arguments concerning the foregoing, including whether the proposed rule change 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–2013–70 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–70. 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 Web site (*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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–70 and should be submitted on or before November 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24850 Filed 10–23–13; 8:45 am]

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[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70720; File No. SR–NYSE–2013–07]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval to Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Which Provide a Schedule for the Reimbursement of Expenses by Issuers to NYSE Member Organizations for the Processing of Proxy Materials and Other Issuer Communications Provided to Investors Holding Securities in Street Name, and To Establish a Five-Year Fee for the Development of an Enhanced Brokers Internet Platform

October 18, 2013.

I. Introduction

On February 1, 2013, 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 the fees set forth in NYSE Rules 451 and 465, and the related provisions of Section 402.10 of the NYSE Listed Company Manual, for the reimbursement of expenses by issuers to NYSE member organizations for the processing of proxy materials and other issuer communications provided to investors holding securities in street name, and to establish a five-year fee for the development of an enhanced brokers internet platform. The proposed rule change was published for comment in the **Federal Register** on February 22, 2013.[3] The Commission initially received twenty-four comment letters on the proposed rule change.[4] On April 3, 2013, the Commission extended the time period for Commission action to May 23, 2013.[5] The Commission thereafter received four more comment letters.[6]

On May 17, 2013, NYSE submitted a response to the comment letters.[7]

On May 23, 2013, the Commission initiated proceedings to determine whether to disapprove the proposed rule change.[8] In response to the Order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68936 (February 15, 2013), 78 FR 12381 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Charles V. Rossi, President, The Securities Transfer Association, dated February 20, 2013 (''STA Letter'') and March 4, 2013 (''STA Letter II''); Karen V. Danielson, President, Shareholder Services Association, dated March 4, 2013 (''SSA Letter''); Jeanne M. Shafer, dated March 6, 2013 (''Schafer Letter''); David W. Lovatt, dated March 6, 2013 (''Lovatt Letter''); Stephen Norman, Chair, The Independent Steering Committee of Broadridge, dated March 7, 2013 (''Steering Committee Letter''); Jeffrey D. Morgan, President & CEO, National Investor Relations Institute, dated March 7, 2013 (''NIRI Letter''); Kenneth Bertsch, President and CEO, Society of Corporate Secretaries & Governance Professionals, dated March 7, 2013 (''SCSGP Letter''); Niels Holch, Executive Director, Shareholder Communications Coalition, dated March 12, 2013 (''SCC Letter''); Geoffrey M. Dugan, General Counsel, iStar Financial Inc., dated March 13, 2013 (''iStar Letter''); Paul E. Martin, Chief Financial Officer, Perficient, Inc., dated March 13, 2013 (''Perficient Letter''); John Harrington, President, Harrington Investments, Inc., dated March 14, 2013 (''Harrington Letter''); James McRitchie, Shareowner, Corporate Governance, dated March 14, 2013 (''CG Letter''); Clare A. Kretzman, General Counsel, Gartner, Inc., dated March 15, 2013 (''Gartner Letter''); Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, dated March 15, 2013 (''CCMC Letter''); Dennis E. Nixon, President, International Bancshares Corporation, dated March 15, 2013 (''IBC Letter''); Argus I. Cunningham, Chief Executive Officer, Sharegate Inc., dated March 15, 2013 (''Sharegate Letter''); Laura Berry, Executive Director, Interfaith Center on Corporate Responsibility, dated March 15, 2013 (''ICC Letter''); Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated March 15, 2013 (''ICI Letter''); Charles V. Callan, Senior Vice President—Regulatory Affairs, Broadridge Financial Solutions, Inc., dated March 15, 2013 (''Broadridge Letter''); Brad Philips, Treasurer, Darling International Inc., dated March 15, 2013 (''Darling Letter''); John Endean, President, American Business Conference, dated March 18, 2013 (''ABC Letter''); Tom Price, Managing Director, The Securities Industry and Financial Markets Association, dated March 18, 2013 (''SIFMA Letter''); and Michael S. O'Brien, Vice President—Corporate Governance Officer, BNY Mellon, dated March 28, 2013 (''BNY Letter'').

[5] *See* Securities Exchange Act Release No. 69286 (April 3, 2013), 78 FR 21481 (April 10, 2013).

[6] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Jeff Mahoney, General Counsel, Council of Institutional Investors, dated April 5, 2013 (''CII Letter''); Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated May 16, 2013 (''AST Letter''); and John M. Payne, Chief Executive Officer, Zumbox, Inc., dated May 20, 2013 (''Zumbox Letter''); *see also* letter to the Honorable Mary Jo White, Chair, Commission from Dieter Waizenegger, Executive Director, CtW Investment Group, dated May 17, 2013 (''CtW Letter'').

[7] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated May 17, 2013 (''NYSE Letter'').

[8] *See* Securities Exchange Act Release No. 69622 (May 23, 2013), 78 FR 32510 (May 30, 2013) (''Order Instituting Proceedings''). In the Order Instituting Proceedings, the Commission, among other things, expressed its belief that questions remained as to whether the Exchange's proposal was consistent with the requirements of: (1) Section 6(b)(4) of the Act, including whether it provides for the equitable allocation of reasonable fees among its members, issuers and other persons using its facilities; (2) Section 6(b)(5) of the Act, including whether it is not designed to permit unfair discrimination, or would promote just and equitable principles of trade, or protect investors and the public interest; and (3) Section 6(b)(8) of the Act, including whether it would not impose any burden on competition that is not necessary or

Instituting Proceedings, the Commission received fourteen additional comment letters on the proposal.[9] On July 9, 2013, NYSE responded to the Order Instituting Proceedings.[10] On August 15, 2013, the Commission extended the time period for Commission action to October 20, 2013.[11] On September 9, 2013, NYSE submitted an additional letter in further support of its proposal.[12] On October 1, 2013, NYSE submitted an additional letter in response to FOLIOfn Letter and FOLIOfn Letter II.[13] This order approves the proposed rule change.

appropriate in furtherance of the purposes of the Act.

[9] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Katie J. Sevcik, Legal and Regulatory Committee Chair, Shareholder Services Association, dated June 12, 2013 (''SSA Letter II''); Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated June 18, 2013 (''AST Letter II''); Loren Hanson, Assistant Secretary/Assistant Treasurer, Otter Tail Corporation, dated June 17, 2013 (''OTC Letter''); Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated June 18, 2013 (''FOLIOfn Letter''); Harold Westervelt, President, INVeSHARE, dated June 18, 2013 (''INVeSHARE Letter''); Dieter Waizenegger, Executive Director, Investment Group, dated June 20, 2013 (''CtW Letter II''); Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated June 20, 2013 (''ICI Letter II''); Lisa Lindsley, Director, Capital Strategies Program, The American Federation of State, County and Municipal Employees, dated July 3, 2013 (''AFSCME Letter''); Brandon Rees, Acting Director, American Federation of Labor and Congress of Industrial Organizations Office of Investment, dated July 5, 2013 (''AFL–CIO Letter''); Charles V. Rossi, President, The Securities Transfer Association, Inc., dated July 5, 2013 (''STA Letter III''); James J. Angel, dated July 5, 2013 (''Angel Letter''); and Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated July 12, 2013 (''FOLIOfn Letter II''); *see also* letters to the Honorable Mary Jo White, Chair, Commission from Ann Yerger, Executive Director, Council of Institutional Investors, dated May 17, 2013 (''CII Letter II''); and Charles E. Schumer, United States Senator, dated May 23, 2013 (''Schumer Letter'').

[10] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated July 9, 2013 (''NYSE Letter II'').

[11] *See* Securities Exchange Act Release No. 70217 (August 15, 2013), 78 FR 51780 (August 21, 2013).

[12] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated September 9, 2013 (''NYSE Letter III''). NYSE Letter III provided additional information from Broadridge about the costs involved in providing proxy and report distribution services (the ''Broadridge Material'').

[13] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated October 1, 2013 (''NYSE Letter IV''). In addition, on October 15, 2013, the Chairman of NYSE's Proxy Fee Advisory Committee submitted a letter in support of NYSE's proposal. *See* letter to Elizabeth M. Murphy, Secretary, Commission from Paul F. Washington, Chairman, NYSE Proxy Fee Advisory Committee, dated October 15, 2013 (''Washington Letter''). Furthermore, on October 18, 2013, the Society of Corporate Secretaries & Governance Professionals submitted a letter in support of the statements made in NYSE Letter IV regarding (i) the elimination of the preference management fee for managed accounts with fewer than five shares and (ii) EBIPs. *See* letter to Elizabeth M. Murphy, Secretary, Commission from Darla C. Stuckey, Senior Vice President, Policy & Advocacy, Society of Corporate Secretaries & Governance Professionals, dated October 18, 2013.

II. Background

NYSE member organizations that hold securities for beneficial owners in street name solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of NYSE issuers.[14] For this service, issuers reimburse NYSE 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,[15] 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. Under these rules, companies must pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners. The Commission's rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for ''reasonable expenses'' incurred.[16]

Currently, the Supplementary Material to NYSE Rules 451 and 465 establish the fee structure for which a NYSE member organization may be reimbursed for expenses incurred in connection with distributing proxy materials to beneficial shareholders.[17] This fee structure is also replicated in Section 402.10 of the NYSE Listed Company Manual.[18] The NYSE fee structure represents the maximum approved rates that an issuer can be billed for proxy distribution services absent prior notification to and consent of the issuer.[19] NYSE member firms may seek reimbursement for less than the approved rates; [20] however, it is the Commission's understanding that in practice most issuers are billed at the maximum approved rates.

The vast majority of nominees that distribute issuer proxy material to beneficial owners are entitled to reimbursement at the NYSE fee schedule rates because most of the brokerage firms are NYSE members or members of other exchanges that have rules similar to the NYSE's rules.[21] Over time, however, NYSE member organizations increasingly have outsourced their proxy delivery obligations to third-party proxy service providers, which are generally called ''intermediaries,'' rather than handling proxy processing internally.[22] At the present time, a single intermediary, Broadridge Financial Solutions, Inc. (''Broadridge''), handles almost all proxy processing and distribution to beneficial owners holding shares in street name in the United States.[23] In general, Broadridge enters into a contract with the NYSE member firm and acts as a billing and collection agent for that member firm.[24] As a result, it is Broadridge that, on behalf of its member firm clients, most frequently bills and collects proxy distribution fees from issuers based on the NYSE fee schedule.

The NYSE's current proxy fee structure is the product of a multi-year, multi-task force effort that began in 1995 and culminated in 2002 with the Commission's approval of an NYSE program that significantly revised the then-current NYSE reimbursement guidelines.[25] In the 2002 Approval Order, the Commission stated that, as long as the NYSE's proxy fee structure remains in place, the Commission expected the NYSE to periodically

[14] 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 14, 2010), 75 FR 42982 (July 22, 2010) (Concept Release on the U.S. Proxy System) (''Proxy Concept Release'').

[15] 17 CFR 240.14b–1; 17 CFR 240.14b–2.

[16] In adopting the direct shareholder communications rules in the early 1980s, the Commission left the determination of reasonable costs to the self-regulatory organizations (''SROs'') because they were deemed to be in the best position to make fair evaluations and allocations of costs associated with these rules. *See* Securities Exchange Act Release No. 20021 (July 28, 1983), 48 FR 35082 (August 3, 1983); *see also* Securities Exchange Act Release No. 45644 (March 25, 2002), 67 FR 15440, 15440 n.8 (April 1, 2002) (order approving NYSE program revising reimbursement rates) (''2002 Approval Order'').

[17] *See* Rules 451 and 465.

[18] *See* Section 402.10, NYSE Listed Company Manual.

[19] *See* Rules 451.93 and 465.23.

[20] *Id.*

[21] *See* Proxy Concept Release, 75 FR 42995 n.110.

[22] *See* 2002 Approval Order, 67 FR 15540. According to the NYSE, this shift was attributable to the fact that NYSE member firms believed that proxy distribution was not a core broker-dealer business and that capital could be better used elsewhere. *Id.*

[23] *See* Proxy Concept Release, 75 FR 42988, n. 57, and at 42996, n.129; *see also* Notice, 78 FR 12382.

[24] *See* Proxy Concept Release, 75 FR 42997.

