

April 14, 2021

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
By email: rule-comments@sec.gov

Re: File Number SR-NYSE-2020-96

Dear Secretary Countryman:

The Securities Transfer Association (STA)¹ appreciates the opportunity to present additional comments on the proposal by the New York Stock Exchange (NYSE) to transfer regulatory responsibility over proxy processing and distribution fees to the Financial Industry Regulatory Authority (FINRA).²

For the reasons stated in this comment letter, STA recommends disapproval of this NYSE proposed rule. In its place, STA recommends that the SEC establish and convene a Proxy Fee Working Group comprised of industry representatives to evaluate the current fee schedule.

During this evaluation period, the SEC should temporarily suspend the existing proxy fee schedule and replace it with an interim fee schedule that: (1) requires issuers to pay for the full cost of distributing proxy materials to their registered shareholders; and (2) requires brokers and banks to pay for the full cost of distributing proxy materials to their customers holding securities in street name.

Proxy Fees Are Inflated and Issuers Have Little Recourse

SEC rules require that issuers and other parties soliciting proxies reimburse brokers and banks for their "reasonable expenses."³ The SEC, however, has never provided an interpretation of this term, or provided guidance as to its meaning. Instead, the SEC has

¹ STA is the professional trade association of transfer agents, official recordkeepers interacting daily with both issuers and their investors regarding securities offerings, issuances, and transfers. STA's membership is comprised of over 130 commercial stock transfer agents, bond agents, mutual fund agents, and related service providers within the United States and Canada. Collectively STA members service more than 100 million registered shareholders on behalf of more than 15,000 publicly traded corporations and private companies trading in the OTC marketplace.

² 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, 86 Fed. Reg. 15,734 (Mar. 24, 2021).

³ See 17 CFR 240.14b-1; 17 CFR 240.14b-2; and 17 CFR 240.14a-13.

always relied on self-regulatory organizations (SROs) to implement this standard and establish an approved proxy fee schedule.⁴

Since 1937, the New York Stock Exchange has been the lead self-regulatory organization responsible for developing and updating a proxy fee schedule.⁵ The fee schedule was first established in 1952 and has been updated periodically since then.⁶ Through its rule proposal to the SEC, the NYSE has requested that its regulatory authority be transferred to FINRA.⁷ At the same time, however, many proxy participants believe the current system is not working properly or fairly.

Some of the specific problems with the system that have been identified over the years include the following:

1. Proxy Fee Rebates to Brokers and Banks. The proxy fees that are established by NYSE Rules are the maximum fees that may be charged. Invoices sent by the proxy agents of brokers and banks typically charge issuers these maximum fee levels, and there is no information provided to issuers about how much is a reimbursement for actual expenses. Similarly, there is no negotiation about the proper fee level for each issuer, nor about the services provided.

It has been well-documented that issuers are being overcharged for the proxy services they receive, as many brokers and banks receive a portion of the proxy fees they collect from issuers as rebates. This issue has been around for more than a decade and was raised by the SEC in its 2010 Concept Release:

It is our understanding that Broadridge currently bills issuers, on behalf of its broker-dealer clients, the maximum fees allowed by NYSE Rule 465. However, we understand that the fees that Broadridge charges its large broker-dealer clients for its services sometimes are less than the maximum NYSE fees charged to issuers on the broker-dealers' behalf, resulting in funds being remitted from Broadridge to a subset of its broker-dealer clients. This practice raises the question as to whether the fees in the NYSE schedule currently reflect 'reasonable reimbursement.' While the issuer pays the proxy distribution fees, the issuer has little or no control over the process by which the proxy service provider is selected, the terms of the contract between the broker-dealer and the proxy

⁴ See, e.g., Requirements for Dissemination of Proxy Information to Beneficial Owners by Issuers and Intermediary Broker-Dealers, 42 Fed. Reg. 35,953, at 35,954 (July 13, 1977) ("The Commission believes that all procedural rules and interpretations implementing the broad mandate of Rule 14b-1, including the setting of 'reasonable expenses,' should continue to be administered and enforced by the various self-regulatory regulations.")

⁵ See Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982, at 42,995 (July 22, 2010) (hereinafter "SEC 2010 Concept Release"). See also NYSE Euronext, Recommendations of the Proxy Fee Advisory Committee to the New York Stock Exchange, at 3, May 16, 2012 (hereinafter "NYSE 2012 PFAC Report.").

