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NYSE Amends Shareholder Approval Requirements for Securities Issuance

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Speed Read

The Securities and Exchange Commission has approved amendments to two New York Stock Exchange rules that provide exceptions to requirements that a listed company obtain shareholder approval before the company issues common stock or securities convertible into or exercisable for common stock ("company securities") (1) greater than 1% in number or voting power to certain related parties or (2) greater than 20% in number or voting power. Both of these exemptions were conditioned in part on the company securities being issued for a price equal or greater than both the book value and the market value of the company's common stock when the company entered into the relevant agreement. The amendments remove the book value price test and replace the prior definition of "market value" with a new defined term, "minimum price." The amendments define "minimum price" as a price that is at least as great as the *lower* of the closing price immediately before the signing of a binding agreement to issue the company securities or the average closing price for the five trading days immediately before the signing of the binding agreement. Together, these amendments should significantly reduce instances in which companies are unexpectedly required to obtain shareholder approval before issuing shares of common stock or securities convertible into or exercisable for common stock, in financing or M&A transactions.

NYSE rules require shareholder approval before a listed company issues company securities in various circumstances. Two of these shareholder approval requirements included exceptions for the issuance of company securities for cash at a price (or, as applicable, where the conversion or exercise price is) at least as great as each of the book value and the market value of the company's common stock.

The NYSE amendments change these price conditions in two ways. First, the amendments eliminate the book value requirement, which the NYSE acknowledges was an accounting measure based on historical cost of assets that did not necessarily reflect the value of a company's common stock or the financial impact of a transaction that involved an issuance of the company's securities.

The NYSE amendments also replace the reference to the market value of the company's common stock when the company enters into a binding agreement to issue the securities with a new price condition, "minimum price," which NYSE rules define as the price that is the lower of (1) the official closing price reported on the NYSE consolidated tape immediately before the company signs a binding agreement to issue the securities and (2) the average official closing price for the five trading days immediately before the company signs the binding agreement.

These amendments will have potentially significant impact on the availability of exceptions to two NYSE rules that require shareholder approval before companies issue company securities.

The first rule, Section 312.03(b), requires shareholder approval if the number of company securities to be issued by the company to a related party (as defined under NYSE rules) exceeds either 1% of the number of shares of common stock outstanding or 1% of the voting power of the company's common stock outstanding before the issuance. As amended, Section 312.03(b) provides an exception if (1) the company securities will be issued to a substantial security holder that does not satisfy any of the other related-party criteria under Section 312.03(b) and (2) the company securities will be issued at a price (or having a conversion or exercise price, as applicable) at least as great as the minimum price (as defined), provided that the number of securities to be issued does not exceed either 5% of the number of shares outstanding or 5% of outstanding voting power.

The second rule, Section 312.03(c), requires shareholder approval if the number of company securities to be issued by the company exceeds 20% of the number of shares of common stock outstanding or 20% of outstanding voting power. As amended, Rule 312.03(c) provides an exception for issuances where the securities will be issued for cash at a price (or having a conversion or exercise price, as applicable) at least as great as the minimum price (as defined).

The text of Sections 312.03(b) and (c), marked to show text deleted by the NYSE amendments with strikethrough text and text inserted by the NYSE amendments with underscored text, is included below for reference.

NYSE Listed Company Manual

Section 312.03 Shareholder Approval

Shareholder approval is a prerequisite to issuing securities in the following situations:

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[312.03](b) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions, to:

(1) a director, officer or substantial security holder of the company (each a "Related Party");

(2) a subsidiary, affiliate or other closely-related person of a Related Party; or

(3) any company or entity in which a Related Party has a substantial direct or indirect interest;

if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance.

However, if the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder, and if the issuance relates to a sale of stock for cash at a price at least as great as ~~each of the book and market value of the issuer's common stock~~ <u>the Minimum Price</u>, then shareholder approval will not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

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[312.03](c) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or

(2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

However, shareholder approval will not be required for any such issuance involving:

- any public offering for cash;
- any bona fide private financing, if such financing involves a sale of:
- common stock, for cash, at a price at least as great as ~~each of the book and market value of the issuer's common stock~~ the Minimum Price; or
- securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least as great as ~~each of the book and market value of the issuer's common stock~~ the Minimum Price.

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