

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90803; File No. SR-NYSE-2020-85)

December 28, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend the NYSE Listed Company Manual to Revise the Shareholder Approval Requirements in Sections 312.03 and 312.04 and the Requirements for Related Party Transactions in Section 314.00

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on December 16, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 312.03, 312.04 and 314.00 of the NYSE Listed Company Manual (“Manual”). The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Paragraphs (b) and (c) of Sections 312.03 of the Manual require listed companies to obtain shareholder approval prior to certain kinds of equity issuances. The Exchange believes that these requirements can make it unnecessarily difficult for listed companies to raise necessary capital in private placement transactions that are in the interests of the company and its shareholders. Consequently, the Exchange proposes to modify these provisions, bringing its shareholder approval requirements into closer alignment with those of Nasdaq and NYSE American,<sup>4</sup> by providing listed companies with flexibility that exists under the rules of those other listing markets. The Exchange has waived certain requirements under Section 312.03 to provide listed companies with greater flexibility to raise capital during the COVID-19 crisis.<sup>5</sup> Among other things, the current proposal includes amendments that are identical in effect to the current waiver. The Exchange has observed that a significant number of companies have benefited from the flexibility provided by the waiver and has not observed any significant

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<sup>4</sup> See Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

<sup>5</sup> See Securities Exchange Act Release No. 34-88572 (April 6, 2020); 85 FR 20323 (April 10, 2020) (SR-NYSE-2020-30). (waiving certain requirements of Section 312.03 through June 30, 2020). See also Securities Exchange Act Release No. 89219 (July 2, 2020); 85 FR 41640 (July 10, 2020) (SR-NYSE-2020-58) (extending the waiver through September 30, 2020). See also Securities Exchange Act Release No. 90020 (September 28, 2020); 85 FR 62357 (October 2, 2020) (SR-NYSE-2020-79) (extending the waiver through December 31, 2020).

problems associated with companies' completion of transactions permitted by the waiver.

Proposed Amendments to Section 312.03(b)

Subject to an exception for early stage companies set forth therein, Section 312.03(b) of the Manual requires shareholder approval of certain issuances of common stock, or securities convertible into or exercisable for common stock, to:

- a director, officer or substantial security holder<sup>6</sup> of the company (each a "Related Party" for purposes of Section 312.03(b));
- a subsidiary, affiliate, or other closely related person of a Related Party; or
- Any company or entity in which a Related Party has a substantial direct or indirect interest.

This prior shareholder approval is required if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. A limited exception to these shareholder approval requirements permits cash sales relating to no more than 5% of the number of shares of common stock or voting power outstanding that meet a Minimum Price test set forth in the rule (the "Minimum Price").<sup>7</sup> However, this exception may only be used if the Related Party in

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<sup>6</sup> For purposes of Section 312.03, Section 312.04(e) provides that: "[a]n interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder."

<sup>7</sup> Section 312.04(i) defines the "Minimum Price" as follows: "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.

question has Related Party status solely because it is a substantial security holder of the company.

The Exchange proposes to amend Section 312.03(b) in several respects.

- The Exchange proposes to modify the class of persons with respect to which an issuance of common stock would require a listed company to seek shareholder approval. Specifically, Section 312.03(b) as amended would require prior shareholder approval for issuances of common stock to directors, officers, and substantial securityholders (“Related Party”) and would no longer require such approval for issuances to such Related Parties’ subsidiaries, affiliates or other closely related persons or to entities in which a Related Party has a substantial interest (except where a Related Party has a 5% or greater interest in the counterparty, as described below). In making this change, the Exchange is harmonizing its approach to the regulation of issuances to related parties with that of Nasdaq and NYSE American, as both of those markets focus their shareholder approval requirements solely on the regulation of the Related Parties themselves and not on closely related persons of Related Parties.
- As proposed to be amended, Section 312.03(b) would require shareholder approval of cash sales to Related Parties (as such term is defined in Section

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Section 312.04(j) defines “Official Closing Price” as follows: “Official Closing Price” of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used.

312.03(b)) only if the price is less than the Minimum Price. Accordingly, Section 312.03(b) would no longer require shareholder approval of issuances in a cash sale that meet the Minimum Price requirement to a Related Party where the number of shares of common stock to be issued, or the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance. However, cash sales to Related Parties that meet the Minimum Price requirement would be subject to the same limitations as cash sales to all other investors under the proposed amended Section 312.03(c), as described below. In addition, cash sales relating to more than 1% of the issuer's common stock or voting power prior to the issuance to a Related Party for prices below the Minimum Price will continue to be subject to shareholder approval under Section 312.03(b) (this requirement is not included in the Nasdaq or NYSE American rules).