⁶ See SEC Concept Release at 42,995.

⁷ New York Stock Exchange LLC, Notice of Filing of Proposed Rule Change Amending Its Rules Establishing Maximum Fee Rates To Be Charged by Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners, 85 Fed. Reg. 83,119 (Dec. 21, 2020).

service provider, or the fees that are incurred through the proxy distribution process.⁸

This issue was also discussed in the 2012 NYSE PFAC report, but no actions have been taken by either the SEC or the NYSE to address these excess payments being made by issuers.⁹

2. Managed Account Fees. Managed accounts are brokerage accounts where investors have delegated investment discretion to an investment adviser. While investors in a managed account program have the absolute right to vote proxies themselves in shareholder meetings, almost all of these investors prefer not to receive what could be a substantial volume of proxy materials, especially for investments they are not selecting themselves.

Once these investors have delegated their proxy voting authority to an investment adviser, the person or entity making the proxy voting decisions does not need to receive more than one copy of the proxy materials.¹⁰ However, under the NYSE proxy fee schedule, issuers are charged almost the same fees as an investor who is receiving a proxy package directly and returning a completed Voting Instruction Form (VIF).

A review of recent street name proxy invoices indicates that issuers are paying processing unit fees, intermediary unit fees, preference management fees, and—in certain circumstances—notice and access fees for managed accounts. Taken together, these fees can total as much as \$1.00 for each beneficial owner who has delegated his or her proxy voting authority. And this is only slightly less than the processing charges for a beneficial owner who seeks to receive proxy materials directly and vote his or her shares accordingly.

The STA and the Shareholder Services Association (SSA) raised this issue with the SEC in connection with the NYSE Proxy Fee Advisory Committee (PFAC) Report in 2012 (and subsequent SEC rulemaking).¹¹ In the PFAC Report, the argument made by Broadridge was that there was significant processing work involved in “keeping track of the shareholder’s election” to receive or not receive proxy materials when in a managed account.¹² In response, the Committee recommended a preference management fee of 16 cents per managed account position.¹³ The Committee did not analyze,

⁸ SEC 2010 Concept Release at 42,997.

⁹ See, e.g., NYSE 2012 PFAC Report at 23-24.

¹⁰ See, e.g., NYSE Euronext, Information Memo Number 94-41, at 1, Sept. 7, 1994 (“Member organizations may wish to provide consolidated proxies and related materials to investment advisers designated by beneficial owners to exercise voting discretion. To facilitate this process, member organizations should prepare a consolidated proxy (or voting instruction form) and distribute such material to the investment advisers.”).

¹¹ See, e.g., STA/SSA Petition for Interpretive Release with Guidance, Mar. 12, 2012, available at <https://www.sec.gov/rules/petitions/2012/petn4-647.pdf>.

¹² NYSE 2012 PFAC Report at 13.

¹³ *Id.* at 18.

however, why an additional 84 cents was also going to be charged for beneficial owners who are not receiving any proxy materials in managed accounts.

These managed account issues and practices need to be investigated and addressed. Unfortunately, there is no ongoing regulatory process involving either the NYSE or the SEC to oversee proxy fees and billing practices.

3. Transition from Paper Delivery to Electronic Delivery. As noted in the STA's earlier comment letter to the SEC of March 1, 2021, the structure of the current proxy fee schedule was established when paper delivery was the predominant form of communication with beneficial owners. Now that proxy materials are primarily sent electronically, the fee-setting process needs to reflect this transition to a different form of communication and the efficiencies in operating systems that have resulted. There is no transparency as to how the processing fees charged by Broadridge and its clients relate to the actual costs incurred.

The brokerage industry continuously promotes the printing and postage savings that issuers receive when investors are choosing electronic delivery of proxy materials. However, these savings are being offset by the processing fees being charged. Transfer agents do not charge these types of processing fees to service registered shareholders, providing further evidence that issuers are being overcharged and are paying more to communicate with their street name shareholders than their registered shareholders.

Proxy Fees Should Be Established By Market Forces

For many years, the issuer community and other market participants have advocated for a more competitive system in the provision of proxy services.¹⁴ This issue was front and center in the SEC's 2010 Concept Release and, eleven years later, the need for a market-driven solution remains as important as ever in the proxy process.

