Katten

SECURITIES ADVISORY

Capital Raising During the COVID-19 Pandemic: Offering Structures for a Volatile Market

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KEY POINTS

Global equity markets have been severely impacted by the coronavirus (COVID-19) pandemic, which has resulted in a period of significant market volatility. In the current environment, public companies may find it more challenging to raise capital, particularly through traditional public offerings. Despite market turmoil, alternative offering structures may afford issuers the opportunity to raise capital while avoiding some of the risks and costs associated with traditional public offerings. Securities sold in alternative offerings may also provide investors with attractive investment opportunities. The advantages, disadvantages and legal and business issues related to alternative offering structures are outlined in this advisory. Among other things, this advisory discusses:

- PIPE transactions, which allow issuers to raise capital without an effective Securities Act registration statement at the time securities are sold and provide flexibility to sell securities on customized terms;

- Registered direct offerings, confidentially marketed public offerings, at-the-market (ATM) offerings, and equity lines, which allow issuers and placement agents to quickly and discreetly raise capital by selling freely-tradeable securities; and

- The appeal of alternative offerings, such as structured PIPEs, by public companies to investors, such as private equity firms seeking to deploy capital amidst a weakened mergers and acquisitions market.

As a result of the coronavirus (COVID-19) pandemic, many public companies are facing (or expect to face) reduced cash flows, more limited access to credit markets and other circumstances that may create liquidity concerns. At the same time, turmoil in global equity markets is likely to make capital raising more difficult for a broad array of issuers, particularly in the context of traditional public offerings. In these challenging times, public companies, including those without reasonable access to traditional credit facilities or public debt markets, may be able to avail themselves of alternative offering structures in order to facilitate a capital raise. Hedge funds, private equity funds and other institutional investors are also well served to familiarize themselves with alternative offering structures, which may provide opportunities to deploy capital on attractive terms in the current environment.

Private-investment-in-public-equity (PIPE) transactions, “registered direct” offerings, confidentially marketed public offerings, “at-the-market” offerings (ATMs) and equity lines are five alternatives to traditional public offerings that may prove useful in a difficult market environment. Each of these structures allows eligible domestic and foreign issuers to pursue equity financing quickly when presented with favorable market conditions, while avoiding the potential downward pressure on stock prices that accompanies the announcement of a traditional offering and to manage market and investor expectations regarding offering size and price. PIPE transactions allow issuers to raise capital without an effective Securities Act registration statement at the time securities are sold often at the expense of an illiquidity discount, and provide flexibility to issue securities on customized terms for a particular financing or investor. Registered direct offerings, confidentially marketed public offerings, at-the-market offerings and equity lines are offering structures that, while requiring an effective registration statement when the issuance occurs, enable public issuers and placement agents to quickly, and discreetly, raise capital through the issuance of freely-tradeable securities without the illiquidity discount often associated with a PIPE.

This advisory describes the characteristics of alternative offering structures and summarizes some of the advantages, disadvantages, and legal and business issues attendant to such offerings. Many public companies may need to consider these offering types in the wake of the coronavirus (COVID-19) pandemic, which has had a negative impact on capital raising in the context of traditional public offerings. The advisory also discusses some threshold matters an issuer (and its placement agent) may need to address in advance to ensure the issuer is positioned to execute a transaction when the opportunity presents itself.

Private Investments in Public Equity (PIPEs)

General Characteristics. Over the past decade, private-investment-in-public-equity (PIPE) offerings have been an attractive option for public companies looking to raise capital for the relative efficiency in time and expense. Indeed, despite the overall decline in stock prices that began in February of this year, PIPE markets remained strong during the first quarter of 2020, with PIPE issuers raising approximately $30.31 billion, compared to $20.2 billion in the comparable quarter of 2019, representing a 50 percent increase, according to preliminary data published in *The Deal's* Q1 PIPEs Report. During the week of April 13, alone, 36 PIPEs raised $2.34 billion, according to *The Deal's* April 21 PIPEs Report.

