SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76814; File No. SR–NYSE–2015–02]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, 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

December 31, 2015.

I. Introduction

New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed on April 16, 2015, 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 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 proposed rule change was published for comment in the **Federal Register** on May 6, 2015.[3] The Commission received no comment letters on the proposal. On June 18, 2015, the Commission designated a longer period for Commission action on the proposed rule change [4] and on August 4, 2015, initiated proceedings under Section 19(b)(2)(B) of the Act [5] to determine whether to approve or disapprove the proposed rule change.[6] In response to the Order Instituting Proceedings, the Commission received a comment letter from the Exchange and Amendment No. 1 to the proposed rule change.[7] The Commission also received a recommendation regarding the proposed rule change from the Office of the Investor Advocate (''OIAD'') [8] and a comment letter.[9] On October 30, 2015, the Commission extended the time period for Commission action [10] and on November 12, 2015, the Exchange submitted a letter responding to the comments.[11] On December 10, 2015, the Exchange filed Amendment No. 2 to the proposed rule change.[12] This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

II. Description of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The Exchange proposes to amend Sections 312.03(b) and 312.04 of the Listed Company Manual (''Manual'') to provide an exemption to an ''early stage company'' listed on the Exchange from having to obtain shareholder approval, under certain circumstances, before issuing shares of common stock, or securities convertible into or exercisable for common stock, to a (1) director, officer [13] or substantial security holder [14] of the company (''Related Party'' or ''Related Parties''), (2) subsidiary, affiliate or closely-related person of a Related Party or (3) company or entity in which a Related Party has a substantial direct or indirect interest (together, a ''Proposed Exempted Party'' or ''Proposed Exempted Parties'').[15] In particular, shareholder approval will no longer be required under Section 312.03(b) for an ''early stage company,'' before the issuance of shares for cash to a Proposed Exempted Party, provided that the company's audit committee or a comparable committee comprised solely of independent directors reviews and approves of all such transactions prior to their completion.[16] Today, shareholder approval is required prior to the issuance of shares, among other things, where the number of shares to be issued to the Proposed Exempted Party exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance (or 5% of the number of shares or voting power, if the Related Party is classified as such solely because it is a substantial security holder, and 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 74849 (April 30, 2015), 80 FR 26118 (May 6, 2015) (''Notice'').

[4] *See* Securities Exchange Act Release No. 75248 (June 18, 2015), 80 FR 36385 (June 24, 2015) (extending the time period for Commission action to August 4, 2015).

[5] 15 U.S.C. 78s(b)(2)(B).

[6] *See* Securities Exchange Act Release No. 75599 (August 4, 2015), 80 FR 47979 (August 10, 2015) (''Order Instituting Proceedings'').

[7] *See* letter to Brent J. Fields, Secretary, Commission from Clare F. Saperstein, Associate General Counsel, New York Stock Exchange, dated August 31, 2015 (''NYSE Response Letter I'') and Amendment No. 1 to the proposed rule change dated August 31, 2015. In Amendment No. 1, the Exchange stated that it believed there was a potential ambiguity in the proposed rule language submitted as part of the original proposal. Amendment No. 1 amends the original proposed rule language to clarify that the proposed exemption from shareholder approval transactions involving the sale of stock for cash by an early stage company applies not only to a related party, as originally proposed, but also to 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.

[8] *See* Memorandum to the Commission from Rick. A. Fleming, Office of the Investor Advocate, Commission, dated October 16, 2015 (''OIAD Recommendation''). As discussed in more detail below, the Commission has carefully considered the OIAD Recommendation. The OIAD was established pursuant to Section 915 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, sec. 911, 124 Stat. 1376, 1822 (July 21, 2010) (the ''Dodd-Frank Act''). The Dodd-Frank Act authorizes the Investor Advocate, among other things, to identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations and to propose to the Commission changes in the regulations or orders of the Commission that may be appropriate to promote the interests of investors.

[9] *See* Public comment email from Suzanne Shatto, dated October 16, 2015 (''Shatto Letter'').

[10] *See* Securities Exchange Act Release No. 76323 (October 30, 2015), 80 FR 68585 (November 5, 2015) (extending the time period for Commission action to December 31, 2015).

[11] *See* letter to Brent J. Fields, Secretary, Commission from Clare F. Saperstein, Associate General Counsel, New York Stock Exchange, dated November 12, 2015 (''NYSE Response Letter II'').