[25] *See* 2002 Approval Order; *see also* Notice, 78 FR 12383.

review the fees to ensure that they are related to the reasonable proxy expenses of the NYSE member firms, and to propose changes as appropriate.[26] Similarly, in the Proxy Concept Release, the Commission stated that ''it appears to be an appropriate time for SROs to review their existing fee schedules to determine whether they continue to be reasonably related to the actual costs of proxy solicitation.'' [27] As is also noted in the Proxy Concept Release, in 2006, a working group formed to review the NYSE proxy fee structure (''Proxy Working Group'') recommended that the NYSE engage an independent third party to analyze and make recommendations regarding the fee structure and to study the performance of the largest proxy service provider (*i.e.,* Broadridge) and the business process by which the distribution of proxies occurs.[28] The Proxy Concept Release further noted that, as of the date of the release, such review had not been done.[29]

The proposed rule change represents the most recent effort to revise the NYSE proxy fee structure. In September 2010, the Exchange formed a Proxy Fee Advisory Committee (''PFAC''), composed of representatives of issuers, broker-dealers and investors, to review the existing NYSE fee structure and make recommendations for change as the PFAC deemed appropriate.[30] The proposed rule change is an outgrowth of the PFAC's recommendations.[31]

III. Description of the Proposal

In the proposal, the Exchange has proposed to amend its schedule for the reimbursement of proxy fees by amending the Supplementary Material to NYSE Rules 451 and 465, and Section 402.10 of the NYSE Listed Company Manual.[32] The Exchange represents that the proposed changes reduce some fees and increase others.[33] Broadridge has estimated that, under the proposed changes, overall fees paid by issuers would decrease by approximately 4%.[34]

Currently, the reimbursement rates set by the Exchange for the distribution of an issuer's proxy materials include: [35]

- A base mailing or basic processing fee of $0.40 for each beneficial owner account of an issuer that is entitled to receive proxy materials when there is not an opposing proxy. When there is an opposing proxy, the base mailing or processing unit fee is $1.00 for each beneficial owner account of the issuer. While NYSE Rule 451.90(1) currently refers to this fee as being for each set of proxy material when mailed as a unit, this fee, in practice, applies regardless of whether the materials have been mailed or the mailing has been suppressed or eliminated.[36]
- As supplemental fees for intermediaries or proxy service providers that coordinate proxy distributions for multiple nominees, a fee of $20 per nominee plus an additional fee of $0.05 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.10 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[37]
- An incentive fee of $0.25 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.50 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts. This fee, which is in addition to the basic processing fee and supplemental intermediary fees, applies when the need to mail materials in paper format has been eliminated, for instance, by eliminating duplicative mailings to multiple accounts at the same address [38] or distributing some or all material electronically.[39]

NYSE's current fee schedule also sets forth fees that issuers must pay to brokers and their intermediaries for obtaining a list of the non-objecting beneficial owners holding the issuer's securities, commonly referred to as a ''NOBO list.'' [40] Currently, these fees are $0.065 per name of non-objecting beneficial owner provided to a requesting issuer and, where the non-objecting beneficial ownership information is furnished to the issuer by an agent designated by the member organization instead of directly by the member organization, issuers are expected to pay the reasonable expenses of the agent in providing such information.[41]

As an initial, technical matter, the Exchange has proposed to eliminate some of the duplication and obsolete language in the NYSE rules in which the fee schedule is set forth.[42] The same proxy fees are currently presented multiple times in Rule 451, Rule 465 and Section 402.10 of the Listed Company Manual.[43] To clarify matters, proposed Rules 465.20–465.25 would cross-reference proposed Rules 451.90–451.95, and proposed Section 402.10 of the Listed Company Manual would reproduce the text of proposed Rules 451.90–451.95.[44] Additionally, the proposed rule change would eliminate obsolete references to the effective dates of past changes to the fee structure as well as to the amount of a surcharge, set forth in Rule 451.91, that was temporarily applied in the mid-1980s.[45] Further, the Exchange has proposed to eliminate several references to ''mailings'' in the proposed rules, given that the processing fees apply even where physical mailings have been suppressed.[46] Lastly, the Exchange has proposed to eliminate several minor minimum fees of $5 or less as irrelevant

[26] *See* 2002 Approval Order, 67 FR 15444.

[27] *See* Proxy Concept Release, 75 FR 42997; *see also* Notice, 78 FR 12382.

[28] *See* Proxy Concept Release, 75 FR 42996.

[29] *Id.*

[30] *See* Notice, 78 FR 12382.

[31] For a more detailed description of the background and history of the proxy distribution industry, proxy fees, and events leading to the instant proposal, *see* the 2002 Approval Order, Proxy Concept Release, and Notice.

[32] The Exchange has proposed to amend Rule 451 and to delete the text of Rule 465, which duplicates Rule 451, and replace it with a general cross reference to proposed Rule 451. Proposed Section 402.10 of the NYSE Listed Company Manual would reproduce proposed Rule 451 as amended. *See* notes 43 and 44 and accompanying text, *infra.*

[33] *See* Notice, 78 FR 12384.

[34] *Id.*

[35] *See* NYSE Rules 451.90–451.95, 465.20–465.25, and Section 402.10 of the NYSE Listed Company Manual; *see also* Proxy Concept Release, 75 FR 42995–96. For an example of the application of the current reimbursement rates, *see* Proxy Concept Release, 75 FR 42996 n.120.

[36] *See* NYSE Rules 451.90, 465.20, and Section 402.10(A) of the NYSE Listed Company Manual; *see also* Proxy Concept Release, 75 FR 42996.

[37] *Id.*

[38] *Id.* The elimination of duplicative mailings to multiple accounts at the same address is referred to as ''householding.'' *See* Proxy Concept Release, 75 FR 42983 n.5; *see also* NYSE Rule 451.95. Specifically, the incentive fee may be collected for such ''householding'' when NYSE member firms ''eliminate multiple transmissions of reports, statements or other materials to beneficial owners having the same address, provided they comply with applicable SEC rules with respect thereto. . . .'' NYSE Rule 451.95.

[39] Proxy materials can be provided electronically to shareholders that have affirmatively consented to electronic delivery. *See* Proxy Concept Release, 75 FR 42986 n.32. Such affirmative consent also is required before the notice of internet availability of proxy materials—a component of the notice and access method of proxy distribution, which is an additional alternative to paper mailing of proxy materials, as discussed below—can be sent to shareholders electronically. *Id.* Without such consent, the notice must be mailed to shareholders in paper format. *Id.* If the notice is sent in paper format, the incentive fee would not be applied.

[40] *See, e.g.,* NYSE Rule 451.92.

[41] *Id.*

[42] *See* Notice, 78 FR 12390.

[43] *Id.*

[44] *Id.* Where the proposed Rules are cited below, for the sake of simplicity, such citations will include only Rules 451.90–451.95 and not the corresponding provisions of proposed Section 402.10 of the NYSE Listed Company Manual.

[45] *See* Notice, 78 FR 12390.

[46] *Id.*

to the overall fees imposed or collected.[47]

Substantively, the Exchange has proposed to revise certain aspects of the existing fee schedule and add new fees.[48] These revisions, described in turn below, include: (a) Amending the base mailing/basic processing fees; (b) amending the supplemental fees for intermediaries that coordinate proxy mailings for multiple nominees; (c) amending the incentive/preference management fees, including the manner in which such fees are applied to managed accounts; (d) adding fees for proxy materials distributed by what is known as the notice and access method; (e) adding fees for enhanced brokers' internet platforms; and (f) amending the fees for providing beneficial ownership information.[49] In addition, notwithstanding any other provision of proposed Rule 451.90, the Exchange has proposed that no fee be incurred by an issuer for any nominee account that contains only a fractional share—*i.e.* less than one share or unit—of the issuer's securities or for any nominee account that is a managed account and contains five or fewer shares or units of the issuer's securities.[50]

A. Base Mailing/Basic Processing Fees

As set forth above, there is currently a fee of $0.40 for each beneficial owner account of an issuer that is entitled to receive proxy materials when there is not an opposing proxy.[51] This fee is commonly referred to as the base mailing or basic processing fee.[52] The Exchange has proposed to replace this flat $0.40 fee with a tiered fee structure for each set of proxy material processed as a unit, which the Exchange has proposed to call a ''Processing Unit Fee.''[53] The tiers would be based on the number of nominee accounts through which an issuer's securities are beneficially owned:

- $0.50 for each account up to 10,000 accounts;
- $0.47 for each account above 10,000 accounts, up to 100,000 accounts;
- $0.39 for each account above 100,000 accounts, up to 300,000 accounts;
- $0.34 for each account above 300,000 accounts, up to 500,000 accounts;
- $0.32 for each account above 500,000 accounts.[54]

Under this tiered schedule, every issuer would pay the first tier rate—$0.50—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[55]

In addition, the Exchange has proposed to clarify that references in proposed Rule 451 to the ''number of accounts'' have a different meaning for a nominee that distributes proxy materials without the services of an intermediary as compared to a nominee that is served by an intermediary. For a nominee that distributes proxy materials without the services of an intermediary, references to number of accounts in proposed Rule 451 mean the number of accounts holding securities of the issuer at the nominee.[56] For a nominee that is served by an intermediary, such references mean the aggregate number of nominee accounts with beneficial ownership in the issuer served by the intermediary.[57] As the Exchange has noted in the proposal, this means that, for a particular issuer, the fee charged by an intermediary or a nominee that self-distributes (and therefore does not use an intermediary) within the different tiers will depend on the number of accounts holding shares in that issuer that are served by the intermediary or held by the particular nominee.[58] Accordingly, for an issuer with a large number of beneficial accounts, intermediaries or self-distributing nominees serving a small portion of the issuer's accounts would bill the issuer at the higher tier-one rates whereas an intermediary serving a large number of the issuer's accounts would bill the issuer at rates that reflect the progressive decrease in rates across the tiers as the number of accounts served increases.[59]

The Exchange has also proposed to specify that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the proposed Processing Unit Fee shall be $1.00 per account, in lieu of the tiered fee schedule set forth above.[60] This would, therefore, be no departure from the current $1.00 fee that is assessed when an opposition proxy has been furnished.

B. Supplemental Intermediary Fees

As stated above, the Exchange's fee schedule currently provides for supplemental fees for intermediaries or proxy service providers that coordinate proxy distributions for multiple nominees of $20 per nominee, plus an additional fee of $0.05 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.10 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[61] The Exchange has proposed to replace the $20 per-nominee fee with a $22 fee for each nominee served by the intermediary that has at least one account beneficially owning shares in the issuer.[62] The Exchange also has proposed to replace the $0.05 and $0.10 fees, which are determined based on whether or not the issuer's securities are held in at least 200,000 beneficial owner accounts, with a tiered fee structure called the ''Intermediary Unit Fee,'' which would be based on the number of nominee accounts through which the issuer's securities are beneficially owned:

- $0.14 for each account up to 10,000 accounts;
- $0.13 for each account above 10,000 accounts, up to 100,000 accounts;

[47] *Id.* Proposed Rule 451.90(3), which would set forth the fee for interim reports and other material, is an example of the proposed technical amendments. As proposed, the pre-existing $0.15 fee in current Rule 451.90 would not change, but the $2.00 minimum for all sets mailed would be eliminated, and the language of the rule would be amended to eliminate the reference to the effective date of the pre-existing rule and to replace the word ''mailed'' with ''processed.'' *See* proposed Rule 451.90(3).

[48] The Exchange has also proposed to codify definitions of the terms ''nominee'' and ''intermediary.'' Under proposed Rule 451.90(1)(a), the term ''nominee'' would be defined to mean a broker or bank subject to SEC Rule 14b–1 or 14b–2, respectively, and the term ''intermediary'' would be defined to mean a proxy service provider that coordinates the distribution of proxy or other materials for multiple nominees.

[49] *See* proposed Rule 451.90.

[50] *See* proposed Rule 451.90(6).

[51] *See* Rule 451.90; *see also* Proxy Concept Release, 75 FR 42996.

[52] *See* Notice, 78 FR 12385; *see also* Proxy Concept Release, 75 FR 42996.

[53] *See* proposed Rule 451.90(1)(b)(i). The Exchange has not proposed to replace the current $0.40 flat fee for proxy follow-up materials with a tiered structure. The Exchange has proposed to keep a flat Processing Unit Fee of $0.40 per account for each set of follow-up material, but for those relating to an issuer's annual meeting for the election of directors, the Exchange has proposed to reduce the fee by half, to $0.20 per account. *See* proposed Rule 451.90(2). The Exchange notes that issuers have a choice whether or not to use reminder mailings, and that the reduced fee may induce more issuers to use reminder mailings, which could increase investor participation, particularly among retail investors. *See* Notice, 78 FR 12390.

[54] *See* proposed Rule 451.90(1)(b)(i).

[55] *Id.*

[56] *Id.*

[57] *Id.* While the definition of the term nominee in NYSE's proposal includes both brokers and banks for purposes of determining which tiers apply, the Commission notes that the scope of the rule being approved here today applies to reasonable rates of reimbursement of NYSE member firms. *See also* note 48, *supra.*

[58] *See* Notice, 78 FR 12385 n.20.

[59] *Id.*

[60] *See* proposed Rule 451.90(1)(b)(ii).

[61] *See* Rule 451.90; *see also* Proxy Concept Release, 75 FR 42996.

[62] *See* proposed Rule 451.90(1)(c)(i).

- $0.11 for each account above 100,000 accounts, up to 300,000 accounts;
- $0.09 for each account above 300,000 accounts, up to 500,000 accounts;
- $0.07 for each account above 500,000 accounts.[63]

Under this tiered schedule, every issuer would pay the first tier rate—$0.14—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[64]

Additionally, the Exchange has proposed the following tiered fee schedule for special meetings that would apply in lieu of the schedule set forth immediately above:

- $0.19 for each account up to 10,000 accounts;
- $0.18 for each account above 10,000 accounts, up to 100,000 accounts;
- $0.16 for each account above 100,000 accounts, up to 300,000 accounts;
- $0.14 for each account above 300,000 accounts, up to 500,000 accounts;
- $0.12 for each account above 500,000 accounts.[65]

Under this tiered schedule, every issuer would pay the first tier rate—$0.19—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[66] The Exchange has proposed that, for purposes of proposed Rule 451.90(1)(c)(iii), a special meeting is a meeting other than the issuer's meeting for the election of directors.[67]

The Exchange has also proposed that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the proposed Intermediary Unit Fee shall be $0.25 per account, with a minimum fee of $5,000.00 per soliciting entity, in lieu of the tiered fee schedules set forth in proposed Rules 451.90(1)(c)(ii) and (iii).[68] Where there are separate solicitations by management and an opponent, the Exchange has proposed that the opponent would be separately billed for the costs of its solicitation.[69]

The Exchange estimates that the proposed tiered fee structures discussed above—for the Intermediary Unit Fee as well as the proposed Processing Unit Fee—entail fee increases that are estimated to add approximately $9–10 million to overall proxy distribution fees.[70] The Exchange states that the PFAC took note of the fact that since the fees were last revised in 2002, there has been an effective decline in the fees of approximately 20% due to the impact of inflation.[71] The Exchange also states that the PFAC believed that economies of scale exist when handling distributions for more widely held issuers, which is why the per-account fees decrease as the number of accounts increases.[72] Further, the Exchange believes that its proposed tiered structures would approximate the sliding impact of such economies of scale better than the current processing and intermediary fee structures.[73]

C. Incentive/Preference Management Fees

As stated above, the Exchange's fee schedule currently provides for an incentive fee of $0.25 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.50 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[74] The Exchange has proposed to refer to this fee as the ''Preference Management Fee'' and to amend it to be: (a) $0.32 for each set of proxy material described in proposed Rule 451.90(1)(b) (proxy statement, form of proxy and annual report when processed as a unit), unless the account is a Managed Account (as defined in proposed Rule 451.90(6), discussed below), in which case the fee would be $0.16;[75] and (b) $0.10 for each set of material described in proposed Rule 451.90(2) (proxy follow-up material) or proposed Rule 451.90(3) (interim reports and other material).[76] The Preference Management Fee would apply to each beneficial owner account for which the nominee has eliminated the need to send materials in paper format through the mails (or by courier service), and would be in addition to, and not in lieu of, the other proposed fees.[77]

The Preference Management Fee would apply not only in the year when paper delivery is first eliminated, but also in each year thereafter.[78] The Exchange represents that the PFAC was persuaded that there was significant processing work involved in keeping track of the shareholders' election, especially given that the shareholder is entitled to change that election from time to time.[79] According to the Exchange, although few shareholders do in fact change their election, data processing has to look at each account position relative to each shareholder meeting or proxy distribution event to determine whether paper mailing has been eliminated.[80]

1. Managed Accounts

For purposes of proposed Rule 451.90, the Exchange has proposed to define the term ''Managed Account'' as:

[A]n account at a nominee which is invested in a portfolio of securities selected by a professional advisor, and for which the account holder is charged a separate asset-based fee for a range of services which may include ongoing advice, custody and execution services. The advisor can be either employed by or affiliated with the nominee, or a separate investment advisor contracted for the purpose of selecting investment portfolios for the managed account. Requiring that investments or changes to the account be approved by the client would not preclude an account from being a ''managed account'' for this purpose, nor would the fact that commissions or transaction-based charges are imposed in addition to the asset-based fee.[81]

As noted above, the Exchange has proposed that the Preference Management Fee applied to Managed Accounts be half that applied to non-managed accounts.[82] In the proposal, the Exchange notes that, with Managed Accounts, the investor has elected to delegate the voting of its shares to a broker or investment manager who chooses to manage this process

[63] *See* proposed Rule 451.90(1)(c)(ii).