Generally, a PIPE transaction involves a private placement of securities by a public company to one or more accredited investors. The securities sold in a PIPE may consist of common stock, convertible preferred stock, convertible debt, warrants or other equity or equity-linked securities of a public company, including a combination of any of these securities. The securities sold in a PIPE may be sold at a fixed price or may be sold at a variable price, in which investors receive some downside protection for their investment, if there is a downward price fluctuation. Variable priced securities (such as warrants or convertible debt with a “floating” exercise or conversion price, which varies based on the date the security is exercised for, or converted into, the underlying shares of common stock), particularly when combined with a “floor” (i.e., a minimum exercise or conversion price), may also be beneficial to an issuer to the extent they may reduce the size of the discount an investor may demand.

Securities sold in a PIPE (and the common stock issuable upon conversion or exercise of warrants, preferred stock, convertible debt or other securities sold in a PIPE) are “restricted securities” and may only be resold by the investor pursuant to a resale registration statement or pursuant to an exemption from the registration requirements of the Securities Act of 1933. PIPE documentation will typically obligate the issuer to file a resale registration statement covering the securities purchased in the PIPE (or common stock underlying such securities) either prior to, or within a short period of time (e.g., within 30 days) following, the closing date. Regardless of whether such a resale registration statement is filed or becomes effective, securities held by investors that are not affiliates of the issuer will generally be eligible for resale under Rule 144 six months after the closing date. Given the initial illiquidity of PIPE securities, they are typically sold at a greater discount to the market price than comparable securities could be sold in a registered offering. However, some issuers may be able to command a premium to market prices in a PIPE

offering in the context of a structured PIPE. For example, on April 16, Outfront Media Inc. (NYSE: OUT) announced the sale of $400 million of convertible preferred stock to affiliates of two institutional investors. The preferred stock carried a 7 percent dividend (payable in cash or in kind) and was convertible at a price of $16.00 per share, which represented a premium over the previous day's closing price of $11.53 but was significantly lower than pre-COVID-19 highs. PIPE transactions may also accompany non-convertible debt financings, where equity securities form a significant element of transaction value from the lender's perspective, and in some such cases the equity may be priced without a discount to market prices.

Advantages of PIPEs from an Issuer's Perspective. From an issuer's perspective, the principal advantage of a PIPE over a traditional public offering is the ability to raise capital quickly, confidentially and without the expense of a registered offering and without the need for an effective registration statement at the time of the offering. PIPEs are also highly customizable, which provides both the issuer and the lead investor(s) the ability to structure an investment that achieves both parties' economic and other objectives — a sometimes difficult feat in times of market dislocation. Some of the terms that may be negotiated in a PIPE are dividend protection provisions, put and/or call rights triggered upon the occurrence of certain events, anti-dilution provisions, preemptive rights, make-whole and "fundamental change" provisions that provide a premium in the case of a change of control or other significant event, liquidation preferences, voting rights (to the extent permitted by stock exchange rules), , liquidated damage provisions, cashless exercise features, standstills and board representation/board observer rights, among others. The ability to customize a PIPE may also enable an issuer to attract private equity funds, hedge funds and other institutional investors with particular industry expertise that may provide value beyond access to capital. This aspect of PIPE financing was on display in at least one recent transactions. On April 20, The Cheesecake Factory, Inc. (NYSE: CAKE), one of many companies in the restaurant industry whose business — and stock price — have been hit hard by the effects of COVID-19, announced the sale of $200 million of its Series A Preferred Stock to an affiliate of Roark Capital Group, a private equity firm with several nationwide restaurant and food businesses in its portfolio.

Disadvantages of a PIPE from an Issuer's Perspective. The transaction described above notwithstanding, the primary disadvantage of a PIPE offering from an issuer's perspective is the fact that securities are typically sold at a greater discount to the market price than the discount associated with the sale of comparable securities in other offering structures, raising the cost of capital (but without necessarily creating a drain on cash flows) and increasing the dilutive effect on existing shareholders when compared to alternatives. Additionally, the existence of convertible securities, warrants and similar instruments may put downward pressure on a company's stock price as the market anticipates sales on the part of the PIPE investor, particularly if the exercise or conversion price varies (or "floats") with the market price of the underlying security. While the ability to customize PIPEs may be beneficial and may help mitigate dilution and other potentially adverse impacts of a PIPE, the need to negotiate transaction documents may take more time than, for example, a registered direct offering or at-the-market offering. It is also worth noting that PIPEs are subject to the so-called "20 percent rule" of the stock exchange, in which the issuer's securities are listed as well as certain other limitations, as described in further detail below.

