

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92667; File No. SR-NYSE-2020-98)

August 13, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, 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

I. Introduction

On November 30, 2020, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 amend its rules to prohibit member organizations from seeking reimbursement, in certain circumstances, from issuers for forwarding proxy and other materials to beneficial owners. The proposed rule change was published for comment in the Federal Register on December 18, 2020.³ On January 29, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On March 17, 2021, the Commission instituted

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 (December 18, 2020) (“Original Notice”). Comments received on the proposal are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2020-98/srnyse202098.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91011 (January 29, 2021), 86 FR 8246 (February 4, 2021).

proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.⁷ On April 6, 2021, the Exchange filed Amendment No. 1 to the proposed rule change; the Exchange withdrew that amendment on April 16, 2021. On April 16, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as originally filed. The proposed rule change, as modified by Amendment No. 2, was published for comment in the Federal Register on April 29, 2021.⁸ On June 11, 2021, the Commission designated a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.⁹ On June 22, 2021, the Exchange filed partial Amendment No. 3 to the proposed rule change.¹⁰ This order approves the proposed rule change, as modified by Amendment Nos. 2 and 3.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See Securities Exchange Act Release No. 91343 (March 17, 2021), 86 FR 15536 (March 23, 2021) (“Order Instituting Proceedings”).

⁸ See Securities Exchange Act Release No. 91663 (April 23, 2021), 86 FR 22725 (April 29, 2021) (“Amendment No. 2”).

⁹ See Securities Exchange Act Release No. 92155 (June 11, 2021), 86 FR 32302 (June 17, 2021).

¹⁰ In Amendment No. 3, the Exchange stated that proposed Rule 451A, in specifically stating that no “fee” shall be imposed, is meant to apply to the charges that are specified in Rule 451, and would not limit a member organization’s eligibility to receive reimbursement for other expenses that are not covered by the specified charges, namely (i) actual postage costs (including return postage at the lowest available rate); (ii) the actual cost of envelopes (provided they are not furnished by the person soliciting proxies); and (iii) any actual communication expenses (excluding overhead) incurred in receiving voting returns either telephonically or electronically. The Exchange further stated that this approach is consistent with the application of existing fee exclusions under Rule 451. Because Amendment No. 3 does not materially alter the substance of the proposed rule change, Amendment No. 3 is not subject to notice and comment. The full text of Amendment No. 3 is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2020-98/srnyse202098-8944033-245707.pdf>.

II. Description of the Proposal, as Modified by Amendment Nos. 2 and 3

NYSE Rules (“Rule”) 451 and 465 require NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and other materials to, beneficial owners on behalf of issuers.¹¹ For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage, and other expenses incurred for a particular distribution.¹² This reimbursement structure stems from Rules 14b-1 and 14b-2 under the Act,¹³ which impose obligations on issuers and nominees to ensure that beneficial owners receive proxy materials. These rules require issuers to send their proxy materials to broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners, and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners.¹⁴ The Commission’s rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for “reasonable expenses” incurred.¹⁵

¹¹ See Rules 451 and 465; Amendment No. 2, supra note 8, 86 FR at 22726. 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. See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530, 63531 n.14 (October 24, 2013) (order approving SR-NYSE-2013-07) (“2013 Approval Order”).

¹² See Rules 451 and 465; 2013 Approval Order, supra note 11, 78 FR at 63531.

¹³ 17 CFR 240.14b-1; 17 CFR 240.14b-2.

¹⁴ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, supra note 11, 78 FR at 63531.

¹⁵ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, supra note 11, 78 FR at 63531. Currently, the Supplementary Material to Rule 451, which is cross-referenced by the Supplementary Material to Rule 465, establishes maximum rates at which a NYSE

The Exchange has proposed to adopt Rule 451A, pursuant to which, 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 fee shall be imposed for a nominee account that contains only shares or units of the securities involved that were transferred to the account holder by the member organization at no cost.¹⁶

According to the Exchange, the proposed rule is meant to address a recent practice in which retail brokers provide customers, without charge, a small number of shares with a very small dollar value as a commercial incentive (for example, upon opening a new account or referring a new customer to the broker).¹⁷ The Exchange stated that 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 NYSE and other self-regulatory organization rules.¹⁸ The Exchange further stated that, in certain cases, the issuer can experience a significant increase in its

member organization may be reimbursed for expenses incurred in connection with distributing proxy and other materials to beneficial owners.

