

NYSE American Amends Shareholder Approval Requirements

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by Christopher L. Doerksen

The NYSE American stock exchange requires a listed company to obtain shareholder approval prior to issuing shares pursuant to (i) stock-based compensation plans, (ii) certain acquisitions and change of control transactions, and (iii) certain other transactions that may result in the issuance of more than 20% of the previously outstanding shares (the “20% Rule”). Effective March 6, 2025, the NYSE American amended the 20% Rule. Previously, the 20% Rule contained an exemption for (x) a transaction that the NYSE American deems to be a “public offering” under a multi-factor test (the “Public Offering Exception”), and (y) any other transaction at a price not less than the greater of book or market value per share (the “Pricing Exception”). In administering the Pricing Exception, the NYSE American has historically considered the market value per share to be the most recent closing price on the NYSE American prior to the signing of the binding agreement for the issuance. Therefore, an issuer seeking to rely on the Pricing Exception was required to sell shares at a price not less than the greater of the latest closing price or book value per share, whichever was higher.

Effective March 6, 2025, the Pricing Exception was amended in a manner that should make it easier for transactions to qualify for the Pricing Exception. As amended, the Pricing Exemption no longer requires consideration of the issuer’s book value per share. In addition, the market price requirement has been replaced with a “Minimum Price” requirement, where the Minimum Price is now defined as the lower of (i) the most recent closing price on the NYSE American prior to the signing of the binding agreement for the issuance, and (ii) average closing price on the NYSE American for the five trading days immediately preceding the signing of the binding agreement. As a result, parties to a transaction will be able to take advantage of the Pricing Exception to permit an issuance of shares in excess of 20% of the outstanding shares, without shareholder approval, at a price that is lower than the most recent NYSE American closing price, as long as that price is not also lower than the average NYSE American closing price over the last five trading days. This could be particularly useful to parties pricing a transaction during a time that the share price is increasing. The amended rule also clarifies that the Pricing Exemption is available only for a cash transaction, and not an exchange offer.

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The amendments to the 20% Rule do not affect the Public Offering Exception, which remains a part of the 20% Rule, nor does it eliminate the ability of a foreign issuer to claim an exemption from the 20% Rule if it provides written certification from independent local counsel that shareholder approval is not required by its home country law.