organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and 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–NYSEArca–2013–52 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–NYSEArca–2013–52.* 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–NYSEArca–2013–52* and should be submitted on or before June 20, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–12846 Filed 5–29–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69622; File No. SR–NYSE–2013–07]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Disapprove 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

May 23, 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 received 28 comments on the proposal.[4] On April 3, 2013, the Commission designated a longer period for Commission action on the proposed rule change, until May 23, 2013.[5] The Exchange submitted a response to the comments on May 17, 2013.[6]

This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposed rule change.

II. Background

NYSE member organizations that hold securities for beneficial owners in street

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[24] 17 CFR 200.30–3(a)(12).

[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''); Michael S. O'Brien, Vice President—Corporate Governance Officer, BNY Mellon, dated March 28, 2013 (''BNY Letter''); 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 Goup, dated May 17, 2013 (''CtW Letter'').

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

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

name solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of NYSE issuers.[7] 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,[8] 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.[9]

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 owners.[10] This fee structure is also replicated in Section 402.10 of the NYSE Listed Company Manual.[11] 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.[12] NYSE member firms may seek reimbursement for less than the approved rates;[13] 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.[14] 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.[15] 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.[16] In general, Broadridge enters into a contract with the NYSE member firm and acts as a billing and collection agent for that member firm.[17] 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.[18]

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.[19] 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 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.[20] 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.'' [21] 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.[22] The Proxy Concept Release further noted that, as of the date of the release, such review had not been done.[23]

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'') to review the existing NYSE fee structure and make recommendations for change as the PFAC deemed appropriate.[24] The proposed rule change is an outgrowth of the PFAC's recommendations.[25]

III. Description of the Proposal

In the proposal, the Exchange has proposed to amend the Supplementary Material to NYSE Rules 451 and 465, and Section 402.10 of the NYSE Listed Company Manual.[26] The Exchange represents that the proposed changes reduce some fees and increase others.[27] Broadridge has estimated that, under the proposed changes, overall fees paid by

[7] 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'').

[8] 17 CFR 240.14b–1; 17 CFR 240.14b–2.

[9] 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'').

[10] *See* Rules 451 and 465; *see also* Proxy Concept Release, 75 FR at 42995. The current NYSE fee schedule under the Supplementary Material to Rule 451 for expenses incurred in connection with proxy solicitations is the same as the current fee schedule for expenses incurred in mailing interim reports or other material pursuant to the Supplementary Material to Rule 465. *See also* Proxy Concept Release, 75 FR at 42995 n.109.

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

[12] *See* Rules 451.93 and 465.23.

[13] *Id.*

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

[15] *See* 2002 Approval Order, 67 FR at 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.*

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

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

[18] *Id.* The Commission understands that Broadridge currently bills issuers, on behalf of its broker-dealer clients, the maximum fees allowed by NYSE Rules 451 and 465. *Id.*

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

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

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

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

[23] *Id.*

[24] *See* Notice, 78 FR at 12382.

[25] 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.

[26] 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 35 and 36 and accompanying text, *infra.*

[27] *See* Notice, 78 FR at 12384.

issuers would decrease by approximately 4%.[28]

Currently, the reimbursement rates set by the Exchange for the distribution of an issuer's proxy materials include: [29]

• 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.[30]

• 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.[31]

• 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 [32] or distributing some or all material electronically.[33]

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.[34] The same proxy fees are currently presented multiple times in Rule 451, Rule 465 and Section 402.10 of the Listed Company Manual.[35] 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.[36] 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.[37] 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.[38] Lastly, the Exchange has proposed to eliminate several minor minimum fees of $5 or less as irrelevant to the overall fees imposed or collected.[39]

Substantively, the Exchange has proposed to revise certain aspects of the existing fee schedule and add new fees.[40] 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.[41] 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.[42]

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.[43] This fee is commonly referred to as the base mailing or basic processing fee.[44] 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.'' [45] 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;

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[28] *Id.*

[29] *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 at 42995–96. For an example of the application of the current reimbursement rates, *see* Proxy Concept Release, 75 FR at 42996 n.120.

[30] *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 at 42996.

[31] *Id.*

[32] *Id.* The elimination of duplicative mailings to multiple accounts at the same address is referred to as ''householding.'' *See* Proxy Concept Release, 75 FR at 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.

[33] Proxy materials can be provided electronically to shareholders that have affirmatively consented to electronic delivery. *See* Proxy Concept Release, 75 FR at 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.*

[34] *See* Notice, 78 FR at 12390.

[35] *Id.*

[36] *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.

[37] *See* Notice, 78 FR at 12390.

[38] *Id.*

[39] *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).

[40] 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.

[41] *See* proposed Rule 451.90.

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

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

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

[45] *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 at 12390.