[12] In Amendment No. 2, the Exchange amended the proposed rule language to clarify that (i) an early stage company may not use the proposed exemption to fund an acquisition of stock or assets of another company that would otherwise require shareholder approval under Section 312.03(b) of the Listed Company Manual; (ii) any sale of a listed company's securities at a below-market price constitutes equity compensation under Section 303A.08 of the Manual and is therefore subject to the shareholder approval requirements under that rule; and (iii) shareholder approval of any issuance 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 Section 312.03(b) or one or more of the other subparagraphs. *See also* letter to Brent J. Fields, Secretary, Commission from Martha Redding, Senior Counsel and Assistant Secretary, New York Stock Exchange, dated December 14, 2015 (''Amendment No. 2'').

[13] Section 312.04(h) of the Manual states that the term ''officer'' has the same meaning as defined by the Commission in Rule 16a–1(f) under the Act.

[14] Section 312.04(e) of the Manual states that 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 shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.

[15] The Exchange seeks to permit early stage companies to sell up to 19.9% of their outstanding equity securities to the Proposed Exempted Parties ''without undertaking the costly and time-consuming process of obtaining shareholder approval.'' *See* NYSE Response Letter I, *supra* note 7.

[16] The Exchange believes that independent committee review and approval of Related Party transactions is an appropriate safeguard to protect shareholder interests because directors owe a fiduciary duty to their shareholders and can be held personally liable for any violation of that duty. *See* NYSE Response Letter I, *supra* note 7.

company's common stock).[17] Shareholder approval is also required for issuances relating to 20% or more of the company's common stock, and prior to any issuance that will result in a change of control.[18]

In addition, the Exchange proposes to amend Section 312.03(b) to make clear that the proposed exemption will not be applicable to a sale of securities by a listed company to any person subject to the provisions of Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.[19]

The Exchange also proposes to clarify in Section 312.03(b) that the sale of stock to a Related Party that is an employee, director or service provider is subject to the equity compensation rules in Section 303A.08 of the Manual.[20] Accordingly, an early stage company will be unable to issue securities to a Related Party that is an employee, director or service provider, at a discount to the then-current market price, without complying with the shareholder approval requirements of Section 303A.08. Furthermore, the Exchange proposes to include a statement in Section 312.03(b) that 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 Section 312.03(b) or one or more of the other subparagraphs in Section 312.03.[21] Therefore, the Exchange states that shareholder approval requirements of Sections 312.03(c) [22] and 312.03(d) [23] will still be applicable.[24]

The Exchange also proposes to amend Section 312.04 to include a definition of the term ''early stage company.'' [25] The Exchange proposes to define an early stage company as a company that has not reported revenues greater than $20 million in any two consecutive fiscal years since its incorporation.[26] The Exchange represents that a company's annual financial statements prior to listing on the Exchange will also be considered when determining if the company should lose its early stage company designation.[27]

Lastly, the Exchange also proposes to delete obsolete text from Section 312.03 of the Manual related to a limited transition period that is no longer relevant.

III. Summary of Comments Received

As noted above, the Commission received a comment letter on the proposed rule change,[28] the OIAD Recommendation,[29] and two supplemental submissions from the Exchange.[30] The OIAD and the comment letter each recommended that the Commission disapprove the proposed rule change.[31]

A. Dilution of Economic and Ownership Interest

OIAD expressed the view that the proposed rule change is inconsistent with investor protection because it could result in economic dilution of the value and ownership control of an existing shareholder's interest in an early stage company.[32] OIAD reasoned that the proposed rule change could allow shares of an early stage company to be sold to substantial security holders at a discount to book or fair market value without shareholder approval unless the transaction exceeded twenty percent of outstanding shares or resulted in a change of control of the issuer.[33] OIAD stated that ''[w]hen new shares are sold at a discount from the greater of book or fair market value, it results in economic dilution'' that ''reduces the value of an existing shareholder's investment in the issuer.'' [34]

In addition, OIAD highlighted that ''all Related Parties . . . could obtain a significantly larger share of ownership control by paying the then-current market price for additional shares in a private transaction, without a vote of the existing shareholders.'' [35] In effect,

[17] The Exchange states that neither The NASDAQ Stock Market LLC (''NASDAQ'') nor NYSE MKT LLC (''NYSE MKT'') has a rule comparable to Section 312.03(b) requiring listed companies to obtain shareholder approval prior to 1% (or in certain cases 5%) share issuances in cash sales to a Proposed Exempted Party. *See* Notice, *supra* note 3, at 26120. 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. *See id.*

[18] *See* Sections 312.03(c) and 312.03(d) of the Manual.

