



October 20, 2010

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: File Number S7-14-10  
Concept Release on the U.S. Proxy System (the "Concept Release")**

Dear Ms. Murphy,

I am writing to offer comment on two sections of the Concept Release: Section III.D Proxy Distribution Fees and Section IV.A Issuer Communications with Shareholders.

Merrill Corporation has been a service provider to corporate issuers, mutual funds, investment bankers and securities attorneys since its founding in 1968. Relevant to this letter, the services provided by Merrill include composition, print, filing and delivery of investor communications for issuers under the 33, 34 and 40 Acts. The comments herein are based on Merrill's market leadership and experience in these areas.

Sections below use the numbering from the Concept Release. Specific SEC questions being responded to are in italics.

**III.D Proxy Distribution Fees**

*Does the current fee/rebate structure reflect reasonable expenses? Why or why not?*

**No, the current fee/rebate structure does not reflect reasonable expenses.** Technology has caused the cost of providing these services to decrease to a level that not only allows the proxy service provider to make a profit, but also allows rebates to broker-dealers. Due to the richness of the current fee structure, the relationship has evolved from the broker-dealer paying the proxy service provider to take on the distribution of materials to shareholders, to a point where the proxy service provider is paying the broker-dealer for the privilege of providing this service. The effect of this evolution has been to further strengthen the monopolistic status of the proxy service provider, with no reduction in cost, improvement of service, or other benefit to the issuers. The existence of the rebate structure clearly establishes that the current fees are not fair and reasonable.

In addition, the current fee structure is directly harming shareholders of both public companies and mutual funds. Public companies and mutual funds pay these fees directly, resulting in reduced earnings and lower returns. Until the current fee structure is fixed, shareholders in public companies and mutual funds will continue to be harmed.

***If not, how should these rates be revised?***

**The rates should be revised through the introduction of free market forces.** To truly fix the current fee structure, competition/free market forces need to be introduced at the proxy service provider level. Affirmatively placing the control of the proxy/shareholder communication process onto the issuer will properly align the relationship between the issuer and the proxy service provider, allowing the issuer to, among other things, select a proxy service provider of their choosing, directly negotiate fees and service expectations, and provide the direct relationship required to address service issues, including the option of selecting another vendor. This concept is further addressed below, under our response to the SEC's question *Should the issuer have more control over the selection and payment of the proxy service provider, and if so, what alternatives to the current system would facilitate this?*

***Should the current fee structure that is set forth in the SRO rules be revised to include fees for notice and access delivery? If so, what fees for the notice and access model might constitute "reasonable reimbursement?"***

**Yes, fees for notice and access delivery should be included.** However, as with all other shareholder communication fees, these fees should be set by the free market. Allowing the issuer to determine the provider for this service, and ensuring the provider of the issuer's choice has access to the information required to provide the service, will allow proper fees and service levels to be established. Similar to current proxy distribution fees, current notice and access fees appear to not adequately take into consideration the growing ease of electronic delivery and communication. Continued enhancement and growth of electronic delivery alternatives establish the need for market forces to set these fees.

***Does the current proxy distribution system – in which the proxy service provider is selected by a broker-dealer but paid by the issuer – create a lack of incentives to reduce costs for issuers?***

**Yes.** The lack of a direct relationship between the issuer and the proxy service provider, coupled with the fact that one proxy service provider holds a monopoly on the beneficial owner lists of all issuers, clearly creates a lack of incentive to reduce costs for the issuers and harms shareholders. In fact, the current proxy distribution system forces a misalignment of the incentive to reduce costs. The current system incentivizes the proxy service provider to reduce its costs to enable more profit and a larger rebate to broker-dealers, but offers no incentive to reduce costs for issuers. After all, the proxy service provider is beholden to the broker-dealer, not the issuer. Due to a lack of relationship with the proxy service provider, the issuer has no opportunity to, and the proxy service provider has no incentive to, reduce the issuer's costs.

