Janet McGinness
EVP & Corporate Secretary

VIA E-MAIL AND FEDERAL EXPRESS

May 17, 2013

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

Re: SR-NYSE-2013-07

Dear Ms. Murphy:

NYSE Euronext, on behalf of New York Stock Exchange LLC ("NYSE" or the "Exchange") submits this letter in response to the comment letters received by the Securities and Exchange Commission (the "SEC" or the "Commission") in connection with the above-referenced filing. In this filing the Exchange proposes to amend NYSE Rules 451 and 465, and the related provisions of Section 402 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.

A total of 25 comment letters have been filed on the proposal[1], expressing divergent views. Eleven of the letters comment generally on the proposals and favor approval[2], while seven

[1] Securities Transfer Association, Inc., February 20, 2013 ("First STA Letter"); Shareholder Services Association, March 4, 2013 ("SSA Letter"); Securities Transfer Association, Inc., March 4, 2013 ("Second STA Letter"); David W. Lovatt, March 6, 2013 ("Lovatt Letter"); Jeanne M. Schafer, March 6, 2013 ("Schafer Letter"); Independent Steering Committee of Broadridge, March 7, 2013 ("Independent Steering Committee Letter"); National Investor Relations Institute, March 7, 2013 ("NIRI Letter"); Society of Corporate Secretaries & Governance Professionals, March 7, 2013 ("Society of Corporate Secretaries Letter"); Shareholder Communications Coalition, March 12, 2013 ("SCC Letter"); International Bancshares Corporation, March 13, 2013 ("IBC Letter"); iStar Financial Inc., March 13, 2013 ("iStar Letter"); Perficient, Inc., March 13, 2013 ("Perficient Letter"); Corporate Governance (CorpGov.net), March 14, 2013 ("CorpGov.net Letter"); Gartner, Inc., March 15, 2013 ("Gartner Letter"); Investment Company Institute, March 15, 2013 ("ICI Letter"); Sharegate Inc., March 15, 2013 ("Sharegate Letter"); Center for Capital Markets Competitiveness, March 15, 2013 ("CCMC Letter"); Harrington Investments, Inc., March 15, 2013 ("Harrington Letter"); Broadridge Financial Solutions, Inc., March 15, 2013 ("Broadridge Letter"); Darling International Inc., March 15, 2013 ("Darling Letter"); Interfaith Center on Corporate Responsibility, March 15, 2013 ("ICCR Letter"); American Business Conference, March 18, 2013 ("ABC Letter"); SIFMA, March 18, 2013 ("SIFMA Letter"); BNY

(from six persons or organizations) comment generally and are opposed[3]. One letter commenting broadly on the proposals does not state a view on whether the proposals should be approved, although it expresses a number of concerns.[4] Six letters focus on the EBIP fee proposal, with one in favor,[5] four opposed[6] and one stating no position on approval.[7] (It should be noted that all of the broadly focused letters favoring approval of the proposals also specifically endorse the EBIP proposal.) We believe that this response letter by the Exchange is best organized by focusing primarily on several themes that emerge from an analysis of the comment letters.

We would note at the outset that many of the issues raised in the letters were discussed in the SEC's Concept Release on the U.S. Proxy System, known as the "Proxy Plumbing Release"[8], and were discussed and addressed in the NYSE rule filing. However, where appropriate we will supplement our discussion of these issues in this response.

1. <u>The NYSE did not conduct an independent review of proxy costs.</u>

This issue was referenced in 12 comment letters, from 11 different persons or organizations[9], with nine of the 11 taking the position that an independent third party review should be undertaken[10], although not all of those oppose approval of the proposed rules pending such review. An extensive comment on this issue was submitted by the STA in its March 4, 2013 letter, advocating that the SEC should disapprove the rule filing until an independent study has been commissioned and completed. That study, the STA contends, should be conducted by "an independent third party to evaluate proxy costs and make recommendations about what are

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Mellon Depositary Receipts, March 28, 2013 ("BNY Letter"); Council of Institutional Investors, April 5, 2013 ("CII Letter").

