

NYSE Proposes Amending Rules on Timing of Broker Searches for Annual and Special Meetings to Clarify Alignment with SEC Rule

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The NYSE has proposed amending its rules on the solicitation of proxies through member organizations, as set forth in Section 402.05 of the Listed Company Manual, to make clear that companies or others soliciting proxy materials through brokers must comply with SEC Rule 14a-13 and that the NYSE does not have a process for permitting exemptions.

SEC Rule 14a-13 sets forth the obligations of issuers in communicating with beneficial owners through banks and brokers. Specifically, the rule requires issuers to conduct broker searches of beneficial owners for purposes of distributing proxy materials for annual or special meetings within specified time frames. The inquiry to brokers must be made at least 20 business days before the record date of the meeting, but if that proves impracticable for a special meeting or a consent solicitation, then it needs to be conducted as many days before the record date as possible. In addition, the rule also allows for a later time as the rules of a national exchange, such as the NYSE, may permit, “for good cause shown.”

Section 402.05 of the NYSE rules is intended to incorporate Rule 14a-13. Currently, it states that companies or others soliciting materials through brokers must conduct broker inquiries at least 10 days in advance of the record date before the meeting in order to determine the number of sets of proxy soliciting materials necessary to enable brokers to supply each beneficial owner with a set. There is a footnote reference to the SEC rule referencing the 20-business day requirement. Section 402.05 also provides that the NYSE must be advised immediately if it becomes “impossible” for an inquiry to be made at least 10 days before the record date.

According to the proposed amendment, the 10-day reference in Section 402.05 was only in recognition of the provision in the SEC rule allowing for less than 20 business days for special meetings and consent solicitations. However, this is not stated in the NYSE rule itself. Over time, in conversations with market participants and the SEC staff, the NYSE has become concerned that NYSE Section 402.05 may be read as requiring only a 10-day advance inquiry, notwithstanding its footnote reference to the SEC rule that contains the 20-business day requirement.

Also, under the SEC rules, a company may actually proceed with less than 10-day advance searches of brokers for special meetings and consent solicitations, and the NYSE does not presently have a “good cause” exemption as permitted under the SEC rule. As a result, the NYSE has come to believe that its own 10-day rule may actually conflict with the SEC rule.

The proposed NYSE amendment revises Section 402.05 of the Manual to clarify that companies must comply with SEC Rule 14a-13, given that the NYSE has no authority to waive compliance with the rule. The amendment deletes entirely the two current references to the 10-day advance inquiry (and the footnote reference to the SEC rule), and instead specifically cites SEC Rule 14a-13. In addition, the revision includes a statement that the NYSE has no authority by which issuers can seek exemptions as allowed under the SEC rule.

The amendment is scheduled to become immediately effective upon SEC approval.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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