

SEC Approves NYSE's Direct Listing "Plus" – Immediate Resales AND New Capital

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On August 26, 2020, the Securities and Exchange Commission (SEC) approved the New York Stock Exchange's (NYSE or the Exchange) proposal to allow private companies to issue shares through direct listings on the Exchange rather than conducting a traditional initial public offering (IPO). This blog post discusses the approved NYSE proposal and its implications.

In a nutshell, the new NYSE rule allows a private company to "go public" by selling shares directly on the NYSE without incurring the usual expenses associated with an IPO such as the expense of an underwriter. Before the adoption of the rule, so-called "direct listings" were available only for secondary offerings by shareholders. Another advantage of direct listings is that the companies and its insiders would not be required to sign conventional "lock up agreements" with underwriters, which prevented sales for 180 days after the IPO's consummation. A company going public via a direct listing would file a registration statement with the SEC and, upon its effectiveness, be able to sell its equity securities on its own behalf directly on the NYSE. To make a direct listing, the company would need to sell either \$100 million of shares in the NYSE's opening auction for the shares or, if a lesser amount is to be sold, at least \$250 million of the company's shares must be publicly held, based on the low point of the price range set forth in the registration. All other NYSE requirements would continue to apply, including as to round lot holders.

It is interesting to note that financial advisors engaged by the company for assistance may face "underwriter" liability under Section 11 of the Securities Act of 1933, even though the advisors are not buying the company's securities with a view to resale. The SEC noted that this determination will depend "on the nature and extent of the financial advisor's activities."^[1] The specter of Section 11 liability will naturally deter investment banks from serving as financial advisors in direct offerings absent suitable compensation, which might in turn deter companies from engaging in direct offerings as compared to a traditional underwriting.

The SEC said that direct listings have the potential to broaden the scope of investors that are able to purchase shares in the IPO because any investor may enter orders on the NYSE. Moreover, it felt that direct listings "may be a more accurate way to price securities offerings" because the IPO price will be determined directly by market forces rather than as the result of negotiations between the company and its underwriters.^[2]

New NYSE Rules for Direct Listings

The SEC approved the NYSE's proposal to (1) redefine Selling Shareholder Direct Floor Listing (defined below), which provides for secondary sales, and (2) to recognize an additional type of direct listing called a Primary Direct Floor Listing (defined below) for actual primary offerings of sales of securities.

TYPE OF LISTING	DESCRIPTION
Selling Shareholder Direct Floor Listing	<p>Under Section 102.01B, Footnote E of the Listed Company Manual, the NYSE had previously allowed companies that had not previously had their securities registered under the Exchange Act but that had sold securities in private placements to list their securities on the Exchange upon the effectiveness of a registration statement filed solely to allow existing shareholders to sell their shares (a "Selling Shareholder Direct Floor Listing").</p> <p>In its proposal, the NYSE proposed to formally define this type of direct listing and clarify that companies would be permitted to make this kind of listing if they had participated in one or more private placements.</p> <p>The NYSE would continue to require that companies undergoing this direct listing have at least a \$100 million aggregate market value of publicly held shares based on (i) an independent third-party valuation of the company and (ii) the most recent trading price for the company's common stock in a trading system for unregistered securities operated by a national securities exchange or a registered broker-dealer. Alternatively, a company could meet this requirement by evidencing a market value of publicly held shares of at least \$250 million.</p>
Primary Direct Floor Listing	<p>The NYSE also proposed to create a new type of direct listing where a company that had not previously had its common equity securities registered under the Exchange Act would list its common equity securities on the Exchange at the time of effectiveness of a registration statement pursuant to which the company would sell shares itself in the opening auction on the first day of trading on the Exchange, in addition to (or instead of) facilitating sales by selling shareholders (a "Primary Direct Floor Listing").</p> <p>In this type of direct listing, the Exchange would have discretion, on a case-by-case basis, on whether to permit a company to list in connection with either a Selling Shareholder Direct Floor Listing or a Primary Direct Floor Listing.</p> <p>The NYSE will require companies interested in undergoing this direct listing to sell at least \$100 million in market value of shares in the Exchange's opening auction on the first day of trading on the Exchange or to evidence that the aggregate market value of the shares that it will sell in the opening auction on the first day of trading is at least \$250 million (which is calculated using a price per share equal to the lowest price of the price range established by the issuer in its registration statement).</p>

Other Requirements

The NYSE noted that any company listing in connection with either a Selling Shareholder Direct Floor Listing or Primary Direct Floor Listing would be required to comply with all other applicable initial listing requirements, including Section 102.01A's requirement to have at least 400 shareholders of round lots and 1.1 million publicly held shares outstanding at the time of initial listing and Section 102.01B's requirement to have a price per share of at least \$4.00 at the time of initial listing.

Capital Markets & Securities Law Watch will continue to monitor any changes to the NYSE's direct listing process and provide updates to our readers on how direct listings change access to capital markets in the future.

[1] See SEC Release, 34-89684, "Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Chapter One of the Listed Company Manual to Modify the Provisions Relating to Direct Listings" (Aug. 26, 2020), p. 24. SEC Releases are available at their [website](#).

[2] *Id.* at p. 25.

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Authors

[Michael J. Blankenship](#)

[J. Eric Johnson](#)

[John P. Niedzwiecki](#)

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Michael J. Blankenship



J. Eric Johnson



John P. Niedzwiecki

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