[19] *See* Amendment No. 2, *supra* note 12. The Exchange states that this amendment is intended to address concerns that a listed company may sell its securities to a Proposed Exempted Party and then use the proceeds to acquire stock or assets from a company in which that Proposed Exempted Party had a direct or indirect interest. *See id.* The Exchange believes that ''permitting this sort of two-step transaction would enable companies to utilize the proposed exemption for acquisition transactions rather than capital raising and is inconsistent with the intended purpose of the exemption.'' *See id. See also* NASDAQ Rule 5635 which requires shareholder approval when acquiring stock or assets of another company where an officer, director, or substantial security holder has a 5% (or collectively 10% or greater interest) directly or indirectly in the company or assets to be acquired and the outstanding common shares or voting power to be issued will increase by 5% or more.

[20] For example, a sale of stock by an early stage company to any of such Related Parties at a discount to the then market price will be treated as equity compensation under Section 303A.08 notwithstanding the exemption from shareholder approval provided under Section 312.03(b). Consequently, an early stage company will be required to either: (i) Obtain shareholder approval of such sale, or (ii) issue such shares under an equity compensation plan that had previously been approved by shareholders and for which shareholder approval under Section 303A.08 is not otherwise required.

[21] *See also* Section 312.04(a) of the Manual.

[22] Section 312.03(c) of the Manual, with certain exceptions, requires shareholder approval of any issuance of securities in any transaction or related transactions relating to 20% or more of a listed company's stock before the issuance. When applying Section 312.03(c), the Exchange states that it reviews issuances to determine whether they are related and should be aggregated for purposes of the rule. *See* Notice, *supra* note 3, at 26120. The Exchange analyzes the relationship between separate stock issuances 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. *See id.* The Exchange represents that it will engage in this analysis with respect to any series of sales made by an early stage company to a Related Party. *See id.* Moreover, should the Exchange determine that it is necessary to aggregate the series of sales and, as aggregated, the total number of shares sold exceeds 19.9% of the shares outstanding, shareholder approval will be required pursuant to Section 312.03(c). *See id.*

[23] Section 312.03(d) of the Manual requires shareholder approval prior to an issuance giving rise to a change of control.

[24] *See* Notice, *supra* note 3, at 26119–20. The Commission notes, however, that Section 312.03(c)(2) of the Manual contains an exception for sales of common stock (or securities convertible into common stock) for cash in a ''bona fide private financing,'' as defined in Section 312.04(g), if certain requirements are met.

[25] *See* proposed Section 312.04(k) of the Manual.

[26] A company that qualifies as an early stage company does not necessarily maintain such designation indefinitely and can lose its designation as an early stage company anytime it reports two consecutive fiscal years with revenues greater than $20 million each year. *See* Notice, *supra* note 3, at 26119. The Exchange believes that only a small number of currently listed companies will qualify under the proposed exemption from shareholder approval. *See id.* at 26120.

[27] *See* Notice, *supra* note 3, at 26119, n.6. As an example, the Exchange states that 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. *See id.* Moreover, once the early stage company designation is lost, it cannot be regained if the subject company later reports reduced revenues. *See id.* at 26120.

[28] *See supra* note 9.

[29] *See supra* note 8.

[30] *See supra* notes 7 and 11.

[31] *See* OIAD Recommendation, *supra* note 8, at 3; and Shatto Letter, *supra* note 9. The Shatto Letter stated that it concurred with the reasoning of the OIAD Recommendation and requested that the Exchange explain the ''driving necessity that caused the NYSE to put forth [the] proposal.''

[32] *See* OIAD Recommendation, *supra* note 8, at 7.

[33] *See id.*

[34] *See id.*

[35] *See id.*

OIAD believed that such issuances result in an immediate transfer of value from existing shareholders to the new shareholder who injects a ''less-than-proportionate share of capital into the business.'' [36] Finally, OIAD also noted that current investors in these companies would face potential dilution of their voting interest in connection with issuances to Related Parties.[37]

In response, the Exchange stated that OIAD's analysis failed to consider circumstances that make it ''commercially reasonable to price private placement issuances at a discount to the then current market price.'' [38] The Exchange stated that ''a discount is commercially reasonable because investors in private placements are generally unable to resell the shares they purchase in the public market until either the end of the applicable Rule 144 holding period or such time as the company files and obtains effectiveness of a registration statement.'' [39] In addition, the Exchange asserted that the resale limitations on restricted securities make them ''riskier and more illiquid in the hands of the purchaser in a private placement and therefore less valuable.'' [40] Accordingly, ''it is generally necessary to sell shares in a private placement at a lower price than the prevailing public market price.'' [41] Moreover, the Exchange stated that a discount in the sale of shares in a private placement should only be viewed as economically dilutive if there are other sources of capital available on better terms.[42]