[64] *Id.*

[65] *See* proposed Rule 451.90(1)(c)(iii).

[66] *Id.*

[67] *Id.*

[68] *See* proposed Rule 451.90(1)(b)(iv).

[69] *Id.*

[70] *See* Notice, 78 FR 12385.

[71] *Id.* at 12384.

[72] *Id.* at 12385.

[73] *Id.*

[74] *See* Rule 451.90.

[75] *See* proposed Rule 451.90(4)(a). The $0.16 Preference Management Fee for Managed Accounts would apply only to Managed Accounts holding more than five shares or units of an issuer's securities, as the Exchange has proposed that there be no proxy processing fees charged to an issuer for Managed Accounts holding five or fewer shares or units of the issuer's securities. *See* note 50 and accompanying text, *supra,* and discussion of Managed Accounts, *infra.*

[76] *See* proposed Rule 451.90(4)(b); *see also* notes 47 and 53, *supra,* which discuss proposed Rules 451.90(2) and 451.90(3).

[77] *See* proposed Rule 451.90(4). The need for paper mailings can be eliminated through householding and affirmative consent to electronic delivery. *See* notes 38 and 39, *supra.*

[78] *See* Notice, 78 FR 12386.

[79] *Id.*

[80] *Id.*

[81] *See* Proposed Rule 451.90(6); *see also* Notice, 78 FR 12388.

[82] *See* Proposed Rule 451.90(4)(a). The Exchange represents that its proposal that the Preference Management Fee applied to Managed Accounts be half that applied to non-managed accounts would result in an estimated $15 million reduction in fees. *See* Notice, 78 FR 12385.

electronically rather than by receiving multiple paper copies of proxy statements and voting instructions.[83] According to the Exchange, however, tracking the beneficial owner's voting and distribution election is as necessary with Managed Accounts as it is with any other proxy distribution election eliminating the need for paper mailing, such as consent to e-delivery.[84] But the Exchange states that the PFAC concluded that making some distinctions between Managed Accounts and non-managed accounts for fee purposes was appropriate.[85] Among other things, the Exchange states that the popularity of Managed Accounts demonstrates that they offer advantages to investors and brokerage firms.[86] The Exchange states that issuers also reap benefits from inclusion in Managed Account portfolios, including the added investment in the company's stock and a higher rate of voting due to the fact that almost all Managed Account investors delegate voting to the investment manager.[87] Since both issuers and brokers benefit from Managed Accounts, the Exchange represents that the PFAC determined that issuers and brokers should share the cost of tracking the voting and distribution elections of beneficial owners of the stock positions in Managed Accounts, and therefore recommended that the Exchange propose a Preference Management Fee for Managed Accounts at a rate that is half that for other accounts.[88]

Additionally, in recognition of what the Exchange notes is a proliferation of Managed Accounts containing a very small number of an issuer's shares, the Exchange, as noted above, has proposed not to impose any proxy processing fees, including the Preference Management Fee, on an issuer for a Managed Account holding five or fewer shares or units of the issuer's securities.[89] The Exchange states that in certain situations in which Managed Accounts hold very small numbers of shares of an issuer, the benefits of increased stock ownership and increased voting participation were practically nonexistent for the issuer, while the added expense on a relative basis was extraordinary.[90] According to the Exchange, because one of the PFAC's goals was to avoid severe impacts on proxy distribution in the United States, the PFAC drew the line at five shares based on certain information supplied by Broadridge, including information from the 2011 proxy season depicting what the financial impact on proxy revenue would have been of setting the fee proscription for Managed Accounts at different levels.[91] According to the Exchange, setting the proscription at five shares or less in the 2011 proxy season would have created an overall decrease in proxy revenue of approximately $4.2 million.[92] The Exchange states that the PFAC determined that five shares or less was the appropriate level to draw the line and that the PFAC ''was comfortable that, given the relative benefit/burden on issuers and brokerage firms, it is not reasonable to make issuers reimburse the cost of proxy distribution to managed accounts holding five shares or less.'' [93]

Lastly, the Exchange states that no fee distinction would be based on whether or not a Managed Account is referred to as a ''wrap account.'' [94] As described by the Exchange, a wrap account is a managed account product with a relatively low minimum investment that tends to have many very small, even fractional, share positions, which led Broadridge to process such wrap accounts without any charge—either for basic processing or incentive fees.[95] Broadridge relied on its client firms to specify whether or not an account should be treated as a wrap account for this purpose, and positions in small minimum investment managed accounts which were not marketed with that appellation were subjected to ordinary fees, including incentive fees.[96] Under the Exchange's proposal, accounts identified as wrap accounts would no longer be treated as distinct from Managed Accounts not identified as such, and would therefore be subject to the same proxy fees as Managed Accounts.

D. Notice and Access Fees

The Commission has adopted a notice and access model that permits issuers to send shareholders what is called a ''Notice of Internet Availability of Proxy Materials'' in lieu of the traditional paper mailing of proxy materials.[97] Currently, the NYSE proxy fee structure does not include maximum fees that member firms—or, in practice, third-party proxy service providers—can charge issuers for deliveries of proxy materials using the notice and access method.[98] Broadridge currently imposes fees on issuers for use of the notice and access method, in addition to the other fees permitted to be charged under NYSE Rule 451.90.[99] In the proposal, the Exchange has proposed to codify the notice and access fees currently charged by Broadridge, with one adjustment.[100]

Specifically, for issuers that elect to utilize the notice and access method of proxy distribution, the Exchange has proposed an incremental fee based on all nominee accounts through which the issuer's securities are beneficially owned, as follows:

- $0.25 for each account up to 10,000 accounts;
- $0.20 for each account over 10,000 accounts, up to 100,000 accounts;
- $0.15 for each account over 100,000 accounts, up to 200,000 accounts;
- $0.10 for each account over 200,000 accounts, up to 500,000 accounts;
- $0.05 for each account over 500,000 accounts.[101]

The Exchange has also proposed to clarify that, under this schedule, every

[83] *See* Notice, 78 FR 12387.

[84] *Id.* In support of this the Exchange states that Commission rules require each beneficial owner holding shares in a Managed Account to be treated as the individual owner of those shares for purposes of having the ability to elect to vote those shares and receive proxy materials. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *See* proposed Rule 451.90(6); *see also* Notice, 78 FR 12388.

[90] *See* Notice, 78 FR 12388.

[91] *Id.* The Exchange represents that, based on the Broadridge-supplied information, the overall impact varied from approximately $2.6 million at the fractional (less than one) share level, up to approximately $16 million if the proscription applied to accounts holding 25 shares or less. *Id.*

[92] *Id.* The Commission understands that this figure does not account for the inclusion of wrap accounts in the proposed fee structure for Managed Accounts.

[93] *Id.*

[94] *Id.* The Commission understands a wrap account to be a certain type of account that is managed by an outside investment adviser. *See* Proxy Concept Release, 75 FR 42998 n.140.

[95] *See* Notice, 78 FR 12387.

[96] *Id.* at 12387–88.

[97] *See* Proxy Concept Release, 75 FR 42986 n.32. The notice and access model works in tandem with electronic delivery—although an issuer electing to send a notice in lieu of a full proxy package would be required to send a paper copy of that notice, it may send that notice electronically to a shareholder who has provided an affirmative consent to electronic delivery. *Id.* These concepts are distinct because the issuer elects whether to use the notice-only option of the notice and access model on the one hand, while affirmative consents to electronic delivery are a matter between a broker and its customer.

[98] *Id.* at 42996.

[99] *See* Notice, 78 FR 12389. As of the date of the Proxy Concept Release, Broadridge charged issuers that elected the notice and access method of proxy delivery a fee ranging from $0.05 to $0.25 per account for positions in excess of 6,000, in addition to the other fees permitted to be charged under NYSE Rule 451. *See* Proxy Concept Release, 75 FR 42996–97.

[100] *See* Notice, 78 FR 12389. The Exchange has proposed to exclude from its proposed notice and access fee schedule the $1,500 minimum fee that Broadridge currently charges issuers that are held by 10,000 accounts or less and elect notice and access. The Exchange states that, in its view, such a minimal charge could be unfairly high on a small issuer billed by several intermediaries. *Id.*

[101] *See* proposed Rule 451.90(5).

issuer would pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[102] The Exchange has further proposed that follow-up notices would not incur an incremental fee for notice and access, and that no incremental fee would be imposed for fulfillment transactions (*i.e.,* a full pack of proxy materials sent to a notice recipient at the recipient's request), although out of pocket costs such as postage would be passed on as in ordinary proxy distributions.[103]

E. Enhanced Brokers' Internet Platform Fee

In the Proxy Concept Release, the Commission solicited views on whether retail investors might be encouraged to vote if they received notices of upcoming corporate votes, and had the ability to access proxy materials and vote, through their own broker's Web site—a service that the Commission referred to as enhanced brokers' internet platforms (''EBIP'').[104] According to the Exchange, Broadridge discussed with the PFAC a similar service that it offers, and maintained that while some brokerage firms have already implemented services like the EBIP, it appeared likely that some financial incentive would be necessary to achieve widespread adoption.[105]

Accordingly, the Exchange has proposed, for a five-year test period, a one-time, supplemental fee of $0.99 for each new account that elects, and each full package recipient among a brokerage firm's accounts that converts to, electronic delivery while having access to an EBIP.[106] According to the Exchange, this fee is intended to persuade firms to develop and encourage the use of EBIPs by their customers.[107] To qualify for the fee, an EBIP would have to provide notices of upcoming corporate votes, including record and meeting dates for shareholder meetings, and the ability to access proxy materials and a voting instruction form, and cast the vote, through the investor's account page on the firm's Web site without an additional log-in.[108] This fee would not apply to electronic delivery consents captured by issuers, positions held in Managed Accounts, or accounts voted by investment managers using electronic voting platforms.[109] This fee also would not be triggered by accounts that receive a notice pursuant to notice and access or accounts to which mailing is suppressed by householding.[110]

The Exchange has proposed to require NYSE member organizations with a qualifying EBIP to provide notice thereof to the Exchange, including the date such EBIP became operational, and any limitations on the availability of the EBIP to its customers.[111] The Exchange has also noted in the proposed rule that records of conversions to electronic delivery by accounts with access to an EBIP, marketing efforts to encourage account holders to use the EBIP, and the proportion of non-institutional accounts that vote proxies after being provided access to an EBIP must be maintained for the purpose of reporting such records to the NYSE when requested.[112]

The Exchange states that the EBIP fee would be available to firms that already have EBIP facilities, as even a firm that already has an EBIP can be incented to engage in marketing efforts to persuade its account holders to utilize the EBIP.[113] Further, the Exchange states that the fee would be triggered when a new account elects e-delivery immediately (and has access to an EBIP), except for accounts subject to notice and access or householding.[114] However, the Exchange represents that a firm making the EBIP available to only a limited segment of its account holders could not earn the EBIP fee from an e-delivery election by an account not within the segment having access to the EBIP.[115]

The Exchange represents that a study of the impact of the program would be conducted after three years.[116]

F. Fee for Providing Beneficial Ownership Information

As noted by the Exchange, since 1986 NYSE rules have provided for fees which issuers must pay to brokers and their intermediaries for obtaining a list of the non-objecting beneficial owners holding the issuer's stock.[117] Such a list is commonly referred to as a NOBO list, and the fees are charged per name in the NOBO list.[118] Currently, Rule 451.92 sets forth a $0.065 fee per NOBO name provided to the requesting issuer, but where the NOBO list is not furnished directly to the issuer by the member organization, and is instead furnished through an agent of the member organization, the current rule does not specify a fee—rather, it says only that the issuer will be expected to pay the reasonable expenses of the agent in providing such information.[119] The Exchange states that it understands that Broadridge, acting as such an agent, charges a $100 minimum fee per requested NOBO list, as well as a tiered per-name fee of: $0.10 per name for the first 10,000 names; $0.05 per name from 10,001 to 100,000 names, and $0.04 per each name above 100,000.[120] The Exchange has proposed to adopt and codify Broadridge's minimum and tiered per-name fees into its rules, and to delete its existing language that allows payment of the ''reasonable expenses of the agent.'' [121]

The Exchange also notes that it has been customary for brokers, through their intermediary, to require that issuers desiring a NOBO list take (and pay for) a list of all shareholders who are NOBOs, even in circumstances where an issuer would consider it more cost-effective to limit its communication to NOBOs having more than a certain number of shares, or to those that have not yet voted on a solicitation.[122] The Exchange has proposed to depart from this practice, so that when an issuer requests beneficial ownership information as of a date which is the record date for an annual or special meeting or a solicitation of written shareholder consent, the issuer may ask to eliminate names holding more or less than a specified number of shares, or names of shareholders that have already voted, and the issuer may not be charged a fee for the NOBO names so eliminated—a process commonly referred to as ''stratification.'' [123] For all other requested lists, however, the issuer would be required to take and pay for complete lists.[124]

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[102] *Id.*

[103] *Id.*

[104] *See* Notice, 78 FR 12391; *see also* Proxy Concept Release, 75 FR 43003. This is in contrast to the current situation in which, for most brokers, a beneficial owner must go to a separate Web site in order to view proxy materials and vote.

