

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85374; File No. SR-NYSE-2018-54)

March 20, 2019

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change Amending Sections 312.03 and 312.04 of the Listed Company Manual To Amend the Price Requirements for Certain Exceptions From the Shareholder Approval Rules

I. Introduction

On December 3, 2018, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Sections 312.03 and 312.04 of the NYSE Listed Company Manual (“Manual”) to modify the price requirements that companies must meet to avail themselves of certain exceptions from the shareholder approval requirements set forth in Section 312.03. The proposed rule change was published for comment in the Federal Register on December 20, 2018.³ On January 30, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated March 20, 2019, as the date by which it should either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission has received no comment letters on the proposal. This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 84821 (Dec. 14, 2018), 83 FR 65378 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 85005 (Jan. 30, 2019), 84 FR 1812 (Feb. 5, 2019).

II. Description of the Proposal

The Exchange has proposed to amend Sections 312.03 and 312.04 of the Manual to modify the price requirements that companies must meet to avail themselves of certain exceptions from the shareholder approval requirements set forth in Section 312.03.

Currently, under Section 312.03(b), the Exchange requires a NYSE-listed company to obtain 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, to a director, officer or substantial security holder of the company (each a “Related Party”); 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, 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 (“Related Party Transaction”).⁶ However, if the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder (“Substantial Security Holder Transaction”), and if the issuance relates to a sale of stock for cash at a price at least as great as each of the book and market value of the issuer’s common stock, then shareholder approval would not be required unless the number of shares of common stock to be issued, or unless the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.⁷

⁶ See Section 312.03(b) of the Manual.

⁷ See id.

In addition, under Section 312.03(c), the Exchange currently requires a NYSE-listed company to obtain 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: (1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock or; (2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent 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 (“20% Issuance”). However, shareholder approval would not be required for any 20% Issuance involving any bona fide private financing,⁸ if such financing involves a sale of common stock, for cash, at a price at least as great as each of the book and market value of the issuer’s common stock or the sale of securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least as great as each of the book and market value of the issuer’s common stock.⁹

“Market value” of the issuer’s common stock is defined in Section 312.04(i), for purposes of shareholder approval required under Section 312.03, as the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the entering into of a

⁸ “Bona fide private financing” is defined as a sale in which 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 not one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than five percent of the shares of the issuer’s common stock or more than five percent of the issuer’s voting power before the sale. See Section 312.04(g) of the Manual.

⁹ See Section 312.03(c) of the Manual. Shareholder approval is also not required for any 20% Issuance involving any public offering for cash. See id.

binding agreement to issue the securities.¹⁰ The current rule provides that, for example, if the transaction is entered into 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 entered into 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.¹¹ The current rule also states that an average price over a period of time is not acceptable as “market value” for purposes of Section 312.03.¹²

The Exchange has proposed a new measure of market value for purposes of Section 312.03, to be known as the “Minimum Price,” which will be defined as a price that is the lower of (1) the Official Closing Price immediately preceding the signing of the binding agreement to issue the securities or (2) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement to issue the securities.¹³ The Exchange has proposed to define “Official Closing Price” of the issuer’s common stock as the official closing price on the Exchange as reported to the Consolidated Tape¹⁴ immediately preceding the signing of a binding agreement to issue the securities.¹⁵ This definition is based on the current definition of “Market Value” in Section 312.04(i), which currently uses the official closing price as

¹⁰ See Section 312.04(i) of the Manual.

¹¹ See id.

¹² See id.

¹³ See proposed Section 312.04(i) of the Manual.

¹⁴ The Exchange states that the manner in which the official closing price as reported to the Consolidated Tape is determined is set forth in NYSE Rule 123C(1)(e). See Notice, supra note 3, at 65379 n.6.

¹⁵ See proposed Section 312.04(j) of the Manual. The Exchange proposes to renumber existing subsections (j) and (k) as subsections (k) and (l), respectively. See proposed Section 312.04(j)–(l) of the Manual.

reported to the Consolidated Tape in its definition, with certain changes.¹⁶ Under the proposal, the exceptions to the shareholder approval requirements set forth in Sections 312.03(b) and (c) described above¹⁷ will only be available for issuances that are priced at least as great as the Minimum Price. In addition, while the new definition of “Official Closing Price” would retain the example in the current definition of “Market Value,” the Exchange proposed to delete the statement that an average price over a period of time is not acceptable as “market value” for purposes of Section 312.03.¹⁸ The Exchange stated that this statement will no longer be accurate upon approval of the proposed rule change.¹⁹

