



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-74849; File No. SR-NYSE-2015-02]

April 30, 2015

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual to Exempt Early Stage Companies From Having to Obtain Shareholder Approval Before Issuing Shares for Cash to Related Parties, Affiliates of Related Parties or Entities In Which A Related Party has A Substantial Interest

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on April 16, 2015, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 312.03(b) and 312.04 of the NYSE Listed Company Manual (the “Manual”) to exempt early stage companies from having to obtain shareholder approval before issuing shares to related parties, affiliates of related parties or entities in which a related party has a substantial interest. The text of the proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Sections 312.03(b) and 312.04 of the Manual to exempt early stage companies from having to obtain shareholder approval before selling shares for cash to related parties, affiliates of related parties or entities in which a related party has a substantial interest.

The Exchange recently eliminated its Assets and Equity Test initial listing standard and replaced it with a new initial listing standard that permits companies to list on the Exchange if they demonstrate a total global market capitalization of at least \$200 million (the "Global Market Capitalization Test"). Among the stated reasons for adopting this rule change was to enable the Exchange to compete with the Nasdaq Global Market ("Nasdaq") for the listing of early stage companies that do not yet meet the \$75 million minimum assets and \$50 million minimum stockholders' equity requirements that were required to list under the Exchange's Assets and Equity Test that was formerly in place.

In the Exchange's experience, many early stage companies do not yet generate revenues internally from sales. Instead, such companies are largely dependent on raising funds via

financing transactions, such as an initial public offering (“IPO”) and subsequent sales of their equity securities, in order to continue operations or to finance their research or exploration activities. Early stage companies are hampered in their ability to access debt financing due to their lack of cash flows and tangible assets. It is also often difficult for them to access the public equity markets by means of firm commitment underwritten offerings, as many of them are ineligible for shelf registration. Consequently, these early stage companies frequently need to raise capital via private placement share issuances to their founders or other significant existing shareholders or their executive officers or directors. Under Section 312.03(b), any of these potential investors in private placements would generally be deemed to be a “related party” (“Related Party”) of the listed company.⁴ Accordingly, if the private placement share issuance to any of these Related Parties exceeds either one percent of the number of shares of common stock or one percent of the voting power outstanding before the issuance, the company is required by Section 312.03(b) to obtain shareholder approval prior to the issuance.⁵

⁴ For purposes of 312.03(b), a Related Party is defined as a director, officer or substantial security holder (i.e., a holder of 5% or more of the common stock) of the company.

⁵ Section 312.03 (b) requires shareholder approval of shares [sic] issuances exceeding 1% to:

- (1) a Related Party;
- (2) a subsidiary, affiliate or other closely-related person of a Related Party; or
- (3) any company or entity in which a Related Party has a substantial direct or indirect interest.

However, if the Related Party involved in the transaction is classified as such solely because such person is a substantial security holder, 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 will 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 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance.

The process of obtaining shareholder approval is frequently expensive and time consuming for listed companies. It typically takes several months of advance preparation and requires companies to go through an SEC review process, mail proxy statements and hold a shareholder meeting. The delays inherent in obtaining shareholder approval can be especially troublesome for early stage companies that do not yet generate significant revenue from operations and may therefore need to raise capital quickly in order to fund their ongoing operations. Accordingly, the Exchange proposes to amend Sections 312.03(b) and 312.04 to provide early stage companies with a limited exemption to the requirements of Section 312.02(b).

The Exchange proposes to amend Section 312.04 to include a definition of an “Early Stage Company.” An Early Stage Company will be defined as a company that has not reported annual revenues greater than \$20 million in any two consecutive fiscal years since its incorporation. Further, an Early Stage Company will lose that designation at any time after listing on the Exchange that it files an annual report with the Commission in which it reports two consecutive fiscal years in which it has revenues greater than \$20 million in each year.⁶ The Exchange proposes to amend Section 312.03(b) to exempt Early Stage Companies from the requirement that they obtain shareholder approval prior to a sale of securities for cash to Related Parties, affiliates of Related Parties, or entities in which a Related Party has a substantial interest, provided that the Early Stage Company’s audit committee or a comparable committee comprised

