

A CURRENT GUIDE TO DIRECT LISTINGS

To Our Clients and Friends:

Direct Listings: An evolving pathway to the public capital markets.

Direct listings have increasingly been gaining attention as a means for a private company to go public. A direct listing refers to the listing of a privately held company's stock for trading on a national stock exchange (either the NYSE or Nasdaq) without conducting an underwritten offering, spin-off or transfer quotation from another regulated stock exchange. Under current stock exchange rules, direct listings involve the registration of a secondary offering of a company's shares on a registration statement on Form S-1 or other applicable registration form filed with, and declared effective by, the Securities and Exchange Commission, or the SEC.^[1] Existing shareholders, such as employees and early-stage investors, whose shares are registered for resale are able to sell their shares on the applicable exchange, but are not obligated to do so, providing flexibility and value to such shareholders by creating a public market and liquidity for the company's stock. Upon listing of the company's stock, the company becomes subject to the reporting and governance requirements applicable to publicly traded companies, including periodic reporting requirements under the Securities Exchange Act of 1934, as amended, and governance requirements of the applicable exchange.

Companies may pursue a direct listing to provide liquidity and a broader trading market for its shareholders; however, the listing company can also benefit. Forecasting a direct listing may make the listing company's equity more attractive to potential investors while the company is still private and provide greater process control to the company as it goes public. For instance, the traditional roadshow has been replaced in some direct listings by an investor day whereby the company invites investors to learn about the company one-to-many, such as via a webcast, which can be considered more democratic as all investors have access to the same educational materials at once. In addition, equity that will be publicly traded can serve as a more attractive acquisition currency, both before and after listing. Most significantly, listing provides a company with optionality to use the public capital markets to raise cash, typically lowering its cost of capital and increasing flexibility in capital planning.

Companies have not raised fresh capital as part of the direct listing process, but the NYSE recently proposed changes to its rules that would allow a primary offering along with, or in lieu of, a direct secondary listing.^[2]

Advantages of a direct listing as compared to an IPO.

Immediate Benefits to Existing Shareholders.

All shareholders whose shares are registered on the resale shelf registration statement will have the opportunity to participate in the first day of trading of the company's stock. Shareholders who choose to sell are able to do so at market trading prices, rather than only at the initial price to the public set in an IPO. The ability to sell at market prices on the first day of a listing can be a significant benefit to existing shareholders who elect to sell. However, this benefit assumes there is sufficient market demand for the shares offered for resale.

Potentially Wider Initial Market Participation.

The traditional IPO process includes a focused set of participants, and institutional buyers tend to feature prominently in the initial allocation of shares to be sold by the underwriting syndicate. In a direct listing, any prospective purchasers of shares are able to place orders with their broker-dealer of choice, at whatever price they believe is appropriate, and such orders become part of the initial reference price-setting process.

Flexibility in Timing of Public Announcement.

IPO marketing has become more flexible since the introduction of rules providing for "testing-the-waters" communications by Emerging Growth Companies and, starting December 3, 2019, all companies.^[3] However, a direct listing allows a company to avoid the rigidity of the traditional roadshow conducted for a specified period of time following the publicly announced launch of an IPO and allows it to tailor marketing activities to the specific considerations underlying the direct listing. These marketing efforts may include one or more investor days and a roadshow-like presentation, conducted at times deemed most advantageous (although the applicable registration statement must still be publicly filed for at least 15 days in advance of any such marketing efforts). Although the approximate timing of the direct listing can be inferred from the status of the publicly filed registration statement, the company may have more flexibility as to the day its shares commence trading on the applicable stock exchange.

Brand Visibility.

As direct listings are still a novel concept in U.S. capital markets, any direct listing with moderate success will likely draw broad interest from market participants and relevant media. This effect is multiplied when the listing company has a well-recognized brand name.

No Underwriting Fees.