Registered Direct Offerings.

General Characteristics. A registered direct offering is a public offering of securities (often consisting of a combination of common stock and warrants) pursuant to an effective shelf registration statement directly to a select group of investors. Similar to the marketing process in PIPE transactions, registered direct offerings typically are marketed to one or more accredited investors, usually through a placement agent, and usually sold pursuant to a purchase agreement with each investor.

The execution of a registered direct offering is not normally subject to risk of delay as a result of Securities and Exchange Commission (SEC) review, as might be the case in the traditional public offering context, because securities are offered and sold pursuant to a registration statement that is already effective prior to the initial marketing and announcement of the offering. Typically, securities sold in a registered direct offering have been

registered on a universal shelf registration statement (i.e., a Form S-3 or, for foreign private issuers, Form F-3, or, in the case of certain Canadian issuers eligible to use the US-Canadian Multijurisdictional Disclosure System, Form F-10), including a base prospectus, that registers the offer and sale of common stock, preferred stock, warrants, debt securities, subscription rights and/or other securities). Depending upon the way in which the registered direct offering is marketed and sold, the registration statement is updated by filing a prospectus supplement that describes the offering. In certain circumstances, it may be advisable to file a Form 8-K or otherwise disclose material information before investors make an investment decision to purchase securities in the offering, if the periodic filings already incorporated by reference into the registration statement do not include sufficient information.

As indicated above, in order to be eligible to undertake a registered direct offering, an issuer must have an effective registration statement on file with the SEC, which typically means that the issuer must be eligible to use Form S-3 for primary offerings (i.e., have a market capitalization of at least $75 million, excluding shares held by affiliates) or be listed on a national securities exchange and not sell more than one-third of its public float in any 12-month period, as well as be current in its public filings, among other requirements). Well-known seasoned issuers, commonly known as “WKSIs,” have the most flexibility, including the flexibility to file an automatically effective registration statement. Issuers that are ineligible to use Form S-3 (or Form F-3 for foreign private issuers) may, as a practical matter, be unable to take advantage of registered direct offering opportunities.

Advantages of Registered Direct Offerings from an Issuer’s Perspective. Registered direct offerings share a number of the same advantages as PIPEs. As with a PIPE, a key advantage of registered direct offerings is that they can be marketed to potential institutional investors before the offering is announced, allowing issuers to test the market without the publicity (and opportunities for arbitrage) associated with traditional public offerings, which may be difficult to close in a volatile market environment. To address selective disclosure concerns, potential investors are typically required to enter into confidentiality agreements before being provided with full information about the offering. Registered direct offerings are typically announced and priced on the same day, and an issuer can therefore avoid the downward pressure on its stock price that frequently occurs between the time a traditional “road show” is first announced and the date the offering is priced. Registered direct offerings, like PIPEs, also provide the issuer with flexibility to offer and sell common stock or any other security (e.g., preferred stock, warrants or debt securities) that is included in its shelf registration statement.

Although registered direct offerings resemble PIPE transactions to the extent that they typically are marketed to a select group of accredited or institutional investors and not purchased by an underwriter on a principal basis, the shares sold pursuant to a registered direct offering are registered with the SEC and, therefore, are freely tradeable in the public market upon issuance, subject to limitations generally applicable to “control securities” held by affiliates of the issuer. As a result, shares sold in a registered direct offering are generally priced more favorably to the issuer than securities sold in a PIPE offering, which often must be sold at a greater discount to prevailing market prices. Also, in contrast to a PIPE, registered direct offerings eliminate the need to prepare and file a resale registration statement with respect to the offered securities following the closing because the securities have already been registered (i.e., they are not “restricted securities”).