The Exchange also noted that Section 312.03(d) of the Manual provides a ''significant limitation'' on any increase in the relative voting power of Related Parties by requiring shareholder approval of any share issuance that gives rise to a change of control.[43] As a result, the Exchange represented that ''the proposed exemption could never be used as a mechanism for obtaining overall control of a listed company without shareholder approval.'' [44] Furthermore, the Exchange asserted that ''the voting rights of existing shareholders are not being diluted in any unfair manner'' because ''investors in any private placement will receive voting rights on the same terms as all other shareholders.'' [45]

B. Time-Sensitive Situations

OIAD suggested that the Exchange's existing rules already provide a way for early stage companies to address time-sensitive situations without first obtaining shareholder approval.[46] Specifically, OIAD identified Section 312.05 of the Manual as providing ''NYSE-listed issuers assistance when the delay in securing shareholder approval would seriously jeopardize the financial viability of the enterprise.'' [47]

In response, the Exchange stated that OIAD's suggested application of Section 312.05 is ''inconsistent with the language and longstanding application of the limited exemption from obtaining shareholder approval.'' [48] The Exchange stated that the intent and current application of Section 312.05 is only for circumstances where ''a bankruptcy filing is the only realistic alternative'' for a company.[49] In other words, the exemption is ''intended for use in a crisis'' and not as a ''useful tool to enable [e]arly [s]tage [c]ompanies to meet their ongoing capital needs.'' [50] Furthermore, as ''illustrative of the fact that the exemption is rarely a realistic option,'' the Exchange highlighted the fact that it has not received a single financial distress exemption application in the last year.[51]

C. Audit Committee Approval

OIAD stated that the audit committee (or a comparable committee of independent directors) approval requirement is not an adequate substitute for a shareholder vote on Related Party transactions,[52] explaining that ''[a]lthough the audit committee performs many critical functions that serve to protect the interests of investors, an audit committee will not always reach the same conclusion as shareholders regarding the best interest of the company.'' [53] As a result, OIAD believed that certain corporate actions that significantly impact shareholders' interests should be subject to shareholder approval, similar to the standard for equity compensation plans.[54] The Order Instituting Proceedings also raised questions about whether the audit committee would be an appropriate substitute for the approval of shareholders.[55]

In response, the Exchange stated that directors owe a fiduciary duty to the shareholders they represent and can be held personally liable for any violation of that duty.[56] The Exchange further noted that independent directors are often well-positioned to evaluate related party transactions because of their knowledge of company affairs.[57]

D. Reduced Qualitative Standards for Listed Companies

OIAD expressed concern that the proposal reflects a ''race to the bottom'' among the exchanges,[58] believing that the Commission ''should be encouraging the exchanges to *enhance* their standards, not devolve to the lowest common denominator because of competitive concerns.'' [59] OIAD stated that investors have an expectation that listed companies on NYSE are subject to heightened qualitative listing standards.[60] Given these public expectations, OIAD believed ''it is inadvisable to create what could be considered a *de facto* second tier on the NYSE, with lower corporate governance standards for smaller companies,'' [61] warning that this could lead to ''significant investor confusion'' about the listing standards on the Exchange because not all listed companies would have ''the same standards of accountability.'' [62]

[36] *See id.* OIAD also stated that even if an infusion of capital into a company could be in an existing shareholder's long-term best interest, when the recipient of new shares is a Related Party, it creates a risk that the company may be engaging in a ''sweetheart deal'' that is motivated by a conflict of interest. *See id.* at 8. In such circumstances, the transaction creates a heightened risk of harm to existing shareholders, and therefore, such shareholders should be given the opportunity to evaluate the merits of the transaction and to vote on whether to approve it. *See id.*

[37] *See id.*

[38] *See* NYSE Response Letter II, *supra* note 11, at 1.

[39] *See id.* at 1–2.

[40] *See id.* at 2.

[41] *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See* OIAD Recommendation, *supra* note 8, at 8.

[47] *See id.* Section 312.05 of the Manual provides that ''[e]xceptions may be made to the shareholder approval policy in Para. 312.03 upon application to the Exchange when (1) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and (2) reliance by the company on this exception is expressly approved by the Audit Committee of the Board.''

[48] *See* NYSE Letter Response II, *supra* note 11, at 2.

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* OIAD Recommendation, *supra* note 8, at 8.

[53] *See id.*

[54] *See id.* at 9.

[55] *See* Order Instituting Proceedings, *supra* note 6, at 47978.

[56] *See* NYSE Response Letter I, *supra* note 7.

[57] *See id.*

[58] *See* OIAD Recommendation, *supra* note 8, at 9.

[59] *See id.*

[60] *See id.*

[61] *See id.* at 9. Moreover, OIAD believed that the benefit to be afforded to a small subset of early stage company issuers listed on NYSE would be unreasonable when weighed against the possible investor confusion concerning corporate governance and shareholder rights on the Exchange. *See id.* at 10.