• $0.34 for each account above 300,000 accounts, up to 500,000 accounts;
• $0.32 for each account above 500,000 accounts.[46]

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.[47]

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.[48] 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.[49] 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.[50] 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.[51]

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.[52] 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.[53] 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.[54] The Exchange has also 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;
• $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.[55]

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.[56]

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.[57]

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.[58] 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.[59]

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).[60] 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.[61]

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.[62] 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.[63] 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.[64] 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.[65]

C. Incentive/Preference Management Fees

As stated above, the Exchange's fee schedule currently provides for an

[46] *See* proposed Rule 451.90(1)(b)(i).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *See* Notice, 78 FR at 12385 n.20.
[51] *Id.*
[52] *See* proposed Rule 451.90(1)(b)(ii).
[53] *See* Rule 451.90; *see also* Proxy Concept Release, 75 FR at 42996.
[54] *See* proposed Rule 451.90(1)(c)(i).
[55] *See* proposed Rule 451.90(1)(c)(ii).
[56] *Id.*
[57] *See* proposed Rule 451.90(1)(c)(iii).
[58] *Id.*
[59] *Id.*
[60] *See* proposed Rule 451.90(1)(b)(iv).
[61] *Id.*
[62] *See* Notice, 78 FR at 12385.
[63] *Id.* at 12384.
[64] *Id.* at 12385.
[65] *Id.*

incentive or preference management 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.[66] 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; [67] 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).[68] 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.[69]

The Preference Management Fee would apply not only in the year when paper delivery is first eliminated, but also in each year thereafter.[70] 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.[71] 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.[72]

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.[73]

As noted above, the Exchange has proposed that the Preference Management Fee applied to Managed Accounts be half that applied to non-managed accounts.[74] 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 electronically rather than by receiving multiple paper copies of proxy statements and voting instructions.[75] 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.[76] But the Exchange states that the PFAC concluded that making some distinctions between Managed Accounts and non-managed accounts for fee purposes was appropriate.[77] Among other things, the Exchange states that the popularity of Managed Accounts demonstrates that they offer advantages to investors and brokerage firms.[78] 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.[79] 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.[80]

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.[81] 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.[82] 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.[83] 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.[84] The Exchange states that the PFAC determined that five shares or less was the appropriate level to draw the line

[66] *See* Rule 451.90.

[67] *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 42 and accompanying text, *supra,* and discussion of Managed Accounts, *infra.*

[68] *See* proposed Rule 451.90(4)(b); *see also* notes 39 and 45, *supra,* which discuss proposed Rules 451.90(2) and 451.90(3).

[69] *See* proposed Rule 451.90(4). The need for paper mailings can be eliminated through several alternative methods of distribution, such as householding, electronic delivery, and notice and access. *See* notes 32 and 33, *supra,* and discussion of notice and access, *infra.*

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

[71] *Id.*

[72] *Id.*

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

[74] *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 at 12385.

[75] *See* Notice, 78 FR at 12387.

[76] *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.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

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

[82] *See* Notice, 78 FR at 12388.

[83] *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.*

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

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.'' [85]

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.'' [86] 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.[87] 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.[88] 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.[89] 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.[90] 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.[91] In the proposal, the Exchange has proposed to codify the notice and access fees currently charged by Broadridge, with one adjustment.[92]

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.[93]

The Exchange has also proposed to clarify that, under this schedule, every 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.[94] 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.[95]

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'').[96] 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.[97]

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.[98] According to the Exchange, this fee is intended to persuade firms to develop and encourage the use of EBIPs by their customers.[99] 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.[100] 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.[101] 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.[102]

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.[103] 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.[104]

The Exchange states that the EBIP fee would be available to firms that already

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[85] *Id.*

[86] *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 at 42998 n.140.

[87] *See* Notice, 78 FR at 12387.

[88] *Id.* at 12387–88.

[89] *See* Proxy Concept Release, 75 FR at 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.*

[90] *Id.* at 42996.

[91] *See* Notice, 78 FR at 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 at 42996–97.

[92] *See* Notice, 78 FR at 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.*

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

[94] *Id.*

[95] *Id.*

[96] *See* Notice, 78 FR at 12391; *see also* Proxy Concept Release, 75 FR at 43003.

[97] *See* Notice, 78 FR at 12391.

[98] *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.*

[99] *See* Notice, 78 FR at 12393.

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

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

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.[105] 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.[106] 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.[107]

The Exchange represents that a study of the impact of the program would be conducted after three years.[108]

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.[109] Such a list is commonly referred to as a NOBO list, and the fees are charged per name in the NOBO list.[110] 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.[111] 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.[112] 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.'' [113]

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.[114] 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.[115] For all other requested lists, however, the issuer would be required to take and pay for complete lists.[116]

IV. Comment Letters and the Exchange's Response

As noted above, the Commission received 28 comment letters concerning the Exchange's proposal.[117] Twelve commenters expressed general support for the proposed rule change,[118] and other commenters supported certain aspects of the proposed rule change. Generally, five commenters believed that the proposal would improve transparency of the proxy fee structure; [119] five believed that the proposal eliminates the ''cliff'' pricing schedule, in favor of a more rational tiered system; [120] one believed that the Exchange has taken a fair and reasonable approach to charges for managed accounts; [121] 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; [122] eleven believed that the proposed success fee for enhancements to EBIPs would reduce costs and/or lead to higher retail voting rates; [123] one believed that providing additional incentives for integration of a customer's documents in EBIPs would provide a benefit to investors; [124] and six supported the stratification of NOBO lists.[125]

Other commenters raised concerns regarding the proposal. Generally, ten commenters expressed concern about the lack of an independent third-party review of actual costs in the proxy distribution process; [126] five expressed concern with the lack of a thorough cost/benefit analysis of the proposed rule change; [127] four believed that the processing and intermediary unit fees do not allocate fees equitably between large and small issuers; [128] seven questioned the fairness of the proposed fee schedule; [129] four believed that the structure and level of the proposed proxy fees place a burden on competition; [130] seven expressed concern about the incentive structure for developing EBIPs; [131] two raised concerns regarding the five share limit for fees for processing shares held through managed accounts; [132] three believed the stratified NOBO lists should be made available outside of a record date; [133] and two expressed concern about the impact of the proposal on mutual funds in particular.[134] Finally, one commenter recommended an effective date for the proposed rules.[135] These issues, and the Exchange's response, are discussed below.

