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Executive Vice President,
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January 11, 2021

J. Matthew DeLesDernier
Assistant Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule Change Amending Rules of New York Stock Exchange, LLC, 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

Dear Mr. DeLesDernier:

This letter is submitted on behalf of the Financial Industry Regulatory Authority, Inc. (“FINRA”)¹ with respect to the proposed rule change amending the rules of New York Stock Exchange, LLC (“NYSE”) establishing maximum fee rates to be charged by NYSE member organizations for forwarding proxy and other materials to beneficial owners (“the Proposal”).² As discussed below, FINRA believes that it is premature for the Commission to approve a proposal to rescind the NYSE processing fee schedule without considering its broader implications, and without determining the best means to regulate these activities, which in our view would be standards – and, if necessary, fee schedules – established directly by the Commission.

In particular, the rule filing would impose new obligations on FINRA without the NYSE having engaged in any coordination or notice with FINRA. FINRA requests that,

¹ FINRA is a not-for-profit self-regulatory organization authorized by federal law to help protect investors and ensure the fair and honest operation of securities markets. Under the oversight of the Securities and Exchange Commission (“Commission” or “SEC”), FINRA regulates the activities of U.S. broker-dealers and performs market regulation pursuant to its own statutory responsibility and under contract for certain exchanges.

² See Securities Exchange Act Release No. 90677 (December 15, 2020), 85 FR 83119 (December 21, 2020) (Notice of Filing of File No. SR-NYSE-2020-96) (“Proposing Release”).

rather than approving this rule filing, the Commission organize a public dialogue on the appropriate regulation of reimbursement of broker-dealer proxy processing expenses. FINRA also petitions the Commission to consider amending Rule 14b-1 under the Securities Exchange Act of 1934 (“Exchange Act”) to prescribe the fees charged for these expenses if the Commission determines such rules are appropriate.

Exchange Act Rule 14b-1

Exchange Act Rule 14b-1, among other things, requires a registered broker-dealer, upon receipt of a proxy, other proxy soliciting material, information statement, and/or annual report to securities holders from the issuer or other soliciting person, to forward such materials to its customers who are beneficial owners of the issuer’s securities no later than five business days after receipt of such materials.³ A broker-dealer is not obligated to forward proxy and other materials to beneficial owners if the issuer or other soliciting person does not provide assurance of reimbursement of the broker-dealer’s “reasonable” expenses, both direct and indirect, incurred in connection with performing its obligations imposed by these requirements.⁴ Rule 14b-1 does not specify what fees are considered “reasonable” in connection with forwarding proxy and other materials to beneficial owners.

SRO Rules Governing the Processing and Forwarding of Proxy and Other Materials

For many decades, the NYSE, as an exchange that both lists securities for issuers and regulates its member broker-dealers, has taken the lead in setting rules governing the processing and forwarding of proxy and other issuer-related materials to beneficial owners of securities that are held in “street name” at a broker-dealer.⁵ Among other things, these rules set maximum rates of reimbursement for expenses incurred in processing and forwarding shareholder materials to beneficial owners of securities

³ See Exchange Act Rule 14b-1(b)(2), 17 CFR 240.14b-1(b)(2). Exchange Act Rule 14b-2 imposes similar obligations on banks, associations and other entities that exercise fiduciary powers. See 17 CFR 240.14b-2(b)(3).

⁴ See Exchange Act Rule 14b-1(c)(2), 17 CFR 240.14b-1(c)(2).

⁵ See NYSE Rules 451 (Processing and Transmission of Proxy Materials) and 465 (Processing and Transmission of Interim Reports and Other Material). A security is held in “street name” if a shareholder, or beneficial owner, holds securities in book-entry form through a securities intermediary, such as a broker-dealer or bank. A beneficial owner does not own the securities directly. Instead, as a customer of the securities intermediary, the beneficial owner has an entitlement to the rights associated with ownership of the securities. See Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982, 42985 (July 22, 2010) (Concept Release on the U.S. Proxy System).

