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March 15, 2013

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: NYSE Proposal Concerning Proxy Distribution Fees (File No. SR-NYSE-2013-07)

Dear Ms. Murphy:

The Investment Company Institute<sup>1</sup> is responding to the Securities and Exchange Commission's request for comments on a proposed rule change ("Proposal") filed by the New York Stock Exchange ("NYSE") concerning proxy distribution fees—*i.e.*, the fees that broker-dealers and banks are entitled to receive from issuers for forwarding their proxy materials to beneficial owners who hold shares in "street name."<sup>2</sup> The Proposal is based, in large part, on recommendations issued last year by an industry working group, the Proxy Fee Advisory Committee ("PFAC").<sup>3</sup> The NYSE formed the PFAC to review the existing fee structure and recommend such changes as it believed appropriate. The

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$14.6 trillion and serve over 90 million shareholders.

<sup>2</sup> See Securities and Exchange Commission, Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of 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, SEC Release No. 34-68936 (Feb. 15, 2013), 78 Fed. Reg. 12381 (Feb. 22, 2013) ("Release"), available at <http://www.sec.gov/rules/sro/nyse/2013/34-68936.pdf>.

<sup>3</sup> See Recommendations of the Proxy Fee Advisory Committee (May 16, 2012) ("PFAC Report"), available at [https://usequities.nyx.com/sites/usequities.nyx.com/files/final\\_pfac\\_report.pdf](https://usequities.nyx.com/sites/usequities.nyx.com/files/final_pfac_report.pdf).

Release acknowledges that the PFAC was formed with issuers other than mutual funds in mind and notes that the NYSE, with industry participation, currently is reviewing the fees provided in the NYSE rules as they impact mutual funds to determine whether additional changes are appropriate.<sup>4</sup>

As issuers of voting securities, registered investment companies (“funds”) prepare proxy solicitation materials in connection with meetings of their shareholders. Relative to other types of issuers, funds (especially closed-end funds) have a disproportionately large retail shareholder base. In addition, a significant portion of fund shares is held in street name. Consequently, funds have a strong interest in the structure and amount of fees charged for the distribution of proxy and related materials to beneficial shareholders.<sup>5</sup>

Indeed, while it is true that open-end funds (*i.e.*, mutual funds and exchange-traded funds) are not required to hold annual meetings of shareholders, our members report that when they *do* hold shareholder meetings,<sup>6</sup> the costs can be very high. In addition, closed-end funds whose shares are listed on an exchange *are* required by exchange rules to hold annual meetings of shareholders and, thus, must distribute proxy materials every year. In both cases (open-end and closed-end funds), the costs involved typically are fund expenses that fund shareholders pay. On behalf of these fund shareholders, ICI and its members believe it is important for the Commission to do all it can to eliminate unreasonable costs from the system.

ICI expressed its strong concerns with the current proxy distribution fee system in a comment letter in response to the Commission’s 2010 concept release on the U.S. proxy system.<sup>7</sup> We and other commenters urged the Commission to take steps to reduce costs and increase competition related to the distribution of proxy and other issuer-prepared material to beneficial shareholders. We pointed out several shortcomings of the current proxy distribution system, including: (1) the system by its very terms fails to create an incentive to reduce fees, because the proxy service provider is selected by the broker or other financial intermediary but paid by the issuer; and (2) virtually all banks and brokers contract out the administrative process for proxy distribution to one vendor.<sup>8</sup> We also noted the long period of time that had elapsed since the NYSE last modified the fee schedule.

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<sup>4</sup> We appreciate the NYSE’s including ICI in its Mutual Fund Proxy Fee Review group, which has been focusing primarily on the “interim fees” associated with distribution of annual and semi-annual reports to fund shareholders.

<sup>5</sup> As such, our members’ interests in this matter extend beyond the costs associated with distributing shareholder reports.

<sup>6</sup> Open-end funds generally hold shareholder meetings when required by state law or the Investment Company Act of 1940 and as otherwise needed to conduct corporate business.

<sup>7</sup> See Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Ms. Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, dated October 20, 2010 (“Proxy System Comment Letter”), available at <http://www.ici.org/pdf/24637.pdf>.

<sup>8</sup> The Release notes that Broadridge is the service provider for most U.S. broker-dealers.