[105] *See* Notice, 78 FR 12391.

[106] *See* proposed Rule 451.90(7). As a one-time fee, NYSE member organizations could bill an issuer only once for each account covered by the rule. *Id.* Billing for the fee would be separately indicated on the issuer's invoice and would await the next proxy or consent solicitation by the issuer that follows the triggering of the fee by an eligible account's electronic delivery election. *Id.*

[107] *See* Notice, 78 FR 12393.

[108] *See* proposed Rule 451.90(7).

[109] *Id.* In addition, the Commission notes that the EBIP fee does not apply to accounts that converted to electronic delivery prior to the approval of the EBIP fee in this order.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See* Notice, 78 FR 12392.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 12390; *see also* Rule 451.92.

[118] *See* Notice, 78 FR 12390.

[119] *See* Rule 451.92.

[120] *See* Notice, 78 FR 12390.

[121] *See* proposed Rule 451.92; *see also* Notice, 78 FR 12391.

[122] *See* Notice, 78 FR 12390–91.

[123] *See* proposed Rule 451.92.

[124] *Id.; see also* Notice, 78 FR 12391.

IV. Summary of Comment Letters and the Exchange's Responses

As noted above, the Commission received a total of 44 comment letters concerning the Exchange's proposal,[125] as well as four supplemental submissions from the NYSE.[126] Fourteen commenters expressed general support for the proposed rule change,[127] and other commenters supported certain aspects of the proposed rule change. Generally, six commenters believed that the proposal would improve transparency of the proxy fee structure; [128] five believed that the proposal eliminates the ''cliff'' pricing schedule, in favor of a more rational tiered system; [129] two expressly supported the Exchange's approach to charges for managed accounts; [130] one stated that the elimination of fees for fractional share positions would eliminate exposure that issuers face from unanticipated increases in the number of street name accounts on a yearly basis; [131] twelve believed that the proposed EBIP fees would reduce costs, enhance efficiency and/or lead to more retail shareholder participation; [132] one believed that providing additional incentives for integration of a customer's documents in EBIPs would provide a benefit to investors; [133] and six supported the stratification of NOBO lists.[134] One commenter also believed that failure to approve the proposal would keep in place a fee structure that is less transparent and less connected to the current work and costs associated with proxy processing.[135]

Other commenters raised concerns regarding the proposal. Generally, twelve commenters expressed concern about the lack of an independent third-party review of actual costs in the proxy distribution process; [136] five expressed concern with the lack of a thorough cost/benefit analysis of the proposed rule change; [137] four believed that the processing and intermediary unit fees do not allocate fees equitably between large and small issuers; [138] seven questioned the fairness of the proposed fee schedule; [139] four believed that the structure and level of the proposed proxy fees place a burden on competition; [140] nine expressed concern about the incentive structure for developing EBIPs; [141] four raised concerns regarding the five share limit for fees for processing shares held through managed accounts; [142] three believed the stratified NOBO lists should be made available outside of a record date; [143] two expressed concern about the impact of the proposal on mutual funds in particular; [144] and one believed that the rule proposal is inconsistent with and violates Regulation 14A of the Act, including specifically Rules 14a–13, 14b–1 and 14b–2.[145] These issues, and the Exchange's response, are discussed below.[146]

A. Independent Third-Party Review of Proxy Costs

Four commenters that expressed general support for the proposal commented on the issue of whether an independent third-party audit of proxy costs should be conducted.[147] One commenter noted that while ''an independent third party may be desirable, the PFAC made a determination that 'utility rate making' which could be independently audited would not work for proxy fees.'' [148] Another commenter believed that determining the cost of proxy processing services based on utility style ''cost-of-service'' calculations would be very difficult as a practical matter.[149] Yet another commenter stated that while an independent review ''is often attractive in the abstract, the regulatory landscape is laden with examples where the costs of such reviews outweigh the benefits.'' [150] Finally, one commenter stated that an independent review is not necessary because the PFAC is an independent committee with representatives from all parties.[151]

However, several commenters stated that the NYSE should engage an independent third party to evaluate the structure and level of fees being paid for proxy distribution, as recommended by the NYSE Proxy Working Group in 2006.[152] Two commenters argued that an independent third-party audit is the best way to evaluate whether the fees are reimbursed fairly, equitably and

[125] *See supra* notes 4, 6, 9 and 13.

[126] *See supra* notes 7, 10, 12 and 13. As previously noted, NYSE Letter responded to the comments submitted in response to the Notice, NYSE Letter II responded to the Order Instituting Proceedings, NYSE Letter III provided additional cost information from Broadridge, and NYSE Letter IV responded to FOLIOfn Letter and FOLIOfn Letter II.

[127] *See* Steering Committee Letter, SCSGP Letter, iStar Letter, SCC Letter, Perficient Letter, Gartner Letter, CCMC Letter, Broadridge Letter, Darling Letter, ABC Letter, SIFMA Letter, Zumbox Letter, INVeSHARE Letter, Washington Letter; *see also* Schumer Letter (strongly supporting success fee to ''encourage the use of enhanced brokers' internet platforms'').

[128] *See* Steering Committee Letter, SCSGP Letter, SCC Letter, Broadridge Letter, NIRI Letter, Washington Letter.

[129] *See* SCSGP Letter, ABC Letter, Broadridge Letter, BNY Letter, SCC Letter.

[130] *See* SCSGP Letter, INVeSHARE Letter.

[131] *See* Broadridge Letter.

[132] *See* Steering Committee Letter, SCSGP Letter, iStar Letter, SCC Letter, Perficient Letter, CCMC Letter, Broadridge Letter, Darling Letter, ABC Letter, SIFMA Letter, NIRI Letter, Schumer Letter.

[133] *See* Zumbox Letter.

[134] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter, ICI Letter, ICI Letter II, SCSGP Letter.

[135] *See* Washington Letter.

[136] *See* STA Letter, STA Letter II, STA Letter III, SSA Letter, Schafer Letter, Lovatt Letter, SCC Letter, IBC Letter, NIRI Letter, ICI Letter, ICI Letter II, BNY Letter, OTC Letter, CtW Letter II, AFL–CIO Letter; *see also* AST Letter. In addition, one commenter questioned whether the fee structure used by Broadridge should be subject to an independent audit. *See* CtW Letter.

[137] *See* STA Letter, STA Letter II, SSA Letter, Schafer Letter, Lovatt Letter, IBC Letter.

[138] *See* STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter.

[139] *See* STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter, BNY Letter, ICI Letter, CtW Letter.

[140] *See* SSA Letter, IBC Letter, Schafer Letter, Lovatt Letter.

[141] *See* Harrington Letter, ICC Letter, Sharegate Letter, CG Letter, CII Letter, Zumbox Letter, CtW Letter, CtW Letter II, AFSCME Letter, AFL–CIO Letter.

[142] *See* Broadridge Letter, SIFMA Letter, FOLIOfn Letter, FOLIOfn Letter II, Angel Letter.

[143] *See* SCSGP Letter, Broadridge Letter, BNY Letter.

[144] *See* ICI Letter, AST Letter.

[145] *See* FOLIOfn Letter.

[146] The Commission also received comments regarding Broadridge's decision to end its practice of disclosing voting tallies to shareholder proponents of shareholder proposals (*see* CII Letter II, Schumer Letter, AFSCME Letter, AFL–CIO Letter), establishing a performance based proxy fee structure (*see* Angel Letter), and Voting Instruction Forms applied to EBIPs (*see* CII Letter, Angel Letter; *see also infra* note 307 and accompanying text for discussion of Voting Instruction Forms). The Commission notes that these issues are beyond the subject of this proposed rule change by the NYSE. In addition, the Commission received a comment regarding the effective date for the proposed rules (*see* SIFMA Letter) and comments regarding the propriety of assigning the task of proxy regulation to the NYSE (*see* FOLIOfn Letter, Angel Letter). In its initial response letter, the Exchange stated its belief that a lengthy period before effectiveness of the proposed fee structure would appear to be unnecessary given that invoicing of proxy fees is typically handled by the intermediary rather than the broker-dealer and given that Broadridge stated in its comment letter that it is prepared to implement the new fee structure soon after approval. *See* NYSE Letter; *see also* Broadridge Letter. Further, subsequent to the Exchange's initial response letter, Broadridge stated that it ''is committed to implementing the new [fee] structure within a short time of its approval.'' *See* Broadridge Material. With regard to the comment that the Commission has assigned the task of proxy regulation to the NYSE, although the NYSE participates in some aspects of regulating the proxy process, the Commission has engaged in and overseen numerous rulemakings and overseen and reviewed SRO proposed rules relating to the proxy process.

[147] *See* Broadridge Letter, ABC Letter, INVeSHARE Letter, Angel Letter.

[148] *See* Broadridge Letter.

[149] *See* Angel Letter.

[150] *See* ABC Letter.

[151] *See* INVeSHARE Letter.

[152] *See* STA Letter, STA Letter II, SSA Letter, Schafer Letter, Lovatt Letter, NIRI Letter, SCC Letter, IBC Letter, ICI Letter, ICI Letter II, OTC Letter, CtW Letter II; *see also* AST Letter, FOLIOfn Letter.

objectively, and would eliminate the vested interests of those involved in the process.[153] Three other commenters believed the Commission should not approve the proposed rule change until the audit has been commissioned and completed,[154] while two others suggested that the Commission approve the proposal, but require an independent third-party review as part of an ongoing process.[155] One commenter believed that, without a third-party audit, many issuers would continue to question the validity of proxy fees.[156] Another commenter noted that there was no independent verification of the data on the Securities Industry and Financial Markets Association (''SIFMA'') study related to the costs of proxy processing,[157] and yet another believed that the PFAC did not have access to the information necessary to determine whether particular fees were reasonable.[158] Finally, one commenter expressed the view that a comprehensive assessment of the NYSE proposal's net impact on proxy distribution costs for all issuers, including mutual funds, would require further analysis.[159]

In its initial response, the Exchange stated that the PFAC determined that an independent review of proxy costs was unnecessary.[160] The Exchange noted that the PFAC itself was an independent body and that it reviewed audited financial information on Broadridge, segment information provided by Broadridge on its Web site, and several independent analyst reports on Broadridge that gave the PFAC comfort that the existing fees were not providing Broadridge with excessive margin on its activities.[161] Further, the Exchange stated that the NYSE proxy fees have been revised a number of times over the years without an independent review of proxy costs.[162] The Exchange stated that there is no requirement that an independent third-party review be conducted, and that such a review was conducted only in the context of significant rule changes developed in the late 1990s.[163] The Exchange also stated that ''given the availability of audited financials on Broadridge and the SIFMA survey of costs at representative brokerage firms undertaken at the NYSE's request, arguably the proposed fee changes have been based on information comparable to that used in the independent studies conducted in the late 1990s.'' [164]

In a supplemental response, the Exchange explained that the costs of the proxy distribution process have not typically been segregated from other costs incurred at firms and intermediaries.[165] The Exchange stated that the PFAC learned from conversations with various brokerage firms and intermediaries, including Broadridge, that there is no common methodology for tracking proxy distribution costs, ''nor do these entities segregate these costs from the cost of other similar processing activities that are not reimbursable by issuers.'' [166] The Exchange explained that this is why the ''PFAC and the Exchange 'judged that it would likely be impossible and certainly not cost effective, to engage an auditing firm to review industry data for purposes of the Committee's work.' '' [167] The Exchange reiterated that the PFAC requested that Broadridge provide it non-public financial data, but Broadridge declined.[168] However, the Exchange stressed that the ''PFAC did study available materials that allowed it to conclude that the fees it proposed did constitute a reasonable reimbursement of the industry's costs for proxy distribution to street name accounts.'' [169]

The Exchange also stated that the PFAC accepted that it was appropriate for Broadridge to make a reasonable profit.[170] In this context, the Exchange noted that, based on public information showing Broadridge's pre-tax margin on its Investment Communication Solutions Segment, Broadridge's margin was consistent with, and in most cases was significantly lower than, ''other firms in comparable businesses, such as transaction processing firms (*e.g.,* Visa), financial processing firms (*e.g.,* Fiserv), other processing firms (*e.g.,* MSCI) and securities industry infrastructure firms (*e.g.,* Computershare).'' [171] The Exchange stated that the ''PFAC found this credible evidence that the profit being earned by Broadridge on this business segment was reasonable.'' [172]

In response to concerns that the PFAC relied substantially on the limited information provided by Broadridge, the Exchange noted that the PFAC requested that Broadridge provide it non-public financial data, but Broadridge declined.[173] However, the Exchange explained that ''Broadridge was otherwise forthcoming with the PFAC and described at length their processes, and provided the PFAC with the detailed task list that was included with the Exchange's rule filing as an appendix to the SIFMA survey.'' [174] In addition, the Exchange noted that the PFAC met with a number of other industry participants to discuss the proxy processing business.[175]

The Exchange also provided additional information from Broadridge about the costs involved in providing proxy and report distribution services.[176] Among other things, Broadridge represented that the ''proposed fee structure results in a high degree of alignment between the overall fees paid and the reasonable costs of the services provided.'' [177] Broadridge estimated that the work associated with the basic processing fee, nominee coordination and intermediary unit fee and preference management fee would

[153] *See* NIRI Letter, ICI Letter.

[154] *See* STA Letter, STA Letter II, IBC Letter, AFL–CIO Letter; *see also* OTC Letter (stating the mere fact that much of the data supplied to the PFAC for its analysis of the proposed rule change came exclusively from Broadridge without an independent review and without additional sources discredits the results of the PFAC's research).

[155] *See* SCC Letter, SCSGP Letter.

[156] *See* NIRI Letter.

[157] *See* BNY Letter.

[158] *See* AFSCME Letter.

[159] *See* AST Letter, AST Letter II.

