Proskauer

NYSE Facilitates Private Financing to Assist Public Companies through the COVID-19 Period

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SEC Approves Temporary Waiver of NYSE Shareholder Approval Rules to Provide Companies Additional Flexibility to Raise PIPE Financing

On April 6, 2020, the Securities and Exchange Commission (the "SEC") announced the approval and immediate effectiveness of a proposal from the New York Stock Exchange LLC (the "NYSE") to temporarily waive certain shareholder approval requirements applicable to certain private investment in public equity ("PIPE") transactions. During a time where listed companies may have urgent liquidity needs in the coming months due to lost revenues and maturing debt obligations, a PIPE can be a timely and efficient way for a public company to seek private financing to provide additional liquidity. A PIPE investment can be implemented quickly because the front-end of the transaction is privately negotiated and the transaction is completed pursuant to an exemption from SEC registration requirements.[1] Given the current unusual economic and market conditions, the NYSE is providing this temporary waiver to provide listed companies with some incremental flexibility to urgently obtain new capital through sales of equity securities in private placements.

The waiver effectively makes the NYSE shareholder approval rules align with the Nasdaq Stock Market LLC's existing shareholder approval rules with respect to issuances at or above the Minimum Price[2] (i) in bona fide private financings in excess of 20% of the listed company's outstanding common stock or voting power and (ii) to a director, officer or substantial shareholder in excess of 5% of the listed company's outstanding common stock or voting power. Issuances must still comply with the NYSE's shareholder approval rules in relation to change of control and equity compensation plans.

The waiver will provide some incremental flexibility for NYSE-listed companies to raise equity from related parties and in PIPE financings completed at or above the Minimum Price through June 30, 2020.

The NYSE's shareholder approval rules effectively limit a listed company's ability to engage in large PIPE transactions without shareholder approval, including the following restrictions which are subject to the temporary waiver:

- Transactions of 20% or More – Commonly known as the "20% Rule," the NYSE requires shareholder approval for any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance other than in a public offering for cash. The 20% Rule also includes an exception for transactions involving a cash sale of the company's securities that comply with the Minimum Price requirement and also meet the definition of a "bona fide private financing." The waiver lifts a limitation that more than 5% of the company's shares could be allocated to an individual investor in order to satisfy the "bona fide private financing" exception.
- Issuance to a Related Party – In addition, listed companies are also required to seek shareholder approval of any issuance to a director, officer, or substantial security holder (generally 5% holders) if the number of shares of common stock be issued, or if 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. An exception permits cash sales to substantial security holders, or their affiliates, at or above the Minimum Price and that relate to no more than 5% of the company's outstanding common stock. The waiver lifts both the 1% and 5% limits in this rule so long as the transaction is reviewed and approved by the company's audit committee or comparable committee comprised solely of independent directors. Note that this waiver is not applicable to any transaction involving the stock or assets of another company where any director, officer, or substantial security holder of the company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more.

Importantly, while the incremental flexibility may provide listed companies with additional flexibility to execute on dilutive transactions without shareholder approval, the waiver is limited to the terms of the 20% Rule and any proposed transaction will still need to be evaluated for compliance with the other NYSE shareholder approval rules, including the change of control rule. These rules, among other things, may require a company to seek stockholder approval before issuing shares which would result in a shareholder exceeding 20% ownership. In evaluating any specific transaction, listed companies, investors and their counsel should review the proposed transaction under all the shareholder approval rules of the NYSE.

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PIPE transactions can be an effective and time-efficient path for a public company to seek additional liquidity, especially during times of economic stress. We expect these waivers to provide NYSE-listed companies with additional flexibility to seek PIPE financing.

Proskauer's market leading Global Capital Markets Practice has experience acting for issuers, investment banks and investors in a wide variety of capital markets financing transactions, including PIPE financings, both in the US and in Europe. Please contact us if we can be of assistance.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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[1] Note, however, that a resale of the securities issued pursuant to a PIPE transaction will need to be separately registered or subject to an exemption and, as such, many PIPE transactions require a resale registration statement to become effective at or promptly following the closing of the initial sale.

[2] Minimum Price is generally the lower of (a) the closing price and (b) the average closing price of the five trading days, in each case immediately preceding the signing of a binding agreement to issue securities.

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