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Capital-Raising Alternatives for Public Companies in the Current Environment

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Recent volatility in the stock markets and the current credit crisis have limited many public issuers' access to traditional forms of financing, including firm commitment underwritten offerings and convertible debt offerings implemented under Rule 144A of the Securities Act of 1933 (Securities Act). In light of these events, public issuers are exploring other financing structures to meet their capital requirements. These alternatives, which include private investments in public equity (PIPEs), registered direct offerings, at-the-market offerings and rights offerings, may offer public issuers a solution for raising capital in the current environment and also allow them to meet their liquidity needs on a more expedited basis and less expensively than through more traditional financing methods. The availability of some of these financing alternatives to public issuers has increased considerably with the recent amendments to the eligibility requirements of the Form S-3 registration statement. These amendments permit a number of previously ineligible issuers, mainly smallcap and microcap companies, with securities listed on a national securities exchange to conduct limited primary offerings of securities on a delayed (i.e., "shelf") basis at varying prices pursuant to Rule 415 under the Securities Act (Rule 415). Changes implemented by the Securities and Exchange Commission (SEC) under its 2005 Securities Offering Reform have further increased the benefits and appeal of many of these alternatives to both issuers and investors.

PIPEs

Background

PIPEs have become a permanent fixture in the capital-raising landscape for public companies. In 1998 there were 428 reported PIPE transactions in which issuers raised approximately $3 billion. By comparison, the number of reported PIPE transactions completed in 2008 was more than 1,000 and represented over $120 billion in gross proceeds. The composition of PIPE issuers and investors has changed over this period as well. Microcap and smallcap issuers historically dominated the PIPE transaction market, with hedge funds, pension funds and corporate insiders representing the largest group of PIPE investors. Today large financial institutions and midcap companies regularly undertake PIPE transactions to raise capital, and private equity funds, sovereign wealth funds and venture capitalists—groups that historically avoided making private investments in public issuers—have become significant investors in PIPEs. Together these changes have given the U.S. PIPE market added legitimacy.

Structure

PIPE transactions have two principal components. First, securities are sold by a public company to one or more accredited investors pursuant to a securities purchase agreement in reliance on the statutory private placement exemption provided by Section 4(2) of the Securities Act and/or the private offering exemption provided by Regulation D under the Securities Act. Typically the transaction is marketed by a placement agent retained by the issuer and directed at a select group of potential investors with extensive experience investing in PIPE offerings. The securities sold in a PIPE transaction may include common stock, straight or convertible preferred stock, straight or convertible debt or a combination of these securities. Warrants are frequently issued to investors as an extra incentive for them to participate in the offering.

Since they are privately placed to the investors, securities issued in PIPE transactions are not freely tradable as they are considered "restricted securities" within the meaning of the rules under the Securities Act. To compensate investors for the lack of immediate resale liquidity applicable to restricted securities, PIPE securities are often sold at a discount to the issuer's market price. In some cases, the size of the discount is substantial. Investors typically require the issuer to publicly announce the PIPE transaction in a press release and on a current report on Form 8-K within one or two business days after the execution of the transaction agreements, which are filed as exhibits to the Form 8-K.

Restricted securities may not be resold publicly pursuant to Rule 144 under the Securities Act (Rule 144) for at least six months. To provide PIPE investors with liquidity prior to this time, in the second component of a PIPE transaction, the issuer files a registration statement on Form S-1 or Form S-3 with the SEC to register the resale of the common shares issued (or issuable) in the PIPE by the investors. The secondary offering covered by the registration statement ordinarily provides for resales from time to time on a delayed basis in one or more transactions at varying prices pursuant to Rule 415. Although the PIPE can be structured so that an effective registration statement is a condition to closing the transaction, most PIPE transactions today provide for the filing of a registration statement within 30 to 60 days *after* the transaction is closed and the issuer has received the proceeds from the sale of the securities. In some cases investors may be willing to defer the issuer's obligation to file a registration statement until a much later date or even indefinitely if they intend to hold their PIPE securities as a long-term investment and are willing to rely exclusively on Rule 144 to meet their resale liquidity needs, which today allows non-affiliate investors to sell an unlimited amount of securities after the six-month holding period. Once the SEC declares the registration statement effective, the PIPE investors are generally able to resell freely their common shares in the market. However, in the event an issuer is unable to register some or all the PIPE shares for resale on a timely basis or fails to maintain the effectiveness of the resale registration statement over a minimum period, it may incur significant cash and other penalties in favor of the investors.