In the current rulemaking on the pending NYSE rule proposal, almost all of the commenters advocated for reforms to the proxy system that would result in a more competitive system for proxy distribution services and fees.¹⁵ This has also been the historical position of the NYSE.¹⁶

¹⁴ See, e.g., New York Stock Exchange, Report and Recommendations of the Proxy Working Group to the New York Stock Exchange, June 5, 2006 (hereinafter "NYSE Proxy Working Group Report."); and Shareholder Communications Coalition, *Public Company Proxy Voting: Empowering Individual Investors and Encouraging Open Shareholder Communications*, Aug. 4, 2009, available at <https://www.sec.gov/comments/s7-14-10/s71410-3.pdf>.

¹⁵ See SEC Comment Letter File No. SR-NYSE-2020-96, available at <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096.htm>.

¹⁶ Letter from NYSE Euronext to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Oct. 20, 2010, available at <https://www.sec.gov/comments/s7-14-10/s71410-203.pdf> ("[Proxy reform regulation should] [r]emove self regulatory organizations from the role of specifying the fees to be paid for proxy distribution services [and] [p]rovide for competition among service providers, to the extent possible").

For almost 25 years, the SEC itself has acknowledged the need for market competition in the establishment of proxy distribution fees. In a 1997 approval of the NYSE proxy fee schedule, the SEC stated:

The Commission believes that ultimately market competition should determine 'reasonable expenses' and recommends that issuers, broker-dealers and the NYSE develop an approach that may foster competition in this area. Rather than having the rates of reimbursement set by the SROs, the Commission suggests that the NYSE and other SROs explore whether reimbursement can be set by market forces, and whether this would provide a more efficient, competitive, and fair process than SRO standards.¹⁷

The SEC issued similar statements about the need for a more competitive process in setting proxy fees in approving NYSE rule proposals in 1999, 2002, and 2013.¹⁸ Unfortunately, no regulatory actions have been taken to move towards this goal.

A Path Forward

This NYSE rule proposal is not the proper forum to resolve the broader policy questions about how to design a regulatory framework that ensures market competition determines proxy fees. However, the SEC can take the following steps to respond to the NYSE's request and incrementally improve the current system:

First, the SEC should disapprove this NYSE rule proposal. As noted in the STA's earlier comment letter, FINRA represents the interests of brokers and has no regulatory or other relationship with issuers.¹⁹ And, as stated earlier, FINRA's members are the direct beneficiaries of the rebates received from proxy fees, as they are charging the maximum rates on the NYSE proxy fee schedule.²⁰ It has always been the position of the SEC that self-regulatory organizations that represent both issuers and brokers are in the best position to allocate costs and oversee the proxy fee setting process.²¹

¹⁷ Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to [NYSE] Proposed Rule Change Relating to a One-Year Pilot Program for Transmission of Proxy and Other Shareholder Communications, 62 Fed. Reg. 13,922, at 13,930 (Mar. 24, 1997).

¹⁸ See 64 Fed. Reg. 14,294, at 14,299 (Mar. 24, 1999); 67 Fed. Reg. 15,440, at 15,444 (Apr. 1, 2002); and 78 Fed. Reg. 63,530, at 63,547 (Oct. 24, 2013).

¹⁹ Letter from Todd J. May, President, Securities Transfer Association, to Secretary Vanessa Countryman, Securities and Exchange Commission, Mar. 1, 2021, available at <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096-8431003-229612.pdf>.

²⁰ *Id.*

²¹ See, e.g., Facilitating Shareholder Communications Provisions, 48 Fed. Reg. 35,082 at 35,085 (Aug. 3, 1983) ("The Commission continues to believe that, because the self-regulatory organizations represent the interests of both issuers and brokers, they are in the best position to make a fair allocation of the costs associated with the [proxy fee] amendments.").

FINRA is also not interested in undertaking this new role and, instead, has advocated that the SEC use its plenary jurisdiction to prescribe proxy fees for market participants.²²

Second, the SEC should accept this advice by FINRA and other commenters and assume more responsibility for regulatory oversight of the process to establish street name proxy fees. A leadership role by the SEC is necessary here, as there are many different vested interests and industry discussions without the involvement of the SEC have not resolved any of these issues.

