SECURITIES AND EXCHANGE COMMISSION

In the Matter of the New York Stock Exchange LLC **Regarding an Order Disapproving 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	File No. SR-NYSE-2020-96

THE NEW YORK STOCK EXCHANGE LLC'S STATEMENT IN OPPOSITION TO THE ORDER DISAPPROVING PROPOSED RULE CHANGE

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Pursuant to the Commission's Order granting the Petition for Review (the "Petition") of the New York Stock Exchange LLC ("NYSE" or the "Exchange"),[1] NYSE respectfully submits this statement in opposition ("Statement") to the order disapproving, pursuant to authority delegated to the Division of Trading and Markets (the "Division"), the Exchange's proposed rule change to delete the maximum fee rates that member organizations may charge securities issuers for forwarding proxy materials and other reports to the beneficial owners of the issuers' stock (the "Disapproval Order").[2]

PRELIMINARY STATEMENT

NYSE's proposal to amend its rules governing the maximum fee rates its member organizations may charge for forwarding proxy and other materials to beneficial owners (the "Proposal") satisfies all applicable requirements of the Securities Exchange Act of 1934 (the "Exchange Act") and Commission rules thereunder. Citing factors that are wholly extraneous to the Exchange Act, the Division erred by disapproving the Proposal based on NYSE's historical role in regulating proxy reimbursement rates. The Disapproval Order, moreover, conflicts with the Exchange Act and is arbitrary and capricious because it inappropriately treats NYSE differently from other exchanges, *all* of which have already adopted rules—with Commission approval—that are materially indistinguishable from NYSE's proposal. The Commission should now set aside the Disapproval Order and approve NYSE's Proposal.

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[1] Order Granting Petition for Review and Scheduling Filing of Statements, Release No. 34-93934 (Jan. 7, 2022), File No. SR-NYSE-2020-96, 87 FR 2189 (Jan. 13, 2022) (the "Review Order").

[2] Order Disapproving 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, Release No. 34-92700 (Aug. 18, 2021), 86 FR 47351 (Aug. 24, 2021) (the "Disapproval Order").

NYSE submitted its Proposal on December 2, 2020, notifying the Division that it intended to de-publish its existing maximum rate schedule for reimbursement of proxy forwarding expenses to bring NYSE's rules in line with other exchanges' rules.[3] The Commission published a Notice of the Proposal for comment on December 15, 2020.[4] On March 18, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the Proposal.[5] Following an extension of time and the receipt of numerous comment letters, the Division issued the Disapproval Order on delegated authority, disapproving NYSE's proposed rule change on August 18, 2021.[6] NYSE filed its Petition on September 1, 2021,[7] which the Commission granted by order published in the Federal Register on January 13, 2022.[8]

As set forth in greater detail in the Notice and Petition, and as elaborated further below, the Proposal satisfies the requirements of Sections 19(b) and 6(b) of the Exchange Act and should be approved. The Proposal will require NYSE members to charge issuers only "fair and reasonable" rates when seeking reimbursement of the expenses they incur in forwarding proxy materials and periodic reports to the beneficial owners of the issuers' securities. This change will simply conform NYSE's proxy expense reimbursement rules to the Commission's *own*

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[3] *See* Notice of Filing of Proposed Rule Change, Release No. 34-90677, File No. SR-NYSE-2020-96 (Dec. 15, 2020), 85 FR 83119, 83119 (Dec. 21, 2020) (the "Notice").

[4] *Id.*

[5] 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, Release No. 34-91359 (Mar. 18, 2021), 86 FR 15734 (Mar. 24 2021).

[6] Disapproval Order, *surpa* note 2, 86 FR at 47352.

[7] Pet. for Review (No. SR-NYSE-2020-96) (the "Petition").

[8] Review Order, *supra* note 1.

rules, as well as to the comparable rules of other exchanges, which the Commission has repeatedly approved as compliant with the Exchange Act's provisions. Moreover, the Proposal will not effect any practical change to the maximum proxy reimbursement fees actually chargeable by NYSE members. Members will still have to comply with the published reimbursement rate schedules maintained by any other self-regulatory organization ("SRO") to which they belong. The rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") contain reimbursement rate schedules substantively identical to those in NYSE's existing rule, and all NYSE member organizations who service "street name" accounts are also members of FINRA. Accordingly, following the Proposal's implementation, no NYSE member will be permitted to charge an issuer more for distributing proxy or other materials than it currently may charge.

