

**August 31, 2020**

# **SEC Approves NYSE New Primary Direct Floor Listing Proposal**

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On August 26, 2020, the U.S. Securities and Exchange Commission (SEC) announced its approval of the New York Stock Exchange (NYSE) proposal to create a new type of direct listing (referred to by the SEC as a “Primary Direct Floor Listing”) that allows a company to issue new shares and sell them to the public in a large transaction on the first day of trading, similar to the first day of trading for an initial public offering (IPO). Previously, companies could only use a direct listing to let existing investors sell shares. This is the path taken by Spotify and Slack. With a Primary Direct Floor Listing, a company can allow existing investors to sell their shares while concurrently selling newly issued shares to the public.

A Primary Direct Floor Listing allows a company to float its shares on an exchange without hiring investment banks to underwrite the transaction as in an IPO. This saves on investment banking fees (3-7% commission) and may avoid restrictions such as lockup periods that prevent insiders from selling their shares for 180 days after the IPO. A Primary Direct Floor Listing may offer greater liquidity, allowing existing shareholders to sell shares directly to the public, enables market-driven pricing, and avoids the roadshow process.

The NYSE proposed the change in November 2019 requesting that listed companies be allowed to raise capital and go public through a direct listing, provided the company sells shares worth at least \$250 million. The proposal was originally rejected in December 2019, but after two rounds of comments and an amendment to the proposal (“Amendment 2” proposed in June 2020), the SEC finally approved the change.

The SEC made several comments in its announcement supporting alternative IPO formats, including that “issuers should be offered choices that match their objectives so long as they protect the integrity of the markets and are fair and clear to investors” and that “allowing for multiple pathways for

private companies to achieve exchange listing would encourage more companies to participate in public equity markets and provide investors a broader array of attractive investment opportunities.”

The Council of Institutional Investors, a group of pension funds and other money managers, criticized the NYSE proposal in its July comment letter claiming investors in a direct listing “may have fewer legal protections than if they purchased the shares in a regular IPO because they may not be able to trace their shares to a registration statement and determine the amount of damages based on an offering price.”

Despite dissenting viewpoints, the SEC believes there are reasonable steps in place to help ensure that direct listing participants comply with federal securities laws and that the proposed changes are consistent with the Securities Exchange Act, and its goal to prevent manipulative acts and practices, and protect investors and the public interest.

With the coronavirus pandemic and wild volatility in the markets, an IPO exit has become a less certain path. This has increased the use of special purpose acquisition companies (SPACs), formed without existing business operations to raise money through an IPO for the purpose of acquiring an unnamed target company, and receiving their money back if a company is not acquired. There have been 67 SPAC offerings globally (61 U.S.) in the past year, nearly a fifth of the total IPO funds. However, this new SEC option allowing for direct listings provides similar advantages to SPACs and companies may now choose to opt for the NYSE’s Primary Direct Floor Listing. On August 24, 2020, Nasdaq also requested that the SEC permit direct listings onto its markets.

Michael Best’s Securities & Capital Markets team has experts who advise public and private companies on compliance with the SEC regulations. Please do not hesitate to contact a member of the Securities & Capital Markets team for additional information on this change how it could assist your company in meeting its goals.

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