

April 9, 2021

SEC Approves Amendments to NYSE Shareholder Approval Requirements

On April 2, 2021, the SEC approved (SEC order available [here](#)) the NYSE's proposed amendments to its shareholder approval requirements applicable to issuances to related parties and private placements in excess of 20% of a listed company's common stock (by number of shares or by voting power). These amendments largely codify the waivers of these requirements that the NYSE had issued last year to assist companies in their capital-raising efforts early in the COVID-19 pandemic, which waivers have now expired. As a result of the amendments (and previously, the waivers), the NYSE rules are now largely consistent with the equivalent Nasdaq Marketplace Rules.¹ The amendments were adopted largely as initially proposed.²

Under the amended shareholder approval requirements, companies have significantly greater flexibility to raise capital. They will not need to seek shareholder approval for issuances to directors, officers and substantial security holders ("Related Parties") and their affiliates, or for non-public offering issuances³ in excess of 20% of their common stock so long as the issuances are made for cash and are above a "Minimum Price"⁴ threshold, and in the case of transactions involving Related Parties, are approved by the audit committee or another body of independent directors.

Issuances to Related Parties – Section 312.03(b)

Prior Rule

The NYSE historically required shareholder approval for any issuance to a Related Party or to their affiliates if the number of shares of common stock to be issued, or the number of shares of common stock into which

¹ For more information on the waivers and the proposed amendments, please see our prior client alert, [Update on NYSE Shareholder Approval Requirements: Waiver Extension and Proposed Amendments](#).

² On March 31, 2021, the NYSE filed with the SEC Amendment No. 1 to its proposal to change its shareholder approval requirements, available [here](#). The original proposal is available [here](#).

³ Shareholder approval is not required for issuances in excess of 20% where the issuance is a public offering for cash. Note that registered direct offerings may not qualify as "public offerings" and as such, the shareholder approval requirements should be considered in connection with registered direct transactions.

⁴ "Minimum Price" means a price that is 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 "Official Closing Price" of the issuer's common stock 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.

the securities may be convertible or exercisable, exceeded either 1% of the number of shares of common stock, or 1% of the voting power, outstanding before the issuance. There was a limited exception that permitted cash sales to a Related Party that was also a substantial security holder⁵ of the company without shareholder approval, provided such sales complied with the Minimum Price requirement and did not involve more than 5% of the company's outstanding common stock. Limited exceptions also existed for "early stage companies."

Amended Rule

Under the amended rules, shareholder approval will no longer be required for any issuance to a Related Party in excess of 1% (the prior *de minimis* threshold) of a company's common stock (by number of shares or by voting power) if that issuance is made for cash at a price no less than the Minimum Price. Shareholder approval would be required if an issuance above 1% is either a non-cash transaction or below the Minimum Price. Shareholder approval would also be required in the case of issuances used to fund an acquisition where the Related Party has a 5% or greater, or a group of Related Parties collectively have a 10% or greater, direct or indirect interest in the company or assets to be acquired or the consideration to be paid.

To further align the NYSE shareholder approval rules with those of Nasdaq, the amended rules limit the approval requirements to just Related Parties (shareholder approval will no longer be required for issuances to the subsidiaries, affiliates or other closely related persons of Related Parties). The provisions permitting issuances of up to 5% of a company's common stock to substantial security holders and granting exemptions to "early stage companies" have been removed because under the amended rules, those exemptions have become unnecessary.

Any issuance to a Related Party is subject to the NYSE's related party transaction review requirements (described below) and would also still be subject to shareholder approval if required under any other applicable listing rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

Related Party Transaction Review

Section 314.00 (Related Party Transactions) has been amended to provide that all related party transactions must be reviewed *in advance* by either a company's audit committee or other independent body of the board of directors, and that the audit committee or other body must prohibit a transaction if it determines it is inconsistent with the interests of the company and its shareholders. This review requirement applies to all related party transactions within the meaning of Item 404 of Regulation S-K, or, in the case of foreign

⁵ Typically, a holder of 5% or more of the company's common stock (by number of shares or by voting power).

private issuers, Item 7.B of Form 20-F (but without applying the transaction value thresholds), and not just to issuances of stock to Related Parties pursuant to Section 312.03(b).⁶

Issuances in Excess of 20% – Section 312.03(c)

Prior Rule

The NYSE Manual historically required shareholder approval for any issuance of 20% or more of a company's outstanding common stock or 20% or more of the voting power outstanding before such issuance, other than in a public offering for cash.

There was a limited exception that permitted cash sales in excess of 20% without shareholder approval, provided the transaction complied with the Minimum Price requirement and fell within the definition of "bona fide private financing." "Bona fide private financing" meant a sale in which: a registered broker-dealer purchased the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or the issuer sold the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquired, or had the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer's common stock or more than 5% of the issuer's voting power before the sale.

Amended Rule

Shareholder approval will no longer be required for non-public offering issuances of more than 20% of a company's common stock (by number of shares or by voting power) so long as the issuance is made for cash and at least at the Minimum Price, regardless of the number of investors. If the transaction involves a Related Party, then the transaction is also subject to the related party transaction review requirements of Section 314.00 (as amended, as described above). Non-cash transactions and transactions below the Minimum Price would continue to be subject to shareholder approval. Additionally, if the securities are to be issued in connection with the acquisition of the stock or assets of another company, and such securities together with other securities issued (or planned to be issued) in connection with the acquisition would equal or exceed 20% of the company's common stock (by number of shares or by voting power), then shareholder approval would be required.⁷

⁶ The NYSE amended its proposal to clarify that: (i) the related party transaction review must occur prior to the transaction; (ii) the body reviewing the transaction must consider the interests of the company and its shareholders (not just the company); (iii) the body reviewing the transaction must prohibit it if contrary to the interests of the company and its shareholders; and (iv) when looking to Item 404 of Regulation S-K to identify related party transactions subject to Section 314.00, a company should disregard the dollar thresholds identified therein.

⁷ The NYSE amended its proposal to clarify that approval requirements apply to any securities issuances in connection with an acquisition, (not just a securities issuance the proceeds of which are used to fund the acquisition), and that such issuances must

Any such issuance would also still be subject to shareholder approval if required under any other applicable listing rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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be considered with potential securities issuances (not just historic issuances) when evaluating whether the 20% threshold has been reached. The amendments also clarified that, consistent with the rest of Section 312.03(c), shareholder approval is required where such issuances equal or exceed 20%.