

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-88736; File No. SR-NYSE-2020-38)

April 23, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Its Application of the Proxy Delivery Requirements of NYSE Rule 451(b)(1) Through and Including May 31, 2020

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on April 23, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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 modify its application of the proxy delivery requirements of NYSE Rule 451(b)(1) through and including May 31, 2020. 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.

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

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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.

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 452 provides for limited circumstances in which a member organization may vote shares it holds on behalf of its "street" name customers when the beneficial owner has not provided voting instructions with respect to certain "routine" matters. This ability on the part of member organizations is subject to certain limitations, including the requirement of Rule 451(b)(1) that the proxy materials mailed to beneficial holders include the following disclosure:

a request for voting instructions and, as to matters which may be voted without instructions under Rule 452, a statement to the effect that, if such instructions are not received by the tenth day before the meeting, the proxy may be given at discretion by the owner of record of the stock; provided, however, that such statement may be made only when the proxy soliciting material is transmitted to the beneficial owner of the stock or to the beneficial owner's designated investment adviser, at least fifteen days before the meeting. When the proxy soliciting material is transmitted to the beneficial owner of the stock or to the beneficial owner's designated investment adviser twenty-five days or more before the meeting, the statement accompanying such material shall be to the effect that the proxy may be given fifteen days before the meeting at the discretion of the owner of record of the stock.

The ability of member organizations to vote on "routine" matters serves an important purpose for many public companies. The low level of voting response from "street" name account holders to proxy solicitations means that it is often difficult for companies to meet

applicable quorum requirements under state law, the company's constitutive documents or stock exchange rules. However, the ability of member organizations to vote on routine items in the absence of beneficial owner proxy voting instructions enables beneficial owners to be counted as present for quorum purposes for the meeting as a whole even if they do not submit voting instructions and therefore enables companies to conduct all required business at their shareholder meetings. Generally, Rule 452 does not allow member organizations to vote uninstructed shares on nonroutine matters, so the voting of those shares by member organizations with respect to routine matters does not generally affect the outcome of any vote of any importance to the company and its shareholders, while facilitating the effective conduct of shareholder meetings.

The Exchange has been made aware that the recent ongoing spread of the COVID-19 virus throughout the United States and the social distancing and stay-at-home measures imposed by many state and local governments has severely disrupted the operations of the primary intermediary responsible for distributing proxy materials on behalf of member organizations. The primary intermediary has informed the Exchange that it is having difficulty in some cases meeting the specification of Rule 451(b)(1) to transmit proxy materials to beneficial owners at least 15 days prior to shareholder meetings, due to delays in receiving the printed materials from issuers for distribution and also because its own processing times have been slowed down by reduced staffing levels caused by the disruption associated with the spread of COVID-19.

The Exchange is concerned about the effect on the ability of companies to hold shareholder meetings that may arise out of the current difficulties being experienced in transmitting proxy materials no later than the 15 days in advance of the meeting specified in Rule 451(b)(1). The Exchange notes that it has been the practice since at least the 1990s to apply Rule 451(b)(1) on the basis that member organizations may not vote any uninstructed shares if the

mailing of any of the required physical proxy materials is made later than 15 days before the meeting, including shares whose beneficial owner opted for electronic delivery and to whom the materials are transmitted electronically on a timely basis.<sup>4</sup> Consequently, many companies may have difficulty meeting applicable quorum requirements for their scheduled shareholder meetings.

The primary intermediary has informed the Exchange that it would need to undertake significant systems development work to be able to differentiate for voting purposes those shares whose beneficial owners are sent timely electronic distributions from those shares whose beneficial owners are sent physical distributions that are mailed fewer than fifteen days before a shareholder meeting. As this development work would likely take months to complete, it is not possible during the upcoming proxy season, occurring during the current crisis, to allow the voting of uninstructed shares of a company where the materials are transmitted no later than 15 days in advance of the meeting and to disallow the voting on uninstructed shares where the materials were transmitted past that deadline.

