Shareholder Services Association
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Founded 1946 (Formerly CTA)

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THE STA
SECURITIES TRANSFER ASSOCIATION, INC.

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March 12, 2012

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

VIA OVERNIGHT MAIL & EMAIL

RE: Petition for Immediate Regulatory Action Regarding Issuer Invoice Payments to Broker-Dealers for Separately Managed Accounts

Dear Ms. Murphy:

The Securities Transfer Association (STA)[1] and the Shareholder Services Association (SSA)[2] jointly petition the U.S. Securities and Exchange Commission (SEC) to issue an interpretive release with guidance, clarifying that broker-dealers and their agents are prohibited from charging issuers for proxy processing, suppression, voting, and other fees for wrap fee accounts and separately managed accounts, at the beneficial owner level.[3] This fee prohibition should apply to any circumstance in which a beneficial owner has instructed in writing that an investment adviser is to receive issuer proxy materials and vote his or her proxies in lieu of the beneficial owner.

In the alternative, the STA and the SSA petition the SEC for an emergency or interim order to direct issuers to place the full amount of any disputed proxy fees into an escrow account until these issues are resolved through rulemaking by the SEC.

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[1] The Securities Transfer Association (STA), established in 1911, is the professional association of transfer agents. The STA membership includes more than 150 registered transfer agents maintaining records of more than 100 million registered shareholders on behalf of more than 15,000 issuers. Additional information about the STA can be obtained at http://www.stai.org.

[2] The Shareholder Services Association (SSA), established in 1946, is a professional association whose purpose is to support corporate issuers in effectively meeting their responsibilities for shareholder recordkeeping and service. The SSA provides its members a forum through which they can monitor securities industry issues and events, communicate with their industry peers, obtain and share information, and address needs in servicing security holders. More information about SSA can be obtained at http://www.shareholderservices.org.

[3] This Petition for Rulemaking is filed pursuant to 17 C.F.R. § 201.192 ("Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary.").

I. Background

Many broker-dealers are sponsors of wrap fee account and separately managed account programs for investors who seek to delegate investment discretion and proxy voting authority to an investment adviser. In most cases, these are investors who lack the expertise, time, or interest to manage their own investments directly. A fully-diversified discretionary account may include hundreds of investment positions. Typically, these investors prefer not to receive what could be a substantial volume of proxy materials, especially for investments they are not selecting themselves.

As discussed below, current SEC rule interpretations do not permit broker-dealers to charge issuers any proxy fees for wrap fee accounts at the beneficial owner level. However, for a number of years now, broker-dealers and their agents[4] have been charging issuers a series of proxy fees for separately managed accounts at the beneficial owner level. These fees are being charged despite the fact that investors in these accounts are not receiving—or expecting to receive—any proxy materials and are not casting any proxy votes.

Both wrap fee accounts and separately managed accounts function in the same manner regarding proxy voting activities. In both cases, the sponsor of these investment programs receives one package of proxy materials on behalf of each issuer holding a shareholder meeting. Acting in its capacity as an investment adviser, this sponsor then casts proxy votes in lieu of the beneficial owners who have delegated proxy voting authority, as a part of these investment programs.

For many years now, the SEC has relied on Self-Regulatory Organizations (SROs) under its jurisdiction to establish the fees that issuers must pay to reimburse broker-dealers and banks for proxy processing and distribution services.[5] The fee structure for proxy services is developed through the SRO rulemaking process, which requires SEC approval, pursuant to Section 19(b) of the Exchange Act.[6]

Historically, the New York Stock Exchange (NYSE) has taken the lead in establishing proxy procedures and the proxy fee structure for broker-dealers, banks, and issuers. Similar rules have been adopted by the Financial Industry Regulatory Authority (FINRA), the industry regulator of broker-dealers, and the NASDAQ Stock Market (NASDAQ).[7]

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[4] As is well known, a substantial majority of broker-dealers and banks have outsourced their proxy processing and distribution functions to Broadridge Financial Solutions, Inc. (Broadridge), a central intermediary and service provider that compiles contact information and individual share positions for beneficial owners as of an issuer's record date. On behalf of its broker-dealer and bank clients, Broadridge also provides proxy distribution, communications, and vote tabulation services, in connection with an annual or special meeting of shareholders.