Benefits

PIPE transactions are highly flexible structures that typically require minimal documentation or regulatory burdens. This allows issuers to receive a cash infusion on an expedited basis and more quickly than through many registered public offering formats. Moreover, PIPEs may be marketed to a discrete group of potential investors (often with the assistance of a placement agent), which reduces the strain on management. Because these transactions are priced and completed on a confidential basis, they avoid the "market overhang" associated with a marketed public offering. Overhang exists when the market perceives an issuer's pending offering as potentially dilutive, which tends to exert

downward pressure on an issuer's stock price and ultimately may reduce the price at which securities are sold in an offering. In addition, PIPEs can provide issuers with a greater degree of certainty to close than a traditional firm commitment underwritten offering conducted through traditional red herring prospectus and road show communications. General market volatility and a lack of sufficient public demand for the offered securities can obstruct companies' underwritten offering efforts and force them to postpone or withdraw their transactions as they wait for a more favorable market window. However, given the confidential format and the investor base, PIPEs generally can be completed even in the face of unfavorable general market conditions.

Registered Direct Offerings

Background

Whereas a PIPE transaction involves registering securities for *resale* by the PIPE investors after they have been privately placed, in a registered direct offering the issuer's *initial* sale of securities is registered with the SEC. This allows investors to resell securities issued in a registered direct offering into the public market immediately after the transaction. The number of registered direct offerings has increased steadily in recent years and in 2008 U.S. issuers completed approximately 80 registered direct transactions in which they raised nearly $3 billion. The 2008 amendments to the Form S-3 registration statement significantly expanded the class of issuers eligible to conduct these transactions.

Structure

To complete a registered direct offering, the issuer must have an effective registration statement. Typically the issuer files a "universal shelf" registration statement (also known as an "unallocated shelf") in which it registers a specific dollar amount of securities *or* a specific number of securities without setting any price terms or specifying an offering date. A shelf registration statement allows the issuer to sell securities on a delayed basis under Rule 415 and therefore to capitalize on favorable market conditions. The securities sold in a registered direct offering may include common stock, preferred stock, debt, depository shares, rights, warrants or a combination of these securities that are jointly referred to as "units."

To be eligible to conduct a shelf offering under Rule 415, the issuer must be eligible to use Form S-3 for a *primary* offering. Well-known seasoned issuers (known as "WKSIs"), which must have a "public float" (the market value of the issuer's common shares held by non-affiliates) of at least $700 million or must have issued at least $1 billion of nonconvertible securities in registered primary offerings over the prior three years, can take advantage of the streamlined shelf registration process that provides automatic effectiveness of the registration statement upon filing (referred to as an "automatic shelf registration statement" or "ASR"). Automatic effectiveness allows these issuers to defer filing a Form S-3 for their offering until immediately prior to conducting the transaction. "Seasoned" issuers, which generally include issuers with a public float of at least $75 million but less than $700 million and that have satisfied their SEC reporting obligations on a timely basis for at least the previous 12 months, are eligible to conduct an *unlimited* primary offering of securities on Form S-3, but are ineligible to file an ASR. As a result, seasoned issuers generally must have an effective shelf registration statement on Form S-3 before they begin marketing and negotiating the terms of a registered direct offering.

Prior to the 2008 amendments to Form S-3, "unseasoned" issuers (generally issuers with a public float of less than $75 million) were ineligible to conduct a primary shelf offering and therefore could not

undertake a standard registered direct offering. The Form S-3 amendments now permit an unseasoned issuer to engage in a *limited* primary offering of securities on a shelf basis as long as it has a class of common equity securities listed on a national securities exchange and otherwise meets the eligibility requirements to use Form S-3. The value of shares that may be sold in a primary offering on Form S-3 by an unseasoned issuer is capped at one-third of the issuer's public float over any rolling 12-month period.

An issuer contemplating a registered direct offering typically retains a placement agent to assist in locating prospective investors and facilitating the offering. The placement agent's fee is a percentage of the gross sales of securities in the offering, usually in the range of 3% to 6%. Because a placement agent is acting solely on an agency basis and does not actually acquire the issuer's securities as an underwriter does in a firm commitment offering, the agent is not required to deploy any regulatory capital in the transaction.