The Disapproval Order does not set forth any valid grounds for disapproving NYSE's Proposal. The Division's rationales failed to address the Exchange Act's requirements and are arbitrary, capricious, and invalid under the Administrative Procedure Act ("APA"). The Disapproval Order largely focused on NYSE's voluntary, historical leadership in setting maximum reimbursement rates for forwarding proxy materials—a consideration that is not relevant to any statutory factor enumerated in Sections 19 or 6. Moreover, as NYSE has established, it is no longer well-positioned to continue playing a leadership role in setting industry-wide rates for proxy reimbursement fees because many of the institutions that distribute proxy materials *are not NYSE members*, and many of the issuers that reimburse them for doing so are *not listed on NYSE*. The Disapproval Order arbitrarily applies a different (and unmeetable) standard to NYSE than the Division has applied to other SROs. Nor does the Exchange Act permit the Commission to disapprove the Proposal in an effort to coopt NYSE

into continuing to act as a de facto regulator of maximum proxy expense reimbursement rates for the industry.

For all of these reasons, NYSE requests that the Commission set aside the Disapproval Order and approve the Proposal.

BACKGROUND

The broader proxy reimbursement context is set forth more fully in the Notice and Petition.[9] By way of summary, under Exchange Act and Commission rules, issuers must provide proxy materials to their stockholders.[10] Most stock is held in the name of nominees, frequently broker-dealers or banks, rather than in the names of the beneficial owners. Commission Rules 14b-1 and 14b-2 require that banks and broker-dealers (i.e., the nominees) that hold shares of the issuers' stock on behalf of customers forward the issuers' proxy materials and other periodic reports to those beneficial owners of the stock within five days of receipt of these materials from the issuers,[11] but only when the issuers provide "assurance of reimbursement of [the nominees'] reasonable expenses, both direct and indirect, incurred in connection with" forwarding the proxy materials.[12]

NYSE first required issuers to reimburse brokers for reasonable costs in forwarding proxy materials in 1937—years before the Commission promulgated Rules 14b-1 and 14b-2.[13]

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[9] *See* Notice, *supra* note 3, 85 FR at 83119-120; Petition, *supra* note 7, at 4-11.

[10] *See, e.g.*, 15 U.S.C. §§ 78n(a)(1)-(2); 17 C.F.R. § 240.14a-3(a).

[11] 17 C.F.R. § 240.14b-1(b)(2); 17 C.F.R. § 240.14b-2(b)(3).

[12] 17 C.F.R. § 240.14b-1(c)(2)(i); 17 C.F.R. § 14b-2(c)(2)(i).

[13] 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, Release No. 34-91359 (Mar. 18, 2021), 86 FR 15734, 15736 n.38 (Mar. 24 2021).

NYSE first published a maximum rate schedule for these costs in 1952.[14] At the time, NYSE was seen as conveniently positioned to gather industry views on the reasonableness of proxy reimbursement rates because of its relationships with NYSE-listed issuers and prominent broker-dealers, who were then members of the NYSE. By dint of this history, for many years since the Commission promulgated Rules 14b-1 and 14b-2, NYSE has periodically updated its published rate schedules following industry consultations carried out at its own (considerable) expense.[15]

As NYSE set out in the Notice and Petition, however, the structure of the market for distributing proxy and other materials and the reimbursement of associated costs has changed significantly over time.[16] A large and increasing percentage of the affected public companies who must distribute their proxy statements and other periodic reports to their beneficial owners through nominees now list their stock on exchanges other than NYSE. Mutual funds—issuers who frequently require proxy distribution services and bear a significant portion of the reimbursement costs—often are not exchange-listed or do not list their shares on NYSE. The banks and many of the broker-dealers that serve as nominees are not NYSE members. Nor are the vendors with whom the nominees contract to actually handle the distribution of proxy and other materials to the beneficial owners. Thus, today, NYSE is no better situated than any other SRO to set maximum proxy reimbursement rates.[17]

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[14] *Id*.