To alleviate the problem described above, the Exchange proposes to modify its application of Rule 451(b)(1) temporarily for shareholder meetings occurring on or before May 31, 2020. As proposed, the Exchange would permit member organizations to vote uninstructed shares as long as proxy materials are transmitted to beneficial owners no later than 10 days prior to the shareholder meeting, rather than the fifteen day period required by the text of the rule. All of the other requirements and limitations associated with voting by member organizations would

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<sup>4</sup> The Exchange understands that proxy materials are delivered electronically to the beneficial owners of approximately 84% of all shares and approximately 43% of shares held by retail investors, according to data provided by the primary intermediary with respect to the 12 months ended June 30, 2018.

continue to be applied during this period. The Exchange expects that best efforts will be made to ensure that transmissions of proxy materials will continue to be made prior to the fifteenth day before the meeting whenever possible, either in whole or in part. In particular, the Exchange expects electronic transmissions of proxy materials to continue to be made within the normal time frames provided by the rule.

In order to rely on the proposed relief, the intermediary acting as agent for the member organization will be required to post prominently on its website the following disclosures:

- that it is experiencing operational challenges as a result of the disruptive effects of COVID-19 and is therefore experiencing difficulty in some cases in transmitting proxy materials to beneficial owners at least 15 days prior to shareholder meeting dates;
- as a consequence, it is relying on relief provided by the NYSE to shorten from 15 days to 10 days the period required under Rule 451(b)(1) that proxy materials must be transmitted to beneficial owners in order for the member organization to be permitted to vote its customers' uninstructed shares on routine matters;<sup>5</sup>
- a list of the companies whose proxy distributions are affected, including the meeting date and the date on which the transmission was completed; and
- a statement encouraging beneficial owners to submit their voting instructions through the electronic or telephonic means, if any, described in the request for voting instructions sent by the member organization to ensure that such instructions are received in advance of the shareholder meeting.

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<sup>5</sup> The intermediary should provide a link on its website to this filing as posted on nyse.com.

While the Exchange believes that the proposed temporary modification of Rule 451(b)(1) would provide significant relief to issuers during the ongoing COVID-19 crisis by enabling them to conduct their shareholder meetings as planned, it does not believe that it would have a significant effect on the voting right of beneficial owners or the outcome of any material proposals voted on at those meetings. First, a high percentage of “street” name shareholders of most public companies elect to receive electronic delivery of proxy materials and vote by electronic means. The electronic distributions to those shareholders would not be delayed as a result of the proposed accommodation. Second, a significant percentage of shareholders who receive physical distributions of proxy materials and vote, vote through the internet or by phone,<sup>6</sup> so the Exchange believes that the rule as modified would continue to provide adequate time for most beneficial owners to review their proxy materials and vote on a timely basis. The Exchange also notes that Rule 452 generally prohibits member organizations from voting material matters such as director elections (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the “Investment Company Act”))<sup>7</sup> and equity compensation plans and that member organizations can vote only on routine matters such as the ratification of auditors (which is generally included on a meeting agenda precisely to ensure the presence of all shares held in brokerage accounts for quorum purposes).

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<sup>6</sup> Based on information provided by the primary intermediary for the 12 months ended December 24, 2019, the Exchange understands that approximately 30% of the shares owned by retail shareholders are voted. Of the voted amount, 26% are voted by paper vote instruction form and 74% are voted by electronic methods including internet or phone.

<sup>7</sup> See Rule 452, Supplementary Material .11, subsections (2) and (19).

Rule 451(b) provides that the member organization as record holder may give a proxy to vote shares if the beneficial owner has not provided voting instructions before the tenth day preceding the shareholder meeting. However, the number of shares included in the member organization's proxy is adjusted over the period right up to the time of the meeting to reflect the ability of beneficial owners to continue to provide instructions throughout that period. Supplementary Material .20 to Rule 451 includes forms of letters to be sent to beneficial owners when soliciting voting instructions. The forms of letters provided include the following provision:

If we do not hear from you by the tenth day before the meeting, we may vote your shares in our discretion to the extent permitted by the rules of the Exchange. If you are unable to communicate with us by such date, we will, nevertheless follow your voting instructions, even if our discretionary vote has already been given, provided your instructions are received prior to the stockholders' meeting.