A. Independent Third-Party Review of Proxy Costs

Two commenters that expressed general support for the proposal commented on the issue of whether an

[105] *See* Notice, 78 FR at 12392.

[106] *Id.*

[107] *Id.*

[108] *Id.*

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

[110] *See* Notice, 78 FR at 12390.

[111] *See* Rule 451.92.

[112] *See* Notice, 78 FR at 12390.

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

[114] *See* Notice, 78 FR at 12390–91.

[115] *See* proposed Rule 451.92.

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

[117] *See* note 4, *supra.*

[118] *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.

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

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

[121] *See* SCSGP Letter.

[122] *See* Broadridge Letter.

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

[124] *See* Zumbox Letter.

[125] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter; ICI Letter; SCSGP Letter.

[126] *See* STA Letter, STA Letter II, SSA Letter, Schafer Letter, Lovatt Letter, SCC Letter, IBC Letter, NIRI Letter, ICI Letter, BNY 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.

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

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

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

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

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

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

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

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

[135] *See* SIFMA Letter.

independent third-party audit of proxy costs should be conducted.[136] One of them 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.'' [137] The other 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.'' [138]

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.[139] Two commenters argued that an independent third-party audit is the best way to evaluate whether the fees are reimbursed fairly, equitably and objectively, thereby eliminating the vested interests of those involved directly and indirectly in the process.[140] Two other commenters stated that the Commission should disapprove the proposed rule change until the audit has been commissioned and completed,[141] while two other commenters suggested that the Commission approve the proposal, but require an independent third-party review as part of an ongoing process.[142] One commenter believed that without a third-party audit, any proposal to adjust fees is akin to ''putting the cart before the horse,'' and it is highly likely that many issuers would continue to question the accuracy of proxy fees.[143] Another commenter highlighted 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.[144] One commenter stated that a comprehensive assessment of the fee proposal's net impact on proxy distribution costs for all issuers, including mutual funds, would require additional analysis from the Exchange and Broadridge (or an independent source).[145]

In response, the Exchange stated that the PFAC determined that an independent review of proxy costs was unnecessary.[146] 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.[147] The Exchange also noted that ''the PFAC made significant efforts to 'drill down' on the work performed by Broadridge and by the firms, and to satisfy itself that the fees were appropriately correlated with the work done.'' [148] 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.[149] The Exchange recognized, as noted by several commenters,[150] 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.[151] 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.[152] 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.'' [153] The Exchange 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.' '' [154]

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.[155] Two commenters stated that until an objective and comprehensive cost-benefit analysis can be developed, the SEC should disapprove this rule filing.[156]

The Exchange responded by noting that no such cost-benefit analysis is required by the relevant statute or SEC rules.[157] However, the Exchange contended that ''a cost-benefit analysis is exactly what took place, since 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.'' [158] The Exchange cited the PFAC's conclusions regarding Managed Accounts as an example of the PFAC's cost-benefit analysis.[159]

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.[160] Moreover, two commenters believe that these fees should not be charged at the same level for beneficial owners who are not receiving an actual proxy package.[161] These commenters also stated that such fees fall disproportionately on smaller issuers, especially those with less than 300,000 beneficial owner positions.[162] 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.[163] 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

[136] *See* Broadridge Letter, ABC Letter.

[137] *See* Broadridge Letter.

[138] *See* ABC Letter.

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

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

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

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

[143] *See* NIRI Letter.

[144] *See* BNY Letter.

[145] *See* AST Letter.

[146] *See* NYSE Letter.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See* STA II Letter, NIRI Letter, SCC Letter, IBC Letter, BNY Letter.

[151] *See* NYSE Letter.

[152] *Id.*

[153] *Id.*

[154] *Id.*

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

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

[157] *See* NYSE Letter.