[15] Petition, *supra* note 7, at 9-10.

[16] Notice, *supra* note 3, 85 FR at 83119-120; Petition, *supra* note 7, at 7-10.

[17] To the extent that any SRO is well positioned to set reimbursement rates, FINRA would be the logical choice. As set forth in the Petition, all broker-dealers that service "street name" accounts are FINRA members, and FINRA publishes a rate schedule identical to that published by NYSE. *See* Petition, *supra* note 7, at 20.

While other SROs previously published rate schedules that were consistent with NYSE's prevailing reimbursement rate guidance, in recent years, every other SRO except FINRA has amended its rules to remove the schedule.[18] In each instance, the Commission has approved those rule changes as consistent with the Exchange Act's requirements.[19] NYSE's Proposal now seeks to take precisely the same action, while preserving the bedrock requirement that the reimbursement rates charged be "reasonable."

Industry participants and the Commission have increasingly agreed that NYSE is no longer well-positioned to set industry-wide proxy reimbursement rates. The last two rounds of updates to NYSE's reimbursement schedule in 2002 and 2013 met with considerable resistance.[20] Even the Commission recognized in 2013 that "'a long-term solution' to proxy distributions should 'allow market forces rather than SRO rules to set rates.'"[21] Moreover, in connection with the instant Proposal, multiple commenters expressed support for NYSE's proposed rule change, in part because they do not want NYSE to continue as a *de facto* ratemaking board in this space.[22]

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[18] *Id*. at 6–8.

[19] *Id.* at 18-19 & n.53.

[20] *Id*. at 10; *see also* Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Amending Its Rules Regarding the Transmission of Proxy and Other Shareholder Communication Material and the Proxy Reimbursement Guidelines Set Forth In Those Rules, Release No. 34-45644 (Mar. 25, 2002), 67 FR 15440, 15444 (Apr. 1, 2002) (the "2002 Order"); *see also* Order Granting Approval to Proposed Rule Change Amending NYSE Rules 451 and 465, Release No. 34-70720 (Oct. 18, 2013), 78 FR 63530, 63547 (Oct. 24, 2013) (order approving NYSE amendments to rules governing proxy expense reimbursement schedule) ("2013 Approval Order").

[21] Petition, *supra* note 7, at 10 (quoting 2013 Approval Order, *supra* note 20, at 63547).

[22] *See generall*y Petition, *supra* note 7, at 12-14 & nn.32-35, 37-38.

LEGAL STANDARDS

Under Commission Rule of Practice 431(a), "[t]he Commission may affirm, reverse, modify, set aside or remand for further proceedings" the Disapproval Order.[23] The Commision's review is *de novo*, based on "careful consideration [of] the entire record"—including the Proposal, the Petition for Review, and all comments and submitted statements.[24]

Under Section 19(b)(2)(C), the Commission "shall approve a proposed rule change of a [SRO] if it finds that such proposed rule change is consistent with the requirements of" the Act and the rules and regulations thereunder that are applicable to such organization.[25] Under Section 6(b), the rules of an exchange must be "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 regulating, clearing, settling, processing information with respect to, and 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 investors and the public interest," and must not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange."[26]

In addition, the APA prohibits agency action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[27]

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[23] 17 C.F.R. § 201.431(a).

[24] *See* Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change, Release No. 34-90768, at 3 (Dec. 20, 2020), 85 FR 85807, 85807 (Dec. 29, 2020).

[25] 15 U.S.C. § 78s(b)(2)(C).

[26] 15 U.S.C. § 78f(b)(5).

[27] 5 U.S.C. § 706.

ARGUMENT

The Commission should approve the Proposal because the Proposal complies with all relevant requirements of Sections 19 and 6 of the Exchange Act. The Commission should set aside the Disapproval Order because it treats NYSE different from other similarly situated exchanges without any reasonable or valid basis, in violation of the Exchange Act and the APA.

