



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99238; File No. SR-NYSE-2023-34]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Amending Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual to Modify the Circumstances Under Which a Listed Company Must Obtain Shareholder Approval of a Sale of Securities Below the Minimum Price to a Substantial Security Holder of the Company**

December 26, 2023.

#### I. Introduction

New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed on September 26, 2023, with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed company. The proposed rule change was published for comment in the **Federal Register** on October 4, 2023.<sup>3</sup> On November 16, 2023, the Commission designated a longer period for Commission action on the proposed rule change.<sup>4</sup> On December 21, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the original filing in its

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 98662 (September 29, 2023), 88 FR 68675 (October 4, 2023) (“Notice”).

<sup>4</sup> See Securities Exchange Act Release No. 98967 (November 16, 2023), 88 FR 81462 (November 22, 2023) (extending the time period for Commission action to January 2, 2024).

entirety.<sup>5</sup> The Commission has received no comment letters on the proposal. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. The Exchange’s Description of the Proposed Rule Change, as Modified by Amendment No. 1<sup>6</sup>

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The NYSE previously filed a proposed rule filing to amend Section 312.03(b) of the Manual to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities to a substantial security holder of the listed company.<sup>7</sup> The proposed rule change was published for comment in the **Federal Register** on October 4, 2023.<sup>8</sup> This Amendment No. 1 supersedes the original filing in its entirety.

Amendment No. 1 includes in the Purpose and Statutory Basis sections additional explanation of why the Exchange is proposing the rule change and believes that it is appropriate,

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<sup>5</sup> In Amendment No. 1, the Exchange revised the proposal to: (1) adopt a new definition of an “Active Related Party” in Section 312.03(b)(i) of the NYSE Listed Company Manual (“Manual”) and to retain the current definition of Related Party for purposes of Section 312.03(b)(ii) of the Manual; (2) adopt in Section 312.04 of the Manual definitions of “control” and “group” for purposes of proposed amended Section 312.03(b)(i) of the Manual; (3) include additional explanation of why the Exchange is proposing the rule change and believes that it is appropriate; (4) explain that the proposal would not have any substantive effect on the application of Section 312.03(b)(ii) of the Manual and that a listed company selling securities to a Related Party under the circumstances set forth in 312.03(b)(ii) of the Manual, as amended, would remain subject to the shareholder approval requirements therein; and (5) make other clarifying and conforming changes. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nyse-2023-34/srnyse202334-320179-832762.pdf>.

<sup>6</sup> This Section II reproduces Amendment No. 1, as filed by the Exchange.

<sup>7</sup> See SR-NYSE-2023-34 (September 26, 2023).

<sup>8</sup> See Securities Exchange Act Release No. 98662 (September 29, 2023), 88 FR 68675 (October 4, 2023).

specifically discussing the Exchange’s belief that there is a lesser possibility that a substantial security holder may exercise influence over the terms of a transaction with the company if such substantial security holder does not have representation on the board or in management. In addition, Amendment No. 1 amends the rule text to adopt a new definition of an “Active Related Party” in Section 312.03(b)(i) and to retain the current definition of Related Party for purposes of Section 312.03(b)(ii).<sup>9</sup> The Purpose section is amended to describe these proposed amendments, as well as to explain that their purpose is to ensure that the proposal would not have any substantive effect on the application of Section 312.03(b)(ii). A listed company selling securities to a Related Party under the circumstances set forth in the rule as amended would remain subject to the shareholder approval requirements in 312.03(b)(ii). Finally, Amendment No. 1 amends the rule text to adopt in Section 312.04 definitions of “control” and “group” for purposes of proposed amended Section 312.03(b)(i), providing clarity as to the meaning of the terms “controlling shareholder” and “control group” in that provision as amended. The Purpose section is amended to describe the addition of those new defined terms and to include footnotes explaining how “control” is defined and the standards to be applied in determining whether or not a “group” exists.

Section 312.04(e) of the Manual provides that an interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

Section 312.03(b)(i) of the Manual provides that shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock,

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<sup>9</sup> Section 312.03(b)(ii) provides that shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of related transactions in which a Related Party has a five percent or greater interest (or such persons collectively have a ten percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into common stock, could result in an issuance that exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

in any transaction or series of related transactions, to a director, officer or substantial security holder of the company 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.

