



CORONAVIRUS: NYSE TEMPORARILY SUSPENDS CERTAIN SHAREHOLDER APPROVAL REQUIREMENTS

On April 6, 2020, the U.S. Securities and Exchange Commission approved the immediate effectiveness of a rule change proposed by the New York Stock Exchange ("NYSE"), available [here](#). This rule change facilitates raising capital, including from related parties or an existing investor, by partially waiving the NYSE's shareholder approval requirements through the end of June, subject to specified conditions.

The NYSE recognizes that the U.S. and global economies have experienced unprecedented disruption as a result of the COVID-19 pandemic, including limitations on companies' ability to operate their businesses as well as dramatic market declines in, and volatility and disruptions to, equity and debt markets. As a result, the NYSE believes that many listed companies have urgent liquidity needs in the next few months due to lost revenues, maturing debt obligations and for other capital needs. Both recently and during the Financial Crisis of 2008-2009, many companies sought capital by selling significant amounts of equity in private placement transactions to a single investor or small group of investors, in many cases including existing major shareholders. Often times, this was limited by the NYSE shareholder approval requirements.

Which NYSE Shareholder Approval Requirements are temporarily waived?

Subject to specified conditions described below, the NYSE is waving the application of shareholder approval rules that would otherwise be triggered by large private placements that raise capital from related parties or a single investor. Any transactions that benefit from this temporary rule change remain subject to other applicable shareholder approval requirements of the NYSE Listed Company Manual (the "Manual"), including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

Approval requirements for issuances to related parties

Section 312.03(b) of the Manual generally requires shareholder approval of any issuance of securities to a listed company's related parties, which includes

directors, officers and substantial security holders (*i.e.*, holding 5% or more) and their affiliates, if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the aggregate number of shares of common stock outstanding before the issuance or one percent of the pre-issuance voting power.

A limited exception to this requirement permits sales of no more than 5% of the company's outstanding common stock to substantial security holders not otherwise related to the listed company for cash at a price that is not lower than the "Minimum Price", which is the lower of:

- the official closing price immediately preceding the signing of the binding agreement; or
- the average official closing price for the five trading days immediately preceding the signing of the binding agreement.

Conditions to the temporary waiver. The NYSE will waive its shareholder approval requirement with respect to sales of securities to related parties (or other persons subject to Section 312.03(b)) through and including June 30, 2020 for transactions that:

- involve the sale of a listed company's securities for cash at a price that meets the Minimum Price Requirement described above; and
- are reviewed and approved by the listed company's audit committee (or a comparable committee comprised solely of independent directors).

As a result of this waiver, the NYSE's application of Section 312.03(b) will be consistent with the application of NASDAQ Marketplace Rule 5635(a). **Subject to the limitation described below, this waiver permits an NYSE-listed company to conduct a private placement in which related parties may participate without any numerical restrictions on their investment.**

Limitation on the temporary waiver. This waiver is not available for any sale of securities by an NYSE-listed company where:

- the proceeds are used to finance a transaction involving the acquisition of stock or assets of a separate company where any director, officer or substantial security holder of the listed company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company whose stock or assets are to be acquired or in the consideration to be paid; and
- the transaction or series of related transactions could result in an increase in outstanding common shares or voting power of 5% or more.

20% Shareholder Approval Requirement

Section 312.03(c) of the Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% or more of the company's voting power outstanding before such issuance other than a public offering for cash.

This requirement does not apply if the transaction is a cash sale that complies with the Minimum Price requirement and constitutes a "bona fide private financing" – a transaction in which either:

- a registered broker-dealer purchases the securities from the listed company with a view to the private sale of such securities to one or more purchasers; or
- the company 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 company's common stock or more than 5% of the company's voting power before the sale.

Conditions to the temporary waiver. For listed companies seeking to rely on the bona fide private financing exception to the shareholder approval rule for issuances of more than 20% of outstanding shares or voting power, the NYSE is temporarily waiving both the 5% limitation of any sale to an individual investor and the requirement that there be multiple purchasers, so long as the transaction is a sale of a company's securities for cash as a price that meets the Minimum Price Requirement. If any purchaser in a transaction benefitting from this waiver is a related party (or other person subject to Section 312.03(b)), then the listed company's audit committee (or a comparable committee comprised solely of independent directors) would also need to review and approve the transaction.

This waiver permits an NYSE-listed company to conduct a private placement regardless of size, number of participating investors or amount of securities purchased by any single investor, so long as the securities are sold for cash at a price that meets the Minimum Price requirement.

CONTACTS

Americas

Jay Bernstein
Partner

T +1 212 878 8527
E jay.bernstein
@cliffordchance.com

Gary Brooks
Partner

T +1 212 878 8242
E gary.brooks
@cliffordchance.com

Per Chilstrom
Partner

T +1 212 878 2079
E per.chilstrom
@cliffordchance.com

Andrew Epstein
Partner

T +1 212 878 8332
E andrew.epstein
@cliffordchance.com

Jacob Farquharson
Partner

T +1 212 878 3302
E jacob.farquharson
@cliffordchance.com

Larry Medvinsky
Partner

T +1 212 878 8149
E larry.medvinsky
@cliffordchance.com

Jason Myers
Partner

T +1 212 878 8324
E jason.myers
@cliffordchance.com

Anand Saha
Partner

T +1 212 878 8301
E anand.saha
@cliffordchance.com

Hugo Triaca
Partner

T +1 212 878 3222
E hugo.triaca
@cliffordchance.com

Kathleen Werner
Partner

T +1 212 878 8526
E kathleen.werner
@cliffordchance.com

Jon Zonis
Partner

T +1 212 878 3250
E jonathan.zonis
@cliffordchance.com

Patrick Jackson
Counsel

T +55 11 3019 6017
E partrick.jackson
@cliffordchance.com

Rebecca Hoskins
Professional Support
Lawyer

T +1 212 878 3118
E rebecca.hoskins
@cliffordchance.com

Hank Michael
Strategic Advisory
Attorney

T +1 212 878 8225
E hank.michael
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA

© Clifford Chance 2020

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Moscow • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Asia

Liu Fang
Partner

T +852 2825 8919
E fang.liu
@cliffordchance.com

Johannes Juette
Partner

T +65 6410 2293
E johannes.juette
@cliffordchance.com

Richard Lee
Partner

T +852 2825 8911
E richard.lee
@cliffordchance.com

Alex Lloyd
Foreign Legal
Consultant

T +852 2826 3447
E alex.lloyd
@cliffordchance.com

Jean Thio
Partner

T +65 6506 1956
E jean.thio
@cliffordchance.com

Europe

Alex Bafi
Partner

T +33 1 4405 5267
E alex.bafi
@cliffordchance.com

John Connolly
Partner

T +44 207006 2096
E john.connolly
@cliffordchance.com

Michael Dakin
Partner

T +44 207006 2856
E michael.dakin
@cliffordchance.com

George Hacket
Partner

T +49 69 7199 3103
E george.hacket
@cliffordchance.com

Andrew Kelly
Partner

T +44 20 7006 8552
E andrew.kelly
@cliffordchance.com

Arthur Levi
Counsel

T +44 20 7006 5717
E arthur.levi
@cliffordchance.com

Olivier Plessis
Counsel

T +33 1 4405 5487
E olivier.plessis
@cliffordchance.com

Laura Scaglioni
Counsel

T +39 02 8063 4254
E laura.scaglioni
@cliffordchance.com