In proposing to use a five-day average closing price to determine if a shareholder vote is required under Sections 312.03(b) and (c), the Exchange stated that it is a widespread practice in commercial transactions involving the issuance of securities to use a five-day average when pricing transactions to avoid unanticipated and inequitable results that may occur with use of a single day’s closing price if there is unexpected price volatility.²⁰ While the Exchange noted that there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required,²¹ the Exchange stated that it believes that the risks of using the five-day average closing price are already accepted by the market, as evidenced by the

¹⁶ See supra notes 10-12 and accompanying text. The new definition of “Official Closing Price” would replace all references to “entering into” agreements and/or transactions with “signing” agreements and/or transactions. The Exchange stated in its proposal that this change would conform the language used throughout the rule and does not have any substantive effect. See Notice, supra note 3, at 65379 n.7.

¹⁷ See supra notes 7-9 and accompanying text.

¹⁸ See proposed Section 312.04(j) of the Manual.

¹⁹ See Notice, supra note 3, at 65379.

²⁰ See id.

²¹ See id.

use of an average price in transactions that do not require shareholder approval, such as those transactions where less than 20% of the outstanding shares are being issued.²² Thus, the Exchange proposed to define market value as the lower of the most recent closing price or five-day average closing price.²³

In conjunction with its proposal to redefine market value for purposes of determining whether an exception to the shareholder approval requirements of Sections 312.03(b) and (c) is available, the Exchange has also proposed to eliminate the current requirement that the price paid in a Substantial Security Holder Transaction or 20% Issuance qualifying for such exceptions must not be less than book value. Currently, as noted above, the Exchange's rules provide exceptions to the shareholder approval requirements in Sections 312.03(b) and (c) for certain sales of common stock for cash at a price at least as great as market and book value. Under the proposal, Substantial Security Holder Transactions and 20% Issuances that otherwise qualify for the exceptions to the shareholder approval requirements in Sections 312.03(b) and (c) and are priced below book value but at or above market value, as defined by the Minimum Price, would no longer require shareholder approval. In its proposal, the Exchange stated that book value is an accounting measure that is based on the historic cost of assets rather than their current value, and that it believes it is not a meaningful measure of whether a transaction is dilutive or should otherwise require shareholder approval.²⁴

²² See id.

²³ See id.

²⁴ See id.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing standards of national securities exchanges, in particular, play an important role in assuring that exchange-listed companies observe good governance practices including safeguarding the interests of shareholders with respect to certain potentially dilutive transactions.²⁷

²⁵ 15 U.S.C. 78f(b). In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ See, e.g., Securities Exchange Act Release Nos. 84287 (Sept. 26, 2018), 83 FR 49599 (Oct. 2, 2018) (SR-NASDAQ-2018-008) (approving amendments to change the definition of market value for purposes of the shareholder approval rule and eliminate the requirement for shareholder approval of issuances at a price less than book value but

As discussed above, the proposal would, among other things, (i) change the definition of market value, for purposes of determining whether exceptions to the shareholder approval requirements under Sections 312.03(b) and (c) are met, by proposing to use the lower of the official closing price or five-day average closing price and, as a result, also remove the prohibition on an average price over a period of time being used as a measure of market value for purposes of Section 312.03; and (ii) eliminate the requirement for shareholder approval under Sections 312.03(b) and (c) at a price that is less than book value but at least as great as market value. The Commission has carefully considered the proposal and finds that the proposed rule change is consistent with the Act.

The Commission believes that the proposed change to the determination of market value (proposed to be defined as “Minimum Price”), to use the lower of the official closing price or five-day average closing price, for determining whether certain exceptions to the shareholder approval provisions apply to Substantial Security Holder Transactions in Section 312.03(b) and to 20% Issuances in Section 312.03(c), is consistent with the Act.²⁸ The Commission notes that, according to the Exchange, the five-day period for establishing the average closing price is related to the way transactions are actually structured, in situations where shareholder approval is

greater than market value); 76814 (Dec. 31, 2015), 81 FR 0820 (Jan. 7, 2016) (SR-NYSE-2015-02) (approving amendments to the NYSE Listed Company Manual to exempt early stage companies from having to obtain shareholder approval in certain circumstances); 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (SR-NYSE-2002-46 and SR-NASD-2002-140) (approving equity compensation shareholder approval rules of both the NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ); and 58375 (Aug. 18, 2008), 73 FR 49498 (Aug. 21, 2008) (File No. 10-182) (order approving registration of BATS Exchange, Inc. noting that qualitative listing requirements including shareholder approval rules are designed to ensure that companies trading on a national securities exchange will adequately protect the interest of public shareholders).

