

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91359; File No. SR-NYSE-2020-96)

March 18, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Rules Establishing Maximum Fee Rates to be Charged by Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners

I. Introduction

On December 2, 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 delete the maximum fee rates for forwarding proxy and other materials to beneficial owners set forth in NYSE Rules 451 and 465 and Section 402.10 of the NYSE Listed Company Manual (“Manual”), and establish in their place a requirement for member organizations to comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member. The proposed rule change was published for comment in the Federal Register on December 21, 2020.³ On February 1, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90677 (December 15, 2020), 85 FR 83119 (“Notice”). Comments received on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096.htm>.

⁴ 15 U.S.C. 78s(b)(2).

proposed rule change.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

NYSE Rules 451 and 465, and the related provisions in Section 402.10 of the Manual, require NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of issuers.⁷ For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution.⁸ This reimbursement structure stems from SEC Rules 14b-1 and 14b-2 under the Act,⁹ which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials. These rules require companies to send their proxy materials to broker-dealers or banks, as nominees that hold securities in street name, for forwarding to beneficial owners, and

⁵ See Securities Exchange Act Release No. 91025, 86 FR 8246 (February 4, 2021). The Commission designated March 21, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ See NYSE Rules 451 and 465, and Section 402.10 of the Manual; Notice, supra note 3, 85 FR at 83119. 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.” See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530, 63531 n.14 (October 24, 2013) (SR-NYSE-2013-07) (Order Granting Approval to Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual) (“2013 Approval Order”). 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. Id.

⁸ See NYSE Rules 451 and 465, and Section 402.10 of the Manual; 2013 Approval Order, supra note 7, 78 FR at 63531.

⁹ 17 CFR 240.14b-1; 17 CFR 240.14b-2.

to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners.¹⁰ 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.¹¹

Currently, the Supplementary Material to NYSE Rule 451, which is cross-referenced by the Supplementary Material to Rule 465 and Section 402.10 of the Manual, establish the maximum rates at which an NYSE member organization may be reimbursed for expenses incurred in connection with distributing proxy and other issuer communication materials to beneficial holders. FINRA Rule 2251 also sets forth a schedule of maximum rates that is substantively identical to the rate schedule specified in NYSE Rule 451.¹² The rules of other self-regulatory organizations (“SROs”) generally provide that member organizations must forward proxy and other issuer communication materials if they receive “reasonable” reimbursement, but they do not specify any schedule of maximum permitted charges.¹³

The Exchange proposes to amend Supplementary Materials .90–.96 to NYSE Rule 451 by deleting the provisions setting maximum reimbursement rates and replacing them with rule text stating that member organizations must comply with any schedule of approved charges set

¹⁰ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, *supra* note 7, 78 FR at 63531.

¹¹ See 17 CFR 240.14b-1 and 14b-2; see also 2013 Approval Order, *supra* note 7, 78 FR at 63531.

¹² See Notice, *supra* note 3, 85 FR at 83120. The Exchange states that FINRA Rule 2251 differs from NYSE Rule 451 in one respect. See *id.*, 85 FR at 83119, n.8. Specifically, FINRA has not adopted the Notice and Access fees for investment company shareholder report distributions set forth in Section 5 (Notice and Access Fees) of Supplementary Material .90 to NYSE Rule 451 as part of FINRA Rule 2251. *Id.*

¹³ See Notice, *supra* note 3, 85 FR at 83119. But see NYSE American LLC Rule 576.80 (setting forth a schedule of approved charges by member organizations in connection with proxy solicitations).

forth in the rules of any other national securities exchange or association of which such member organization is a member.¹⁴ The Exchange also proposes to delete the cross-references to NYSE Rule 451.90–96 in Supplementary Material .20 to NYSE Rule 465 and replace it with rule text that is identical to the proposed new language in Supplementary Material .90 to NYSE Rule 451.¹⁵ The Exchange states that the proposed rule change is not intended to take a position on the appropriateness of the fee schedules for proxy and other distributions currently set forth in NYSE Rules 451 and 465 or in the rules of any other SRO.¹⁶

According to the Exchange, since all NYSE member organizations that are subject to the fee schedule set forth in NYSE Rule 451 (and cross referenced by NYSE Rule 465) are also FINRA member firms, the proposal would effectively require member organizations to comply with the fee schedule set forth in FINRA Rule 2251.¹⁷ The Exchange acknowledges that it has historically taken the lead in establishing the maximum proxy distribution reimbursement rates, but states that it no longer believes the Exchange is best positioned to retain this role going forward.¹⁸ The Exchange states that all of the brokers who hold shares on behalf of customers in street name are FINRA members, while only a subset of them are members of the NYSE.¹⁹ The Exchange also notes that a large and increasing number of the affected issuers are listed on

¹⁴ See proposed Supplementary Material .90 to NYSE Rule 451. The Exchange also proposes to delete Section 402.10 of the Manual, which replicates the fee schedule set forth in Supplementary Material .90–.96 to NYSE Rule 451.

¹⁵ See proposed Supplementary Material .20 to NYSE Rule 465.