The Manual provides an exception to the shareholder approval requirement if such transaction is a cash sale for a price that is at least the Minimum Price. Section 312.04(h) defines the Minimum Price as a price that is the lower 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(i) defines the “Official Closing Price” of an issuer's common stock as the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities.<sup>10</sup>

Certain NYSE listed companies are significantly dependent on their ability to regularly raise additional capital to fund their operations or acquire new assets. For example, pre-revenue stage biotechnology companies regularly seek additional capital to fund their research and development activities and real estate investment trusts seek to fund the acquisition of new properties by selling equity securities in private placements or direct registered sales priced at a small discount to the prevailing market price. It is the Exchange’s understanding that, in many cases, existing shareholders of the listed company are willing purchasers of securities in such circumstances, as they already understand the company’s business and have a positive view of its future prospects. Sales to existing shareholders can also be advantageous to both the issuer and the shareholders because of the speed with which a direct sale to an existing shareholder can be

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<sup>10</sup> For example, if the transaction is signed 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 signed 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.

completed if no shareholder approval is required. However, the benefits of low transaction costs and speed of execution that typically exist when conducting these transactions with existing shareholders face countervailing factors if the counterparty is deemed to be a substantial securityholder for purposes of Section 312.03(b)(i). In such cases, to mitigate potential conflicts of interest, Exchange rules require that any sale below the Minimum Price can relate to no more than one per cent of the shares of common stock or one percent of the voting power outstanding before the issuance. Any such transaction that relates to more than one per cent of the common stock is subject to shareholder approval, which imposes significant delay and additional costs on the issuer, thereby often making the sale impracticable. This one percent limitation is therefore a significant restriction on the ability of an NYSE listed company to raise capital from its existing shareholders. Notably, the NYSE is the only listing exchange in the United States that has such a limitation in its rules and NYSE companies are therefore at a disadvantage in raising additional capital when compared to their peers listed on other national securities exchanges.

The Exchange believes there are significant benefits from the protection provided to a listed company's investors by the shareholder approval requirements in Section 312.03(b)(i) when a purchaser of the securities in a transaction is an officer or director or other control person of the company. In such cases, the potential exists for a related party purchaser to use their influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole. However, the current definition of substantial security holder used in the rule also applies to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way generally do not

have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company.<sup>11</sup> As discussed below the Exchange will be adopting the definition contained in Rule 12b-2 under Regulation 12B of the Exchange Act to define control for purposes of the proposed amended rule.

In light of the foregoing, the Exchange proposes to amend Section 312.03(b)(i) to limit its application to related parties whose interest in the company is not passive in nature. As proposed, Section 312.03(b)(i) would be limited in application to sales to a director, officer, controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person<sup>12</sup> who is an officer or director of the company (each an “Active Related Party”). For purposes of determining the existence of a group, the Exchange proposes to rely on the filings on Schedule 13D or Schedule 13G disclosing the existence of a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act, along with any additional follow-up inquiry that is needed.<sup>13</sup> The Exchange proposes to amend Section 312.04 to include new definitions for purposes of Section 312.03, providing that: (i) a “group” means a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Exchange Act; and (ii) “control” has the same meaning as defined in Rule 12b-2 of Regulation 12B under the Exchange Act.<sup>14</sup> The Exchange intends to revise its internal procedures in reviewing proposed

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<sup>11</sup> The Exchange recognizes that substantial shareholders who are not represented on the board or in management are likely to vote their shares at shareholder meetings but believes that this in itself is generally not sufficient to create a relationship with the company that would give a substantial shareholder the ability to influence inappropriately the terms of any transaction it enters into with the company.

<sup>12</sup> In determining whether a person is an affiliated person for purposes of the definition of an Active Related Party, the Exchange will consider all relevant facts and circumstances, including, but not limited to, whether such person is an affiliate within the meaning of that term under provisions of the federal securities laws and the rules thereunder.

<sup>13</sup> Section 13(d)(3) or Section 13(g)(3) provide: “When two or more persons act as a [ ] group for the purpose of acquiring, holding, or disposing of [equity] securities of an issuer, the group shall be deemed a ‘person’ . . .” The determination under Sections 13(d)(3) and 13(g)(3) as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement. Depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding – which includes voting – or disposing of securities of an issuer are sufficient to constitute the formation of a group.

<sup>14</sup> Rule 12b-2 under Regulation 12B of the Exchange Act provides that “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or

transactions to the extent necessary to obtain the necessary information to make determinations with respect to whether shareholders participating in transactions are Active Related Parties.