²⁸ See infra notes 31 - 35 and accompanying text for a discussion of other circumstances that may require shareholder approval.

not required, to help smooth out price fluctuations.²⁹

The Commission believes that the proposal to eliminate the requirement for shareholder approval under Sections 312.03(b) and (c) at a price that is less than book value but at least as great as market value is also consistent with the Act. As noted by the Exchange,³⁰ book value may not be an appropriate indicator of whether a transaction is dilutive for purposes of the Exchange's shareholder approval rule.

The Commission notes, in approving the changes to measure market value as the lower of the closing price and five-day average closing price and eliminate the book value requirement, that the ability of listed companies to issue securities without shareholder approval continues to remain limited by other important Exchange rules.³¹ For example, the Commission notes that any discounted issuance of stock to a company's employees, directors, or other service providers

²⁹ See Notice, supra note 3, at 65380. As noted above, the rule proposal would also remove an explicit provision in the Exchange's rules that states that an average price over a period of time is not acceptable as market value for purposes of the shareholder approval rules. The removal of this prohibition is necessary in order for the Exchange to adopt the same five-day average pricing period that Nasdaq currently uses in its shareholder approval rules. See infra note 36. In approving the removal of this prohibition, the Commission notes it is only doing so after finding that the five-day average pricing period is consistent with the Act. The deletion of the prohibition is not meant to imply any other period of time to calculate average pricing would be consistent with the Act, and any proposal to do so would have to be analyzed on its own merits pursuant to a proposed rule change under Section 19(b) of the Act.

³⁰ See Notice, supra note 3, at 65379.

³¹ See, e.g., Sections 312.03(a) and (d) of the Manual. The Commission notes that, under Exchange rules, if shareholder approval is not required under the requirements in Sections 312.03(b) or (c) it could still be required under one of the other shareholder approval provisions in Section 312.03 of the Manual since these provisions apply independently of each other. See Section 312.04(a) of the Manual ("Shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs."). The Commission notes that the independent application of these provisions includes the provisions on shareholder approval for equity compensation plans as set forth in Section 303A.08, as referenced in Section 312.03(a) of the Manual.

would require shareholder approval under the Exchange’s equity compensation rules.³² In addition, shareholder approval would continue to be required if the issuance resulted in a change of control,³³ as well as for certain issuances to Related Parties, such as officers, directors and their affiliates, among others.³⁴ Finally, as discussed above, Sections 312.03(b) and (c) set forth circumstances under which shareholder approval would be required, and such approval would continue to be required under the proposal to the extent that an issuance would not qualify for the exceptions enumerated in those rules.³⁵

The Commission further notes, in approving the changes to measure market value as the lower of the closing price and five-day average closing price and eliminate the book value requirement, that the proposed amendments are similar to the rules of another national securities exchange that the Commission found consistent with the Act.³⁶

³² See Sections 312.03(a) and 303A.08 of the Manual. The Commission notes that Section 303A.08 uses the term “fair market value” for purposes of determining whether an issuance of stock would qualify for an exception from the shareholder approval requirement in Section 303A.08. The Exchange has represented that for purposes of qualifying for that exception, the Exchange has always interpreted fair market value as identical to the Official Closing Price definition proposed to be adopted in Section 312.04, and, to avoid any potential confusion, the Exchange will submit a proposed rule filing to amend Section 303A.08 to codify this interpretation. See Notice, supra note 3, at 65379-80. For any avoidance of doubt, the Commission notes that the term Minimum Price, as defined above by the Exchange in its current proposal, is not applicable to the equity compensation provisions in Section 303A.08 or Section 312.03(a).

³³ See Section 312.03(d) of the Manual.

³⁴ See Section 312.03(b) of the Manual.

³⁵ See supra notes 6-9 and accompanying text.

³⁶ See Securities Exchange Act Release No. 84287 (Sept. 26, 2018), 83 FR 49599 (Oct. 2, 2018) (SR-NASDAQ-2018-008). See also NASDAQ Rule 5635(d).

The Commission believes that the additional proposed amendments and clarifications to the rule, including to the definition of official closing price, will add transparency to the Exchange's rules and are therefore consistent with the Act.³⁷

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁸ that the proposed rule change (SR-NYSE-2018-54), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁹

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Deputy Secretary

³⁷ The Commission notes that the Exchange has indicated that the changes to the definition of Official Closing Price were made to conform the definition to the language used throughout the rule and does not have any substantive effect. See supra note 16.

³⁸ 15 U.S.C. 78s(b)(2).

³⁹ 17 CFR 200.30-3(a)(12).