

NYSE Temporarily Eases Certain Shareholder Approval Requirements as a Result of Coronavirus (COVID-19)

May 19, 2020 | Advisory | By **Daniel T. Kajunski**

VIEWPOINT TOPICS

- Securities & Capital Markets
- COVID-19

RELATED PRACTICES

- Securities & Capital Markets

RELATED INDUSTRIES

On May 14, 2020, the Securities and Exchange Commission ("SEC") approved changes to the NYSE Listed Company Manual to provide a temporary exception to the shareholder approval rules for certain capital raising transactions as a result of the coronavirus ("COVID-19") pandemic.

Transactions of 20% or More

Section 312.03(c) of the NYSE Listed Company Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance other than in (i) a public offering for cash or (ii) a transaction involving a cash sale of the company's securities that complies with the recently amended "minimum price" test and is also a "bona fide private financing," which is a sale where either:

- a registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or
- the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than 5% of the shares of the issuer's common stock or more than 5% of the issuer's voting power before the sale.

Related Party Issuances & Equity Compensation

Section 312.03(b) of the NYSE Listed Company Manual requires shareholder approval of any issuance to "related parties," including directors, officers, or substantial security holders or to an affiliate of a related party, if the number of shares of common stock to be issued (or into which the securities may be convertible or exercisable), exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. There is a limited exception for issuances to related parties that are only substantial shareholders for cash sales of up to 5% of the company's outstanding common stock if the sales satisfy the recently amended "minimum price" test.

In addition, Sections 312.03(c) and 303A.08 of the NYSE Listed Company Manual require shareholder approval, with certain exceptions, prior to the issuance of securities when a stock option or purchase plan is to be established or materially amended, or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants. The NYSE interprets these sections to require shareholder approval for certain sales to officers, directors, employees, or consultants when such issuances could be considered a form of "equity compensation."

New Temporary Section 312.03T (Temporary COVID-19 Exception)

The NYSE has adopted a new Section 312.03T of the NYSE Listed Company Manual to provide a limited, temporary exception from the shareholder approval requirements in Section 312.03(c), accompanied, in certain narrow circumstances, by a limited exception to the shareholder approval requirements in Sections 312.03(a) and (b) and Section 303A.08. The exception in Section 312.03T is available until and including June 30, 2020.

In order to rely on Section 312.03T of the NYSE Listed Company Manual, a NYSE-listed company must submit a supplemental listing application and certification discussed below, obtain NYSE's approval to rely on the exception, and thereafter execute a binding agreement governing the issuance of the securities no later than June 30, 2020. The issuance of the securities may occur after June 30, 2020, so

long as the issuance takes place no later than 30 calendar days following the date of the binding agreement.

Section 312.03T provides an exception to the shareholder approval requirements under Section 312.03(c) if a company can demonstrate:

- the need for the transaction is due to circumstances related to COVID-19, and the proceeds will not be used to fund any acquisition transaction;
- the delay in securing shareholder approval would (a) have a material adverse impact on the company's ability to maintain operations under its pre-COVID-19 business plan, (b) result in workforce reductions, (c) adversely impact the company's ability to undertake new initiatives in response to COVID-19, or (d) seriously jeopardize the financial viability of the enterprise;
- the company undertook a process designed to ensure that the proposed transaction represents the best terms available to the company;
- the company's audit committee or a comparable committee comprised solely of independent, disinterested directors (a) expressly approved reliance on Section 312.03T and (b) determined that the transaction is in the best interest of shareholders; and
- the company has submitted a supplemental listing application for the transaction along with a certification that the company complies with all of the requirements of Section 312.03T discussed above and with respect to "affiliated purchasers" discussed below, if applicable, and obtained advance NYSE approval of the transaction.

Section 312.03T also provides a limited attendant exception to the shareholder approval requirements under Sections 312.03(b), 312.03(c), and 303A.08, provided that the transaction satisfies the following requirements:

- any participation by an "affiliated purchaser" must be less than 5% of the transaction;
- the participation of all "affiliated purchasers" collectively must be less than 10% of the transaction;
- the participation of any "affiliated purchasers" must have been specifically required by unaffiliated investors; and
- the "affiliated purchasers" must not have participated in negotiating the economic terms of the transaction.

Under Section 312.03T, the company must make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release as promptly as possible, but no later than two business days before the issuance of the securities, disclosing:

- the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received);
- that shareholder approval would ordinarily be required under NYSE rules but for the fact that the company is relying on Section 312.03T; and
- that the audit committee or a comparable committee comprised solely of independent, disinterested directors expressly approved reliance on the exception and determined that the transaction is in the best interest of shareholders.

Securities issued in reliance on Section 312.03T will be aggregated with any subsequent issuance at a discount to the NYSE's recently amended minimum price requirement if the binding agreement governing the subsequent issuance is executed within 90 days of the prior issuance. If, following the subsequent issuance, the aggregate issuance (including shares issued in reliance on the exception in Section 312.03T) equals or exceeds 20% of the total shares or the voting power outstanding before the initial issuance, then shareholder approval will be required under Section 312.03(c) prior to the subsequent issuance.

NYSE-listed companies are still required to comply with all other applicable requirements of the NYSE's listing rules, including its other shareholder approval requirements.

The relief granted in Section 312.03T is in addition to the previous COVID-19 related relief granted by the NYSE with respect to (i) its minimum capitalization continued listing requirement and shareholder approval requirements for certain transaction discussed in our recent [Viewpoints](#) advisory and (ii) its bid price and market value of publicly held shares continued listing requirements discussed in another recent [Viewpoints](#) advisory.

Authors

Daniel T. Kajunski, Member



Dan is a corporate and securities attorney whose practice spans the full gamut of corporate law. He has advised clients for over two decades in public and private equity and debt financings, securities law matters, mergers and acquisitions, and strategic advice on a broad range of other corporate matters. He capably counsels public and private companies with offerings, compliance, and securities questions and leads buyers and sellers throughout the transaction process. Dan represents life sciences companies as well as clients in other technology fields, financial services, and professional services firms.

More Viewpoints

NYSE Temporarily Eases Certain Continued Listing and Shareholder Approval Requirements as a Result of Coronavirus (COVID-19)

April 13, 2020 | Advisory | By **Daniel T. Kajunski**

[Read more](#)

NYSE Temporarily Extends Compliance Periods for Certain Continued Listing Requirements as a Result of Coronavirus (COVID-19)

April 24, 2020 | Advisory | By **Daniel T. Kajunski**

[Read more](#)