A direct listing can save money by allowing companies to avoid underwriting discounts and commissions on the shares sold in the IPO. However, the company will still incur significant fees to market makers or specialists, as applicable, independent valuation agents, auditors, legal counsel, and a financial advisor.

No Lock-up Agreements.

Existing management and significant shareholders are not typically subject to the restrictions imposed by 180-day lock-up agreements standard in IPOs. Notwithstanding, as practice evolves, investors may expect certain key players will be subject to lock-up arrangements, as was the case with Spotify's largest non-management shareholder.

Certain issues to consider before choosing a direct listing.

Establishing a Price Range and Initial Reference Price.

No marketing efforts are permissible without a compliant preliminary prospectus on file with the SEC, and such prospectus must include an estimated price range. In a traditional IPO, the cover page of the preliminary prospectus contains a price range of the anticipated initial sale price of the shares. In a direct listing, the current market practice is to describe how the initial reference price is derived (e.g., by buy and sell orders collected by the applicable exchange from various broker-dealers). These buy and sell orders have in the past been largely determined with reference to high and low sales prices per share in recent private transactions of the subject company. In cases where a company does not have such transactions to reference, additional information will be necessary to educate and assist investors and help establish an initial bid price. In addition, the listing company may elect to increase the period between the effectiveness of its registration statement and its first day of trading, thereby allowing time for additional buy and sell orders to be placed. The financial advisor to the company will play an important role in this process, as discussed below.

Financial Advisors and their Independence.

The rules of both the NYSE and Nasdaq require that the listing company appoint a financial advisor to provide an independent valuation of the listing company's "publicly held" shares and, in practice, assist the applicable exchange's market maker or specialists, as applicable, in setting a reference price. In past direct listings, in particular those involving the NYSE, the financial advisor that served this role was not the financial advisor the listing company engaged to advise generally, including to assist the company define objectives for the listing, position the equity story of the company, advise on the registration statement, and assist in preparing presentations and other public communications. As reviewed in detail below, the financial advisor that values the "publicly held" shares and assists the applicable exchange's market maker or specialists, as applicable, must be independent, which under the relevant rules disqualifies any broker-dealer that has provided investment banking services to the listing company within the 12 months preceding the date of the valuation.

Shares to be Registered.

In a direct listing, a company generally registers for resale all of its outstanding common equity which cannot then be sold pursuant to an applicable exemption from registration (such as Rule 144), including those subject to registration rights obligations. The company may register shares held by affiliates and non-affiliates who have held the shares for less than one year or otherwise did not meet the requirements for transactions without restriction under Rule 144.^[4] Companies may also register shares held by

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employees to address any regulatory concerns that resales of shares by employees occurring around the time of the direct listing may not have been entitled to an exemption from registration under the Securities Act. All shares subject to registration may be freely resold pursuant to the registration statement only as long as the registration statement remains effective and current. The company will typically bear the related costs.

Direct Listing-specific Risks.

Traditional IPOs offer certain advantages that are not currently present in direct listings. Going public without the structure of an IPO process is not without risk, such as the need to obtain research coverage in the absence of an underwriting syndicate that has research analysts or the need to educate investors on the company's business model. Any company considering a direct listing should contemplate whether its investor relations apparatus is capable of playing an outsized role in coordinating marketing efforts and outreach to potential investors. Notably, in a direct listing, the listing company's management plays no role in setting the initial reference price, and certain market-making activities conducted by the underwriting syndicate may be unavailable. This may present unacceptable risks for companies that may otherwise be poised to undertake a direct listing.

The NYSE and Nasdaq rules applicable to a direct listing.

Background

The direct listing rules of both the NYSE^[5] and Nasdaq Global Select Market^[6] are substantially similar and are structured as an exception to each exchange's requirement concerning the aggregate market value of the company to be listed. Prior to the direct listing rules, companies that did not previously have their common equity registered under the Exchange Act were required to show an aggregate market value of "publicly held" shares in excess of \$100 million (\$110 million for Nasdaq Global Select Market, under certain circumstances), such market value being established by both an independent third-party valuation and recent trading prices in a trading market for unregistered securities (commonly referred to as the Private Placement Market).

