

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 29	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2020 - * 85	Amendment No. (req. for Amendments *)
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Filing by New York Stock Exchange LLC  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	<input type="checkbox"/> 19b-4(f)(6)
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposal to amend certain of the shareholder approval requirements set forth in Sections 312.03 and 312.04 of the NYSE Listed Company Manual

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* John      Last Name \* Carey

Title \* Senior Director, NYSE Group Inc.

E-mail \* John.Carey@theice.com

Telephone \* (212) 656-5640      Fax (212) 656-8101

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 10/06/2020      Associate General Counsel

By Clare Saperstein     

(Name \*)

Clare Saperstein,

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> New York Stock Exchange LLC (“NYSE” or the “Exchange”) proposes to amend certain of the shareholder approval requirements set forth in Sections 312.03 and 312.04 of the NYSE Listed Company Manual (“Manual”).

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1

- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.

- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

John Carey  
Senior Director  
NYSE Group, Inc.  
(212) 656-5640

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

- (a) Purpose

Paragraphs (b) and (c) of Section 312.03 of the Manual require listed companies to obtain shareholder approval prior to certain kinds of equity issuances. The Exchange believes that these limitations can make it difficult for listed companies to raise necessary capital in private placement transactions that are in the interests of the company and its shareholders. Consequently, the Exchange proposes to

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

modify these provisions, bringing its shareholder approval requirements into closer alignment with those of Nasdaq and NYSE American,<sup>3</sup> by providing listed companies with flexibility that exists under the rules of those other listing markets.

#### Proposed Amendments to Section 312.03(b)

Subject to an exception for early stage companies set forth therein, Section 312.03(b) of the Manual requires shareholder approval of certain issuances of common stock, or securities convertible into or exercisable for common stock, to:

- a director, officer or substantial security holder<sup>4</sup> of the company (each a "Related Party");
- a subsidiary, affiliate, or other closely related person of a Related Party;
- or
- Any company or entity in which a Related Party has a substantial direct or indirect interest.

This prior shareholder approval is required 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 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. A limited exception to these shareholder approval requirements permits cash sales of no more than 5% of the number of shares of common stock or voting power outstanding that meet a market price test set forth in the rule (the "Minimum Price").<sup>5</sup> However, this exception may only be used if the Related

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<sup>3</sup> See Nasdaq Marketplace Rule 5635 and NYS American Company Guide Sections 712 and 713.

<sup>4</sup> For purposes of Section 312.03, Section 312.04(e) provides that: "[a]n 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."

<sup>5</sup> Section 312.04(i) defines the "Minimum Price" as follows: "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 binding agreement.

Section 312.04(j) defines "Official Closing Price" as follows: "Official Closing Price" of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is

Party in question has Related Party status solely because it is a substantial security holder of the company.

The Exchange proposes to amend Section 312.03(b) in several respects.

- The Exchange proposes to modify the class of persons that an issuance of common stock would require a listed company to seek shareholder approval. Specifically, Section 312.03(b) as amended would require prior shareholder approval for sales of common stock to directors, officers, and substantial securityholders (“Related Party”) and would no longer require such approval for sales to such Related Party’s subsidiaries, affiliates or other persons closely related or (except as described below) to entities in which a Related Party has a substantial interest. In making this change, the Exchange is harmonizing its approach to the regulation of issuances to related parties with that of Nasdaq and NYSE American, as both of those markets focus their shareholder approval requirements solely on the regulation of the Related Parties themselves and not on closed related persons of Related Parties.
- As proposed to be amended, Section 312.03(b) would restrict cash sales to Related Parties only if they do not comply with the Minimum Price requirement. Consequently, Section 312.03(b) would no longer require shareholder approval of issuances in a cash sale that meets the Minimum Price requirement to a Related Party of more than 5% of the number of outstanding shares or the voting power outstanding. Cash sales to Related Parties that meet the Minimum Price requirement would be subject to the same limitations as cash sales to all other investors under the proposed amended Section 312.03(c), as described below. In addition, cash sales of more than 1% of the issuer’s common stock to a Related Party for prices below the Minimum Price will continue to be subject to shareholder approval. This continuing investor protection requirement is not included in the Nasdaq or NYSE American rules.
- The Exchange proposes to require shareholder approval of any transaction in which any individual director, officer or substantial shareholder of the listed company has a 5% or greater interest (or such persons 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 present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of 5% or more. This proposed provision is substantively identical to the only limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules. The Exchange would also continue to require shareholder approval of a sale of securities by a

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signed at any time between the close of the regular session on Monday and the close if the regular session on Tuesday, then Monday's official closing price is used.

listed company to a Related Party in a transaction, or series of transactions, whose proceeds will 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.

