



## NYSE Extends Waiver of “Related Party” and “20%” Stockholder Approval Rules

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**Editor’s note:** Eleazer Klein is partner and Adriana Schwartz and Clara Zylberg are special counsel at Schulte Roth & Zabel LLP. This post is based on their SRZ memorandum.

Recognizing that companies need quick access to capital due to the unprecedented disruption caused by COVID-19 and to mitigate against the NYSE stockholder approval rules presenting a hurdle to raising capital, the NYSE and the SEC approved the temporary waiver (“NYSE Waiver”) of certain NYSE stockholder approval rules set forth in Section 312.03 of the NYSE Listed Company Manual (“NYSE Manual”). The NYSE Waiver was last set to expire on Sept. 30, 2020, but, effective Sept. 28, 2020, has been extended through Dec. 31, 2020.<sup>1</sup> The relevant NYSE rules require a listed company to obtain stockholder approval before it issues 1% (or, in certain circumstances, 5%) of its outstanding shares of common stock or voting power pre-issuance to certain Related Parties<sup>2</sup> and before issuing in excess of 20% of its outstanding shares of common stock or voting power pre-issuance at a discount to the “NYSE Minimum Price.”<sup>3</sup>

As described in more detail in our May 11, 2020 *Alert*, Nasdaq also adopted certain exceptions from its stockholder approval rules in response to the COVID-19 pandemic in Nasdaq Marketplace Rule 5636T, which expired on June 30, 2020 and has not been further extended. Both exchanges continue to provide an exception from their respective stockholder approval requirements where the delay caused by obtaining stockholder approval would “seriously jeopardize the financial viability of the company.”<sup>4</sup>

### Rule 312.03(b) – The Related Party Stockholder Approval Rule

Rule 312.03(b) of the NYSE Manual generally requires a company to obtain stockholder approval for any issuance to a Related Party or to an affiliate of a Related Party if the number of shares of common stock to be issued or issuable exceeds 1% of the shares of common stock or voting power outstanding before the issuance. However, stockholder approval is not required for such issuances to substantial security holders that are not also a director or an officer if: (i) the price is

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<sup>1</sup> SEC Release No. 34-90020; File No. SR-NYSE-2020-79, available [here](#).

<sup>2</sup> A “Related Party” is defined under NYSE Marketplace Rules as a director, officer or a substantial security holder (a holder of 5% or more of the company’s common stock).

<sup>3</sup> The “NYSE Minimum Price” is the lower of: (i) the official closing price on the NYSE as reported on the consolidated tape immediately preceding the signing of a binding agreement to issue the securities (“NYSE Official Closing Price”); and (ii) the average of the NYSE Official Closing Prices for the five trading days immediately preceding the signing of the binding agreement to issue the securities.

<sup>4</sup> See Section 312.05 of the NYSE Manual and Nasdaq Marketplace Rule 5635(f).

equal to or greater than the NYSE Minimum Price; and (ii) the issuance does not exceed 5% of the shares of common stock or voting power before the issuance.

The NYSE Waiver significantly relaxes the shareholder approval requirements under Rule 312.03(b) and facilitates capital raises with substantial security holders. Under the NYSE Waiver a company may issue stock to a Related Party regardless of amount to the extent the transaction satisfies the following conditions:

- The transaction involves the sale of the company's securities for cash.
- The transaction satisfies the NYSE Minimum Price requirement.
- The transaction must be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors.
- The proceeds of the transaction will not 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 in circumstances where shareholder approval would be required under Nasdaq Marketplace Rule 5635(a).

### Rule 312.03(c) – The 20% Stockholder Approval Rule

Section 312.03(c) of the NYSE Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or voting power outstanding before such issuance other than:

1. A public offering for cash; or
2. Transactions involving a cash sale of the company's securities that comply with the NYSE Minimum Price requirement and also constitutes a "bona fide private financing," defined in Rule 312.04(g) of the NYSE Manual as meeting the following criteria:
  - A registered broker-dealer purchases the securities from the company with a view to the private sale of such securities to one or more purchasers; or
  - The company 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 company's common stock or voting power before the sale.

With respect to the "bona fide private financing" requirement, the NYSE Waiver does away with the 5% limitation to an individual investor and permits companies to undertake a bona fide private financing to a single purchaser.

Any transaction that qualifies for the NYSE Waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation and change of control requirements.