⁶ A company’s annual financial statements prior to listing on the Exchange will also be considered when determining if it should lose its Early Stage Company designation. For example, if a company files an annual report with the Commission one year after listing on the Exchange and such annual report shows that the company has had revenues greater than \$20 million in each of two consecutive years (even if one of those years was prior to listing on the Exchange), the company will lose its Early Stage Company designation at that time.

solely of independent directors reviews and approves all such transactions prior to their completion. Any issuance of securities that is not a sale for cash, including any issuance in connection with the acquisition of stock or assets of another company, will remain subject to the shareholder approval provisions of Section 312.03(b). Additionally, as stated in Section 312.04(a), an exemption from one provision of Section 312.03 is not a general exemption from all of Section 312.03. Therefore, notwithstanding that a transaction by an Early Stage Company may have an exemption under Section 312.03(b), the shareholder approval requirements of Sections 312.03(c) (requiring shareholder approval of issuances relating to 20% or more of the company's stock) and 312.03(d) (requiring shareholder approval of any issuance giving rise to a change of control) will still be applicable.⁷

Further, the provisions of Section 312.03(c) apply to any transaction or series of transactions. In applying Section 312.03(c), the Exchange carefully reviews issuances to determine whether they are related and should be aggregated for purposes of the rule. The Exchange analyses [sic] the relationship between separate issuances with particular care if they occur within a short period of time, are made to the same or related parties, or if there is a common use of proceeds. The Exchange would engage in this analysis with respect to any series of sales made by an Early Stage Company to a Related Party. Should the Exchange determine that it is necessary to aggregate the series of sales and, as aggregated, the total number of shares

⁷ The Exchange notes that the shareholder approval requirements of Nasdaq and the NYSE MKT do not restrict the amount of stock a company can sell for cash to a Related Party provided that the price per share is at least as great as each of the book and market value of the issuer's stock. Under the Exchange's proposal, however, an issuer will only be able to sell up to 19.9% of its outstanding stock to a Related Party for cash without first obtaining shareholder approval. For sales to a Related Party equal to or greater than 20% of the issuer's common stock, such issuer will be subject to the shareholder approval provisions of Section 312.03(c).

sold exceeds 19.9% of the shares outstanding, shareholder approval would be required pursuant to Section 312.03(c).

The Exchange believes that the proposed rule change will enable Early Stage Companies to raise capital in an efficient manner in order to fund their research or exploration activities or grow their business while still being sufficiently protective of shareholders. First, under the proposed rule change, a company will only be able to avail itself of the exemption if it has not reported revenues greater than \$20 million in any two consecutive fiscal years since its incorporation. After listing, once a company does report revenues greater than \$20 million in each of two consecutive fiscal years, it will lose its designation as an Early Stage Company and be subject to all shareholder approval requirements set forth in Section 312.03(b). Once the Early Stage Company designation is lost, it cannot be regained if the subject company later reports reduced revenues. The proposed rule change, therefore, is narrowly tailored and not designed to benefit companies whose revenues have diminished over time due to a decline in demand for their products. Further, the Exchange believes that the proposed rule change benefits shareholders of Early Stage Companies. Investors who choose to invest in Early Stage Companies are aware that the ability to raise additional capital in a flexible manner is crucial to the ultimate success of these companies. It is to the benefit of these investors, therefore, that Early Stage Companies have the ability to raise capital quickly and inexpensively. Without the exemption afforded by the proposed rule change, Early Stage Companies may not be able to raise capital or may do so on less advantageous terms to the detriment of their shareholders. Lastly, under the proposed rule, the sale of shares for cash by and [sic] Early Stage Company to a Related Party will only be exempt from the shareholder approval requirements of Section 312.03(b) to the extent such Early Stage Company's audit committee (or comparable committee

comprised solely of independent directors) has reviewed and approved such transaction prior to its completion.

The Exchange notes that many Early Stage Companies have historically listed on Nasdaq or NYSE MKT. Importantly, neither Nasdaq nor NYSE MKT has a rule comparable to Section 312.03(b) requiring that listed companies obtain shareholder approval prior to 1% (or in certain cases 5%) share issuances in cash sales to a Related Party.⁸ For the reasons enumerated above, the Exchange believes that Section 312.03(b)'s current requirements are particularly onerous for Early Stage Companies and could therefore discourage their listing on the Exchange. Thus, the Exchange believes the proposed rule change is necessary to enable the Exchange to compete with Nasdaq for the listing of Early Stage Companies.

