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VIA E-MAIL AND FEDERAL EXPRESS

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 further support of 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.

In addition to the original filing, the Exchange has submitted letters dated May 17, 2013, July 9, 2013 and September 9, 2013. These letters respectively respond to comments on the Exchange's proposal, respond to the May 23, 2013 Order of the Securities and Exchange Commission (the "Commission") instituting proceedings to determine whether to disapprove the proposed rule change, and provide certain additional information requested by the Commission staff.

In a September 17, 2013 conference call with Exchange staff, members of the Commission staff requested that the Exchange respond in writing to certain comments of FOLIO*fn* Investments, Inc. ("Folio") made in letters to the Commission dated July 12 and June 18, 2013. The Exchange's response is presented in this letter.

The essence of Folio's comments appears to be that the aspect of the proposal that would provide no reimbursement for distribution of materials to managed account holders of five shares or less of an issuer's stock, is inconsistent with Exchange Act Rules 14b-1 and 14b-2. These rules provide that the obligation of a broker/bank to distribute material to street name shareholders is contingent on the broker/bank receiving assurance of reimbursement of its reasonable expenses, both direct and indirect, incurred in distributing the materials to its customers. Essentially, Folio appears to be arguing that compliance with these Exchange Act rules requires that each individual brokerage firm or bank must receive reimbursement of its particular expenses. In fact, this has never been the way in which the schedule of proxy fees has been determined.

1. <u>The schedule of proxy fees is appropriately based on overall industry costs, not the costs of any individual firm.</u>

Consistent with prior reviews of proxy fees, the Exchange's Proxy Fee Advisory Committee ("PFAC") looked at overall costs to the industry, and overall revenues produced by proxy fees charged to issuers. The Exchange has specifically noted that the extent of reimbursement of any individual brokerage firm will vary depending on the specifics of its account population. As the Exchange stated in the rule filing:

> Although the NYSE rules speak in terms of reimbursing brokers for their reasonable expenses, it appears self-evident that this was never feasible on an individual brokerage firm basis given that the rules provided one price to be used by a multiplicity of firms providing services, each with presumably different costs. That issue continued even after services were almost all centralized in one outsourced service provider, Broadridge. This is so because each firm continued to have some workload of its own, and each firm negotiated its own, arms-length agreement with Broadridge, and so had outsourcing costs that differed from firm to firm. In addition, the introduction of incentive fees in the late 1990's established that "fair and reasonable rates of reimbursement" encompassed rates that were not associated with a specified level of costs, but rather were considered adequate to encourage the development of systems that would lead to the elimination of physical delivery.[1]

In its July 9, 2013 letter at page 9, in a discussion of brokerage firm reimbursement, the Exchange stated

> This issue – that a one-size-fits-all fee schedule will have winners and losers – has been present in the proxy fee context from the beginning, and has apparently been acceptable to the industry and the SEC for that entire period.

Accordingly, it is the Exchange's position that by providing reimbursement of the reasonable overall expenses of brokers/banks in the aggregate, the fees as proposed are consistent with Exchange Act Rules 14b-1 and 14b-2, and are consistent in this respect with the fees approved by the SEC in prior proxy fee rule filings over the years.

2. <u>Background of the proposal concerning managed accounts.</u>

Although the Folio letters focus mostly on the portion of the proposal regarding small managed account positions, Folio does comment adversely on the proposal to distinguish between managed accounts and non-managed accounts in the amount of the Preference Management Fee. Accordingly, we will first review the basis for the approach to managed accounts generally.

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[1] See SEC Release No. 34-68936, February 15, 2013 (the "Rule Filing") at page 9. See also page 49, where the Exchange noted that "[G]iven the different sizes and cost structures of the various brokers, it is impossible to set fees that are tied directly to the individual broker's costs."

