

Required fields are shown with yellow backgrounds and asterisks.

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| Page 1 of * <input type="text" value="47"/> | SECURITIES AND EXCHANGE COMMISSION<br>WASHINGTON, D.C. 20549<br>Form 19b-4 | File No.* SR - <input type="text" value="2020"/> - * <input type="text" value="85"/><br>Amendment No. (req. for Amendments *) <input type="text" value="1"/> |
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Filing by   
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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

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| 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) *   | Section 806(e)(2) *  |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
|   | Section 3C(b)(2) *   |
|   | <input type="checkbox"/>   |

|                                  |                                  |
|----------------------------------|----------------------------------|
| Exhibit 2 Sent As Paper Document | Exhibit 3 Sent As Paper Document |
| <input type="checkbox"/>         | <input type="checkbox"/>         |

**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 \*  Last Name \*

Title \*

E-mail \*

Telephone \*  Fax

**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

By

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 \***

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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 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 Sections 312.03, 312.04 and 314.00 of the NYSE Listed Company Manual (“Manual”). This Amendment No. 1 supersedes the original filing in its entirety.<sup>3</sup>

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

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

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

<sup>3</sup> The NYSE previously filed a proposed rule filing to amend the shareholder approval requirements of Sections 312.03 and 312.04 and the related party transaction approval requirements of Section 314.00 (the “Original Filing”). See SR-NYSE-2020-85 (December 16, 2020). The SEC published a notice for the Original Filing in the Federal Register. See Securities Exchange Act Release No. 90803 (December 28, 2020), 86 FR 0148 (January 4, 2021). Subsequently, the SEC published a notice in the Federal Register extending its time to take action with respect to the Original Filing. See Securities Exchange Act Release No. 91126 (February 12, 2021), 86 FR 10362 (February 19, 2021). This Amendment No. 1 supersedes the original filing in its entirety. Amendment No.1 is being filed to: (1) correct an error in the proposed rule text for Section 312.03(b); (2) clarify the application of Section 312.03(c) to financings conducted in connection with acquisition transactions; (3) clarify Section 314.00 to provide that all related party transactions are subject to prior review and potential prohibition by the audit committee or another group of independent directors, without regard to the value or materiality (as applicable) of such transaction; (4) to correct a typographical error in the text of Section 312.04; and (5) make some clarifying changes to the description of the proposal in the Form 19b-4 and delete applicable language from the Form 19b-4.

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

This Amendment No. 1 supersedes the original filing in its entirety.<sup>4</sup>

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 requirements can make it unnecessarily 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>5</sup> by providing listed companies with flexibility that exists under the rules of those other listing markets. The Exchange has waived certain requirements under Section 312.03 to provide listed companies with greater flexibility to raise capital during the COVID-19 crisis.<sup>6</sup> Among other things, the current proposal includes amendments that are identical in effect to the current waiver. The Exchange has observed that a significant number of companies have benefited from the flexibility provided by the waiver and has not observed any significant problems associated with companies' completion of transactions permitted by the waiver.

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<sup>4</sup> See note 3 *supra* for a summary of the changes in Amendment No. 1.

<sup>5</sup> See Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

<sup>6</sup> See Securities Exchange Act Release No. 34-88572 (April 6, 2020); 85 FR 20323 (April 10, 2020) (SR-NYSE-2020-30). (waiving certain requirements of Section 312.03 through June 30, 2020). See also Securities Exchange Act Release No. 89219 (July 2, 2020); 85 FR 41640 (July 10, 2020) (SR-NYSE-2020-58) (extending the waiver through September 30, 2020). See also Securities Exchange Act Release No. 90020 (September 28, 2020); 85 FR 62357 (October 2, 2020) (SR-NYSE-2020-79) (extending the waiver through December 31, 2020).

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>7</sup> of the company (each a "Related Party" for purposes of Section 312.03(b));
- 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 relating to no more than 5% of the number of shares of common stock or voting power outstanding that meet a Minimum Price test set forth in the rule (the "Minimum Price").<sup>8</sup> However, this exception may only be used if the Related Party in question has Related Party status solely because it is a substantial security holder of the company.

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<sup>7</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>8</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.