[2] Independent Steering Committee Letter; NIRI Letter; Society of Corporate Secretaries Letter; SCC Letter; iStar Financial Letter; Perficient Letter; Gartner Letter; Broadridge Letter; Darling Letter; ABC Letter; SIFMA Letter. NIRI supports the NYSE fee proposals, but urges that the SEC or FINRA should oversee proxy fees, rather than NYSE.

[3] First STA Letter; SSA Letter; Second STA Letter; Lovatt Letter; Schafer Letter; IBC Letter; BNY Letter.

[4] ICI Letter.

[5] CCMC Letter.

[6] CorpGov.net Letter; Harrington Letter; ICCR Letter; CII Letter.

[7] Sharegate Letter.

[8] SEC Release No. 34-62495, File No. S7-14-10, 75 Fed. Reg. 42982 (July 22, 2010).

[9] STA, SSA, Lovatt, Schafer, NIRI, Society of Corporate Secretaries, SCC, IBC, ICI, ABC and BNY.

[10] STA, SSA, Lovatt, Schafer, NIRI, SCC, IBC, ICI and BNY.

reasonable expenses for issuers to reimburse to broker-dealers and banks."[11] The SSA position is similar, as is that of IBC.[12] BNY Mellon supports several of the fee change proposals, but recommends independent confirmation of vendor data before allowing the filing to proceed.[13]

NIRI is supportive of adopting the fee change proposals, but also favors a "third party audit of proxy distribution fees" as "the best way to ensure that fees are reimbursed fairly, equitably and objectively."[14] The SCC urges approval of the proposed fee schedule, but believes that after that approval the SEC and NYSE should develop a process to review the fees more frequently, and that an independent third party analysis of proxy costs would be helpful in improving transparency.[15] ICI suggests that the Commission should "conduct an independent third-party audit of the current fee structure to establish reasonable rates of reimbursement."[16]

Two organizations representing the views of the issuers that pay the proxy fees do not believe that an independent third party review is necessary. The Society of Corporate Secretaries & Governance Professionals, which urges the Commission to approve the rule filing, states that it "understands that some commentators believe the Proposed Rule Change should not be adopted because no independent third party evaluated the costs of processing. 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. We would defer to the PFAC's view on this for purposes of this rule change, which is clearly a significant improvement on the existing framework."[17]

The American Business Conference was affirmatively supportive of the PFAC view that an independent review is not necessary or practical. "The PFAC and the NYSE applied a reasonable cost-benefit analysis to the question of whether a third-party audit should be required. While such 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. In this case, the [NYSE filing] sets out a reasonable explanation for the NYSE's decision to avoid those costs."[18] The ABC also elaborated on the undesirability of the "utility" approach:

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[11] Second STA Letter page 4.

[12] IBC is a multi-bank holding company that has an affiliated transfer agent. Its views, as well as those of the SSA and the two individuals commenting, Lovatt and Schafer, appear highly correlated with those of the STA.

[13] BNY Letter pages 1 and 4.
[14] NIRI Letter page 2.

[15] SCC Letter page 2.

[16] ICI Letter page 3.

[17] Society of Corporate Secretaries Letter page 2.

[18] ABC Letter page 3.

> "We fear that a cost-based, "reasonable rate of return" analysis that characterizes utility ratemaking can and has perpetuated monopolistic circumstances in the past. (Airlines, public power and communication utilities come to mind.) While there is a current dominant intermediary in the street-side proxy process, brokers remain free to contract with any entity that can adequately fulfill proxy process services to its clients or to provide those services themselves. Based on past observation of other industries, we have faith in the ability of the free market to disrupt a situation where "excess profits" create opportunity so long as the incumbent players are not protected by legal or regulatory structures."[19]