In addition to the proposed definition of Active Related Party in the proposed amended version of Section 312.03(b)(i), the Exchange proposes for purposes of Section 312.03(b)(ii) to retain the broader definition of a Related Party included in the current rule (i.e., “a director, officer or substantial security holder of the company”). Consequently, this proposal would not have any substantive effect on the application of Section 312.03(b)(ii) and a listed company selling securities to a Related Party under the circumstances set forth in the rule as amended remains subject to the shareholder approval requirements in that provision.<sup>15</sup>

The Exchange also notes that any listed company selling securities in a private placement that does not meet the Minimum Price requirement will remain subject to the shareholder approval requirement of Section 312.03(c) if such transaction relates to 20 percent or more of the issuer’s common stock. In addition, if the securities in such financing are issued in connection with an acquisition of the stock or assets of another company, shareholder approval will be required if the issuance of such securities alone or when combined with any other present or potential issuance of common stock, or securities convertible into common stock in connection with such acquisition, is equal to or exceeds either 20 percent of the number of shares of common stock or 20 percent of the voting power outstanding before the issuance. Sales of securities will also continue to be subject to all other shareholder approval requirements set forth in Section 312.03 (including limitations with respect to equity compensation under Section 312.03(a) and Section 303A.08) and the change of control requirement of Section 312.03(d). The Exchange notes that Section 312.04(a) provides that shareholder approval is required if any of the subparagraphs of Section 312.03 require such approval, notwithstanding the fact that the

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indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.”

<sup>15</sup> See note 9 supra for a description of Section 312.03(b)(ii).

transaction does not require approval under one or more of the other subparagraphs. Finally, the Exchange notes that Section 312.03(b)(i) as proposed to be amended would continue to provide a significant protection to shareholders against conflicts of interest in sales of securities to Active Related Parties and that no other listing venue has such a protection in its rules. The Exchange notes that its shareholder approval requirements are as stringent in every respect as those of its competitor listing venues.<sup>16</sup>

Under the proposal the Exchange will continue to require shareholder approval for below market sales (i.e., below the Minimum Price) over one percent to Active Related Parties. However, as a consequence of the proposed amendment, below market sales over one percent to substantial securityholders who are not Active Related Parties will be permitted without shareholder approval under 312.03(b)(i), but will continue to be subject to all the other applicable shareholder approval requirements under 312.03.

#### 1. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>18</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that proposed amended Section 312.03(b)(i) is consistent with the protection of investors and the public interest. Specifically, the amended rule continues to

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<sup>16</sup> See, for example, Nasdaq Stock Market Rule 5635.

<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

provide for shareholder approval of below-market sales of securities to Active Related Parties of a listed company where a potential conflict of interest exists that Active Related Parties could use their influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole. The current definition of substantial security holder used in the rule extends to holders of a company's common stock who do not participate in the governance or management of the company through board or management representation. The Exchange believes that transactions with these kinds of shareholders who do not participate in the governance or management of the company (except by voting at shareholder meetings) in and of themselves generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management. The Exchange believes that these shareholders that do not participate actively in the company in this way do not generally have the same ability to participate in and influence decision making as is the case with a related party that directly participates in the governance or management of the company. The proposed rule only modifies the existing rule to permit sales to investors who are not a director, officer, a controlling shareholder or member of a control group or any other substantial security holder of the company that has an affiliated person who is an officer or director of the company and with respect to whom the Exchange therefore believes that the potential for such self-dealing does not exist.

The Exchange proposes to use definitions of "control" and "group" in the proposed amended rule that are used in the federal securities laws and the rules thereunder and, consequently, the Exchange believes that the use of such definitions is consistent with the Act.

The Exchange believes that the proposed amendment would promote competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed amendment increases competition among listing venues by removing a limitation on capital raising by listed companies that does not exist for their peers on other listing exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>19</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,<sup>20</sup> 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 foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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

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<sup>19</sup> 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).

<sup>20</sup> 15 U.S.C. 78f(b)(5).

