CtW Investment Group

<u>Via email and SEC upload</u>

June 20, 2013

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

Re: SR-NYSE-2013-07 - Request for investigation including public hearing to examine proposed proxy fee rule change

Dear Ms. Murphy:

On May 23, 2013, the Securities and Exchange Commission ("SEC," or the "Commission") instituted proceedings to determine whether to disapprove proposed changes by the New York Stock Exchange ("NYSE," or the "Exchange") to the reimbursement of expenses by corporate issuers to NYSE member organizations for the processing of proxy materials and other issuer communications held in street name and to establish an incentive fee for the development of an enhanced brokers internet platform ("EBIP") to improve the proxy process (the "NYSE Proposal").

The CtW Investment Group welcomes the opportunity to comment further on concerns we have regarding the fairness of the process that led to the NYSE Proposal and the Proposal's implications for the accuracy, transparency and integrity of the proxy voting process. The CtW Investment Group works with pension funds and other institutional investors with over $250 billion in assets under management to enhance long-term shareholder value through active ownership.

We agree with the Commission that questions remain over whether the NYSE Proposal is consistent with goals of the federal securities laws.[1] We also concur with comments provided by others to the Commission that an independent third-party audit of proxy costs is essential to ensuring fair and equitable reimbursement.[2] At the end of the day, reimbursements by issuers to NYSE members are ultimately costs borne by shareholders. This issue is particularly important in light of the dominant role that one service provider, Broadridge Financial Solutions, Inc. ("Broadridge"), plays in the proxy process.

---

[1] SEC Rel. No. 34-69622, File No. SR-NYSE-2013-07, 78 Fed. Reg. 35210 (May 30, 2013).
[2] Id. at 32516.

1900 L Street NW, Suite 900 Washington, DC 20036 | 330 W. 42nd Street, Suite 900 New York, NY 10036
202-721-6060
www.ctwinvestmentgroup.com

In light of recent events, however, our concerns run deeper. As we detailed in our May 17, 2013, letter to Chairman White during the election contest that preceded the most recent annual meeting of JPMorgan Chase & Co. ("JPMorgan"), Broadridge abruptly stopped providing preliminary vote tallies to shareholders, ending a practice that had been in place for many years. This decision was arbitrary and without rational basis. According to press reports,[3] this late-in-the-game policy shift followed pressure from a lobbying group once headed up by a senior JPMorgan executive. The decision put the proponents of several proposals and "Vote No" initiatives submitted to JPMorgan shareholders, including us, at a distinct disadvantage relative to management during the voting process.

Thus, we believe the Commission should undertake a **broader investigation, including a public hearing where testimony can be received, into the relationships between Broadridge and its broker-dealer clients, including JPMorgan, before approving any fee changes that would benefit Broadridge.** This investigation should examine whether or not broker-dealers as a whole, or individual firms in particular, have undue influence over Broadridge given, among other things, the wide range of services Broadridge provides to broker-dealers beyond those involved in the proxy process. Our letter of May 17, 2013, to Chairman White asked a series of questions regarding the relationship with JPMorgan that should be part of such an investigation.[4] Only if the Commission pursues these questions diligently can investors be assured that Broadridge is fulfilling the key role it plays in providing a robust, independent and fair proxy voting system including, in particular, the effort embodied in the NYSE Proposal to advance the use of internet-based platforms for proxy voting by shareholders.

The monopoly position Broadridge plays in the proxy voting process requires heightened scrutiny by regulators

In its role as a third party intermediary between issuers and beneficial shareholders, Broadridge helps uphold the accuracy and integrity of the proxy voting process. By protecting beneficial shareholders from intrusive corporate solicitations and, until recently, by providing voting tally reports to proponents of shareholder proposals, Broadridge further helps insure a measure of fairness in the solicitation of proxy votes in advance of a shareholder meeting.