[158] *Id.*

[159] *Id.*

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

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

[162] *Id.*

[163] *Id.*

with less than 300,000 beneficial owners should be bearing such a significantly large burden under the proposed fee schedule.'' [164]

D. Fairness of the Fee Proposals

Five 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.[165] In addition, five commenters believed that the proposal is an improvement that helps eliminate the ''cliff'' pricing schedule that distinguishes between large and small issuers, in favor of a more rational tiered system that is fairer to issuers.[166]

However, several commenters raised concerns about the possibility that issuers may be paying more than would constitute ''reasonable'' reimbursement for actual costs.[167] As a result, several commenters stated that the fee proposal favors the interests of broker-dealers and discriminates against issuers.[168] 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.[169] 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.[170] 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.'' [171]

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.[172] These commenters also highlighted the lack of any detailed analysis about the cost of the work involved for the fee.[173] 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.[174] 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.'' [175] 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.'' [176]

In its 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.[177]

2. Separately Managed and Wrap Accounts

One commenter believed that the Exchange has taken a fair and 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.[178] Several other commenters, however, expressed concern regarding the proxy fees for separately managed accounts, including wrap accounts.[179] One commenter highlighted the lack of detailed analysis for why the managed account fees should remain an issuer expense.[180] 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.'' [181] Two commenters questioned the validity of the amount of work involved in managing a separately managed account.[182] 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.'' [183] 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.'' [184] 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.[185]

In its 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.[186]

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.[187] 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.[188] 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.'' [189]

[164] *Id.*

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

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

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

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

[169] *See* STA Letter II.

[170] *Id.*

[171] *Id.*

[172] *See* STA Letter II, BNY Letter, ICI Letter.

[173] *Id.*

[174] *Id.*

[175] *See* STA Letter II.

[176] *See* BNY Letter.

[177] *See* NYSE Letter.

[178] *See* SCSGP Letter.

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

[180] *See* STA Letter II.

[181] *See* STA Letter II.

[182] *See* STA Letter II, BNY Letter.

[183] *See* BNY Letter.

[184] *See* SSA Letter.

[185] *See* STA Letter II.

[186] *See* NYSE Letter.

[187] *See* STA Letter II.

[188] *Id.*

[189] *Id.*

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.[190] Another commenter stated that the proposal does not provide information sufficient to analyze in detail the cost basis for notice and access fees.[191] One commenter noted that the proposal would generally codify Broadridge's current notice and access fees.[192] 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.'' [193] 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.'' [194]

In its 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.[195] 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.[196]

5. NOBO List Fees

One commenter stated that the current NOBO list fees far exceed what should be considered reasonable and deserves further scrutiny.[197] This commenter noted that the proposed fee schedule codifies the fee that Broadridge historically has charged for issuers to obtain a list of NOBOs.[198] This commenter also raised concerns about (1) The level of fees charged given the relatively uncomplicated nature of the work involved and (2) the possibility that issuers may be paying twice for the same information.[199]

E. Burden on Competition

Several commenters stated that the structure and level of the proposed NYSE proxy fees place a burden on competition.[200] Four commenters stated that the NYSE rule filing does not adequately address the contract arrangements between broker-dealers and Broadridge.[201] 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.[202] 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.'' [203] One commenter stated that there should be an examination of the rebates being provided to ensure that they do not come at the issuer's expense.[204] This commenter also noted that this issue was previously raised by the NYSE 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.[205] 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.'' [206]

In its 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.'' [207] The Exchange suggested that, contrary to one commenter's contention that the rebates reflect excess profits,[208] 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.'' [209]

F. Enhanced Broker Internet Platforms

Ten commenters expressed general support for the proposed EBIP incentive fee, stating that issuers should expect new cost savings from the success fee for enhancements to EBIPs.[210] Two of these commenters believed that the proposed success fee would increase the availability of EBIPs and potentially spur innovation in such platforms.[211] An additional commenter that supported the proposed fee believed that it would result in higher retail voting rates.[212]

Six commenters believed that the incentive structure for developing EBIPs could be further improved.[213] 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.[214] Two commenters stated that these and other entities should be afforded at least the same incentives as brokers.[215] These commenters also argued that EBIPs offer no real benefit to retail shareowners over e-delivery.[216] Several commenters expressed concern that brokers who set up EBIPs could be incentivized to create default voting mechanisms that essentially replicate uninformed ''broker voting.'' [217] Two commenters stated that the fee proposal only addresses the needs of issuers, brokers and Broadridge, without considering the needs of shareowners.[218] 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

[190] *See* STA Letter II, ICI Letter.
[191] *See* AST Letter.
[192] *See* ICI Letter.
[193] *Id.*
[194] *See* STA Letter II.
[195] *See* NYSE Letter.
[196] *Id.*
[197] *See* ICI Letter.
[198] *Id.*
[199] *Id.*
[200] *See* STA Letter II, IBC Letter, SSA Letter, Lovatt Letter, Schafer Letter.
[201] *See* STA Letter II, IBC Letter, SSA Letter, BNY Letter.
[202] *See* STA Letter II, IBC Letter.
[203] *See* ABC Letter.
[204] *See* STA Letter II.
[205] *Id.*
[206] *See* STA Letter II, IBC Letter.
[207] *See* NYSE Letter.
[208] *See* STA II Letter.
[209] *See* NYSE Letter.
[210] *See* Perficient Letter, SIFMA Letter, ABC Letter, CCMC Letter, Broadridge Letter, Darling Letter, SCSGP Letter, iStar Letter, Steering Committee Letter, SCC Letter.
[211] *See* SIFMA Letter, ABC Letter.
[212] *See* NIRI Letter.
[213] *See* Harrington Letter, ICC Letter, Sharegate Letter, CG Letter, CII Letter, Zumbox Letter.
[214] *See* ICC Letter, Harrington Letter, CG Letter.
[215] *See* ICC Letter, CG Letter.
[216] *Id.*
[217] *See* ICC Letter, Harrington Letter, CG Letter.
[218] *See* ICC Letter, CG Letter.