Several comment letters[20] refer to the fact that the Exchange's Proxy Working Group in 2006 recommended that the NYSE engage an independent third party to analyze what is a reasonable amount for issuers to be charged in proxy fees and to commission an audit of [Broadridge] costs and revenues for proxy mailing. As the Exchange mentioned in the rule filing, the Proxy Working Group was primarily focused on review of the NYSE rule that permitted brokers in certain circumstances to vote street name shares for which no instructions were received from the beneficial owner. In an Addendum to the PWG Report published in 2007, the PWG's Cost and Pricing Subcommittee, after study, recommended that the Exchange not specify a fee for the then-new Notice and Access process, so as to allow market forces some time to create a consensus regarding the appropriate kind and level of fees for this function. The Exchange notes that the PWG did not renew its call for a third party analysis at that time.

More importantly, however, the PFAC, in contrast to the PWG, was focused specifically on proxy fees, and had a much greater opportunity to consider whether a third party independent review was necessary. They determined that it was not. Because the STA had raised the lack of an independent analysis in a report made available to the Exchange in July 2012, the Exchange addressed this issue in the rule filing:

> "The Committee and the Exchange have explained that the proxy fees do not lend themselves to "utility rate making" in which costs are accounted for in a uniform and specified way and subject to audit regarding whether the provider is obtaining a permitted rate of return. The costs involved are incurred by a large number of brokerage firms, who record their costs in different ways. 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. Both believe that the result produced by

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[19] Id. pages 3 – 4. Only four issuers wrote comment letters (Darling, Gartner, Perficient and iStar), and all of them <u>supported</u> the proposed fees. The most vocal objections to the proposed amendments were from organizations representing transfer agents, who are in competition with Broadridge on the registered side.

[20] Second STA Letter, NIRI Letter, SCC Letter, IBC Letter, BNY Letter.

> the diligent work of the multi-constituent Committee is an appropriate way to update the schedule of fees which serves the SEC mandate that the reasonable costs of brokers in distributing proxy materials be reimbursed by the issuers involved."[21]

We note that the PFAC itself was an independent body, not under the control of NYSE or beholden to any one constituency, and it reviewed audited financial information on Broadridge, as well as segment information provided by Broadridge publically on its website. Furthermore, the PFAC reviewed several independent analyst reports on Broadridge that, allowing the PFAC to obtain comfort that the existing fees were not providing Broadridge with excessive margin on its activities. Given the availability of audited financials of Broadridge and the SIFMA survey of costs at representative brokerage firms undertaken at the NYSE's request, arguably the proposed proxy fee changes have been based on information comparable to that used in the independent studies conducted in the late 1990's, described below. In addition, it should be 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 (see Addendum III to the PFAC Report, available on the NYSE's website at
https://usequities.nyx.com/sites/usequities.nyx.com/files/final_pfac_report.pdf)

It is important to remember that there is no requirement that an independent third party review be conducted. The NYSE proxy fees have been revised a number of times over the years without such a review. Only in the context of the significant rule changes developed in the late 1990s, which introduced the nominee coordination fee and the incentive fee, was there a third party review. In approving the 1997 proposals on a pilot basis, the SEC noted that "the NYSE has committed to an independent audit, at the conclusion of the 1997 proxy season, of the new fee structure to assess the reasonableness of the costs passed through to issuers with a report of the findings made to the Commission." [22] In fact, there were two studies conducted by Price

[21] SEC Release No. 34-68936; SR-NYSE-2013-07 (February 15, 2013) ("NYSE Rule Filing") at page 41. We note that the STA letter quoted at length from remarks on the subject by the PFAC Chair, Paul Washington, during a webinar conducted by the Exchange on the release of the PFAC Report. Without reproducing the STA quote of his remarks in its entirety, it is relevant to note that he indicated that "the cost-benefit analysis just wasn't there to justify doing probably what would be an impossible task. And by the time you completed the task, the costs would have changed substantially and you'd have to start all over again. So the infrastructure just isn't there to support that kind of analysis, but I think everyone on the Committee felt very comfortable that working with the information we did have, we do believe that the fees provide for reasonable and fair reimbursement of costs that are being incurred." Second STA Letter pages 3 – 4.