"Publicly held" shares include those held by persons other than directors, officers and presumed affiliates (shareholders holding in excess of 10%). The Private Placement Market includes trading platforms operated by any national securities exchange or registered broker-dealers. Generally, in a direct listing, the relevant company either (i) does not have its shares traded on a Private Placement Market prior its listing or (ii) underlying trading in the Private Placement Market is not sufficient to provide a reasonable basis for reaching conclusions about a company's trading price.

Recent Expansion of Markets

On August 15, 2019, Nasdaq submitted to the SEC proposed rule changes related to direct listings on the Nasdaq Global Market and Nasdaq Capital Market, the second- and third-tier Nasdaq markets, respectively.^[7] On December 3, 2019, subsequent to an amendment of its proposal by Nasdaq filed on November 26, 2019, the SEC approved Nasdaq's proposed rule changes.^[8] The effect of the rule changes is that if the company to be listed does not have recent sustained trading activity in a Private

Placement Market, and thereby must rely on an independent third-party valuation consistent with the rules described above, such calculation must reflect a (i) tentative initial bid price, (ii) market value of listed securities and (iii) market value of publicly held shares that each exceed 200 percent of the otherwise applicable requirements.

Requirements for a Direct Listing

The direct listing rules discussed above were intended to provide relief for privately-held “unicorns,” or companies that are otherwise sufficiently capitalized and which do not need to raise money. Each exchange’s listing standards applicable to direct listings by U.S. companies are summarized, by relevant exchange, in the table that follows:

OVERVIEW OF LISTING STANDARDS APPLICABLE TO DIRECT LISTINGS

	NYSE	NASDAQ GLOBAL SELECT MARKET	NASDAQ GLOBAL MARKET	NASDAQ CAPITAL MARKET
Market Value of Publicly Held Shares (i.e., held by persons other than directors, officers and presumed affiliates)	The listing company must have a recent valuation from an independent third party indicating at least \$250 million in aggregate market value of publicly held shares. (<i>Rule 102.01A(E)</i>)[9]	The listing company must have a recent valuation from an independent third party indicating at least \$250 million in aggregate market value of publicly held shares. (<i>Rule IM-5315-1(b)</i>)[9]	The listing company must have a recent valuation ^[10] from an independent third party indicating in excess of \$16 million to \$40 million in aggregate market value of publicly held shares, depending on the financial standard met below. (<i>Rule 5405</i>)	The listing company must have a recent valuation ¹⁰ from an independent third party indicating in excess of \$10 million to \$30 million in aggregate market value of publicly held shares, depending on the financial standard met below. (<i>Rule 5505</i>)
Financial Standards	The listing company is required to meet one of the following applicable financial standards: (i) Each of (a) aggregate adjusted pre-tax income for the last three fiscal years in excess of \$10 million, (b) with at least \$2 million in each of the two most recent fiscal years	The listing company is required to meet one of the following applicable financial standards: (i) Each of (a) aggregate adjusted pre-tax income for the last three fiscal years in excess of \$11 million, (b) with at least \$2.2 million in each of the two most recent fiscal years and (c)	The listing company is required to meet one of the following applicable financial standards: (i) Each of (a) aggregate adjusted pre-tax income in excess of \$1 million in the latest fiscal year or in two of the last three fiscal years and (b) Stockholders’	The listing company is required to meet one of the following applicable financial standards: (i) Each of (a) Stockholders’ equity in excess of \$15 million and (b) two years of operating history. (ii) Each of (a) Stockholders’ equity in excess of