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

- The Exchange proposes to modify the class of persons with respect to which 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 issuances of common stock to directors, officers, and substantial securityholders (“Related Party”) and would no longer require such approval for issuances to such 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 in the counterparty, as described below). 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 closely related persons of Related Parties.
- As proposed to be amended, Section 312.03(b) would require shareholder approval of cash sales to Related Parties (as such term is defined in Section 312.03(b)) only if the price is less than the Minimum Price. Accordingly, Section 312.03(b) would no longer require shareholder approval of issuances in a cash sale that meet the Minimum Price requirement to a Related Party 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: (i) either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance; or (ii) in the case of a Related Party that has that status solely because such person is a substantial securityholder, either 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance. However, 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 relating to more than 1% of the issuer’s common stock or voting power prior to the issuance to a Related Party for prices below the Minimum Price will continue to be subject to shareholder approval under Section 312.03(b) (this requirement is not included in the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges). Similarly, issuances to Related Parties in non-cash transactions relating to more than 1% of the issuer’s common stock or voting power prior to the issuance will continue to be subject to shareholder approval under Section 312.03(b) as proposed to be amended.
- The Exchange proposes to require 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), 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 a limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules.

- The Exchange proposes to delete from Section 312.03(b) two provisions that will no longer be relevant as they relate to transactions that benefit from exemptions from shareholder approval under current Section 312.03(b), but would be exempt from shareholder approval under the general application of Section 312.03(b) as proposed to be amended. These provisions relate to: (i) cash sales meeting the Minimum Price test and relating to no more than 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance to a Related Party where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder; and (ii) the Early Stage Company exemption, to which the Exchange proposes to remove the reference from Section 312.04 as it will no longer be needed. For the same reason, the Exchange proposes to delete from Section 312.03(b) a sentence that provides that the Early Stage Company exemption is not applicable to a sale of securities by the listed company to any person subject to the provisions of Section 312.03(b) 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 also 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 314.00 of the Manual in its proposed amended form will provide that transactions with related parties, such as those in which a director, officer or substantial securityholder has an interest, must be reviewed prior to such transaction by the company's audit committee or another body of independent directors and would be prohibited if the audit committee or such other body of independent directors determined it to be inconsistent with the interests of the company and its shareholders. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including a requirement of shareholder approval for any sale for

less than the Minimum Price relating to 20% or more of the issuer's outstanding common stock or voting power prior to such issuance. The Exchange believes that this requirement means that any significantly 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 314.00 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 (including Related Parties as such term is defined in Section 312.03(b)). In particular, the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties relating to more than 1% of the company's outstanding common stock that do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges. 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 Minimum 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 312.03(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 (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.<sup>9</sup> In addition, as any sale to a broker-dealer under the current Bona Fide Private Financing exception would also qualify for an exception to shareholder approval under the proposed amended exemption, there is no need to retain a separate provision for sales made to broker-dealers. The Exchange also proposes to amend Section 312.03(c) to provide that, if the securities in such financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if 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 in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance. Finally, as the Bona Fide Private Financing term will no longer be used in Section 312.03(c), the Exchange proposes to delete the definition of that term in Section 312.04(g).

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, in replacing the Bona Fide Private Financing exception with the revised exemption described in the immediately preceding paragraph, the proposed amendment would only remove a limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a Minimum Price cash sale of more than 5% of the shares or voting power, as well as the requirement that there be multiple purchasers in the transaction. 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 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

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<sup>9</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).

passed, the Exchange now proposes to delete Section 312.03T in its entirety, as it is no longer applicable.

#### Typographical Error in Section 312.04

The Exchange proposes to amend the definition of “Official Closing Price” in Section 312.04 to correct a typographical error by replacing the word “if” with the word “of” in that last sentence of that definition.

#### Amendment to Section 314.00

In its current form, Section 314.00 provides that related party transactions normally include transactions between officers, directors, and principal shareholders and the company and that each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. The current rule further states that, while 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.