Disadvantages of Registered Direct Offerings from an Issuer’s Perspective. An issuer must have a shelf registration statement (on Form S-3, Form F-3 or Form F-10, as noted above) for a primary offering that is already effective in order to conduct registered direct offerings (though WKSIs can file an automatic shelf registration statement, which is immediately effective, for this purpose). Accordingly, an issuer seeking to maximize flexibility would be well served to ensure it has an effective shelf registration statement with sufficient registered securities to facilitate a potential offering.

Registered direct offerings also typically require a placement agency agreement, and placement agents (who are subject to underwriter liability under Federal securities laws because registered direct offerings are public offerings under these laws) typically conduct due diligence, which may include the need to obtain comfort letters and engage in other aspects of the diligence conducted in connection with an underwritten public offering, although the extent of diligence

may vary depending upon the nature of the investors and the terms of the transaction. The up-front cost of a shelf registration statement, due diligence and negotiating a placement agency agreement cannot be recouped if an issuer is not successful in its efforts to raise capital. The fees payable to a placement agent are often higher in a registered direct offering than in some of the other transactions described in this advisory, particularly ATMs. Moreover, while registered direct offerings engender the liability exposure of a public offering, they are usually not treated as "public" offerings for purposes of stock exchange rules because they do not typically involve sufficient public marketing efforts and, accordingly, are subject to stock exchange limitations on private placements (which are discussed below).

Confidentially Marketed Public Offerings (CMPOs).

General Characteristics. A CMPO is an offering of securities registered on a shelf registration statement on Form S-3 and taken down when market opportunities arise. Much like a registered direct offering, in a CMPO, an underwriter (rather than a placement agent) confidentially markets a potential CMPO to a small number of institutional investors, often without initially disclosing the name of the issuer, until the potential investor provides an indication of its firm interest and agrees not to trade in the issuer's securities until the CMPO is either completed or abandoned. The investor can then be brought "over the wall" to negotiate the terms of the CMPO, after which the offering "flips" from confidential to a public offering involving a prospectus and other public filings that inform the market of the CMPO. The public offering period usually takes place overnight following the announcement of the CMPO and is designed to potentially attract additional investors and to demonstrate marketing efforts required for the transaction to be considered a "public" offering within the meaning of applicable stock exchange rules.

Advantages of a CMPO from an Issuer's Perspective. One of the main benefits of a CMPO is the flexibility offered to the issuer to raise capital as needed. A CMPO is also initially confidential by design, and the time between flipping to a public offering and completion of the CMPO is typically very short (compares to traditional public offerings, which are frequently marketed for a longer period of time following their initial announcement). If, for any reason, the CMPO is abandoned, the market is not typically made aware of that fact, and the issuer mitigates or avoids the associated downward pricing pressure usually triggered by an abandoned offering. Additionally, similar to a registered direct offering, since the securities in a CMPO are sold pursuant to an effective registration statement, the securities can be immediately resold by investors and, consequently, may not be subject to as great an illiquidity discount to market prices as might be the case in an alternative offering structure. Unlike most registered direct offerings, however, assuming the marketing effort during the brief public offering period is sufficient to satisfy stock exchange requirements for a "public" offering, a CMPO will not be subject to the "20 percent rule" described below.

Disadvantages of a CMPO from an Issuer's Perspective. As is the case with registered direct offerings and ATMs, as described and discussed below, prior to conducting a CMPO, the issuer must have an effective registration statement on Form S-3 or Form F-3 (or, in the case of certain Canadian issuers eligible to use the US-Canadian Multijurisdictional Disclosure System, Form F-10), as applicable. Even assuming that an issuer is eligible to use Form S-3 or Form F-3 for a primary offering, an issuer with a smaller market capitalization, as is often the case for issuers pursuing CMPOs, may find that the SEC rules restricting the amount of securities that may be offered and sold in a primary offering undermines, at least in part, the value of a CMPO compared to a registered director offering. In addition, the public offering phase of a CMPO must satisfy the applicable Nasdaq or New York Stock Exchange (NYSE) criteria to qualify as a "public offering." If a CMPO does not qualify as a "public offering," additional exchange rules may be implicated, including the requirement to obtain shareholder approval under the 20 percent rule, as described below in more detail. In addition to the technical legal issues involved in conducting a CMPO, an issuer may find the due diligence process to be challenging because of the often compressed timelines for CMPOs that may cause the underwriters' due diligence to consist of a barrage of activity in a short period of time. In that regard, underwriters of public securities offerings seeking to establish their due diligence defense to avoid Securities Act liability, have recently been engaging in expanded due diligence in order to evaluate the impact of the COVID-19 pandemic on an issuer's business and the adequacy of the issuer's disclosure.