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	<p>and (c) positive income in each of the last three fiscal years (the “<u>NYSE Earnings Test</u>”).</p> <p>(ii) Global market capitalization of \$200 million (the “<u>Global Market Capitalization Test</u>”).</p>	<p>positive income in each of the last three fiscal years (the “<u>Nasdaq Earnings Standard</u>”).</p> <p>(ii) Each of (a) average market capitalization in excess of \$550 million over the prior 12 months, (b) \$110 million in revenue for the previous fiscal year and (c) aggregate cash flows for the last three fiscal years in excess of \$27.5 million and positive cash flows for each of the last three fiscal years (the “<u>Capitalization with Cash Flow Standard</u>”).</p> <p>(iii) Each of (a) average market capitalization in excess of \$850 million over the prior 12 months and (b) \$90 million in revenue for the previous fiscal year (the “<u>Capitalization with Revenue Standard</u>”).</p> <p>(iv) Each of (a) market capitalization in excess of \$160 million, (b) total assets in excess of</p>	<p>equity in excess of \$15 million.</p> <p>(ii) Each of (a) Stockholders’ equity in excess of \$30 million and (b) two years of operating history.</p> <p>(iii) Market value of listed securities in excess of \$150 million.</p> <p>(iv) Total assets and total revenue in excess of \$75 million in the latest fiscal year or in two of the last three fiscal years.</p>	<p>\$4 million and (b) market value of listed securities in excess of \$100 million.</p> <p>(iii) Total assets and total revenue in excess of \$75 million in the latest fiscal year or in two of the last three fiscal years.</p>
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		\$80 million, and (c) stockholders' equity in excess of \$55 million (the " <u>Assets with Equity Standard</u> ").		
Distribution Standards	<p>The listing company must meet all of the following distribution standards:</p> <ul style="list-style-type: none"> (i) 400 round lot shareholders; (ii) 1.1 million publicly held shares; and (iii) Minimum initial reference price of \$4.00. 	<p>The listing company must meet all of the following liquidity requirements:</p> <ul style="list-style-type: none"> (i) 450 round lot shareholders or 2,200 total shareholders; (ii) 1.25 million publicly held shares; and (iii) Minimum initial reference price of \$4.00. 	<p>The listing company must meet all of the following distribution standards:</p> <ul style="list-style-type: none"> (i) 400 round lot shareholders; (ii) 1.1 million publicly held shares; and (iii) Minimum initial reference price of \$8.00. 	<p>The listing company must meet all of the following liquidity requirements:</p> <ul style="list-style-type: none"> (i) 300 round lot shareholders; (ii) 1 million publicly held shares; and (iii) Minimum initial reference price of \$8.00.
Engagement of Financial Advisor	<p>Any valuation used in connection with a direct listing must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. (<i>Rule 102.01A(E)</i>)</p> <p>A valuation agent will not be deemed to be independent if (<i>Rule 102.01A(E)</i>):</p> <ul style="list-style-type: none"> (i) At the time it provides such valuation, the valuation agent or any affiliated person or persons 	<p>Any valuation used in connection with a direct listing must be provided by an entity that has significant experience and demonstrable competence in the provision of such valuations. (<i>Rule IM-5315-1(e)</i>)</p> <p>A valuation agent shall not be considered independent if (<i>Rule IM-5315-1(f)</i>):</p> <ul style="list-style-type: none"> (i) At the time it provides such valuation, the valuation agent or any affiliated person or persons 	<i>Same as the Nasdaq Global Select Market</i>	<i>Same as the Nasdaq Global Select Market</i>

