

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93629; File No. SR-NYSE-2021-53)

November 19, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving of a Proposed Rule Change to Amend the Shareholder Voting Requirement Set Forth in Section 312.07 of the NYSE Listed Company Manual

I. Introduction

On September 15, 2021, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed 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 amend Section 312.07 of the NYSE Listed Company Manual (“Manual”) to address the calculation of votes cast where shareholder approval is required. The proposed rule change was published for comment in the Federal Register on October 5, 2021.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend Section 312.07 of the Manual to address the calculation of “votes cast” when a matter requires shareholder approval, particularly as the calculation relates to abstention votes.⁴ Section 312.07 of the Manual currently provides that where shareholder approval is a prerequisite to the listing of any additional or new securities of a listed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 93192 (September 29, 2021), 86 FR 55071 (“Notice”).

⁴ See Notice, supra note 3, 86 FR at 55072.

company, or where any matter requires shareholder approval, the minimum vote which will constitute shareholder approval for such purposes is defined as approval by a majority of votes cast on a proposal in a proxy bearing on the particular matter.⁵ The Exchange states that the text of Section 312.07 of the Manual does not specifically address a listed company's treatment of abstentions in the company's calculation of votes cast by shareholders.⁶ However, the Exchange states that it has historically advised companies that abstentions should be treated as votes cast for purposes of Section 312.07 of the Manual.⁷ According to the Exchange, under that approach a proposal is deemed approved under Section 312.07 of the Manual only if the votes in favor of the proposal exceed the aggregate of the votes cast against the proposal plus abstentions.⁸ The Exchange states that its current treatment of abstentions has caused confusion among listed companies because the corporate laws of many states, including Delaware, allow companies to include in their governing documents that votes cast for purposes of a shareholder vote includes yes and no votes - but not abstentions- such that a proposal succeeds if the votes in favor exceed the votes cast against.⁹

To avoid further confusion, the Exchange proposes to amend Section 312.07 to provide

⁵ According to the Exchange, shareholder approval is required for equity compensation plans under Sections 303A.08 of the Manual ("Shareholder Approval of Equity Compensation Plans") and in the specific situations set out in 312.03 of the Manual ("Shareholder Approval"). See Id. The Exchange also notes that Item 21(b) of Schedule 14A requires companies soliciting proxies to disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as the company's charter and bylaw provisions. See Id.

⁶ See Notice, supra note 3, at 55072

⁷ See Id.

⁸ See Id.

⁹ See Id. The Exchange added that, consistent with those state laws, many public companies have bylaws indicating that abstentions are not treated as votes cast. See Id.

that with respect to a matter that requires shareholder approval subject to the minimum vote required for such shareholder approval under Section 312.07, a company must calculate the votes cast in accordance with its own governing documents and any applicable state law.¹⁰ The Exchange believes that this treatment of abstentions will avoid any complications engendered among issuers and shareholders when different voting standards are applied under the Exchange rule, a company's governing documents, and/or applicable state laws.¹¹

III. 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.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹³ 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 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 Exchange is proposing to amend Section 312.07 of the Manual to make clear how to calculate the votes cast when any matter requires shareholder approval to be approved by a

¹⁰ See Id. The Exchange notes that while Nasdaq is silent on the treatment of abstentions in its rules, Nasdaq published a FAQ stating that companies must calculate voting in accordance with their own governing documents and applicable state law. See Id.

¹¹ See Id.

¹² 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).

¹³ 15 U.S.C. 78f(b)(5).

majority of votes cast under Section 312.07, particularly to address the calculation as it relates to abstention votes. As described above, the Exchange is proposing to amend Section 312.07 of the Manual to provide that for purposes of calculating shareholder approval, a company must calculate the votes cast in accordance with its governing documents and any applicable state law.¹⁴ The Exchange's proposal, as it states in its filing, does not prescribe a particular way to calculate votes cast under Section 312.07 of the Manual but rather allows a listed company to rely on its governing documents and state law and is a change from the Exchange's historical interpretation on how to calculate abstentions for purposes of votes cast under Section 312.07 of the Manual. While the proposed amendment to Section 312.07 of the Manual does not address the treatment of abstentions explicitly, the Commission believes the proposed changes to Section 312.07 of the Manual provides clear guidance to a listed company that the company's own governing documents and the state law applicable to such listed company must govern the way that a company calculates votes cast on a matter for purposes of meeting the minimum vote requirements under the Exchange's rule. As such, the proposed rule language will make clear that the listed company's own governing documents and applicable state law also will govern how a listed company should count abstentions. As a result, the Commission believes that the proposed amendment is consistent with Section 6(b)(5) of the Act because it will add clarity to the Exchange's rules and help eliminate any confusion about what authority governs the treatment of votes cast in general and abstentions in particular, including the possibility that the Exchange's own guidance about the treatment of abstentions might conflict with the treatment of

¹⁴ The Exchange noted that Nasdaq has an FAQ that is also consistent with this approach. See supra note 10.

abstentions under the listed company’s governing documents or state law applicable to such listed company.

Finally, by setting forth in the Exchange’s rules that corporate documents and applicable state law should be relied on by all listed companies and shareholders in determining how votes cast are calculated, including the treatment of abstentions, for purposes of determining whether a matter meets the minimum vote requirements (i.e., “a majority of votes cast”) of Section 312.07, the proposal should provide transparency to market participants consistent with the Act.¹⁵

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NYSE-2021-53) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁵ Shareholders should have access to a company’s governing documents that indicate how abstentions are treated under the applicable voting standard, such as articles of incorporation and bylaws, as they are required to be filed as exhibits under Item 601 of Regulation S-K for domestic issuers and under Form 20-F for foreign private issuers. See also supra note 5 and Item 21 of Schedule 14A that applies to domestic issuers.

¹⁶ Id.

¹⁷ 17 CFR 200.30-3(a)(12).