To address our concerns, we recommended that the Commission:

- conduct an independent third-party audit of the current fee structure to establish reasonable rates of reimbursement;
- assess the reasonableness of the rates periodically thereafter; and
- work toward the establishment of a more competitive marketplace for the distribution of proxy materials.

ICI recommended specific steps the Commission should take to achieve a system that would allow for the delivery of proxy materials with a more reasonable rate structure, including: (1) prohibiting remittances to brokers/banks in situations where the costs are less than the amount for which the proxy service provider bills the issuer; (2) rationalizing fees associated with use of the “notice and access” model for delivering proxy materials; and (3) limiting “incentive fees” that apply when the need to mail materials in paper format has been eliminated.

The Proposal does not change the views we outlined almost two and a half years ago in the Proxy System Comment Letter. Below we provide several general comments followed by comments on certain aspects of the Proposal.

### **General Comments**

ICI and its members continue to have the concerns we expressed in the Proxy System Comment Letter.<sup>9</sup> We appreciate that the NYSE has taken the initiative and gathered a significant amount of information in an effort to update a fee structure that has been in place for over a decade. Nevertheless, the work of the PFAC and the issuance of the Proposal (with a mere 21-day public comment period) do not substitute for an independent third-party audit of the current fee structure. Regardless of whether the SEC approves or disapproves the Proposal, there are several indications of the continuing need for a rigorous, independent review of the current system that includes, among other things, a thorough analysis of actual costs involved.

For example, as we indicated in the Proxy System Comment Letter, our members tell us that the costs they incur for distributing proxy materials to street name shareholders far exceed those for

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<sup>9</sup> As the NYSE readily acknowledges, some of the important issues and questions that need to be examined are outside the NYSE’s purview, including whether more far-reaching changes to the current system are needed. For example, we would support changing the current system by which the proxy service provider is selected by the broker but paid by the issuer, as it fails to create an incentive to reduce fees paid by funds and borne by their shareholders.

distribution to registered shareholders.<sup>10</sup> We believe this marked disparity—which the Proposal does not appear to address to any significant degree—strongly suggests the need for closer examination of the fees. In addition, other interested parties have raised serious questions about various aspects of the PFAC’s work.<sup>11</sup> While it is logical and appropriate for the NYSE’s PFAC initiative to rely on some of the main stakeholders involved in the proxy distribution process, only an independent third party would be in a position to evaluate objectively (and possibly supplement) the information on which the PFAC’s recommendations are based.

At a minimum, there should be further analysis of the proxy distribution fees paid by funds and how the proposed changes would affect those fees.<sup>12</sup> The Release states that “[t]he PFAC’s changes should have a relatively modest impact on mutual funds,” but this conclusion seems to be based solely on the fact that mutual funds are not required to hold annual shareholder meetings. There is no acknowledgement or distinct analysis of how the current and proposed new fees would affect funds. Given the disproportionate number of retail shareholders (especially for closed-end funds), and the possibility that the increase in fees for “special meetings” could affect open-end funds more than other issuers,<sup>13</sup> such an analysis seems warranted.

Indeed, we understand that preliminary analysis by an independent proxy service firm of how the proposed fee changes would affect fund open-end fund special meetings finds that based on the proposed changes in processing and intermediary unit rates, funds with less than 500,001 beneficial accounts would see the combined tier rates rise from 6.7% to as much as 38% for funds with fewer than 10,000 beneficial accounts. Since the proposed combined processing and intermediary tier rate for more than 500,000 beneficial accounts would result in a reduction of only \$.01 per additional account, they estimate that the proposed changes would result in higher cumulative combined (processing + special meeting intermediary) fees for funds having fewer than 5,140,000 accounts processed by a single intermediary. This preliminary analysis suggests that the impact of the proposed changes in many cases may not be “relatively modest.”

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<sup>10</sup> For example, one member firm indicated that its costs for distribution to street name shareholders were twice the amount of the costs of distribution to registered shareholders. Another member reports that in a recent proxy, the beneficial account proxy vendor’s per unit price was 79% higher than that of the registered account proxy vendor.

<sup>11</sup> See, e.g., Letter from Charles V. Rossi, President, The Securities Transfer Association, Inc., to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated March 4, 2013, available at <http://www.sec.gov/comments/sr-nyse-2013-07/nyse201307-3.pdf>.

