

Governance Update

NASDAQ Follows the NYSE with Rule Changes that Permit Primary Issuances Alongside Direct Listings

On May 19, 2021, the Securities and Exchange Commission (the “SEC”) approved a change to NASDAQ rules such that an issuer may now conduct a primary offering of its securities (alone or concurrent with a secondary listing of equity securities) in connection with a direct listing on NASDAQ instead of a traditional underwritten offering. The NASDAQ rule change follows analogous rule changes at the New York Stock Exchange (the “NYSE”) in December 2020. The following is a brief summary of the requirements relating to a direct listing on NASDAQ.

NASDAQ Direct Listings

Previously, a company listing its shares on NASDAQ in connection with a direct listing could only effectuate a secondary listing (a “secondary direct listing”). As such, until the rule change approved by the SEC, a direct listing on NASDAQ was solely a means by which existing shareholders could sell previously issued and outstanding shares of their company’s common stock to the public.

Secondary Direct Listings. A company pursuing a secondary direct listing on NASDAQ must meet a minimum market valuation threshold of \$110 million of unrestricted publicly held shares (or \$100 million if the company has stockholders’ equity of at least \$110 million) based on the lesser of an independent third-party valuation and the most recent trading price for the company’s shares in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer (a “Private Placement Market”). If, however, a company’s shares do not have a recent trading history on a Private Placement Market, the company must have a market value of publicly held shares of at least \$250 million based solely on an independent third-party valuation.

Primary Direct Listings. Under the NASDAQ rule changes, a company may pursue a primary direct listing on NASDAQ if the amount of the company’s unrestricted publicly held shares before the offering, along with the market value of the shares to be sold by the company in NASDAQ’s opening auction, is at least \$110 million (or \$100 million, if the company has

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stockholders' equity of at least \$110 million). The market value of unrestricted publicly held shares before the offering will be calculated using a price per share equal to the lowest price of the price range disclosed in the company's effective registration statement.

In calculating the amount of a company's unrestricted publicly held shares for a secondary or primary direct listing, shares held by officers, directors or 10% or greater shareholders are excluded. However, shares sold to such insiders in a primary direct listing may be included in the market value of shares sold by the company in the offering.

Secondary and primary direct listings on NASDAQ must satisfy all of NASDAQ's traditional initial listing requirements applicable to traditional IPOs.

Final Thoughts

Now that both NASDAQ and the NYSE permit companies to raise capital as part of the direct listing process, the evolutionary development of the direct listing is complete. The ability to raise primary capital in connection with a direct listing may make the direct listing a more formidable alternative to the traditional IPO (or even public listing *via* SPAC merger).

We plan to bring you further analysis of this development in the near term through our Debevoise In Depth series.



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