


Nyse listed company manual 312.03

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On November 19, 2021, the SEC approved the NYSE's proposed amendment to the shareholder voting requirement set forth in Section 312.07 of the NYSE Listed Company Manual (Manual). Section 312.07 provides that, where shareholder approval is a prerequisite to the listing of any additional or new securities of a listed company, or where the NYSE rules require shareholder approval for any other matter, the minimum vote which will constitute shareholder approval for purposes of the NYSE requirement is a majority of "votes cast" on the particular matter. Section 312.07 is currently applicable to shareholder approval of stock issuances under Manual Sections 303A.08 (equity compensation) and 312.03. Although the text of Section 312.07 did not address the treatment of abstentions, the NYSE has historically advised companies that abstentions should be treated as votes cast for purposes of Section 312.07, such that a proposal would be deemed approved only if the votes in favor exceed the aggregate of the votes cast against plus abstentions (i.e., giving abstentions the effect of a vote against). The corporate laws of many states, however, including Delaware, allow companies to specify in their governing documents that votes cast for purposes of a shareholder vote include yes and no votes (but not abstentions), such that a proposal succeeds if the votes in favor exceed the votes against. Consistent with those state laws, many public companies have bylaws indicating that abstentions are not treated as votes cast. The NYSE has amended Section 312.07 to provide that a company must determine whether a proposal has been approved by a majority of the votes cast for purposes of Section 312.07 in accordance with its own governing documents and any applicable state law, which would permit a company to disregard abstentions if its governing documents and any applicable state law so provide. In its proposal, the NYSE noted that this is consistent with Nasdaq's approach. The NYSE also noted that the amendment will help ensure that shareholders properly understand the implications of choosing to abstain on a proposal subject to approval under NYSE rules. © Arnold & Porter Kaye Scholer LLP 2021 All Rights Reserved. This Advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation. On April 2, 2021, the Securities and Exchange Commission (the "SEC") approved amendments to Sections 312.03, 312.04 and 314.00 of the New York Stock Exchange ("NYSE") Listed Company Manual (the "Manual") filed by the NYSE with the SEC on December 16, 2020 and March 30, 2021. No comment letters on the initially proposed amendments were submitted to the SEC, and the SEC approved the proposed rule changes, as amended, on an accelerated basis. The amendments revise the shareholder approval requirements for certain equity issuances and the independent director review and approval requirements for related party transactions. The amendments to Section 312.03 largely make permanent certain waivers provided by the NYSE to facilitate capital raising during the COVID-19 pandemic, and accordingly, Section 312.03T of the Manual (which only was applicable by its terms through June 30, 2020) has been deleted. The amendments to Sections 312.03 and 312.04 more closely align the shareholder approval requirements for certain equity issuances with those of the Nasdaq and NYSE American markets and provide listed companies with greater flexibility to raise capital in private placements. The amendments to Section 314.00 impose additional requirements for related party transactions, and companies should consider amending their related party transaction policies to better align with the amended rule. Amendments to Section 312.03(b) and Section 312.04 Section 312.03(b) of the Manual requires prior shareholder approval for certain issuances of securities to certain related parties. Prior to the amendments, Section 312.03(b) generally required prior shareholder approval of certain issuances of common stock, or securities convertible into or exercisable for common stock, to (i) a director, officer or 5% or greater security holder, (ii) a subsidiary, affiliate or other closely related person of any of such persons, or (iii) any company or entity in which any of such persons has a substantial direct or indirect interest. Shareholder approval was required if the number of shares to be issued (or which were issuable upon conversion or exercise) exceeded either 1% of the outstanding shares or 1% of the voting power, with cash sales to 5% or greater security holders subject to a higher 5% threshold if a minimum price test was satisfied. The amendments make the following key changes: shareholder approval is no longer required under Section 312.03(b) for issuances to entities or other related persons of directors, officers or 5% or greater security holders (except in cases where a director, officer or 5% or greater security holder has a 5% or greater indirect interest in an acquired company as described below); and cash sales to directors, officers or 5% or greater security holders only will require shareholder approval in cases where the sale price is less than a prescribed minimum price, which is generally the current market price. The minimum price is defined as the lesser 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 (the "Minimum Price"). Cash sales to such related parties involving more than 1% of the outstanding shares or voting power that do not satisfy the Minimum Price requirement and non-cash issuances to such related parties involving more than 1% of the outstanding shares or voting power will continue to be subject to the shareholder approval requirement. Cash sales to such related parties that satisfy the Minimum Price requirement would be subject to the shareholder approval requirements under Section 312.03(c) discussed below that apply to cash sales to other investors and would be subject to amended Section 314.00 governing related party transactions, also discussed below. In addition, Section 312.03(b) continues to note that any sale of stock to an employee, director or service provider is also subject to the equity compensation rules in Section 303A.08, and that a sale at a discount to the market price would be treated as equity compensation under Section 303A.08. Any issuance of securities to a related party that gives rise to a change of control also would be subject to shareholder approval under Section 312.03(d). Section 312.03(b) was