

December 21, 2023

**VIA E-MAIL**

Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: SEC Release No. 34-97869 (SR-NYSE-2023-34)

Dear Secretary

NYSE LLC, Inc. filed the attached Amendment No. 1 to the above-referenced filing on December 21, 2023.

Sincerely,

A handwritten signature in blue ink, appearing to be 'MJ', is located below the 'Sincerely,' text.

Encl. (Amendment No. 1 to SR-NYSE-2023-34)

**Martha Redding**  
**Corporate Secretary**

New York Stock Exchange  
11 Wall Street  
New York, NY 10005  
Tel: +1 212.656. 2938 | Fax: +1 212.656.8101  
**ice.com**

Required fields are shown with yellow backgrounds and asterisks.

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2023 - \* 34

Amendment No. (req. for Amendments \*) 1

Filing by New York Stock Exchange LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010  
Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

### Description

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

### Contact Information

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

First Name \* John Last Name \* Carey

Title \* Senior Director, Regulation

E-mail \* john.carey@ice.com

Telephone \* (212) 656-5640 Fax

### Signature

Pursuant to the requirements of the Securities Exchange of 1934, New York Stock Exchange LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 12/21/2023

(Title \*)

By David De Gregorio

Associate General Counsel

(Name \*)

David De Gregorio

Digitally signed by David De Gregorio  
Date: 2023.12.21 14:13:44 -05'00'

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

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

Add Remove View

SR-NYSE-2023-34, Amendment No. 1

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

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

Add Remove View

SR-NYSE-2023-34, Amendment No. 1

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 Advanced 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 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**

Add Remove View

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 Sent As Paper Document

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

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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 Sent As Paper Document

**Exhibit 4 - Marked Copies**

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SR-NYSE-2023-34, Amendment No. 1

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**

Add Remove View

SR-NYSE-2023-34, Amendment No. 1

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 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> New York Stock Exchange LLC (“NYSE” or the “Exchange”) proposes to amend Section 312.03(b) of the NYSE Listed Company Manual (“Manual”) to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed company. The text of the proposed rule change is set forth in Exhibit 5 attached hereto. This Amendment No. 1 supersedes the original filing in its entirety. The changes to the original filing made in Amendment No. 1 are described in the Purpose section below.
- (b) The Exchange does not believe that the proposed rule change would have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

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

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

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

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

(a) Purpose

The NYSE previously filed a proposed rule filing to amend Section 312.03(b) of the Manual to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed

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

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

company.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on October 4, 2023.<sup>4</sup> This Amendment No. 1 supersedes the original filing in its entirety.

Amendment No. 1 includes in the Purpose and Statutory Basis sections additional explanation of why the Exchange is proposing the rule change and believes that it is appropriate, specifically discussing the Exchange's belief that there is a lesser possibility that a substantial security holder may exercise influence over the terms of a transaction with the company if such substantial security holder does not have representation on the board or in management. In addition, Amendment No. 1 amends the rule text to adopt a new definition of an "Active Related Party" in Section 312.03(b)(i) and to retain the current definition of Related Party for purposes of Section 312.03(b)(ii).<sup>5</sup> The Purpose section is amended to describe these proposed amendments, as well as to explain that their purpose is to ensure that the proposal would not have any substantive effect on the application of Section 312.03(b)(ii). A listed company selling securities to a Related Party under the circumstances set forth in the rule as amended would remain subject to the shareholder approval requirements in 312.03(b)(ii). Finally, Amendment No. 1 amends the rule text to adopt in Section 312.04 definitions of "control" and "group" for purposes of proposed amended Section 312.03(b)(i), providing clarity as to the meaning of the terms "controlling shareholder" and "control group" in that provision as amended. The Purpose section is amended to describe the addition of those new defined terms and to include footnotes explaining how "control" is defined and the standards to be applied in determining whether or not a "group" exists.

Section 312.04(e) of the Manual provides that 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.

Section 312.03(b)(i) of the Manual provides that 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 a director, officer or substantial security holder of the company 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.

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<sup>3</sup> See SR-NYSE-2023-34 (September 26, 2023).

<sup>4</sup> See Securities Exchange Act Release No. 98662 (September 29, 2023), 88 FR 68675 (October 4, 2023).

