

CORONAVIRUS RESOURCE CENTER

NYSE Provides Temporary Shareholder Approval Exemptions in Light of COVID-19

May 22, 2020

In response to ongoing issues raised by COVID-19, the SEC approved new temporary Section 312.03T of the NYSE Listed Company Manual that provides NYSE-listed companies with additional forms of temporary relief from its shareholder approval requirements for non-public offerings in an effort to streamline companies' access to capital.¹ Effective May 14, 2020 through June 30, 2020, a NYSE-listed company may enter into an agreement to issue securities without shareholder approval in (i) non-public offerings otherwise subject to Section 312.03(c) of the NYSE Listed Company Manual (the "20% rule") and (ii) issuances to officers, directors, employees and consultants under Section 312.03(b) of the NYSE Listed Company Manual, subject to specified conditions.²

Non-Public Offerings Below the Minimum Price.³ For transactions other than public offerings, Section 312.03(c) ordinarily requires shareholder approval prior to a 20% issuance at a price that is less than the minimum price.⁴ Under new Section 312.03T(c),

¹ SEC Release available [here](#). See also the prior SEC Release of NYSE exemptions, dated April 6, 2020 (available [here](#)) and "NYSE Provides Temporary Relief from Certain Shareholder Approval Rules" (available [here](#)).

² NYSE Listed Company Manual available [here](#).

³ Section 312.04(i) defines the minimum price as the lower price 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(j) defines the Official Closing Price as the official closing price on the NYSE as reported to the consolidated tape immediately preceding the signing of a binding agreement to issue the securities.

⁴ Section 312.03 requires shareholder approval 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 if: (i) the common stock has, or will have upon issuance, voting power equal to or in excess of 20% of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or (ii) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20% of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.

no prior shareholder approval is necessary for such a transaction if the issuing company demonstrates that:

- the need for the transaction is due to circumstances related to COVID-19 and the proceeds would not be used to fund any acquisition transaction;
- 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 company undertook a process to ensure that the proposed transaction represents the best terms available to the company; and
- the company's audit committee (or a comparable committee comprised solely of independent, disinterested directors) expressly approved reliance on this exception and determined that the transaction is in the best interest of the company's shareholders.

To rely on this exception, the company must submit an application to NYSE (including a certification that the offering complies with the requirements listed above) and obtain NYSE approval. The company must also execute a binding agreement governing the issuance of the securities prior to June 30, 2020. The transaction may close after June 30, 2020 so long as it closes within 30 days of the date of the binding agreement governing the issuance of securities.

Transactions with Affiliates and Substantial Securityholders. Section 312.03T also provides that issuances to a Related Party⁵ or other person⁶ meeting the conditions

⁵ Section 312.03 defines a "Related Party" as a director, officer or substantial security holder (those controlling 5% or more of the company's shares or voting power) of the company.

⁶ Section 312.03 also requires shareholder approval in situations involving a subsidiary, affiliate or other closely-related person of a Related Party or any company or entity in which a Related Party has a substantial direct or indirect interest.

outlined above will not require shareholder approval under Section 312.03(a)⁷ or (b) Section 303A.08⁸ if the transaction satisfies the following requirements:

- any participation by an Affiliated Purchaser⁹ is less than 5% of the transaction;
- all Affiliated Purchasers participation (in the aggregate) is less than 10% of the transaction;
- any Affiliated Purchaser's participation in the transaction is specifically required by unaffiliated investors; and
- no Affiliated Purchasers participated in the negotiation of the economic terms of the transaction.

Disclosure Obligations. In order to take advantage of the shareholder approval relief in either transaction noted above, the company must make a public announcement of the Section 312.03T transaction no later than two business days prior to the issuance of the securities. Such announcement must disclose, among other things, the terms of the transaction, that approval would be required but for the company's reliance on the exceptions provided in Section 312.03T, and 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 the company's shareholders.

Section 312.03T also provides that any subsequent issuance at a discount to the Minimum Price pursuant to a binding agreement executed within 90 days of the prior issuance will be aggregated with the prior issuance (including shares issued in reliance on the exception) for purposes of determining whether shareholder approval will be required under Section 312.03(c) prior to the subsequent issuance.

* * *

For more information regarding the legal developments related to coronavirus, please visit our [Coronavirus Resource Center](#).

Please do not hesitate to contact us with any questions.

⁷ Section 312.03(a) requires shareholder approval for equity compensation plans.

⁸ Section 303A.08 requires that shareholders be given the opportunity to vote on all equity-compensation plans and material provisions thereto, with limited exemptions explained therein.

⁹ Section 312.03T(c)(1) defines "Affiliated Purchasers" as any Related Party or other person subject to Section 312.03(b) or Section 303A.08.



Morgan J. Hayes
Partner, New York
+1 212 909 6983
mjhayes@debevoise.com



Eric T. Juergens
Partner, New York
+1 212 909 6301
etjuergens@debevoise.com



Matthew E. Kaplan
Partner, New York
+1 212 909 7334
mekaplan@debevoise.com



Peter J. Loughran
Partner, New York
+1 212 909 6375
pjloughran@debevoise.com



Paul M. Rodel
Partner, New York
+1 212 909 6478
pmrodel@debevoise.com



Steven J. Slutzky
Partner, New York
+1 212 909 6036
sjslutzky@debevoise.com



Nicholas P. Pellicani
Associate, New York
+1 212 909 6369
nppellicani@debevoise.com



Abraham J. Williamson
Associate, New York
+1 212 909 6824
ajwilliamson@debevoise.com