Not only does the current system create a lack of incentives to reduce the issuer's costs, it incentivizes the monopolistic proxy service provider to lobby to increase those costs. Let us say, for argument's sake, that the fees charged to issuers were at one time reasonable. Over time the monopolistic proxy service provider has been able to reduce its costs in providing such services to a point where it can not only make a healthy profit, but also pass along some of its profit to the broker-dealers in the form of "rebates." Granted, the word "rebates" is used loosely in this context, as rebates are typically paid by

an entity back to the person or entity that actually pays for the service or item. In this case, the rebates are not reverting back to the entity paying for the service (the issuer); the rebates are going to the broker-dealer in order to strengthen the relationship between the proxy service provider and the broker-dealer. This compels us to ask why the proxy service provider chose this path instead of reducing its fees charged to the issuers – the true recipients of the service – or improving the service it provides. Had the proxy service provider been in a direct relationship with the issuer, the fees paid by the issuer all of these years would have decreased by at least the amount of the “rebates” being provided to the broker-dealers, and the quality of service would have improved. Given the course taken by the proxy service provider to date, one can only surmise that any fee increase granted to the proxy service provider would be used only to further strengthen its monopolistic position through its relationship with the broker-dealers.

As noted above, all of the behavior to date has been at the expense and detriment of shareholders. Issuers are perfectly aligned to have the shareholder’s best interest in mind. Issuers are beholden to their shareholders and are properly incentivized to produce the best earnings/returns and communications for corporate and mutual fund shareholders. Had the relationship been between the issuer and proxy service provider, as technology has enabled these services to be provided at a lower cost, the issuers would have demanded and received better pricing and better service, thus protecting shareholders from the harm they have been experiencing under the current fee structure.

***Should the issuer have more control over the selection and payment of the proxy service provider, and if so, what alternatives to the current system would facilitate this?***

**Yes.** The primary complaint we hear from issuers is that although they bear the cost and liability for proper shareholder communications, they have no control over the service they receive. They have no choice in the selection of the proxy service provider and, therefore, no leverage with regard to the fees they pay, the service they receive, or ability to leverage/aggregate the beneficial owner list with their shareholders of record to avoid duplicate mailings. Issuers are unable to protect shareholders from above-market fees. If the fees are too high, or the service is poor, the issuer has no other proxy service provider to turn to and has no privity of contract with the proxy service provider under which to pursue remedies. They simply write a check, no matter how dissatisfied they are with the service.

The alternative to the current system that would facilitate issuer control over the selection and payment of the proxy service provider is simply to affirmatively place the control of the proxy/shareholder communication process onto the issuer. Here is how the process would work:

1. The issuer requests from the depository trust company a list of all securities intermediaries of record on the record date.
2. The issuer directs all securities intermediaries to send their entire list of beneficial owners to the third-party service provider of the issuer’s choice. The third-party service provider could be any one of a number of vendors, including vote tabulators, transfer agents, financial printers, mailing and fulfillment houses, etc. [Note: If the SEC continues to support OBO status, the SEC will need to allow securities intermediaries to disclose their OBO list on a protected basis to third-party service providers selected by the issuer.]
3. The third-party service provider coordinates the distribution of the proxy or other shareholder communication.

***What are the potential benefits and drawbacks of such alternatives?***

This proposed system (the “Issuer Control System”) properly aligns all relevant relationships while protecting the OBO status, resulting in a number of significant benefits:

- The proxy service provider becomes directly beholden to the issuer – the party ultimately responsible for effective shareholder communications.
- The issuer can negotiate fees, properly address service issues, and select the proxy service provider of its choice, thus protecting shareholders from above-market fees and infrequent and ineffective communications.
- There is privity of contract between the issuer and proxy service provider, thus streamlining liability issues.
- Free market forces allow competition and new entrants, creating a natural check and balance in regard to price, service, and quality and frequency of shareholder communications.
- Selection by the issuer of the transfer agent or other third-party proxy service provider allows aggregation of the beneficial owner and record owner list, thus eliminating duplicate mailings, increasing efficiency, lowering costs and reducing shareholder confusion.

As the existence of the rebate structure and other market pricing comparisons confirm, the current fee structure is artificially high. Shareholders are ultimately paying these inflated fees through reduced corporate earnings and mutual fund returns. Therefore, the ultimate benefit of the Issuer Control System is protecting shareholders from these above-market fees.

The only disadvantage that can be raised to this proposal is the perceived lack of control of the objecting beneficial owner information. Under the Issuer Control System, objecting beneficial owner data may be disseminated to more than one proxy service provider. However, that concern is quickly dismissed by looking at the regulation of other forms of personally identifiable information. For example, there is no central repository of information controlled by HIPAA, GLB, or the numerous state privacy laws, yet such information is properly protected.