However, despite acting only on an agency basis, the placement agent may be deemed a statutory underwriter of the issuer's securities in the offering for purposes of the federal securities laws. As a statutory underwriter, the agent has potential underwriter liability under Section 11 of the Securities Act and therefore typically requires the same documentation and procedures employed by an underwriter in a firm commitment underwritten offering to establish its "due diligence" defense. The backup diligence includes an auditor's comfort letter, opinions of the issuer's and the agent's counsel, negative assurance letters from counsel, "closing" certificates from the issuer and conference calls with the issuer's management. To provide stability to the issuer's stock price for a certain period following completion of the registered direct offering, the placement agent often requires the issuer's directors, executives and primary stockholders to enter into a lock-up agreement.

Once the final terms of the transaction have been determined, the issuer and placement agent (if one is used) enter into a placement agency agreement. The issuer then files a prospectus supplement to the registration statement pursuant to Rule 424(b) under the Securities Act, which describes the final terms of the offering, including the number of shares to be sold and their sale price, identifies the placement agent(s) and contains the actual "plan of distribution" of the securities to be sold in the offering. The issuer also reports the offering and the execution of the placement agency agreement on a current report on Form 8-K. Many registered direct offerings are structured so that investors do not enter into individual purchase agreements with the issuer, which allows the parties to complete the transaction more quickly.

Registered direct offerings are subject to the rules and regulations of the Financial Industry Regulatory Authority (FINRA). If the issuer engages a placement agent for the transaction, FINRA's Corporate Financing Rule requires the issuer or the placement agent to file information relating to the offering and the compensation arrangement between the issuer and the agent with FINRA's Corporate Financing Department. The issuer may not complete the offering unless and until it receives a "no objection" letter regarding the proposed compensation arrangement from the Department. However, a transaction is exempt from the Corporate Financing Rule's filing and pre-approval requirements if the issuer has a public float of at least $150 million ($100 million if it had an annual trading volume of at least three million shares for the 12-month period prior to the offering) and has been subject to and in compliance with the reporting requirements of the Securities Exchange Act of 1934 (Exchange Act) for a period of at least 36 months prior to the offering and the offering is completed under a Form S-3 registration statement. The compensation arrangements for exempt transactions must still comply with FINRA's fairness and reasonableness requirements.

Benefits

Similar to a PIPE transaction, a registered direct offering allows the issuer to negotiate with a select group of investors and negotiate the terms of the transaction on a confidential basis, which minimizes the risk of an "announcement effect" that typically accompanies firm commitment offerings and otherwise reduces arbitrage opportunities. In addition, by avoiding a detailed "road show" and lengthy negotiations with investors, registered direct offerings generally can be completed more quickly than traditional firm commitment offerings. Because investors receive freely tradable shares upon issuance (unless the investor is an affiliate of the issuer), these transactions typically are priced at a much smaller discount to the issuer's market price than PIPE transactions.

At-the-Market Offerings

Background

An at-the-market offering is a registered transaction in which the issuer sells shares of its common stock into the public market over time at market prices. These transactions, which are also referred to as "ATM offerings," "equity distribution programs," "continuous offering programs," "controlled equity offerings" and "dribble out" programs, are receiving greater attention from issuers and investors, given the extreme volatility recently experienced in the market. Delta Airlines and the parent company of American Airlines each commenced $200 million at-the-market offerings in December 2008. Real estate investment trusts (known as "REITs") regularly use this structure to meet their working capital requirements and fund acquisitions. The 2005 Securities Offering Reform and the 2008 amendments to Form S-3 have played a significant role in increasing the appeal and use of at-the-market offerings over the last few years. Prior to the Securities Offering Reform, Rule 415 limited the value of securities that could be sold in an at-the-market offering to 10% of the issuer's public float. Now WKSIs and seasoned issuers are eligible to sell an unlimited number of securities on Form S-3 in an at-the-market offering and unseasoned issuers who qualify to use Form S-3 for a primary offering (under the 2008 amendments) can sell up to one-third of their public float over a rolling 12-month period.

Structure

The registration requirements for an at-the-market offering mirror those for a registered direct transaction. Prior to commencing the offering, the issuer must have on file an effective shelf registration statement on Form S-3. Typically these offerings are conducted through a takedown of securities off a universal shelf registration statement that identifies an at-the-market offering in the plan of distribution as one of a number of possible alternatives for selling securities.

