

March 28, 2013

Elizabeth M. Murphy, Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
Re: Comment Request on Proxy Fee Changes, File No. SR-NYSE-2013-07

Dear Ms. Murphy:

BNY Mellon acts as depositary for over 1,300 sponsored American Depositary Receipts (ADRs) and Global Depositary Receipts (GDRs) programs. The underlying issuers for many of these programs extend voting rights to their DR holders, and BNY Mellon, in its capacity as depositary bank, assists issuers in the distribution of proxy material and tabulation and casting of proxy votes for shareholder meetings. From this unique position, the BNY Mellon Depositary Receipts (DR) Division has gained considerable insight into the U.S. proxy system from the perspective of foreign private issuers. The views expressed below on the NYSE rule change application to amend proxy distribution fees<sup>1</sup> reflect this perspective.

The BNY Mellon Depositary Receipts Division compliments the NYSE and Proxy Fee Advisory Committee (“PFAC”) for the considerable effort expended in reviewing the current proxy fee structure, particularly in light of the NYSE’s stated preference to no longer be involved in setting these fees.<sup>2</sup> We believe that the proposed rule changes have merit, and support measures to:

- Change the processing fee structure from a single-tiered system to a staggered five-tiered model. This proposal should represent a more fair application of costs and remove the problem of an issuer with slightly fewer than 200,000 beneficial owner accounts (the current breaking point) paying more than an issuer with slightly greater than 200,000 accounts.
- Reduce fees on separately managed accounts (SMAs).
- Allow issuers to order stratified Non-Objecting Beneficial Owner (NOBO) lists.

There are, however, other aspects of the proposal that raise concerns for further consideration by the U.S. Securities and Exchange Commission (SEC) when rendering a decision on the rule change. These include:

- **Lack of an independent third-party to audit the fees** – It is our understanding that many of the recommendations of the rule change application were based on conclusions driven by data provided by Broadridge and without independent verification or third-party opinion regarding the appropriateness of such fees. The proposal indicated that “The Committee and the Exchange judged that it would likely be impossible, and certainly not cost effective, to engage an auditing firm to review industry data for purposes of the Committee’s work.”<sup>3</sup> We believe that further explanation of this decision would be appropriate, particularly in light

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<sup>1</sup> Release No. 34-68936; File No. SR – NYSE-2013-07, U.S. Securities and Exchange Commission, February, 15, 2013, <http://www.sec.gov/rules/sro/nyse/2013/34-68936.pdf>

<sup>2</sup> Ibid, p. 14, footnote 14.

<sup>3</sup> Ibid, p. 55.

of the fact that this action is contrary to the recommendation of the 2006 NYSE Proxy Working Group Recommendations,<sup>4</sup> the last time the NYSE reviewed proxy fees.

- **Proposed treatment of SMA accounts** - While the proposed fee schedule would change the charges applied to SMA accounts from \$0.50 or \$0.25 per account to \$0.16, concerns have been raised about the justification for continued charges on these accounts. Fundamentally, there is significant 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. The NYSE stated that a reduction in SMA fees would require "additional very significant increases in the basic processing fee."<sup>5</sup> However, previously the NYSE, in listing its goals, stated its aim that "fees are consistent with the type and amount of work involved."<sup>6</sup> Administering additional charges to processing fees, to compensate in a shortfall in revenue from SMAs, does not appear consistent with this goal.
- **The estimated savings of the proposed fees** - In the May 2012 PFAC report, the Committee estimates that net fees for issuers will decline by four percent. In the proposed rule filing in February 2013, the estimate is unchanged, although the rule filing contained additional fee reductions not included in the PFAC report. It is unclear how the same estimate would apply despite material differences between fees suggested in the PFAC report and those proposed in this rule change filing. To test the impact of the proposed rule changes, the BNY Mellon DR Division conducted an analysis of proxy distribution invoices of 18 DR issuers. Under the fees proposed in the PFAC report, net fees were estimated to increase by 4.1%, while under the rule change filing, it is estimated that net fees will decline by 1.1%.<sup>7</sup> While the BNY Mellon DR Division acknowledges that our sample size is statistically insignificant, we have included these findings to 1) demonstrate that there is a material difference between the fees in the PFAC report and those in the recent rule change filing, and that as such, it seems unreasonable that estimated savings calculation from the NYSE should be the same, and 2) add another perspective into the potential impact of the proposed rule filing. We believe increased transparency into the calculation of net savings across the spectrum of issuers would be greatly beneficial to this process.
- **Rebates to banks/brokers** – There does not appear to be sufficient transparency around fee sharing and rebate payment between and among market participants. The potential to use this mechanism to achieve undisclosed revenue seems in contradiction to the intention of NYSE Rules 451<sup>8</sup> and 465<sup>9</sup>, which state that, in connection with transmitting solicitation

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<sup>4</sup> Report and Recommendations of the Proxy Working Group to the New York Stock Exchange, June 5, 2006, p. 7.

