

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82796; File No. SR-NYSE-2017-42)

March 1, 2018

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change to Amend the NYSE Listed Company Manual to Modify Its Requirements with Respect to Physical Delivery of Proxy Materials to the Exchange

I. Introduction

On November 22, 2017, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend its rules that require listed companies to provide the Exchange with hard copies of proxy material sent to shareholders. The proposed rule change was published for comment in the Federal Register on December 12, 2017.³ On January 22, 2018, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to March 12, 2018.⁴ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

Currently, Sections 204.00(B) and 402.01 of the NYSE Listed Company Manual (“Manual”) set forth requirements with respect to the physical delivery of hard copies of proxy materials to the Exchange. Among other things, Section 204.00(B) requires listed companies to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82225 (December 6, 2017), 82 FR 58473 (“Notice”).

⁴ See Securities Exchange Act Release No. 82565, 83 FR 3812 (January 26, 2018).

file with the Exchange six hard copies of proxy materials not later than the date on which the material is physically or electronically delivered to shareholders, and one hard copy of any filing made on Form 6-K that is not required to be filed through the SEC's EDGAR system not later than the date on which the Form 6-K is filed with the Commission. Section 402.01 requires listed companies to provide the Exchange with three hard copies of definitive proxy material (together with proxy card) not later than the date on which such material is sent, or given, to any security holders, which satisfies the copies required to be provided to the Exchange under Rule 14a-6(b) of the Exchange Act.⁵

In addition to the Exchange's own requirements mandating that any listed company provide the Exchange with hard copies of proxy materials that are sent to shareholders, all U.S. domestic listed companies that are subject to the Commission's proxy rules are required to electronically file their proxy materials on the SEC's EDGAR system.⁶ The Exchange stated that its staff is notified when a listed company submits a filing to the Commission on EDGAR and generally reviews proxy materials on the EDGAR system shortly after they are filed.⁷ The Exchange also stated that its staff generally has completed its review of proxy materials prior to receiving the hard copies of the materials, and therefore the Exchange has no real need to receive hard copies.⁸ As to listed foreign private issuers, while their securities are exempt from the

⁵ The copies required to be submitted to the Exchange pursuant to Rule 14a-6(b) under the Exchange Act only apply to domestic companies. See infra notes 9-11 and accompanying text. The Commission notes, however, that the Exchange's rules require listed companies, including foreign private issuers, to provide multiple hard copies of proxy materials under Sections 204.00 and 402.01 of the Manual.

⁶ See Regulation S-T, 17 CFR 232.101.

⁷ See Notice, supra note 3, at 58473.

⁸ See id.

Commission’s proxy rules,⁹ the Exchange rules require listed companies, including foreign private issuers, to hold annual shareholder meetings and solicit proxies for such meetings.¹⁰ A foreign private issuer, including those listed on the Exchange, will generally furnish proxy material on EDGAR using Form 6-K or may file its proxy material on Form 8-K if the foreign private issuer chooses to file periodic reports under the provisions for domestic companies.

Accordingly, the Exchange proposed to amend its paper filings requirements related to proxy materials in Sections 204.00(B) and 402.01 of the Manual to eliminate “a significant amount of unnecessary use of paper and of resources devoted to processing unneeded materials received through the mail.”¹¹

Specifically, the Exchange has proposed to amend Section 402.01 of the Manual to provide that listed companies will not be required to provide proxy materials to the Exchange in physical form, provided such proxy materials are included in a Commission filing available on the SEC’s EDGAR filing system.¹² If such proxy materials are available on EDGAR but not filed pursuant to Schedule 14A under the Exchange Act, the listed company would be required to provide to the Exchange information sufficient to identify such filing (by one of the means specified in Section 204.00(A))¹³ not later than the date on which such material is sent, or given,

⁹ 17 CFR 240.3a12-3(b).

¹⁰ See Sections 302.00 (Annual Meetings) and 402.04 (Proxy Solicitation Required) of the Manual.

¹¹ See Notice, supra note 3, at 58474.

¹² See proposed Section 402.01.