<sup>5</sup> Section 312.03(b)(ii) provides that shareholder approval is 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 Manual provides an exception to the shareholder approval requirement if such transaction is a cash sale for a price that is at least the Minimum Price. Section 312.04(h) defines the Minimum Price as 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(i) defines the “Official Closing Price” of an issuer's common stock as 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.<sup>6</sup>

Certain NYSE listed companies are significantly dependent on their ability to regularly raise additional capital to fund their operations or acquire new assets. For example, pre-revenue stage biotechnology companies regularly seek additional capital to fund their research and development activities and real estate investment trusts seek to fund the acquisition of new properties by selling equity securities in private placements or direct registered sales priced at a small discount to the prevailing market price. It is the Exchange’s understanding that, in many cases, existing shareholders of the listed company are willing purchasers of securities in such circumstances, as they already understand the company’s business and have a positive view of its future prospects. Sales to existing shareholders can also be advantageous to both the issuer and the shareholders because of the speed with which a direct sale to an existing shareholder can be completed if no shareholder approval is required. However, the benefits of low transaction costs and speed of execution that typically exist when conducting these transactions with existing shareholders face countervailing factors if the counterparty is deemed to be a substantial securityholder for purposes of Section 312.03(b)(i). In such cases, to mitigate potential conflicts of interest, Exchange rules require that any sale below the Minimum Price can relate to no more than one per cent of the shares of common stock or one percent of the voting power outstanding before the issuance. Any such transaction that relates to more than one per cent of the common stock is subject to shareholder approval, which imposes significant delay and additional costs on the issuer, thereby often making the sale impracticable. This one percent limitation is therefore a significant restriction on the ability of an NYSE listed company to raise capital from its existing shareholders. Notably, the NYSE is the only listing exchange in the United States that has such a limitation in its rules and NYSE companies are therefore at a disadvantage in raising additional capital when compared to their peers listed on other national securities exchanges.

The Exchange believes there are significant benefits from the protection provided to a listed company’s investors by the shareholder approval requirements in Section 312.03(b)(i) when a purchaser of the securities in a transaction is an officer or director or other control person of the company. In such cases, the potential exists for a related party purchaser to use their influence within the company to obtain superior terms from the company to the detriment of the company’s shareholders as a whole. However, the

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<sup>6</sup> 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.

current definition of substantial security holder used in the rule also applies to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way generally do not have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company.<sup>7</sup> As discussed below the Exchange will be adopting the definition contained in Rule 12b-2 under Regulation 12B of the Exchange Act to define control for purposes of the proposed amended rule.

In light of the foregoing, the Exchange proposes to amend Section 312.03(b)(i) to limit its application to related parties whose interest in the company is not passive in nature. As proposed, Section 312.03(b)(i) would be limited in application to sales to a director, officer, controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person<sup>8</sup> who is an officer or director of the company (each an "Active Related Party"). For purposes of determining the existence of a group, the Exchange proposes to rely on the filings on Schedule 13D or Schedule 13G disclosing the existence of a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act, along with any additional follow-up inquiry that is needed.<sup>9</sup> The Exchange proposes to amend Section 312.04 to include new definitions for purposes of Section 312.03, providing that: (i) a "group" means a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act; and (ii) "control" has the same meaning as defined in Rule 12b-2 of Regulation 12B under the

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<sup>7</sup> The Exchange recognizes that substantial shareholders who are not represented on the board or in management are likely to vote their shares at shareholder meetings, but believes that this in itself is generally not sufficient to create a relationship with the company that would give a substantial shareholder the ability to influence inappropriately the terms of any transaction it enters into with the company.

<sup>8</sup> In determining whether a person is an affiliated person for purposes of the definition of an Active Related Party, the Exchange will consider all relevant facts and circumstances, including, but not limited to, whether such person is an affiliate within the meaning of that term under provisions of the federal securities laws and the rules thereunder.

<sup>9</sup> Section 13(d)(3) or Section 13(g)(3) provide: "When two or more persons act as a [ ] group for the purpose of acquiring, holding, or disposing of [equity] securities of an issuer, the group shall be deemed a 'person' . . ." The determination under Sections 13(d)(3) and 13(g)(3) as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement. Depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding – which includes voting – or disposing of securities of an issuer are sufficient to constitute the formation of a group.

Exchange Act.<sup>10</sup> The Exchange intends to revise its internal procedures in reviewing proposed transactions to the extent necessary to obtain the necessary information to make determinations with respect to whether shareholders participating in transactions are Active Related Parties.