[http://www.nyse.com/pdfs/PWG\\_REPORT.pdf](http://www.nyse.com/pdfs/PWG_REPORT.pdf)

<sup>5</sup> Ibid, p. 56.

<sup>6</sup> Ibid, p. 14.

<sup>7</sup> Fee estimates do not include reductions triggered by cost savings for SMAs five shares or less, as this information is not available on the invoices provided by Broadridge.

<sup>8</sup> New York Stock Exchange, NYSE Rules, Rule 451,

<http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F5%5F12%5F3&CiRes triction=451&manual=%2Fnyse%2Frules%2Fnyse%2Drules%2F>

materials on behalf of a company, a member organization shall receive satisfactory assurance that it will be reimbursed by such company for all “out-of-pocket expenses, including reasonable clerical expenses.”

- **Preference Management Fee** - The NYSE rules have long provided for a fee to be assessed for each beneficial owner account for whom a mailing is suppressed. This fee has been known as an “incentive” fee, so named because it incentivized nominees to solicit electronic delivery instructions from beneficial owners. The fee has been renamed “preference management fee” as an indication of the nominee’s “management” of the beneficial owner’s delivery preferences. Under the proposed rule change, the fee is assessed for all accounts that are suppressed from the mailing, including those, such as separately managed accounts and “wrap” accounts (except those five shares or less), who have contractually given their voting rights to an account manager. This fee is “evergreen”, assessed to an account as long as it exists, as opposed to being charged only in the year the election to suppress is made. The 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 a mailing.
- **NOBO lists** - The NYSE filing proposes that NOBO lists tied to the record date of a shareholder meeting may be stratified.<sup>10</sup> The NYSE gives no explanation for restricting the stratification of the lists outside of financial considerations. Specifically, it states that “it limited its recommendation to record date lists because such lists are more likely to be used by issuers for communications with shareholders about voting at the meeting, a type of shareholder communication that the PFAC said was most deserving of facilitation. The NYSE notes that there is also a cost-related reason to so limit the proposal.” Issuers should be able to cost-effectively communicate with their shareholders at any time without incurring a substantial fee. The stated justification 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. It would seem that any potential negative impact on the vendor should not be sufficient justification to restrict potential benefits to issuers. Furthermore, the insistence of issuers ordering a full-NOBO list outside of the period of shareholder meetings does not seem consistent with the NYSE’s stated goals of ensuring “that fees are as fair as possible” and that “fees are consistent with the type and amount of work involved.” We recommend that stratification of NOBO lists be permissible at all times.
- **SIFMA data on cost recovery payments** – The NYSE rule change filing indicates that the Securities Industry and Financial Markets Association (SIFMA) was asked to conduct a study related to the costs of proxy processing.<sup>11</sup> Like the data provided by Broadridge, there was no independent verification of this data. Data that is not independently verified may contain conflicting bases, and is not sufficiently transparent to the market or impacted issuers.

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<sup>9</sup> Ibid, Rule 465,

<http://nyserules.nyse.com/NYSETools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F5%5F13%5F1&CiRestriction=465&manual=%2Fnyse%2Frules%2Fnyse%2Drules%2F>.

<sup>10</sup> Op. cit., 1, p. 36.

<sup>11</sup> Ibid, p. 45.



We respectfully request further review and consideration by the SEC on the issues raised above and in particular, independent confirmation of vendor data before proceeding with a revised filing.

Best regards,

A handwritten signature in black ink that reads "Michael S. O'Brien". The signature is fluid and cursive, with a horizontal line extending from the end.

Michael S. O'Brien  
Vice President - Corporate Governance Officer  
BNY Mellon Depositary Receipts

cc:  
Christopher Kearns, Chief Executive Officer BNY Mellon Depositary Receipts