As noted in the Rule Filing, the PFAC devoted considerable time to the consideration and discussion of managed accounts in the proxy fee context, given that in recent years this appeared to be the most contentious of all the issues raised by those critical of the current fees.[2] Such accounts are also significant in terms of the amount of proxy fees generated, as elimination of paper deliveries attributable to holdings in managed accounts is responsible for approximately half of all incentive fees generated.[3]

The Exchange explained at some length the basis for the PFAC determinations made regarding preference management fees for managed accounts:

> Eliminations in the managed account context occur not because an investor has consented to have distributions come to him or her electronically, but because the investor has elected to delegate the voting of shares (and typically, the receipt of materials) to a broker or investment manager, and the broker or manager quite naturally prefers to manage the process electronically rather than by receiving multiple paper proxy statements and voting instructions. That the investor makes this election is often described as a rational result of the fact that in a managed account the investments are selected by the manager rather than the investor, and the investor looks to the manager not only to know whether or when to buy or sell a stock, but how to vote the shares as well. . . . Once the investor determines to open a managed account, the incentive to delegate voting flows naturally from the nature of the account, rather than from any specific effort made by an intermediary or its agent.
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> However, the maintenance of the preference is as necessary here as it is in any other election, such as consent to e-delivery. SEC rules applicable to managed accounts require that each beneficial owner be treated as the individual owner of the shares attributed to his or her account, and that includes having the ability to elect to vote those shares and receive proxy materials. Accordingly, each beneficial owner's election must be tracked – just as is the case with an investor in a non-managed account.
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> As a general matter then, the elimination of preference management fees for all managed accounts appeared unreasonable. However, the Committee did conclude that making some distinctions between managed accounts and non-managed accounts for fee purposes was appropriate.[4]

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2 Rule Filing at text accompanying note 28.

3 Rule Filing at text accompanying note 29.

4 Rule Filing at pages 20-21. We note that at one point Folio appears to argue that the proposal should distinguish between managed accounts that have delegated voting to an advisor, and those that have not. The PFAC considered that issue, but the information presented to the PFAC by firm personnel involved with managed accounts was that almost all managed account investors delegate voting. As a result, it appeared

Accordingly, the PFAC and the Exchange proposed that issuers and brokers in effect share the preference management fee for managed accounts, by setting that fee for managed accounts at half the rate applicable to non-managed accounts. As the Exchange stated in its July 9, 2013 letter to the Commission:

> Issuers benefit from managed accounts in the proxy context because almost all account holders delegate voting to the manager, and managers typically elect electronic delivery and vote much more frequently than the average retail investor. . . . The benefit to brokers is not a benefit related to proxy processing, but rather refers to the fact that the managed account is a product type that has been increasingly popular as an "asset gathering" strategy for firms, providing fee income to the firms and permitting them to lessen reliance on commission income. The benefit to issuers in the proxy context is an incidental attribute of a product type marketed by the brokerage industry because of the perceived advantages of the product for both brokerage firms and investors. As a result, the PFAC believed it appropriate to differentiate between suppressions secured as a result of the type of account involved (i.e., a managed account), compared with suppressions secured because an investor with a non-managed account has agreed to electronic delivery or accepted householding of multiple accounts at the same address. Those latter types of suppressions benefit only issuers, with no identifiable benefit to the broker, other than payment of a preference management fee which is meant only to reimburse the broker's costs.[5]

It is useful at this point to discuss a respect in which Folio appears to differ from most other brokers/banks in the proxy distribution context. Most firms have some customers that want paper delivery, and some that elect electronic delivery. A portion of the basic per-account proxy fee should be considered as providing reimbursement for the facilities, systems and personnel needed to accommodate those physical deliveries, and as described, the preference management fee is basically supporting the processing necessary to keep track of the choices made by customers (and subject to change by those customers) in how they wish to take delivery of proxy materials and cast their votes.

Folio, in contrast, does not appear to have a need either to process paper deliveries or to track changes in customers' elections, since all its customers are required to agree to take all notices and documents

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both unnecessary, and an unjustifiable expense, to have firms distinguish and categorize managed accounts as having delegated or retained voting, for purposes of whether the account should be subject to a reduced preference management fee, or should be subject to the fee elimination imposed on accounts with five shares or less. Folio may be unique in having significant numbers of managed account holders who retain the vote, but as noted a number of times herein, the rules are based on overall industry experience, and may affect different firms differently.

