

NYSE Proposes Relaxation of Shareholder Approval Rules

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Proposal Mirrors Recent Temporary Waivers and Aligns with Nasdaq Rules

On December 28, the NYSE proposed [rules](#) that would relax its current requirements to obtain shareholder approval prior to certain equity issuances. The proposal is substantially similar to the COVID-19-related temporary waivers issued by the NYSE last spring (as discussed in our memo [here](#)) and, if approved, would more closely align the NYSE's rules with current Nasdaq requirements.

Relaxation of Issuances to Related Parties

The proposal, which would amend Sections 312.03, 312.04 and 314.00 of the NYSE [Listed Company Manual](#), would expand the circumstances under which a company may sell stock to a related party without obtaining shareholder approval. Under current Section 312.03(b), shareholder approval is required when a company sells stock to a "related party" if the stock to be issued exceeds 1% of either the number of shares or voting power outstanding before the issuance. A limited exception permits cash sales to substantial stockholders (who are not otherwise related to the company) of no more than 5% of the outstanding stock or voting power at a price that is no less than the current market price.

The proposed rules would:

- permit sales of stock, without stockholder approval, to existing investors that exceed the 1% and 5% limits for cash at a price no less than the current market price;
- no longer require approval for issuances to 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); and
- require, similar to the Nasdaq rules, 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) in the company to be acquired and the issuance of stock could result in an increase in 5% or more in outstanding stock or voting power.

The proposal would eliminate current provisions of the rule that would no longer be relevant under the proposal, including the early stage company exemption and the exemption for cash sales of 5% or less of the company's stock at a price no less than the current market value, to related parties who are substantial stockholders.

The current rules requiring shareholder approval for cash sales of more than 1% of a company's stock to a related party for prices below the current market price and sales to a related party used to fund an acquisition would remain unchanged.

Changes to 20% Rule's Bona Fide Private Financing Exception

The proposal would change the bona fide private financing exception to the so-called "20% rule," which allows sales for cash at a price no less than the current market price of 20% or more of a company's stock without stockholder approval if no purchaser acquires more than 5%. The proposal would expand the exception to the 20% rule to any "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. Note, however, that if the transaction would give rise to a change of control, then shareholder approval under Section 312.03(d) would still be required.

The proposal would also provide that, if any of the proceeds of such a financing would be paid in an acquisition and the stock generating such proceeds, when combined with any stock issued in connection with such acquisition, exceeds either 20% of the stock or voting power outstanding before the issuance, then shareholder approval would be required.

The proposed amendments would make the NYSE's rules for cash sales of stock at a price no less than current market value substantively identical to those of Nasdaq. The proposal would not change the current NYSE rules as they relate to issuances in cash or non-cash transactions for a price below the current market price.

Review of Related Party Transactions

Related party transactions under the proposed rules would be required to be reviewed by either the company's audit committee or another independent body of the board of directors. The transaction may be prohibited if it is determined to be inconsistent with the interests of the company. The term "related party transaction" would be defined as a transaction required to be disclosed pursuant to Item 404 of Reg S-K. For foreign private issuers, the term "related party transactions" would refer to transactions required to be disclosed pursuant to Form 20-F.

Other Shareholder Approval Requirements Would Continue to Apply

The NYSE's current rules requiring shareholder approval for the issuance of securities in connection with a change of control and an increase in the share capacity under a company's equity compensation plans would remain unchanged.

Finally, Section 312.03T, adopted to provide temporary relief during the pandemic, would be eliminated pursuant to the proposal.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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