¹³ Section 204.00(A) of the Manual generally requires that prompt notice to the Exchange must be provided via a web portal or email address specified by the Exchange on its website.

to any security holders.¹⁴ Notwithstanding the foregoing, any listed company whose proxy materials are not included in their entirety (together with proxy card) in an SEC filing available on EDGAR will continue to be required to provide three definitive copies of any proxy material not available on EDGAR to the Exchange not later than the date on which such material is sent, or given, to any security holders. This is consistent with the number of copies required to be filed with the Exchange under Rule 14a-6(b) under the Exchange Act.¹⁵

The Exchange has also proposed conforming amendments to Section 204.00(B) of the Manual for consistency with the proposed amendments to Section 402.01. Specifically, the Exchange would amend Section 204.00(B) so as to require listed companies to file three hard copies of any proxy materials required to be submitted to the Exchange in physical form pursuant to Section 402.01 (as proposed to be amended) not later than the date on which the material is physically or electronically delivered to shareholders.¹⁶ In addition, the Exchange would amend Section 204.00(B) to require companies to file one hard copy of any filing that is

¹⁴ Domestic listed companies occasionally file their proxy materials on the SEC's EDGAR system using forms other than Schedule 14A, which may not be readily identified by Exchange staff. See Notice, supra note 3, at 58474. The Exchange stated that, as there is no easy way to identify which SEC report includes a company's proxy materials, the Exchange proposed to require listed companies not filing proxies using Schedule 14A under the Exchange Act to provide to the Exchange information needed to identify the submission containing proxy materials. Id. at 58474.

¹⁵ See proposed Section 402.01. The Exchange also proposed to correct an erroneous reference to SEC Rule 14a-6(c) in Section 402.01 to refer instead to SEC Rule 14a-6(b). SEC Rule 14a-6(b) requires listed companies subject to the proxy rules to file three copies of such proxy material with the Exchange.

¹⁶ See id. The Exchange also proposed to delete from this provision a cross-reference to Section 402.00 (Proxies) in the Manual.

not required to be filed through EDGAR, including pursuant to a hardship exemption granted by the Commission.¹⁷

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁹ 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.

The Commission believes that the proposed amendments to the Manual are consistent with Section 6(b)(5) of the Exchange Act because, by allowing the Exchange to rely on

¹⁷ See proposed Section 204.00(B); see also 17 CFR 232.201 and .202. As noted above, the current language in Section 204.00(B) only requires the Exchange to provide one hard copy of any filing made on Form 6-K that is not required to be filed through EDGAR to be provided to the Exchange, and does not include the reference to a hardship exemption that the Exchange now proposes to add. In addition, the Exchange has proposed non-substantive changes to Section 204.00(B), including removing from Section 204.00(B)'s introductory paragraph a sentence stating that listed companies are required to file hard copies of certain SEC reports and other materials (such as proxies) with the Exchange. See proposed Section 204.00(B). The Exchange noted that this provision would be inconsistent with the Exchange's proposed revised approach to the review of SEC filings. See Notice, supra note 3, at 58473.

¹⁸ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 15 U.S.C. 78f(b)(5).

electronic copies of proxy materials available on EDGAR, the proposed amendments are reasonably designed to allow Exchange staff to review all listed company proxy material in a timely manner and to ensure compliance with Exchange rules and the federal securities laws²⁰ while eliminating the need for unnecessary paper copies when warranted.²¹ At the same time, the proposed rule changes furthers the purposes of Section 6(b)(5), and in particular the protection of investors and the public interest, because Sections 204.00(B) and 402.01 of the Manual will still require listed companies that do not file proxy materials electronically on EDGAR, or that do not include their entire proxy materials (including the proxy card) on EDGAR, to submit three hard copies of such materials to the Exchange.

The Commission notes that it has previously granted the Exchange no-action relief, on behalf of listed companies and third party filers, from the obligation to provide paper copies to the Exchange with respect to materials filed with the Commission through the EDGAR system, including proxy materials (“1998 No-Action Letter”).²² The Exchange, however, had previously

²⁰ Generally, the Exchange reviews proxies for purposes of Exchange rules concerning broker voting and for other matters that may arise concerning compliance with Exchange rules and the federal securities laws. In addition, the Commission notes that NYSE Listing Agreement requires listed companies to comply with the requirements of the federal securities laws, as well as NYSE rules. See https://www.nyse.com/publicdocs/nyse/listing/Domestic_Co_Listing_Agreement.pdf.

²¹ The Commission notes that other national securities exchanges, such as The Nasdaq Stock Market LLC (“Nasdaq”), also have rules that allow listed companies to satisfy the exchange’s filing requirements, including for proxies, by virtue of filing on EDGAR. See, e.g., Nasdaq Rules 5005(a)(16), 5620(b), and 5250(c)(1).

