

**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



**April 8, 2020**

## **NYSE Provides Temporary Relief to Listed Companies for Private Financings with Related Parties and Certain Continued Listing Standards**

On April 3, 2020, the New York Stock Exchange (NYSE) filed with the Securities and Exchange Commission (SEC) two proposals designed to assist NYSE-listed companies with temporary relief in response to market-wide declines due to Coronavirus Disease 2019 (COVID-19).

### **Private Financings**

As is often the case in times of widespread market or industry related financial crisis, many companies seek capital by selling significant amounts of equity in private placement transactions (e.g., PIPEs) to a single investor or small group of investors. These transactions may be limited to or include existing major shareholders in the company. Companies raising capital in this manner may be limited by the NYSE's shareholder approval requirements with respect to the size and structure of the transactions. Given the extraordinary nature of the current circumstances, the NYSE is temporarily providing a partial waiver of the application of Sections 312.03(b) and 312.03(c) through and including June 30, 2020.

### **Issuances to a Related Party**

The NYSE amendment provides a temporary waiver of certain shareholder approval requirements set forth in Section 312.03 of the NYSE Listed Company Manual through June 30, 2020. Subject to an exception for early stage companies, Section 312.03(b) requires shareholder approval prior to issuances to directors, officers, or substantial security holders (i.e., greater than 5% holders) (**Related Parties**) if the

number of shares of common stock (or common stock equivalents) to be issued exceeds 1% of the number or voting power of outstanding shares before the issuance. A limited exception permits: (1) cash sales to Related Parties and their affiliates that meet a market price test set forth in the rule (**Minimum Price**);<sup>1</sup>; (2) relate to no more than 5% of the company’s outstanding common stock; and (3) the Related Party is a substantial security holder that is not a director or officer. To qualify for the waiver, the proposed transaction must be reviewed and approved by the company’s audit committee (or comparable committee comprised solely of independent directors). The new rule temporarily permits NYSE-listed companies to sell securities to Related Parties without complying with the numerical limitations of the current rule if the sale is for cash and the transaction meets the NYSE’s Minimum Price requirement.

The amendment provides that the waiver is not applicable to a sale of securities by a listed company to any person subject to the provisions of Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

### **Transactions of 20% or More**

Section 312.03(c) of the NYSE Listed Company Manual requires shareholder approval of any transaction relating to 20% or more of the company’s common stock or voting power outstanding before such issuance other than a public offering for cash. Section 312.03(c) includes an exception for transactions involving a cash sale of the company’s securities that comply with the Minimum Price requirement and meet the following definition of a “bona fide private financing,” as set forth in Section 312.04(g):

- **“Bona fide private financing”** refers to a sale in which either:
  - a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or
  - the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer’s common stock or more than 5% of the issuer’s voting power before the sale.”

The NYSE amendment temporarily waives through June 30, 2020, for purposes of the bona fide financing exception to the 20% requirement, the 5% limitation for any sale to an individual investor in a bona fide private financing pursuant to Section 312.03(c) and permits companies to undertake a bona fide private financing during that period in which there is only a single purchaser. Any transaction benefitting from this waiver must be a sale of the company’s securities for cash at a price that meets the Minimum Price requirement. However, if any purchaser in a transaction benefitting from this waiver is a Related Party or other person subject to Section 312.03(b), the proposed transaction must be reviewed and approved by the company’s audit committee (or comparable committee comprised solely of independent directors).<sup>2</sup>

<sup>1</sup> Section 312.04(i) of the NYSE Listed Company Manual defines the “Minimum Price” as follows: “**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 binding agreement. Section 312.04(j) of the NYSE Listed Company Manual defines “Official Closing Price” as follows: “**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. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday’s official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday’s official closing price is used.

<sup>2</sup> These temporary emergency waivers would simply provide NYSE listed companies with the flexibility on a temporary emergency basis to consummate transactions without shareholder approval that would not require shareholder approval under the rules of the NASDAQ Stock Market, as the specific limitations the NYSE is proposing to waive do not exist in the applicable NASDAQ rules.