[5] See SEC Release No. 34-21900, 50 Fed. Reg. 13,297 (Apr. 3, 1985) ("In adopting the direct shareholder communications rules the Commission left the determination of reasonable costs to the SROs, because, as representatives of both issuers and brokers, they were deemed to be in the best position to make a fair allocation of the costs associated with the amendments, including start-up and overhead costs.").

[6] 15 U.S.C. § 78s(b).

[7] See NYSE Rules 451 and 465, and section 402.10 of the NYSE Listed Company Manual; NASDAQ Rule 2251; and FINRA Rule 2251.

These SROs have been aware of the proxy fee issues involving separately managed accounts for several years now. In October 2007, a senior FINRA executive, Anand Ramtahal, delivered a speech at a Securities Industry and Financial Markets Association (SIFMA) Proxy Symposium. Mr. Ramtahal was quoted in Securities Industry News as stating that broker-dealers should not be charging processing or suppression fees for separately managed accounts.[8] Mr. Ramtahal pledged that FINRA would investigate this practice, and he went on to say that "broker-dealers should not be forwarding the names of [separately managed account] investors to the issuers or their service providers."[9]

It has been more than four years since Mr. Ramtahal's public remarks and FINRA has not completed an investigation into this practice, nor has FINRA taken any publicly documented action to prohibit this practice. In fact, FINRA's position is to defer to the NYSE on proxy fee issues.[10] See Attachment #1.

The STA sent a letter to the SEC on the separately managed accounts issue in June 2010.[11] As a result of the STA's letter, a discussion of the problem was included in the 2010 SEC Concept Release on the U.S. Proxy System.[12]

In August 2010, the NYSE established a Proxy Fee Advisory Committee (Committee) to conduct a broad review of the current fee schedule for proxy processing and distribution services.[13] The agenda for this Committee includes the separately managed accounts issue. To date, the Committee has not finalized any recommendations or proposed a rule change to address this issue or any other proxy fee issue.

The STA filed a formal complaint with FINRA about the separately managed accounts issue on October 31, 2011.[14] A formal complaint was filed with NASDAQ on November 9,

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[8] Chris Kentouris, "Finra To Investigate Proxy Suppression Fees for SMAs," Securities Industry News, Oct. 19, 2007, available at http://www.securitiestechnologymonitor.com/news/21609-1.html ("We don't believe that broker-dealers should be charging these fees and will be looking into the practice for separately managed accounts [SMAs]." (quoting Anand Ramtahal, Vice President, FINRA)). Anand Ramtahal was described in this media article as a Vice President of a FINRA division responsible for risk oversight and operational regulation.

[9] Id.

[10] Letter from Marc Menchel, Executive Vice President and General Counsel, FINRA, to Charles V. Rossi, President, The Securities Transfer Association, January 23, 2012.

[11] See Letter from Thomas L. Montrone, The Securities Transfer Association, to Mary L. Schapiro, Chairman, Securities and Exchange Commission, June 2, 2010, available at http://www.stai.org/pdfs/STA_Letter_to_SEC_re_Managed_Accounts_6-2-2010.pdf.

[12] See Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982, at 42,997 (July 22, 2010).

[13] Information on the NYSE Proxy Fee Advisory Committee can be accessed through the following link: http://usequities.nyx.com/listings/list-with-nyse/proxy.

[14] Letter from Charles Rossi, President, The Securities Transfer Association, to Richard G. Ketchum, Chairman and Chief Executive Officer, Financial Industry Regulatory Authority, October 31, 2011, available at http://www.stai.org/pdfs/2011-10-ketchum-letter.pdf.

2011.[15] As of this writing, neither SRO has taken any action to investigate this issue, or to propose a rule to address this problem.

