

Coronavirus Disclosure Guidance for Public Companies – Further SEC Guidance and Exchange Relief

April 13, 2020

Client Advisory

April 13, 2020 by Guy Ben-Ami

This advisory was updated on April 17, 2020. The updates are reflected in red.

We previously discussed the disclosure guidance and regulatory relief provided by the U.S. Securities and Exchange Commission (the “SEC”) in response to the COVID-19 pandemic. The SEC is continuing to provide guidance to public companies.

In a Public Statement of the Chairman and the Director of the Division of Corporation Finance of the SEC dated April 8, 2020 they offered observations and requests regarding companies’ disclosures on the current and future effects of COVID-19. Companies are encouraged to disclose as much information as practicable about their current state of affairs and future outlook, including:

- current operating and financial status, and strategy to assess, plan for and address the effects of COVID-19, as well as the progress the company has already made in its response;
- potential impact to operations and financial condition;
- income statement and balance sheet effects;
- current liquidity position and expected financial resource needs;
- impact of COVID-19 on operations;
- company efforts and policies to protect the health and well-being of its workforce and customers;
- receipt of financial assistance under the CARES Act or similar program;
- nature, amounts and effects of financial assistance to the extent it materially affects, or is reasonably likely to have a material effect on, the company’s financial condition or operating results.

As explained in our prior Advisory, companies are encouraged to provide robust, forward-looking disclosures. Companies may use the safe-harbor rules for such statements.

While the SEC has given its guidance, the national exchanges, i.e., the New York Stock Exchange (the “NYSE”) and NASDAQ (together, the “Exchanges”) have also addressed potential relief for their listed companies.

The following matters are of particular interest:

I. Continued Listing Standards.

A company seeking to continue to list securities on the national exchanges must meet minimum listing requirements, including specified financial, liquidity and corporate governance criteria. At a time of global economic distress, many companies may find themselves not in compliance through no fault of their own, and the Exchanges might want to provide temporary relief. During the financial crisis of 2008, the Exchanges faced similar issues and suspended certain standards to allow companies to focus on running their businesses, rather than satisfying market-based requirements that might be largely beyond their control, and to help to restore investor confidence (allowing investors to make investment decisions without considering the likelihood of a near-term delisting).

NYSE.

Section 802.01B of the NYSE Listed Company Manual requires a listed company to have both shareholders' 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 Requirement).

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 (Closing Price Requirement).

Section 801.02B of the NYSE Listed Company Manual provides that the NYSE would promptly initiate suspension and delisting procedures for any listed company determined to have an average global market capitalization over a consecutive 30 trading-day period of less than \$15 million (\$15 Million Requirement).

Due to the sudden decrease in shares prices following the outbreak of COVID-19, the NYSE has proposed to suspend the application of all three requirements until June 30, 2020.

While the relief for the \$50 Million Requirement and the Closing Price Requirement are still pending approval by the SEC, the temporary suspension of the \$15 Million Requirement is in effect. The suspension of the \$15 Million Requirement does not affect companies that have previously been notified of noncompliance or are in the delisting appeal process; however, companies will not be notified of any new events of noncompliance under this listing standard during the suspension period.

The NYSE has also indicated that it is exercising flexibility with respect to the Closing Price Requirement because of the "abnormally low share prices" during this time of market volatility and is continuing to work with the SEC on other forms of relief.

NASDAQ.

NASDAQ has not yet provided relief for its continued listing standards. We plan to update this Advisory if NASDAQ follows the lead of the NYSE. The NASDAQ Composite has fared better to date than some other indexes during the COVID-19 crisis.

Update 4/17/2020:

NASDAQ announced its proposal to provide temporary relief from the continued listing bid price and market value of publicly held shares listing requirements through June 30, 2020. Under the relief, companies will have additional time to regain compliance for these price-based requirements.

While NASDAQ will continue to notify companies about new instances of non-compliance with bid price and market value of publicly held shares requirements during this period, compliance periods for any newly identified non-compliance will not begin until July 1, 2020. In addition,

the compliance periods for any company previously notified about non-compliance will be suspended and resume on July 1. Starting on July 1, companies would receive the balance of any pending compliance period to come back into compliance with the applicable requirement.

NASDAQ says it will continue to monitor securities to determine if they regain compliance during the relief period. A company can regain compliance by satisfying the minimum requirement for a minimum of 10 consecutive days.

You can view the rule filing [here](#).