In addition to the proposed definition of Active Related Party in the proposed amended version of Section 312.03(b)(i), the Exchange proposes for purposes of Section 312.03(b)(ii) to retain the broader definition of a Related Party included in the current rule (i.e., “a director, officer or substantial security holder of the company”). Consequently, this proposal would not have any substantive effect on the application of Section 312.03(b)(ii) and a listed company selling securities to a Related Party under the circumstances set forth in the rule as amended remains subject to the shareholder approval requirements in that provision.<sup>11</sup>

The Exchange also notes that any listed company selling securities in a private placement that does not meet the Minimum Price requirement will remain subject to the shareholder approval requirement of Section 312.03(c) if such transaction relates to 20 percent or more of the issuer’s common stock. In addition, 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. Sales of securities will also continue to be subject to all other shareholder approval requirements set forth in Section 312.03 (including limitations with respect to equity compensation under Section 312.03(a) and Section 303A.08) and the change of control requirement of Section 312.03(d). The Exchange notes that Section 312.04(a) provides that 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. Finally, the Exchange notes that Section 312.03(b)(i) as proposed to be amended would continue to provide a significant protection to shareholders against conflicts of interest in sales of securities to Active Related Parties and that no other listing venue has such a protection in its rules. The Exchange notes that its shareholder approval requirements are as stringent in every respect as those of its competitor listing venues.<sup>12</sup>

Under the proposal the Exchange will continue to require shareholder approval for below market sales (i.e., below the Minimum Price) over one percent to Active Related Parties. However, as a consequence of the proposed amendment, below market sales over one

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<sup>10</sup> Rule 12b-2 under Regulation 12B of the Exchange Act provides that “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”

<sup>11</sup> See note 5 supra for a description of Section 312.03(b)(ii).

<sup>12</sup> See, for example, Nasdaq Stock Market Rule 5635.



percent to substantial securityholders who are not Active Related Parties will be permitted without shareholder approval under 312.03(b)(i), but will continue to be subject to all the other applicable shareholder approval requirements under 312.03.

(b) Statutory Basis

The Exchange believes that 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 promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that proposed amended Section 312.03(b)(i) is consistent with the protection of investors and the public interest. Specifically, the amended rule continues to provide for shareholder approval of below-market sales of securities to Active Related Parties of a listed company where a potential conflict of interest exists that Active Related Parties could use their influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole. The current definition of substantial security holder used in the rule extends to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company (except by voting at shareholder meetings) in and of themselves generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way do not generally have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company. The proposed rule only modifies the existing rule to permit sales to investors who are not a director, officer, a controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person who is an officer or director of the company and with respect to whom the Exchange therefore believes that the potential for such self-dealing does not exist.

The Exchange proposes to use definitions of "control" and "group" in the proposed amended rule that are used in the federal securities laws and the rules thereunder and, consequently, the Exchange believes that the use of such definitions is consistent with the Act.

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

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

The Exchange believes that the proposed amendment would promote competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed amendment increases competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

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

The Exchange does not consent at this time to an extension of any time period for Commission action.

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

Not applicable.

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-2023-34, Amendment No. 1)

[Date]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change proposes to amend Section 312.03(b) of the NYSE Listed Company Manual.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on December 21, 2023, 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 Section 312.03(b) of the NYSE Listed Company Manual (“Manual”) to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed company. The text of the proposed rule change is set forth in Exhibit 5 attached hereto. This Amendment No. 1 supersedes the original filing in its entirety. The changes to the original filing made in Amendment No. 1 are described in the Purpose section below. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

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

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

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

1. Purpose

The NYSE previously filed a proposed rule filing to amend Section 312.03(b) of the Manual to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed company.<sup>4</sup> The proposed rule change was published for comment in the Federal Register on October 4, 2023.<sup>5</sup> This Amendment No. 1 supersedes the original filing in its entirety.

Amendment No. 1 includes in the Purpose and Statutory Basis sections additional explanation of why the Exchange is proposing the rule change and believes that it is appropriate, specifically discussing the Exchange’s belief that there is a lesser possibility that a substantial security holder may exercise influence over the terms of a transaction with the company if such substantial security holder does not have representation on the board or in management. In addition, Amendment No. 1 amends the rule text to adopt a new definition of an “Active Related Party” in Section 312.03(b)(i) and to retain the current definition of Related Party for purposes of

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<sup>4</sup> See SR-NYSE-2023-34 (September 26, 2023).

<sup>5</sup> See Securities Exchange Act Release No. 98662 (September 29, 2023), 88 FR 68675 (October 4, 2023).

Section 312.03(b)(ii).<sup>6</sup> The Purpose section is amended to describe these proposed amendments, as well as to explain that their purpose is to ensure that the proposal would not have any substantive effect on the application of Section 312.03(b)(ii). A listed company selling securities to a Related Party under the circumstances set forth in the rule as amended would remain subject to the shareholder approval requirements in 312.03(b)(ii). Finally, Amendment No. 1 amends the rule text to adopt in Section 312.04 definitions of “control” and “group” for purposes of proposed amended Section 312.03(b)(i), providing clarity as to the meaning of the terms “controlling shareholder” and “control group” in that provision as amended. The Purpose section is amended to describe the addition of those new defined terms and to include footnotes explaining how “control” is defined and the standards to be applied in determining whether or not a “group” exists.

