

CORONAVIRUS: ADDITIONAL RELIEF FROM NYSE SHAREHOLDER APPROVAL REQUIREMENTS FACILITATES RAISING URGENTLY NEEDED CAPITAL

Companies listed on the New York Stock Exchange ("NYSE") seeking to rapidly raise urgently needed capital due to circumstances related to the COVID-19 pandemic may benefit from new temporary conditional relief from the NYSE's shareholder approval requirements. A release issued by the U.S. Securities and Exchange Commission ("SEC") approving the immediate effectiveness of Section 312.03T of the NYSE's Listed Company Manual (the "**Manual**") is available [here](#). This relief is comparable to a recently approved temporary exception to Nasdaq's shareholder approval requirements. The SEC's release approving Nasdaq's Listing Rule 5636T is available [here](#).

This new exception is intended to facilitate capital raising by NYSE-listed companies experiencing urgent liquidity needs due to the crisis caused by the COVID-19 pandemic. The relief provided by Section 312.03T is in addition to the NYSE's April 2020 waiver of certain shareholder approval requirements in response to the COVID-19 pandemic. Our briefing regarding the NYSE's April 2020 waiver is available [here](#). Unlike the April 2020 waiver, new Section 312.03T does not require issuances to meet minimum price requirements. An appendix to this briefing provides an overview of current NYSE shareholder approval requirements as temporarily modified by Section 312.03T and the April 2020 waiver. The temporary conditional relief provided by Section 312.03T of the Manual and the NYSE's April 2020 waiver will be effective through and including June 30, 2020.

This additional temporary conditional relief from NYSE shareholder approval requirements:

- provides a path for listed companies to rapidly raise capital from third parties without limitations on size or any minimum price requirements;
- permits co-investment by related persons in certain limited circumstances;
- requires a company's audit committee (or a comparable committee) to approve reliance on this exception and determine that the transaction is in the best interests of shareholders;
- only is available if the NYSE approves a supplemental listing application that includes specified certifications;
- requires public disclosures regarding the terms of the transaction; and
- does not permit proceeds from transactions qualifying for this relief to be used to fund any acquisition.

Which NYSE shareholder approval requirements are impacted by this new temporary conditional relief?

Relief from shareholder approval requirements for qualifying private placements involving issuances in excess of 20% of previously outstanding shares or voting power

Section 312.03(c) of the Manual requires shareholder approval for issuances of common stock (or securities convertible into or exercisable for common stock) in excess of 20% of common stock outstanding (or 20% of the voting power) prior to the issuance. Existing exceptions to this shareholder approval requirement include public offerings for cash and qualifying private offerings of common stock (or securities convertible into or exercisable for common stock) for cash at a price that is not lower than the "**Minimum Price**", which is the lower of:

- the official closing price immediately preceding the signing of the binding agreement; or
- the average official closing price for the five trading days immediately preceding the signing of the binding agreement.

New Section 312.03T provides a temporary conditional exception that allows listed companies to issue securities below the Minimum Price without shareholder approval, regardless of the size of the offering. To qualify for this exception, a listed company must file a supplemental listing application with the NYSE including certifications of compliance with the following conditions:

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;
2. the company undertook a process designed to ensure that the transaction represents the best terms available to the company;
3. the company's audit committee (or a comparable committee comprised solely of independent, disinterested directors) approved the company's reliance on this exception and determined the transaction to be in the best interest of the company's shareholders; and
4. the delay in securing shareholder approval would:
 - have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan;
 - result in workforce reductions;
 - adversely impact the company's ability to undertake new initiatives in response to COVID-19; or
 - seriously jeopardize the financial viability of the enterprise.

The supplemental listing application must include specific descriptions of how the company satisfies these conditions. The NYSE must approve such a supplemental listing application in advance of any issuance in reliance on the exemption provided by Section 312.03T. Once approved, the exception will be available if the listed company:

- enters into a binding agreement for the relevant securities issuance no later than June 30, 2020; and
- issues the securities within 30 calendar days following the date of such binding agreement, which may be later than June 30, 2020.

Relief from shareholder approval requirements for certain related person investments and executive compensation transactions

The NYSE's additional temporary relief allows persons related to a listed company to invest alongside unaffiliated investors in qualifying transactions that do not meet the Minimum Price requirement, subject to the percentage and other limitations described below. Otherwise, the following NYSE rules would restrict their participation:

- Rule 312.03(b) of the Manual would require shareholder approval for certain related party transactions involving issuances of common stock, or securities convertible or exercisable into common stock, if the issuance exceeds 1% of the number of shares of common stock or voting power outstanding before the issuance.
- Rule 312.03(a) and 303A.08 of the Manual require shareholder approval for certain issuances under a compensation plan or arrangement under which stock may be acquired by officers, directors, employees or consultants.

Rule 312.03T provides a temporary exception for sales to an affiliated person participating in a qualifying transaction that would otherwise be subject to shareholder approval under paragraphs (a) or (b) of Rule 312.03 or under Rule 303A.08 ("**Affiliated Purchasers**") if the following conditions are met:

- each Affiliated Purchaser's participation is specifically required by unaffiliated investors;
- each Affiliated Purchaser's participation is less than 5% of the transaction;
- all Affiliated Purchasers' participation in the aggregate is less than 10% of the transaction; and
- the Affiliated Purchasers must not have participated in negotiating the economic terms of the transaction.