[160] *See* NYSE Letter.

[161] *Id. See also* Washington Letter (stating that the PFAC ''conducted an independent evaluation of how the underlying work and expenses have evolved (including a detailed analysis of the categories of work currently performed by Broadridge, the costs incurred by Broadridge and by bankers and brokers, and independent investment analyst reports regarding Broadridge's margins).'').

[162] *Id.* The Exchange also recognized, as noted by several commenters, that the Proxy Working Group formed in 2006 recommended that the NYSE engage an independent third party to analyze the reasonableness of the proxy fees and to commission an audit of Broadridge's costs and revenues for proxy mailing, but the Exchange pointed out that that Proxy Working Group did not renew its call for such independent analysis at the time an addendum to the group's report was published in 2007. *See* STA II Letter, NIRI Letter, SCC Letter, IBC Letter, BNY Letter, NYSE Letter.

[163] *Id.*

[164] *Id.* The Exchange also asserted that ''throughout the history of the NYSE proxy fees, negotiation among the members of a committee of issuers and brokers, supplemented by the comment process which accompanies a rule filing with the SEC, has been an effective method for reaching a workable consensus on what constitutes 'reasonable reimbursement.' '' *Id.*

[165] *See* NYSE Letter II.

[166] *Id.*

[167] *Id.* (quoting Notice).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id., see also supra* note 161.

[174] *See* NYSE Letter II. In particular, the Exchange stated that the ''PFAC requested that Broadridge run tests of various proposals, so that the PFAC could analyze and compare in some detail how different fee structures would impact the issuer population, assisting the PFAC in determining to its satisfaction that its proposals fairly allocated the fees among different size issuers.'' *Id.*

[175] These market participants included Mediant Communications, Bank of America Merrill Lynch, Citibank, Morgan Stanley Smith Barney, Fidelity's National Financial and Curian Capital. *Id.*

[176] *See supra* note 12.

[177] *See* NYSE Letter III.

be 56.7%, 26% and 17.5% of total work effort, respectively, and that if the proposed fees had been in place in fiscal year 2012, such fees would have represented 55.4%, 27% and 18.9% of total fees paid, respectively. Accordingly, in Broadridge's estimation, there is a high degree of alignment between costs and services.[178]

B. Cost/Benefit Analysis of the Proxy Fee Proposals

Several commenters stated that the NYSE failed to undertake an analysis of the costs and benefits of the fee proposal, using the same degree of rigor applicable to SEC rule changes.[179] Two commenters stated that until an objective and comprehensive cost-benefit analysis can be developed, the SEC should disapprove this rule filing.[180]

The Exchange responded by noting that no such cost-benefit analysis is required by the relevant statute or SEC rules.[181] However, the Exchange also noted that ''the essence of the PFAC process was a negotiation among parties with often divergent interests seeking an outcome which to each was a balance of the costs and benefits involved.'' [182]

C. Equitable Allocation of Processing and Intermediary Unit Fees Between Large and Small Issuers

Several commenters stated that the proposed processing and intermediary fees do not allocate fees equitably between large and small issuers.[183] Moreover, two commenters believed that these fees should not be charged at the same level for beneficial owners who are not receiving an actual proxy package.[184] These commenters also stated that such fees fall disproportionately on smaller issuers, especially those with less than 300,000 beneficial owner positions.[185] They further stated that it was not fair for smaller issuers to be subject to more than a 20% increase in their proxy fees, while an issuer with 1,000,000 beneficial owners would have a decrease in processing and intermediary unit fees.[186]

The Commission also raised concerns in the Order Instituting Proceedings regarding the proposed tiered fees, noting that while the proposed tiered structures appeared to be an incremental improvement over the status quo, the Exchange had not clearly explained why the particular tiers or rates within each tier were chosen, nor had the Exchange provided evidence that either the Exchange or PFAC had ''conducted a meaningful review of the economies of scale present in the proxy processing business, or the overall costs associated therewith.'' [187] In response, the Exchange stated that the PFAC requested and reviewed numerous pricing scenarios from Broadridge to ensure that small issuers were not unduly impacted under the proposal.[188] The Exchange explained that ''the PFAC wished to develop a more equitable tiering arrangement, in which fees would decline not for all accounts with issuers of a certain size, but where the same price would apply to the first tier in all companies, a reduced price to the second tier in all companies, and so on.'' [189] According to the Exchange, the PFAC considered and analyzed a number of scenarios and determined that the proposed tiered arrangement was the most effective in removing the distortions of the current fee structure, which has a pricing ''cliff'' in that it applies a lower fee to all accounts with issuers of a certain size.[190] The Exchange also noted that ''[a]s a final check regarding the propriety of the proposed tiers, the PFAC had secured from Broadridge the estimate that overall under the current fees issuers with 100,000 or fewer accounts paid approximately 38% of proxy processing fees, issuers owned by more than 100,000 up to 500,000 accounts paid approximately 30% of such fees, and issuers owned by more than 500,000 accounts paid approximately 32% of the fees.'' [191] The Exchange stated that estimates of the impact of the proposed fees were that ''such proportions would continue, which the PFAC considered to be consistent with its goals and to represent a fair allocation among the issuer population.'' [192]

D. Fairness of the Fee Proposals

Six commenters believed that the proposal would improve transparency of the proxy fee structure so that it is clearer to issuers what services they are paying for and that the fees are consistent with the type and amount of work involved.[193] In addition, six commenters believed that the proposal is an improvement that helps eliminate the ''cliff'' pricing schedule.[194]

However, several commenters raised concerns about the possibility that issuers may be paying more than would constitute ''reasonable'' reimbursement for actual costs.[195] As a result, several commenters stated that the fee proposal favors the interests of broker-dealers and discriminates against issuers.[196] One commenter noted that a 2011 survey of transfer agent pricing compared to the NYSE proxy fee schedule concluded that market-based proxy fees for registered shareholders were more than 40% less than the proxy fees being charged to provide the same services to beneficial owners.[197] This commenter also noted that the same study found that all transfer agents participating in the survey charged processing and suppression fees that were significantly less than the fees being charged by broker-dealers under the current NYSE proxy fee schedule.[198] This commenter concluded that the NYSE proxy fee schedule, as proposed, does not satisfy the requirements of Section 6(b)(5) of the Act because the proposed fees are ''not based on actual costs incurred and exceed similar charges under competitive pricing and through other broker-dealer utilities operating on an at-cost basis.'' [199] Another commenter also disputed the NYSE's assertion that market forces currently shape the fees issuers are required to pay for proxy distribution, and believed a fuller explanation of how the proposed fees represent reimbursement for actual costs

[178] *See* NYSE Letter III. *See also* further summary of Broadridge Material in subpart D, Fairness of the Fee Proposals, *infra.*

[179] *See* STA Letter, STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter.

[180] *See* STA Letter, STA Letter II, IBC Letter.

[181] *See* NYSE Letter. *See infra* Section V, Discussion and Commission Findings, for a discussion of the likely economic impact that the Commission considered in this context.

[182] *Id.* The Exchange also cited the PFAC's conclusions regarding Managed Accounts as an example of the PFAC's cost-benefit analysis. *Id.*

[183] *See* STA Letter II, IBC Letter, Schafer Letter, Lovatt Letter.

[184] *See* STA Letter II, IBC Letter.

[185] *See* STA Letter II, IBC Letter; *see also* OTC Letter.

[186] *See* STA Letter II, IBC Letter. These commenters concluded that even ''after accounting for economies of scale, the processing and intermediary unit fees proposed by the NYSE are not equitably allocated between large and small issuers, in light of the fact that there is no substantive justification for why smaller issuers with less than 300,000 beneficial owners should be bearing such a significantly large burden under the proposed fee schedule.''

[187] Order Instituting Proceedings, 78 FR 32522.

[188] *See* NYSE Letter II. *See also* Washington Letter (stating that the PFAC '' 'reality tested' the fee structure to assess whether there would be unintended consequences of significantly changing fees for categories of users.'').

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See* Steering Committee Letter, SCSGP Letter, SCC Letter, Broadridge Letter, NIRI Letter, Washington Letter.

[194] *See* SCSGP Letter, ABC Letter, Broadridge Letter, BNY Letter, SCC Letter, INVeSHARE Letter.

[195] *See* STA Letter, STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter, BNY Letter, ICI Letter.

[196] *See* STA Letter II, IBC Letter, Schafer Letter, Lovatt Letter, OTC Letter.

[197] *See* STA Letter II.

[198] *Id.*

[199] *Id.*

is necessary to ensure compliance with statutory requirements.[200]

In response to concerns regarding the fairness of the proposed rule change, the Exchange, through the Broadridge Material, took the position that the proposal improves the overall fairness and reasonableness of the fee allocation by considering a number of factors, such as an issuer's size and the characteristics of an issuer's shareholder base.[201] The Broadridge Material expressed the view that, under the current fee structure, fees paid for processing the largest issuers and jobs subsidize the fees paid for processing smaller issuers and jobs, and that the ''subsidy of smaller firms by larger firms is narrowed, but not eliminated, by the proposed fee structure.'' [202] Furthermore, according to the Broadridge Material, ''in comparison to the current, 'one-size-fits-all' fee structure, the proposed fee structure better recognizes economies of scale for issuers of different sizes, as measured by their number of beneficial shareholders.'' [203]

The Exchange, through the Broadridge Material, also represented that the ''proposed fees are lower than current fees, they provide greater total savings, and they contain measures and incentives to improve retail participation.'' [204] In particular, the Broadridge Material stated that issuers would have saved an estimated 4%–6% on average if the proposal had been in effect for 2012,[205] and expressed the view that the incentive fee structure would help continue to drive additional reductions in printing and postage costs.[206]

In addition, the Broadridge Material cited a study indicating that the regulated fees issuers pay for delivering a proxy to a beneficial shareholder (*e.g.,* through Broadridge) were lower on average than unregulated fees issuers pay for delivering a proxy to a registered shareholder, as well as a supplemental review performed by Broadridge that confirmed that conclusion.[207]

Finally, the Broadridge Material highlighted its major systems enhancements in recent years, and noted that its IT infrastructure, development and labor costs have risen by 8.4%, 15.4% and 8.1%, respectively, on a compound annual basis, over the past six years, while NYSE's regulated fees have not changed.[208]

Below is a more detailed summary of the comments regarding the significant fees on the NYSE schedule, as proposed in the rule filing.

1. Preference Management Fee

Several commenters raised concerns regarding the change of the paper and postage elimination fee into a preference management fee, which is assessed for all accounts for which a mailing is suppressed.[209] These commenters also highlighted the lack of any detailed analysis about the cost of the work involved for the fee.[210] In addition, these commenters questioned the appropriateness of the ''evergreen'' nature of the fees, which currently are charged not only in the year in which the electronic delivery is elected but also in each year thereafter.[211] One commenter stated that if ''Broadridge is paid to 'keep track' of a shareholder preference regarding householding or electronic delivery, it should not also be permitted to charge a basic processing fee and an intermediary unit fee for accounts that are suppressed.'' [212] Another commenter stated that the preference management fee has ''no apparent connection to the amount of effort involved in recording the beneficial owner's preference on the broker's system nor that involved in the suppression of mailing.'' [213] Furthermore, one commenter questioned why the tiered system was appropriate for the ''basic processing fee'' and ''supplemental fees,'' and not for the preference management fee.[214]

In its first response letter, the Exchange referred to its discussion in its rule filing of the appropriateness of charging the preference management fee every year, and noted that, following the SEC's review of the proxy fees put in place in 1997, the every-year approach was maintained by an independent proxy review committee.[215] In its second letter, in response to concerns raised in the Order Instituting Proceedings that the Exchange had not clearly explained why a tiered approach would be inappropriate for the preference management fee,[216] the Exchange stated that a tiered approach was not appropriate because preference management processing ''appeared to have fewer economies of scale than the other processing activities.'' [217] The Exchange also noted that the PFAC asked Broadridge ''to model a tiered approach for preference management fees, but determined that it was too complex, especially in light of the fact that the basic processing fees were being tiered.'' [218] The Exchange also represented that the work effort associated with both the basic processing fee and intermediary unit fee are separate and in addition to the activities supporting the preference management fee.[219]

2. Separately Managed and Wrap Accounts [220]

One commenter fully supported the reduction of the separately managed account fees [221] and another believed that the Exchange has taken a fair and

[200] *See* AFSCME Letter.

[201] *See* NYSE Letter III.

[202] *Id.*

[203] *Id.*

[204] *Id. See also* Washington Letter.

[205] *Id.* The Broadridge Material indicated that this figure is based on an analysis of ''all of the invoices Broadridge processed on behalf of its clients, using the proposed fees in place of the current fees, as charged, for U.S. equity proxy meetings.''

[206] *Id.* The Broadridge Material also stated that the ''total cost to issuers (fees, printing and postage) is lower by several hundred million dollars each year than it was at the time of the last fee review in 2002,'' and represented that in ''each of the past six years, the estimated annual savings not only exceeded the incentive fees paid out but all fees issuers paid.'' The Broadridge Material further expressed the view that the preference management fee and one-time EBIP incentive fee will ''drive investments in technology, and systems development by Broadridge and its clients—resulting in greater use of technology—with large and growing savings to issuers, and greater conveniences to shareholders in accessing proxy information and voting their shares.''

[207] *Id.* In addition, Broadridge stated that it compared the invoices for the registered shareholder processing services it performed on behalf of issuers in fiscal year 2012 to NYSE's proposed fees and the results showed that for ''over 80% of issuers and meetings, the proposed regulated fee issuers pay for delivering a proxy to a beneficial shareholder would be lower than the unregulated fee issuers pay for delivering a proxy to a registered shareholder.''

[208] *Id.* The Broadridge Material described how costs had been impacted by ''inflation, processing volumes, market activity, regulatory requirements and the evolution of technology, and highlighted the significant growth (116%) in the lines of computer code necessary to process communications from 2002 to 2011. In addition, Broadridge stated that as a result of these costs, and flat to declining volumes and fee revenues, profit margins at Broadridge's Investor Communications Services business group are at the low end of the processing services industry, on after-tax basis ranging from 9% to 11%.

[209] *See* STA Letter II, BNY Letter, ICI Letter, AFSCME Letter.