At-the-market offerings are conducted through sales agents. Prior to the Securities Offering Reform, an issuer was required to identify the sales agent (which would be acting as a statutory underwriter) engaged for an at-the-market offering in its registration statement at the time it was declared effective. In the past, because a sales agent often was not identified in the registration statement at effectiveness (given that the issuer may have only later decided to conduct an at-the-market offering), an issuer was usually forced to file a post-effective amendment to its Form S-3 to identify the sales agent. Post-effective amendments were subject to further SEC review and comment and therefore not only risked delaying the issuer's offering but also signaled to the market that an offering was imminent, creating market overhang. With the adoption of the Securities Offering Reform, an issuer now is permitted to identify the sales agent in a prospectus supplement filed after the issuer has determined to conduct the offering.

Prior to commencing an at-the-market transaction, the issuer and agent enter into a distribution (or sales) agreement. The agreement provides that the issuer will sell shares of its common stock into the market from time to time at varying prices through the agent. In turn, the agent agrees to use reasonable efforts to have the shares sold publicly (usually in ordinary brokers' transactions) in accordance with the issuer's instructions. Like a registered direct offering, as long as the placement agent acts only in an agency role to facilitate the sale of the issuer's stock and does not purchase shares directly from the issuer (i.e., as the principal), it is not required to set aside capital and assume market risk in connection with the transaction. The distribution agreement usually specifies the maximum number of shares or maximum aggregate offering price of shares that the agent may arrange for sale in the entire transaction, the duration of the offering and other material terms. Unless the distribution agreement is included as an exhibit to the issuer's Form S-3 registration statement, it is filed under a current report on Form 8-K.

Once the distribution agreement is in place, the issuer may place individual orders with the agent from time to time specifying the minimum and maximum number of shares that the issuer wishes to sell over a fixed period of time (usually limited to the one or two-day period after the order is delivered) and the minimum per share price at which the shares must be sold. Issuers typically reserve the right to revoke their orders at any time prior to the execution of sales. Unlike a PIPE or registered direct offering that provides for the sale of securities at a single point in time, sales in an at-the-market offering may be completed over an extended period and may span months or even quarters. To minimize the risk that ongoing sales would contravene the provisions of Rule 10b-5 under the Exchange Act, the distribution agreement prohibits the issuer from placing sales orders with the agent during "closed" trading windows under the issuer's insider trading policy and at other times when the issuer possesses material, non-public information. Each day sales are made in the offering, the placement agent is required to send a report to the issuer stating the number of shares sold, the gross sales price per share, the net proceeds to the issuer and the amount of compensation payable to the agent, which is usually in the range of 1% to 3% of the gross sales price of the shares. The distribution agreement requires the issuer to disclose the sales information on at least a quarterly basis in its periodic reports filed with the SEC. In some cases, the agent also requires the issuer to file a prospectus supplement each quarter to include this information.

A sales agent for an at-the-market offering will have potential underwriter liability under Section 11 of the Securities Act and therefore will require the same due diligence procedures employed in a registered direct offering. Unlike a registered direct offering in which the due diligence backup documents and procedures are delivered and performed solely at closing, they are normally required at multiple intervals over the course of an at-the-market offering. Specifically, an issuer is required to confirm (i.e., "bringdown") to the sales agent the accuracy of the issuer's representations and warranties in the distribution agreement in connection with each sale and settlement of shares in the offering and each time the issuer amends its Form S-3 registration statement or prospectus, including through the automatic incorporation of the issuer's subsequently filed periodic reports and current reports on Form 8-K. Officers' certificates, opinions and negative assurance letters from counsel and comfort letters must be delivered concurrently with the bringdown of the issuer's representations and warranties. The sales agent also may require (or reserve the right to require) that the issuer's management and outside auditors participate in routine due diligence sessions with the agent and its representatives throughout the course of the offering.

Agented at-the-market offerings are subject to FINRA's Corporate Financing Rule, but are eligible for the same filing and pre-approval exemption available for registered direct transactions. If an issuer

does not qualify for the exemption, it (or the agent) would be required to submit the filings to FINRA and receive a "no objection" response prior to commencing the offering.

