

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90653; File No. SR-NYSE-2020-98)

December 14, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Its Rules to Prohibit Member Organizations from Seeking Reimbursement, in Certain Circumstances, from Issuers for Forwarding Proxy and Other Materials to Beneficial Owners

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on November 30, 2020, 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 its rules to prohibit member organizations from seeking reimbursement from issuers for forwarding proxy and other materials to beneficial owners who received shares from their broker at no cost or at a price substantially less than the market price in connection with a promotion by the broker. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Rule 451 requires NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of issuers.<sup>4</sup> For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution. This reimbursement structure stems from SEC Rules 14b-1 and 14b-2 under the Act,<sup>5</sup> which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials and are given the opportunity to vote. These rules require companies to send their proxy materials to nominees, i.e., broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners and to pay nominees for reasonable

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<sup>4</sup> The ownership of shares in street name means that a shareholder, or “beneficial owner,” has purchased shares through a broker-dealer or bank, also known as a “nominee.” In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. For more detail regarding share ownership, see Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982 (July 22, 2010) (Concept Release on the U.S. Proxy System) (“Proxy Concept Release”).

<sup>5</sup> 17 CFR 240.14b-1; 17 CFR 240.14b-2.

expenses, both direct and indirect, incurred in providing proxy information to beneficial owners. Similarly, Rule 465 requires member organizations to forward issuer communications to beneficial owners on behalf of issuers subject to receipt of reimbursement of expenses.

Recently, brokers providing retail brokerage services have developed a practice in which customers are given securities without charge as a commercial incentive (for example, upon opening a new account or referring a new customer to the broker). Typically, these incentives involve the transfer of a small number of shares to benefiting customers and result in the customer having a position in the company whose shares they receive that has a very small dollar value. Rule 451 does not distinguish between these beneficial owners and beneficial owners that have paid for their shares, so brokers are required to solicit proxies from these accounts and are entitled to reimbursement of their expenses under Rules 451 and 465, as well as pursuant to the applicable rules of any other national securities exchange or national securities association of which the NYSE member organization is a member.<sup>6</sup> As a consequence, issuers are billed under Exchange rules and the rules of other SROs for the reimbursement of expenses the broker incurs in making distributions to these beneficial owners who have very small positions, which they acquired from their broker without any payment by the customer. In certain cases, the issuer can experience a significant increase in its distribution reimbursement expenses solely due to its shares being included in these broker promotional schemes.

While the distribution of shares in these broker promotions may result in a significant increase in the number of beneficial owners of an issuer's stock, the generally very small size of each of these positions means that they usually represent a very small percentage of the voting power. As such, the costs the issuer incurs in reimbursing the broker for distributing proxies to

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<sup>6</sup> See, for example, FINRA Rule 2251.

these accounts is very disproportionate to the maximum potential vote such shares represent. By contrast, the broker using such a scheme chooses to engage in it because it believes that it will result in a commercial benefit to the broker. Consequently, the Exchange believes that it is more appropriate for the broker to bear these proxy distribution costs. Accordingly, the Exchange proposes new Rule 451A, which would provide that, notwithstanding the applicable provisions of Rules 451 or 465 or what may be permitted by the rules of any other national securities exchange or national securities association of which a member organization is also a member, no member shall seek to be reimbursed for expenses incurred in connection with the distribution of proxies or other materials on behalf of issuers to the beneficial owners of shares or units of an issuer's securities in a nominee account if those shares or units were transferred to the account holder by the member organization at no cost or at a price substantially less than the market price.

As proposed, Rule 451A would not limit a broker's right to reimbursement for distributions to any beneficial owner if any part of that beneficial owner's position in an issuer's securities was received by any means other than a transfer without charge or at a price substantially less than the market price from the broker. Rules 451 and 465 would continue to apply to all distributions, so the broker would continue to be fully obligated to solicit votes from, and make other distributions on behalf of issuers to, all beneficial owners notwithstanding the limitations on reimbursement of expenses imposed by Rule 451A.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities

Exchange Act of 1934 (the “Act”) generally.<sup>7</sup> Section 6(b)(4)<sup>8</sup> requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using the facilities of an exchange. Section 6(b)(5)<sup>9</sup> requires, among other things, that exchange rules are 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 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 the public interest and the interests of investors, promote just and equitable principles of trade and that they are not designed to permit unfair discrimination between issuers, brokers or dealers.

The Exchange believes that the proposal is consistent with Sections 6(b)(4) and 6(b)(5) of the Act as it would only limit the reimbursement of distribution expenses in circumstances where a broker distributes the shares to its customers as part of a voluntary promotional strategy by the broker from which it derives a commercial benefit. The Exchange notes that the recipients of shares without charge or at a price substantially less than the market price from the broker as part of such schemes typically will not be given any choice as to which shares they receive and are therefore not making any investment decision. As the broker typically has sole control over the allocation of these shares to its customers and derives a commercial benefit from doing so, the Exchange believes that the proposal is not unfairly discriminatory and does not represent an inequitable allocation of the costs of the distribution of proxy and other issuer materials. The

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<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

Exchange also notes that brokers will continue to be required to distribute proxy and other materials on behalf of issuers notwithstanding the fact that brokers will not be entitled to any reimbursement of expenses and believes that the proposal is therefore consistent with Rules 14b-1 and 14b-2 under the Act,<sup>10</sup> which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials and are given the opportunity to vote.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed limitation on distribution expense reimbursement would apply to any broker that adopts a commercial strategy of distributing shares to account holders free of charge or at a substantial discount to the market price. Brokers that adopt this strategy do so because they believe that they derive a commercial and competitive advantage from doing so. As such, the Exchange believes that any burden on competition associated with this proposal is appropriate in light of the fact that brokers will only be subject to any such burden as a consequence of voluntarily adopting a strategy that they believe is beneficial for their business. There would be no effect on the competition among issuers resulting from the proposed rule change, as all issuers would benefit from the proposed restriction in the same manner if their shares have been distributed without charge as part of such a commercial arrangement.

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

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<sup>10</sup> 17 CFR 240.14b-1; 17 CFR 240.14b-2.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-98 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-2020-98. 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, D.C. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-98 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).