Given this lack of attention and action, both the STA and the SSA are now petitioning the SEC for immediate regulatory action. It is imperative that the SEC act promptly to prevent these proxy fees from being charged to issuers during the current proxy season.

II. These Proxy Fees Are Not Authorized Under SEC Rule Interpretations

Under current SEC rules, issuers are responsible for reimbursing broker-dealers and banks for their "reasonable expenses" in distributing proxy materials to beneficial owners.[16] However, the SEC approved a series of SRO rules in 1994-1995 to permit beneficial owners to delegate proxy voting authority in accounts in which investment discretion also has been delegated.[17] As discussed in greater detail below, these SRO rule changes were advanced for the primary purpose of ensuring that beneficial owners do not receive any issuer proxy materials whenever proxy voting authority has been delegated to an investment adviser.

Several years later, this issue arose again in the context of proxy voting in wrap fee accounts. As is well-established, a wrap fee account is an arrangement between a broker-dealer or investment adviser and an investor in which the investor receives discretionary investment advisory, execution, clearing, and custodial services in a bundled form.[18] Typically, these services include proxy voting by the investment adviser in lieu of the beneficial owner. In exchange for all the services provided, the investor pays an all-inclusive or "wrap" fee, determined as a percentage of the assets held in the wrap fee account.

Wrap fee accounts are typically part of a wrap fee "program," a term that describes an institutional process that promotes uniformity among participating clients.[19] Under regulations to implement the Investment Advisers Act, the SEC defines a wrap fee program as "an advisory program under which a specified fee or fees not based directly upon transactions in a client's account is charged for investment advisory services (which may include portfolio management or

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[15] Letter from Charles Rossi, President, The Securities Transfer Association, to Robert Greifeld, Chief Executive Officer and President, The NASDAQ OMX Group, November 9, 2011, available at http://www.stai.org/pdfs/2011-11-sta-letter-to-robert-greifeld-nasdaq.pdf.

[16] See 17 C.F.R. § 240.14a-13(a)(5).

[17] See, e.g., Order Approving a Proposed Rule Change Relating to Amendments to NYSE Rules 450, 451, 452, and 465, SEC Release No. 34-34596, 59 Fed. Reg. 45,050 (Aug. 31, 1994); and Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Interpretation of the Board of Governors—Forwarding of Proxy and Other Material, SEC Release No. 34-35681, 60 Fed. Reg. 25,749 (May 5, 1995).

[18] See Steven W. Stone, Wrap Fee Programs and Separately Managed Accounts, ALI-ABA Investment Adviser Regulation, January 2009, available at http://www.morganlewis.com/pubs/stevestone_presentation_wrapfeeprogs.pdf.

[19] See Disclosure by Investment Advisers Regarding Wrap Fee Programs, SEC Release No. IA-1411, 59 Fed. Reg. 21,657, at 21,658 (footnote 8) (Apr. 26, 1994). See also 17 C.F.R. § 275.204-3(h)(3) ("Sponsor of a wrap fee program means an investment adviser that is compensated under a wrap fee program for sponsoring, organizing, or administering the program, or for selecting, or providing advice to clients regarding the selection of, other investment advisers in the program.")

advice concerning the selection of other investment advisers) and the execution of client transactions."[20]

In adopting Rule 3a-4 under the Investment Company Act—a safe harbor from registration under the Act for managed accounts—the SEC stated the following in 1997, with respect to proxy voting in wrap fee accounts:

> The Commission is clarifying that, if a client delegates voting rights to another person, the proxies, proxy materials, and, if applicable, annual reports, need be furnished only to the party exercising the delegated voting authority.[21]

Three years later, the SEC confirmed this basic framework in promulgating its householding rules. In this rulemaking, the SEC acknowledged the householding process that was already occurring in broker-dealer advisory accounts; i.e., when beneficial owners delegate proxy voting authority to an investment adviser and, therefore, no longer need to receive proxy materials.[22]

Separately managed accounts work in exactly the same manner as wrap fee accounts, at least with respect to proxy voting. A broker-dealer establishes a program in which individual investors delegate investment discretion to an investment adviser. This delegation typically includes proxy voting authority, as one of the services provided by the investment adviser. For these "bundled" services, investors pay a specified fee based on a percentage of assets, instead of paying brokerage commissions on individual transactions within the account.