	<p>beneficially own in the aggregate, as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days.</p> <p>(ii) The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the valuation. For purposes of this provision, "investment banking services" includes, without limitation, acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions), or similar investments;</p>	<p>beneficially own in the aggregate, as of the date of the valuation, more than 5% of the class of securities to be listed, including any right to receive any such securities exercisable within 60 days.</p> <p>(ii) The valuation agent or any affiliated entity has provided any investment banking services to the listing applicant within the 12 months preceding the date of the valuation. For purposes of this provision, "investment banking services" includes, without limitation, acting as an underwriter in an offering for the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital, equity lines of credit, PIPEs (private investment, public equity transactions), or similar investments; serving as placement agent</p>		
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	<p>serving as placement agent for the issuer; or acting as a member of a selling group in a securities underwriting.</p> <p>(iii) The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.</p>	<p>for the issuer; or acting as a member of a selling group in a securities underwriting.</p> <p>(iii) The valuation agent or any affiliated entity has been engaged to provide investment banking services to the listing applicant in connection with the proposed listing or any related financings or other related transactions.</p>		
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Upon satisfaction of the above requirements of the applicable exchange, the exchange will generally file a certification with the SEC, confirming that its requirements have been met by the listing company. After such filing, the company’s registration statement may be declared effective by the SEC (assuming the SEC review has run its course). In practice, the SEC has reviewed registration statements that contemplate a direct listing in substantially the same manner it reviews traditional IPO registration statements, with some additional focus on process as direct listing practice and the related rules evolve. After the registration statement is declared effective by the SEC, the company becomes subject to the governance requirements of the applicable exchange (subject to compliance periods) and the reporting requirements under the Exchange Act. The company may then establish the day its equity will commence trading in consultation with the applicable exchange, which could be the same day as the SEC declares the registration statement effective, assuming the exchange’s market maker or specialists, as applicable, and the financial advisor appointed by the company are able to determine an initial reference price.

NYSE’s proposed rule changes: Primary capital raise via direct listing

Allowing companies to conduct their initial public offering outside of the traditional IPO format (*i.e.*, an underwritten firm commitment) could potentially revolutionize the way in which companies go public. Historically, companies have not raised fresh capital as part of the direct listing process. On December 12, 2019, the NYSE filed a revised proposal with the SEC that seek to allow companies to publicly raise capital through a direct listing – called a “Primary Direct Floor Listing.” The NYSE’s proposal would

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allow a company to sell shares on its own behalf, without underwriters, in addition to or in place of a secondary offering by shareholders. .

Under the NYSE's proposal, companies hoping to conduct a primary offering while listing pursuant to the NYSE's proposed rules would have been required to either:

- sell at least \$100 million in the opening auction on the first day of listing, thereby ensuring that there will be at least \$100 million in public float after the first trade; or
- the aggregate market value of publicly held shares immediately prior to listing and the market value of shares sold by the company in the opening auction is at least \$250 million.

In addition, the NYSE's proposal would create a new 90-day grace period for a listed company to meet the requirement for 400 round lot shareholders - called a "Distribution Standard Compliance Period." To benefit from the NYSE's proposed "Distribution Standard Compliance Period," a company would have been required to:

- conduct a primary offering in which the company sells at least \$250 million in market value of shares in the opening auction on the initial listing date;
- conduct a secondary offering that demonstrates \$350 million in market value of publicly held shares; or
- conduct a primary offering in which the aggregate of the market value of publicly held shares immediately prior to listing and the market value of shares sold by the company in the opening auction is at least \$350 million.

Pursuant to Section 19(b)(2) of the Securities Act, the SEC has 45 days to either approve or disapprove the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved. The SEC could also extend the 45-day period by an additional 45 days if it determines that a longer period is appropriate and publishes the reasons for such determination, as it did with the recently approved Nasdaq rules.

Nasdaq has not to date introduced a proposed rule change that would allow primary registered offerings concurrently with a direct listing. However, Nasdaq is expected to introduce a similar proposal in order to allow it to best compete with the NYSE as the direct listing practice evolves.

Conclusion

Direct listings are a sign of the times. As U.S. companies raise increasingly large amounts of capital in the private markets, the public capital markets need to provide a wider variety of means for a private company to enter the public capital markets and provide liquidity to existing shareholders. Although direct listings will undoubtedly provide new opportunities for entrepreneurial companies with a well-recognized brand name or easily understood business model, we do not expect direct listings to replace IPOs any time soon. Direct listing practice is evolving and involves new risks and speedbumps. Any

company considering an entry to the public capital markets through a direct listing is encouraged to carefully consider the risks and benefits in consultation with counsel and financial advisors. Members of the Gibson Dunn Capital Markets team are available to discuss strategy, options and considerations as the rules and practice concerning direct listings evolve.

