

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98662; File No. SR-NYSE-2023-34)

September 29, 2023

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Section 312.03(b) of the NYSE Listed Company Manual to Modify the Circumstances Under Which a Listed Company Must Obtain Shareholder Approval of a Sale of Securities Below the Minimum Price to a Substantial Security Holder of the Company

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 26, 2023, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“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 [sic] hereto. 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.

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

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

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

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

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.

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>3</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

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<sup>3</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.

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 passive holders of a company's common stock who have no board or management representation and who may have acquired their position in the company entirely through secondary market trades. The Exchange believes that transactions with these kinds of passive holders 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.

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 who is an officer or director of the company. For purposes of determining the existence of a control group, the Exchange proposes to rely on the filings on Form 13D or 13G disclosing the existence of a group as defined in Exchange Act Rule

13D-5. The Exchange proposes to amend Section 312.04 to include a new definition for purposes of Section 312.03, providing that a “control group” means a group as defined in Exchange Act Rule 13D-5 that controls the listed company.

The Exchange notes that any listed company selling securities in a private placement that does not meet the Minimum Price requirement to a passive investor 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, any such transaction would remain subject to shareholder approval under Section 312.03(e) if it resulted in a change of control. 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 related parties and that no other listing venue has such a protection in its rules.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>5</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

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<sup>4</sup> 15 U.S.C. 78f(b).

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

securities to related parties of a listed company where a potential conflict of interest exists that 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 proposed rule only modifies the existing rule to permit sales to passive investors with respect to whom the Exchange believes that the potential for such self-dealing does not exist. 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 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. 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 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>6</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>6</sup> 17 CFR 200.30-3(a)(12).