¹⁶ See Notice, supra note 3, 85 FR at 83120. As noted above, FINRA and NYSE American LLC presently are the only SROs besides NYSE with rules that set forth a fee schedule.

¹⁷ See id.

¹⁸ See id., 85 FR at 83119.

¹⁹ See id., 85 FR at 83120.

Nasdaq, CBOE or other non-NYSE Group exchanges or are traded solely over the counter.²⁰

The Exchange further states that the development of the mutual fund industry has led to the existence of a huge number of issuers who are not listed on any exchange.²¹

III. Summary of Comment Letters Received

Several commenters support the proposal.²² One commenter believes the Commission should approve the proposed rule change “[g]iven the technical nature of the change and NYSE’s lack of interest in reforming, or even examining, the current fee system.”²³ This commenter, however, believes it is imperative for the Commission to take this opportunity to reform the current system relating to processing fees for shareholder materials, including by facilitating competition in the distribution of shareholder materials through greater issuer participation in the

²⁰ See id. 85 FR at 83120.

²¹ See id., 85 FR at 8319-20.

²² See letters from Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, and Joanne Kane, Senior Director, Operations and Transfer Agency, Investment Company Institute, dated January 8, 2021, at 2 (“ICI Letter”); Timothy W. McHale, Senior Vice President & Senior Counsel, Capital Research and Management Company, and Anthony M. Seiffert, Chief Compliance Officer, American Funds Service Company, Capital Group, dated January 11, 2021; Catherine L. Newell, General Counsel and Executive Vice President, Dimensional Fund Advisors LP, dated January 11, 2021; Peter J. Germain, Chief Legal Officer, Federated Hermes, Inc., dated January 11, 2021; Basil K. Fox, Jr., President, Franklin Templeton Investor Services, LLC, dated January 11, 2021; Heidi Hardin, Executive Vice President and General Counsel, MFS Investment Management, dated January 11, 2021; Thomas E. Faust Jr., Chairman and Chief Executive Officer, Eaton Vance Corp., dated January 14, 2021; and Noah Hamman, Chief Executive Officer, AdvisorShares Investments, LLC, dated January 14, 2021.

²³ See ICI Letter at 2.

selection process or, barring that, by reforming the processing fee schedule.²⁴ A number of commenters from the fund industry agree with the views expressed by this commenter.²⁵

Several other commenters oppose the proposal. One commenter expressed the view that “the most appropriate approach is to retain NYSE in the role and accelerate discussions about fundamental reform of the proxy communication process, abolishing the need for reimbursement fees and facilitating issuer-directed communications.”²⁶ This commenter explained that “NYSE has played a longstanding, central role in the industry dialogue on proxy reform and the fee-setting process, given its representation of both issuers and brokers,” and so the commenter “continue[s] to believe that its leadership will be critical to any transition to new arrangements for proxy communications and associated fees.”²⁷ Another commenter stated that “[i]nstead of approving a rule proposal that transfers regulatory oversight of proxy fees from one Self-Regulatory Organization to another,” the Commission should reform the proxy processing system by “replacing the current regulatory framework with one in which market forces determine fees for proxy distribution and other services.”²⁸ This commenter added that, “[u]nlike the stock exchanges, FINRA has no regulatory relationship with public companies, or other issuers of securities, and certainly cannot represent their interests or provide a mechanism

²⁴ Id. at 2-4. This commenter also urged the Commission to emphasize that the existing fee schedules represent the maximum rates for “reasonable” processing fees, rather than an obligation to pay those exact fees. Several commenters from the fund industry agreed with the views expressed in the ICI Letter.

²⁵ See supra note 22.

²⁶ See letter from Paul Conn, President, Global Capital Markets, Computershare, dated January 11, 2021, at 4.

²⁷ See id.

²⁸ See letter from Niels Holch, Executive Director, Shareholder Communications Coalition, dated January 20, 2021, at 4.

for a balanced oversight process.”²⁹ Similarly, a third commenter endorsed the “market-driven solution” advocated by other commenters, and “does not support the proposal to transfer responsibility for the maximum fee-setting process to FINRA, whose membership represents the broker side of the industry but not the issuer side.”³⁰

Finally, FINRA opposes the proposal on the grounds that it “is premature and incorrectly predicated on FINRA assuming primary responsibility for a regulatory regime that it has never led, and which FINRA is not best equipped to lead.”³¹ FINRA notes that “historically the NYSE has taken the lead on proxy distribution fee schedules,” and that FINRA has “amend[ed] its proxy distribution rule fee schedule to conform with [NYSE’s] in the interest of ensuring regulatory clarity and harmonization.”³² FINRA adds that “[i]n light of the NYSE’s historical experience with these rules derived in part from its listing relationship with many issuers, which FINRA lacks,” FINRA would “give strong consideration to rescinding its fee schedule” if the Commission were to approve NYSE’s proposal.³³ FINRA suggests that, “prior to approving or disapproving the NYSE proposal, the Commission organize a public dialogue on the appropriate regulation of reimbursement of broker-dealer expenses for forwarding issuer documents.”³⁴

²⁹ See id. at 5.

³⁰ See letter from Todd J. May, President, Securities Transfer Association, Inc., dated March 1, 2021, at 2.

