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Update on NYSE Shareholder Approval Requirements: Waiver Extension and Proposed Amendments

The NYSE has extended its waiver of certain shareholder approval requirements applicable to issuances to related parties and private placements in excess of 20% of a listed company's common stock (by number or by voting power) through March 31, 2021 (available here).[1] In addition, the NYSE has proposed amendments to its shareholder approval requirements that would largely codify the waivers (as published by the SEC, available here). As a result of the continued waiver, the NYSE rules are, and upon adoption of the proposed amendments would continue to be, largely consistent with the equivalent Nasdaq Marketplace Rules.

Under the waiver and amendments, companies have significantly greater flexibility to raise capital. They would not need to seek shareholder approval for issuances to directors, officers and substantial security holders ("Related Parties") and their affiliates, or for private placements in excess of 20% of their common stock so long as the issuances are made for cash and are above a minimum price threshold (as described below), and in the case of transactions involving Related Parties, are approved by the audit committee or another body of independent directors.

Issuances to Related Parties – Section 312.03(b)

Existing Rule

The NYSE requires shareholder approval for any issuance to a Related Party or to their affiliates if 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. There is a limited exception that permits cash sales to a Related Party that is also a substantial security holder[2] of the company without shareholder approval, provided such sales meet a market price test ("Minimum Price")[3] and do not involve more than 5% of the company's outstanding common stock.

1 For more details on the waiver, please see our prior client alert, COVID-19 Update: NYSE Shareholder Approval for Related Party and 20% Issuances Temporarily Waived and Minimum Market Capitalization Standard Temporarily Suspended.

2 For purposes of Section 312.03(b), "an 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."

3 "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

Temporary waiver

Under the NYSE's temporary waiver, a company may issue shares of common stock to Related Parties and their affiliates without complying with the 1% or 5% limitation, if the issuance is a cash transaction that meets the Minimum Price requirement. Additionally, any such transaction must be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors. Any transaction benefitting from the waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

The waiver is not available in the case of a sale of securities by a listed company to a Related Party in a transaction, or series of transactions, whose proceeds would be used to fund an acquisition of stock or assets of another company where such Related Party has a 5% or greater, or, where a group of Related Parties collectively have a 10% or greater, direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

Amendment

The NYSE's proposed amendments to Section 312.03(b) would codify the waiver, more closely aligning the NYSE approval requirements with those of Nasdaq. Under the amendment, shareholder approval would not be required for any issuance to a Related Party in excess of 1% of a company's common stock (by number or by voting power) if that issuance is made for cash at a price no less than the Minimum Price. Shareholder approval would be required if the issuance is either a non-cash transaction or below the Minimum Price. Shareholder approval would also be required in the case of issuances used to fund an acquisition where the Related Party has a 5% or greater, or a group of Related Parties collectively have a 10% or greater, direct or indirect interest in the company or assets to be acquired or the consideration to be paid.

To further align the NYSE shareholder approval rules with those of Nasdaq, the proposed amendments would limit the approval requirements to just Related Parties (shareholder approval would no longer be required for issuances to the subsidiaries, affiliates or other closely related persons of Related Parties). The proposed amendment would also remove the prior provision permitting issuances of up to 5% of a company's common stock (by number or by voting power) to substantial security holders, and the Early Stage Company exemptions, because under the proposed rules those exemptions would become unnecessary.

To effect the board committee approval requirements of the waiver, the proposed amendments would add language to Section 314.00 (Related Party Transactions) clarifying that related party transactions must be reviewed by either a company's audit committee or other independent body of the board of directors, and that the audit committee or other body may prohibit a transaction if it determines it is inconsistent with the interests of the company. This review requirement applies to all related party transactions within the

binding agreement. The "Official Closing Price" of the issuer's common stock means the official closing price on the NYSE as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.

meaning of Item 404 of Regulation S-K, and not just to issuances of stock to Related Parties pursuant to Section 312.03(b).

Any issuance to a Related Party would still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

Private Placements in Excess of 20% – Section 312.03(c)

Existing Rule

The NYSE Manual requires shareholder approval for any issuance of 20% or more of a company's outstanding common stock or 20% or more of the voting power outstanding before such issuance, other than in a public offering for cash.[4]

There is a limited exception that permits cash sales in excess of 20% without shareholder approval, provided the transaction complies with the Minimum Price requirement and falls within the definition of "bona fide private financing." "Bona fide private financing" is a sale in which: 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 5% of the issuer's voting power before the sale.

Temporary Waiver

The NYSE waiver modifies the bona fide private financing exception by waiving the 5% limitation for any sale to an individual investor and permitting companies to undertake a bona fide private financing during the period covered by the waiver (through March 31, 2021) even if there is only one purchaser. In other words, a listed company is exempt from the shareholder approval requirement in relation to a private placement regardless of its size or the number of participating investors or the amount of securities purchased by any single investor as long as the transaction is a sale of securities for cash at a price that meets the Minimum Price requirement. Additionally, the company's audit committee or a comparable committee comprised solely of independent directors is required to review and approve the transaction benefitting from the waiver, if any purchaser in the transaction is a Related Party.

Any transaction benefitting from the waiver would still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

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4 Registered direct offerings many not qualify as "public offerings." As such, the shareholder approval requirements should be considered in connection with registered direct transactions.

Amendment

Here too, the NYSE's proposed amendments would codify the waiver, further aligning the NYSE requirements with those of Nasdaq. Shareholder approval would not be required for issuances of more than 20% of a company's common stock (by number or by voting power) so long as the issuance is made for cash and at least at the Minimum Price, regardless of the number of investors in the private placement. If the transaction involves a Related Party, then the audit committee or other body of independent directors would need to review the transaction. Non-cash transactions and transactions below the Minimum Price would continue to be subject to shareholder approval requirements. Additionally, the proposed amendments would provide that if the proceeds of any such financing are to be paid in an acquisition and the issued securities together with other securities issued in connection with the acquisition exceed 20% of the company's common stock (by number or by voting power), then shareholder approval would be required.

Any such transaction would still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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