[210] *Id.*

[211] *See* STA Letter II, BNY Letter, ICI Letter, AFSCME Letter.

[212] *See* STA Letter II.

[213] *See* BNY Letter.

[214] *See* OTC Letter.

[215] *See* NYSE Letter.

[216] *See* Order Instituting Proceedings, 78 FR 32522.

[217] *See* NYSE Letter II. The NYSE stated that performance management fees have low set-up costs, as opposed to the basic processing fee, which has certain set-up costs irrespective of the size of the job. In addition, the Exchange noted that the PFAC determined to distinguish between managed accounts and other accounts in terms of the amount of the preference management fee.

[218] *Id.*

[219] *See* NYSE Letter III.

[220] *See infra* subpart E, Minimum Share Threshold for Managed Accounts.

[221] *See* INVeSHARE Letter.

reasonable approach with respect to charges for managed accounts by cutting the preference management fee in half for positions in managed accounts and eliminating the fee altogether for any position under five shares.[222] Several other commenters, however, expressed concern regarding the proxy fees for separately managed accounts, including wrap accounts.[223] One commenter highlighted the lack of detailed analysis for why the managed account fees should remain an issuer expense.[224] Three commenters questioned the validity of the amount of work involved in managing a separately managed account.[225] One commenter expressed uncertainty ''on the value or need to track accounts where there is no need or expectation to deliver proxy materials, since these accounts are voted by a single manager.'' [226] Another commenter expressed concern that ''private, nonpublic information is being sent to the broker-dealer's service provider when the broker-dealer should be the entity eliminating the accounts for proxy distribution. With today's technology, the broker-dealer would easily be able to extract only the accounts which truly should receive proxy materials.'' [227] Yet another commenter concluded that a fee prohibition should apply when a beneficial owner has instructed an investment adviser to receive issuer proxy materials and vote his or her proxies in lieu of the beneficial owner.[228]

In its first and fourth response letter, the Exchange referred to the discussion in its rule filing of the issue of the appropriateness of applying the preference management fee to managed accounts.[229] In its second letter, in response to concerns raised in the Order Instituting Proceedings that the Exchange had not provided a rationale for treating managed accounts differently only with respect to preference management fees,[230] the Exchange explained that the PFAC discussion focused on the preference management fee because the suppression of paper delivery for a managed account ''appeared to be more a consequence of the nature of the account than an effort made to suppress paper delivery.'' [231]

3. Nominee and Coordination Fees

One commenter stated that the proposed increase in the nominee coordination fee would be 10%, from $20 to $22 for each nominee holding at least one share of an issuer's stock.[232] This commenter noted that the fee appeared to be significantly higher than similar fees charged by the Depository Trust Company (''DTC'') and the National Securities Clearing Corporation (''NSCC''), two broker-dealer utilities that work on an at-cost basis.[233] This commenter stated that without independent confirmation of the actual cost of sending electronic search requests to nominees and processing the responses, ''it is hard to justify a 10% increase in this fee, especially when the cost of sending electronic requests, messages, and beneficial owner account information is significantly less expensive when conducted through the DTC and/or NSCC processing systems.'' [234]

4. Notice and Access Fees

Two commenters stated that there needs to be an independent review of the actual costs incurred for notice and access fees to reflect a rate of reasonable reimbursement.[235] Another commenter stated that the proposal does not provide information sufficient to analyze in detail the cost basis for notice and access fees.[236] One commenter noted that the proposal would generally codify Broadridge's current notice and access fees.[237] This commenter stated that ''even if the Commission determines that it is appropriate for such a fee to be charged, it is not reasonable for the fee to apply to all accounts, even those which receive the full set of proxy materials.'' [238] One commenter reiterated that the ''lack of an independent audit hampers the ability of issuers to know what costs are incurred, and why these fees are needed to handle a much lower level of mail processing, *i.e.,* the mailing of one piece instead of a four-piece proxy package.'' [239]

In its initial response letter, the Exchange referred to the discussion in its rule filing of notice and access fees, but emphasized that the PFAC members were satisfied with the overall level of notice and access costs.[240] The Exchange represented that the only question was whether Broadridge's approach with respect to those costs made sense and, after reviewing alternative approaches, the PFAC came to a consensus that Broadridge's approach was best.[241]

In addition, the NYSE explained, through the Broadridge Material, that notice and access requires ''incremental software and maintenance, additional processing of an issuer's shareholder position file, printing of the Notice . . ., establishment of a new production line for Notice processing, and management of inventory to timely fulfill shareholder requests for hard copies of proxy materials.'' [242] In addition, the Broadridge Material stated that every notice and access request ''makes different demands on three production streams, *i.e.,* for processing mailed Notices, for processing full sets and for processing electronic deliveries.'' [243] Thus, according to the Exchange, ''each and every issuer that chooses to use [notice and access] places additional demands on proxy systems and servicing costs.'' [244]

5. NOBO List Fees and Stratification

One commenter stated that the current NOBO list fees far exceed what should be considered reasonable and deserves further scrutiny.[245] This commenter noted that the proposed fee schedule codifies the fee that Broadridge historically has charged for issuers to obtain a list of NOBOs.[246] This commenter also raised concerns about the level of fees charged given the relatively uncomplicated nature of the work involved and the possibility that

[222] *See* SCSGP Letter.

[223] *See* STA Letter II, SSA Letter, BNY Letter.

[224] *See* STA Letter II. This commenter stated that the ''documentation and data processing for both wrap fee accounts and separately managed accounts are standardized within a broker-dealer's accounting platform.'' *See also* AFSCME Letter (noting that the proposal ''does not explain why issuers should reimburse indefinitely fees associated with not sending materials to a beneficial owner . . . because those owners have delegated their voting rights to an investment manager.'').

[225] *See* STA Letter II, BNY Letter, FOLIOfn Letter.

[226] *See* BNY Letter.

[227] *See* SSA Letter.

[228] *See* STA Letter II.

[229] *See* NYSE Letter, NYSE Letter IV. According to the Exchange, there is ''processing work to track and maintain the voting and distribution elections made by the beneficial owners of the stock positions in the managed account.'' *See* Notice, 78 FR 12387.

[230] *See* Order Instituting Proceedings, 78 FR 32522–23.

[231] *See* NYSE Letter II.

[232] *See* STA Letter II.

[233] *Id.*

[234] *Id.* The Commission notes that the Exchange stated in the Notice that the nominee coordination fee has declined by approximately 29% on an inflation-adjusted basis since it was first introduced in 1997. *See* Notice, 78 FR 12384.

[235] *See* STA Letter II, ICI Letter.

[236] *See* AST Letter.

[237] *See* ICI Letter.

[238] *Id.*

[239] *See* STA Letter II.

[240] *See* NYSE Letter.

[241] *Id.*

[242] *See* NYSE Letter III. In addition, the Exchange, through the Broadridge Material, represented that every notice and access request ''makes different demands on three production streams, *i.e.,* for processing mailed Notices, for processing full sets and for processing electronic deliveries.''

[243] *Id.*

[244] *Id.*

[245] *See* ICI Letter.

[246] *Id.*

issuers may be paying twice for the same information.[247]

Six commenters, however, supported the stratification of NOBO lists.[248] Three commenters believed that the proposal to provide stratified NOBO lists would reduce issuers' costs in communicating with shareholders.[249] Another commenter believed that stratified NOBO lists would enhance retail voter participation, as well as help issuers communicate with their shareholders at proxy time.[250]

Four commenters believed that the stratified NOBO lists should be made available outside of a record date.[251] One commenter noted its disappointment that an issuer could not request a stratified NOBO list outside of a record date, ''especially at a time when issuers have a greater need to communicate more frequently with their shareholders, and especially their street name holders.'' [252] Another commenter stated that the justification used by the NYSE for limiting stratification ''is the impact such a change would have on the proxy system, which appears to be the impact this would have on the vendor (Broadridge) that provides this information,'' [253] and took the position that any potential negative impact on the vendor is not sufficient justification to restrict potential benefits to issuers.[254] One commenter, however, believed that if the proposal were expanded to include requests for stratified lists at any time of the year, there would be an imbalance between fees and the work involved.[255] This commenter recommended that the Commission and the NYSE monitor developments with respect to NOBO lists for the first year of the new fees and, at the end of the first year, adjust the rule if necessary.[256]

The Exchange stated in its first response letter that it believes that there is a rational basis to distinguish between record date lists and other lists, and that it is concerned about the potential impact of the proposed NOBO list fee change on overall proxy fee revenues available to reimburse brokers for their costs.[257] The Exchange added that issuer and broker experience with the new rule would inform whether future changes are desirable.[258]

E. Minimum Share Threshold for Managed Accounts

One commenter, who stated that it has been adversely affected by fees attributable to managed accounts that hold fractional shares of its own stock, expressed full support for the proposal.[259] In addition, one commenter stated that the removal of fees for fractional share positions would help eliminate exposure some issuers have to large, unanticipated increases in the number of street name accounts from one year to the next.[260] This commenter estimated that this amendment would save issuers approximately $3.6 million over a period of twelve months.[261]

However, four commenters raised concerns regarding the five-share limit for fees for processing shares held through managed accounts.[262] One commenter stated that the rules for reimbursement should be based on actual (or a reasoned estimate of) proxy processing costs rather than on arbitrarily fixed thresholds.[263] Two commenters stated that the proposal lacked a detailed analysis concerning the basis for selecting any particular threshold.[264] Two commenters stated that the work required to process proxy distribution to managed accounts is the same, regardless of the number of shares held,[265] and one commenter stated the proposed approach has the potential to create an imbalance between the fees and the amount of work involved.[266] Instead of drawing the line at five shares, one commenter believed that issuers should not be required to reimburse brokers for processing managed accounts that have less than one whole share.[267] Another commenter believed that the same fees should apply regardless of how many shares—or fractions of shares—a shareholder owns if the account holder retains voting rights and thus receives the voting materials, rather than delegating voting rights to a manager.[268] In addition, one commenter suggested a per distribution fee that equals the average cost for all distributions actually made regardless of the number of shares held in a managed account.[269]

Furthermore, this commenter took the position that the proposal effectively disenfranchises shareholders who hold five or fewer shares in a security in a managed account because it would provide no reimbursement of costs for distribution of proxy materials to those shareholders.[270]

In the Order Instituting Proceedings, the Commission expressed concerns that the Exchange had not provided a clear explanation as to why the five-share threshold for charging proxy fees for managed accounts was chosen.[271] In its second response letter, the Exchange reiterated that ''the PFAC was concerned with the proliferation of managed accounts containing a very small number of an issuer's shares'' and that ''[t]he basic question was at what point did the benefit to an issuer in terms of shares voted become so minimal as to justify charging the issuer nothing for processing the account.'' [272] According to the Exchange, the PFAC considered setting the minimum share threshold for managed accounts at various points from a fractional share to 5, 10, 15, 20 and 25 shares, and obtained estimates of the economic impact of each of those, but ultimately reached consensus at the five share threshold.[273] The Exchange stated that ''the estimated impact on aggregate proxy fees was considered relatively modest (approximately $4.2 million), and it seemed clear that the voting benefit of five shares or less was limited, [t]o say the least.'' [274]

In its fourth response letter, the Exchange emphasized that the schedule of proxy fees is appropriately based on overall industry costs, not the costs of any individual firm.[275] The Exchange also referred to its discussion in its rule filing of the reimbursement of brokers

[247] *Id.*

[248] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter, ICI Letter, ICI Letter II, SCSGP Letter.

[249] *See* ABC Letter, Broadridge Letter, NIRI Letter.

[250] *See* SCSGP Letter.

[251] *See* SCSGP Letter, STA Letter II, BNY Letter, NIRI Letter.

[252] *See* STA Letter II. This commenter also stated that ''issuers find it more cost-effective to order a subset of the NOBO list, segmented by whether or not a beneficial owner already voted on a solicitation, or stratified by a minimum threshold of shares held.''

[253] *See* BNY Letter.

[254] *Id.*

[255] *See* Broadridge Letter.

[256] *See* Broadridge Letter.

[257] *See* NYSE Letter.

[258] *Id.*

[259] *See* Gartner Letter.

[260] *See* Broadridge Letter.

[261] *Id.*

[262] *See* Broadridge Letter, SIFMA Letter, AST Letter, FOLIOfn Letter, FOLIOfn Letter II.

[263] *See* SIFMA Letter.

[264] *See* AST Letter, FOLIOfn Letter.

[265] *See* Broadridge Letter, SIFMA Letter.

[266] *See* Broadridge Letter.

[267] *Id.*

[268] *See* Angel Letter; *see also* FOLIOfn Letter II (stating that the costs for distribution to an account that holds three shares in a security is identical to the costs for distribution to an account that holds thirty or more shares).

[269] *See* FOLIOfn Letter II.

[270] *See* FOLIOfn Letter. This commenter stated further that ''although the argument is that no disenfranchisement occurs because firms would still be required to distribute materials to all shareholders, even though distribution to some would not be compensated, the result is that smaller investors are materially disfavored.''

[271] *See* Order Instituting Proceedings, 78 FR 32522.

[272] *See* NYSE Letter II.