[62] *See id.* at 9–10. OIAD also stated that the proposal ''does not appear to take any meaningful steps to preclude likely investor confusion; for example, NYSE's Manual will not otherwise describe or highlight the proposed exception.'' *See id.* at 10.

In response, the Exchange stated that the concerns of creating a ''*de facto* two-tier exchange'' and ''race to the bottom'' are misplaced because only a limited number of companies would qualify for the proposed exemption.[63] In addition, the Exchange emphasized that the proposal would only provide an exemption to early stage companies from shareholder approval for transactions that would also be exempt from shareholder approval under the exchange listing rules of NASDAQ and NYSE MKT.[64]

E. Impact of Proposal on Efficiency, Competition, and Capital Formation

OIAD stated that the Notice does not provide sufficient information for the Commission to evaluate the proposal's impact on efficiency, competition, and capital formation, under Section 3(f) of the Act,[65] in particular highlighting that the Notice does not provide a ''count or description of the current NYSE-listed companies that would qualify for the proposed exemption, nor is there a count or description of the larger universe of such companies listed on other exchanges or quoted over-the-counter.'' [66] OIAD also stated that the Notice did not describe how many companies list (or delist) in a given year and how often, if ever, such companies accessed capital through private placements to Related Parties.[67] OIAD further emphasized that there is no description of the cost imposed on companies seeking shareholder approval in those instances, or the suggestion that any of those companies experienced issues with the level of access to capital afforded by NYSE's listing standards.[68] OIAD suggested that the Exchange obtain information regarding NASDAQ-listed companies that would qualify as early stage companies on the Exchange,[69] asserting that ''such information would allow for a data-driven and meaningful consideration of the proposed rule's impact on efficiency, competition, and capital formation.'' [70]

In response, the Exchange provided data on the impact of the proposal. The Exchange stated that there are currently 21 listed companies (out of 2,133 operating companies listed on the Exchange) that would qualify as an early stage company under the proposal.[71] Based on the data provided, the Exchange asserted that the impact of the proposal would be minimal as the number of early stage companies ''is tiny both in absolute terms and as a percentage of listed companies (less than 1%).'' [72] In addition, the Exchange highlighted from the data that the availability of the proposed exemption to early stage companies would typically be for a limited period.[73] The Exchange also stated that it did not believe data on NASDAQ-listed companies would be ''particularly helpful'' given that ''a large percentage of NASDAQ listed companies do not qualify for listing on the Exchange and that transfers between the two exchanges are relatively infrequent.'' [74]

In addition, the Exchange explained that the costs to comply with the proposed exemption will vary depending on the company and, among other things, the number and type of shareholders.[75] Based on the Exchange's experience in the listing of early stage companies on its affiliated exchange, NYSE MKT, the Exchange stated that such listed companies are ''frequently highly dependent on capital infusions from private placements in which management and significant shareholders participate to enable them to continue their operations until they reach the point of commercialization.'' [76] The Exchange represented that these companies frequently raise capital in transactions that would have required shareholder approval under Section 312.03(b), but to which shareholder approval requirements are not applicable under NYSE MKT or NASDAQ rules.[77] Furthermore, the Exchange stated that it believed that, ''while the companies that would avail themselves of the proposed exemption would likely be very small, the alternative could be very significant to the survival and success of those that utilize it.'' [78]

IV. 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.[79] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[80] 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 Commission recognizes that some commenters did not support the proposed rule change. The Commission, however, must approve a proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Act and the

[63] *See* NYSE Response Letter II, *supra* note 11, at 3–4.

[64] *See id.* at 4. The Exchange also stated that early stage companies would remain subject to the shareholder approval requirement for private placements relating to more than 20% of their outstanding shares without regard to price. *See id.* Accordingly, ''even if the proposal is approved, the Exchange's requirements would remain higher than those on other exchanges.'' *Id.*

Furthermore, in response to commenter concerns that the proposal would lead to investor confusion about which shareholder approval standards would apply to specific listed companies, the Exchange noted that all listing exchanges currently have exemptions in their corporate governance requirements that apply to different categories of issuers (*e.g.,* controlled companies), so having a limited exemption in its rules for early stage companies would not be novel to investors. *See id.* The Exchange also asserted that, to alleviate concerns with respect to how investors would become aware that an early stage company qualifies for the proposed exemption, companies generally disclose the applicability of exemptions in their annual reports or proxy statements filed with the Commission. *See id.* Moreover, the Exchange stated that it believes early stage companies that were likely to avail themselves of the proposed exemption ''should include disclosures in their SEC filings about that fact and the possible risks to investors.'' *See id.* Given the limited nature of the exemption, the Exchange stated that a separate designation for early stage companies would be ''confusing and would be unnecessary given the issuers' own disclosure obligations.'' *See id.*

[65] *See* OIAD Recommendation, *supra* note 8, at 10.