implement EBIPs.'' [219] 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.[220] One commenter requested that the Commission include investment advisors and beneficial owners in developing the incentive plan for EBIPs.[221] Two commenters recommended that the proposed rule change be delayed and amended to encourage an open form of client directed voting. [222] One commenter recommended an approach to EBIPs that provides revenue streams to companies who prove they can provide a superior service in demand by the investor customer.[223] One commenter requested that the Commission consider the following four issues associated with EBIPs prior to finalizing the proposed rule change: (1) whether Voting Information Forms (''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.[224] Another commenter believed that providing additional incentives for integration of a customer's documents within one investor mailbox would provide a stronger benefit to investors.[225] 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.[226] 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.[227]

With respect to EBIPs, the Exchange stated in its response letter that it proposed the EBIP incentive fee because the PFAC and issuer representatives supported the fee.[228] The Exchange expressed that it has no opinion on whether EBIPs can or would be used to facilitate client directed voting, as this was not an issue discussed with the PFAC or with the Exchange in its follow up discussion regarding the EBIP fee proposal.[229] The Exchange noted one commenter's concerns regarding the voting instruction form used to obtain voting instructions from street name shareholders,[230] but stated that these concerns similarly were not discussed with the PFAC or in follow up EBIP discussions.[231]

G. Stratification of NOBO Lists Outside of a Record Date

Six commenters supported the stratification of NOBO lists.[232] Three commenters believed that the proposal to provide stratified NOBO lists would reduce issuers' costs in communicating with shareholders.[233] Another commenter believed that stratified NOBO lists would enhance retail voter participation, as well as help issuers communicate with their shareholders at proxy time.[234]

However, four commenters believed that the stratified NOBO lists should be made available outside of a record date.[235] 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.'' [236] 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.'' [237] 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.'' [238] This commenter highlighted that any potential negative impact on the vendor is not sufficient justification to restrict potential benefits to issuers.[239] One commenter 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.[240] 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, the proposed rule should be adjusted, if necessary, in light of the actual use of the new stratified NOBO list option.[241]

The Exchange stated in its response letter that it believes that there is a rational basis to distinguish between record date lists and other lists, and that the Exchange is concerned about the unknown impact of the proposed NOBO list fee change on overall proxy fee revenues available to reimburse brokers for their costs.[242] The Exchange stated that issuer and broker experience with this change would inform whether future changes are desirable.[243]

H. 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.[244] 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.[245] This commenter estimated that this amendment would save issuers approximately $3.6 million over a period of twelve months.[246]

[219] *See* SIFMA Letter.
[220] *Id.*
[221] *See* Harrington Letter.
[222] *See* ICC Letter, CG Letter.
[223] *See* Sharegate Letter.
[224] *See* CII Letter.
[225] *See* Zumbox Letter.
[226] *See* CtW Letter.
[227] *Id.*
[228] *See* NYSE Letter.
[229] *Id.*
[230] *See* CII Letter.
[231] *See* NYSE Letter.
[232] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter, ICI Letter, SCSGP Letter.
[233] *See* ABC Letter, Broadridge Letter, NIRI Letter.
[234] *See* SCSGP Letter.
[235] *See* SCSGP Letter, STA Letter II, BNY Letter, NIRI Letter.
[236] *See* STA Letter II.
[237] *Id.*
[238] *See* BNY Letter.
[239] *Id.*
[240] *See* Broadridge Letter.
[241] *Id.*
[242] *See* NYSE Letter.
[243] *Id.*
[244] *See* Gartner Letter.
[245] *See* Broadridge Letter.
[246] *Id.*

However, three commenters raised concerns regarding the five-share limit for fees for processing shares held through managed accounts.[247] 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.[248] Another commenter stated that the proposal lacked a detailed analysis concerning the basis for selecting any particular threshold.[249] Two commenters stated that the work required to process proxy distribution to Managed Accounts is the same, regardless of the number of shares held,[250] and one commenter stated the proposed approach has the potential to create an imbalance between the fees and the amount of work involved.[251] 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.[252]

I. Impact on Mutual Funds

Two commenters stated 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.[253] 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.[254] 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.' '' [255] 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 costs reductions could mitigate the impact of higher combined processing and intermediary unit fees.[256]

In its response letter, the Exchange criticized these two commenters as premising their comments on a misunderstanding of what constitutes a ''special meeting.'' [257] According to the Exchange, contrary to the suggestion in one commenter's letter,[258] a meeting that involves the election of directors, even if other non-routine items are included on the ballet, would not be a special meeting.[259] The Exchange believes that this misunderstanding may have impacted the proxy fee analysis performed by the other commenter.[260]

J. Effective Date of the Proposed Rules

One commenter recommended that the new rules become effective on January 1, 2014.[261] This commenter also urged the Commission to set an effective date for the commencement of the five-year EBIP program that is at least six to nine months following the date of adoption of the final rules implementing the EBIP program.[262] In its response letter, the Exchange stated its belief that a lengthy period before effectiveness of the proposed fee structure would be unnecessary.[263]

V. Proceedings to Determine Whether To Disapprove SR–NYSE–2013–07 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [264] to determine whether the proposed rule change should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B),[265] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(4) of the Act [266] 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.[267] In addition, Section 6(b)(5) of the Act [268] 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. Section 6(b)(5) also prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Further, Section 6(b)(8) of the Act [269] prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.