At-the-Market Offerings (ATMs).

General Characteristics. An at-the-market offering (which is sometimes also referred to as an "ATM," "continuous offering program" or an "equity distribution program") is a public offering of securities in which the issuer sells shares of its common stock, through a sales agent, into the public market over time at market prices (rather than at a fixed price). As is the case with registered direct offerings, prior to conducting an ATM, the issuer must have an effective registration statement on Form S-3 or Form F-3, as applicable. To facilitate an ATM, the issuer will enter into a distribution or sales agreement with one or more sales agents. The issuer engages the sales agent(s) to sell shares of its common stock into the market at various prices, and the sales agent agrees to use reasonable efforts to sell the shares publicly (or purchase from the issuer, as principal), in accordance with the issuer's directives (e.g., based on a maximum number of shares or a maximum aggregate offering price and the duration of the offering, as well as any other material terms) but generally without any requirement that the issuer sell any particular number of shares pursuant to the program. Since sales in an ATM may be completed in multiple transactions executed over an extended period of time, the distribution agreement typically prohibits an issuer from placing sales orders with the sales agent when the insider trading window is closed, in accordance with the issuer's insider trading policy, and at other times when the issuer possesses material, non-public information.

Advantages of ATMs from an Issuer's Perspective. Due to the volatility in the market and the many unknowns public companies face in the wake of the COVID-19 pandemic, ATMs may be uniquely appealing to issuers that want the flexibility to raise capital on an as-needed basis. In fact, according to data compiled by The Deal, issuers have raised an aggregate of approximately $3.7 billion through 30 ATM transactions completed since March 13 (compared to approximately $10.6 billion in 71 ATM transactions during the first two and a half months of 2020). ATM equity offerings work well in the volatile equity markets because they allow public company issuers and placement agents to put an ATM program in place and then wait and raise capital quickly with limited additional advance disclosure (minimizing arbitrage opportunities) when market conditions are appropriate. Moreover, once an ATM program is in place, a company can raise capital under the program without requiring management to devote substantial time and resources to marketing efforts, and transaction costs are fairly predictable.

Disadvantages of ATMs from an Issuer's Perspective. As is the case with a registered direct offering, an issuer must have a shelf registration statement on Form S-3 (or Form F-3 for foreign private issuers) for a primary offering already effective in order to conduct ATMs (though WKSIs can file an automatic shelf registration statement, which is immediately effective, for this purpose). As with any public offering, both the issuer and the distribution agent will need to be comfortable that the issuer's public disclosure is adequate and current, and free of material misstatements or omissions at any time when the securities are being sold. Accordingly, distribution agreements provide for customary underwriter protections, including accountant comfort letters, opinions of counsel, representations and warranties of the issuer and certificates to the agent from officers of the issuer, and placement agents will need to perform satisfactory due diligence. The distribution agent will require that certificates and other documents be updated periodically and require ongoing "bring-down" due diligence. Diligence requirements associated with ATMs result in up-front costs for the issuer (and the agent, though distribution agreements often provide that the agent's fees will be reimbursed under some circumstances), even if little or no capital is raised. However, these up-front costs avoid the need to start due diligence and documentation from scratch at the time the issuer is looking to raise capital, as is the case in a customary public offering. While ATM programs are useful for issuers seeking to raise relatively small amounts over an extended period of time, they are not designed to raise a substantial amount of capital in a single offering.