The beneficial impact of the current system on the shareholder franchise, however, cannot be assumed or taken for granted. Broadridge controls more than 95% of the market for distributing and processing proxy materials and is thus the primary beneficiary of changes to the current fee structure. Broadridge's effective monopoly on the process leaves the fee-setting process susceptible to the vested interests of those involved. Thus, in the absence of clear market competition, the integrity of the services

---

[3] Susanne Craig and Jessica Silver-Greenberg, Shareholders Denied Access to JPMorgan Vote Results, N.Y. Times, May 15, 2013; Brian Browdie, JPM Exec's SIFMA Ties Could Help Dimon Vote, Amer. Banker, May 16, 2013.
[4] See Letter to the Honorable Mary Jo White, Chairman, Commission from Dieter Waizenegger, Executive Director, CtW Investment Group, dated May 17, 2013.

provided by Broadridge should be subject to heightened scrutiny in order to insure the integrity of the entire proxy voting process.

An objective, independent and transparent process for establishing the fees paid to Broadridge is essential to maintaining the integrity of the proxy voting process

The NYSE Proposal came out of an opaque and potentially deficient process. The Commission itself has noted this prompts "significant questions … 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 [Exchange] Act."

We note, for example, the narrowly constituted membership of the NYSE's Proxy Fee Advisory Committee ("PFAC"), which generated the NYSE Proposal.[5] Only one member could be considered a representative of the investor community while all others are representatives of issuers, member organizations, or the NYSE itself. In other words, the participants have been the very entities responsible for dividing up the proxy voting fee pie while little or no voice was present representing the shareholders impacted by the system Broadridge controls – the supposed beneficiaries and ultimate payers of the system. This raises concern that the claim of the Exchange in its May 17, 2013, letter to the Commission that the PFAC is "independent" and "not under the control of NYSE or beholden to any one constituency" lacks an objective basis.[6]

Moreover, we note that the Exchange, despite claiming the Committee is independent of the Exchange, takes upon itself the role of defending the PFAC to the Commission. As far as we know, the PFAC itself has not responded in writing to the Commission. We do note, however, that the PFAC met with members of the SEC staff on May 7, 2013. An all too brief memo[7] summarizing the meeting was entitled "Meeting with Representatives of NYSE and *its* Proxy Fee Advisory Committee." (Emphasis added.) This suggests that the Commission itself does not accept the representations made by the Exchange with respect to the independence of the PFAC.

The explanations now provided by the Exchange on behalf of the PFAC for why an independent review is unnecessary are unconvincing and fall far short of assuring investors of the impartiality and thoroughness of the process. The Exchange, for example, implies that because the Proxy Working Group did not repeat its original 2006 call for an audit when it issued an addendum in 2007 it was thereby changing its view that an independent third party review should be conducted and endorsing the position of the NYSE. We fail to see why this should be the case. We assume that it is not the Commission's view that we should repeat in every submission to the Commission every comment we have made in the past on an SEC policy or rule lest it be ruled moot.

---

[5] See http://usequities.nyx.com/listings/list-with-nyse/proxy.

[6] See Letter to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated May 17, 2013.

[7] Michael Bradley, Memorandum, Re: Meeting with Representatives of NYSE and its Proxy Fee Advisory Committee, May 7, 2013.

Nor are we aware of any genuinely deliberative process undertaken by the PFAC to reach its conclusions independently from the control or influence of the Exchange, of Broadridge or of the NYSE's member organizations. The Exchange, and not the PFAC itself, provides only a cursory summary of how the PFAC reached its conclusion to recommend against an audit.

It is standard practice to require rate increases by monopolies to be reviewed by responsible independent bodies and we see no reason why this increase should be treated any differently or why the original call of the Working Group should be ignored. The Exchange argues that the analogy to a utility rate setting process is inapt but fails to provide any logic or basis for this conclusion. Indeed, the Exchange itself in its original 2010 comment letter on the Proxy Concept Release noted the need "to provide the maximum opportunity for competition and market based pricing."

Thus, we reiterate our support for an independent audit of the fee structure proposed by the PFAC including a review of its impact on encouraging a robust proxy voting process.

Review should examine Broadridge's multiple ties with Broker-Dealers

Our concern about the proxy fee setting process is heightened because of the expansive relationship that now exists between Broadridge and NYSE member organizations. Broadridge's services to the broker-dealer community (and their parent firms) extend far beyond the distribution of proxy voting materials.