<sup>12</sup> The NYSE’s Mutual Fund Proxy Fee Review group might be an appropriate forum to initiate such analysis and, if so, we look forward to working with the NYSE to gather and assess, at least preliminarily, this data.

<sup>13</sup> If “special meetings” encompass all meetings for which there are non-routine items on the ballot (whether or not there is a director election), many if not most open-end fund shareholder meetings will fall into this category.

And even if after such an analysis is completed, it is determined that the impact of the changes in fact would be “relatively modest,” that does not mean the fees funds are paying—whether annually or less frequently—are appropriate.

### **Comments on the Proposal**

We are unable to provide feedback on most of the Proposal’s specific changes to fee levels or structures. As stated above, the Proposal does not provide data specific to funds for us to evaluate. It is not feasible for our member companies to replicate the work of the PFAC during the short public comment period. Further, at least in the first instance, Broadridge would need to supply some of the information needed to conduct such an evaluation. Nevertheless, we have comments on certain aspects of the Proposal, as discussed below.

#### “Cost Recovery Payments”

As noted above, in the Proxy System Comment Letter, ICI recommended that the SEC prohibit remittances to brokers in situations where the broker’s costs are less than the amount for which the proxy service provider bills the issuer.<sup>14</sup> The Release, like the PFAC Report, discusses this topic, referring to such remittances as “cost recovery payments.” It indicates that the PFAC “was persuaded that the existence of these payments is not any indicator of unfairness or impropriety.” It concludes that because proxy distribution fees “are fixed at ‘one size’ that has to ‘fit all,’” but the costs of providing services vary, there necessarily will be “winners and losers.’” The Release also describes a “representative survey” that SIFMA conducted in an effort to supplement the PFAC’s analysis. Both the NYSE and SIFMA acknowledged the many limitations involved in conducting the survey.

ICI and its members remain concerned about the implications of this practice and the possibility that funds may be paying more than would constitute “reasonable” reimbursement for actual costs. We continue to believe that this is one of several areas that should be the subject of further, independent review.

#### Notice and Access Fees

In the Proxy System Comment Letter, ICI noted that neither the NYSE nor any other self-regulatory organization (“SRO”) has established the maximum fees that member firms may charge issuers for delivery of proxy materials using the notice and access model. We expressed concern with the current manner in which the primary proxy service provider (*i.e.*, Broadridge) assesses notice and

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<sup>14</sup> See Concept Release on the U.S. Proxy System, SEC Release Nos. 34-62495; IA-3052; IC 29340 (July 14, 2010) (explaining that the primary proxy service provider currently bills issuers, on behalf of its broker-dealer clients, the maximum fees charged to issuers on the broker-dealers’ behalf, resulting in monies being remitted by the primary proxy service provider to a subset of its broker-dealer clients).

access fees. In particular, as discussed in the Release, if an issuer elects the “notice-only” delivery option for any or all accounts, Broadridge currently charges an “Incremental Fee” in addition to the other fees permitted to be charged under SRO rules. This Incremental Fee is charged to *all* accounts, even if the issuer has elected to continue “full set” delivery to some accounts.

The Release acknowledges concerns with this approach, and states that Broadridge “was asked to suggest an alternative approach that would net Broadridge a similar amount of fee revenue from notice and access but avoid the application of a fee to all accounts.” It explains that Broadridge prepared estimates of two models of an alternative approach but that each one had a disproportionate impact on certain issuers. It states that “[a]ccordingly, the majority of [PFAC] members decided that, while perhaps not ideal, simply bringing notice and access under the regulatory tent would be the better approach ....” Thus, the Proposal generally would codify Broadridge’s current notice and access fees.<sup>15</sup>

In so doing, the Proposal clearly does nothing to change our view that it is not appropriate for special fees automatically to apply when issuers elect the notice-only delivery option. Such an approach has the potential to discourage the use of notice and access, a result the PFAC seemed eager to avoid. Rather, any incremental fees only should be permitted if incremental costs associated with this delivery option are documented as necessary to allow for *reasonable* reimbursement. 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. Therefore, there is still a need for an independent review of these fees with a view toward rationalizing them to reflect a rate that allows for no more than reasonable rates of reimbursement of expenses associated with the notice and access model.