STA acknowledges that the SEC does not typically regulate prices for services in the capital markets. However, it should use its authority to establish and convene a Proxy Fee Working Group comprised of industry representatives to evaluate the current fee schedule. This Working Group, with appropriate oversight by the SEC, should include all market participants and not consist solely of representatives who want to maintain the status quo. As one of its first tasks, the Working Group should facilitate the engagement of an independent third party to analyze and make recommendations regarding the structure and amount of proxy fees paid by issuers for their beneficial owners, as recommended by the NYSE Proxy Working Group in 2006.²³

By way of example, the SEC formed an Advisory Committee on Shareholder Communications in 1981 to evaluate certain beneficial owner communications issues.²⁴ The Committee was composed of 14 individuals from the private sector, including representatives of issuers, exchanges, banks, brokers, and others.²⁵ The Committee held numerous meetings over a one-year period and produced a report with recommendations for the Director of the Division of Corporation Finance.²⁶

When the concept of a central intermediary for proxy processing services was approved in 1985, the SEC stated that the selected entity, the Independent Corporation of America (IECA), would be “governed by a user board consisting of registrants, brokers, and other industry representatives.”²⁷ This user board governance process was never implemented and a newly formed Proxy Working Group could provide this type of oversight, at least temporarily.

Third, as an interim step, the SEC should suspend (or withdraw its approval of) the current NYSE and FINRA proxy fee schedules, effective on January 1, 2022, and

²² See Letter from Marcia Asquith, Executive Vice President, Board & External Relations, FINRA, to J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission, at 5, Jan. 11, 2021, available at <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096-8231370-227746.pdf>.

²³ NYSE Proxy Working Group Report at 5.

²⁴ See Advisory Committee on Shareholder Communications; Establishment and Meeting, 46 Fed. Reg. 22,508 (Apr. 17, 1981).

²⁵ *Id.*

²⁶ See Facilitating Shareholder Communications, 47 Fed. Reg. 55,491, at 55,491-55,492 (Dec. 10, 1982). The report developed by the Advisory Committee was entitled *Improving Communications Between Issuers and Beneficial Owners of Nominee Held Securities* and it was submitted to the Division of Corporation Finance on June 10, 1982.

²⁷ Facilitating Shareholder Communications, 50 Fed. Reg. 42,672, at 42,674 (Oct. 22, 1985).

continue this temporary suspension or withdrawal until the Proxy Fee Working Group has completed its evaluation and the SEC has issued an approval for an updated proxy fee schedule. In place of the current Exchange Act Rule 14 regulations—and again on an interim basis—the SEC should issue a temporary rule that allocates proxy costs in an equitable manner and one that encourages competitive pricing.²⁸

STA recommends such a temporary rule by the SEC: (1) requiring issuers to pay for 100% of the costs of distributing proxy materials to their registered shareholders; and (2) requiring brokers and banks to pay for 100% of the costs of distributing proxy materials to their customers holding securities in street name.

On an interim basis, this would align proxy functions with other processing activities that brokers and banks already manage as a part of their services to beneficial owners, such as distributing dividends and executing corporate actions. These processing functions are handled today by brokers and banks without reimbursement by issuers. The distribution of proxy materials—especially when sent electronically to beneficial owners—should be treated no differently.

This approach would also reduce or eliminate rebates and excess fees in the proxy distribution system, as the contractual relationships between service providers and their broker and bank client are negotiated at arm's length. A temporary regulatory framework where intermediaries are paying directly for proxy processing services will reduce proxy fees within the street name system and result in fee arrangements that approximate what these fees would be in a competitive market.²⁹

STA thanks the Securities and Exchange Commission for this opportunity to comment on this NYSE rule proposal, and STA members appreciate your consideration of these recommendations. We are available for further discussion at your convenience via the STA Executive Director, Melissa Cabocel, at [REDACTED].

Sincerely,

A handwritten signature in black ink that reads "Todd J. May". The signature is fluid and cursive, with the first name "Todd" and last name "May" clearly legible.

Todd J. May
President
Securities Transfer Association

²⁸ The SEC clearly has the authority to issue such a temporary rule, using its exemptive authority under Section 36 of the Exchange Act. *See, e.g.*, 15 U.S.C. § 78l(h).

²⁹ A similar approach was recommended by Computershare in a 2019 comment letter. *See* Letter from Paul Conn, President Global Capital Markets, Computershare Limited, to Ms. Vanessa Countryman, Acting Secretary, Apr. 12, 2019, available at <https://www.sec.gov/comments/4-725/4725-5356425-184067.pdf>. This letter also recommended that the SEC permit issuers to use a NOBO list to directly send proxy materials to their NOBO investors. *Id.* at 4.