[1] Many foreign private issuers have listed their shares, in the form of American Depositary Shares (evidenced by American Depositary Receipts), on U.S. exchanges without a simultaneous U.S. capital raising, seeking such listing in connection with the company’s filing of a registration statement on Form 20-F under the Securities Exchange Act of 1934, as amended, and the depositary bank’s filing of a registration statement on Form F-6 under the Securities Act of 1933, as amended (a so-called “Level II ADR facility”). Such Level II ADR facilities are outside the scope of this article and should be separately considered with the advice of counsel.

[2] The NYSE’s most recent proposal, submitted on December 12, 2019, is available at the following link: <https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2019/SR-NYSE-2019-67%2c%20Re-file.pdf>. The NYSE’s initial proposal, submitted on November 26, 2019, which was withdrawn, is available at the following link: <https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2019/SR-NYSE-2019-67.pdf>.

[3] The SEC’s revision to Rule 163B under the Securities Act of 1933, as amended, which permits “testing-the-waters” communications by all issuers, was adopted on September 25, 2019. The adopting release is available at the following link: <https://www.sec.gov/rules/final/2019/33-10699.pdf>.

[4] The SEC has published a helpful guide concerning Rule 144 transactions that is available at the following link: <https://www.sec.gov/reportspubs/investor-publications/investorpubsrule144htm.html>. Such a transaction is outside the scope of this article and should be separately considered with the advice of counsel

[5] Certain NYSE rules are reviewed herein. The NYSE Listed Company Manual, which contains all of the listing standards and other rules applicable to a company listed on the NYSE, is available at the following link: <https://nyse.wolterskluwer.cloud/listed-company-manual>.

[6] Certain Nasdaq rules are reviewed herein. The Nasdaq Equity Rules, which contain all of the listing standards and other rules applicable to a company listed on Nasdaq, is available at the following link: <http://nasdaq.cchwallstreet.com/>.

[7] The Nasdaq proposal, submitted on August 15, 2019, is available at the following link: <https://www.sec.gov/rules/sro/nasdaq/2019/34-86792.pdf>. Nasdaq’s amendment to its proposal, submitted on November 26, 2019, is available at the following link <https://www.sec.gov/comments/sr-nasdaq-2019-059/srnasdaq2019059-6482012-199454.pdf>.

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[8] The SEC’s adopting release approving the Nasdaq proposal dated August 15, 2019, as amended on November 26, 2019, is available at the following link:
<https://www.sec.gov/rules/sro/nasdaq/2019/34-87648.pdf>.

[9] There must be an independent valuation where a company goes public without an underwriting syndicate that would otherwise represent to the applicable exchange that such exchange’s distribution requirements will be met by the contemplated offering. If consistent and reliable private market trading quotes are available, both the independent valuation and valuation based on private market trading quotes must show a market value of “publicly held” shares in excess of \$100 million (\$110 million for Nasdaq Global Select Market, under certain circumstances).

[10] In lieu of a valuation for listings on the Nasdaq Global Market and Nasdaq Capital Market, the exchange may accept “other compelling evidence” that the (i) tentative initial bid price, (ii) market value of listed securities and (iii) market value of publicly held shares each exceed 250 percent of the otherwise applicable requirements. Under the rules, as amended, such compelling evidence is currently limited to cash tender offers by the company or an unaffiliated third party that meet certain other requirements.



Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact any member of the Gibson Dunn team, the Gibson Dunn lawyer with whom you usually work in the firm’s Capital Markets or Securities Regulation and Corporate Governance practice groups, or the authors:

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