The Exchange proposes to amend the first paragraph of Section 314.00.<sup>10</sup> The proposed new rule text strengthens the rule in two important respects:

- For purposes of Section 314.00, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act (without applying the transaction value threshold of Item 404). In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B (without regard to the materiality threshold of that provision).
- Related party transactions under the rule as amended must be subject to prior review by either the company's audit committee or another independent body of the board of directors and the audit committee or such other body will prohibit such a transaction if it determines it to be

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<sup>10</sup> The Second paragraph of Section 314.00 will be retained in its entirety. It reads as follows:

The Exchange will continue to review proxy statements and other SEC filings disclosing related party transactions and where such situations continue year after year, the Exchange will remind the listed company of its obligation, on a continuing basis, to evaluate each related party transaction and determine whether or not it should be permitted to continue.

inconsistent with the interests of the company and its shareholders.<sup>11</sup>

(b) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>13</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 314.00 of the Manual, as proposed to be amended, will provide that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and approved by the issuer's audit committee or another group of independent directors. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including required shareholder approval of any sale relating to 20% or more of the issuer's common stock or voting power immediately preceding this issuance for less than the Minimum Price. The Exchange believes that this requirement means that any significant economically dilutive transaction would be subject to shareholder approval. The Exchange notes that Section 312.03(c) applies to any transaction or series of related transactions, which provides shareholders with further protection by ensuring that a company cannot avoid the shareholder approval requirement by separating an overall transaction into smaller separate transactions that would not individually require 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

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<sup>11</sup> The Exchange proposes to delete from Section 314.00 a sentence that reads as follows: "Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated." This sentence is no longer necessary, as the proposed amended rule gives the audit committee or other independent body of the board the authority to prohibit any related party transaction it reviews.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

limitations with respect to related party issuances as described above (including the review of such transactions under Section 314.00 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 (including Related Parties as such term is defined in Section 312.03(b)). 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 or voting power and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges. 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 Minimum 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 arbitrary limitations in the Bona Fide Private Financing exception that limit the participation of any single investor in a Minimum Price cash sale to 5% and require multiple purchasers to participate in the transaction. 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.

The Exchange believes that the proposed amendments to Section 314.00 are also designed to protect the public interest and the interests of investors. By proposing to use the definition of a related party transaction in SEC disclosure rules, the Exchange is providing greater clarity to both issuers and investors as to when the rule must be applied. By proposing to require that transactions subject to the rule must be subject to prior review and potential prohibition by either the audit committee or another body of independent directors, the Exchange is making the requirement more explicit and preventing any listed issuer from giving that role to any group that is not entirely made up of independent directors.

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 and therefore enhances competition among listing exchanges. As all listed companies will be subject to the same shareholder approval and related party transaction approval requirements, the proposal does not impose any burden on competition among listed issuers.

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 changes to Section 312.03 are based on Nasdaq Marketplace Rules 5635(a) and (d) and NYSE American Company Guide Sections 712 and 713. The proposed changes to Section 314.00 are based on Nasdaq Marketplace Rule 5630.

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

Exhibit 4 – Revisions to Proposed Rule Text in Amendment No. 1

Exhibit 5 – Proposed Rule Text

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NYSE-2020-85, Amendment No. 1)

[Date]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Sections 312.03, 312.04 and 314.00 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 March 30, 2021, 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 Sections 312.03, 312.04 and 314.00 of the NYSE Listed Company Manual (“Manual”). This Amendment No. 1 supersedes the original filing in its entirety.<sup>4</sup> The proposed rule change is available on the Exchange’s

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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.

<sup>4</sup> The NYSE previously filed a proposed rule filing to amend the shareholder approval requirements of Sections 312.03 and 312,04 and the related party transaction approval requirements of Section 314,00 (the “Original Filing”). See SR-NYSE-2020-85 (December 16, 2020). The SEC published a notice for the Original Filing in the Federal Register. See Securities Exchange Act Release No. 90803 (December 28, 2020), 86 FR 0148 (January 4, 2021). Subsequently, the SEC published a notice in the Federal Register extending its time to take action

website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

This Amendment No. 1 supersedes the original filing in its entirety.<sup>5</sup>

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 requirements can make it unnecessarily difficult for listed companies

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with respect to the Original Filing. See Securities Exchange Act Release No. 91126 (February 12, 2021), 86 FR 10362 (February 19, 2021). This Amendment No. 1 supersedes the original filing in its entirety. Amendment No.1 is being filed to: (1) correct an error in the proposed rule text for Section 312.03(b); (2) clarify the application of Section 312.03(c) to financings conducted in connection with acquisition transactions; (3) clarify Section 314.00 to provide that all related party transactions are subject to prior review and potential prohibition by the audit committee or another group of independent directors, without regard to the value or materiality (as applicable) of such transaction; (4) to correct a typographical error in the text of Section 312.04; and (5) make some clarifying changes to the description of the proposal in the Form 19b-4 and delete applicable language from the Form 19b-4.