5 Letter dated July 9, 2013 from Janet McGinness, EVP & Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, at page 7 ("July 9th Letter). See also Rule Filing at pages 21-22.

electronically. The Folio customer agreement available on the firm's website provides in relevant part that: "Our opening and maintaining your account is conditioned on your agreement to receive all notices, documents, and other information related to your account and investments electronically. . . . You may revoke this consent to electronic delivery at any time by providing written notice to us. However, since we have priced our services based on the considerable savings of electronic delivery, we reserve the right to terminate your account or, in certain instances, charge you an extra fee if you ask for paper documents." (Folio Customer Agreement at page 2.) It appears likely that Folio rarely if ever has to deliver paper copies to its customers, as the 'boilerplate' information on a Folio invoice to an issuer for proxy fees, provided to the Exchange, states "We distribute your corporate materials to shareholders electronically and, therefore, will always request only two sets of materials from you, regardless of the number of record date shareholders holding shares at FOLIO."

The Exchange does not argue with the fact that Folio charges issuers the full amount of the basic fee (currently 40 cents per account) and the incentive (preference management) fee (currently 50 cents per account). We simply note that Folio is a good example of the fact that the fees are not determined with respect to any one firm's costs of distribution.

3. <u>Background regarding the proposal for no charge for small managed account positions.</u>

Folio's greatest concern appears to be with the proposal that there be no reimbursement for distributions to managed accounts with positions of five shares or less in the issuer's securities.

As the Exchange explained in the Filing and in the July 9th Letter, an issue of increasing concern to issuers was the amount of proxy fees generated by the proliferation of accounts containing a very small number of an issuer's shares that can be found when a managed account is offered with a relatively low investment minimum.[6] The Exchange received a number of complaints about this issue in recent years, and noted in the Rule Filing an example of a company whose proxy fees doubled as a result of stock holdings in such accounts aggregating only .017% of the issuer's stock.[7]

This issue was actually considered when the incentive fees were first developed in the 1990's, and resulted in Broadridge processing "Wrap Accounts" without charge. As the Exchange stated in the Rule Filing:

> The Exchange understands that this kind of issue had in fact been considered in the mid-1990s when the incentive fees were being formulated. While the managed account product was not as widespread as it is today, one firm did market a managed account product with a relatively low minimum investment which the firm called a "Wrap Account". It was the tendency of these accounts to have many very small, even fractional share

[6] Rule Filing at pages 22-23; July 9th Letter at page 8.

[7] Rule Filing at page 24.

> positions that led to the practice followed by Broadridge to process "Wrap Account" positions without any charge – either for basic processing or incentive fees. However, 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. This has produced the anomalous results, and issuer concerns, described above.[8]

As the Exchange noted in the July 9th Letter, the wrap account approach became less effective over time given the lack of a definition of the term "wrap account", in addition to being problematical because it was not codified in the proxy fee rule, and the PFAC searched for an approach that would deal more effectively with the issue.[9] The July 9th Letter also provides a succinct description of the basis on which the PFAC developed the proposal contained in the Rule Filing:

> A more precise alternative to the "wrap account" approach which the PFAC found attractive was to specify that no fees would apply to managed accounts holding fewer than a specified number of an issuer's shares. The question was what number of shares to specify. The PFAC obtained from Broadridge information showing that among managed account positions between 1 and 500 shares (which constituted 89% of all managed account positions), the average position was 91 shares, and median position size was approximately 50 shares. The basic question was at what point did the benefit to an issuer in terms of shares voted become so minimal as to justify charging the issuer nothing for processing the account. The PFAC was also mindful of the overall economic impact on proxy fees, not wanting to have a disparate impact from this one item. Accordingly the PFAC considered setting the bar at various points from a fractional share to 5, 10, 15, 20 and 25 shares, and obtained estimates of the economic impact of each of those set points. In the end, there was consensus at a level of five shares. The estimated impact on aggregate proxy fees was considered relatively modest (approximately $4.2 million), and it seemed clear that the voting benefit of five shares or less was limited, to say the least. This was a reasoned judgment by the PFAC, but one that was made after careful consideration of alternatives.[10]

In summary, the PFAC identified this issue as one that should be addressed, and came to the opinion that it was appropriate to address it in a similar fashion to that chosen by those who had developed the incentive fee proposal in the 1990's. However, the PFAC saw a clear need to address the issue in a structured manner that could be codified in the proxy fee schedule to assure its consistent and uniform application going forward. After careful consideration based on information available to it, the PFAC developed the proposal that has been put forward. As has been noted with respect to all the fees,

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[8] Rule Filing at page 23.

