

NYSE Temporarily Waives Certain Shareholder Approval Requirements

I. Overview

On April 3, 2020, the New York Stock Exchange (the “NYSE”) filed with the Securities and Exchange Commission (the “SEC”) a proposal to temporarily waive certain shareholder approval requirements applicable to private placements set forth in Section 312.03 of the NYSE Listed Company Manual (the “Manual”). Specifically, the proposal waives certain shareholder approval requirements for private placement transactions involving certain related parties or 20% or more of the number of shares of common stock or voting power of a company. It is intended to address the potential liquidity needs of listed companies resulting from the recent declines and volatility of the financial markets in connection with the spread of COVID-19. The proposed rule changes became effective immediately upon filing with the SEC on April 3, 2020¹ and will remain in effect through June 30, 2020 (although the SEC may suspend the rule changes within 60 days from the date of the filing, or June 2, 2020, if it determines that such suspension is appropriate in the public interest or for the protection of investors).

II. Stock Issuances to Related Parties

Section 312.03(b) of the Manual provides that, subject to certain limited exceptions, shareholder approval is required before the issuance of common stock, or of securities convertible into or exercisable for common stock, to (1) a director, officer or substantial security holder of a company (each, a “Related Party”), (2) a subsidiary, affiliate or other closely-related person of a Related Party, or (3) any company or entity in which a Related Party has a substantial direct or indirect interest (collectively, “Restricted Parties”), in each case, if the number of shares to be issued or into which the securities may be convertible or exercisable exceeds 1% of either the number of shares of common stock or the voting power outstanding before such issuance.²

The rule change partially waives the application of Section 312.03(b) for a sale of a company’s securities if (1) the sale is for cash, (2) the sale is for a price that is not less than the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement (the “Minimum Price”), and (3) the company’s audit committee or a comparable committee comprised solely of independent directors reviews and approves the sale.³ “Official Closing Price” means “the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.”⁴ In effect, the rule change temporarily permits NYSE-listed companies to sell securities to Restricted Parties without shareholder approval, regardless of the size of such sale, so long as the conditions above are met. The waiver would be effective for transactions occurring on or before June 30, 2020, and any transaction to which the waiver might apply would still be subject to shareholder approval if required by any other rule.

¹ For full text of the proposal and the related SEC release, see Securities and Exchange Commission, Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Waive the Application of Certain of the Shareholder Approval Requirements in Section 312.03 of the NYSE Listed Company Manual Through June 30, 2020 Subject to Certain Conditions, SEC Release No. 34-88572; File No. SR-NYSE-2020-30, available at <https://www.sec.gov/rules/sro/nyse/2020/34-88572.pdf> (April 6, 2020). Unless otherwise specified, quoted statements in this memorandum are taken from the foregoing release.

² NYSE Listed Company Manual, Section 312.03(b).

³ See NYSE Listed Company Manual Section 312.04(i) for definition of “Minimum Price”.

⁴ NYSE Listed Company Manual, Section 312.04(j).

III. Stock Issuances Subject to 20% Limit

Section 312.03(c) of the Manual provides that, subject to certain limited exceptions, shareholder approval is required before the issuance of common stock, or of securities convertible into an exercisable common stock, if (1) the number of shares to be issued is, or will be, 20% or more of the number of shares of common stock outstanding before such issuance or (2) the common stock so issued has, or will have, 20% or more of the voting power outstanding before such issuance.⁵

An existing exception provides that shareholder approval will not be required for such issuance of common stock or convertible securities for cash at the Minimum Price if (1) a registered broker-dealer purchases the securities with a view to sell them to one or more purchasers in a private sale or (2) the securities are sold to multiple purchasers, and no one purchaser, or group of related purchasers, acquires, or has the right to acquire, more than 5% of the shares of the issuer's common stock or voting power before the sale (the "Bona Fide Financing Exception").⁶

The rule change waives the multiple purchaser requirement and the 5% limitation in the Bona Fide Financing Exception, permitting companies to qualify for the Bona Fide Financing Exception even when there is only one purchaser and even when the purchaser or purchasers acquire more than a 5% interest. In effect, the rule change temporarily permits listed companies to sell securities without shareholder approval, regardless of the size, number of participating investors, or the amount of securities purchased by any single investor, so long as the sale is for cash at the Minimum Price. The waiver would be effective for transactions occurring on or before June 30, 2020, and any transaction to which the waiver might apply would still be subject to shareholder approval if required by any other rule.

IV. Conclusion

In proposing these rule changes, the NYSE noted that the waivers would "provide NYSE listed companies with the flexibility on a temporary emergency basis to consummate transactions without shareholder approval that would not require shareholder approval under the rules of the NASDAQ Stock Market, as the specific limitations [being waived] do not exist in the applicable NASDAQ rules." The rule changes acknowledge that "existing large investors are often the only willing providers of much-needed capital to companies undergoing difficulties."

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; or Joseph E. Cho at 212.701.3589 or jcho@cahill.com; or email publications@cahill.com.

⁵ NYSE Listed Company Manual, Section 312.03(c).

⁶ NYSE Listed Company Manual, Section 312.04(g).