

# SEC Approves NYSE Primary Direct Listings (Again)

December 24, 2020

On December 22, 2020, the SEC approved the NYSE's proposed rule change that allows a company to conduct a primary securities offering as part of a direct listing on the NYSE.<sup>1</sup> Effective immediately, a company may sell, on its own behalf, newly issued shares directly into the public markets as part of a NYSE listing, subject to satisfying certain requirements, without the involvement of a traditional underwriter. Highlighted below are the key takeaways from the NYSE's rule change.

## BACKGROUND

Since 2018, the NYSE rules have permitted direct listings that involve only secondary sales of shares without an underwritten offering, resulting in such high-profile direct listings as Spotify, Slack and, most recently, Palantir. While the SEC approved a version of the NYSE proposed rule discussed here in August 2020, its order was stayed in September 2020 after an investor group filed a petition for a full commission review of the approval order. On Tuesday, the SEC issued an order finding that the "NYSE had met its burden to show that the proposed rule change is consistent with the Exchange Act of 1934" and re-approved the rule.<sup>2</sup>

## NYSE PRIMARY DIRECT LISTING REQUIREMENTS

**Overview.** The NYSE rule now allows companies to sell shares directly to investors in order to raise new capital, without a traditional underwritten offering, under a new "primary direct floor listing." Shares listed in a primary direct floor listing may be sold by the company or by the company and selling shareholders. In order to qualify for a primary direct floor listing, a company must meet certain listing requirements relating

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<sup>1</sup> SEC release is available [here](#). See also the SEC release from August 2020, which previously approved the NYSE's proposed rule change to permit primary direct listings, available [here](#).

<sup>2</sup> NASDAQ has also filed a similar rule change proposal with the SEC, which has not yet been approved by the SEC.

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to market value and conduct the primary offering in accordance with newly established auction mechanics.

**Listing Standards.** A primary direct floor listing requires that a company either (i) sell at least \$100 million in market value of shares in the opening auction on the first day of trading (the “Sale Requirement”) or (ii) have at least \$250 million in aggregate market value of publicly held shares at the time of listing, as calculated using a price per share equal to the lowest price of the price range disclosed in the registration statement (the “Public Float Requirement”). In addition, in order to qualify for a primary direct floor listing, a company must satisfy all other traditional NYSE initial listing requirements at listing, including that the company has at least 400 round lot shareholders, 1.1 million publicly held shares outstanding and a per share price of at least \$4.00 at the time of initial listing.

**Auction Process.** The new rule lays out the specific auction mechanics for the initial trades in a primary direct floor listing. The first trade in a primary direct floor listing must be executed by a designated market maker (“DMM”) as a compliant issuer direct offering order (“IDO Order”), a new form of limit order for sales by the company in such listings. Only a single IDO Order may be placed in connection with the primary direct floor listing, which must cover the number of shares to be issued by the company, as disclosed in the prospectus of the effective registration statement, at a price equal to the lowest price of the price range set forth in the company’s effective registration statement. While the IDO Order will have priority over other orders placed at the listing price, it may not be modified or canceled and, to the extent the IDO Order cannot be executed in full by the DMM, the listing auction will not proceed and the shares will not begin trading on the NYSE. As a result, a primary direct floor listing may be effectuated only if the auction price is within the price range disclosed in the effective registration statement and the entire allotment of primary shares in the IDO Order is sold within such range.

**Liability Considerations.** The SEC’s Order makes clear that participants in a primary direct listing are subject to potential liability under the federal securities laws to the same extent as they would be in connection with a traditional IPO. In particular, the issuer and its officers and directors, the financial advisor(s), the DMM and the company’s independent accountants must bear in mind the following potential sources of liability: (i) the anti-fraud provisions of the federal securities laws; (ii) the anti-manipulation provisions of the federal securities laws, including Regulation M; and (iii) potential statutory “underwriter” liability for financial advisors, including under Section 11 of the Securities Act, depending upon the relevant facts and circumstances, including the nature and extent of the financial advisor’s activities.

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**STAY TUNED**

We will continue to monitor, and keep you updated as to developments relating to primary direct listings.

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Please do not hesitate to contact us with any questions.



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