The Exchange notes that Section 312.03(b) would continue to include text stating that any sale of stock to an employee, director or service provider is subject to the equity compensation rules in Section 303A.08 of the Manual and stating that shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding that the transaction does not require approval under Section 312.03(b) or one or more of the other subparagraphs.

There would continue to be other significant protections for shareholders with respect to a company's sales of securities. Firstly, Section 314 of the Manual provides that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and evaluated by an appropriate group within the listed company.<sup>6</sup> Furthermore, there are other significant protections under other paragraphs of Section 312.03, including any sale of 20% or more of the issuer's common stock for less than the Minimum Price. This requirement means that any economically dilutive transaction would be subject to shareholder approval. In addition, any Related Party sale that gives rise to a change of control would be subject to shareholder approval under Section 312.03(d).

The Exchange believes that the continuation of the important limitations with respect to Related Party issuances as described above (including the review of such transactions under Section 314 and the continued application of the shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed companies with protections in relation to issuances to Related Parties. In particular the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties that relate to more than 1% of the company's outstanding common stock and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to Related Parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Market Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

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<sup>6</sup> Section 314 goes on to say that “[w]hile the Exchange does not specify who should review related party transactions, the Exchange believes that the Audit Committee or another comparable body might be considered as an appropriate forum for this task.”

Proposed Amendments to Section 312.02(c)

Section 312.03(c) of the Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance, but provides the following exceptions: (1) any public offering for cash; (2) any bona fide private financing involving a cash sale of the company's securities that comply with the Minimum Price requirement." As set forth in Section 312.04(g), a "bona fide private financing" ("Bona Fide Private Financing") refers to a sale in which either:

- 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 five percent of the issuer's voting power before the sale."

The Exchange proposes to replace the reference to "bona fide private financing" in Section 312.03(c) with "other financing 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.<sup>7</sup> In addition, as any sale to a broker-dealer under the current Bona Fide Private Financing exception would also qualify under the proposed amended exemption, there is no need to retain a separate provision for sales made to broker-dealers.

The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it relates to issuances in non-cash transactions or in cash transactions for a price below the Minimum Price. Instead, the proposed amendment would only remove an arbitrary limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a market price cash sale to 5%. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement protects against a sale using the exception resulting in economic dilution. Further, the separately applicable requirements of Section 312.03(d) require that the shareholders approve any transaction that would result in a change of control.

The proposed amendments would make the Exchange's rules for cash sales of securities that meet the Minimum Price test substantively identical to those of

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<sup>7</sup> While the proposed amended exemption would not limit the size of any transaction that meets the Minimum Price test, any such transaction giving rise to a change of control will be subject to shareholder approval under Section 312.03(d).

Nasdaq and NYSE American and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

#### Deletion of Section 312.03T

Section 312.03T was adopted to provide temporary relief from certain of the requirements of Section 312.03 during the COVID-19 pandemic. Section 312.03T was applicable by its terms through June 30, 2020. As that date has passed, the Exchange now proposes to delete Section 312.03T in its entirety, as it is no longer applicable.

#### (b) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendments to Section 312.03(b) are designed to protect the public interest and the interests of investors because there would continue to be other significant protections for shareholders with respect to sales of securities to related parties. Firstly, Section 314 of the Manual provides that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and evaluated by an appropriate group within the listed company. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including any sale of 20% or more of the issuer's common stock for less than the Minimum Price. This requirement means that any economically dilutive transaction would be subject to shareholder approval. In addition, any Related Party sale that gives rise to a change of control will be subject to shareholder approval under Section 312.03(d).