- The Exchange proposes to require shareholder approval of any transaction or series of related transactions in which any Related Party has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction and the present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of 5% or more. This proposed provision is substantively identical to the only limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules. The Exchange would

also continue to require shareholder approval of any sale of securities by a listed company to a Related Party in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such Related Party has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

- The Exchange proposes to delete from Section 312.03(b) two provisions that will no longer be relevant as they relate to transactions that benefit from exemptions from shareholder approval under current Section 312.03(b), but would be exempt from shareholder approval under the general application of Section 312.03(b) as proposed to be amended. These provisions relate to: (i) cash sales meeting the Minimum Price test and relating to no more than 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance to a Related Party where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder; and (ii) the Early Stage Company exemption, to which the Exchange proposes to remove the reference from Section 312.04 as it will no longer be needed. For the same reason, the Exchange proposes to delete from Section 312.03(b) a sentence that provides that the Early Stage Company exemption is not applicable to a sale of securities by the listed company to any person subject to the provisions of Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

The Exchange notes that Section 312.03(b) would continue to include text stating that any sale of stock to an employee, director or service provider is also subject to the equity compensation rules in Section 303A.08 of the Manual and stating that shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding that the transaction does not require approval under Section 312.03(b) or one or more of the other subparagraphs.

There would continue to be other significant protections for shareholders with respect to a company's sales of securities. Firstly, Section 314.00 of the Manual in its proposed amended form will provide that transactions with related parties, such as those in which a director, officer or substantial securityholder has an interest, must be reviewed and approved by the company's audit committee or another body of independent directors. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including a requirement of shareholder approval for any sale for less than the Minimum Price relating to 20% or more of the issuer's outstanding common stock or voting power prior to such issuance. This requirement means that any economically dilutive transaction would be subject to shareholder approval. In addition, any related party sale that gives rise to a change of control would be subject to shareholder approval under Section 312.03(d).

The Exchange believes that the continuation of the important limitations with respect to related party issuances as described above (including the review of such transactions under Section 314.00 and the continued application of the shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed companies with protections in relation to issuances to related parties (including Related Parties as such term is defined in Section 312.03(b) In particular, the

Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties relating to more than 1% of the company's outstanding common stock that do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to related parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Minimum Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

Proposed Amendments to Section 312.03(c)

Section 312.03(c) of the Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance, but provides the following exceptions: (1) any public offering for cash; (2) any bona fide private financing involving a cash sale of the company's securities that comply with the Minimum Price requirement. As set forth in Section 312.04(g), a "bona fide private financing" ("Bona Fide Private Financing") refers to a sale in which either:

- a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or
- the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has 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 five percent of the issuer's voting power before the sale.

The Exchange proposes to replace the reference to "bona fide private financing" in Section 312.03(c) with "other financing (that is not a public offering for cash) in which the

company is selling securities for cash.” This change would eliminate the 5% limit for any single purchaser participating in a transaction relying on the exemption.<sup>8</sup> In addition, as any sale to a broker-dealer under the current Bona Fide Private Financing exception would also qualify for an exception to shareholder approval under the proposed amended exemption, there is no need to retain a separate provision for sales made to broker-dealers. The Exchange also proposes to amend Section 312.03(c) to provide that, if any of the proceeds of such a financing will be paid in an acquisition and the securities generating such proceeds when combined with any securities issued in connection with such acquisition exceed either 20% of the number of shares of common stock or 20% of the voting power outstanding before the issuance, then shareholder approval is required. Finally, as the Bona Fide Private Financing term will no longer be used in Section 312.03(c), the Exchange proposes to delete the definition of that term in Section 312.04(g).

The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it relates to issuances in non-cash transactions or in cash transactions for a price below the Minimum Price. Instead, in replacing the Bona Fide Private Financing exception with the revised exemption described in the immediately preceding paragraph, the proposed amendment would only remove a limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a Minimum Price cash sale of more than 5% of the shares or voting power. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement protects against a sale using the exception resulting in economic dilution. Further, the separately applicable requirements of Section

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<sup>8</sup> While the proposed amended exemption would not limit the size of any transaction that meets the Minimum Price test, any such transaction giving rise to a change of control will be subject to shareholder approval under Section 312.03(d).