I. The Proposed Rule Change Complies with the Exchange Act

As the Notice and Petition demonstrate, NYSE's Proposal is both justified and consistent with the Exchange Act. The Proposal is consistent with the requirements of the Exchange Act and Commission rules because it conforms NYSE rules to the language of Commission Rules 14b-1 and 14b-2 by ensuring that NYSE members will charge issuers only fair and "reasonable" rates of reimbursement for distributing proxy and other materials to beneficial owners.[28] A rule that requires compliance with the Commission's own rules and prohibits member organizations from charging *unfair* reimbursement rates to issuers necessarily is designed "to promote just and equitable principles of trade" and avoid "unfair discrimination between . . . issuers, brokers, or dealers . . . ."[29] The Commission has repeatedly made this determination in the past when approving the substantively identical proxy reimbursement rules proposed *by other exchanges*.[30] As discussed below, there is no legal basis to hold NYSE to a different standard.

Moreover, the Proposal does not effect any immediate, practical change from NYSE's existing proxy reimbursement rules, which the Commission already approved as consistent with

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[28] Petition, *supra* note 7, at 18; Notice, *supra* note 3, 85 FR at 83120.

[29] 15 U.S.C. § 78f(b)(5).

[30] Petition, *supra* note 7, at 18-19 & n.53.

the Exchange Act's standards.[31] Under the Proposal, NYSE members must continue 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."[32] FINRA's rules contain a reimbursement rate schedule that is effectively identical to NYSE's, and all broker-dealers that are members of NYSE that service "street name" accounts also are members of FINRA.[33] The Proposal thus ensures that all broker-dealers who are NYSE member organizations will not charge higher reimbursement rates for distributing proxy materials than they do today. There can be no negative economic impact resulting from NYSE's Proposal because there will be no economic impact at all.

In addition, the Proposal is justified because NYSE no longer is "best positioned" to continue setting maximum reimbursement rates going forward.[34] As explained in the Proposal, "the significant evolution of the securities industry" since NYSE began publishing rates has left other exchanges on equal footing with NYSE in terms of relationships with issuers.[35] Indeed, FINRA is better positioned than NYSE to set reimbursement rates because—as explained above—"[a]ll the NYSE member organizations that are subject to the NYSE fee schedule are also members of FINRA," and "all of the brokers who are not NYSE members but who hold shares on behalf of street name account holders are also FINRA members."[36] Contrary to the

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[31] *See* 2013 Approval Order, *supra* note 20, 78 FR at 63544-45 (finding that the existing NYSE proxy fee reimbursement rule "is consistent with the requirements of the Act and the rules and regulations thereunder," including Section 6(b) of the Exchange Act).

[32] Notice, *supra* note 3, at 83120.

[33] *Id.* at 83119-20; *see also* Petition, *supra* note 7, at 18.

[34] Notice, *supra* note 3, at 83119.

[35] *Id.*

[36] *Id.*

Division's premise, NYSE has no special relationship with mutual funds or many of the other issuers who require their proxy and other materials distributed to beneficial owners; the banks and many of the brokers who are required to distribute such materials under Commission rules; or the vendors who actually handle the distributions.[37] In short, NYSE is situated no better than any other industry participant to set industry-wide reimbursement rates for proxy distributions.

Neither the Division nor any commenter identified any benefit that would be achieved by requiring NYSE to keep its existing rate schedule in place.[38] To the contrary, many commenters—who overwhelmingly supported the Proposal[39]—questioned whether the rates currently in NYSE's published reimbursement rate schedule, which were last revised in 2013, are reasonable or reflect current costs.[40] NYSE itself has acknowledged that the rates likely require an update.[41] To the extent those commenters are correct, the Proposal serves the goals of the Exchange Act by de-publishing a potentially outdated fee reimbursement schedule from NYSE's rules and thereby removing an "impediment[] to . . . a free and open market."[42] Moreover, by directing member organizations to determine whether the reimbursement rates they are charging are "fair and reasonable," the Proposal underscores—consistent with Commission rules—that the proper standard at all times remains "reasonableness."

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[37] Petition, *supra* note 7, at 19-20.

[38] *Id*. at 19.

[39] *Id.* at 12-13 & n.32.

[40] *See e.g.* Letter from Eric J. Pan, CEO, Investment Co. Inst. to Secretary, Securities and Exchange Commission (Sept. 7, 2021) (noting "funds are being forced to pay *three to five times more* to deliver materials through broker-dealers and their vendors than they would pay to deliver the same materials directly").

