisting investors in a secondary offering.[1] The NYSE amendments would recognize a new category of "primary direct floor listing" that would permit companies to raise capital directly, provided certain requirements were met. In particular, companies would need to meet higher market valuation requirements and satisfy NYSE's existing initial listing requirements, which may be more difficult to satisfy within the context of a direct listing than an IPO.

To ensure a sufficiently liquid trading market in the absence of the pricing support and stabilization measures traditionally available in underwritten public offerings, companies seeking to directly list would need to meet a market valuation of $100 to $250 million, compared with the $40 million market valuation that currently applies to IPOs. Companies seeking to directly list would also immediately have to satisfy the NYSE's initial listing requirements, including that companies have at least 1.1 million publicly held shares, 400 round lot holders (on the NYSE, holders of 100 shares) and a price-per-share of at least $4.00. These thresholds are expected to be challenging for many private companies to satisfy without the assistance of underwriters, which in a traditional IPO ensure these requirements are met prior to listing through the book-building process.

[1] For more background on secondary direct listings and an analysis of the rules currently in effect on the NYSE, see our February 8, 2018, client alert, "SEC Approves NYSE Rules to Facilitate Direct Listings."

Capital Markets Alert
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