[273] *Id.*

[274] *Id.*

[275] *Id.*

for their reasonable expenses, and stated that by providing ''reimbursement of the reasonable overall expenses of brokers/ banks in the aggregate, the fees as proposed are consistent with the Exchange Act Rules 14b–1 and 14b–2, and are consistent in this respect with the fees approved by the SEC in prior proxy fee rule filings over the years.'' [276] In addition, the Exchange asserted that the ''average'' reimbursement approach suggested by one commenter is outdated and might benefit one particular firm, but it would not remedy the anomalous fee impact experienced by issuers resulting from the growth of low minimum investment managed accounts or encourage efforts to eliminate paper distribution.[277]

F. Burden on Competition

Several commenters stated that the structure and level of the proposed NYSE proxy fees place a burden on competition.[278] Five commenters stated that the NYSE rule filing does not adequately address the contract arrangements between broker-dealers and Broadridge.[279] In particular, two commenters expressed the view that the rule filing does not adequately address the rebates being provided by Broadridge to broker-dealers as a result of excess profits generated by the NYSE proxy fee schedule, which they believe create a burden on competition that is not necessary or appropriate,[280] while another commenter believed that the most significant burden to competition is the business practice of the primary provider of services in the proxy fee market and not the fee structure.[281] Two commenters believed that the SEC should ''disapprove the rule filing on the basis that the excess profits being generated are creating a burden on competition, as the dominant service provider in this area is able to use these excess profits to subsidize its ability to successfully encroach on the proxy servicing business of transfer agents.'' [282] One commenter stated, however, that although there is one dominant intermediary on the street side, brokers remain free to contract with any entity that can fulfill proxy process services to their clients or can provide those services themselves.'' [283]

In its first response letter, the Exchange referred to the discussion in its rule filing and the PFAC report of the payments made by Broadridge to certain of its broker-dealer clients pursuant to their contractual arrangements, but reiterated that ''the existence of these cost recovery payments is a completely rational result of the fact that the fees are 'one size' but have to 'fit all,' so that the firms with large volumes can be served at a lower unit cost, while those with smaller volumes have a higher unit cost to Broadridge.'' [284] The Exchange suggested that, contrary to one commenter's contention that the rebates reflect excess profits,[285] the rebates ''may also be viewed as a demonstration that market forces are directing the 'excess' to firms that can be serviced by Broadridge for a lower unit price but have themselves greater internal street name proxy administration costs, given their larger number of accounts.'' [286]

In its second letter, in response to concerns raised in the Order Instituting Proceedings that Broadridge's rebate arrangements may result in an unnecessary or inappropriate burden on competition,[287] the Exchange noted that, according to Broadridge approximately 200 of its 900 bank/ broker clients receive ''cost recovery'' payments.[288] The Exchange noted that ''all firms have to incur at least some costs related to proxy distribution beyond the cost of retaining Broadridge,'' and took the position that those larger clients who receive cost recovery payments ''are most likely to have more sophisticated operations and greater costs.'' [289] In addition, the Exchange referred to a survey conducted by SIFMA that, according to the Exchange, ''demonstrated that on an industry basis, brokerage firms are not receiving reimbursement in excess of the costs they expend.'' [290] On this point, the Exchange referred to SIFMA's extended description of the proxy distribution activities undertaken by broker-dealers, beyond what is outsourced to third-party service providers like Broadridge.[291] In particular, the SIFMA description outlined major categories of activities broker-dealers engage in to support proxy services, including: (i) Preference management, (ii) data infrastructure, (iii) oversight and supervision, (iv) client service, and (v) record retention.[292]

G. Enhanced Broker Internet Platforms

Twelve commenters expressed general support for the proposed EBIP incentive fee, noting that it would reduce costs, enhance efficiency and/or lead to more retail shareholder participation.[293] Two of these commenters believed that the proposed success fee would increase the availability of EBIPs and potentially spur innovation in such platforms.[294] Two additional commenters that supported the proposed fee believed that it would result in higher retail shareholder engagement.[295]

Six commenters believed that the incentive structure for developing EBIPs could be further improved.[296] Three commenters expressed concern that the incentives provided to brokers for developing EBIPs do not extend to other more open platforms, such as ProxyDemocracy.org, Sharegate.com or other Web sites.[297] Two commenters stated that these and other entities should be afforded at least the same incentives as brokers.[298] These commenters also argued that EBIPs offer no real benefit to retail shareowners over e-delivery.[299] Several commenters expressed concern that brokers who set up EBIPs could be incentivized to create default voting mechanisms that essentially replicate uninformed ''broker voting,'' [300] or that the design of EBIPs otherwise could be unfair or biased.[301] Two commenters were of the view that the EBIP proposal addresses the needs

[276] *Id.*

[277] *Id.*

[278] *See* STA Letter II, IBC Letter, SSA Letter, Lovatt Letter, Schafer Letter.

[279] *See* STA Letter II, IBC Letter, SSA Letter, BNY Letter, CtW Letter II; *see also* AFSCME Letter (stating that the Commission should fully explore the conflicts of interest involving Broadridge and provide any guidance it deems appropriate before approving the proxy fee proposal).

[280] *See* STA Letter II, STA Letter III, IBC Letter. One of these commenters stated that there should be an examination of the rebates being provided to ensure that they do not come at the issuer's expense. *See* STA Letter II. This commenter also noted that this issue was previously raised by the Proxy Working Group in 2006 and the Proxy Concept Release, and expressed the view that the PFAC did not address this issue in any meaningful way. *Id. See infra* Section V, Discussion and Commission Findings, for a discussion of the likely economic impact that the Commission considered in this context.

[281] *See* INVeSHARE Letter.

[282] *See* STA Letter II, IBC Letter.

[283] *See* ABC Letter.

[284] *See* NYSE Letter.

[285] *See* STA II Letter.

[286] *See* NYSE Letter.

[287] *See* Order Instituting Proceedings, 78 FR 32523–24.

[288] *See* NYSE Letter II.

[289] *Id.*

[290] *Id.*

[291] *See* NYSE Letter III.

[292] *Id.*

[293] *See* Perficient Letter, SIFMA Letter, ABC Letter, CCMC Letter, Broadridge Letter, Darling Letter, SCSGP Letter, iStar Letter, Steering Committee Letter, SCC Letter, INVeSHARE Letter, Schumer Letter.

[294] *See* SIFMA Letter, ABC Letter.

[295] *See* NIRI Letter, Schumer Letter.

[296] *See* Harrington Letter, ICC Letter, Sharegate Letter, CG Letter, CII Letter, Zumbox Letter.

[297] *See* ICC Letter, Harrington Letter, CG Letter.

[298] *See* ICC Letter, CG Letter.

[299] *Id.*

[300] *See* ICC Letter, Harrington Letter, CG Letter; *see also* CtW Letter II.

[301] *See* AFSCME Letter, CtW Letter II, AFL–CIO Letter.

of issuers, brokers and Broadridge, rather than shareholders.[302] One commenter noted that the ''99 cent fee level was not based on any survey of brokers, or on the anticipated impact of any particular level of success fee on individual broker decisions to implement EBIPs.'' [303] One commenter requested that the Commission include investment advisors and beneficial owners in developing the incentive plan for EBIPs.[304] Two commenters recommended that the proposed rule change be delayed and amended to encourage an open form of client directed voting.[305] Another commenter recommended an approach to EBIPs that provides revenue streams to companies who prove they can provide a superior service to the investor customer.[306]

One commenter requested that the Commission consider issues regarding Voting Instruction Forms (''VIFs'') and EBIPs before finalizing the proposed rule change.[307] However, another commenter believed it is premature to regulate these details of EBIPs, and that experimentation with different types of platforms should be permitted.[308] Yet another commenter believed that providing additional incentives for integration of a customer's documents within one brokerage Web site would provide a stronger benefit to investors.[309] One commenter questioned whether the proposal improperly encourages the adoption of Internet voting procedures such as EBIP that, according to the commenter, shift control of the voting process to brokers and corporate managers.[310] This commenter also questioned whether the proposal would ensure proper Commission oversight of the preparation of clear, informative and balanced VIFs, and whether it would enable the creation of open rather than proprietary client directed voting systems.[311]

One commenter believed that the proposed EBIP fee is inequitable because it does not apply to accounts that already have converted to electronic delivery while having access to an EBIP,[312] and another commenter believed the incentive fees for EBIPs should apply to all EBIPs, not just new ones.[313] However, another commenter urged the Commission not to adopt an incentive fee for the development of EBIPs ''without evidence that such an incentive is necessary'' and noted that no evidence is presented that the PFAC obtained any data in support of the proposed financial incentive.[314]

The Exchange, in its initial response letter, noted that it proposed the EBIP incentive fee because it was supported by the PFAC and issuer representatives.[315] The Exchange expressed no opinion as to whether EBIPs would be used to facilitate client directed voting, as this was not an issue discussed with the PFAC.[316] The Exchange noted one commenter's concerns regarding the VIF used to obtain voting instructions from street name shareholders,[317] but stated that these concerns similarly were not discussed with the PFAC or in follow up EBIP discussions.[318] With respect to concerns about firms that have already instituted EBIPs, the Exchange referred to a related discussion in its rule filing, and noted that the proposed fee is premised on the expectation that investors who are provided EBIP will be more likely to elect to switch to e-delivery, with the attendant significant savings to issuers in paper and postage.[319]

H. Impact on Mutual Funds

Two commenters took the position that there should be further analysis of the impact the proposed rule change would have on proxy distribution fees paid by mutual funds and, in particular, the open-end funds that hold special meetings each year.[320] One of these commenters stated that the proposal could result in a significant fee increase in combined processing and intermediary unit fees for many mutual funds.[321] This commenter also stated that the ''net impact of the proposed changes will vary widely due to the complexity of a proposed fee structure that raises combined processing and intermediary costs for many funds (and especially funds conducting special meetings without the election of directors/trustees), while also reducing certain costs associated with 'managed accounts.' '' [322] This commenter noted that there was insufficient information to determine the cost basis and impact of the fee changes, including the extent to which related cost reductions could mitigate the impact of higher combined processing and intermediary unit fees.[323]

In its first response letter, the Exchange expressed the view that these two commenters [324] had premised their comments on a misunderstanding of the meaning of a ''special meeting.'' [325] According to the Exchange, such misunderstanding may have impacted the proxy fee analysis performed by the other commenter.[326] One commenter responded that ''the [Exchange's] response did not change (or specifically address) our view that there is a need for additional analysis of the proxy distribution fees paid by funds.'' [327]

V. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations

[302] *See* ICC Letter, CG Letter.

[303] *See* SIFMA Letter. This commenter also suggested that the rules for brokers' eligibility to receive a success fee be drafted to provide bright lines so that brokers are not compelled to conduct extensive analysis to determine how the fee might apply in their individual circumstances.

[304] *See* Harrington Letter.

[305] *See* ICC Letter, CG Letter; *see also* Angel Letter (stating that client directed voting will help increase shareholder participation).

[306] *See* Sharegate Letter.

[307] *See* CII Letter. Specifically, this commenter requested that the Commission consider (1) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should be subject to the same degree of Commission oversight as proxy ballots; (2) whether EBIPs that distribute VIFs to beneficial shareowners should be prohibited from presenting voting options in a manner that unfairly tilts votes in favor of management recommendations; (3) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should be prohibited from describing proxy ballot items using wording, headings, or fonts that differ from those used on the related proxy card; and (4) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should not be permitted to tally unmarked shareowner votes in favor of management's recommendations when the underlying voting items are otherwise ineligible for discretionary voting by brokers. The Commission notes that these comments are beyond the subject of this proposed rule change by the NYSE.

[308] *See* Angel Letter.

[309] *See* Zumbox Letter.

[310] *See* CtW Letter, CtW Letter II.

[311] *Id.*

[312] *See* FOLIOfn Letter.

[313] *See* Angel Letter.

[314] *See* AFSCME Letter.

[315] *See* NYSE Letter.

[316] *Id.*

[317] *See* CII Letter.

[318] *See* NYSE Letter.

[319] *See* NYSE Letter IV.

[320] *See* ICI Letter, AST Letter.

[321] *See* AST Letter.

[322] *See* AST Letter.

[323] *See* AST Letter.

[324] *See, e.g.,* ICI Letter.

[325] *See* NYSE Letter.

[326] *Id., see also* AST Letter. With respect to that analysis, the Exchange asserts that it is not clear how many issuers were included, and that the experiences of particular issuers will differ. *See* NYSE Letter. The Exchange also noted that that analysis clearly states that it looks only at the basic processing and intermediary fees, and only at the fees applicable to special meetings. *Id.* In addition, the Commission notes that the Exchange has stated that the increased special meeting fees reflect the additional work required of the intermediary for these meetings, such as faster turnaround and more frequent vote tabulation, analytics and reporting because of the need for approval and concerns about quorum. *See* Notice, 78 FR 12390.

[327] *See* ICI Letter II. The commenter acknowledged its inclusion in the Exchange's Mutual Fund Proxy Fee Review group, which, according to the commenter, has been focusing on the ''interim fees'' associated with the distribution of annual and semi-annual reports to fund shareholders. *See* ICI Letter.

thereunder applicable to a national securities exchange.[328] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[329] which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities; [330] Section 6(b)(5) of the Act,[331] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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 not be designed to permit unfair discrimination between customers, issuers, brokers or dealers; and Section 6(b)(8) of the Act,[332] which prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.

The Exchange's proposal has presented a number of complex and controversial issues, and generated substantial comment, both for and against. The Commission's Order Instituting Proceedings identified several areas where questions were raised as to whether the Exchange's proposal was consistent with the requirements of the Act, including those relating to the reasonableness of fees and their equitable allocation, unfair discrimination, and unnecessary burdens on competition. After carefully considering the proposal, the comment letters received and NYSE's responses, the Commission finds that, on balance, the proposal is consistent with the Act and therefore must be approved.[333]

The Commission recognizes that some commenters did not support certain aspects of the proposed rule change. The Commission, however, must approve a proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Act and the applicable rules and regulations thereunder. NYSE responded to the comments received and the issues identified in the Order Instituting Proceedings, and no comments otherwise convinced us that the proposed rule change was not consistent with the Act and the applicable rules and regulations thereunder. As more fully discussed below, the Commission believes that, overall, the proposed rule change will improve the way proxy distribution and related expenses are allocated. The Exchange has proposed to amend its rules that provide a schedule of ''fair and reasonable'' rates of reimbursement by issuers to NYSE member organizations for expenses in connection with the processing of proxy materials and other issuer communications provided to investors holding securities in street name. The Exchange's proposal relies substantially on the recommendations of the PFAC, an advisory committee composed of representatives of issuers, broker-dealers and investors. The PFAC's recommendations, according to the Exchange, were intended to serve several goals, including supporting the current proxy distribution system given that it provides a reliable and accurate process for distributing proxies to street name stockholders; [334] encouraging and facilitating retail investor voting; improving the transparency of the fee structure; and ensuring that the fees are as fair as possible.[335]

In the Order Instituting Proceedings, the Commission acknowledged that aspects of the Exchange's proposal appear designed to make incremental improvements to the existing fee structure.[336] Nevertheless, the Commission believed significant questions existed as to whether the Exchange had provided adequate justification for material aspects of its proposal such that the Commission could make a determination that the proposal is consistent with the Act.[337]

Specifically, in the Order Instituting Proceedings, the Commission questioned the rigor with which the PFAC and the Exchange reviewed the costs associated with proxy processing in developing its recommendations, and noted the PFAC's reliance on publicly available financial information about Broadridge that did not break out the proxy distribution business as a standalone segment, as well as related analyst reports.[338] In addition, several commenters fundamentally questioned the basis for the proposed fee schedule, and believed the Exchange should first engage an independent third party to audit the actual costs incurred in proxy distribution activities.[339] In the Order Instituting Proceedings, the Commission concluded that neither the Exchange nor the PFAC had articulated a sufficient analysis of Broadridge's costs of providing proxy processing services, so that the Commission lacked a sufficient basis on which to assess whether the incremental changes proposed to the existing fee structure were consistent with the statutory standard.[340]

In response, the Exchange explained that, today, there is no common methodology for tracking the costs incurred in the proxy distribution process, and that they typically have not been segregated from other related costs either at broker-dealers or at intermediaries such as Broadridge.[341] The Exchange reiterated the information that led it to conclude that the proposed fees overall were reasonable, including the fact that the profit margins on Broadridge's broader business segment were consistent with the margins of firms in comparable businesses.[342] In addition, the Exchange cited a recent analysis by Broadridge indicating that the fees issuers pay for delivering proxies to registered shareholders, which are not governed by NYSE rule, generally are higher than the proposed fees for delivering proxies to beneficial shareholders.[343] The Exchange also provided supplemental information from Broadridge about the higher technology costs it incurred as the delivery of proxies became increasingly electronic, and detailed Broadridge's major technology investments over the past decade.[344] In this regard, the Commission recognizes the difficulties associated with attempts to assign substantial fixed costs, such as those incurred in building and maintaining technological infrastructure, to specific functions or activities. Finally, the Exchange stressed that the proposal was expected to lower overall proxy

[328] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). We address comments about the potential competitive impact of the proposed rule change below.