***What factors are currently affecting the level of competition in the market for proxy service providers and their fees?***

**The lack of a direct relationship with the issuer.** The proxy service provider is selected by the securities intermediaries (not the issuer), all the fees are paid by the issuer (not the securities intermediary) and the securities intermediaries are receiving “rebates” from the proxy service provider for the privilege of providing a service to the securities intermediary. Simply put, there is no incentive for the securities intermediary to change to another vendor. In addition, the incumbent proxy service provider, which holds greater than a 98% share of the market, is well funded. Clearly, a new entrant could not survive.

***What principles should guide the Commission’s current consideration of competition among proxy service providers?***

**Alignment of the relationship between the issuer and the proxy service provider.** As discussed above, it is the relationship misalignment that has caused a lack of incentive to reduce the fees paid or to

improve services received. Under the current system, shareholder interests are not represented or protected at all. Issuers' interests are aligned with shareholders' interests, but issuers have neither alignment nor relationship with the proxy service provider. Under the Issuer Control System, issuers would be aligned with the proxy service provider, thus providing a direct path to protecting shareholder interests.

***Would multiple competing service providers affect the quality of service?***

**Yes, multiple competing proxy service providers would improve the quality of service.** Under the current system, the issuer has no say in the quality of service provided, no alternative provider to go to if service is deficient, and no remedy if the quality of service is deficient. If the issuer had a direct relationship with the proxy service provider, it could pursue remedies for deficient service. If the issuer were allowed to select from multiple proxy service providers, proxy service providers would be incentivized to compete not only on price but also on service and new product offerings. All proxy service providers would then know that if they provide deficient service or fall behind in their product offerings, their relationship with the issuer is at risk – the issuer could go somewhere else. This is a motivation that currently does not exist for the monopolistic proxy service provider.

The above reference to new product offerings is in response to the innovation fostered by market competition. Not only will the quality of service increase but so will the types of service, service features, product offerings and all the other innovation that stems from the existence of multiple competing service providers. Shareholders will benefit from these innovations by improved and more effective communications.

***What steps would be necessary to enable prices to be based on competitive market forces?***

**Affirmatively place the control of the proxy/shareholder communication process onto the issuer.** Once this is done, issuers can turn to any number of third parties (including vote tabulators, transfer agents, financial printers, mailing and fulfillment houses, etc.) that are already equipped to provide the services of the proxy service provider. To date, the only barrier preventing them from providing these services has been access to the beneficial owner list. Immediately upon the effective date of such new rule, prices would be based on competitive market forces.

***What are the potential benefits and drawbacks of moving to a system where prices are determined by competitive market forces?***

**The most significant benefit is shareholder protection.** Public companies and mutual funds pay proxy distribution fees directly, resulting in reduced earnings and lower returns to shareholders. When prices are determined by competitive market forces, shareholders will be protected from being harmed by above-market fees. There are no drawbacks to the Issuer Control System that we have been able to identify.

***What effect, if any, would this have in terms of accuracy, accountability, reliability, cost, and efficiency of the proxy distribution system?***

**The costs and services related to the proxy distribution system would be improved.** Currently, there is one proxy service provider with 98% of the market. All costs and fees for proxy distribution are paid by the issuer, yet the issuer neither selects nor has a relationship with the proxy service provider.

Therefore, the issuer has no means to influence service or costs. Under the Issuer Control System, proxy service providers will be forced to compete on price and services, thus creating an incentive to improve in both areas.

We respectfully suggest that this question is missing two key aspects of a single provider system – risk and delay. Currently, all proxy distribution runs through one proxy service provider, creating unnecessary risk and a natural constraint during proxy season. Allowing the securities intermediaries to provide their beneficial owner lists to a proxy service provider of the issuer's choosing will allow multiple players into that space, thus reducing the risk and constraint inherent in having only one provider.

***Would a market-based model increase or decrease costs for issuers?***

**A market-based model would decrease costs for issuers, thus benefiting all shareholders.** The current structure allows the monopolistic proxy service provider enough profit to share it with the broker-dealers, all to the detriment of shareholders who ultimately pay the artificially high fees through decreased earnings and returns on their investments. Putting the issuer and the proxy service provider in direct relationship will, at a minimum, reduce the issuer's fees by the amount of rebate that is currently being paid to the broker-dealers.