As discussed above, 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. According to the Exchange, over 80% of publicly held securities are in street name today, and NYSE member organizations have contracted with Broadridge, a third-party service provider, to handle almost all proxy processing in the U.S. The Exchange's proposal relies substantially on the recommendations of the PFAC, an advisory committee composed of representatives of issuers, broker-dealers and investors, which in turn relied substantially on information provided by Broadridge.

The PFAC's recommendations, according to the Exchange, were intended to serve several goals, including supporting the current proxy distribution system; encouraging and facilitating retail investor voting; improving the transparency of the fee structure; and ensuring that the fees are as fair as possible.[270] The Commission notes that aspects of the Exchange's

[247] *See* Broadridge Letter, SIFMA Letter, AST Letter.

[248] *See* SIFMA Letter.

[249] *See* AST Letter.

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

[251] *See* Broadridge Letter.

[252] *Id.*

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

[254] *See* AST Letter.

[255] *Id.*

[256] *Id.*

[257] *See* NYSE Letter.

[258] *See* ICI Letter.

[259] *See* NYSE Letter.

[260] *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.

[261] *See* SIFMA Letter.

[262] *See* SIFMA Letter.

[263] *See* NYSE Letter.

[264] 15 U.S.C. 78s(b)(2)(B).

[265] *Id.*

[266] 15 U.S.C. 78f(b)(4).

[267] 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.

[268] 15 U.S.C. 78f(b)(5).

[269] 15 U.S.C. 78f(b)(8).

[270] *See* Notice, 78 FR at 12384.

proposal appear designed to make incremental improvements to the existing fee structure, including for example, creating more finely-tuned, tiered fee structures for certain fees in an attempt to take into account economies of scale; eliminating proxy distribution fees for fractional shares; providing stratified NOBO lists; rationalizing the treatment of wrap accounts as compared to managed accounts; and encouraging EBIP use. Nevertheless, as is further discussed below, the Commission believes that significant questions exist as to whether the Exchange has provided adequate justification for material aspects of its proposal such that the Commission can make a determination that the proposal is consistent with the Act.

The Exchange estimates that issuers spend approximately $200 million in aggregate on fees for proxy distribution to street name shareholders each year. While the PFAC, according to the Exchange, ''did what it could'' to review the costs associated with proxy processing, such as reviewing publicly available financial information on Broadridge, which does not separately report information about its proxy distribution business as a standalone segment, as well as reviewing analyst reports that discuss Broadridge's business segments, it does not appear that the PFAC looked beyond this general information to obtain a clearer understanding of the costs of proxy processing or of how they may have changed in recent years, for example, in light of notice and access.[271]

The Exchange's rules currently set forth rates of reimbursement for processing and distribution expenses that are broken down into several specific categories. As discussed above, these include a ''basic processing fee'' of $0.40 for each account through which the issuer's securities are beneficially owned, as well as a ''supplemental fee'' of either $0.05 or $0.10 per beneficial owner account for issuers with securities held in 200,000 or more accounts, or less than 200,000 accounts, respectively. In addition, for accounts where paper mailings have been eliminated (*e.g.,* where there has been consent to electronic delivery or the suppression of duplicative mailings to the same address), there is an ongoing ''incentive fee'' of either $0.25 or $0.50 per beneficial owner account for issuers with securities held in 200,000 or more accounts, or less than 200,000 accounts, respectively. Although Broadridge currently charges issuers that elect to use the ''notice and access'' method for distributing proxy materials a separate per account fee, ''notice and access'' fees are not presently addressed by the Exchange's rules.

With respect to the basic processing fee, the PFAC recommended and the Exchange proposed a rate structure consisting of five tiers, ranging from $0.32 to $0.50 per beneficial owner account depending on the number of issuer accounts. Similarly, with respect to the supplemental fee, the PFAC recommended and the Exchange proposed a rate structure consisting of five tiers, ranging from $0.07 to $0.14 per beneficial owner account depending on the number of issuer accounts. The net effect of these changes is estimated to increase overall proxy distribution fees by approximately $9–10 million. According to the Exchange, the PFAC recommended these changes, among other things, to better reflect the economies of scale in processing issuers with a larger number of accounts, and to reflect the impact of inflation since the fees were last adjusted. The Exchange, however, has not clearly explained why the particular five tiers were chosen, or provided the rationale for the specific differential charges for those tiers. It also offers no evidence that either the Exchange or the PFAC conducted a meaningful review of the economies of scale present in the proxy processing business, or the overall costs associated therewith.

With respect to the incentive fee, the PFAC recommended and the Exchange proposed to change its name to the ''preference management'' fee, and set the rate at $0.32 per beneficial owner account, without regard to the number of issuer accounts. For managed accounts, however, the preference management fee would be $0.16 per account, except that no fee would be charged for accounts with five or fewer shares. The net effect of these changes is estimated to decrease overall proxy distribution fees by approximately $15 million.