The Exchange believes that the continuation of the important limitations with respect to Related Party issuances as described above (including the review of such transactions under Section 314 and the continued application of the shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed

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<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).



companies with protections in relation to issuances to Related Parties. In particular the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties that relate to more than 1% of the company's outstanding common stock and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to Related Parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Market Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

The Exchange believes that the proposed amendments to Section 312.03(c) are also designed to protect the public interest and the interests of investors. The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it relates to issuances in non-cash transactions or to cash transactions for a price below the Minimum Price. The sole purpose of the amendment is to remove an arbitrary limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a market price cash sale to 5%. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement provides protection against economic dilution, while the separately applicable requirements of Section 312.03(d) provide that shareholders will have a vote on any transaction that would result in a change of control. The proposed amendments would also make the Exchange's rules for cash sales of securities that meet the Minimum Price test substantively identical to those of Nasdaq and NYSE American and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes will conform the shareholder approval requirements of the NYSE to those of Nasdaq and NYSE American in certain respects.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule changes are based on Nasdaq Marketplace Rules 5635(a) and (d) and NYSE American Company Guide Sections 712 and 713.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NYSE-2020-85)

[Date]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Certain of the Shareholder Approval Requirements in Sections 312.03 and 312.04 of the NYSE Listed Company Manual

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 6, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend certain of the shareholder approval requirements set forth in Sections 312.03 and 312.04 of the NYSE Listed Company Manual (“Manual”). The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Paragraphs (b) and (c) of Section 312.03 of the Manual require listed companies to obtain shareholder approval prior to certain kinds of equity issuances. The Exchange believes that these limitations can make it difficult for listed companies to raise necessary capital in private placement transactions that are in the interests of the company and its shareholders. Consequently, the Exchange proposes to modify these provisions, bringing its shareholder approval requirements into closer alignment with those of Nasdaq and NYSE American,<sup>4</sup> by providing listed companies with flexibility that exists under the rules of those other listing markets.

Proposed Amendments to Section 312.03(b)

Subject to an exception for early stage companies set forth therein, Section 312.03(b) of the Manual requires shareholder approval of certain issuances of common stock, or securities convertible into or exercisable for common stock, to:

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<sup>4</sup> See Nasdaq Marketplace Rule 5635 and NYS American Company Guide Sections 712 and 713.

- a director, officer or substantial security holder<sup>5</sup> of the company (each a "Related Party");
  - a subsidiary, affiliate, or other closely related person of a Related Party;
- or
- Any company or entity in which a Related Party has a substantial direct or indirect interest.

This prior shareholder approval is required 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 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. A limited exception to these shareholder approval requirements permits cash sales of no more than 5% of the number of shares of common stock or voting power outstanding that meet a market price test set forth in the rule (the "Minimum Price").<sup>6</sup> However, this exception may only be used if the Related Party in question has Related Party status solely because it is a

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<sup>5</sup> For purposes of Section 312.03, Section 312.04(e) provides that: "[a]n 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."

<sup>6</sup> Section 312.04(i) defines the "Minimum Price" as follows: "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 binding agreement.

Section 312.04(j) defines "Official Closing Price" as follows: "Official Closing Price" of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used.

substantial security holder of the company.

The Exchange proposes to amend Section 312.03(b) in several respects.

- The Exchange proposes to modify the class of persons that an issuance of common stock would require a listed company to seek shareholder approval. Specifically, Section 312.03(b) as amended would require prior shareholder approval for sales of common stock to directors, officers, and substantial securityholders (“Related Party”) and would no longer require such approval for sales to such Related Party’s subsidiaries, affiliates or other persons closely related or (except as described below) to entities in which a Related Party has a substantial interest. In making this change, the Exchange is harmonizing its approach to the regulation of issuances to related parties with that of Nasdaq and NYSE American, as both of those markets focus their shareholder approval requirements solely on the regulation of the Related Parties themselves and not on closed related persons of Related Parties.
- As proposed to be amended, Section 312.03(b) would restrict cash sales to Related Parties only if they do not comply with the Minimum Price requirement. Consequently, Section 312.03(b) would no longer require shareholder approval of issuances in a cash sale that meets the Minimum Price requirement to a Related Party of more than 5% of the number of outstanding shares or the voting power outstanding. Cash sales to Related Parties that meet the Minimum Price requirement would be subject to the same limitations as cash sales to all other investors under the proposed

amended Section 312.03(c), as described below. In addition, cash sales of more than 1% of the issuer's common stock to a Related Party for prices below the Minimum Price will continue to be subject to shareholder approval. This continuing investor protection requirement is not included in the Nasdaq or NYSE American rules.

