ADVISORSHARES™
Actively Managed ETFs

January 14, 2021

Ms. Vanessa A. Countryman
Secretary
US Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303

Re: Notice of Filing of Proposed Rule Change Amending Its Rules Establishing Maximum Fee Rates To Be Charged By Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners (File No. SR-NYSE-2020-96)

Dear Ms. Countryman:

AdvisorShares Investments, LLC[1] appreciates the opportunity to comment on the New York Stock Exchange's proposed rule change that would direct NYSE member firms that also are FINRA member firms to comply with FINRA Rule 2251's fee schedule that sets forth the maximum amount that NYSE member organizations may charge registered investment companies[2] for delivering proxy and other disclosure materials, such as shareholder reports and prospectuses ("fund materials") to any shareholder who holds shares in nominee name through an intermediary.[3] The NYSE proposal also would eliminate the existing NYSE fee schedule that is the corollary of the FINRA fee schedule. AdvisorShares agrees with the views expressed by the Investment Company Institute in its letter to you on this matter,[4] many of which we have restated in this letter.

The FINRA fee schedule is almost identical to the NYSE's current fee schedule. According to the NYSE Proposal, the technical effect of the proposal, therefore, would not result in any "substantive change in the maximum rates NYSE member organizations may charge because all NYSE member organizations subject to these rules are also members of FINRA and, consequently, will be subject to the fee schedule set forth in FINRA Rule 2251."[5]

Given the technical nature of the change and NYSE's lack of interest in reforming, or even examining, the current fee system, we support the SEC approving the proposed rule change.[6] But it is imperative that

[1] AdvisorShares Investments, LLC ("AdvisorShares") is an investment management firm registered with the Securities and Exchange Commission that is focused on actively traded exchange-traded funds.

[2] For the sake of simplicity, we use "investment company" and "fund" interchangeably to refer to registered investment companies and their affiliated transfer agents and advisers throughout this letter.

[3] *Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Rules Establishing Maximum Fee Rates To Be Charged By Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners* (File No. SR-NYSE-2020-96) (Release No. 34-90677); (December 15, 2020), *available at* https://www.sec.gov/rules/sro/nyse/2020/34-90677.pdf ("NYSE Proposal"); 85 FR 83119 (December 21, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-21/pdf/2020-28010.pdf

[4] *See* Letter from Dorothy M. Donohue, Deputy General Counsel and Joanne Kane, Senior Director, Investment Company Institute, dated January 11, 2021.

[5] NYSE Proposal at 7.

[6] *See* Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Adopting Maximum Fees Member Organizations may Charge in Connection with the Distribution of Investment

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the Commission not stop there. It must take this opportunity to reform the current processing fee system for distributing fund materials. This system is broken, providing a near-monopoly for intermediaries' predominant vendor with little to no incentive to reduce processing fees. The result is unnecessarily high costs for fund shareholders.

In fact, funds pay three to five times as much to distribute materials through intermediaries as they pay when they can distribute materials directly—an excess cost caused by lack of competition and lack of incentives to control costs.

The Commission must take on an integral role in reforming the system, especially considering that FINRA is the brokerage industry's self-regulatory organization. It will be essential for the Commission to independently arbiter the differences between funds' and intermediaries' viewpoints on how to reform the current processing fee system.

One important, incremental step we strongly urge the Commission to take is to affirmatively state in any approval order that neither the NYSE fee schedule nor the FINRA fee schedule obligate funds to pay the exact fees that appear in the fee schedule. Rather, each of the fee schedules sets forth *maximum* rates for what constitutes "reasonable" delivery expenses (*i.e.,* "processing fees") that funds must reimburse intermediaries.[7] This statement is essential because funds almost always are charged this maximum rate, as intermediaries lack the incentive to negotiate a lower rate for funds. In fact, in situations where an intermediary has negotiated processing fees that are lower than the NYSE maximum processing fee, the vendor typically does not charge the fund the negotiated rate. Instead, the vendor invoices the fund for the maximum NYSE fee rate, and then "remits" the difference back to the broker. The concept of "remittances" entirely ignores the fact that the intermediary is negotiating the price on behalf of the fund. When funds negotiate with vendors on behalf of their direct-held accounts, the fund pays the negotiated rate.[8]

The longstanding problems with the current framework have over time resulted in fund shareholders paying hundreds of millions of dollars more than what is "reasonable" and thus permissible under Commission rules. Despite the Commission having directed funds, intermediaries, vendors, and other interested industry members ("processing fee working group") to work together to examine the intermediary process for delivering regulatory materials and try to jointly agree on how to improve the system, it is increasingly apparent that the processing fee working group doing so is likely to be impossible, given the strongly held, irreconcilable views of the participants. We maintain that only the Commission can independently assess, and make the judgments necessary to reform, the current system consistent with the public interest and investor protection.

Company Shareholder Reports Pursuant to Any Electronic Delivery Rules Adopted by the Securities and Exchange Commission, Release No. 34-78589 (Aug. 16, 2016), available at https://www.sec.gov/rules/sro/nyse/2016/34-78589.pdf (where the NYSE stated that it "may not be best positioned to take on the regulatory role in setting fees for mutual funds."); NYSE Proposal at 4 ("[g]iven the significant evolution of the securities industry during the period in which the NYSE has taken the lead in establishing proxy distribution reimbursement rates, the NYSE does not believe that it is best positioned to retain this responsibility going forward.")

[7] Separate and apart from these fees, funds also must reimburse intermediaries for actual out-of-pocket costs, such as printing and mailing.

[8] *See* Letter to Brent J. Fields, Secretary, US Securities and Exchange Commission from Susan Olson, General Counsel, Investment Company Institute, dated October 31, 2018 ("ICI 2018 Letter"), for a comprehensive discussion of the current system and recommendations for reform, *available at* https://www.ici.org/pdf/18_ici_processing_fees_ltr.pdf.

The NYSE Proposal notes that "[t]he current fee schedule has been in place since 2013 and a comprehensive review of fee levels may be necessary in the near future to respond to the continuing evolution in both technology and the securities ownership patterns of investors since that time."[9] We agree and strongly recommend that the Commission review the ICI 2018 Letter, which details recommendations for change, supported by data gathered through an extensive survey and ICI member engagement. The ICI provided the Commission with two distinct paths: facilitate greater competition or reform the processing fee system. We summarize those recommendations immediately below.

The SEC should facilitate greater competition. The SEC should permit funds (rather than intermediaries) to select who will deliver fund materials on their behalf and negotiate the price for their distribution. This will realign incentives and reintroduce market competition, eliminating the need for a regulator-set fee schedule and allowing vendors to compete for funds' business.

If the SEC is unwilling to do so, it should reform the processing fee schedule, including:

- Creating a fee schedule tailored to fund disclosure delivery obligations;
- Replacing the existing layered fees with simple flat fees that reflect actual costs, using cost for direct-held accounts as a guide;
- Creating a robust regulatory oversight framework; and
- Mandating regular independent review of fee rates and vendor billing practices.

We fully support efforts to reform the system for distributing fund materials. If you have questions or would like to discuss our comments, please feel free to contact Noah Hamman at 202.684.6383.

Sincerely,

/s/Noah Hamman
Chief Executive Officer

cc: The Honorable Elad Roisman
The Honorable Hester Peirce
The Honorable Allison Herren Lee
The Honorable Caroline Crenshaw
Sarah ten Siethoff, Acting Director, Division of Investment Management
Christian Sabella, Acting Director, Division of Trading & Markets

[9] NYSE Proposal at 4.