<sup>5</sup> See note 4 *supra* for a summary of the changes in Amendment No. 1.

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>6</sup> by providing listed companies with flexibility that exists under the rules of those other listing markets. The Exchange has waived certain requirements under Section 312.03 to provide listed companies with greater flexibility to raise capital during the COVID-19 crisis.<sup>7</sup> Among other things, the current proposal includes amendments that are identical in effect to the current waiver. The Exchange has observed that a significant number of companies have benefited from the flexibility provided by the waiver and has not observed any significant problems associated with companies' completion of transactions permitted by the waiver.

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>8</sup> of the company (each a

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<sup>6</sup> See Nasdaq Marketplace Rule 5635 and NYSE American Company Guide Sections 712 and 713.

<sup>7</sup> See Securities Exchange Act Release No. 34-88572 (April 6, 2020); 85 FR 20323 (April 10, 2020) (SR-NYSE-2020-30). (waiving certain requirements of Section 312.03 through June 30, 2020). See also Securities Exchange Act Release No. 89219 (July 2, 2020); 85 FR 41640 (July 10, 2020) (SR-NYSE-2020-58) (extending the waiver through September 30, 2020). See also Securities Exchange Act Release No. 90020 (September 28, 2020); 85 FR 62357 (October 2, 2020) (SR-NYSE-2020-79) (extending the waiver through December 31, 2020).

<sup>8</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

"Related Party" for purposes of Section 312.03(b));

- 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 relating to no more than 5% of the number of shares of common stock or voting power outstanding that meet a Minimum Price test set forth in the rule (the "Minimum Price").<sup>9</sup> However, this exception may only be used if the Related Party in question has Related Party status solely because it is a substantial security holder of the company.

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be regarded as a substantial security holder."

<sup>9</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.

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

- The Exchange proposes to modify the class of persons with respect to which 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 issuances of common stock to directors, officers, and substantial securityholders (“Related Party”) and would no longer require such approval for issuances to such 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 in the counterparty, as described below). 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 closely related persons of Related Parties.
- As proposed to be amended, Section 312.03(b) would require shareholder approval of cash sales to Related Parties (as such term is defined in Section 312.03(b)) only if the price is less than the Minimum Price. Accordingly, Section 312.03(b) would no longer require shareholder approval of issuances in a cash sale that meet the Minimum Price requirement to a Related Party 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: (i) either 1% of

the number of shares of common stock or 1% of the voting power outstanding before the issuance; or (ii) in the case of a Related Party that has that status solely because such person is a substantial securityholder, either 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance. However, 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 relating to more than 1% of the issuer's common stock or voting power prior to the issuance to a Related Party for prices below the Minimum Price will continue to be subject to shareholder approval under Section 312.03(b) (this requirement is not included in the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges). Similarly, issuances to Related Parties in non-cash transactions relating to more than 1% of the issuer's common stock or voting power prior to the issuance will continue to be subject to shareholder approval under Section 312.03(b) as proposed to be amended.

- The Exchange proposes to require 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), 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 a limitation placed specifically on issuances to related parties in the Nasdaq and NYSE American rules.