- The Exchange proposes to require shareholder approval of any transaction in which any individual director, officer or substantial shareholder of the listed company has a 5% or greater interest (or such persons 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 present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of 5% or more. This proposed provision is substantively identical to the only limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules. The Exchange would also continue to require shareholder approval of a sale of securities by a listed company to a Related Party in a transaction, or series of transactions, whose proceeds will 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.

The Exchange notes that Section 312.03(b) would continue to include text stating that any sale of stock to an employee, director or service provider is subject to the equity

compensation rules in Section 303A.08 of the Manual and stating that shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding that the transaction does not require approval under Section 312.03(b) or one or more of the other subparagraphs.

There would continue to be other significant protections for shareholders with respect to a company's sales of securities. Firstly, Section 314 of the Manual provides that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and evaluated by an appropriate group within the listed company.<sup>7</sup> Furthermore, there are other significant protections under other paragraphs of Section 312.03, including any sale of 20% or more of the issuer's common stock for less than the Minimum Price. This requirement means that any economically dilutive transaction would be subject to shareholder approval. In addition, any Related Party sale that gives rise to a change of control would be subject to shareholder approval under Section 312.03(d).

The Exchange believes that the continuation of the important limitations with respect to Related Party issuances as described above (including the review of such transactions under Section 314 and the continued application of the shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed companies with protections in relation to issuances to Related Parties. In particular the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties that relate to more than

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<sup>7</sup> Section 314 goes on to say that “[w]hile the Exchange does not specify who should review related party transactions, the Exchange believes that the Audit Committee or another comparable body might be considered as an appropriate forum for this task.”



1% of the company's outstanding common stock and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to Related Parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Market Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

Proposed Amendments to Section 312.02(c)

Section 312.03(c) of the Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance, but provides the following exceptions: (1) any public offering for cash; (2) any bona fide private financing involving a cash sale of the company's securities that comply with the Minimum Price requirement." As set forth in Section 312.04(g), a "bona fide private financing" ("Bona Fide Private Financing") refers to a sale in which either:

- 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

five percent of the issuer's voting power before the sale.”

The Exchange proposes to replace the reference to “bona fide private financing” in Section 312.03(c) with “other financing 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.<sup>8</sup> In addition, as any sale to a broker-dealer under the current Bona Fide Private Financing exception would also qualify under the proposed amended exemption, there is no need to retain a separate provision for sales made to broker-dealers.

The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it relates to issuances in non-cash transactions or in cash transactions for a price below the Minimum Price. Instead, the proposed amendment would only remove an arbitrary limitation in the Bon Fide Private Financing exception that limits the participation of any single investor in a market price cash sale to 5%. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement protects against a sale using the exception resulting in economic dilution. Further, the separately applicable requirements of Section 312.03(d) require that the shareholders approve any transaction that would result in a change of control.

The proposed amendments would make the Exchange’s rules for cash sales of securities that meet the Minimum Price test substantively identical to those of Nasdaq and NYSE American and the Exchange believes that the long experience of those other

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<sup>8</sup> While the proposed amended exemption would not limit the size of any transaction that meets the Minimum Price test, any such transaction giving rise to a change of control will be subject to shareholder approval under Section 312.03(d).

markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

#### Deletion of Section 312.03T

Section 312.03T was adopted to provide temporary relief from certain of the requirements of Section 312.03 during the COVID-19 pandemic. Section 312.03T was applicable by its terms through June 30, 2020. As that date has passed, the Exchange now proposes to delete Section 312.03T in its entirety, as it is no longer applicable.

#### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendments to Section 312.03(b) are designed to protect the public interest and the interests of investors because there would continue to be other significant protections for shareholders with respect to sales of securities to related parties. Firstly, Section 314 of the Manual provides that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and evaluated by an appropriate group within the

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

listed company. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including any sale of 20% or more of the issuer's common stock for less than the Minimum Price. This requirement means that any economically dilutive transaction would be subject to shareholder approval. In addition, any Related Party sale that gives rise to a change of control will be subject to shareholder approval under Section 312.03(d).