(“NYSE fee schedule”). The NYSE Listing Company Manual also includes the NYSE fee schedule for the information of companies listed on the NYSE.⁶ Other exchanges and self-regulatory organizations (“SROs”), including FINRA, whose members hold securities on behalf of customers in street name also have rules requiring their member organizations to forward proxy materials and other distributions on behalf of companies to street name account holders.⁷ These SROs have largely followed the lead of the NYSE in prescribing rates of reimbursement to satisfy Rule 14b-1’s standard of reasonable compensation.

NYSE Processing Fee Proposal

On December 15, 2020, the Commission published on its website a proposal filed by the NYSE that would amend NYSE Rules 451 and 465 and delete Section 402.10 of the NYSE Listed Company Manual. The Proposal would revise Rule 451 Supplementary Material .90 by eliminating the NYSE fee schedule and replacing it with text stating that, in determining fair and reasonable rates of reimbursement for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with copies of proxy solicitations and the processing of proxy and other material, member organizations must 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 Proposal would amend Rule 465 Supplementary Material .20 by deleting its cross-reference to Rule 451’s fee schedule, and replacing it with text that is essentially the same as amended Rule 451 Supplementary Material .90. The Proposal also would delete Section 402.10 of the NYSE Listed Company Manual, which currently provides the Rule 451 fee schedule.⁸

The NYSE asserts that these proposed rule changes are appropriate on the ground that all NYSE member organizations are members of FINRA, and that all broker-dealers that are not NYSE members but that hold securities in street name are also FINRA members. Additionally, the NYSE notes that “a large percentage” of affected issuers are listed on other exchanges or are not listed on any exchange (such as mutual funds). The NYSE states that “[g]iven the significant evolution of the securities industry during the period in which the NYSE has taken the lead in establishing proxy distribution rates, the

⁶ See NYSE Listing Company Manual, Section 402.10.

⁷ See, e.g., FINRA Rule 2251 (Processing and Forwarding of Proxy and Other Issuer-Related Materials) and The Nasdaq Stock Market, General Regulation 9, Section 6.

⁸ See Exhibit 5 to the Proposing Release, available on www.sec.gov. The Proposal would not alter current rule text in Rule 451 Supplementary Material .90 allowing member organizations to receive reimbursement for actual postage, envelope and communications expenses, but would include this current rule text in amended Rule 465 Supplementary Material .20.

NYSE does not believe that it is best positioned to retain this responsibility going forward.”⁹

FINRA Comments on Proposal

FINRA is concerned that moving forward with the Proposal now, without considering its broader implications, will be needlessly disruptive for issuers, broker-dealers, and many other securities market participants. The NYSE staff did not consult or alert FINRA staff that it intended to file this proposed rule change. The first time FINRA staff became aware of the Proposal was on December 15, 2020, when the Commission published the Proposal on its website. We are not aware of any prior effort by the NYSE staff to communicate its view to FINRA that its proxy distribution fee schedules are unnecessary in light of FINRA rules.

As the NYSE acknowledges in its rule filing, historically the NYSE has taken the lead on proxy distribution fee schedules. As the NYSE has stated previously, “[p]roxy distribution fees have been part of the New York Stock Exchange’s rules for many years, and have been reviewed and changed periodically over that time.”¹⁰ In 2010, the NYSE formed the Proxy Fee Advisory Committee (“PFAC”) to review the existing fee structure and make such recommendations for change as the PFAC believed appropriate. At the behest and under the leadership of the NYSE, the PFAC provided a report and recommendations to the NYSE regarding a new proxy processing and distribution fee schedule in May 2012, which the NYSE incorporated in a February 2013 proposal to amend its fee schedules.¹¹

FINRA has stated its intention to amend its proxy distribution rule fee schedule to conform with the NYSE’s proxy rate reimbursement provisions in the interest of ensuring regulatory clarity and harmonization.¹² The Proposal therefore does not take into account

⁹ See Proposing Release, 85 FR 83119.

¹⁰ See Securities Exchange Act Release No. 68936 (February 15, 2013), 78 FR 12381 (February 22, 2013) (Notice of Filing of File No. SR-NYSE-2013-07) (“NYSE Proxy Fee Proposal Release”).

¹¹ See NYSE Proxy Fee Proposal Release; see also Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530 (October 24, 2013) (Order Approving File No. SR-NYSE-2013-07).