All companies listed on the NYSE are eligible to take advantage of either of these two temporary waivers. As provided by Section 312.03(a), however, any transaction benefitting from either of these two proposed waivers will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d). Issuers should review the underlying governing documents of each of their securities and any relevant contractual obligations to confirm the terms and conditions of those securities or obligations are not adversely affected by these temporary emergency waivers.

### Effective Date

The SEC has approved the proposed amendments to Sections 312.03(b) and 312.03(c), which became operative immediately upon filing by the NYSE with the SEC on April 3, 2020.

### Minimum Market Capitalization and Stock Price Listing Requirements

According to the NYSE, it does not wish to impose on companies in the midst of this crisis the additional burden of drafting and filing disclosures with respect to non-compliance with the NYSE continued listing standards and to force them to work on the required compliance plan submissions. The NYSE has also expressed concern about the potential negative effect a below-compliance designation may have on investor perceptions of these companies, especially given the fact that many companies are suffering falling stock prices as a result of general market conditions rather than any company specific factors.

The NYSE's second proposal seeks to suspend the application of the NYSE's \$50 million market capitalization/shareholder's equity<sup>3</sup> and \$1.00 price continued listing requirements<sup>4</sup> through June 30, 2020. The NYSE's proposed suspension of the continued listing standards is in addition to the ongoing temporary suspension of the \$15 million market capitalization standard through June 30, 2020, with respect to which the NYSE submitted an earlier rule filing to the SEC.

A company that is in a compliance period for noncompliance with these standards at the time of commencement of the rule suspension will have that compliance period tolled and the period will recommence at the end of the proposed suspension. Determination as to whether a company is below compliance with the \$50 Million Standard after the end of the proposed suspension will be based on a consecutive 30 trading-day period commencing on or after July 1, 2020. Consistent with Sections 802.02 and 802.03 of the NYSE Listed Company Manual, a company that is operating under a compliance plan for non-compliance with the \$50 Million Standard will be deemed to be back in compliance with continued listing requirements if at any time, including during the period of suspension of the rule, the company is able to demonstrate (1) compliance with the \$50 Million Standard, or (2) the ability to qualify under an original listing standard, in each case for a period of two consecutive quarters.

In addition, consistent with the normal application of the rule, a company in a compliance period at the time of commencement of the suspension will be deemed to have regained compliance during the proposed rule suspension period if, at the expiration of its respective six-month cure period established prior to the commencement of the rule suspension, it has a \$1.00 closing share price on the last trading day of the period and a \$1.00 average share price based on the preceding 30 trading days (e.g., a company that is currently in a compliance period with a specified end date of May 30, 2020, will be deemed to have returned to compliance if it meets the applicable requirements on May 30, notwithstanding the fact that the rule will remain suspended at that time). Further, consistent with the normal application of the rule, a company that is in a compliance period at the time of commencement of the rule suspension can return to compliance during the suspension before the specified end date for its compliance period if that company

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<sup>3</sup> Section 802.01B of the NYSE Listed Company Manual requires, subject to a maximum 18-month cure period, a listed company to have both stockholders' equity greater than \$50 million and an average global market capitalization over a consecutive 30 trading-day period of greater than \$50 million (**\$50 Million Standard**)

<sup>4</sup> Section 802.01C of the NYSE Listed Company Manual requires a company to maintain an average closing price of its common stock greater than \$1.00 over a consecutive 30 trading-day period (**Dollar Price Standard**)

has both a \$1.00 closing share price on the last trading day of any calendar month during the previously-established compliance period and a \$1.00 average share price based on the 30 trading days preceding the end of such month. Following the temporary rule suspension, any new events of noncompliance with the Dollar Price Standard would be determined based on a consecutive 30 trading-day period commencing on or after July 1, 2020.

### Effective Date

In view of the immediate nature of the relief requested, the NYSE has requested that the proposed suspension of the continued listing standards become operative immediately. However, the proposal is subject to the review and approval of the SEC, which has not publicly expressed its view of the proposals or its approval timeline.

For more information and updates on the developing COVID-19 situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

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