#### “Preference Management” Fees

ICI previously recommended that the Commission limit “incentive fees,” *i.e.*, fees assessed when the need to mail materials in paper format has been eliminated, for instance, when duplicative mailings to multiple accounts at the same address have been eliminated. Similar to our concern with applying notice and access fees to all accounts, even those that are receiving “full set” delivery, we expressed the view that incentive fees should not continue to be charged *ad infinitum* but rather—if at all—on a one-time basis upon the elimination of paper mailings for an account.

The Release acknowledges that questions have arisen about the appropriateness of the “evergreen” nature of these fees, which currently are charged not only in the year in which electronic delivery is elected but also in each year thereafter. The Release indicates, however, that the PFAC “was persuaded that there was in fact significant processing work involved in ‘keeping track of the shareholder’s election,’ especially given that the shareholder is entitled to change that election from

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<sup>15</sup> The Proposal would eliminate the minimum fee of \$1500 for issuers held by up to 10,000 accounts.

time to time.” In addition, because the PFAC found that a significant amount of the work involved was in ‘maintaining’ or ‘managing’ the distribution preferences attached to each position, the PFAC “believes that transparency and understanding will be served” by using different nomenclature; specifically, by re-naming incentive fees “preference management” fees.

While there appears to be information supporting the notion that ongoing work is being done, ICI and its members believe this is yet another area where independent review and verification are warranted. In the words of the NYSE, we believe that transparency and understanding would be served by such review and verification. An independent review should consider, for example, the extent to which preference management fees might be duplicative in light of contractual arrangements between registered investment companies and broker-dealers holding street name accounts that already provide for compensation to the broker-dealer to maintain distribution preferences.<sup>16</sup>

### NOBO Fees

The Proposal would codify the fee that Broadridge historically has charged for issuers to obtain a list of non-objecting beneficial owners, or “NOBOs.”<sup>17</sup> NOBO fees is another area in which our members believe that current fees far exceed what should be considered “reasonable” and are deserving of further scrutiny.<sup>18</sup> Members have raised concerns, for example, about (1) the level of fees charged given the relatively uncomplicated nature of the work involved<sup>19</sup> and (2) the possibility that issuers may be paying twice for the same information. An independent review could, and should, delve into these questions.

In the meantime, we note that the Proposal would take one step in the right direction. In particular, the Proposal would not permit the per-name amounts to be charged for names eliminated in permitted stratifications, which would include record date requests to eliminate positions above or

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<sup>16</sup> Further, we question at least part of the NYSE’s apparent basis for deciding not to change the preference management fee to a one-time fee. In particular, the Release states that “clearly, a change to a one-time fee would radically impact the overall revenue produced by the proxy fees, presumably requiring at least some compensating increases to the ‘one-time’ fee or to other proxy fees.” We do not necessarily see why such a fee should be immune from modification, if it is not a “reasonable expense” as provided for in Securities Exchange Act of 1934 Rule 14b-1(c)(2).

<sup>17</sup> The Release indicates that it is the NYSE’s understanding that Broadridge has long charged a tiered amount per name in the NOBO list: 10 cents per name for the first 10,000 names in the list; 5 cents per name from 10,001 to 100,000 names; and 4 cents per name above 100,000 (with a \$100 minimum). These fees are in addition to the 6.5 cent per name basic fee.

<sup>18</sup> As stated in the Release, NYSE rules provide that where there is an agent processing NOBO data for the broker, the issuer will also be expected to pay the “reasonable expenses” of the agent.

<sup>19</sup> One member reports having received a quote of \$135,000 for 1.3 million shareholders, or approximately 10.4 cents per name. Assuming that this figure includes the 6.5 cent per name broker fee, the agent’s fee appears to represent an additional 60 percent charge. More information is needed to assess whether this amount represents “reasonable expenses” of the agent.

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below a certain level, or those that have already voted. While we remain concerned about NOBO fees more generally, ICI believes this change would be a positive development and strongly supports this aspect of the Proposal.

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ICI appreciates the opportunity to provide its views. If you have any questions about our comments, please contact the undersigned at 202/218-3563, or Frances Stadler at 202/326-5822.

Sincerely,

/s/

Dorothy M. Donohue  
Deputy General Counsel – Securities  
Regulation

cc: Norm Champ, Director  
Diane Blizzard, Associate Director  
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