The Exchange believes that the continuation of the important limitations with respect to Related Party issuances as described above (including the review of such transactions under Section 314 and the continued application of the shareholder approval requirements with respect to equity compensation set forth in Section 303A.08) would continue to provide shareholders of NYSE listed companies with protections in relation to issuances to Related Parties. In particular the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties that relate to more than 1% of the company's outstanding common stock and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules. The proposed amendments would make the Exchange's rules for cash sales to Related Parties substantively identical to those of Nasdaq and NYSE American for issuances that meet the Market Price test and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

The Exchange believes that the proposed amendments to Section 312.03(c) are also designed to protect the public interest and the interests of investors. The Exchange notes that the proposed amendments to Section 312.03(c) do not change the rule as it

relates to issuances in non-cash transactions or to cash transactions for a price below the Minimum Price. The sole purpose of the amendment is to remove an arbitrary limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a market price cash sale to 5%. The Exchange believes that this change is consistent with the protection of investors because the Minimum Price requirement provides protection against economic dilution, while the separately applicable requirements of Section 312.03(d) provide that shareholders will have a vote on any transaction that would result in a change of control. The proposed amendments would also make the Exchange's rules for cash sales of securities that meet the Minimum Price test substantively identical to those of Nasdaq and NYSE American and the Exchange believes that the long experience of those other markets in applying those substantially identical rules provides evidence that they provide an appropriate level of investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule changes will conform the shareholder approval requirements of the NYSE to those of Nasdaq and NYSE American in certain respects.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or

up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-85 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2020-85. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-85 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

Eduardo A. Aleman  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).

Added text underlined;  
Deleted text in [brackets].

NYSE Listed Company Manual

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312.03 Shareholder Approval

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

(a) Shareholder approval is required for equity compensation plans. See Section 303A.08.

(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] and:

(i) such transaction is a cash sale for a price that is less than the Minimum Price, and 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[.]; or

(ii) such securities are issued as consideration in a transaction in which a Related Party has a five percent or greater interest (or such persons collectively have a ten percent 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 present or potential issuance of common stock, or securities convertible into common stock, could result in an increase in outstanding common shares of five percent or more.

[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 the Minimum Price, 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.

In addition, the provisions of this Section 312.03(b) will not apply to the sale of stock for cash by an Early Stage Company to (i) a Related Party, (ii) a subsidiary, affiliate or other closely-related person of a Related Party; or (iii) any company or entity in which a Related Party has a substantial direct or indirect interest, provided that the Early Stage Company's audit committee or a comparable committee comprised solely of independent directors reviews and approves of all such transactions prior to their completion.]

The exemption in the preceding paragraph will not be applicable to a sale of securities by the listed company to any person subject to the provisions of this Section 312.03(b) in a transaction, or series of transactions, [whose] in which the proceeds of the sale of securities to a Related Party will be used to fund an acquisition of stock or assets of another company where such [person] Related Party has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

[The] Any sale of stock to a Related Party that is an employee, director or service provider is also subject to the equity compensation rules in Section 303A.08 of the Manual. For example, a sale of stock [by an Early Stage Company] to any of such parties at a discount to the then market price would be treated as equity compensation under Section 303A.08 notwithstanding the [exemption from] fact that shareholder approval [provided] may not be required under Sections 312.03(b) or 312.03(c). Consequently, the company would be required to either: (i) obtain shareholder approval of such sale, or (ii) issue such shares under an equity compensation plan that had previously been approved by shareholders and for which shareholder approval under Section 303A.08 is not otherwise required. Moreover, shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under this subparagraph or one or more of the other subparagraphs. (See Section 312.04(a).)

(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; or

•any [bona fide private] other financing in which the company is selling securities for cash, if such financing involves a sale of[:•] common stock, or securities convertible into or exercisable for common stock, [for cash,] at a price at least as great as 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 the Minimum Price].

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[312.03T Temporary COVID-19 Exception

(a) This Section 312.03T is operative until, and including, June 30, 2020. To rely on this rule, the company must submit the related supplemental listing application and certification pursuant to Section 312.03T(b)(5)(A) below and obtain the Exchange's approval of its utilization of the exception pursuant to Section 312.03T(b)(5)(B) below and thereafter sign a binding agreement no later than June 30, 2020. The issuance of the securities governed by such agreement may occur after June 30, 2020, provided the issuance takes place no later than 30 calendar days following the date of the binding agreement.