[41] Petition, *supra* note 7, at 11; *see also id.* at 20 ("NYSE previously has published a rate schedule—an outdated rate schedule, if commenters are to be credited—that lingers on its rulebooks unnecessarily.").

[42] 15 U.S.C. § 78f(b)(5).

Because, as set forth above, the Proposal complies with the applicable provisions of the Exchange Act and the rules thereunder, the Commission "*shall* approve" it.[43]

II. The Division Failed to Articulate Any Valid Basis for Disapproving the Proposal

The Disapproval Order focused on NYSE's relationship with brokers and issuers and its historical role in setting proxy reimbursement rates across the industry as the principal reasons for disapproving the Proposal, but those rationales offer no basis to conclude that the Proposal does not satisfy Exchange Act requirements. Moreover, by disapproving the Proposal based on NYSE's prior voluntary efforts to bring the industry together on proxy rates, after approving substantively identical rule changes submitted by other exchanges, the Division improperly applied a different, arbitrary and capricious standard to NYSE, in violation of the Exchange Act and the APA.

A. The Disapproval Order Imposes Obligations on NYSE Beyond the Exchange Act's Requirements

The Disapproval Order concluded that permitting NYSE to de-publish its rate schedule "would result in NYSE's relinquishment of an important market-wide regulatory function that it currently performs[.]"[44] But NYSE's past leadership on proxy reimbursement rates is not a relevant factor under the Exchange Act or Commission rules. No statute, rule, or regulation has ever required NYSE to assess and publish reasonable reimbursement rates for forwarding proxy materials and other periodic reports.[45] The Division cannot commandeer NYSE to conduct in

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[43] 15 U.S.C. § 78s(b)(2)(C) (emphasis added).

[44] Disapproval Order, *supra* note 2, at 47355; *see also, e.g.*, *id.* ("[T]he Exchange has not met its burden to demonstrate that it would be consistent with the Act for the Exchange to relinquish its current role in setting the maximum reimbursement rates that establish the industry standard."); *see generally* Petition, *supra* note 7, at 21-22.

[45] Petition, *supra* note 7, at 11.

perpetuity the inevitably resource-intensive process of attempting to build industry-wide consensus around what reimbursement rates would be reasonable by denying NYSE the ability to de-publish its existing, aging rate structure today.[46]

The only Exchange Act provision the Division even referenced in its discussion of NYSE's historic role in setting proxy reimbursement rates is Section 6(b)(4),[47] which requires that "[t]he rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."[48] But, the Proposal plainly complies with that provision because it requires that member organizations charge only "fair and reasonable" reimbursement rates for forwarding proxy and other materials. Indeed, if Section 6(b)(4) constrained exchanges to have reimbursement rate schedules in their rules, then the Commission could not have approved other exchanges' rules that do not include a published rate schedule.

Moreover, to the extent that the Disapproval Order relied on the proposition that NYSE's existing rate schedule represents a "consensus product" with the support of issuers and brokers, the Division was mistaken. As explained above, NYSE's existing rate schedule was approved in 2013 over significant opposition from several constituencies, and the main "consensus" among the commenters on the current Proposal—which included associations representing issuers and brokers—was that the NYSE should *not* be setting proxy reimbursement rates for the industry.[49]

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[46] *Id.* at 19-20.

[47] Disapproval Order, *supra* note 2, at 47354.

[48] 15 U.S.C. § 78f(b)(4).

[49] *See supra* notes 20-22 & accompanying text.

B. Disparate Treatment of NYSE Violates the Exchange Act and Is Arbitrary and Capricious in Violation of the APA

By disapproving NYSE's Proposal, the Division has improperly treated NYSE differently from other exchanges in violation of the Exchange Act and the APA. As demonstrated above, the Commission has repeatedly approved materially identical proxy reimbursement rules proposed by other exchanges.[50] The Disapproval Order thus uniquely burdens NYSE relative to other exchanges because it effectively requires NYSE to continually update its maximum fee rate schedule for the reimbursement of proxy distribution expenses to ensure that such rates remain reasonable, while all other exchanges—which do not maintain fee rate schedules—have no similar burden. NYSE member organizations and listed companies will ultimately be required to fund these efforts through their payments of dues and listing fees, yet the member organizations of other exchanges and the companies listed on such exchanges will incur no similar assessments. This result imposes a disparate burden on NYSE, and the Disapproval Order disadvantages NYSE in competition with the other exchanges. The Disapproval Order, however, did not consider whether treating NYSE differently would "promote efficiency, competition and capital formation"—let alone conclude—that this burden on competition was "necessary or appropriate," in violation of what the Exchange Act requires.[51]