¹⁶ See proposed Rule 451A. None of the fees in the schedule in the Supplementary Material .90 to Rule 451 would be impossible on issuers in these circumstances, but issuers would still be responsible for reimbursing member organizations for any actual postage costs, envelope costs, and communication expenses (excluding overhead) incurred in receiving voting returns, which is consistent with what occurs currently in other contexts where no fees are imposed, *i.e.*, a managed account that contains five or fewer shares or units of the security involved or an account that contains only a fractional share. See Amendment No. 3, *supra* note 10. Accordingly, references herein to the distribution costs or expenses for which member organizations are prohibited from seeking reimbursement from issuers under the proposal are meant to refer to the charges specified in Supplementary Material .90 to Rule 451.

¹⁷ See Amendment No. 2, *supra* note 8, 86 FR at 22726.

¹⁸ See *id.*; see also, *e.g.*, FINRA Rule 2251.

distribution reimbursement expenses solely due to its shares being included in these broker promotional schemes.¹⁹

The Exchange believes that it would be more appropriate for the broker to bear the proxy distribution costs in these circumstances.²⁰ According to the Exchange, 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.²¹ As such, according to the Exchange, the costs the issuer incurs in reimbursing the broker for distributing proxies to these accounts is disproportionate to the maximum potential vote such shares represent.²² The Exchange stated that, 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.²³ In addition, the Exchange stated that recipients of shares without charge 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.²⁴

The Exchange stated that 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

¹⁹ See Amendment No. 2, supra note 8, 86 FR at 22726.

²⁰ See id.

²¹ See id.

²² See id.

²³ See id.

²⁴ See id., 86 FR at 22727.

from the broker.²⁵ The Exchange also stated that proposed Rule 451A would not limit a broker's right to receive reimbursement under Rules 451 and 465 unless that broker itself transferred the issuer's shares without charge into the account of the beneficial owner.²⁶ The Exchange further stated that 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 proposed Rule 451A.²⁷

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 2 and 3, is consistent with the requirements of the Act and the rules and regulations thereunder.²⁸ In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 2 and 3, is consistent with Section 6(b)(4) of the Act,²⁹ which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; and with Section 6(b)(5) of the Act,³⁰ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to

²⁵ See id., 86 FR at 22726.

²⁶ See id. Specifically, the Exchange stated that if a beneficial owner transferred shares received in this manner into an account at another broker, Rule 451A would not preclude that other broker from claiming reimbursement under Rules 451 and 465.

²⁷ See id.

²⁸ In approving this proposed rule change, as modified by Amendment Nos. 2 and 3, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁹ 15 U.S.C. 78f(b)(4).

³⁰ 15 U.S.C. 78f(b)(5).

promote just and equitable principles of trade, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also believes that the proposal as modified is consistent with Rule 14b-1 under the Act.³¹

The Commission raised concerns about the proposal in the Order Instituting Proceedings,³² but the Commission believes that the Exchange has amended the proposal adequately to address those concerns. Originally, proposed Rule 451A would have prohibited an NYSE member organization from imposing distribution fees on an issuer in cases where the member provided the shares or units of the securities held in the beneficial owner's account at no cost or at a price "substantially less than the market price."³³ In the Order Instituting Proceedings, the Commission stated that the Exchange did not explain how it would determine whether a price is "substantially less than the market price" or otherwise provide guidance on the meaning of that term.³⁴ In Amendment No. 2, the Exchange addressed the Commission's concern by eliminating that term from the proposed rule, resulting in a rule with a more clearly defined application to nominee accounts that contain only shares or units of the securities involved that were transferred to the account holder by the member at no cost.

The Commission also stated in the Order Instituting Proceedings that the initial proposal did not explain why it is consistent with the Act for the proposed reimbursement prohibition not

³¹ 17 CFR 240.14b-1.

³² See Order Instituting Proceedings, supra note 7.

³³ See Original Notice, supra note 3.

³⁴ See Order Instituting Proceedings, supra note 7, 86 FR at 15537.

to apply if a customer transferred its account to a new broker or held any shares of the issuer in its account other than those received through a below-market price transfer from the member seeking reimbursement.³⁵ Additionally, the Commission stated that the initial proposal did not address the feasibility of tracking shares held by a particular beneficial owner where the eligibility for reimbursement may change over time.³⁶ The Exchange addressed these concerns in Amendment No. 2 by clarifying that it would be impossible for the new broker in these circumstances to track whether the shares of a specific issuer transferred into its custody had all been received by the beneficial owner without charge from another broker.³⁷ In addition, according to the Exchange, the new broker would not have received the same commercial benefit as the original broker that transferred the shares without charge to its customers.³⁸ For these reasons, the Exchange stated that it is impracticable to extend the proposed reimbursement prohibition to the new broker and reasonable to limit its application to the original broker that transferred the shares without charge.³⁹

Further, in the Order Instituting Proceedings, the Commission stated that the Exchange had not explained how the proposal would be consistent with Rule 14b-1 under the Act⁴⁰ in light of the fact that a broker-dealer would be required to distribute proxies or other materials but be precluded from seeking reimbursement of its expenses in the applicable circumstances.⁴¹ In

³⁵ See id., 86 FR at 15537-38.