¹² FINRA expressly stated this intention in rule filings that amended the FINRA proxy reimbursement provisions to conform with changes adopted by the NYSE in 2013. See Securities Exchange Act Release No. 71272 (January 9, 2014), 79 FR 2741 (January 15, 2014) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2013-056); see also Securities Exchange Act Release No. 47392 (February 21, 2003), 68 FR 9730 (February 28, 2003) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2003-019).

the approach that FINRA or other SROs may take in this area, including the possibility of again following the NYSE's lead.

In light of the NYSE's historical experience with these rules derived in part from its listing relationship with many issuers, which FINRA lacks, FINRA will be strongly inclined, again in the interest of regulatory clarity and harmonization, to revise its rule in accord with the NYSE's rule amendments, as may other SROs. Therefore, before acting on the NYSE's proposed rule changes, the SEC should foster a broader discussion of the appropriate standards in this area and the appropriate regulatory agency. Otherwise, the SEC may need to address this issue in serial fashion as it receives successive SRO filings.

FINRA believes that the Commission is in the best position to determine what standards should govern broker-dealer fees for forwarding and processing proxy and other materials, and whether those fees should be subject to a maximum fee schedule similar to the fee provisions in NYSE Rule 451. The SEC's own rule sets the stage for this determination by requiring forwarding of issuer materials, and sets the base requirement of reimbursement of "reasonable expenses."

If the SEC believes specific fee schedules are appropriate, the SEC should prescribe those fees. The SEC has plenary jurisdiction over securities industry participants that have an interest in these matters, including not only broker-dealers, but also issuers that list their securities on national securities exchanges, and mutual funds and other issuers that do not. FINRA believes that only through a comprehensive approach, led by the Commission, can the securities industry resolve many of the disagreements and concerns that industry participants have with the current regulatory structure for governing fees imposed for processing and forwarding proxies and other shareholder materials.¹³

By contrast, for example, FINRA rules only apply to registered broker-dealers that are FINRA members. They do not apply to issuers or other registrants that list their securities on the NYSE or other national securities exchanges. Accordingly, if the Commission determines to approve the Proposal, FINRA is concerned that it would introduce and exacerbate the disconnect between the rules and policies that apply to issuers within the framework of NYSE rules, and the fees charged by FINRA members within the framework of FINRA rules.

Because of these concerns, FINRA respectfully suggests that the Commission decline to advance the Proposal until these larger issues regarding the appropriate structure to regulate fees for forwarding and processing proxy and other materials have

¹³ In the past SEC, NYSE and FINRA staff have discussed hosting an industry roundtable on these fees, and FINRA believes it would be productive to restart those conversations to plan a roundtable (virtual or otherwise) in the future to discuss these issues.

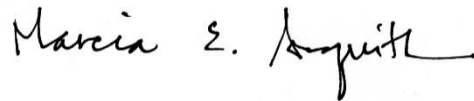
been properly presented, discussed, and considered.¹⁴ Should the Commission determine to approve the Proposal, FINRA will give strong consideration to rescinding its fee schedule for forwarding and processing shareholder materials as well, allowing the Commission to move forward on these matters unfettered by current SRO rules.

Conclusion

FINRA appreciates the opportunity to comment on the NYSE's proposal to rescind its existing rules governing the fees that broker-dealers may impose to process and forward proxies and other materials to beneficial owners of securities held in street name. As discussed above, FINRA remains concerned that the Proposal 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. FINRA requests 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. 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.

Should you have any questions or wish further to discuss FINRA's views, please contact Robert Colby, Executive Vice President & Chief Legal Officer, FINRA, at (202) 728-8484 (Robert.Colby@finra.org).

Sincerely,



Marcia Asquith
Executive Vice President, Board & External Relations
FINRA

¹⁴ FINRA understands that the mutual fund industry shares the view that the Commission is in the best position to determine what rules should apply to forwarding and processing shareholder materials. See Letter from Susan Olson, General Counsel, Investment Company Institute (ICI), to Brent J. Fields, Secretary, SEC, dated October 31, 2018 (comments of ICI in response to the SEC's Request for Comments on the Processing Fees Charged by Intermediaries for Distributing Materials Other Than Proxy Materials to Fund Investors, SEC Release No. 33-10505 (June 5, 2018)), at page 31, available on www.sec.gov.