312.03(d) require that the shareholders approve any transaction that would result in a change of control.

The proposed amendments would make the Exchange's rules for cash sales of securities that meet the Minimum Price test substantively identical to those of Nasdaq and NYSE American and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

#### Deletion of Section 312.03T

Section 312.03T was adopted to provide temporary relief from certain of the requirements of Section 312.03 during the COVID-19 pandemic. Section 312.03T was applicable by its terms through June 30, 2020. As that date has passed, the Exchange now proposes to delete Section 312.03T in its entirety, as it is no longer applicable.

#### Amendment to Section 314.00

In its current form, Section 314.00 provides that related party transactions normally include transactions between officers, directors, and principal shareholders and the company and that each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. The current rule further states that, while the Exchange does not specify who should review related party transactions, the Exchange believes that the Audit Committee or another comparable body might be considered as an appropriate forum for this task.

The Exchange proposes to amend the first paragraph of Section 314.00.<sup>9</sup> The proposed new rule text strengthens the rule in two important respects:

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<sup>9</sup> The Second paragraph of Section 314.00 will be retained in its entirety. It reads as

- For purposes of Section 314.00, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act. In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B.
- Related party transactions under the rule as amended must be reviewed by either the company's audit committee or another independent body of the board of directors and the audit committee or such other body may prohibit such a transaction if it determines it to be inconsistent with the interests of the company.<sup>10</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>12</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles

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follows:

The Exchange will continue to review proxy statements and other SEC filings disclosing related party transactions and where such situations continue year after year, the Exchange will remind the listed company of its obligation, on a continuing basis, to evaluate each related party transaction and determine whether or not it should be permitted to continue.

<sup>10</sup> The Exchange proposes to delete from Section 314.00 a sentence that reads as follows: "Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated." This sentence is no longer necessary, as the proposed amended rule gives the audit committee or other independent body of the board the authority to prohibit any related party transaction it reviews.

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendments to Section 312.03(b) are designed to protect the public interest and the interests of investors because there would continue to be other significant protections for shareholders with respect to sales of securities to related parties. Firstly, Section 314.00 of the Manual, as proposed to be amended, will provide that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and approved by the issuer's audit committee or another group of independent directors. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including any sale relating to 20% or more of the issuer's common stock or voting power immediately preceding this issuance for less than the Minimum Price. This requirement means that any economically dilutive transaction would be subject to shareholder approval. The Exchange notes that Section 312.03(c) applies to any transaction or series of related transactions, which provides shareholders with further protection by ensuring that a company cannot avoid the shareholder approval requirement by separating an overall transaction into smaller separate transactions that would not individually require shareholder approval. In addition, any related party sale that gives rise to a change of control will be subject to shareholder approval under Section 312.03(d). The Exchange believes that the continuation of the important limitations with respect to related party issuances as described above (including the review of such transactions under Section 314.00 and the continued application of the

shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed companies with protections in relation to issuances to related parties (including Related Parties as such term is defined in Section 312.03(b)). In particular, the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties that relate to more than 1% of the company's outstanding common stock or voting power and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to related parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Minimum Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

The Exchange believes that the proposed amendments to Section 312.03(c) are also designed to protect the public interest and the interests of investors. The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it relates to issuances in non-cash transactions or to cash transactions for a price below the Minimum Price. The sole purpose of the amendment is to remove an arbitrary limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a Minimum Price cash sale to 5%. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement provides protection against economic dilution, while the separately applicable requirements of Section 312.03(d) provide that shareholders will have a vote on any transaction that would result in a change of control. The proposed amendments would also make the Exchange's rules for cash sales of securities that meet the Minimum Price

test substantively identical to those of Nasdaq and NYSE American and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

The Exchange believes that the proposed amendments to Section 314.00 are also designed to protect the public interest and the interests of investors. By proposing to use the definition of a related party transaction in SEC disclosure rules, the Exchange is providing greater clarity to both issuers and investors as to when the rule must be applied. By proposing to require that transactions subject to the rule must be reviewed and approved by either the audit committee or another body of independent directors, the Exchange is making the requirement more explicit and preventing any listed issuer from giving that role to any group that is not entirely made up of independent directors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes will conform the shareholder approval requirements of the NYSE to those of Nasdaq and NYSE American in certain respects and therefore enhances competition among listing exchanges. As all listed companies will be subject to the same shareholder approval and related party transaction approval requirements, the proposal does not impose any burden on competition among listed issuers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or up to 90

days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-85 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-85 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).