To Our Clients and Friends

Memorandum

April 15, 2020

NYSE Temporarily Waives Shareholder Approval Requirements for Certain Security Issuances

The ongoing spread of COVID-19 and the resulting disruption in economic and market conditions has prompted the New York Stock Exchange (NYSE) to address the urgent liquidity needs of NYSE-listed companies.

On April 6, 2020, NYSE announced waivers (available here), effective through June 30, 2020, to facilitate NYSE-listed companies' access to capital from single investors or groups of investors, including "Related Parties," such as existing major shareholders. As discussed below, the waivers permit listed companies to raise capital in private placements with existing large shareholders without obtaining shareholder approval, so long as minimum pricing requirements and certain other conditions are met.

Waiver of Shareholder Approval Rules

Related Party Transactions. Rule 312.03(b) of the NYSE Listed Company Manual requires shareholder approval for any issuance of common stock (or securities convertible into or exercisable for common stock) to a director, officer or substantial security holder[1] of the company (each, a "Related Party"), or to an affiliate or other closely-related person of a Related Party, or to a company or entity in which a Related Party has a substantial interest, if the number of shares of common stock to be issued (or shares of common stock into which the securities may be convertible or exercisable) exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. The rule exempts from the shareholder approval requirements issuances of stock (or shares of common stock into which the securities may be convertible or exercisable) to substantial security holders for cash at a price at least equal to the Minimum Price[2] and in an amount that does not exceed either 5% of the number of shares of common stock or 5% of the voting power outstanding before the issuance.

---

1 Under Rule 312.04(e), an interest consisting of less than either 5% of the number of shares of common stock or 5% of the voting power outstanding of a company or entity will not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

2 Under Rule 312.04(i), Minimum Price means a price that is the lower of: (i) the Official Closing Price (as defined in Rule 312.04(j)) immediately preceding the signing of a binding agreement to issue the securities; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement.

Copyright © 2020 Fried, Frank, Harris, Shriver & Jacobson LLP
A Delaware Limited Liability Partnership

The temporary waivers eliminate the 1% and 5% limitations of Rule 312.03(b) and allow companies to enter into securities transactions with substantial security holders without obtaining shareholder approval, provided (1) the issuance of a company's securities is for cash at a price that is at least equal to the Minimum Price, and (2) the transaction is reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors. The waiver does not apply to the issuance of securities to fund an acquisition of stock or assets of another company where any Related Party or other person subject to Rule 312.03(b) has a 5% or greater interest (or such persons collectively have a 10% or greater interest) in the company or assets to be acquired or in the consideration to be paid for such acquisition.

Transactions in Excess of 20%. NYSE Rule 312.03(c) requires shareholder approval for an issuance of common stock (or securities convertible into or exercisable for common stock) in any transaction or series of related transactions if the issuance exceeds 20% of the voting power or number of shares outstanding before the issuance. The rule has an exception for a "bona fide private financing," which permits a sale for cash at a price at least equal to the Minimum Price, provided that no one purchaser or group of related purchasers acquires more than either 5% of the company's common stock or 5% of the voting power outstanding before the sale.

The temporary waiver eliminates the 5% limitation for any sale to an individual investor in a bona fide private financing that is a sale for cash at a price that meets the Minimum Price requirement. However, if any purchaser in a transaction benefiting from this waiver is a Related Party or other person subject to Rule 312.03(b), the proposed transaction must also be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors.

As a result of these waivers, the application of the NYSE shareholder approval requirements for security issuances are now more consistent with the application of the rules of the NASDAQ Stock Market, as the specific limitations that the NYSE has waived do not exist in the applicable NASDAQ rules. These waivers do not apply to issuances which would require shareholder approval under any other applicable NYSE rules, such as change-of-control transactions or certain equity compensation arrangements.

* * *

Authors

Steven Epstein

Daniel J. Bursky

Meredith L. Mackey

Matthew V. Soran

Matthew E. Sadofsky

Rati Ranga

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts:

London		
Ashar Qureshi	+44.20.7972.9173	ashar.qureshi@friedfrank.com
John Satory	+44.20.7972.9210	john.satory@friedfrank.com
New York		
Andrew B. Barkan	+1.212.859.8468	andrew.barkan@friedfrank.com
Lee T. Barnum	+1.212.859.8883	lee.barnum@friedfrank.com
Daniel J. Bursky	+1.212.859.8428	daniel.bursky@friedfrank.com
Joshua T. Coleman	+1.212.859.8633	joshua.coleman@friedfrank.com
Steven Epstein	+1.212.859.8964	steven.epstein@friedfrank.com
Mark S. Hayek	+1.212.859.8890	mark.hayek@friedfrank.com
Meredith L. Mackey	+1.212.859.8974	meredith.mackey@friedfrank.com
Ezra Schneck	+1.212.859.8764	ezra.schneck@friedfrank.com
Matthew V. Soran	+1.212.859.8462	matthew.soran@friedfrank.com
Joshua Wechsler	+1.212.859.8689	joshua.wechsler@friedfrank.com
Washington, DC		
Stuart A. Barr	+1.202.639.7486	stuart.barr@friedfrank.com