- The Exchange proposes to delete from Section 312.03(b) two provisions that will no longer be relevant as they relate to transactions that benefit from exemptions from shareholder approval under current Section 312.03(b), but would be exempt from shareholder approval under the general application of Section 312.03(b) as proposed to be amended. These provisions relate to: (i) cash sales meeting the Minimum Price test and relating to no more than 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance to a Related Party where the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder; and (ii) the Early Stage Company exemption, to which the Exchange proposes to remove the reference from Section 312.04 as it will no longer be needed. For the same reason, the Exchange proposes to delete from Section 312.03(b) a sentence that provides that the Early Stage Company exemption is not applicable to a sale of securities by the listed company to any person subject to the provisions of Section 312.03(b) 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 also 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 314.00 of the Manual in its proposed amended form will provide that transactions with related parties, such as those in which a director, officer or substantial securityholder has an interest, must be reviewed prior to such transaction by the company's audit committee or another body of independent directors and would be prohibited if the audit committee or such other body of independent directors determined it to be inconsistent with the interests of the company and its shareholders. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including a requirement of shareholder approval for any sale for less than the Minimum Price relating to 20% or more of the issuer's outstanding common stock or voting power prior to such issuance. The Exchange believes that this requirement means that any significantly 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 314.00 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 (including Related Parties as such term is defined in Section 312.03(b)). In particular, the Exchange notes that the continued shareholder approval requirement for cash sales to Related Parties relating to more than 1% of the company's outstanding common stock that do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges. 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 Minimum 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 312.03(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 (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.<sup>10</sup> In addition, as any sale to a broker-dealer under the current Bona Fide Private Financing exception would also qualify for an exception to shareholder approval under the proposed amended exemption, there is no need to retain a separate provision for sales made to broker-dealers. The Exchange also proposes to amend Section 312.03(c) to provide that, if the securities in such financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of the securities alone or when combined with any other present or potential issuance of

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<sup>10</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).

common stock, or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance. Finally, as the Bona Fide Private Financing term will no longer be used in Section 312.03(c), the Exchange proposes to delete the definition of that term in Section 312.04(g).

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, in replacing the Bona Fide Private Financing exception with the revised exemption described in the immediately preceding paragraph, the proposed amendment would only remove a limitation in the Bona Fide Private Financing exception that limits the participation of any single investor in a Minimum Price cash sale of more than 5% of the shares or voting power, as well as the requirement that there be multiple purchasers in the transaction. 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 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.

Typographical Error in Section 312.04

The Exchange proposes to amend the definition of “Official Closing Price” in Section 312.04 to correct a typographical error by replacing the word “if” with the word “of” in that last sentence of that definition.

Amendment to Section 314.00

In its current form, Section 314.00 provides that related party transactions normally include transactions between officers, directors, and principal shareholders and the company and that each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. The current rule further states that, while 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.

The Exchange proposes to amend the first paragraph of Section 314.00.<sup>11</sup> The proposed new rule text strengthens the rule in two important respects:

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<sup>11</sup> The Second paragraph of Section 314.00 will be retained in its entirety. It reads as follows:

The Exchange will continue to review proxy statements and other SEC filings disclosing related party transactions and where such situations continue year after year, the Exchange will remind the listed company of its obligation, on a continuing basis, to evaluate each related party

- For purposes of Section 314.00, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act (without applying the transaction value threshold of Item 404). In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B (without regard to the materiality threshold of that provision).
- Related party transactions under the rule as amended must be subject to prior review by either the company's audit committee or another independent body of the board of directors and the audit committee or such other body will prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders.<sup>12</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>14</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and

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transaction and determine whether or not it should be permitted to continue.

<sup>12</sup> The Exchange proposes to delete from Section 314.00 a sentence that reads as follows: "Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated." This sentence is no longer necessary, as the proposed amended rule gives the audit committee or other independent body of the board the authority to prohibit any related party transaction it reviews.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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 314.00 of the Manual, as proposed to be amended, will provide that related party transactions, such as those in which a director, officer or substantial securityholder has an interest, are required to be reviewed and approved by the issuer's audit committee or another group of independent directors. Furthermore, there are other significant protections under other paragraphs of Section 312.03, including required shareholder approval of any sale relating to 20% or more of the issuer's common stock or voting power immediately preceding this issuance for less than the Minimum Price. The Exchange believes that this requirement means that any significant economically dilutive transaction would be subject to shareholder approval. The Exchange notes that Section 312.03(c) applies to any transaction or series of related transactions, which provides shareholders with further protection by ensuring that a company cannot avoid the shareholder approval requirement by separating an overall transaction into smaller separate transactions that would not individually require 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 314.00 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 (including Related Parties as such term is defined in Section 312.03(b)). 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 or voting power and do not meet the Minimum Price requirement is an important protection not provided by the Nasdaq or NYSE American rules, although such sales may also be subject to shareholder approval pursuant to the equity compensation rules of all three exchanges. 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 Minimum 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 arbitrary limitations in the Bona Fide Private Financing exception that limit the participation of any single investor in a Minimum Price cash sale to 5% and require multiple purchasers to

participate in the transaction. 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.