[66] *See id.* at 10–11.

[67] *See id.* at 11.

[68] *See id.*

[69] *See id.*

[70] *See id.*

[71] *See* NYSE Response Letter II, supra note 11, at 3. The Exchange noted that many of these 21 companies do not have an extensive history of selling stock in private placements to fund their operations while listed on the Exchange. *See id.* Furthermore, the Exchange stated that 13 out of 15 companies that were designated as early stage companies a year ago that no longer qualify as such continue to be listed on the Exchange, while only five companies listed in the past year currently qualify as early stage companies. *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.* The Exchange stated that NYSE MKT lists many ''R&D-focused biotech companies and exploration stage mining companies.'' *Id.*

[77] *See id.*

[78] *See id.*

[79] 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).

[80] 15 U.S.C. 78f(b)(5).

applicable rules and regulations thereunder.[81]

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.[82] Commenters raised several concerns with the proposed rule change.

As discussed above, OIAD noted that the proposed rule change could result in economic dilution of the value and ownership control of an existing shareholder's interest in an early stage company.[83] OIAD expressed concern that the potential for a greater percentage of shares to be issued at a discount to substantial security holders, without a shareholder vote, could lead to harmful dilution of the economic value of existing shares.[84] OIAD also expressed concern that the voting power of existing shareholders could be inappropriately diluted as a result of the proposal's increased flexibility to issue additional shares at fair market value to all Related Parties.[85]

The Commission has carefully considered these and the other concerns expressed by the commenters. The Commission nevertheless finds, however, that the proposed rule change, on balance, is consistent with the Act, for the reasons set forth below.

The Commission acknowledges that the proposed rule change, by expanding the circumstances under which an early stage company could issue additional stock without shareholder approval, raises concern that such companies could engage in transactions with a harmful dilutive impact on existing shareholders. In the Commission's view, however, the significant proposed limitations on the ability of early stage companies to engage in such transactions, together with the countervailing potential benefits to the ability of small issuers to efficiently raise capital, and to fair competition among the listing exchanges, sufficiently offset those risks. Because the proposal allows early stage companies the flexibility to meet their financing needs while still preserving significant shareholder rights afforded under the other provisions of Section 312.03, the Commission finds that the proposal is consistent with investor protection and the public interest.

First, the Commission notes that the additional flexibility provided by the proposed rule change for early stage companies to issue additional stock without shareholder approval is limited by other important Exchange rules. For one, any discounted issuance of stock to an early stage company's officers or directors, or to a substantial security holder that is an employee or other service provider, would require shareholder approval under the Exchange's equity compensation rules.[86] Shareholder approval also generally is required for an issuance of additional stock, even at fair market value, that is in excess of 20% of an issuer's outstanding shares.[87]

In addition, the proposed rule change requires that, for all such transactions, the approval of the early stage company's audit committee, or a comparable committee comprised solely of independent directors, first be obtained. The Commission has long acknowledged the important role an independent Board committee has in protecting shareholders from potential conflicts of interest.[88] The Commission agrees with the Exchange that an independent committee review and approval of these transactions is an appropriate safeguard to protect shareholder interests. As noted by the Exchange, the knowledge of independent directors of the company's business affairs, together with their fiduciary obligations to shareholders, make them well-positioned to effectively protect shareholder interests under these circumstances.[89]

The Commission believes that an independent director committee is a proper forum, in executing its fiduciary duty, to review and approve these transactions and can appropriately protect shareholder interests. Additionally, the Commission notes that the Exchange, as a self-regulatory organization, is required, among other things, to enforce compliance with all Exchange rules, including its listing standards. To help the Exchange appropriately surveil its listed companies for compliance with the shareholder approval rules, under Section 703.01(A) of the Manual, listed companies are required to submit in writing, in advance of any issuance, a supplemental listing application to issue any additional shares of a listed security, including shares issued in a private transaction. Section 703.01(A) also requires that the company state whether shareholder approval is required under Exchange rules and, if so, when it was obtained. These provisions facilitate the monitoring of listed companies for compliance with the shareholder approval rules under the Manual and should aid the Exchange in monitoring compliance with the requirements for issuing private securities under the exemption, as well as whether shareholder approval is required under the change of control or equity compensation rules, among others.[90] As provided by the Act, any future changes to exchange listing standards, including the shareholder

[81] 15 U.S.C. 78s(b)(2)(C)(i).