[9] July 9th Letter at page 8.

[10] Id.

different participants will be impacted differently, but the proposal appears fair and appropriate in terms of its overall impact on proxy fees, and does in fact appear to address the anomaly in proxy fees created by the proliferation of low minimum investment managed accounts.

Given that what is relevant is reimbursement of reasonable aggregate industry expenses, for all the reasons discussed in the filing and in this letter it is the position of the Exchange that the proposals regarding managed accounts, including the proposal that there be no fees for managed accounts of five shares or less, are consistent with Exchange Act Rules 14b-1 and 14b-2.

Folio argues in its July 12, 2013 letter for a simplified "average" "per distribution" fee that could be applied by all firms and "eliminate all complexity and potential unfairness". The proxy fees have evolved away from that approach over the last 20+ years, with efforts to address various developments such as the emergence of the "intermediary" serving numbers of brokers/banks, and the technological developments that facilitate the elimination of paper and postage, increasing technology costs to proxy distributors, but permitting issuers to save very significant amounts in paper and postage costs. The way the fees have evolved, and the ways they are proposed to further evolve, are considered to be to the general benefit of both issuers and brokers/banks, and to investors as well, given the increased efficiencies and level of performance in terms of the accurate and timely distribution of materials. The simplified approach suggested by Folio might benefit that particular firm, but we note, for example, that it would do nothing to rectify the anomalous fee impact experienced by issuers resulting from the proliferation of low minimum investment managed accounts, nor would it do anything to encourage the continued efforts to eliminate paper distribution.

4. <u>Comment on proposed EBIP incentive fee.</u>

Folio describes this proposed fee as "unjustified", and complains that brokers that have already instituted EBIPS and persuaded their customers to adopt them "will get nothing under this proposal for already having done the right thing." The Exchange anticipated that some firms could have such a reaction, and addressed it in the Rule Filing as follows:

> As discussed above, some firms already provide account holders with notices of upcoming votes and the ability to view proxy-related material and to vote their proxies on-line. The Exchange believes that this is an important element of improving the account holder's experience, and it applauds those firms that have taken this step in the absence of any kind of specific EBIP fee. While this EBIP success fee proposal was brought forward in the course of the PFAC examination of proxy fees generally, it is functionally different from the existing fees that are intended to reimburse banks and brokers for the reasonable costs of delivering proxy materials to beneficial owners, and its proposal by the NYSE is not a suggestion that all firms are entitled to reimbursement for the costs of providing an EBIP facility. Rather, it is an additional, limited duration, one-time fee that is intended to persuade firms to develop and encourage the use of EBIPs by their customers, providing a benefit to investors and to corporate governance generally, while being funded by only a small portion of the amounts

a typical issuer will save from one account holder switching from full-package physical to electronic delivery of proxy materials.[11]

We note further that the proposed fee is premised on the expectation that investors who are provided an EBIP will be more likely to elect to switch to e-delivery, with the attendant significant savings to issuers in paper and postage. Interestingly, the presence or absence of an EBIP at Folio would have no impact on this, since all customers at Folio are required to take electronic delivery. The Exchange applauds the Folio approach, but it is not within the universe that the EBIP incentive fee is intended to impact.

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In summary and with respect to Folio's comments generally, we would say that the fact that Folio has chosen to operate in an idiosyncratic way is its choice, and presumably is attractive to those investors who maintain accounts with the firm. However, this does not provide Folio with a basis to claim that fees and practices across an entire industry should be altered to accommodate it, or to permit it to subsidized its operating costs with anomalous proxy fees collected from issuers unfairly impacted by the fees generated by minimal share positions in its low minimum investment managed accounts.

The Exchange is pleased to have the opportunity to submit this additional information to the Commission in support of the rule filing. We would also be pleased to answer any other questions that the Commission or the Staff may have.

Very truly yours,

Janet McGinness

11 Rule Filing at page 43-44.