

NYSE Provides Temporary Relief from Certain Continued Listing Standards During COVID-19 Pandemic

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The global health crisis caused by the novel coronavirus disease known as COVID-19, and the public and private responses to the pandemic, combined with the significant decline in oil trading prices have led to high market volatility during the first quarter of 2020, negatively affecting the trading price and market capitalization of many listed companies. These recent, significant, marketwide declines put many listed companies in jeopardy of falling below certain stock exchange continued listing standards, which can result in immediate delisting or suspension from trading on an exchange if not subject to certain cure periods that may require significant corporate action to rectify any noncompliance. The timing of these atypical market stressors is not ideal – occurring over the busy months when most public companies produce year-end and first quarter reports and prepare for their annual shareholders meeting, typically held during the spring and summer.

The New York Stock Exchange (NYSE) has responded to its listed companies' pleas for relief, and while the relief does not cure noncompliance, it provides a temporary reprieve from certain NYSE continued listing standards and rules for required shareholder approvals. The NYSE also has provided guidance for listed companies seeking to remain in compliance with NYSE rules. Below is a brief description of the relief and guidance provided by the NYSE to date, followed by a brief outline of what you need to know and a description of what you need to do if you receive a notice of noncompliance from an exchange during the next few months.

Note that as of today, the Nasdaq Stock Market (NASDAQ) has not provided similar relief, but we would expect it to follow suit.

NYSE Temporary Relief

In response to the recent market stressors, the NYSE has received approval from the US Securities and Exchange Commission (SEC) to temporarily, through June 30, 2020, (i) suspend the \$15 million 30-trading-day average market capitalization continued listing standard and (ii) modify the rule requiring shareholder approval for certain issuances of common stock in an amount greater than or

equal to 20% of the outstanding shares. The temporary rule changes went into effect immediately.

The NYSE also applied to the SEC on April 3, 2020, to temporarily suspend the \$1.00 minimum price standard and the \$50 million market capitalization continued listing standards, but the application was rejected by the SEC; therefore, both standards remain in effect and unchanged. Note that both standards have cure periods under the existing rules. On April 6, 2020, the NYSE said it was in discussions with the SEC regarding potential additional relief under its continued listing standards and other rules.

The last time the NYSE temporarily suspended certain continued listing standards was in 2009 during the financial crisis.

Temporary Suspension of the \$15 Million 30-Trading-Day Average Market Capitalization Continued Listing Standard and Other Informal Guidance Relating to Other Continued Listing Standards

The NYSE received [approval](#) from the SEC to temporarily suspend, effective March 19, 2020 through June 30, 2020, the continued listing standard in NYSE Rule 802.01B. This rule requires an NYSE-listed company to maintain an average market capitalization of at least \$15 million over a consecutive 30-trading-day period. This will provide significant relief for NYSE-listed companies at risk of violating Rule 802.01B, because there is no cure period and noncompliance typically results in immediate suspension and delisting from the exchange.

Below is a chart containing the NYSE quantitative continued listing standards, which we have annotated to reflect recent relief and informal guidance from the NYSE.

Standard	Cure Period	Notes
Rule 802.01C \$1.00 30-Trading-Day Average Price	Six months, with cure permitted at any interim month end	Company has 10 days to respond to notice of noncompliance with plan accepted by NYSE; six-month cure period can be longer if corporate action to cure requires shareholder approval at next annual meeting ** NYSE in ongoing discussions with SEC
Rule 802.01D Abnormally Low Share Price (\$0.16/share)	None – immediate suspension and delisting	Minimum threshold for continued listing ** NYSE has indicated in informal discussions that it will review each company's situation in the context of current market conditions on a case-by-case basis
Rule 802.01B \$50 Million 30-Trading-Day Average Market Cap or \$50	Up to 18 months	Company has 45 days to respond to notice of noncompliance with plan accepted by NYSE; subject to quarterly monitoring and

Million Shareholder Equity		reassessment with regulatory committee ** NYSE in ongoing discussions with SEC
Rule 802.01B \$15 Million 30-Trading-Day Average Market Cap	None – immediate suspension and delisting	Minimum threshold for continued listing ** Temporarily suspended through June 30, 2020

Temporary Modifications to Shareholder Approval Rules

In the coming months, many public companies will need access to additional capital for any number of reasons, including but not limited to the servicing of debt obligations. During that time frame, such additional capital may not be available in the public equity or financing markets. Recognizing that certain NYSE rules act as impediments to accessing private capital, the NYSE applied for and received from the SEC temporary relief from certain shareholder approval requirements for private placements.