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.<sup>21</sup>

As discussed above, the Exchange proposes to amend Section 312.03(b)(i) of the Manual to modify its application. Specifically, the Exchange proposes to limit the shareholder approval requirements of Section 312.03(b)(i) of the Manual, which applies to issuances of common stock exceeding either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance for a price below the Minimum Price,<sup>22</sup> to require shareholder approval only for issuances to Active Related Parties, defined as directors, officers, controlling shareholders or members of a control group or any other substantial security holders<sup>23</sup> of the company that have an affiliated person who is an officer or director of the company,<sup>24</sup> and to no longer require shareholder approval under this provision for such issuances

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<sup>21</sup> See, e.g., Securities Exchange Act Release Nos. 91471 (Apr. 2, 2021), 86 FR 18362 (NYSE-2020-85) (revising the shareholder approval requirements in Sections 312.03 and 312.04 and the requirements for related party transactions in Section 314.00); 85374 (Mar. 20, 2019) 84 FR 11354 (Mar. 26, 2019) (NYSE-2018-54) (modifying the price requirements that companies must meet to avail themselves of certain exceptions from the shareholder approval requirements in Section 312.03); 84287 (Sept. 26, 2018) 83 FR 49599 (Oct. 2, 2018) (Nasdaq-2018-008) (approving a Nasdaq proposal to change to the definition of market value for purposes of the shareholder approval rule and eliminate the requirement for shareholder approval of issuances at less than book value but greater than market value); 76814 (Dec. 31, 2015), 81 FR 0820 (Jan. 7, 2016) (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). See also Securities Exchange Act Release Nos. 48108 (June 30, 2003), 68 FR 39995 (Jul. 3, 2003) (approving equity compensation shareholder approval rules of both the NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ); and 65225 (Aug. 30, 2011), 76 FR 55148 (Sept. 6, 2011) (approving rules for the qualification, listing and delisting of companies on BATS, 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).

<sup>22</sup> “Minimum Price” means a price that is the lower 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. See Section 312.04(h) of the Manual.

<sup>23</sup> Section 312.04(e) of the Manual provides that “[a]n interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.”

<sup>24</sup> See proposed amended Section 312.03(b)(i) of the Manual defining “Active Related Party.”

to Related Parties<sup>25</sup> that are not Active Related Parties (i.e., substantial security holders that are not controlling shareholders or a member of a control group or that do not have an affiliated person who is an officer or director of the company). According to the Exchange, this change would allow substantial security holders who do not participate in the governance or management of the company (and who are thus not in the newly defined Active Related Party category) to acquire additional stock below the Minimum Price without the need for shareholder approval under Section 312.01(b)(i), thus making it less burdensome for NYSE listed companies to raise additional capital quickly.<sup>26</sup> The Exchange states its belief that transactions with substantial security holders that are not Active Related Parties generally do not give rise to the potential conflicts of interest in the determination of transaction terms that exist where the purchaser has a role in the listed company's board or management, as there is a lesser possibility that a substantial security holder that is not an Active Related Party may exercise influence over the terms of a transaction with the company if such substantial security holder does not have representation on the board or in management.<sup>27</sup> The Exchange also proposes to adopt two new definitions under the revised rule for purposes of defining "control" and "group." "Control" would be defined using the definition in Rule 12b-2 under the Act<sup>28</sup> and "group" (for purposes of

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<sup>25</sup> See Section 312.03(b)(i) of the Manual and proposed amended Section 312.03(b)(ii) of the Manual defining Related Party. In each case, "Related Party" is defined as "a director, officer or substantial security holder of the company."

<sup>26</sup> See supra Section II.A. Shareholder approval is required if any of the subparagraphs of Section 312.03 of the Manual apply notwithstanding the fact that the transaction does not require approval under on or more of the other subparagraphs. See Section 312.04(a). As discussed below, these other shareholder approval provisions require approval for certain sales of discounted stock (i.e., below the Minimum Price) in private placements as well as sales of stock under certain situations regardless of whether or not such sale is below the Minimum Price.

<sup>27</sup> See supra Section II.A.

<sup>28</sup> Rule 12b-2 under Regulation 12B of the Exchange Act provides that "[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See supra note 14 and accompanying text.

control group) would be defined as a group as determined under Section 13(d)(3) or Section 13(g)(3) of the Act.<sup>29</sup>

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act. As stated by the Exchange, the shareholder approval requirement in Section 312.03(b)(i) of the Manual protects against a potential conflict of interest when the acquirer of additional stock may have enough influence within the company to obtain superior terms from the company to the detriment of the company's shareholders as a whole.<sup>30</sup> As amended, the shareholder approval requirement in Section 312.03(b)(i) of the Manual would continue to apply to below market sales of securities of greater than 1% to Active Related Parties (i.e., directors, officers, controlling shareholders or members of a control group or any other substantial security holders of the company that have an affiliated person<sup>31</sup> who is an officer or director of the company). As a result, these Active Related Parties, that have a role in the listed company's board or management or are substantial security holders that exercise control and thus have a potential conflict of interest in connection with the negotiation of any purchase of stock, will continue to be subject to the shareholder approval requirements under Section 312.03(b)(i) of the Manual. Moreover, even though substantial security holders that are not Active Related Parties will no longer be subject to the shareholder approval requirement in Section 312.03(b)(i) of the Manual, they will continue to be subject to the other shareholder approval requirements set forth in Section 312.03 of the Manual, to the extent applicable.

