

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91663; File No. SR-NYSE-2020-98)

April 23, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 2, to Amend Its Rules to Prohibit Member Organizations from Seeking Reimbursement, in Certain Circumstances, from Issuers for Forwarding Proxy and Other Materials to Beneficial Owners

On November 30, 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 amend its rules to prohibit member organizations from seeking reimbursement, in certain circumstances, from issuers for forwarding proxy and other materials to beneficial owners. The proposed rule change was published for comment in the Federal Register on December 18, 2020.³ On January 29, 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 proposed rule change.⁵ On March 17, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 (December 18, 2020). Comments received on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2020-98/srnyse202098.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 91011 (January 29, 2021), 86 FR 8246 (February 4, 2021).

the proposed rule change.⁶ On April 6, 2021, the Exchange filed Amendment No. 1 to the proposed rule change; the Exchange withdrew that amendment on April 16, 2021. On April 16, 2021, the Exchange filed Amendment No. 2 to the proposed rule change, which superseded the proposed rule change as originally filed, and is described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to prohibit member organizations from seeking reimbursement from issuers for forwarding proxy and other materials to beneficial owners who received shares from their broker at no cost in connection with a promotion by the broker. This Amendment No. 2 amends and restates the original filing in its entirety.⁷ The proposed rule

⁶ See Securities Exchange Act Release No. 91343 (March 17, 2021), 86 FR 15536 (March 23, 2021).

⁷ The NYSE previously filed a proposed rule filing to amend its rules to prohibit member organizations from seeking reimbursement from issuers for forwarding proxy and other materials to beneficial owners who received shares from their broker at no cost or at a substantially discounted price in connection with a promotion by the broker. See SR-NYSE-2020-98 (November 30, 2020). The proposed rule change was published for comment in the Federal Register on December 18, 2020. See Securities Exchange Act Release No. 90653 (December 14, 2020), 85 FR 82539 (December 18, 2020). On January 29, 2021, pursuant to Section 19(b)(2) of the Exchange Act, 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 proposed rule change. See Securities Exchange Act Release No. 91011 (January 29, 2021), 86 FR 8246 (February 4, 2021). By an order dated March 17, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) to determine whether to approve or disapprove the proposed rule change. See Securities Exchange Act Release No. 91343 (March 17, 2021), 86 FR 15536 (March 23, 2021). The Exchange previously withdrew Amendment No. 1 to the filing. Amendment No. 1 [sic] is being filed to: (1) remove from the filing the prohibition on brokers claiming reimbursement from issuers for distributions to any beneficial owner when the shares of the issuer held in such

change is available on the Exchange’s website at 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 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

This Amendment No. 2 amends and restates the original filing in its entirety.⁸

NYSE Rule 451 requires 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.⁹ For this service, issuers reimburse NYSE

beneficial owner’s account were purchased from that broker at a substantially discounted price; (2) explain why the proposal does not apply by its terms to a broker claiming reimbursement for distributions relating to shares that the beneficial owner transferred into an account at such broker from an account at another broker that had transferred those shares to the beneficial owner without charge; and (3) explain why the Exchange believes the proposal is consistent with the requirement of Rules 14b-1 and 14b-2 under the Act that brokers are entitled to receive “reasonable reimbursement” for making proxy distributions on behalf of issuers.

⁸ See note 7 supra for details of how Amendment No. 2 differs from the original filing.

⁹ 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.” 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. For more detail regarding share ownership, see Securities Exchange Act Release No. 62495 (July

member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution. This reimbursement structure stems from SEC Rules 14b-1 and 14b-2 under the Act,¹⁰ which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials and are given the opportunity to vote. These rules require companies to send their proxy materials to nominees, i.e., broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners. Similarly, Rule 465 requires member organizations to forward issuer communications to beneficial owners on behalf of issuers subject to receipt of reimbursement of expenses.

Recently, brokers providing retail brokerage services have developed a practice in which customers are given securities without charge as a commercial incentive (for example, upon opening a new account or referring a new customer to the broker). Typically, these incentives involve the transfer of a small number of shares to benefiting customers and result in the customer having a position in the company whose shares they receive that has a very small dollar value. Rule 451 does not distinguish between these beneficial owners and beneficial owners that have paid for their shares, so brokers are required to solicit proxies from these accounts and are entitled to reimbursement of their expenses under Rules 451 and 465, as well as pursuant to the applicable rules of any other national securities exchange or national securities association of which the NYSE member organization is a member.¹¹ As a consequence, issuers are billed

14, 2010), 75 FR 42982 (July 22, 2010) (Concept Release on the U.S. Proxy System) (“Proxy Concept Release”).

¹⁰ 17 CFR 240.14b-1; 17 CFR 240.14b-2.

¹¹ See, for example, FINRA Rule 2251.

under Exchange rules and the rules of other SROs for the reimbursement of expenses the broker incurs in making distributions to these beneficial owners who have very small positions, which they acquired from their broker without any payment by the customer. In certain cases, the issuer can experience a significant increase in its distribution reimbursement expenses solely due to its shares being included in these broker promotional schemes.