In contrast to the approach taken with the basic processing and supplemental fees, the Exchange explains that, for the preference management fee, the PFAC recommended eliminating a rate structure tiered by the number of issuer accounts in order to avoid ''unnecessary complexity,'' and because it believed the processing involved in managing preferences was less susceptible to economies of scale by issuer size ''because it is, of necessity, an account by account task.'' [272] The Exchange does not clearly explain, however, why the tiered approach—which in fact is based on the number of accounts—is inappropriate for the preference management fee but appropriate for the basic processing and supplemental fees.

The Exchange acknowledges the concerns raised in the Commission's Proxy Concept Release about the continuing nature of the incentive fees after the election to discontinue paper mailings is made. According to the Exchange, however, the PFAC was persuaded, following discussions with broker-dealers and Broadridge, that there was significant processing work involved in keeping track of a shareholder's election, even though few shareholders actually change their elections. The Exchange explains that ''data processing has to look at each position relative to each meeting or distribution event to determine how the 'switch' should be set,'' and that ''[d]ata management requires ongoing technology support, services and maintenance, and is a significant part of the total cost of eliminating paper proxy materials.'' [273]

With respect to managed accounts, where voting typically is delegated to a broker or investment manager, the Exchange takes the position that the maintenance of the beneficial owner's preference is as necessary as it is with non-managed accounts. In the Exchange's view, however, managed accounts are different because, unlike non-managed accounts, the elimination of paper mailings benefits the broker as well as the issuer. Although the Exchange does not clearly explain how the broker benefits with managed accounts in this context, it represents that ''[i]t is this unique attribute of the managed account that suggested to the Committee that it would be most fair, and most reasonable, for issuers and brokers to share the cost of the admittedly real processing work that is done to track and maintain the voting and distribution elections made by the beneficial owners of the stock positions in the managed account.'' [274] No preference management fee would be charged for managed accounts with five or fewer shares, though, because ''the benefit to issuers of holdings of five or fewer shares in a managed account is limited.'' [275] The Exchange, however, does not provide a clear explanation as to why the five share threshold was chosen. Further, the Exchange offers no rationale for treating managed accounts differently only with respect to preference management fees, and not

[271] *Id.*

[272] *Id.* at 12388.

[273] *Id.* at 12386.

[274] *Id.* at 12387.

[275] *Id.* at 12388.

the basic processing, supplemental, and other fees.

For notice and access fees, which for the first time would be addressed in the Exchange's rules, the Exchange essentially has proposed to codify Broadridge's existing fee schedule.[276] Although Broadridge occupies a dominant position as a proxy processor for broker-dealers, the Exchange expresses the view that Broadridge's notice and access fees are the ''product of market forces.'' [277] The Exchange acknowledges that some issuers represented on the PFAC expressed concern that notice and access fees were charged for all issuer accounts, even in cases where an issuer uses notice and access only for a subset of its accounts (*e.g.,* smaller accounts), or where mailings already have been suppressed (*e.g.,* by consent to electronic delivery). Because, in the Exchange's view, there was ''general satisfaction with the overall level of notice and access fees, 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.'' [278] In response, Broadridge suggested applying its higher preference management fee to accounts that are actually subject to notice and access. According to the Exchange, however, an impact analysis showed that this alternative would disproportionately impact certain issuers, so a majority of the PFAC recommended that Broadridge's current rate schedule for notice and access fees largely be incorporated into the Exchange's proposal.

The Exchange also addressed the concern, reflected in the Proxy Concept Release, that Broadridge rebates a portion of the fees paid by issuers for proxy processing to its larger broker-dealer clients. According to the Exchange, the PFAC ''was persuaded that the existence of these payments is not any indicator of unfairness or impropriety.'' [279] The Exchange recognizes that broker-dealers and Broadridge engage in individual arm's length negotiations over the price to be paid to Broadridge for proxy processing services, and that the largest firms may negotiate a better rate. The Exchange does not clearly explain, however, why these savings are not passed on to issuers (*i.e.,* why the maximum rates permitted under the Exchange's rules continue to be charged to issuers in these cases, despite the lower costs incurred).

The Commission also notes that commenters expressed varying views on the Exchange's proposed EBIP fee, including suggestions about the type of EBIP service that should qualify for the fee.[280] Generally, many commenters expressed support for the proposed EBIP fee,[281] while several others believed that the incentive structure for developing EBIPs could be further improved.[282]

As discussed above, while a number of commenters expressed general support for the proposed rule change, others expressed a variety of concerns with the proposed fees.[283] Several commenters fundamentally questioned the basis for the proposed fee schedule, and suggested that the Exchange should first engage an independent third-party to audit the actual costs incurred in proxy distribution activities. In their view, only then could the Exchange meaningfully develop fees that are fair and reasonable, equitably allocated, and otherwise consistent with statutory standards.[284] A number of commenters believed that the proposed fees were too high, and thus favored the interests of broker-dealers over issuers.[285] Particular concerns were expressed with respect to the rationale for and fairness of the proposed preference management fees, treatment of managed accounts, and notice and access fees. Commenters also questioned whether the proposed proxy fee structure placed a burden on competition, particularly in light of the contractual arrangements between broker-dealers and Broadridge and the related rebate payments to certain broker-dealers.[286]

