



NYSE Proposes to Permanently Amend Stockholder Approval Rules

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Editor's note: Eleazer Klein is partner and Evan A. Berger is an associate at Schulte Roth & Zabel LLP. This post is based on their SRZ memorandum.

In April 2020, the NYSE initially adopted, and the SEC approved, a temporary waiver ("NYSE Waiver") of certain NYSE stockholder approval rules set forth in Section 312.03 of the NYSE Listed Company Manual ("NYSE Manual") in order to lessen the hurdles companies face when seeking to raise capital, as many needed to do during the COVID-19 pandemic.¹

After a series of extensions of the NYSE Waiver (the latest through March 31, 2021), the NYSE is proposing to officially amend Section 312.03 of the NYSE Manual. The proposed rule change will now go through a notice and comment period, but, if adopted, will make permanent the following.

Rule 312.03(b) — The Related Party Stockholder Approval Rule, as amended, would:

- No longer require prior stockholder approval for issuances to the subsidiaries, affiliates or other closely related persons of directors, officers and substantial security holders ("Related Party") 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)).
- No longer require stockholder approval of issuances in a cash sale that meets the NYSE minimum price requirement to a Related Party. This would be the case even 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 of the voting power outstanding before the issuance.
- Require stockholder approval of any transaction or series of related transactions in which any Related Party has a 5% or greater interest (or 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 issuance of common stock, or securities convertible into common stock, could increase the outstanding common shares by 5% or more.
- Delete now irrelevant provisions relating to: (i) cash sales that meet the NYSE minimum price requirement, and where the issuance does not exceed 5% of the shares of common stock or voting power before the issuance, to a Related Party where the Related Party

¹ See "NYSE Further Extends Waiver of Parts of 'Related Party' and '20%' Stockholder Approval Rules," SRZ Alert, Oct. 9, 2020, available [here](#), for more detail.

involved in the transaction is classified as such solely because such person is a substantial security holder; and (ii) an exemption related to early-stage companies.

Rule 312.03(c) — The 20% Stockholder Approval Rule, as amended, would:

- Replace the reference to “bona fide private financing” in the exception from shareholder approval for transactions relating to 20% or more of the company’s outstanding common stock or voting power with “other financing (that is not a public offering for cash) in which the company is selling securities for cash.” This would eliminate the 5% limit for any single purchaser participating in such a transaction, thus permitting companies to consummate a financing to a single purchaser.
- Require shareholder approval 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 of the voting power outstanding before the issuance.

In addition, Section 314 of the NYSE Manual would be amended to require a company’s audit committee or other independent body of the board of directors to review related party transactions, which for purposes of Section 314 would mean those transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act of 1934, as amended.