(b) Notwithstanding the requirements of Section 312.03(c), a listed company may issue securities without shareholder approval upon approval by the Exchange of an application demonstrating that the transaction satisfies the following requirements:

1. the need for the transaction is due to circumstances related to COVID-19 and the proceeds will not be used to fund any acquisition transaction;
2. the delay in securing shareholder approval would: (A) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan; (B) result in workforce reductions; (C) adversely impact the company's ability to undertake new initiatives in response to COVID-19; or (D) seriously jeopardize the financial viability of the enterprise;
3. the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company;
4. the company's audit committee or a comparable committee comprised solely of independent, disinterested directors (A) expressly approved reliance on this exception; and (B) determined that the transaction is in the best interest of shareholders.

5. (A) The company must submit a supplemental listing application as required by Section 703.01(part one)(A) in relation to the applicable transaction along with a certification to the Exchange that it complies with all requirements of this Section 312.03T(b) (and Section 312.03T(c) if applicable) and describing with specificity how it complies; (B) The Exchange must approve all transactions in advance of any issuance of securities in reliance on this Section 312.03T. Such approval of a company's reliance on this exception will be based on a review of whether the company has established that it complies with the requirements of Section 312.03T(b) (and Section 312.03T(c) if applicable).

(c) A transaction described in Section 312.03T(b) will not require shareholder approval under Section 312.03(b) or Sections 312.03(a) and 303A.08, provided that the transaction satisfies the following requirements:

1. any participation by a Related Party or other person who is subject to Section 312.03(b) or Section 303A.08 (an "Affiliated Purchaser") must be less than 5% of the transaction;
2. the participation of all Affiliated Purchasers collectively must be less than 10% of the transaction;
3. the participation of any Affiliated Purchaser must have been specifically required by unaffiliated investors; and
4. the Affiliated Purchasers must not have participated in negotiating the economic terms of the transaction.

(d) A company that relies on the exception in this Section 312.03T must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

1. the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
2. that shareholder approval would ordinarily be required under Exchange rules but for the fact that the company is relying on this temporary exception to the shareholder approval rules; and
3. that the audit committee or a comparable committee comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

(e) Issuances pursuant to this Section 312.03T must comply with all other requirements of applicable Exchange rules, except as provided for herein.

(f) Other than a public offering for cash, securities issued in reliance on the exception in this Section 312.03T will be aggregated with any subsequent issuance at a discount to the Minimum Price if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. If, following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Section 312.03(c) prior to the subsequent issuance.]

312.04 For the Purpose of Section 312.03

For the purpose of Section 312.03:

(a) Shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs.

(b) Pursuant to Sections 312.03 (b) and (c), shareholder approval is required for the issuance of securities convertible into or exercisable for common stock if the stock that can be issued upon conversion or exercise exceeds the applicable percentages. This is the case even if such convertible or exchangeable securities are not to be listed on the Exchange.

(c) The Exchange's policy regarding the need to apply to list common stock reserved for issuance on the conversion or the exercise of other securities is described in Section 703.07.

(d) Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used in making any calculation provided for in Sections 312.03 (b) and (c). Shares reserved for issuance upon conversion of securities or upon exercise of options or warrants will not be regarded as outstanding.

(e) 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.

(f) "Voting power outstanding" refers to the aggregate number of votes that may be cast by holders of those securities outstanding that entitle the holders thereof to vote generally on all matters submitted to the company's security holders for a vote.

(g) ["Bona fide private financing" refers to a sale in which either:

- 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 five percent of the shares of the issuer's common stock or more than five percent of the issuer's voting power before the sale.

**h)]** "Officer" has the same meaning as defined by the Securities and Exchange Commission in Rule 16a-1(f) under the Securities Exchange Act of 1934, or any successor rule.

**(i)h)** "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 binding agreement.

**(j)i)** "Official Closing Price" of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used.

**(k)i)** The issuance of shares from treasury is considered an issuance of shares for purposes of Section 312.03. (See Section 703.01, Part 1, of the Listed Company Manual regarding required notice to the Exchange of issuance of shares from treasury.)

**(l)k)** "Early Stage Company" means a company that has not reported revenues greater than \$20 million in any two consecutive fiscal years since its incorporation and any Early Stage Company will lose that designation at any time after listing on the Exchange that it files an annual report with the SEC in which it reports two consecutive fiscal years in which it has revenues greater than \$20 million in each year.]

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