Benefits

An at-the-market offering provides issuers with tremendous flexibility to raise capital on an as-needed (or as-desired) basis. Once the issuer enters into the distribution agreement with the placement agent, it controls whether and when any shares are sold, how many shares are sold and at what minimum price or prices. Because most at-the-market offerings provide for the sales of shares over time, the issuer can minimize the significant dilution that may occur with large, one-time offerings, including PIPE transactions and registered direct offerings, and help minimize volatility in the issuer's stock price. In addition, the placement agent fees for an at-the-market offering are generally less than the fees charged by agents for PIPE transactions, registered direct offerings, rights offerings and firm commitment offerings.

Rights Offerings

Background

In a typical rights offering, the issuer grants each of its stockholders the opportunity to participate as investors in the financing on a pro rata basis and on the same terms and conditions. Rights offerings are conducted routinely by issuers organized outside the U.S. Many European Union countries have adopted statutes that provide stockholders with preemptive rights to purchase securities sold by an issuer in any equity financing. Notable rights offerings by U.S. issuers over the past few years include KKR Financial's $270 million offering in 2007 and Ares Capital Corporation's $266 million offering in 2008.

Structure

In a standard rights offering, the issuer distributes rights to purchase common stock or other securities from the issuer at a fixed price during a fixed period. Although the issuance of the rights may be registered with the SEC, the rights usually are issued as a form of dividend without registration pursuant to the SEC's "no sale" theory. An issuer may elect to distribute the rights solely to its stockholders (on a pro rata basis), or expand the class of participants to include its other securityholders – namely optionholders, debtholders and/or warrantholders. The exercise price of the rights typically is set at a discount to the issuer's recent trading price in order to encourage rightsholders to participate in the offering. Subject to listing and other qualification requirements of the national securities exchange where the issuer's shares are listed, the rights may be transferable by the rightsholders during the offer period.

Regardless of whether the rights themselves are registered, the issuer must register the sale of the securities underlying the rights. Unlike an at-the-market offering, which must be conducted from a Form S-3 registration statement, a rights offering can be completed on Form S-1 by an issuer that does not have primary Form S-3 eligibility. To conduct the offering, an issuer with an effective Form S-3 universal shelf registration statement files a prospectus supplement to disclose the terms of the offering, including the type and amount of the security being offered, the subscription price, the record date for the issuance of the rights and the duration of the offer period. The prospectus supplement often includes a summary section prepared in a "question and answer" format to help the rightsholders (many of whom are retail investors) better understand the rights offering process. Unless they are filed as exhibits to the issuer's registration statement, the issuer's material

agreements used in the offering are filed under a current report on Form 8-K. An issuer without an effective Form S-3 shelf registration statement would need to file a Form S-1 or Form S-3 registration statement to cover the rights offering, which would be subject to SEC review unless the issuer filed an automatically effective ASR Form S-3.

The record date for the issuance of the rights is usually the date the registration statement becomes effective or, for a shelf registration statement, the date of the prospectus supplement that includes the final offering terms. Under rules of the Nasdaq Stock Market LLC (Nasdaq), an issuer distributing a dividend as part of a rights offering for a listed stock must inform Nasdaq and the public at least 10 calendar days prior to the record date for the dividend. Issuers with a class of securities listed on the New York Stock Exchange (NYSE) also must notify the exchange and their stockholders at least 10 calendar days prior to the proposed record date for the issuance of the rights. Rule 10b-17 under the Exchange Act imposes similar notification requirements on other rights offering issuers.

The issuer commences the rights offering by distributing the prospectus supplement along with the rights certificates (often referred to as “subscription warrants”) to the record holders. Neither the SEC nor Nasdaq currently prescribes a minimum period that a rights offering must remain open. The NYSE requires that its issuers keep the offering period open for a minimum of 16 days (14 days in certain limited cases) after the rights are distributed. Most offerings run from 16 to 40 days, but issuers may reserve the right to shorten, extend or terminate the offering at any time.