The Exchange believes that the proposed amendments to Section 314.00 are also designed to protect the public interest and the interests of investors. By proposing to use the definition of a related party transaction in SEC disclosure rules, the Exchange is providing greater clarity to both issuers and investors as to when the rule must be applied. By proposing to require that transactions subject to the rule must be subject to prior review and potential prohibition by either the audit committee or another body of independent directors, the Exchange is making the requirement more explicit and preventing any listed issuer from giving that role to any group that is not entirely made up of independent directors.

**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 and therefore

enhances competition among listing exchanges. As all listed companies will be subject to the same shareholder approval and related party transaction approval requirements, the proposal does not impose any burden on competition among listed issuers.

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>15</sup>

Eduardo A. Aleman  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).

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 Deleted text in [brackets]  
 Amendment 1 added text in ***bold italics underline***  
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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) (i) 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

~~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. ***However, shareholder approval will not be required if such transaction is a cash sale for a price that is at least the Minimum Price.***~~

[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.]

(ii) Shareholder approval is also required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of related transactions 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 or series of related transactions and the present or potential issuance of common stock, or securities convertible into common stock, could result in an issuance that exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

[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 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] (iii) 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] 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 (that is not a public offering for cash) 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] , provided that if ***the securities in any of the proceeds of such financing are issued in connection with*** ~~will be paid in an acquisition and the securities generating such proceeds~~ ***of the stock or assets of another company, shareholder approval will be required if the issuance of such securities alone or*** when combined with any securities issued ***other present or potential issuance of common stock, or securities convertible into common stock*** in connection with such acquisition, ***is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance,*** ~~then shareholder approval is required.~~

\* \* \* \* \*

[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)** "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.]

\* \* \* \* \*

#### 314.00 Related Party Transactions

[Related party transactions normally include transactions between officers, directors, and principal shareholders and the company. Each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. While 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. Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated.] A company's audit committee or another independent body of the board of directors, shall conduct a reasonable *prior* review and oversight of all related party transactions for potential conflicts of interest and ~~may~~ *will* prohibit such a transaction if it determines it to be inconsistent with the interests of the company *and its shareholders*. For purposes of this rule, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act *(but without applying the transaction value threshold of that provision)*. In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B *(but without regard to the materiality threshold of that provision)*.

\* \* \* \* \*

Added text underlined;  
Deleted text in [brackets].

## NYSE Listed Company Manual

\* \* \* \* \*

### 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) (i)** 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, shareholder approval will not be required if such transaction is a cash sale for a price that is at least the Minimum Price.

[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.]

(ii) Shareholder approval is also required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of related transactions 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 or series of related transactions and the present or potential issuance of common stock, or securities convertible into common stock, could result in an issuance that exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

[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 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] (iii) 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] 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 (that is not a public offering for cash) 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] provided that if the securities in such financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of such securities alone or when combined with any other present or potential issuance of common stock, or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance.

\* \* \* \* \*

[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)]** "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)]** "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 [if] of the regular session on Tuesday, then Monday's official closing price is used.

**(k)]** 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)]** "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.]

\* \* \* \* \*

#### 314.00 Related Party Transactions

[Related party transactions normally include transactions between officers, directors, and principal shareholders and the company. Each related party transaction is to be reviewed and evaluated by an appropriate group within the listed company involved. While 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. Following the review, the company should determine whether or not a particular relationship serves the best interests of the company and its shareholders and whether the relationship should be continued or eliminated.] A company's audit committee or another independent body of the board of directors, shall

conduct a reasonable prior review and oversight of all related party transactions for potential conflicts of interest and will prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders. For purposes of this rule, the term "related party transaction" refers to transactions required to be disclosed pursuant to Item 404 of Regulation S-K under the Securities Exchange Act (but without applying the transaction value threshold of that provision). In the case of foreign private issuers, the term "related party transactions" refers to transactions required to be disclosed pursuant to Form 20-F, Item 7.B (but without regard to the materiality threshold of that provision).

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