Equity Lines

General Characteristics. In an equity line, an issuer enters into an agreement with an investor pursuant to which the investor agrees to purchase securities from the issuer if certain conditions are met. After the issuer and the investor execute the definitive agreements to establish the equity line, the issuer files a resale registration statement

covering the resale by the investor of the securities subject to the equity line. The registration statement must be declared effective before the issuer can "draw" upon the equity line and effectively "put" the subject securities to the investor. Sometimes referred to as an "equity line of credit," these arrangements allow an issuer to draw against its equity on an as-needed basis, typically for a period of months, by selling registered shares to an investor for cash.

Advantages of Equity Lines. Similar to an ATM, an equity line can provide an issuer with access to cash from time to time, which may be particularly important in the current economic climate, including in order to fulfill an issuer's ongoing working capital obligations. Investors may also favor an equity line over other forms of investment because the securities are purchased over time in tranches at a pre-determined discount to the market prices (which may be based on forward or backward pricing formulas) of the issuer's common stock , which allows investors to cost average their investments over time (rather than bearing the price risks associated with a one-time investment).

Disadvantages of Equity Lines. Since equity lines are drawn upon by the issuer as needed, it is not likely to be the preferred form of offering by an issuer that needs an immediate, one-time cash infusion into its business. Also, because the shares to be sold to the investor in an equity line must be registered on an effective resale registration statement, which the SEC may or may not choose to review, there may be additional fees and delays or uncertain timing for receiving a much-needed cash infusion. Moreover, there is a limited number of firms that provide this type of financing.

Additional Considerations

Stock Exchange Requirements

Both Nasdaq and the NYSE require listed companies to obtain shareholder approval for certain issuances of common stock or securities convertible into common stock, including the issuance of securities representing 20 percent or more of the issuer's outstanding common stock or voting power at a price below the minimum market price (as determined under applicable exchange rules) or in connection with an acquisition (which we refer to in this advisory collectively as the "20 percent rule"). Under applicable Nasdaq and NYSE rules, "public offerings" are exempt from the 20 percent rule. The fact that an offering is registered with the SEC does not necessarily mean that the offering is "public" for purposes of the 20 percent rule. Nasdaq, for example, will consider the particular facts and circumstances of the transaction in determining whether the offering was public, including the number of offerees and the manner in which the offering was marketed. Accordingly, while a registered direct offering is, by definition, a public offering for securities law purposes, such a transaction may be considered by the exchanges to be a private placement, and, consequently, subject to the applicable 20 percent rule. By contrast, CMPOs are typically not affected by the 20 percent rule because they involve firm commitment underwritten offerings and are generally marketed in a manner that causes the exchanges to consider them "public offerings."

Although PIPE transactions are clearly subject to the 20 percent rule, issuers, investors and their advisors have been able to structure investments (e.g., through the use of convertible securities, conversion limits and cash settlement provisions) in appropriate circumstances in accordance with exchange guidance to permit the issuer to obtain requisite shareholder approval *after* a PIPE transaction has been completed, allowing the PIPE to be completed without the need to wait for a shareholder meeting to be held, which can be a timely process. It is also worth noting that both of the exchanges also provide for exceptions from the shareholder approval requirement if, subject to certain conditions, an issuer faces financial hardships that require prompt access to capital (the so-called "financial viability" exception to the 20 percent rule). In order to avail itself of the financial viability exception, an issuer must demonstrate that a delay in securing shareholder approval, as required under the 20 percent rule, would "seriously jeopardize the financial viability" of the issuer and that the issuer's audit committee or other comparable body of the issuer's board of directors has expressly approved reliance on the financial viability exception. Since there is a high standard for proving that obtaining shareholder approval would seriously jeopardize the issuer's financial viability, it is generally difficult for an issuer to obtain approval from the applicable exchange to rely upon the financial viability exception. However, in light of the COVID-19 pandemic, Nasdaq issued guidance, indicating that, in reviewing

requests by issuers to rely upon the financial viability exception, NASDAQ will consider the impact of disruptions caused by COVID-19. As of the date of this advisory, the NYSE has not provided comparable guidance, and neither the NYSE nor Nasdaq has indicated that it will lower the standard required for an issuer to be able to rely upon the financial viability exception in the current market environment. If an issuer is approved by the applicable exchange to rely on the financial viability exception, the issuer must mail to all of its shareholders, no less than 10 days before the issuance of the securities, a letter informing them that (1) the issuer will not be seeking shareholder approval for the offering and (2) the audit committee approved the issuer's reliance on the financial viability exception.