Prior to the temporary modification, NYSE Rule 312.03 required companies to get shareholder approval for certain securities transactions involving the issuance of (i) 20% or more of a company's outstanding common stock (other than in a public offering for cash) or (ii) securities to related parties if the stock to be issued would exceed 1% of either the outstanding common stock or the voting power outstanding prior to such issuance. NYSE rules provide limited exceptions to the 20% rule for cash sales meeting certain minimum price requirements in a "bona fide private financing," which involves either (i) sales where a broker-dealer purchases the securities with the intention of making private sales of the securities or (ii) sales to multiple purchasers, when no one purchaser or group of related purchasers acquires more than 5% of the company's common stock outstanding. Additionally, NYSE rules provide a limited exception to the related-party approval rule that permits cash sales to a substantial security holder (classified as a related party solely due to its status as a substantial security holder) of no more than 5% of the outstanding stock at a price that meets certain minimum price requirements.

With respect to the 20% rule, the SEC [approved](#) the temporary waiver, effective April 3, 2020 through June 30, 2020, for purposes of the bona fide private financing exception, of the 5% limitation for any sale to an individual investor. Note that if any purchaser in a transaction benefiting from this waiver is a related party, such transaction must be reviewed and approved by the company's audit committee or a comparable committee composed solely of independent directors.

With respect to the related-party rule, the SEC approved a temporary waiver (also effective April 3, 2020, through June 30, 2020) to permit companies to sell securities to related parties without complying with the 1% and 5% sale limitations in Rule 312.03, as long as such sales are for cash at a price meeting the minimum price requirements in the NYSE rules. However, note that this waiver will not be available for a sale of securities to a related party in a transaction whose proceeds will be used to fund an acquisition of stock or assets of another company where such related party has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition. In addition, to qualify for the waiver, the transaction must be reviewed and

approved by the company's audit committee or a comparable committee comprised solely of independent directors.

In addition, any transaction benefiting from the above waivers will still be subject to shareholder approval if required under any other NYSE rule, such as the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

The NYSE noted that the waivers will provide NYSE-listed companies with flexibility on a temporary basis to consummate, without shareholder approval, transactions that would not require shareholder approval under NASDAQ rules.

While NASDAQ has not requested approval from the SEC to temporarily suspend any of its continued listing requirements, NASDAQ has issued [guidance](#) stating that it would consider the effects of COVID-19 in its review of any pending or new requests for a financial viability exception to its shareholder approval requirements. Upon application by a listed company, the NYSE may also make exceptions to its shareholder approval policies when the delay involved in obtaining shareholder approval would "seriously jeopardize the financial viability of the enterprise" and when reliance by the company on this exception is approved by its audit committee. A company relying on this exception is required to mail to all shareholders, not later than 10 days before issuance of the securities, a letter informing them of the omission to seek shareholder approval and of the audit committee's approval.

Receiving a Notice of Noncompliance — What To Do Next

Regardless of the exchange on which a company is listed, listed companies should always track and monitor their compliance with the applicable listing standards of the exchange on which their securities are traded. This active monitoring should be conducted in coordination with the company's in-house (and, as needed, outside) legal team and finance team, so the company is prepared in advance to respond appropriately to any noncompliance notification.

With that being said, the first thing a company should do when it receives a notice of noncompliance from an exchange is contact its legal and finance teams to discuss its options for responding to the notice and curing the noncompliance, including planning any corporate actions that will be necessary.

The date that a company receives a notice of noncompliance from an exchange is important, because any applicable cure period begins to run on that date. The exchanges' continued listing standards contain specific deadlines by which a company is required to formally respond to a notice of noncompliance; not adhering to these deadlines will result in the immediate suspension and delisting of the company. The date that a company receives a notice of noncompliance from an exchange is also important because receipt of the notice triggers Item 3.01(a) of Form 8-K, which begins a four-business-day period during which the company must file with the SEC a Form 8-K complying with the applicable disclosure requirements of that Item.

If you believe your company may have, or will have in the near future, a potential compliance issue with exchange rules or continued listing requirements, we recommend that you promptly contact your legal and finance teams to discuss your options.

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