The Exchange intends to allow any company falling within the proposed definition of an Early Stage Company (whether listed before or after the adoption of the Global Market Capitalization Test listing standard) to avail itself of the proposed exemption from Section 312.03(b). The Exchange believes this is appropriate given that such companies are in a similar stage of development and face the same financing challenges as any companies that will benefit from the exemption if listed subsequent to its adoption. Further, based on the Exchange's review of companies listed on the Exchange, only a small number of current listed companies would qualify for the exemption. While exempting currently listed companies that qualify as Early Stage Companies from the provisions of Section 312.03(b) removes a protection currently afforded such companies' shareholders, the Exchange believes that this lessened protection is

⁸ Both Nasdaq and the NYSE MKT do, however, have a rule requiring shareholder approval prior to the issuance of shares as sole or partial consideration for an acquisition of the stock or assets of another company if a Related Party has a 5% or greater interest in the company or assets to be acquired and the shares to be issued as consideration would result in an increase in shares outstanding of 5% or more.

desirable because of the overall benefit of providing these companies with necessary flexibility in raising capital. First, the Exchange believes that shareholders were likely well aware of the ongoing capital needs of such companies at the time of their initial investment. Early Stage Companies typically make ample disclosure in both their offering documents and their periodic filings, including risk factor disclosure, of their significant capital requirements and the negative consequences of being unable to meet those requirements. Therefore, shareholders of currently listed companies able to avail themselves of the Early Stage Company exemption to Section 312.03(b) will benefit from such companies having less cumbersome access to capital in order to fund their business and operations. Second, although currently listed companies that fall within the definition of Early Stage Company will be exempt from the shareholder approval requirements of Section 312.03(b), any transaction that would have required shareholder approval under such provision will still require the review and approval of such Early Stage Company's audit committee or comparable committee comprised of independent directors, thus offering an additional protection to shareholders. Lastly, the ability of an Early Stage Company to raise money via a sale of shares to a Related Party as opposed to via a public offering is likely to be more cost efficient as such company will not incur underwriting and other standard offering expenses that are incurred in the standard public offering. The greater speed with which a private sale can be executed also protects shareholders from the market risk associated with a possible share price decline during a public offering process.

The Exchange also proposes to delete obsolete text from Section 312.03 related to a limited transition period that is no longer relevant.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)⁹ of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ 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. The Exchange believes that the proposed amendment is consistent with the investor protection objectives of Section 6(b)(5) because it creates a very limited exemption to the NYSE's shareholder approval requirements that would be applicable only to share issuances by a narrowly-defined category of Early Stage Companies. The Exchange believes this amendment is consistent with the protection of investors because: (i) investors investing in Early Stage Companies do so in the knowledge that those companies do not currently generate revenue and that their ability to continue to execute their business strategy is significantly dependent on their ability to raise additional capital quickly and cheaply; and (ii) issuances that would be exempt from shareholder approval under the proposed amendment would need to be approved by an Early Stage Company's audit committee or comparable committee comprised of independent directors, mitigating the risk of any inappropriate conflict of interest in the transaction.

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 purpose of the Act. The proposed rule change provides a limited exemption to the shareholder approval requirements of

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

Section 312.03(b) for Early Stage Companies. These companies frequently must conduct time-sensitive capital raises in order to continue their research or exploration activities and fund their operations. Currently, any such company listed on the Exchange may be required to engage in a costly and time consuming process of obtaining shareholder approval for certain share issuances to a related party. If the same company was listed on Nasdaq or NYSE MKT, however, it would not be required to engage in this process as neither marketplace has a comparable rule to Section 312.03(b). As such, the limited exemption proposed herein would more closely align the Exchange, Nasdaq and NYSE MKT's rule in this regard and enable the Exchange to more effectively compete for the listing of Early Stage Companies.

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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2015-02 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2015-02. This file number should be included on the subject line if e-mail 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 (<http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NYSE-2015-02 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Brent J. Fields,
Secretary.

8011-01p

[FR Doc. 2015-10503 Filed: 5/5/2015 08:45 am; Publication Date: 5/6/2015]

¹¹ 17 CFR 200.30-3(a)(12).