In addition to the 20 percent rule, under NYSE rules, subject to certain exceptions, an NYSE-listed issuer must obtain shareholder approval for any issuance to company insiders, including its directors, officers and holders (including groups of holders) of 5 percent or more of the issuer's common stock and certain of their affiliates of common stock (or securities exercisable for or convertible into) in excess of 1 percent of its common stock or voting power, in either case, that was outstanding immediately prior to the issuance. Generally, Nasdaq does not have an explicit restriction on related party transactions. However, Nasdaq Rule 5635(a)(2) requires shareholder approval in connection with an acquisition, if any director, officer or substantial shareholder that has a 5 percent or more interest (or, in the aggregate, such persons have a 10 percent or more interest) in the issuer or the assets to be acquired, and the issuance could result in an increase in outstanding common stock or voting power of 5 percent or more, and Nasdaq Rule 5635(c) requires shareholder approval in connection with an issuance to an employee, officer or director priced at a discount, if the issuance is considered equity compensation.

On April 6, the SEC announced that, in an effort to facilitate capital raising in the wake of COVID-19, the NYSE filed a rule change with the SEC that, effective immediately and through and including June 30, waived certain aspects of the shareholder approval requirements otherwise applicable to NYSE-listed companies under the 20 percent rule and in connection with related party transactions are, subject to certain conditions. The full text of the SEC's announcement of the NYSE's partial waiver is available here , and a more fulsome discussion of the waiver is included in the April 17 edition of Corporate and Financial Weekly Digest.

In addition to the 20 percent rule, both NYSE and Nasdaq requiring shareholder approval prior to a securities issuance would result in a change of control of the issuer, even if issued in a public offering.

Organizational Documents and Anti-Takeover Provisions

Even if the exchanges do not require shareholder approval, issuers should review their organizational documents to ensure that (1) there are sufficient authorized shares available for issuance in the transaction, and (2) if shares of preferred stock will be issued, the issuer has available blank check preferred stock to enable the issuer's board to establish the rights, preferences and other terms applicable to such shares. If there are insufficient shares authorized and available for issuance, a company may need to amend its charter to increase the number of authorized shares, which amendment is typically subject to shareholder approval. In the case of a transaction that is led by (or comprised of) a single large investor, the issuer and the investor should also consider whether anti-takeover provisions (e.g., poison pills) might be implicated by the completion of a financing transaction. Even in the absence of a single large investor, the issuer and the investor should consider whether any preemptive rights or other anti-dilution provisions would be triggered by the offering (unless waived), which may be of particular concern when the offering is a down round financing relative to the issuer's prior equity financing transactions.

Third Party Agreements

Issuers should be mindful of the amount and type of securities that are being issued, as there may be circumstances in which a capital raising transaction could result (or be deemed to result) in a change of control under the issuer's third party agreements, including its equity incentive plans, its credit agreement or other documentation of indebtedness and its other contracts with third parties.

In addition, issuers should review their credit agreements and other indebtedness documents to confirm that the proposed issuance, whether of equity securities or securities convertible into equity, will comply with the covenants in those agreements, including, for example, any requirements relating to the use of the proceeds from the issuance.

