



SEC Approves NYSE’s Amended “Related Party” and “20%” Stockholder Approval Rules

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Editor’s note: Eleazar Klein is partner and Evan A. Berger is an associate at Schulte Roth & Zabel LLP. This post is based on their SRZ memorandum. Related research from the Program on Corporate Governance includes [Independent Directors and Controlling Shareholders](#) by Lucian Bebchuk and Assaf Hamdani (discussed on the Forum [here](#)).

On April 2, 2021, the Securities and Exchange Commission approved, on an accelerated basis, an amended proposal by the NYSE to amend certain of its stockholder approval rules set forth in the NYSE Listed Company Manual (“NYSE Manual”). The formal approval comes after the NYSE instituted a temporary waiver of these rules due to the challenges companies faced during the COVID-19 pandemic. See our Jan. 12, 2021 [Alert](#) and Oct. 9, 2020 [Alert](#) for more detail.

Rule 312.03(b) — As amended, the Related Party Stockholder Approval Rule:

- No longer requires prior stockholder approval for issuances to the subsidiaries, affiliates or other closely related persons of directors, officers and substantial securityholders (“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 requires stockholder approval of cash sales to a Related Party if the sale meets the NYSE minimum price requirement, 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 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance.
- Requires 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.
- Deletes 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 involved in the transaction is classified as a Related Party solely because the person is a substantial security holder; and (ii) an exemption related to early stage companies.

Rule 312.03(c) — As amended, the 20% Stockholder Approval Rule:

- Replaces 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 a transaction, thus permitting companies to consummate a financing to a single purchaser.
- Requires shareholder approval if the securities in a financing are issued in connection with an acquisition of the stock or assets of another company and the issuance of the securities alone or when combined with any other present or potential issuance of common stock, or securities convertible into common stock, is equal to or exceeds either 20% of the number of shares of common stock or of the voting power outstanding before the issuance.

In addition, amendments to Section 314 of the NYSE Manual requires a company’s audit committee or other independent body of the board of directors to review related party transactions prior to any transaction and prohibit the transaction if it determines the transaction is not consistent with the interests of the company and its shareholders. For purposes of Section 314, related party transactions 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 (without giving effect to the transaction value threshold of that provision).