[329] 15 U.S.C. 78f(b)(4).

[330] Relatedly, SEC Rules 14b–1 and 14b–2 condition broker-dealer's and bank's obligation to forward issuer proxy materials to beneficial owners on the issuer's assurance that it will reimburse the broker-dealer's or bank's reasonable expenses, both direct and indirect, incurred in connection with performing that obligation. *See* 17 CFR 240.14b–1 and 17 CFR 240.14b–2.

[331] 15 U.S.C. 78f(b)(5).

[332] 15 U.S.C. 78f(b)(8).

[333] 15 U.S.C. 78s(b)(2)(C)(i).

[334] *See* Proxy Concept Release, *supra* note 24.

[335] *See* Notice, 78 FR 12384.

[336] *See* Order Instituting Proceedings, 78 FR 32521–22.

[337] *Id.* at 32522.

[338] *Id.*

[339] *See* Section IV.A, *supra.*

[340] *See* Order Instituting Proceedings, 78 FR 32523.

[341] *See* NYSE Letter II.

[342] *See* notes 170–172, *supra* and accompanying text and NYSE Letter III.

[343] *See* note 207, *supra* and accompanying text and NYSE Letter III.

[344] *See* note 208, *supra* and accompanying text and NYSE Letter III.

distribution fees by at least 4%.[345] After reviewing the comments and the Exchange's responses, we conclude that the Exchange has adequately addressed these issues, and we find that the incremental changes proposed to the existing fee structure are consistent with applicable statutory and regulatory requirements.

In the Order Instituting Proceedings, the Commission also questioned the rigor with which the PFAC and the Exchange analyzed the individual components of the proposed fees to assure they met the statutory standards.[346] For example, with respect to the basic processing and supplemental fees, the Exchange proposed to introduce a new five-tiered rate structure, with incrementally lower fees for issuers with larger numbers of beneficial owner accounts. Although the Commission acknowledged the Exchange's desire to better reflect the economies of scale in processing issuers with a larger number of accounts, the Commission expressed concern, among other things, that the Exchange had not explained why the particular five tiers were chosen, or conducted a meaningful review of the economies of scale present in the proxy processing business.[347]

In response, the Exchange stressed that there were significant fixed ''set-up'' costs associated with each proxy distribution job, and provided an estimate from Broadridge that such fixed costs conservatively represent 25%, and for some functions as much as 50–60%, of total costs.[348] According to the Exchange, the proposed fee schedule does not fully reflect the benefits of economies of scale when providing services to large issuers but, sensitive to the potential impact of proxy distribution fees on small issuers, the PFAC determined it was equitable to continue a structure where there was some subsidization of smaller issuers by larger ones.[349] The Exchange also noted that, in assessing the fairness of the proposal, the PFAC considered that the overall percentage of proxy processing fees borne by small, medium, and large issuers would remain roughly the same under the new fee schedule.[350] Finally, as noted above, the Exchange provided supplemental information indicating that, in Broadridge's judgment, there was a high degree of alignment between the proposed fees and the required ''work efforts'' to provide the corresponding service (*e.g.,* basic processing is estimated to require 56.7% of the work effort and would represent approximately 55.4% of the proposed fees).[351] We find that the Exchange's responses adequately address our concerns about the individual components of the proposed fees and demonstrate that they are consistent with the Act and relevant rules and regulations thereunder.

With respect to the preference management fee, which currently is characterized as an ''incentive'' fee for eliminating paper mailings, the Commission raised questions in the Order Instituting Proceedings as to the nature of the ongoing work that would justify such a fee, and the rationale for eliminating the existing tiered rate structure.[352] The Exchange's response adequately addressed these concerns. The Exchange explained that ''preference management'' required confirmation of each preference record on a daily basis.[353] According to the Exchange, these ongoing tasks were largely a variable cost, and appeared to have fewer economies of scale than other processing activities.[354] The Exchange also provided Broadridge's assessment that its work effort associated with preference management activities (17.5%) is highly aligned with the proportion of preference management fees (18.9%).[355]

In the Order Instituting Proceedings, the Commission also raised questions as to the rationale for generally charging managed accounts one-half the rate of other accounts for the preference management fee, and for charging managed accounts with five or fewer shares no fees.[356] We find that the Exchange's further responses adequately articulate the rationale for this proposed change. The Exchange noted that managed accounts generate approximately half of all preference management fees,[357] and indicated that it was equitable for issuers and broker-dealers, in effect, to share the cost of ongoing preference management services, because managed accounts benefit broker-dealers by allowing them to gather assets and generate fee income.[358] The Exchange also noted the proliferation of low minimum investment managed accounts,[359] and indicated that, for very small managed account positions, it was equitable for there to be no fee given the minimal benefit to an issuer of the number of shares voted from these accounts.[360] The Exchange stressed that its rule is designed to provide reasonable reimbursement of the overall expenses of broker-dealers in the aggregate, and the extent of reimbursement of any individual firm would vary depending on the specifics of its account population.[361]

According to the Exchange, the PFAC—representing issuers, broker-dealers and investors—examined several possible thresholds, but reached consensus at the five-share level.[362] The Commission acknowledges that any general rule setting forth an industry-wide fee schedule for the reimbursement of reasonable broker-dealer expenses necessarily will not precisely reimburse the actual expenses incurred by individual firms. Broker-dealers nevertheless must comply with their obligations pursuant to Rules 14b-1 and 14b-2 under the Act if provided assurance of reimbursement of reasonable expenses as provided in NYSE Rules 451 and 465 and the related material.[363]

With respect to the notice and access fees, the Commission expressed concern in the Order Instituting Proceedings that the proposal essentially would codify Broadridge's existing fee schedule.[364] The Exchange responded to this concern by providing supplemental information from Broadridge detailing the work effort associated with notice and access services.[365] The Exchange previously had represented that there was general satisfaction with the current Broadridge notice and access fees, and although the PFAC had explored alternatives, none were more attractive.

Finally, in the Order Instituting Proceedings, the Commission expressed concern regarding the practice by Broadridge of rebating a portion of the fees paid by issuers for proxy processing to its larger broker-dealer clients, and questioned why these savings were not

[345] *See* NYSE Letter III.

[346] *See* Order Instituting Proceedings, 78 FR 32522–23.

[347] *Id.* at 32522.

[348] *See* NYSE Letter III.

[349] *See* NYSE Letter II.

[350] *Id.*

[351] *See* NYSE Letter III.

[352] *See* Order Instituting Proceedings, 78 FR 32522.

[353] *See* NYSE Letter.

[354] *See* NYSE Letter II.

[355] *See* NYSE Letter III.

[356] *See* Order Instituting Proceedings, 78 FR 32522–23.

[357] *See* NYSE Letter IV.

[358] *See* NYSE Letter II.

[359] *See* NYSE Letter IV.

[360] *See* NYSE Letter II.

[361] *See* NYSE Letter IV.

[362] *See* NYSE Letter II.

[363] Issuers must likewise nevertheless comply with their obligations under Rule 14a–13; the Commission does not view the rule change as inconsistent with or violating Regulation 14A. Accordingly, the Commission does not believe the NYSE proposal could effectively ''disenfranchise'' shareholders, as alleged by one commenter. *See* FOLIOfn Letter.

[364] *See* Order Instituting Proceedings, 78 FR 32523.

[365] *See* NYSE Letter III.

passed on to issuers.[366] Several commenters also were of the view that this practice placed an unnecessary burden on competition. In considering the impact on competition of these rebate practices, the Commission took into account the Exchange's representations that broker-dealers incur some costs related to proxy distribution beyond the cost of retaining Broadridge, and that, given the economies of scale associated with Broadridge's services, Broadridge can afford to make ''cost recovery'' payments to larger broker-dealers to reimburse them for some proxy distribution costs not outsourced to Broadridge.[367] Accordingly, these rebate arrangements may in fact appropriately reimburse broker-dealers for reasonable expenses incurred in connection with proxy distribution, and not represent an inappropriate competitive action. The Commission also considered the Exchange's representation that the proposal was expected to lower overall proxy distribution fees by at least 4%, in which case the proposal would not use Broadridge's competitive position to adversely affect, on average, the prices paid by issuers. We conclude the Exchange has adequately demonstrated that to the extent the proposed rule change allows rebate practices to continue, that does not place an unnecessary burden on competition in contravention of relevant statutory and regulatory requirements.

The Commission recognizes, as it did in the Order Instituting Proceedings, that the Exchange's proposal appears designed to make incremental improvements to the existing fee structure. For example, as noted above, the proposed five-tiered rate structure for the basic processing and supplemental fees arguably would more equitably allocate such fees among issuers by better reflecting the economies of scale in proxy processing. The proposal also would incrementally apply the rates in higher tiers, so as to avoid the rate ''cliff'' that currently exists with the supplemental fee tiers.

In addition, the proposal would appear to impose fees more equitably on managed accounts, where voting often is delegated by the beneficial shareholder to the investment manager and the positions held frequently are small. Specifically, the proposal would charge managed accounts one-half the rate of non-managed accounts for the preference management fee, and no fee for managed accounts with five or fewer shares. In addition, the proposal would provide the same treatment to wrap accounts and other managed accounts, ending the current disparate practice of charging no fees to managed accounts labeled as wrap accounts, but full fees to other managed accounts.

Finally, the proposal would, for a five-year test period, provide an EBIP incentive fee to encourage broker-dealers to offer customers the ability, among other things, to access proxy materials and vote through the broker-dealers' Web sites.[368] Commenters expressed the view that the availability of EBIPs would re-engage individual shareholders and encourage retail voting in corporate elections, which the Commission believes would further the protection of investors and the public interest.[369]

In sum, and as discussed in detail above, the Exchange has proposed a variety of revisions to its schedule of reasonable rates of reimbursement by issuers for the processing of proxy materials and other issuer communications provided to beneficial holders, including with respect to the basic, supplemental, preference management, notice and access, NOBO list, and EBIP incentive fees. The Commission views the proposed rule change as an overall package of changes and fees that is, on balance, an improvement to the NYSE's existing reimbursement rate structure. The proposed rule change reflects the consensus recommendation of the PFAC, which is composed of representatives of issuers, broker-dealers and investors, key constituencies impacted by the proposal. In the Order Instituting Proceedings, the Commission questioned the rigor with which the PFAC and the Exchange reviewed the costs associated with proxy processing in developing its recommendations, and analyzed the individual components of the proposed fees to assure they met the statutory standards. The Exchange responded by providing the additional explanation and supplemental information described above, including responses to specific comments on the individual components of the proposal. The Commission believes the Exchange has addressed the questions raised in the Order Instituting Proceedings sufficiently to allow the Commission, on balance, to find that the proposal is consistent with the Act. In approving the proposal, the Commission notes that the proxy system need not be reformed in a single step, and the Commission welcomes improvements to the current system, even incremental ones. In this regard, the Commission emphasizes that it continues to review the issues raised in the Proxy Concept Release, including ways to encourage competition in the proxy distribution process, so that more reliance can be placed on market forces to determine reasonable rates of reimbursement.

VI. Conclusion

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[370] that the proposed rule change (SR–NYSE–2013–07) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[371]

Kevin M. O'Neill,

Deputy Secretary.

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[366] *See* Order Instituting Proceedings, 78 FR 32523.

[367] *See* NYSE Letter III. NYSE supported its representations with a description prepared by SIFMA of these additional proxy distribution costs.

[368] *See supra* notes 106, 108, 109, 110 and accompanying text for a description of the EBIP fee.

[369] *See* Section IV.G, *supra.*

[370] 15 U.S.C. 78s(b)(2).

[371] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70713; SR–NYSE–2013–21; SR–NYSEMKT–2013–25]

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Disapprove Proposed Rule Changes, as Modified by Amendment Nos. 1, Amending NYSE Rule 104 and NYSE MKT Rule 104—Equities to Codify Certain Traditional Trading Floor Functions That May Be Performed by Designated Market Makers, To Make Exchange Systems Available to DMMs That Would Provide DMMs With Certain Market Information, To Amend the Exchanges' Rules Governing the Ability of DMMs To Provide Market Information To Floor Brokers, and To Make Conforming Amendments to Other Rules

October 18, 2013.

On April 9, 2013, the New York Stock Exchange LLC (''NYSE'') and NYSE MKT LLC (''NYSE MKT'') (collectively, the ''Exchanges'') each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act