Disclosure and Insider Trading Issues

Regardless of the type of transaction being pursued, even if the securities to be issued are initially unregistered (as would be the case in a PIPE), or if the issuance is not considered by the exchanges to be a "public offering" (as is typically the case in registered direct offerings), issuers remain subject to general anti-fraud rules, including Rule 10b-5 and, in the case of a transaction pursuant to a registration statement, are also subject to potential liability under Sections 11 and 12 of the Securities Act of 1933, for material misstatements or omissions in connection with both the sale of those securities and public disclosures to existing investors regarding the status of any capital raising transactions. In light of these rules and the general duty to disclose material information or abstain from trading, reporting companies that are considering, or actively engaging in, any such offerings at this time are cautioned to ensure their disclosures regarding the impact of the COVID-19 pandemic are materially complete and accurate and to revise or update disclosures to the extent necessary. Reporting companies relying on a shelf registration statement in particular may need to review their disclosure package and revise, or update, disclosures through periodic or current reports, such as by adding updates to their risk factors, among other COVID-19 related disclosure described in our advisory published on April 1, entitled, "COVID-19 Impact on Public Disclosure on SEC Reporting Companies."

Companies conducting capital-raising transactions are also likely to face challenging Regulation FD questions and other issues related to MNPI. As the SEC's Division of Enforcement underscored in its statement regarding market integrity on March 23, public companies should be mindful of their insider trading prohibitions, and other policies and procedures, in order to "ensure to the greatest extent possible that they protect against the improper dissemination and use of material nonpublic information." The fact that an issuer is contemplating a capital-raising transaction may itself constitute MNPI. Accordingly, an issuer should evaluate and, during the course of any offering, may need to re-evaluate whether such an offering can be conducted, when the company or its corporate insiders are in possession of MNPI, particularly if a blackout period has been imposed. While there is no legal prohibition on conducting an offering during a regularly scheduled blackout period, an issuer may find it particularly challenging to fulfill its disclosure obligations to investors in an offering, including with respect to the issuer's performance, when a fiscal quarter is about to end or has recently been completed and prior to its public announcement of earnings for that quarter. In that context, issuers determined to proceed with an offering may determine to either publicly disclose the MNPI or disclose the MNPI solely to the investors in the offering. If an issuer plans to disclose any MNPI solely to investors or potential investors in the offering, as previously mentioned, issuers typically require investors to enter into confidentiality agreements that obligate them to keep any MNPI confidential and not to trade in the issuer's securities until the cleanse date — the earlier of the date on which the MNPI has been disclosed to the public (which may be subject to a deadline imposed by the confidentiality agreement), and the date on which the MNPI is no longer material. Ultimately, any MNPI related to an offering would ordinarily be disclosed in a prospectus supplement and/or in a current report on Form 8-K.

Role of the Board

As with traditional public offerings, the board of directors plays an important role in connection with each of the offering alternatives described in this advisory. Before approving an offering, a company's board may want to consider the various capital raising options available to the company and the advantages and disadvantages of various options to the company's shareholders, taking into account the advice of their legal and financial advisors. Among the factors for a board to consider are the potentially dilutive effective of the offering and the impact of any discount to the market price that investors may require. Boards of directors should also be mindful of the accuracy and adequacy of disclosure in connection with any registered offering.

Other Requirements

There may be additional requirements for issuers and placement agents to consider in connection with the offering structures discussed in this advisory. For example, participants in a "distribution," such as issuers, underwriters and certain broker dealers, are subject to Regulation M, which, generally speaking, restricts certain market activities by such participants for a period of time following the offering. Filings with, and clearance by, FINRA may also be required in connection with a certain offering. While FINRA regulations generally apply to its members, an issuer filing a shelf registration statement can help facilitate future takedowns by filing its form S-3 (or Form F-3) with, and having it cleared by, FINRA at the time the registration statement is declared effective by the SEC, rather than pursuing the FINRA clearance process at the time of an offering.

This advisory is a summary for general information and discussion only. It is not a full analysis of the matters presented and may not be relied upon as legal advice. Any company exploring or pursuing any of the transactions described above should consider engaging directly with legal counsel. To help our clients navigate the legal and business challenges posed by COVID-19, we have established a Coronavirus (COVID-19) Resource Center (accessible here).

CONTACTS

As the COVID-19 situation continues to evolve, please regularly consult the COVID-19 Resource Center. For more information, or if you have any questions regarding any of the topics discussed in this advisory, please contact the authors of this advisory directly: Mark Wood, Jonathan Weiner and Alyse Sagalchik; the other members of the Katten Corporate Securities Practice listed below; or your primary Katten attorney.

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