³⁶ See id., 86 FR at 15538.

³⁷ See Amendment No. 2, supra note 8, 86 FR at 22726.

³⁸ See id., 86 FR at 22726-27.

³⁹ See id., 86 FR at 22727.

⁴⁰ 17 CFR 240.14b-1.

⁴¹ See Order Instituting Proceedings, supra note 7, 86 FR at 15538.

Amendment No. 2, the Exchange stated that any broker that is prohibited from charging fees under the proposal would continue to be reimbursed for its aggregate expenses with respect to proxy distribution, as the prohibition on distribution fees would be limited to those accounts in which the only shares of the applicable issuer are shares received without charge from that broker.⁴² The Exchange stated that, as such, the effect of the proposal would be to reduce the overall reimbursement received by that broker for a distribution, but not to eliminate that reimbursement.⁴³

Commenters broadly supported the proposal.⁴⁴ One commenter stated that the recent broker practice of gifting small amounts of securities to retail brokerage clients as a promotional measure has caused significant increases in proxy costs for some issuers, and expressed the view that the proposal would alleviate much of the cost impact to issuers from this broker practice, particularly for accounts defaulted to e-delivery.⁴⁵ Two commenters are issuers that stated that

⁴² See Amendment No. 2, supra note 8, 86 FR at 22727.

⁴³ See id.

⁴⁴ See letters from: Paul Conn, President, Global Capital Markets, Computershare, dated January 11, 2021 (“First Computershare Letter”), at 2-3; Niels Holch, Executive Director, Shareholder Communications Coalition, dated January 20, 2021 (“Coalition Letter”), at 5 n.14; Paul Conn, President, Global Capital Markets, Computershare, dated April 14, 2021 (“Second Computershare Letter”), at 4; Kim Warnica, Senior Vice President, General Counsel and Secretary, Marathon Oil Corporation, dated April 27, 2021 (“Marathon Letter”); Patrick J. McEnany, Chairman and CEO, Catalyst Pharmaceuticals, Inc., dated June 9, 2021 (“Catalyst Letter”). An additional commenter appears to suggest that member organizations should be reimbursed in certain circumstances that are not covered by the proposal or the rules the proposal is amending. See letter from David, dated June 14, 2021.

⁴⁵ See First Computershare Letter at 2-3. This commenter also stated that while it understood that the accounts that receive such “gifted” securities generally are set for electronic communications, as a technical matter, if a street-name holder of gifted securities receives hardcopy proxy communications rather than electronic delivery, the issuer will still bear increased costs from printing the materials to be disseminated by the broker. See id. Even if an issuer bears increased printing costs due to its shares being

they experienced dramatic increases in proxy distribution costs for the 2020 proxy season, which they both attributed to the inclusion of their shares in a retail broker's promotional free share program.⁴⁶ Both commenters asserted that the issuer should not bear the proxy distribution costs that arise due to their shares being included in such a broker promotional program.⁴⁷ Another commenter stated that the promotions the proposed rule change is designed to address provide commercial benefits to broker-dealers without providing any parallel benefits to public companies.⁴⁸

The Commission believes that the proposal as modified is consistent with Sections 6(b)(4) and 6(b)(5) of the Act, as well as Rule 14b-1. The proposed rule would appropriately reallocate from an issuer to a broker the fee-related expense of distributing proxy and other

included in a broker promotional program, as discussed below, the Commission believes that the proposal is consistent with the Act because, among other things, the proposed rule's prohibition against imposing fees on issuers would result in a more equitable and not unfairly discriminatory reallocation to brokers of significant costs typically associated with the distribution of proxies and other materials in the circumstances addressed by the proposal.

⁴⁶ See Marathon Letter at 1-2; Catalyst Letter at 2. One of these commenters stated that its 2020 proxy distribution bill was 2,402 percent higher than the 2019 bill, representing distribution to 3,051 percent more stockholders in 2020 than in 2019. See Marathon Letter at 1. The commenter noted that as of its 2020 stockholder meeting date, 80 percent of the stockholders that held the commenter's shares through accounts at the particular retail broker held five shares or less. See id. The commenter believes that, for the vast majority of the accounts holding fewer than five shares, the shares were chosen by that retail broker, not the beneficial owners. See id. at 2. Similarly, the other issuer commenter stated that the number of holders of its common shares who hold their shares through that retail broker increased by more than 2,057 percent from 2019 to 2020, and its proxy distribution bill from the distribution platform that services that retail broker grew 1,779 percent from 2019 to 2020 (from approximately \$12,500 to approximately \$234,000). See Catalyst Letter at 1-2. The commenter believes the increase in both shareholders and costs is directly attributable to the retail broker and its promotional activities. See id. at 2.