While the distribution of shares in these broker promotions may result in a significant increase in the number of beneficial owners of an issuer's stock, the generally very small size of each of these positions means that they usually represent a very small percentage of the voting power. As such, the costs the issuer incurs in reimbursing the broker for distributing proxies to these accounts is very disproportionate to the maximum potential vote such shares represent. By contrast, the broker using such a scheme chooses to engage in it because it believes that it will result in a commercial benefit to the broker. Consequently, the Exchange believes that it is more appropriate for the broker to bear these proxy distribution costs. Accordingly, the Exchange proposes new Rule 451A, which would provide that, notwithstanding the applicable provisions of Rules 451 or 465 or what may be permitted by the rules of any other national securities exchange or national securities association of which a member organization is also a member, no member shall seek to be reimbursed for expenses incurred in connection with the distribution of proxies or other materials on behalf of issuers to the beneficial owners of shares or units of an issuer's securities in a nominee account if those shares or units were transferred to the account holder by the member organization at no cost.

As proposed, Rule 451A would not limit a broker's right to reimbursement for distributions to any beneficial owner if any part of that beneficial owner's position in an issuer's securities was received by any means other than a transfer without charge from the broker.

Rules 451 and 465 would continue to apply to all distributions, so the broker would continue to be fully obligated to solicit votes from, and make other distributions on behalf of issuers to, all beneficial owners notwithstanding the limitations on reimbursement of expenses imposed by Rule 451A.

The Exchange's proposal does not limit the right of a broker to receive reimbursement under Rules 451 and 465 unless that broker had itself transferred those shares without charge into the account of the beneficial owner. Specifically, if a beneficial owner transferred shares received in this manner into an account at another broker, Rule 451A would not preclude that other broker from claiming reimbursement under Rules 451 and 465. The Exchange notes that it would be impossible for the receiving broker in these circumstances to track whether the shares of a specific issuer transferred into its custody had all been received by the beneficial owner without charge from another broker. Moreover, that broker would not have received the commercial benefit from the promotional scheme that would accrue to the broker that had given the shares without charge to its customers. For the foregoing reasons, the Exchange believes that it is impracticable to extend the application of Rule 451A to the broker to whom the shares are transferred in these circumstances and that it is reasonable to limit its application to the broker that had chosen to transfer those shares without charge.

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.¹² Section 6(b)(4)¹³ requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

members and issuers and other persons using the facilities of an exchange. Section 6(b)(5)¹⁴ 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 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 consistent with Sections 6(b)(4) and 6(b)(5) of the Act as it would only limit the reimbursement of distribution expenses in circumstances where a broker distributes the shares to its customers as part of a voluntary promotional strategy by the broker from which it derives a commercial benefit. The Exchange notes that the recipients of shares without charge as part of such schemes typically will not be given any choice as to which shares they receive and are therefore not making any investment decision. As the broker typically has sole control over the allocation of these shares to its customers and derives a commercial benefit from doing so, the Exchange believes that the proposal is not unfairly discriminatory and does not represent an inequitable allocation of the costs of the distribution of proxy and other issuer materials.

The Exchange notes that brokers will continue to be required to distribute proxy and other materials on behalf of issuers notwithstanding the fact that brokers will not be entitled to any reimbursement of expenses and believes that the proposal is therefore consistent with Rules 14b-1 and 14b-2 under the Act, which impose obligations on companies and nominees to ensure

¹⁴ 15 U.S.C. 78f(b)(5).

that beneficial owners receive proxy materials and are given the opportunity to vote. The Exchange also believes that its proposal is consistent with the requirement of Rules 14b-1 and 14b-2 that brokers are entitled to “reasonable reimbursement” of expenses in connection with making proxy distributions on behalf of issuers. First, the Exchange notes that any broker that is prohibited from charging fees under this proposal would continue to be reimbursed for its aggregate expenses with respect to proxy distribution, as the prohibition on distribution fees would be limited to those accounts in which the only shares of the applicable issuer are shares received without charge from that broker. As such, the effect of the proposal would be to reduce the overall reimbursement received by that broker for a distribution, but not to eliminate that reimbursement. The Exchange believes that this reduced level of reimbursement is reasonable in light of the fact that the beneficial owners in question would have received the shares without charge as part of a voluntary commercial scheme initiated by the broker and which the broker undertook because it believed that it was in its own business interest.

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 not necessary or appropriate in furtherance of the purposes of the Act. The proposed limitation on distribution expense reimbursement would apply to any broker that adopts a commercial strategy of distributing shares to account holders free of charge. Brokers that adopt this strategy do so because they believe that they derive a commercial and competitive advantage from doing so. As such, the Exchange believes that any burden on competition associated with this proposal is appropriate in light of the fact that brokers will only be subject to any such burden as a consequence of voluntarily adopting a strategy that they believe is beneficial for their business. There would be no effect on the competition among issuers

resulting from the proposed rule change, as all issuers would benefit from the proposed restriction in the same manner if their shares have been distributed without charge as part of such a commercial arrangement.

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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 2, 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 email to rule-comments@sec.gov. Please include File Number SR-NYSE-2020-98 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-2020-98. This file number should be included on the subject line if email 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-2020-98 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.¹⁵

J. Matthew DeLesDernier
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).