II. Shareholder Approval Relief

While companies are in financial distress, they may wish to secure quick financing. However, the rules of the Exchanges may delay financing by requiring the company to first obtain shareholder approval.

NYSE.

Section 312.03 of the NYSE Listed Company Manual generally requires prior shareholder approval for any:

- Transactions or series of related transactions (other than “public offerings for cash” or certain “bona fide private financings”) involving the sale or issuance (or potential issuance) by the company of its common stock (or securities convertible into or exercisable for its common stock) if:
 - o the common shares have or will have upon issuance voting power equal to 20% or more of the company’s voting power outstanding before the issuance; or
 - o the number of common shares to be issued are or will be upon issuance equal to 20% or more of the company’s outstanding shares of common stock before the issuance.

An example of a “bona fide private financing” that does not require shareholder approval is when the company sells the securities to multiple purchasers, and no single purchaser, or group of related purchasers, acquires more than 5% of common stock the company.

Section 312.03 also requires listed companies (other than some early stage companies) to obtain shareholder approval prior to issuances to directors, officers or substantial security 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.

The NYSE will provide temporary relief from certain shareholder approval requirements through June 30, 2020.

The relief temporarily freezes the shareholder approval requirement for issuing shares to Related Parties when the number of new shares is more than 1% of the total shares outstanding or voting power.

The relief also temporarily waives the 5% limitation for any sale to an individual investor in a bona fide private financing and permits companies to conduct a bona fide private financing in which there is only a single purchaser.

The relief, which became effective April 3, 2020, is subject to the conditions that the securities sold: (i) must be for cash; and (ii) the sale price must exceed the “minimum price” as defined by the NYSE. If the transaction is with a related party, the transaction must be approved by the company’s audit committee. In addition, the relief is not applicable to a sale where the proceeds will be used to fund an acquisition of stock or assets of another company. The NYSE indicated that the relief is intended to allow companies to quickly raise cash through private placements.

NASDAQ.

NASDAQ Rule 5635(d) requires prior shareholder approval for any “20% Issuance” at a price that is less than a “minimum price”:

- A 20% issuance under the NASDAQ rules is defined as a transaction (other than a “public offering”) involving the sale or issuance (or potential issuance) by a company of its common stock (or securities convertible into or exercisable for its common stock) which alone or together with sales by officers, directors or substantial stockholders, is equal to 20% or more of the company’s outstanding common stock or 20% or more of the voting power prior to the issuance.
- Rule 5635(b) also requires prior stockholder approval of change of control transactions, with Nasdaq presuming a change of control exists where a stockholder acquires 20% of the company’s outstanding common stock, calculated on a post transaction basis.

Unlike the NYSE, NASDAQ does not require shareholder approval for Related Party transactions or private financings where one purchaser acquires more than 5% of common stock (unless one of the other shareholder approval rules is implicated). Nevertheless, NASDAQ may view an issuance to Related Parties priced at a discount as equity compensation that may require shareholder approval.

NASDAQ Rule 5635(f) provides a financial viability exception to the requirement to obtain shareholder approval. To qualify for this exception, a company must show that the delay in obtaining shareholder approval would seriously jeopardize the financial viability of the company. If NASDAQ grants the exception, the company must, at least ten days prior to the issuance of the securities, mail to all shareholders a letter informing them that the company is relying on the exception. Obtaining approval from NASDAQ to use this exception is extremely difficult. The written request must demonstrate that the delay in obtaining the financing caused by obtaining shareholder approval will create an acute risk of bankruptcy or insolvency.

NASDAQ has indicated that it will consider the impact of COVID-19 in its review of requests for financial viability exceptions to Rule 5635. NASDAQ will take into consideration the impact of disruptions caused by COVID-19 in its review of pending or new requests for a financial viability exception.

Other than the financial viability issue, NASDAQ has not yet provided specific relief for shareholder approval requirements. Having said that, NASDAQ does not require shareholder approval with respect to the transactions for which NYSE has now provided relief. We plan to update this Advisory if NASDAQ provides additional relief.

Foreign Private Issuers

Irrespective of the additional relief provided, Foreign Private Issuers can rely on home-country-rule exceptions for shareholder approval requirements. A foreign private issuer that follows a home country practice must disclose this reliance in its annual report on Form 20-F or 40-F filed with the SEC and describe the home country practice followed by the company.

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For more information concerning the matters discussed in this publication, please contact the author **Guy Ben-Ami** (212-238-8658, benami@clm.com), or your regular Carter Ledyard attorney.

*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-*

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