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<sup>29</sup> Section 13(d)(3) or Section 13(g)(3) provide: "When two or more persons act as a [ ] group for the purpose of acquiring, holding, or disposing of [equity] securities of an issuer, the group shall be deemed a 'person' . . ." The determination under Sections 13(d)(3) and 13(g)(3) as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement. Depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding – which includes voting – or disposing of securities of an issuer are sufficient to constitute the formation of a group. See supra note 13 and accompanying text.

<sup>30</sup> See supra Section II.A.

<sup>31</sup> In determining whether a person is an affiliated person, the Exchange will consider all relevant facts and circumstances, including, but not limited to whether such person is an affiliate within the meaning of that term under the federal securities laws and rules thereunder. See supra note 12.

To make it clear that there are no changes being made to the application of the other shareholder approval requirements in Section 312.03 of the Manual, the Exchange has specifically amended Section 312.03(b)(ii) of the Manual to retain the definition of Related Party in order to clarify that a listed company selling securities to a Related Party (that includes a substantial security holder)<sup>32</sup> under the circumstances set forth in that rule as amended would remain subject to the shareholder approval requirements set forth therein.<sup>33</sup> By amending the proposal so that the substantive requirements of Section 312.03(b)(ii) of the Manual remain unchanged, the provision will continue to provide important investor protections for shareholders when a listed company is selling securities to a Related Party that has an interest, directly or indirectly, in the company or assets to be acquired or consideration to be paid.

The Commission also finds that the Exchange’s proposed definitions of “group” and “control” in Sections 312.04(k) and (l) of the Manual for purposes of Section 312.03 of the Manual are consistent with the Act.<sup>34</sup> The Exchange’s proposed use of the standards under Sections 13(d)(3) and 13(g)(3) to determine the existence of a group is consistent with the guidance given by the Commission that “[t]he appropriate legal standard for determining whether a group is formed is found in sections 13(d)(3) and 13(g)(3) [of the Act].”<sup>35</sup> The

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<sup>32</sup> See *supra* note 23.

<sup>33</sup> See *supra* Section II.A and proposed Section 312.03(b)(ii) of the Manual, as modified by Amendment No. 1. As discussed above, Section 312.03(b)(ii) of the Manual provides that shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, where such securities are issued as consideration in a transaction or series of related transactions in which a Related Party has a five percent or greater interest (or such persons collectively have a ten percent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into common stock, could result in an issuance that exceeds either five percent of the number of shares of common stock or five percent of the voting power outstanding before the issuance.

<sup>34</sup> In its proposal, the Exchange stated that it will revise its internal procedures in reviewing proposed transactions as necessary to obtain the information necessary to determine whether shareholders participating in transaction are Active Related Parties. In addition, the Exchange stated that it will rely on the filings on Schedule 13D or Schedule 13G for purposes of determining the existence of a group, along with any additional follow-up inquiry that is needed. See *supra* Section II.A. The Commission believes this is reasonable and will help the Exchange ensure compliance with the revised rule.

<sup>35</sup> See Securities Exchange Act Release No. 98704 (Oct. 10, 2023), 88 FR 76896 (Nov. 7, 2023), 76933.

Commission further stated that “[t]he determination depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally.”<sup>36</sup> The Exchange’s proposed use of Rule 12b-2 to determine the existence of control also is reasonable and consistent with the Act given that definition applies to “all reports filed pursuant to section[ ] 13 [ ] of the Act . . . .”<sup>37</sup>

The Commission notes, in approving the proposal to amend the shareholder approval requirement in Section 312.03(b)(i) of the Manual, that the ability of listed companies to sell securities without shareholder approval continues to remain limited by other important Exchange rules.<sup>38</sup> For example, the Commission notes that any discounted issuance of stock to a company’s officers, directors, employees, or consultants would require shareholder approval under the Exchange’s equity compensation rules.<sup>39</sup> In addition, any listed company selling securities in a private placement that does not meet the Minimum Price requirement will remain subject to the shareholder approval requirement of Section 312.03(c) of the Manual if such transaction relates to 20 percent or more of the issuer’s common stock or voting power.<sup>40</sup> Section 312.03(c) of the Manual also requires shareholder approval for issuances of 20% or more of the common stock or the voting power in connection with an acquisition of the stock or assets of another company irrespective of whether the price meets or exceeds the Minimum Price. Furthermore, shareholder approval would be required if the issuance resulted in a change of control and, as discussed

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<sup>36</sup> See id.