[82] *See, e.g.,* Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (approving equity compensation shareholder approval rules of both the NYSE and the National Association of Securities Dealers, Inc. n/k/a NASDAQ). *See also* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (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).

[83] *See* OIAD Recommendation, *supra* note 8, at 7. *See also* Shatto Letter, *supra* note 9, which stated that it concurred with the reasoning of the OIAD Recommendation. Therefore, the Commission notes that any discussion in this Order addressing the concerns raised in the OIAD Recommendation, by its terms, also applies to the Shatto Letter concerns.

[84] *See* OIAD Recommendation, *supra* note 8, at 7.

[85] *See id.*

[86] *See* Amendment No. 2, *supra* note 12.

[87] The Commission notes that Section 312.03(c)(2) of the Manual contains an exception for sales of common stock (or securities convertible into common stock) for cash in a ''bona fide private financing,'' as defined in Section 312.04(g), if certain requirements are met. These require, among other things, that the offering is priced at or above book or fair market value. *See* Section 312.03(c) of the Manual. Shareholder approval also would be required if the transaction would result in a change of control. *See* Section 312.03(d) of the Manual.

[88] For example, the Commission stated in approving an NASD proposed rule change regarding related party transactions that ''requiring an independent body of the board of directors to approve all related party transactions should help to protect investors because directors not related to management should be less likely to approve of related party transactions that could be detrimental to the interests of shareholders.'' *See* Securities Act Release No. 48745 (November 1, 2003), 68 FR 64154, 64179 (November 12, 2003) (NASD and NYSE proposed rule change regarding corporate governance). *See also* Securities Act Release No. 9862 (July 1, 2015), 80 FR 38995 (July 8, 2015) (concept release on possible revisions to audit committee disclosures). *See also* Securities Act Release No. 8220 (April 9, 2003), 68 FR 18788 (April 16, 2003) (adopting Exchange Act Rule 10A–3 prohibiting national securities exchanges and national securities associations from listing any securities of an issuer that is not in compliance with the audit committee requirements mandated by the Sarbanes-Oxley Act of 2002).

[89] *See* NYSE Response Letter I, *supra* note 7.

[90] *See* Sections 312.03(d) and 303A.08 of the Manual.

approval provisions, will have to be submitted under Section 19(b) of the Act. The Commission will, of course, evaluate any future proposed rule changes to exchange listing standards for consistency with the requirements under the Act, including to ensure adequate investor protection for shareholders.

The Commission also believes that facilitating the ability of early stage companies to efficiently raise needed capital under the limited circumstances permitted by the proposed rule change is in the public interest. By definition, early stage companies are those that have not yet generated significant revenue from operations, and may therefore need to raise capital quickly in order to fund their ongoing operations. Allowing early stage companies to flexibly raise capital, subject to audit committee approval and the other limitations described above, but without the delays inherent in a shareholder vote, could improve the business prospects of such companies and ultimately inure to the benefit of shareholders.

Further, the Commission recognizes that, as noted by the Exchange, the rules of other listing exchanges such as NASDAQ and NYSE MKT permit early stage companies similar flexibility in issuing additional stock without shareholder approval. While the Commission acknowledges OIAD's concern about a ''race to the bottom'' by the exchanges, the Commission also is cognizant of the fact that the exchanges operate in a highly competitive environment, including with respect to the listing of issuers. If the Commission were not to allow the Exchange to provide the same flexibility to listed companies offered by other listing markets, the Exchange Act goal of facilitating fair competition among the exchanges could be undermined. At the same time, investor protection might not materially improve, since early stage companies seeking the flexibility proposed by the Exchange simply may choose to list on NASDAQ or NYSE MKT.

The Commission notes that, in determining to approve the Exchange's proposed rule change, the Commission has considered, under Section 3(f) of the Act, whether the action will promote efficiency, competition, and capital formation.[91] The proposed rule change would allow early stage companies to more timely access the capital markets when they critically need funds. To the extent that the proposed rule change would make it easier for such companies to raise the needed capital and continue their operations, it would likely improve the allocation of capital thus enhancing efficiency. On the other hand, if the rule change is primarily used by Related Parties to more easily gain control of a company and in the process expropriate other (minority) shareholders, then the proposed rule change could have a negative effect on efficiency. Given that Section 312.03(d) of the Manual significantly limits any increase in the relative voting power of Related Parties by requiring shareholder approval of any share issuance that gives rise to a change of control, the proposed rule change is unlikely to lead to significant minority shareholder expropriation.