To rely on the exception for issuances to Affiliated Purchasers, the listed company any must also certify in its supplemental listing application that it complies with these additional conditions and describe with specificity how it satisfies them.

Public notice requirement

A listed company seeking to rely on new Section 312.03T to rapidly raise capital will need to provide advance notice of the transaction to its shareholders by filing a Form 8-K or issuing a press release as promptly as possible and no later than two business days before closing. The public announcement must disclose:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration expected to be received);

- that shareholder approval would ordinarily be required under NYSE rules; and
- that the audit committee (or a comparable committee comprised solely of independent, disinterested directors) expressly approved reliance on this exception and determined the transaction to be in the best interest of the company's shareholders.

A listed company taking advantage of this relief will want to take care not to make contradictory statements regarding its financial condition. Given that the supplemental listing application required to qualify for this relief calls for certification that at least one of several adverse consequences would result from a delay of the proposed transaction, taking advantage of this relief risks being viewed by investors as an acknowledgment that a company is in financial distress. If none of the company's other disclosures have signaled that the company is facing financial difficulties, the company should consider whether it needs to make updated information about its financial condition public before it relies on this new relief.

Aggregation of certain subsequent issuances

Issuances of securities in reliance on this new additional relief will be aggregated with any subsequent issuances by the company, other than public offerings for cash, that are made at a discount to the Minimum Price if the related agreement is executed within 90 days of the prior issuance. As a result of this aggregation provision, listed companies will need to seek shareholder approval for even relatively small private placements that do not satisfy the NYSE's Minimum Price requirement for most of the third quarter of 2020. For a listed company that issues securities on in reliance on Section 312.03T on July 30, 2020 (last possible date), aggregation would apply to agreements for the issuance of shares at discounted prices that are entered into at any time on or before October 28, 2020.

Appendix: Overview of Current NYSE Shareholder Approval Requirements

Offerings ordinarily not subject to NYSE's shareholder approval requirements	Offerings temporarily not subject to NYSE's shareholder approval requirements through June 30, 2020 in reliance on NYSE's April 2020 waiver Section 312.03T of the Manual		Offerings that remain subject to NYSE's shareholder approval requirements
<p>Public offerings for cash Private placements of shares (or securities convertible into shares) for cash that:</p> <ul style="list-style-type: none"> • satisfy the Minimum Price requirement; and • involve multiple purchasers and no one purchaser acquires more than 5% of outstanding shares or voting power. 	<p>Private placements of shares (or securities convertible into shares) for cash to any number of purchasers (even just one) without percentage limitations if the transaction:</p> <ul style="list-style-type: none"> • satisfy the Minimum Price requirement; and • is reviewed and approved by the company's audit committee (or a comparable committee). 	<p>Sales of shares (or securities convertible into shares) for cash that do not satisfy the Minimum Price requirement if:</p> <ul style="list-style-type: none"> • the company's audit committee (or a comparable committee) approves reliance on this relief and determines the transaction to be in the best interest of the company's shareholders; • the company files a supplemental listing application including specified certifications; • the NYSE approves use of the exception; and • the listed company gives public notice of the terms of the transaction is provided at least two business days prior to the issuance. 	<p>Sales of shares (or securities convertible into shares) exceeding 20% of outstanding shares or voting power that do not qualify for any exception, including the NYSE's April 2020 waiver or Section 312.03T of the Manual. Transactions subject to shareholder approval pursuant to the change of control requirements of Section 312.03(d) of the Manual.</p>
<p>Issuances to related parties that do not exceed 1% of outstanding shares or voting power Sales of shares (or securities convertible into shares) for cash to related parties that:</p> <ul style="list-style-type: none"> • satisfy the Minimum Price requirement; and • do not exceed 5% of outstanding shares or voting power. 	<p>Sales of shares (or securities convertible into shares) for cash to related parties may exceed 5% of outstanding shares or voting power if the transaction:</p> <ul style="list-style-type: none"> • satisfy the Minimum Price requirement; • is reviewed and approved by the company's audit committee (or a comparable committee); and • the proceeds are not used to acquire stock or assets of any company in which a related person has a 5% or greater interest. 	<p>Related parties are permitted to invest alongside unaffiliated investors at a price that does not satisfy the Minimum Price requirement in a transaction qualifies for Section 312.03T relief if:</p> <ul style="list-style-type: none"> • unaffiliated investors specifically require their participation; • each related person's participation is less than 5% of the transaction and their aggregate participation is less than 10% of the transaction; and • none participated in negotiating the economic terms of the transaction. 	<p>Sales of shares (or securities convertible into shares) to related parties exceeding 1% of outstanding shares or voting power that do not qualify for any exception (for example, consideration paid is not cash or proceeds will be used to acquire stock or assets of any company in which a related person has a 5% or greater interest). Transactions subject to shareholder approval pursuant to the equity compensation requirements of Section 303A.08 of the Manual that do not qualify for the relief provided by Section 312.03T.</p>

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