Rights offerings can be structured to increase the likelihood (or essentially guarantee) that the offering will be fully subscribed. One method used to increase the subscription rate is to make the rights transferable during the offer period. Transferability allows rightsholders who do not wish to participate in the offering to sell their rights to other parties who wish to participate and thereby offset (from an economic perspective) a portion of the dilution they would otherwise experience by not exercising their rights in the offering. If accepted for listing, the rights themselves are traded on the national securities exchange on which the issuer’s common stock is listed (or otherwise may qualify for trading over-the-counter). Another feature is the over-subscription privilege, which allows rightsholders who exercise their subscription rights in full to subscribe for their pro rata portion of the securities subject to rights that remain unexercised at the conclusion of the offering period. Rights offering issuers also may obtain a “standby” or “backstop” commitment whereby a securities firm (a “standby” purchaser) or one or more of the issuer’s significant stockholders (a “backstop” purchaser) agrees to purchase from the issuer any securities subject to rights that are not exercised by the rightsholders during the offer period. For agreeing serve in this role, standby and backstop purchasers are usually paid a fixed fee by the issuer, and an additional fee for each security purchased by them at a price above the issuer’s market price. A rights offering conducted without a standby or backstop commitment is often referred to as “uninsured.” Standby purchasers, namely those affiliated with investment banks, may be deemed statutory underwriters for purposes of Section 11 under the Securities Act and therefore will require most of the diligence procedures attendant to traditional underwritten offerings.

Agented rights offerings are subject to FINRA’s Corporate Financing Rule, but are eligible for the same filing and pre-approval exemption available for registered direct transactions and at-the-market offerings *if* they are conducted on a Form S-3 registration statement.

Benefits

Rights offerings are considered to be a more equitable form of financing and are particularly important where an issuer's stockholders may otherwise experience considerable dilution as a result of the large size of the offering, a significant pricing discount or both. A rights offering also is considered an effective means of helping "cleanse" a financing transaction for the benefit of the issuer (and its board of directors) where the terms of the transaction are negotiated on behalf of the investors by one of the issuer's insiders, including an affiliate of one of the issuer's directors, and therefore may raise questions about the arms'-length nature of the negotiation process. In addition, these transactions often entail very limited marketing time or expense because the class of eligible investors is a predetermined group of current securityholders.

Stockholder Approval Requirements

An issuer with shares listed on the NYSE or Nasdaq is required to obtain stockholder approval prior to selling voting securities that constitute 20% or more of the issuer's pre-transaction shares outstanding at a discount to the issuer's market price in any transaction that does not qualify as a "public offering" under applicable listing rules. The rules are intended to guard against the significant dilution to an issuer's stockholders that could otherwise result from a large offering sold at a discount to the issuer's market price. The NYSE and Nasdaq each use a facts-and-circumstances analysis to determine whether an issuance qualifies as a public offering. A transaction that resembles a firm commitment underwritten public offering and includes a broad marketing component (i.e., a management "roadshow") and both institutional and retail investor participation, is most likely to be deemed a public offering. A PIPE transaction, which by definition is privately-placed, does not qualify as a public offering. In addition, due to the narrow marketing and distribution features of registered direct and at-the-market offerings, these transactions often fail to qualify for the public offering exception. Since each of these transactions typically involves the sale of voting securities at a discount to the issuer's market price, the issuer must limit the size of its offering to 19.99% of its pre-transaction common shares outstanding or obtain stockholder approval prior to commencing the transaction.

Because a rights offering permits all stockholders to participate on the same terms and therefore eliminates the dilution concerns raised by the other financing alternatives, the NYSE and Nasdaq typically classify a rights offering for cash as a "public offering" under their listing rules and therefore do not require issuers to obtain stockholder approval, even if the shares offered in the rights offering would constitute 20% or more of the issuer's pre-transaction shares outstanding at a discount to the issuer's market price. However, if the rights offering includes a backstop purchaser who is also a current stockholder of the issuer, the NYSE and Nasdaq impose additional obligations on the issuer in order qualify as a "public offering" under their listing standards. Specifically, the backstop purchaser may only participate in the rights offering on the same terms as the other stockholders and therefore may not receive a backstop fee from the issuer. In addition, if the rights offering does not contain an over-subscription privilege, the NYSE prohibits the backstop purchaser from participating as a securityholder in the rights offering (i.e., the backstop purchaser is only permitted to purchase the securities not subscribed for in the rights offering). If the rights offering contains an over-subscription privilege, the NYSE permits the backstop purchaser from participating in the initial round of the rights offering, but prohibits the purchaser from participating in the oversubscription round.

In addition to these requirements, the NYSE and Nasdaq require stockholder approval prior to any issuance that may result in a change of control of the issuer, as determined under applicable listing standards.[1]

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[1] This article was published in a slightly different form in the July 2009 issue of *Bloomberg Law Reports Risk & Compliance.*