By making it less costly for early stage companies to raise additional capital they need to continue their operations, the proposed rule change will promote capital formation. Allowing these companies to stay afloat and grow also increases the likelihood that they would raise more funds in the future, further enhancing capital formation. In addition, the proposed rule change could enhance competition by allowing NYSE to compete for the listing of these companies in a competitive environment that allows these companies to list on other markets such as NASDAQ or NYSE MKT. In conclusion, the Commission believes that the proposed rule change could promote efficiency, competition, and capital formation.

Finally, the Commission acknowledges the important contributions that are being made by its Investor Advocate on a range of important policy matters, including those raised by individual proposed rule changes filed by the exchanges, such as the proposal that is the subject of this Order. While the Commission today determined that the NYSE's proposed rule change is consistent with the Act, the Commission encourages the Investor Advocate to continue bringing important matters to our attention, including identifying circumstances where incremental changes, while consistent with the Act, may be contributing to cumulative impacts that harm investors or impede fair and orderly markets. In this instance, the comments of the Investor Advocate prompted the Exchange to bolster the justification for its proposal, including through the provision of additional data, and to clarify its limited scope. As a result, the extent and quality of information available to the Commission in considering the proposed rule change was substantially enhanced, to the benefit of investors and all market participants. As our markets and regulatory structure continue to evolve, the views of the Investor Advocate will remain critical in helping the Commission further its mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

For the reasons discussed above, the Commission believes that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Act.[92]

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether this filing, as modified by whether Amendment Nos. 1 and 2, 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 email 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 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 Web site (*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 Web site 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

[91] *See* 15 U.S.C. 78c(f).

[92] The Commission also finds that deleting obsolete language in Section 312.03 of the Manual, relating to the limited transition period described above, is consistent with Section 6(b)(5) of the Act.

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 January 28, 2016.

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after the date of publication of Amendment Nos. 1 and 2 in the **Federal Register**. As discussed above, Amendment No. 1 merely clarified that the proposed exemption from shareholder approval transactions involving the sale of stock for cash by an early stage company applies not only to a Related Party, as originally proposed, but also to 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.[93] Similarly, Amendment No. 2 clarified that (i) an early stage company may not use the proposed exemption to fund an acquisition of stock or assets of another company that would otherwise require shareholder approval under Section 312.03(b) of the Manual; (ii) any sale of a listed company's securities at a below-market price to an employee, director or service provider constitutes equity compensation under Section 303A.08 of the Manual and is therefore subject to the shareholder approval requirements under that rule; and (iii) shareholder approval of any issuance 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 Section 312.03(b) or one or more of the other subparagraphs.[94] The Commission believes that these revisions provide greater clarity on the application of the proposal and remove uncertainty as to which transactions the Exchange proposes to exempt from shareholder approval under Section 312.03.

Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

[93] *See supra* note 7.

[94] *See* Amendment No. 2, *supra* note 12.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[95] that the proposed rule change (SR–NYSE–2015–02), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[96]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2015–33313 Filed 1–6–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76811; File No. SR–DTC–2015–013]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Postponing the Date for Retirement of Computer to Computer Facility Corporate Action Announcement Files, and Implementing a Fee Associated With Its Use

December 31, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 24, 2015, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rules 19b–4(f)(2) and (f)(4) thereunder.[4] The proposed rule change was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of (i) the postponement of the date for the retirement of DTC's proprietary computer to computer facility (''CCF'') files for corporate action announcements (''CCF Announcement Files'') until further notice; and (ii) the implementation of a fee associated with the use of CCF Announcement Files.

[95] 15 U.S.C. 78f(b)(2).

[96] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2) and (f)(4).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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 these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would (i) postpone the date for the retirement of CCF Announcement Files until further notice, and (ii) implement a fee associated with the use of CCF Announcement Files, as described below.[5]

Background

DTC handles essential aspects of processing corporate action[6] events by routinely receiving and distributing information to its Participants using CCF Announcement Files. There are three corporate action event groups for which CCF files are available: Distributions, Redemptions, and Reorganizations. Participants subscribe to the CCF files for each event group separately.

Postponement of the Date for Retirement

Since 2011, DTC has informed Participants that CCF Announcement Files will be retired in 2015, and has been supporting Participant efforts to migrate to the ISO 20022 standard by providing a robust online learning center, hosting ISO specific monthly

[5] Each term not otherwise defined herein has its respective meaning as set forth in the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx* and the Guide to the 2015 DTC Fee Schedule (''Fee Schedule''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/fee-guides/dtcfeeguide.pdf?la=en.*

[6] Corporate actions processed by DTC include but are not limited to the restructuring of DTC-eligible securities resulting from mergers, acquisitions, and reverse splits. DTC performs corporate actions processing through its Mandatory and Voluntary Reorganization Services. *See* DTC Operational Arrangements (''OA''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/issue-eligibility/eligibility/operational-arrangements.pdf.*