⁴⁷ See Marathon Letter at 2; Catalyst Letter at 2.

⁴⁸ See Coalition Letter at 5 n.14.

materials to beneficial owners in the limited circumstance where the beneficial owner's account contains only shares or units of the issuer's securities that were transferred to the beneficial owner by the broker at no cost.⁴⁹ This circumstance would appear to arise typically due to a broker promotional program that, as stated by the Exchange, the broker chooses to engage in because it believes it will result in a commercial benefit to the broker and, as noted by one commenter,⁵⁰ provides commercial benefits to the broker without providing any parallel benefits to the issuer.⁵¹ The Commission therefore believes that the proposal is reasonably designed to result in a more equitable and not unfairly discriminatory allocation of the costs of the distribution of proxy and other materials, consistent with Sections 6(b)(4) and 6(b)(5) of the Act.

The Commission also believes that the proposal is consistent with the Section 6(b)(5) goal of protecting investors and the public interest, and is consistent with Rule 14b-1, because the cost reallocation effectuated by the proposal would not diminish brokers' obligations to distribute issuer materials to accounts in which securities are held in street name, including accounts covered by the proposal, i.e., that contain only shares or units of the securities involved that were transferred to the account holder by the member organization at no cost. Moreover, this cost reallocation does not preclude the broker from receiving assurance of reimbursement of

⁴⁹ See supra note 25 and accompanying text.

⁵⁰ See Coalition Letter at 5 n.14. See also Catalyst Letter at 2.

⁵¹ One commenter stated that, if, after receiving gifted shares, an investor subsequently chooses to increase its share ownership and makes an investment decision to buy additional shares, it would be appropriate to shift the cost of proxy distribution back to the issuer. See Marathon Letter at 2. As stated above, the Exchange's proposal would affect accounts that only include shares that were transferred to the account holder by the broker at no cost, and accordingly, if a street name investor were to be induced to purchase or otherwise acquire any additional shares of the issuer as a result of being gifted shares by a broker, the issuer would then bear the proxy distribution costs for that investor's account. See supra note 25 and accompanying text.

its “reasonable expenses,” both direct and indirect, consistent with Rule 14b-1. In previously approving, in 2013, an Exchange proposal that, among other things, eliminated fees for distributing issuer materials to managed accounts with five or fewer shares of the issuer’s securities, the Commission acknowledged that any general rule setting forth an industry-wide fee schedule for the reimbursement of reasonable broker-dealer expenses necessarily will not precisely reimburse the actual expenses incurred by individual firms.⁵² Here, a broker with accounts covered by the proposal may not receive precise reimbursement for its expenses incurred for a distribution pertaining to the issuer whose shares it gave away at no cost, but the broker would continue to be reasonably reimbursed for its expenses, both direct and indirect, in the aggregate.⁵³ The proposal would not eliminate a broker’s ability to charge reimbursement fees for distributing an issuer’s materials to accounts that hold any shares or units of the issuer’s securities that the beneficial owner purchased or acquired in any way other than from the broker at no cost. Nor would the proposal affect the broker’s ability to charge reimbursement fees for distributing materials on behalf of issuers whose shares it did not give away at no cost. Any shortfall in precise reimbursement of expenses experienced by the broker because of the proposal

⁵² See Rule 451, Supplementary Material .90; 2013 Approval Order, supra note 11, 78 FR at 63546 (stating that this rule with respect to managed accounts was designed to provide reasonable reimbursement of the overall expenses of broker-dealers in the aggregate, and the extent of reimbursement of any individual firm would vary depending on the specifics of its account population). One commenter analogized the scenario presented by this proposal to the Exchange’s prior proposal to eliminate fees for distributing issuer materials to managed accounts with five or fewer shares of the issuer’s securities. See Marathon Letter at 2.

⁵³ As clarified in Amendment No. 3, supra note 10, issuers must reimburse brokers for any non-fee-related expenses – i.e., any actual, out-of-pocket postage, envelope, and communication expenses incurred in receiving voting returns – notwithstanding the proposed rule.

would be confined to fee-related expenses attributable to distributing an issuer's materials to beneficial owners that receive those materials solely due to the broker's own promotional efforts.

Based on the foregoing, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations thereunder.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵⁴ that the proposed rule change (SR-NYSE-2020-98), as amended by Amendment Nos. 2 and 3, be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁵

J. Matthew DeLesDernier
Assistant Secretary

⁵⁴ 15 U.S.C. 78s(b)(2).

⁵⁵ 17 CFR 200.30-3(a)(12).