According to its latest annual report,[8] Broadridge operates two principal business segments: Investor Communication Solutions ("ICS") and Securities Processing Solutions ("SPS"), representing 71% and 29% of revenue, respectively. ICS includes the third party proxy distribution services, the fees of which are the subject of the NYSE Proposal.

However, ICS also offers an array of other services to the broker-dealer community, including: financial information distribution and transaction reporting services; electronic prospectus services; comprehensive tax outsourcing solutions; client and marketing materials; and document management and archival solutions. ICS also provides voting services for mutual funds' annual election processes, as well as marketing and other informational communication. Mutual funds are frequently the sister firms of broker-dealers within a large corporate parent such as JPMorgan. As a result, it is unclear how much business NYSE's broker-dealer members share with Broadridge's ICS outside of the proxy processing services.

Broker-dealers are the principal client base of SPS, the other major segment of the Broadridge enterprise. According to Broadridge, SPS offers a suite of processes to

---

[8] Broadridge, Annual Report on Form 10-K for fiscal year ended June 30, 2012.

"automate the securities transaction lifecycle, from desktop productivity tools, data aggregation, performance reporting, and portfolio management to order capture and execution, trade confirmation, settlement, and accounting."

It is to be expected then that broker-dealers, particularly the larger ones, and their corporate parents, are amongst Broadridge's largest clients, and that the services they procure extend well beyond the processing and distributing of proxy voting materials.[9] According to the annual report, approximately 23% of Broadridge's consolidated revenues stemmed from just five clients, with one single client accounting for approximately 5% of revenue.

Under these circumstances, a complete review of all the services provided by Broadridge and of its relationships with the broker-dealer community is absolutely essential in order to assure both the fairness of the proxy voting process and ultimately the fairness of the fees charged by Broadridge for its services, particularly those provided to independent investor and shareholder groups whose interests are often at odds with those of the broker-dealers themselves.

Before paying up, investors should discuss the form EBIPs should take

We recognize and applaud the interest of the Commission in promoting increased retail investor voting through the development of EBIPs. We believe such platforms, if well designed, will benefit all investors. We believe, however, that as it currently stands, the NYSE Proposal is inadequate. While we have no objection in principle to an incentive fee structure to help motivate the development of EBIPs, we believe the current proposal puts the cart before the horse.

While we do not believe the SEC should micro-manage the eventual architecture of EBIPs, it is crucial that there be agreement on the principles and goals that should underpin such a system. It makes no sense, for example, to set up a system that has as its goal an increase in investor voting but does so in a manner that returns us to the era of uninformed broker influenced or controlled voting. Such an approach would undermine the integrity of our proxy process, which we note is intended to restore some semblance of a balance of power between incumbent managers and widely dispersed investors. Corporate managers, the Exchange and broker-dealers must keep in mind that the proxy process is, for all practical purposes, a substitute for attendance at the annual meeting itself. It is not intended to allow management to avoid the accountability that that meeting and the voting process should provide.

Thus, we have called attention to the fact that until recently Broadridge's own EPIB solution provided a "one click for management" option for shareholders. It required the intervention of the Commission to alter this practice.[10] This suggests that

---

[9] For FY 2011, brokers provided 90% of Broadridge's total revenue. Broadridge, "Continued Market Leadership through Execution and Innovation, Investor Day presentation, Jun. 22, 2011, avail. at http://www.broadridge-ir.com/main/Investor-Day-Full062211B.pdf.

[10] Ross Kerber, Proxy sites dump one click-vote button SEC Concerns, Reuters, Mar. 20, 2013.

Broadridge has a narrow view of the role of EBIPs. There is no indication that the PFAC took seriously the concerns of retail investor advocates that there should be encouragement of open platforms as opposed to proprietary closed systems. The Broadridge "one click for management" approach suggests an inherent bias towards incumbent managers, a bias that should be fully examined before the requested pricing increase is approved.

Thank you for your consideration and we look forward to future discussion of these important issues with the Commission. Please contact me at (202) 721-6027 if you have any questions.

Sincerely,

Dieter Waizenegger
Executive Director