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[50] *Supra* note 30 & accompanying text; *see also, e.g.*, Application of: Investors' Exchange, LLC for Registration as a National Securities Exchange, Release No. 34-78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (approving the IEX rule); Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Exchange's All-Inclusive Annual Listing Fees for Exchange Traded Products, Release No. 34-87870 (Dec. 30, 2019), 85 FR 391 (Jan. 3, 2020) (approving Nasdaq rule, which adopted FINRA guidance with respect to reasonable rates of reimbursement).

[51] 15 U.S.C. §§ 78c(f), 78w(a)(2); *see N.Y. Stock Exchange LLC v. SEC*, 962 F.3d 541, 550, 551 (D.C. Cir. 2020) (finding Commission pilot program "troubling" in light of Section 3(f) in light of its imposition of burdens on competition and vacating rule due, in part, to Commission's

Further, the Disapproval Order constitutes arbitrary and capricious agency action in violation of the APA because the Division failed to offer any valid justification for treating NYSE different from other exchanges.[52] The Division, in short, "appl[ied] different standards to similarly situated entities and fail[ed] to support this disparate treatment with a reasoned explanation and substantial evidence in the record."[53]

C. The Division Applied an Undefined and Unmeetable Standard

The Division disapproved the Proposal based on a perceived lack of "a sufficient basis . . . [to] demonstrate[] how issuers' interests would continue to be adequately considered, and not unfairly discriminated against, in the expense reimbursement rate-setting process if the Exchange were to relinquish its lead role in this area."[54] There are at least two clear flaws with the Division's reasoning: first, the Division failed to explain how NYSE could ever demonstrate such a "sufficient basis" that issuers' views would continue to be accounted for in future rate setting.[55] Agency action cannot be "vague and indecisive," and an agency cannot set

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failure to determine that burden on competition was necessary or appropriate as required by Section 23); *see also* Petition, *supra* note 7, at 19-20 & n.55.

[52] 5 U.S.C. § 706; *see* Petition, *supra* note 7, at 17-21.

[53] *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.,* 403 F.3d 771, 777 (D.C. Cir. 2005) (vacating agency's new policy subjecting shippers and carriers to different standards when seeking to vacate a rate prescription for lack of a reasoned basis); *see also McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (emphasizing "the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment"); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (FCC must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences"); *see also* Petition, *supra* note 7, at 17-21.

[54] Disapproval Order, *supra* note 2, at 47353-54.

[55] Petition, *supra* note 7, at 22.

requirements absent a "principled way" to satisfy them.[56]

Second, the Division conflated NYSE's discrete Proposal to remove its outdated rates with the Division's flawed perception of NYSE as a *de facto* regulator of industry proxy reimbursement rates.[57] As set forth above, no statute, rule or regulation requires NYSE to play this role.

CONCLUSION

For the foregoing reasons, NYSE respectfully requests that the Commission set aside the Disapproval Order and approve NYSE's Proposal to allow NYSE to remove the existing rate schedule from its rules.

Dated: February 3, 2022
New York, New York

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[56] *Id.* at 22; *see also Rapoport v. SEC*, 682 F.3d 98, 107 (D.C. Cir. 2012) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)).

[57] Petition, *supra* note 7, at 21-22.

CERTIFICATE OF SERVICE

I, Paul S. Mishkin, counsel to the New York Stock Exchange LLC ("NYSE"), hereby certify that on February 3, 2022, I caused to be served copies of the attached Statement in Opposition to Division of Trading and Markets' Disapproval Order (Release No. 34-92700, File No. SR-NYSE-2020-96) by way of Federal Express Overnight Courier and email on the Investment Company Institute, and sent the original and three copies of the same by Federal Express Overnight Courier and email to the Secretary at the following addresses:

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