***If issuers were able to solicit proxies directly from beneficial owners, what effect would that likely have on proxy distribution costs?***

**Proxy distribution costs would decrease if issuers were able to solicit proxies directly from beneficial owners.** Currently, only one proxy service provider has a complete listing of all beneficial owners, requiring all issuers to use this one proxy service provider to communicate with their beneficial owners and to pay whatever fees the proxy service provider demands. The Issuer Control System creates competition at the beneficial owner list level. Under the Issuer Control System, the issuer directs each securities intermediary to provide its list of the beneficial owners of that issuer as of the record date to a proxy service provider of the issuer's choosing. With the monopoly of the beneficial owner list broken, proxy distribution costs will decrease. Under the Issuer Control System, OBO status can be preserved by requiring that beneficial owner lists be provided only to third parties.

In addition to the reduced fees resulting from market competition, allowing issuers to solicit proxies directly from beneficial owners will further reduce fees by enabling an issuer to mail all record and beneficial owners at once (reducing mailing costs), and allowing one solicitation for electing receipt (e-delivery/mail).

***Would costs be reduced through the introduction of competition and better alignment of economic incentives? Or, could the loss of economies of scale increase costs? Would each issuer likely negotiate fees on its own with a proxy service provider?***

**Costs will be reduced through the introduction of competition and better alignment of economic incentives.** As stated throughout this letter, aligning the issuer with the proxy service provider will immediately reduce costs by at least the amount of the rebates currently provided to the broker-dealers. However, that statement alone does not express all of the cost reduction that will occur. Consider the following:

- The current fee structure is rich enough to provide profits to the monopolistic proxy service provider and rebates to the broker-dealers.
- The current fees are not based on leverage obtained through economies of scale; they are an out-of-date number set by the NYSE.
- There are a large number of vendors who currently have scalable operations that would layer this work into their mix of business.

These points clearly show that the introduction of competition and better alignment of economic interests will allow other vendors to layer this work into their mix of business, thus incorporating, for the first time, the benefit of economies of scale in setting proxy distribution fees.

Allowing the issuer to select the proxy service provider and creating competition at that level will reduce costs. By putting the issuer in control of the proxy distribution process, each issuer will negotiate fees on its own with proxy service providers, much like is currently done with transfer agents and financial printers.

*What are the potential merits and drawbacks of having a central data aggregator collect beneficial owner information from securities intermediaries? How would reimbursement to the aggregator, as the distributor of information, be determined?*

**The drawbacks of a central data aggregator are many.** Currently, there is a de facto central data aggregator of all beneficial owner information, and this structure harms shareholders. The above-market fees now paid by issuers – large enough to allow rebates to broker-dealers – reduce the earnings and returns paid to their shareholders. The current monopolistic proxy service provider receives the beneficial owner information through data-feeds from the broker-dealers. Many service providers are already equipped to receive such data-feeds, and the broker-dealers with beneficial owners of an issuer are easily identifiable by the depository trust company. There is no need for or benefit of a central aggregator of such information. A centralized data aggregator will only add unnecessary costs and increased risks and delays to shareholder communications. Without a central data aggregator, fees related to beneficial owner information would be reduced by market forces.

In addition to the increased costs from a central data aggregator, there are also increased risks and delays. Currently, all proxy distribution runs through one proxy service provider, creating unnecessary risk and a natural constraint during proxy season. Allowing the securities intermediaries to provide their beneficial owner lists to a proxy service provider of the issuer's choosing will allow multiple players into that space, thus reducing the risk and constraint inherent in having only one provider.

*Would changes to the OBO/NOBO mechanism, or the creation of a central data aggregator, encourage competition in the proxy distribution sector? Would competition increase or lower costs? Would competition increase or decrease accountability?*

**Changes to the OBO/NOBO mechanism would increase competition in the proxy distribution sector.** Neither changes in the OBO/NOBO status nor a central data aggregator are needed to stop the harm the current system is causing shareholders. Under the Issuer Control System proxy distribution costs are reduced through proper alignment of interests – shareholder to issuer and issuer to proxy service provider. The introduction of market forces through proper alignment of these interests results in reduced costs and increased protection of shareholder interests. The OBO/NOBO status can remain

unchanged; however, the OBO rules must be revised to allow disclosure of the OBO list to a third-party service provider selected by the issuer. In addition, a centralized data aggregator is unnecessary. As mentioned above, securities intermediaries with beneficial owners are easily identifiable, and many vendors are already well equipped to receive data-feeds (the same data-feeds that the current monopolistic proxy service provider is receiving) directly from securities intermediaries.