[22] SEC Release No. 34-38406; File No. SR-NYSE-96-36 (March 24, 1997) at 16.

Waterhouse[23], in 1997 and 1998, and the SEC staff engaged in significant additional analysis, leading to an SEC direction to the Exchange to consider further amendments to the fees.[24] The Exchange engaged in further work with an industry review committee, and it was the work of that committee that the SEC cited favorably in finally approving the proxy fees on a permanent basis in 2002.[25] Significantly, however, this entire process produced relatively modest changes to the fees that were implemented on a pilot basis in 1997.

In other words, 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 a "reasonable reimbursement".

Another issue that we consider subsidiary to the independent review issue is that raised in the STA Letters (and in those letters correlated with them) that the rule filing does not include a thorough cost/benefit analysis using "the same degree of rigor applicable to SEC rule changes." First we note that there is nothing in the relevant statute or SEC rules that requires the Exchange to engage in cost-benefit analysis in its rulemaking of the type suggested by the commentators nor is there a concomitant responsibility on the part of the SEC in approving SRO rule proposals. However, the Exchange notes 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. The Committee's conclusions regarding separately managed accounts, where the respective benefits to the broker-dealers and to the issuers were specifically analyzed and weighed, is just one example of the cost-benefit analysis that was actually present throughout the Committee process.

2. <u>Issues referenced in the Proxy Plumbing Release.</u>

Several issues have been raised for a number of years by those who object to the current proxy fees, and these issues have been raised again by the same parties.[26] They

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[23] The NYSE engaged Price Waterhouse to evaluate voluntary responses to questionnaires provided by listed companies and member broker-dealer firms, as well as a financial audit of the ADP unit responsible for proxy distribution conducted by ADP's auditor, Deloitte & Touche.

[24] SEC Release No. 34-41177; File No. SR-NYSE-98-05 (March 16, 1999) at text accompanying notes 50 – 54.

[25] SEC Release No. 34-45644; File No. SR-NYSE-2001-53 (March 25, 2002). The fees that were implemented on a pilot basis in 1997 remained in effect, with only slight changes, until the rule change approved in 2002. The changes in 2002 introduced the large/small issuer distinction, reducing fees slightly for larger issuers but not for smaller issues.

[26] STA, SSA and ICI. See also IBC and BNY Letters.

question the evergreen nature of the incentive (preference management) fees, and the propriety of applying those fees to eliminations for managed accounts. These points were addressed by the Exchange at some length in the rule filing, and the Exchange incorporates the explanations provided in the rule filing for purposes of this response.[27]

With respect to the "evergreen" nature of the fees, the Exchange notes that following the SEC's review of the fees put in place in 1997, which included the first implementation of the incentive fees, the SEC suggested that the incentive fee should in fact be specified to be a "one time" fee, applied only in the year an elimination was achieved. A draft rule to that effect was prepared by the Exchange, but not pursued by the industry committee, and the evergreen approach was maintained after further review of the rules by the independent proxy review committee.

Another issue raised in the Proxy Plumbing Release and again by several comment letters concerns the fees charged for use of notice and access. This is also addressed at length in the rule filing. However, the Exchange would emphasize that the members of the PFAC were satisfied with the overall level of notice and access costs – the only question raised was whether the methodology for application of those costs by Broadridge made sense. After reviewing alternative approaches, as described in the PFAC Report and the rule filing, the Committee came to a consensus that the existing approach was best.