In articulating the statutory basis for its proposal, the Exchange expresses the belief that its proposed fee schedule is consistent with Section 6(b)(4) of the Act, which among other things requires the ''equitable'' allocation of ''reasonable'' fees, because the PFAC—which included representatives of broker-dealers and issuers—''agreed unanimously that the proposed fees were reasonable in light of the information the Committee had gathered about the costs incurred by brokers.'' [287] Noting that broker-dealers have processes and costs beyond those covered by their agreements with Broadridge, the Exchange represents that the PFAC ''became comfortable with the reasonableness of the overall fees when considered in light of the overall costs involved.'' [288] As discussed above, however, neither the Exchange nor the PFAC have articulated a sufficient analysis of Broadridge's costs of providing proxy processing services, including with respect to issuers of various sizes, or of the costs incurred by broker-dealers that may go beyond the services provided by Broadridge. Accordingly, the Commission lacks a sufficient basis upon which to assess whether the incremental changes proposed to the existing fee structure (*e.g.,* the addition of tiered fee structures to address economies of scale, the elimination of tiered fee structures to promote simplification, the reduction of charges for managed accounts in some contexts but not others, the incorporation of the Broadridge rate schedule for notice and access fees into the Exchange's rulebook) are consistent with the statutory standard, including whether the overall level and structure of the fees reflected in the Exchange's rule are ''reasonable'' or an ''equitable'' allocation of fees. Further, the payment of rebates by Broadridge to certain larger broker-dealers of a portion of the fees paid by issuers—which the Exchange simply characterizes as the product of negotiation—raises further questions about whether the proposal meets the statutory standard.

With respect to Section 6(b)(5) of the Act, which among other things prohibits rules designed to permit unfair discrimination, the Exchange takes the position that the statutory standard is met because ''all issuers are subject to the same fee schedule'' and the PFAC ''thoroughly examined the impact of the current fee structure on different categories of issuers.'' [289] In this regard, the Exchange notes the efforts made in the proposal to mitigate the impact of fees for managed accounts, and to implement a tiered pricing structure for certain fees to better reflect economies of scale. As a preliminary matter, the Commission notes that the fact that all issuers would be subject to the same fee schedule does not address concerns of

[276] The Commission notes that the Exchange has taken the same approach with respect to NOBO list fees, essentially proposing to codify Broadridge's existing NOBO list fee schedule.

[277] *See* Notice, 78 FR at 12389.

[278] *Id.*

[279] *Id.* at 12393.

[280] *See* Section IV.F., *supra.*

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

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

[283] *See, e.g.,* STA Letter II, Shafer Letter, Lovatt Letter, IBC Letter, BNY Letter, ICI Letter.

[284] *See* SSA Letter, STA Letter, STA Letter II, Shafer Letter, Lovatt Letter, NIRI Letter, SCC Letter, IBC Letter, ICI Letter.

[285] *See* STA Letter II, IBC Letter, Shafer Letter, Lovatt Letter.

[286] *See* STA Letter II, IBC Letter, SSA Letter, BNY Letter.

[287] *See* Notice, 78 FR at 12394.

[288] *Id.*

[289] *Id.* at 12395.

unfair discrimination where, as here, issuers would be treated differently within that schedule. Although the Commission acknowledges the efforts by the Exchange to incrementally improve the fairness of its fee schedule, as discussed above, significant questions remain as to the rigor of the Exchange's analysis absent more meaningful cost data and a detailed explanation for the specific levels and structure of the fees proposed, and in light of the extensive reliance by the PFAC and the Exchange on information and recommendations provided by the dominant proxy processor. Finally, the Exchange states that its proposal would not impose any unnecessary burden on competition within the meaning of Section 6(b)(8) of the Act, because care was taken ''not to create either any barriers to brokers being able to make their own distributions without an intermediary or any impediments to other intermediaries being able to enter the market.'' [290] However, as discussed above, and as noted by commenters, there are concerns that the proposed fee structure, which would appear to continue to facilitate the payment of rebates by the dominant proxy processor to larger broker-dealers pursuant to long-term contracts, may result in an unnecessary or inappropriate burden on competition.

The Commission therefore believes that questions remain as to whether the Exchange's proposal is 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 appropriate in furtherance of the purposes of the Act.

VI. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Sections 6(b)(4), 6(b)(5), 6(b)(8) or any other provision of the Act, or the rules and regulation thereunder. The Commission also invites comment on the views expressed by the Exchange in its letter responding to the comments on its proposal. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[291]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be disapproved by June 20, 2013. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by July 5, 2013.

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–2013–07 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–2013–07. 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. 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 publicly available. All submissions should refer to File Number SR– NYSE–2013–07 and should be submitted on or before June 20, 2013. Rebuttal comments should be submitted by July 5, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[292]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–12725 Filed 5–29–13; 8:45 am]

BILLING CODE 8011–01–P

[290] *Id.*

[291] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[292] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69638; File No. SR–CBOE–2013–055]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change To Amend Its Rules Regarding the Trading of XSP Options

May 24, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 14, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules regarding the trading of XSP options. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at

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

[2] 17 CFR 240.19b–4.