

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93192; File No. SR-NYSE-2021-53)

September 29, 2021

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

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 September 16, 2021, 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 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 adopt an amendment to the shareholder voting requirement set forth in Section 312.07 of the NYSE Listed Company Manual. 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

Section 312.07 of the NYSE Listed Company Manual (“Manual”) provides that, where shareholder approval is a prerequisite to the listing of any additional or new securities of a listed 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. Section 312.07 is currently applicable to shareholder approval of stock issuances under Sections 303A.08 (equity compensation) and 312.03 of the Manual.<sup>4</sup>

The text of Section 312.07 does not specifically address the treatment of abstentions. However, the Exchange has historically advised companies that abstentions should be treated as votes cast for purposes of Section 312.07. Under that approach, a proposal is deemed approved under Section 312.07 only if the votes in favor of the proposal exceed the aggregate of the votes cast against the proposal plus abstentions. The Exchange has observed that this approach has caused confusion among listed companies. 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. The Exchange understands that,

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<sup>4</sup> 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.

consistent with those state laws, many public companies have bylaws indicating that abstentions are not treated as votes cast.

The Exchange proposes to amend Section 312.07 to provide that a company must calculate the votes cast with respect to a proposal that is subject to Section 312.07 in accordance with its own governing documents and any applicable state law. 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.

The Exchange notes that Nasdaq has a rule requiring that proposals receive a majority of "the votes cast,"<sup>5</sup> but is silent on the question as to whether abstentions should be treated as votes cast. Nasdaq has published an FAQ on its website that clearly states:

Nasdaq does not define the term "votes cast". As such, a company must calculate the "votes cast" in accordance with its governing documents and any applicable state law.

## 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>6</sup> Section 6(b)(5)<sup>7</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

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<sup>5</sup> See Nasdaq Marketplace Rule 5635(e)(4).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

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 designed to protect the public interest and the interests of investors. The proposed approach to calculations of “votes cast” in Section 312.07 would not prescribe a particular interpretation under Exchange rules. Rather, a listed company would calculate votes cast in accordance with the company’s governing documents and applicable state laws. In doing so, the proposal will reduce confusion among issuers and shareholders. The proposed amendment would also help ensure that shareholders properly understand the implications of choosing to abstain on a proposal subject to approval under Exchange rules.

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

The Exchange does not believe that the proposal would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. There would be no effect on the competition among issuers listed on the NYSE resulting from the proposed amendment, because all issuers would calculate votes cast in accordance with their own governing documents and applicable state laws. The proposed amendment is consistent with the existing interpretation of the comparable rule of the other primary listing exchange, so the proposed amendment would have no effect on the competition for listings among exchanges.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period 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-2021-53 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-2021-53. 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-2021-53, 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>8</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>8</sup> 17 CFR 200.30-3(a)(12).