Finally, there are concerns raised about the "cost recovery payments" made by Broadridge to certain of its broker-dealer customers pursuant to the contracts between Broadridge and those customers. This is again an issue that was addressed in the PFAC Report and again at greater depth in the rule filing, following a survey of its members by SIFMA, described in the rule filing and attached in its entirety as an exhibit to the filing. The Exchange reiterates 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. Although the Second STA Letter contends that the "rebates" reflect "excess profits" being accrued through the use of the proxy fee schedule, we suggest they 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. And at the same time Broadridge is collecting additional payments from the smaller firms, since the fee schedule is inadequate to pay the real costs of servicing their very small customer populations. This is not an indication that the fee schedule is inappropriate. It instead reflects the reality that it is impossible to utilize a generally applicable fee schedule and expect that each firm across a very broad spectrum will be reimbursed precisely for its individual costs.

[27] NYSE Rule Filing at page 19.

As noted above, organizations representing issuers, such as the Society of Corporate Secretaries & Governance Professionals and the American Business Conference, are clearly aligned with the PFAC in their views and in favor of the rule changes that emerged from the PFAC process. This should be considered a signal that the fee approach implemented after the struggles of the 1990s, and updated and polished by the changes proposed by the PFAC, is a successful approach to a difficult regime in which issuers are required to pay for services from a provider they do not retain.

3. <u>Comments focused on the proposed fee relating to Enhanced Broker's Internet Platforms (EBIP).</u>

As noted earlier, there were several comment letters focused on EBIPs, given the EBIP fee proposal that is part of the rule filing. Three letters critical of EBIP appear highly correlated.[28] They express a concern that the incentive provided to brokers for developing EBIPs does not extend to other "more open platforms" providing analysis that shareholders can use in determining how to vote their proxies. In addition, they express a concern that "Brokers who set up EBIPs might be further incentivized to create default mechanisms that allow votes to be cast in a fashion agreed upon through 'client directed voting' where clients can simply click once to have default choices voted, instead of going through each item on the ballot."[29]

The Exchange brought the EBIP incentive fee proposal forward because the PFAC was supportive and representatives of issuers were very eager to see it included in the proposals, all as described at some length in the Rule Filing. As noted in the Rule Filing, the attraction was the expectation that wider availability of this kind of portal would increase the percentage of retail shareholders who would in fact exercise their right to vote.

Whether EBIPs can or would be used to facilitate client directed voting, and under what circumstances, is not something that was discussed with the PFAC or with the Exchange in its follow up discussions regarding the EBIP fee proposal, and thus is a matter on which the Exchange has no opinion. We do note that broker voting of uninstructed shares is governed by existing Exchange rules, and presumably any kind of client directed voting arrangement that might be implemented in the future would have to be compliant with Exchange and FINRA rules and with SEC requirements, and can presumably be analyzed from this respect at such time as it may be developed.

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[28] CorpGov.net, Harrington and ICCR Letters.

[29] CorpGov.net Letter page 2. This letter also suggests (at page 9) that a portion of "paper suppression fees" [as proposed, preference management fees] should be directed to firms providing voting advice to shareholders.

A letter from the Council of Institutional Investors (CII) raises several concerns regarding the voting instruction form ("VIF") used to obtain voting instructions from street name shareholders. CII requests that before the SEC takes any action that may encourage use of EBIPs, it first address CII's concerns with the VIF that would be accessed by investors using an EBIP to vote. As with the above concerns regarding CDV, this issue is not one that was discussed with the PFAC or in follow up EBIP discussions. In addition, it is not an issue that involves NYSE rules, either current or proposed. However, we also do not see the need to delay the proposed EBIP fee while issues relating to the VIF are debated.