During the period of the proposed relief from the 15-day requirement, the forms of letters included in proxy mailings must clearly emphasize the ability of beneficial owners to provide voting instructions right up to the time of the meeting.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is 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

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

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

in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change is designed to provide significant relief to issuers during the ongoing COVID-19 crisis by enabling them to conduct their shareholder meetings as planned. The Exchange believes that the proposed rule change is consistent with the protection of investors because it would not have a significant effect on the voting rights of beneficial owners or the outcome of any material proposals voted on at shareholder meetings. The Exchange notes that a high percentage of “street” name shareholders of most public companies elect to receive electronic delivery of proxy materials and vote by electronic means. Electronic distributions to those shareholders would not be delayed as a result of the proposed accommodation. In addition, a significant percentage of shareholders who receive physical distributions of proxy materials and vote, vote through the internet or by phone, so the Exchange believes that the rule as modified would continue to provide adequate time for beneficial owners to review their proxy materials and vote on a timely basis. The Exchange also notes that Rule 452 generally prohibits member organizations from voting material matters such as director elections and equity compensation plans and that member organizations can vote only on routine matters such as the ratification of auditors (which is generally included on a meeting agenda precisely to ensure the presence of all shares held in brokerage accounts for quorum purposes).

**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 that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide limited relief to member organizations and issuers in relation to difficulties experienced



in distributing proxy materials during the current ongoing COVID-19 crisis.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>12</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>13</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. According to the Exchange, the proposed rule change would provide significant relief to issuers during the ongoing COVID-19 crisis by enabling them to conduct their shareholder meetings as planned given the current difficulties being experienced

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

transmitting proxy materials. As noted above, the proposed rule change would temporarily permit member organizations until May 31, 2020 to vote uninstructed shares on routine matters pursuant to NYSE Rule 452 provided that such materials are transmitted to beneficial owners no later than 10 days prior to the shareholder meeting, instead of 15 days in advance of a meeting. The Exchange stated, among other things, that member organizations can only vote on routine matters under its rules and that the proposal would not have a significant effect on the outcome of any material proposals voted on at shareholder meetings. The Exchange further stated that the waiver of the 30-day operative delay will help companies plan, and meet quorum requirements, for shareholder meetings during the upcoming proxy season.

The Commission notes that while the proposed rule change provides temporary relief in the event that there are delays in distributing proxy materials as a result of COVID-19, the Exchange and the Commission expect that best efforts will be made to ensure that transmissions of proxy materials will continue to be made prior to the 15th day before the meeting. To the extent that materials cannot be distributed prior to the 15th day, the Commission notes that the conditions set forth above requiring, in part, the intermediary acting on behalf of a member organization to disclose prominently on its website that it is experiencing operational challenges as a result of COVID-19, identify the companies whose proxy distributions are affected, and encourage beneficial owners to submit their vote by electronic or telephone means to ensure their instructions are received in advance of the shareholder meeting should help to ensure beneficial owners have adequate time to review their proxy material and vote on a timely basis.

Moreover, the Commission notes that, as discussed above, proxy materials are delivered electronically to the beneficial owners of 84% of all shares,<sup>14</sup> and that the Exchange expects

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<sup>14</sup> See supra note 4.

electronic transmissions of proxy materials to continue to be made within the normal time frames provided by its rule. In addition, according to the Exchange, a significant percentage of shareholders who receive physical distributions of proxy materials and vote, vote through the Internet or by phone, so the rule as modified would continue to provide adequate time for most beneficial owners to review their proxy materials and vote on a timely basis.<sup>15</sup> The proposal also only continues to allow member organizations to vote uninstructed shares on routine matters in accordance with Exchange Rule 452. The Commission also notes that the proposal is a temporary measure designed to respond to current, unusual market conditions. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal as operative upon filing.<sup>16</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or 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

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<sup>15</sup> See supra note 6 and accompanying text.

<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2020-38 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-2020-38. 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, DC 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-2020-38 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>17</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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