<sup>37</sup> See Rule 12b-1, which sets forth the scope of Regulation 12B and provides that all rules contained in Regulation 12B, including Rule 12b-2, apply to such filings. For example, the Commission has enforced violations of Rule 12b-2 in Regulation 12B against beneficial owners for disclosure deficiencies in their Schedule 13D filings.

<sup>38</sup> See, e.g., Section 312.03(a), (b)(ii), (b)(iii), (c) and (d) of the Manual. The Commission notes that if shareholder approval was not required under Section 312.03(b)(i) of the Manual, 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.

<sup>39</sup> See Sections 312.03(a), 312.03(b)(iii) and 303A.08 of the Manual.

<sup>40</sup> See Section 312.03(c) of the Manual.

above, for the acquisition of stock or assets of another company where the issuance increases voting power or common shares by 5% or more and a Related Party has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.<sup>41</sup>

Finally, the Exchange also states its belief that Section 312.03.(b)(i) as proposed to be amended would continue to provide a significant protection to shareholders against conflicts of interest in sales of securities to Active Related Parties and that no other listing exchange has such a requirement.<sup>42</sup> The Exchange also represents that its shareholder approval requirements are as stringent as those of its competitor listing venues.<sup>43</sup> The Commission is cognizant of the fact that the Exchange operates in a highly competitive environment including with respect to the listing of issuers. While the proposal would allow below market sales (i.e., below the Minimum Price) over one percent by listed companies to substantial security holders that are not Active Related Parties without shareholder approval, the other shareholder approval requirements remain unchanged and provide additional protections on the amount of shares that can be issued without a shareholder vote.<sup>44</sup> Importantly, Active Related Parties, that have a role in the listed company's board or management or are substantial security holders that exercise control and thus have a potential conflict of interest in connection with the negotiation of any purchase of stock, will continue to be subject to the shareholder approval requirements under Section 312.03(b)(i) of the Manual. The proposal also will promote fair competition among listing exchanges. For the reasons discussed above, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

#### IV. Solicitation of Comments

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<sup>41</sup> See Sections 312.03(d) and 312.03(b)(ii) of the Manual. See also, supra note 33 and accompanying text concerning Section 312.03(b)(ii).

<sup>42</sup> See, e.g., Nasdaq Rule 5635; NYSE American LLC Company Guide, Section 711-713.

<sup>43</sup> See supra Section II.A at note 16 and accompanying text.

<sup>44</sup> See, for example, Section 312 (b)(ii), (c) and (d) and supra notes 39-42 and accompanying text.

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSE-2023-34 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSE-2023-34. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2023-34 and should be

submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment No. 1, prior to the 30<sup>th</sup> day after the date of publication of Amendment No. 1 in the **Federal Register**. As discussed above, Amendment No. 1, the Exchange revised the proposal to: (1) adopt a new definition of an “Active Related Party” in Section 312.03(b)(i) of the Manual and to retain the current definition of “Related Party” for purposes of Section 312.03(b)(ii) of the Manual; (2) adopt in Section 312.04 of the Manual definitions of “control” and “group” for purposes of proposed amended Section 312.03(b)(i) of the Manual; (3) include additional explanation of why the Exchange is proposing the rule change and believes that it is appropriate; (4) explain that the proposal would not have any substantive effect on the application of Section 312.03(b)(ii) of the Manual and that a listed company selling securities to a Related Party under the circumstances set forth in 312.03(b)(ii) of the Manual, as amended, would remain subject to the shareholder approval requirements therein; and (5) make other clarifying and conforming changes. The Commission believes that these revisions provide greater clarity on the application of the proposal and its scope and the circumstances under which shareholder approval is still required under Section 312.03 of the Manual. The additional explanation in support of the proposal as well as the amended rule language in Amendment No. 1 assist the Commission in evaluating the Exchange’s proposal and in determining that it is consistent with the Act.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>45</sup> that the proposed rule change (SR-NYSE-2023-34), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

**Christina Z. Milnor,**

*Assistant Secretary.*

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<sup>45</sup> 15 U.S.C. 78f(b)(2).

<sup>46</sup> 17 CFR 200.30-3(a)(12).