NYSE Issues New Proposal on Direct Listings

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Proposal is NYSE's third try to allow companies to raise funds in a direct listing

On June 22nd, the New York Stock Exchange (NYSE) filed a **proposed rule change** with the Securities and Exchange Commission that would permit companies to raise capital in a direct listing. The NYSE had previously proposed a rule change, which it subsequently revised and resubmitted, that would have allowed companies to participate in direct listings (as discussed in our November 2019 **memo** and December 2019 **memo**). The latest iteration of the NYSE's rule proposal is similar to the prior versions, but it provides more detail around the auction mechanics for a primary direct listing. In addition, it eliminates the previously proposed flexibility to delay compliance with the requirement to have 400 round lot holders, which had the potential to make direct listings available to many more private companies.

Consistent with the revised proposal submitted in December 2019, the latest rule change proposal would provide similar flexibility for a company to sell newly issued primary shares into the opening auction in a direct listing. The proposal would allow a company, or a company together with selling shareholders, to sell newly issued primary shares on its own behalf directly into the opening trade, without a traditional underwritten public offering and with the IPO price determined by the opening trade auction (a "primary direct listing"). In order to qualify for a primary direct listing, a company would need to either (i) sell at least $100 million in market value of shares in the opening auction, or (ii) have a market value of freely tradeable shares at the time of listing of at least $250 million. See our previous client memos for more information.

However, the NYSE's current proposal eliminates the 90-day grace period that was previously proposed for the minimum holder requirement. As a result, both primary and secondary direct listings would continue to be subject to the requirement to have 400 shareholders at the time of initial listing. This requirement will continue to preclude many private companies from pursuing a direct listing because they do not having the required number of round lot holders.

Unlike the prior proposals, this version also provides more granular detail around the auction process for a primary direct listing. Significantly, the auction process would require that the company disclose a price range and the number of shares to be sold in the SEC registration statement for a primary direct listing, and would require that the opening auction price be within the disclosed price range. For purposes of the opening auction, the company would be required to submit a limit order for the number of shares that it wishes to sell, with the limit set at the bottom end of the price range. The proposed rule changes would not allow the company's limit order to be cancelled or modified, and the limit order would need to be executed in full in order to conduct the primary direct listing.

While the latest proposal provides helpful detail around the mechanics for a primary direct listing and also demonstrates the NYSE's continued efforts to expand the availability of direct listings, the elimination of the previously proposed grace period for the minimum holder requirement reflects a substantial narrowing of the proposal. As we have previously noted, there also continue to be other potential limitations to direct listings.

If the SEC approves the proposal, the rule change is not expected to take effect until at least 45 days after its publication in the Federal Register.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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