²² See letter to Michael J. Simon, Milbank, Tweed, Hadley & McCloy from Ann M. Krauskopf, Special Counsel, Division of Corporation Finance, Commission, and Howard L. Kramer, Senior Associate Director, Office of Market Supervision, Division of Market Regulation, Commission, dated July 22, 1998. The 1998 No-Action Letter also granted the Exchange relief in relation to documents available for review on EDGAR from the recordkeeping requirements of Rule 17a-1 under the Exchange Act. The Exchange stated that at the time such no-action relief was granted, the Exchange decided not to rely on it in relation to proxy materials. See Notice, supra note 3, at 58474.

decided not to rely on the 1998 No-Action Letter with respect to proxy material but now has, for the reasons described in its proposal, decided to do so. Given that the Exchange currently uses EDGAR to review proxies, the Commission would expect there should be little impact on the Exchange's proxy review process if it no longer also receives paper submissions of proxies filed on EDGAR. As the Exchange noted in its filing, it generally completes its review "... long before [it] receives hard copies of proxy materials,"²³ so there appears to be little risk in eliminating the paper copy requirement for proxy material where the complete filing is available on EDGAR. Further, to the extent the Exchange cannot rely on the 1998 No-Action Letter because proxy material is not submitted on EDGAR (such as when a hardship exemption is granted) or is not available in its entirety on EDGAR, the Exchange rules will continue to require listed companies to provide three hard copies of such proxy material to the Exchange, which would meet the requirements of Rule 14a-6 under the Exchange Act for companies subject to the U.S. proxy rules.

The Commission notes that the proposed changes to the Exchange rules are drafted to enable the Exchange to eliminate outdated paper copy requirements in the Manual only in those cases where the Exchange is able to review proxy material in a timely manner on EDGAR, for purposes of compliance with Exchange rules and the federal securities laws, and as long as consistent with the conditions of the 1998 No-Action Letter.

The Exchange's proposal also requires listed companies to provide to the Exchange information sufficient to identify proxy materials that have been submitted through EDGAR, but not filed pursuant to Schedule 14A under the Exchange Act. This provision should enable the Exchange to identify the documents it needs to review proxy materials on EDGAR quickly to

²³ See Notice, supra note 3, at 58473.

review for compliance with both Exchange rules and the federal securities laws consistent with investor protection and the public interest. In particular, this should help the Exchange more readily identify proxy materials filed on EDGAR by foreign private issuers, which, as the Exchange notes, often furnish and submit their proxy materials to the Commission as part of a Form 6-K or Form 8-K,²⁴ as well as proxy materials occasionally filed by domestic listed companies on forms other than Schedule 14A under the Exchange Act.

Finally, the proposal to require companies to file with the Exchange one hard copy of any filing that is not required to be filed through EDGAR should help enable the Exchange to continue to receive all filings made by its listed companies, which in turn should aid the Exchange in fulfilling its regulatory responsibilities to oversee companies for compliance with listing, and other Exchange, rules and the federal securities laws.²⁵ This situation may arise, for example, when a listed company has been granted a hardship exemption under Regulation S-T to file in paper rather than electronically on EDGAR.²⁶

Accordingly, for the reasons discussed above, the Commission finds that the proposed rule change is consistent with the Exchange Act.

²⁴ See Notice, supra note 3, at 58473. As the Exchange also noted, while foreign private issuers are not required to comply with the Commission's proxy rules, the Exchange requires them to solicit proxies. See id.

²⁵ The Commission notes that this change broadens the Exchange's current rule which had been limited to filings on Form 6-K not submitted on EDGAR. See supra note 17. The requirement to submit to the Exchange one copy of any filing not filed in EDGAR covers all listed company filings with the Commission, including Form 6-Ks, with the exception of proxy material, for which three copies of all the proxy material not filed in EDGAR must be filed with the Exchange. See also General Instructions to Form 6-K.

²⁶ The Commission notes that the 1998 No-Action Letter stated that the no-action relief may not be relied upon and a paper filing with the Exchange would be required if a listed company or third party filer files a document with the Commission in paper pursuant to a hardship exemption.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,²⁷ that the proposed rule change (SR-NYSE-2017-42), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

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²⁷ 15 U.S.C. 78f(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).