further amended to require shareholder approval prior to the issuance of securities as consideration for the acquisition of the stock or assets of another company where any director, officer or 5% or greater security holder 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 where the issuance could result in a greater than 5% increase in the outstanding shares or voting power. Section 312.03(b) also was amended to remove an exception to the shareholder approval requirement for issuances to related parties of early stage companies, which the NYSE determined was no longer necessary due to the other amendments, and Section 312.04 was therefore amended to delete the definition of "Early Stage Company." The amendments to Section 312.03(b) will allow companies greater flexibility in raising capital in private financings while preserving shareholder protection, and will align the shareholder approval requirements for acquisition transactions in which a related party has an interest more closely with the rules of Nasdaq and the NYSE American exchange. The amended rule continues to impose more stringent shareholder approval requirements, as compared with Nasdaq and NYSE American rules, which do not have a separate shareholder approval requirement for issuances to related parties, other than in connection with acquisitions in which a related party has an interest. Amendments to Section 312.03(c) and Section 312.04 Section 312.03(c) of the Manual requires shareholder approval of transactions involving the issuance of 20% or more of a company's outstanding shares or voting power. Prior to the amendments, Section 312.03(c) generally required prior shareholder approval of any transaction or series of related transactions involving 20% or more of the company's outstanding shares or voting power, other than public offerings for cash and bona fide private financings for cash that satisfied the Minimum Price requirement. Section 312.04(g) defined a "bona fide private financing" as a sale in which either (i) a registered broker-dealer purchases the securities from the issuer with a view to the private resale to one or more purchasers or (ii) 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, more than 5% of the outstanding shares or voting power. As amended, Section 312.03(c) replaces the exception for bona fide private financings with an exception for any non-public offering for cash which satisfies the Minimum Price requirement. However, amended Section 312.03(c) requires shareholder approval if the securities issued in such a financing are issued in connection with an acquisition and the issuance of such securities either alone or when combined with any securities issued or issuable in connection with such an acquisition equals or exceeds 20% of either the company's outstanding shares or voting power. Given the amendments to Section 312.03(c), Section 312.04 was amended to delete the definition of "Bona fide private financing." The amendments to Section 312.03(c) will allow companies greater flexibility in raising capital in private financings while preserving shareholder protection, and will align the shareholder approval requirements for cash sales that meet the Minimum Price test more closely with the rules of Nasdaq and the NYSE American exchange. Amendments to Section 314.00 Prior to the amendments, Section 314.00 provided that related party transactions (described as transactions with officers, directors and principal shareholders) should be reviewed by an appropriate group within the company and further specified that the NYSE believed that the audit committee or another comparable body might be considered the appropriate approving body. The amendments to Section 314.00 strengthen the governance requirements for related party transactions in two respects. First, amended Section 314.00 now defines a related party transaction as any transaction required to be disclosed under Item 404 of Regulation S-K, without applying the transaction value threshold of Item 404 (or, in the case of foreign private issuers, required to be disclosed pursuant to Item 7.B of Form 20-F, without regard to the materiality threshold of Item 7.B). This change more clearly defines and expands the kinds of related party transactions subject to approval under amended Section 314.00. Second, amended Section 314.00 requires that the company's audit committee or another independent body of the company's board of directors must conduct "a reasonable prior review and oversight of all related party transactions for potential conflicts of interest." Amended Section 314.00 also specifies that the audit committee or such other body will prohibit such a transaction if it determines the transaction to be inconsistent with the interests of the company and its shareholders. Given these changes to Section 314.00 of the Manual, NYSE-listed companies should consider amending their related party transaction policies and audit committee charters to align more closely with amended Section 314.00. For domestic registrants, given that the review requirement applies only to related party transactions required to be disclosed under Item 404 of Regulation S-K, the transactions required to be reviewed under Section 314.00 should be limited (i.e., even without applying the \$120,000 threshold in Item 404(a) of Regulation S-K, only transactions in which a related party has or will have a direct or indirect material interest are required to be disclosed under Item 404(a), and amended Section 314.00 only requires prior review of related party transactions that are required to be disclosed under Item 404 of Regulation S-K). However, the prior review provision of amended Section 314.00 imposes a more demanding requirement than many related party transaction policy provisions which allow for prior approval or ratification, and the obligation set forth in amended Section 314.00 that the audit committee or other independent director committee "will" prohibit an improper related party transaction imposes a more far-reaching requirement than the typical related party transaction policy language, which only subjects a related party transaction to audit committee or other independent director committee approval. Companies also may wish to consider incorporating other language from Section 314.00 in their related party transaction policies relating to the scope of the related party transaction review. *A special thank you to Maggie Goff for her contribution to this article.

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