³¹ See letter from Marcia Asquith, Executive Vice President, Board & External Relations, FINRA, dated January 11, 2021, at 6.

³² See id. at 4.

³³ See id. at 5-6.

³⁴ See id. at 6. FINRA also formally petitions the Commission to consider amending Rule 14b-1 to prescribe the fees charged for these expenses if the Commission determines that prescription of specific broker-dealer reimbursement fees is appropriate. See id.

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2020-96 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.³⁵ Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning the proposed rule change's consistency with the Act and, in particular, with Section 6(b)(5) of the Act,³⁶ 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.³⁷

As acknowledged by both the Exchange and commenters, the NYSE historically has taken the lead in establishing and updating the maximum rates of reimbursement for "reasonable expenses" that broker-dealers may seek from issuers in connection with the distribution of proxy

³⁵ 15 U.S.C. 78s(b)(2)(B).

³⁶ 15 U.S.C. 78f(b)(5).

³⁷ Id.

and other materials to beneficial owners.³⁸ The NYSE has periodically engaged in a formal process to review and update these maximum reimbursement rates, with the goal of ensuring that they are related to the reasonable proxy expenses of member firms,³⁹ and accordingly has gained considerable expertise in this area.⁴⁰ Further, because NYSE is a primary listing market, it has relationships with issuers as well as broker-dealers, and thus is well-positioned to take into account the views of both major stakeholder groups.⁴¹

NYSE is proposing to remove the provisions setting maximum reimbursement rates from its rules, and replace them with a requirement that an NYSE member firm comply with any schedule of approved charges set forth in the rules of any other SRO of which it is a member. This effectively would make the maximum reimbursement rates set forth in FINRA rules the industry reference, and establish FINRA as the lead SRO in this area.

³⁸ Since 1937, NYSE has required issuers, as a matter of policy, to reimburse its members for out of pocket costs for forwarding materials. See Concept Release on the U.S. Proxy System, Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982, 42995 (July 22, 2010) (“Proxy Concept Release”). NYSE’s reimbursement rates were formally established by rule in 1952, and have been revised periodically since then. See id.

³⁹ Today’s maximum rates set forth in NYSE Rules 451 and 465 are the product of several multi-year efforts lead by NYSE. The current fee structure was first established by NYSE as part of a pilot program in 1997 that was permanently approved by the Commission in 2002 and this basic fee structure, with some updates, remains in place today on the NYSE. The most recent NYSE review of the fees involved the establishment of NYSE’s Proxy Fee Advisory Committee (“PFAC”) in 2010, which provided a report and recommendations to NYSE. NYSE proposed to adopt the PFAC fee recommendations and the Commission approved these changes in 2013. See 2013 Approval Order, supra note 7.

⁴⁰ See 2013 Approval Order, supra note 7. The rules of national securities exchanges and FINRA follow the NYSE fee schedule as reasonable rates of reimbursement for distribution of proxy and other material to beneficial owners. See Securities Exchange Act Release No. 71272 (January 9, 2014), 79 FR 2741 (January 15, 2014) (SR-FINRA-2013-056) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend FINRA Rule 2251).

⁴¹ See Proxy Concept Release, supra note 38, 75 FR at 42995.

In its proposal, NYSE expresses the view that FINRA is in a better position to take the lead in setting maximum reimbursement rates for the distribution of proxy and other issuer materials to beneficial owners because (1) all broker-dealers that hold shares in street name for customers are FINRA members, while only a subset of them are NYSE members, and (2) a large number of affected issuers are not listed on the NYSE. Unlike NYSE, however, FINRA does not have a relationship with issuers, who ultimately pay the reimbursement rates set forth in these rules. NYSE does not explain why, in the absence of a relationship with this important constituency, FINRA is in a better position than NYSE to assume the leadership role in this area. Further, NYSE has not explained the significance of the fact that only a subset of impacted broker-dealers are NYSE members, given that NYSE would appear well-positioned to consider the views of this constituency, or why the fact that all such broker-dealers are FINRA members puts FINRA in a materially better position to assume the leadership role in this area. Similarly, NYSE has not explained the significance of the fact that only a subset of impacted issuers are listed on NYSE, given that NYSE would appear well-positioned to consider the views of this constituency and, as discussed above, FINRA would not. As a result, the Commission believes there are questions as to whether NYSE's proposal is consistent with Section 6(b)(5) of the Act and, in particular, its requirements that the rules of the Exchange be designed to promote just and equitable principles of trade 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 notes that, under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization ['SRO'] that proposed the

rule change.”⁴² The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁴³ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴⁴

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁴⁵ to determine whether the proposal should be approved or disapproved.

V. Commission’s Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written view of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁴⁶

⁴² Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁴³ See id.

⁴⁴ See id.

⁴⁵ 15 U.S.C. 78s(b)(2)(B).

⁴⁶ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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 email to rule-comments@sec.gov. Please include File Number SR-NYSE-2020-96 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-2020-96. 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

Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 such 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-2020-96 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷

Eduardo A. Aleman
Deputy Secretary

⁴⁷ 17 CFR 200.30-3(a)(57).