***A number of investors have complained about the services of proxy service providers (and transfer agents performing similar functions). How are investors' interests addressed, if at all, in the selection of proxy service providers? Are the interests of investors in this process given adequate weight?***

**Investors' interests are not currently addressed in the selection of proxy service providers.** Currently, the securities intermediaries select the proxy service provider to whom they provide their beneficial owner list. Over 98% of them have continually selected the same proxy service provider, and many have received a rebate from that proxy service provider for the privilege of providing this service to them. Therefore, one proxy service provider has the entire beneficial owner list for all issuers. Because it is cost prohibitive to buy this list and use another proxy service provider, the securities intermediaries have, in effect, selected the proxy service provider for all issuers. Because the investor's relationship is with the issuer, and since the issuer has neither the ability to choose the proxy service provider nor a direct relationship with the proxy service provider, the issuer has no ability to address cost, quality and service concerns. Given the above under the current system, investors' interests in the selection of proxy service providers are not addressed and are given no weight. As shown by our discussion in this letter, not only are investors' interests not addressed from a quality perspective, investors must endure reduced earnings and returns because issuers are forced to pay above-market costs for such services.

Investor's interests are properly addressed through the Issuer Control System. Under the Issuer Control System, the issuer selects the proxy service provider to whom the securities intermediaries provide their beneficial owner list. Once there is no longer a monopoly on that list, market forces will be able to set service levels and costs. If investors receive poor service, they can voice that concern to the issuer, and the issuer will have the power to address those concerns.

#### **IV.A Issuer Communications with Shareholders**

***Do our existing rules inappropriately inhibit issuers from effectively communicating with investors?***

**Yes, shareholder communications are inappropriately inhibited by the existing rules.** The artificially high cost created by the monopoly holding the beneficial owner list has made meaningful communication with beneficial owners cost prohibitive. It is not necessarily the rules that are inappropriately inhibiting issuers from effectively communicating with investors, it is the structure created by current provisions that enables or allows this monopoly to exist.

***If so, what changes should we make to our rules to improve investor communication?***

**Adopt the Issuer Control System.** Require the securities intermediaries to disclose their beneficial owner lists to the proxy service provider selected by the issuer. Such a system will align issuer and investor interests, and will allow market forces to set costs and service levels. The reduced fees and increased level of service will allow more meaningful issuer-to-investor communications.

*Are there merits to, or concerns about, establishing a central beneficial owner data aggregator for use by issuers, as suggested by the Shareholder Communications Coalition and as described above?*

**We do not believe such a central beneficial owner data aggregator is necessary.** Under the Investor Control System, securities intermediaries are required to provide the beneficial owner list to the proxy service provider named by the issuer. The securities intermediaries with beneficial owners of an issuer are easily identifiable through the depository trust company. There are many companies that can readily accept the same data-feeds that the current monopolistic proxy service provider is receiving. Therefore, there is no need for a centralized beneficial owner data aggregator. Requiring such centralized aggregator (similar to the current de facto centralized aggregator) would only result in the continuation of both unnecessary costs and harm to investors.

*Is competition in the proxy distribution service market needed, and if so, what changes to facilitate issuers' communications with investors would also encourage competition in the proxy distribution service market?*

**Competition in the proxy distribution service market is needed.** The above-market fees that are charged by the current monopolistic proxy service provider stem from the monopoly it holds on the beneficial owner list of all issuers. The factor prohibiting new entrants in the proxy service provider space is the lack of access to the list of beneficial owners. If issuers were allowed to direct securities intermediaries to disclose their list of beneficial owners to the proxy service provider selected by the issuer, and if the SEC allowed such disclosure, competition would enter into that space. When market forces enter that space, costs will decrease and services and investor communications will improve.

We appreciate the opportunity to respond to these important issues and look forward to an improved proxy system. Please feel free to contact me if you have any questions or if you would like any additional information on the responses provided.

Sincerely,



Boyd Johnson

Senior Vice President and Chief Legal Officer