4. <u>Other issues.</u>

a) <u>NOBO lists.</u>

Comments generally favored the proposal to permit issuers to stratify record date NOBO lists, but several issuer representatives as well as the STA called for such stratification to be available across the board. As the Exchange explained at some length in the rule filing, it believes there is a rational basis to distinguish between record date lists (which have already essentially been prepared when the initial record date analysis is made) and other lists (which have to be prepared from scratch, as it were), and the Exchange is concerned about the unknown impact of this change on the overall proxy fee revenues available to reimburse brokers for their costs. Issuer and broker experience with this first step in altering NOBO list pricing will be instructive for follow up and future changes if they appear desirable.

b) <u>Question about "special meetings".</u>

In footnote 13 in its letter, ICI stated "If 'special meetings' encompass all meetings for which there are non-routine items on the ballot (whether or not there is a director election), many if not most open-end fund shareholder meetings will fall into this category." An Exchange representative explained to an ICI representative after reading this that the supposition is not correct – a special meeting for this purpose under the rule is one that does not involve the election of directors, as clearly stated in the rule filing. The presence or absence of other items on the agenda, whether "routine" or not, is not relevant.

The ICI representative indicated that this misunderstanding may well have impacted the analysis of the fees performed by the "independent proxy service" referenced in the ICI letter. Although ICI did not identify the firm, subsequent information released in an "Industry Update" by an organization named AST FundSolutions[30] suggests that its analysis as presented in that update is the same as that referenced in the ICI letter.

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[30] Its website indicates that AST FundSolutions is affiliated with American Stock Transfer & Trust, a transfer agent.

That analysis clearly states that it looks only at the basic processing and intermediary fees, and only at the fees applicable to special meetings. It is also not clear how many issuers were included in the analysis, as only percentages are given. As the Exchange pointed out in the rule filing when discussing the STA claims that their analysis of the proposed rates produced different results than those suggested by the Exchange, the analysis presented in the rule filing is for all jobs serviced by Broadridge as intermediary, which is to say, a very large percentage of the whole. As the Exchange also noted, the experience of any particular issuer (or, logically, any group of issuers that is only a small fraction of the whole) will differ. Given the different characteristics of issuer populations and issuer "jobs", this is only to be expected.

c) Effective date for rule amendments.

The Exchange did not specify an effective date for the rule changes in its rule filing, and notes that no such specification was made when proxy fees have been changed in the past. The Exchange did ask Broadridge to specify whether any particular lead time would be required for them to implement the proposed pricing changes. We note they indicate in their comment letter that "Broadridge is prepared to implement the new fee structure soon after the proposal is approved by the SEC."[31] We note in contrast that SIFMA in their comment recommends a general effective date of January of next year, to "provide sufficient time for brokers and their agents to modify their operations to reflect the new fee structure."[32]

Given that invoicing of proxy fees is typically handled by the intermediary rather than the broker-dealer, and given that Broadridge would appear to be ready more quickly, a lengthy period before effectiveness would appear to be unnecessary.

SIFMA also suggests a separate and specific provision delaying onset of the EBIP incentive fee program for 6 to 9 months, saying that otherwise the utility of the five year duration of the fee would be limited, given that firms that do not yet have EBIPs would need time to determine whether to implement one and then would need time to put it in place.[33] We note, as referenced in the rule filing, that this is the same concern that led to a three year duration being lengthened to five years. The Exchange would be reluctant to further extend that duration unilaterally.

The Exchange notes that as has been the case when proxy fees have changed in the past, we would expect other exchanges and FINRA to adopt conforming changes to their own proxy fee rules. Of these, the most important is FINRA, since the proxy fee rules actually apply to brokers with street name accounts, and the only SRO with complete

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[31] Broadridge Letter page 1.

[32] SIFMA Letter page 2.

[33] Id.

coverage of that universe is FINRA. In the past, it would appear that the industry moved to new rules promptly after SEC approval of NYSE rule changes, without waiting for rule change action by FINRA. If this is considered undesirable, the SEC may wish to take into account FINRA's expected rule change timetable when considering whether to specify an effective date other than the date of its order approving the NYSE rule filing.

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The Exchange believes that the foregoing, along with the discussion in the rule filing, fully responds to the issues raised in the comment letters and relevant to the rule filing. Of course, we would be pleased to respond to any additional questions that the Commissioners or the staff may have.

Very truly yours,

Janet McGinness