Section 312.04(e) of the Manual provides that 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.

Section 312.03(b)(i) of the Manual provides that 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 a director, officer or substantial security holder of the company if the number of shares of common stock to be issued, or if the number of

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<sup>6</sup> Section 312.03(b)(ii) provides that shareholder approval is 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.

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.

The Manual provides an exception to the shareholder approval requirement if such transaction is a cash sale for a price that is at least the Minimum Price. Section 312.04(h) defines the Minimum Price as 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(i) defines the “Official Closing Price” of an issuer's common stock as 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.<sup>7</sup>

Certain NYSE listed companies are significantly dependent on their ability to regularly raise additional capital to fund their operations or acquire new assets. For example, pre-revenue stage biotechnology companies regularly seek additional capital to fund their research and development activities and real estate investment trusts seek to fund the acquisition of new properties by selling equity securities in private placements or direct registered sales priced at a small discount to the prevailing market price. It is the Exchange’s understanding that, in many cases, existing shareholders of the listed company are willing purchasers of securities in such circumstances, as they already understand the company’s business and have a positive view of its future prospects. Sales to existing shareholders can also be advantageous to both the issuer and the shareholders because of the speed with which a direct sale to an existing shareholder can be

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<sup>7</sup> 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.

completed if no shareholder approval is required. However, the benefits of low transaction costs and speed of execution that typically exist when conducting these transactions with existing shareholders face countervailing factors if the counterparty is deemed to be a substantial securityholder for purposes of Section 312.03(b)(i). In such cases, to mitigate potential conflicts of interest, Exchange rules require that any sale below the Minimum Price can relate to no more than one per cent of the shares of common stock or one percent of the voting power outstanding before the issuance. Any such transaction that relates to more than one per cent of the common stock is subject to shareholder approval, which imposes significant delay and additional costs on the issuer, thereby often making the sale impracticable. This one percent limitation is therefore a significant restriction on the ability of an NYSE listed company to raise capital from its existing shareholders. Notably, the NYSE is the only listing exchange in the United States that has such a limitation in its rules and NYSE companies are therefore at a disadvantage in raising additional capital when compared to their peers listed on other national securities exchanges.

The Exchange believes there are significant benefits from the protection provided to a listed company's investors by the shareholder approval requirements in Section 312.03(b)(i) when a purchaser of the securities in a transaction is an officer or director or other control person of the company. In such cases, the potential exists for a related party purchaser to use their influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole. However, the current definition of substantial security holder used in the rule also applies to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company generally do not give rise to the



potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way generally do not have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company.<sup>8</sup> As discussed below the Exchange will be adopting the definition contained in Rule 12b-2 under Regulation 12B of the Exchange Act to define control for purposes of the proposed amended rule.

In light of the foregoing, the Exchange proposes to amend Section 312.03(b)(i) to limit its application to related parties whose interest in the company is not passive in nature. As proposed, Section 312.03(b)(i) would be limited in application to sales to a director, officer, controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person<sup>9</sup> who is an officer or director of the company (each an "Active Related Party"). For purposes of determining the existence of a group, the Exchange proposes to rely on the filings on Schedule 13D or Schedule 13G disclosing the existence of a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act, along with any additional follow-up inquiry that is needed.<sup>10</sup> The Exchange proposes to amend Section

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<sup>8</sup> The Exchange recognizes that substantial shareholders who are not represented on the board or in management are likely to vote their shares at shareholder meetings, but believes that this in itself is generally not sufficient to create a relationship with the company that would give a substantial shareholder the ability to influence inappropriately the terms of any transaction it enters into with the company.

<sup>9</sup> In determining whether a person is an affiliated person for purposes of the definition of an Active Related Party, the Exchange will consider all relevant facts and circumstances, including, but not limited to, whether such person is an affiliate within the meaning of that term under provisions of the federal securities laws and the rules thereunder.

<sup>10</sup> Section 13(d)(3) or Section 13(g)(3) provide: "When two or more persons act as a [ ] group for the purpose of acquiring, holding, or disposing of [equity] securities of an issuer, the group shall be deemed a 'person' . . ." The determination under Sections 13(d)(3) and 13(g)(3) as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement. Depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding – which includes voting – or disposing of securities of an issuer are sufficient to constitute the formation of a group.

312.04 to include new definitions for purposes of Section 312.03, providing that: (i) a “group” means a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act; and (ii) “control” has the same meaning as defined in Rule 12b-2 of Regulation 12B under the Exchange Act.<sup>11</sup> The Exchange intends to revise its internal procedures in reviewing proposed transactions to the extent necessary to obtain the necessary information to make determinations with respect to whether shareholders participating in transactions are Active Related Parties.

In addition to the proposed definition of Active Related Party in the proposed amended version of Section 312.03(b)(i), the Exchange proposes for purposes of Section 312.03(b)(ii) to retain the broader definition of a Related Party included in the current rule (i.e., “a director, officer or substantial security holder of the company”). Consequently, this proposal would not have any substantive effect on the application of Section 312.03(b)(ii) and a listed company selling securities to a Related Party under the circumstances set forth in the rule as amended remains subject to the shareholder approval requirements in that provision.<sup>12</sup>

The Exchange also notes that any listed company selling securities in a private placement that does not meet the Minimum Price requirement will remain subject to the shareholder approval requirement of Section 312.03(c) if such transaction relates to 20 percent or more of the issuer’s common stock. In addition, 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

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<sup>11</sup> Rule 12b-2 under Regulation 12B of the Exchange Act provides that “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”

<sup>12</sup> See note 6 supra for a description of Section 312.03(b)(ii).

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. Sales of securities will also continue to be subject to all other shareholder approval requirements set forth in Section 312.03 (including limitations with respect to equity compensation under Section 312.03(a) and Section 303A.08) and the change of control requirement of Section 312.03(d). The Exchange notes that Section 312.04(a) provides that 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. Finally, the Exchange notes that Section 312.03(b)(i) as proposed to be amended would continue to provide a significant protection to shareholders against conflicts of interest in sales of securities to Active Related Parties and that no other listing venue has such a protection in its rules. The Exchange notes that its shareholder approval requirements are as stringent in every respect as those of its competitor listing venues.<sup>13</sup>

Under the proposal the Exchange will continue to require shareholder approval for below market sales (i.e., below the Minimum Price) over one percent to Active Related Parties. However, as a consequence of the proposed amendment, below market sales over one percent to substantial securityholders who are not Active Related Parties will be permitted without shareholder approval under 312.03(b)(i), but will continue to be subject to all the other applicable shareholder approval requirements under 312.03.

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<sup>13</sup> See, for example, Nasdaq Stock Market Rule 5635.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>15</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that proposed amended Section 312.03(b)(i) is consistent with the protection of investors and the public interest. Specifically, the amended rule continues to provide for shareholder approval of below-market sales of securities to Active Related Parties of a listed company where a potential conflict of interest exists that Active Related Parties could use their influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole. The current definition of substantial security holder used in the rule extends to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company (except by voting at shareholder meetings) in and of themselves generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the

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

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

listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way do not generally have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company. The proposed rule only modifies the existing rule to permit sales to investors who are not a director, officer, a controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person who is an officer or director of the company and with respect to whom the Exchange therefore believes that the potential for such self-dealing does not exist.

The Exchange proposes to use definitions of "control" and "group" in the proposed amended rule that are used in the federal securities laws and the rules thereunder and, consequently, the Exchange believes that the use of such definitions is consistent with the Act.

The Exchange believes that the proposed amendment would promote competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed amendment increases competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

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 within such longer period 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSE-2023-34, Amendment No. 1 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-2023-34, Amendment No. 1. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2023-34, Amendment No. 1 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).

Additions underlined

Deletions [bracketed]

Amendment No. 1 added text in bold italics double-underlined

Amendment No. 1 deleted text in strikethrough

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 a director, officer, a controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person who is an officer or director of the company (each an "Active Related Party") 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.

(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 director, officer or substantial security holder of the company (each 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.

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### 312.04 For the Purpose of Section 312.03

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(j) 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.)

~~(k) A “control group” means a group as defined in Exchange Act Rule 13D-5 that controls the listed company. A “group” means a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act.~~

(L) “Control” has the same meaning as defined in Rule 12b-2 of Regulation 12B under the Exchange Act.

\* \* \* \* \*

Additions underlined  
Deletions [bracketed]

## NYSE Listed Company Manual

\* \* \* \* \*

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(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 director, officer or substantial security holder of the company (each 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.

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(k) A “group” means a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act.

(L) “Control” has the same meaning as defined in Rule 12b-2 of Regulation 12B under the Exchange Act.

\* \* \* \* \*