Although separately managed accounts are not expressly defined by SEC rules, they certainly have been considered to be within the definition of wrap fee programs. In 2010, the SEC described both wrap fee accounts and separately managed accounts in the following manner:

> Under wrap fee programs, which are sometimes referred to as 'separately managed accounts,' advisory clients pay a specified fee for investment

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[20] 17 C.F.R. § 275.204-3(h)(5).

[21] SEC Release Nos. IC-22579 and IA-1623, 1997 SEC LEXIS 673, at *47 (Mar. 24, 1997). The SEC re-affirmed this position in its Concept Release on the U.S. Proxy System, issued in July 2010. See Concept Release on the U.S. Proxy System. 75 Fed. Reg. 42,982, at 42,998 (July 22, 2010) ("Are separately managed accounts different from 'wrap' accounts for which issuers may not be charged suppression fees for providing proxy communication services to holders of WRAP accounts?").

[22] See Delivery of Proxy Statements and Information Statements to Households, SEC Release No. 33-7912, 65 Fed. Reg. 65,736, at 65,744 (Nov. 2, 2000) ("… we are … persuaded that, in most cases, companies and intermediaries should be allowed to household to investment advisers as they have in the past. Thus, we will allow such householding to continue outside of the scope of the rules we adopt today, provided that the investment adviser is eligible to vote the proxies under the self-regulatory organization rules and does not object to householding."); See also Delivery of Proxy and Information Statements to Households, SEC Release No. 33-7767, 64 Fed. Reg. 62,548, at 62,554 (Nov. 16, 1999) ("Comment is requested on whether companies and intermediaries should be able to household proxy materials to such investment advisers and investment managers without having to rely on the proposed householding rules *since it is unlikely that a single person or entity making the proxy voting decisions would need more than one copy of the proxy materials.*")(emphasis added).

> advisory services and the execution of transactions. The advisory services may include portfolio management and/or advice concerning selection of other advisors, and the fee is not based directly upon transactions in the client's account.[23]

There is no substantive reason to treat separately managed accounts differently than wrap fee accounts, at least with regard to an issuer's limited responsibility to provide proxy materials only to an investment adviser sponsoring such accounts, when proxy voting authority has been delegated by the underlying beneficial owners.

An additional argument against these proxy fees is the fact that broker-dealers sponsoring discretionary investment programs are acting as investment advisers, pursuant to the Investment Advisers Act.[24] Sections 206(1) and 206(2) of the Act make it unlawful for an investment adviser, directly or indirectly, to employ any device, scheme, or artifice to defraud, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.[25]

The U.S. Supreme Court interprets Section 206 as recognizing an investment adviser as a fiduciary, with an affirmative duty of utmost good faith, and a requirement of full and fair disclosure of all material facts to its clients.[26] In turn, the SEC has interpreted Section 206 as requiring investment advisers to act for the benefit of their clients, and precludes them from using their clients' assets to benefit themselves.[27]

As fiduciaries, investment advisers to separately managed accounts should not be permitted to charge issuers for proxy services at the beneficial owner level, when such services are

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[23] Amendments to Form ADV, SEC Release No. IA-3060, 75 Fed. Reg. 49,234, at 49,246 (footnote 182) (Aug. 12, 2010).

[24] For several years now, the SEC also has required registration under the Investment Advisers Act for broker-dealers offering these types of advisory services, as this activity no longer qualifies for the broker-dealer exception to the Investment Advisers Act. This exception is available to a broker-dealer providing investment advice that is "solely incidental" to its brokerage business and who is not receiving "special compensation" for rendering such investment advice. 15 U.S.C. § 80b-2(a)(11)(C). See also Status of Investment Advisory Programs Under the Investment Company Act of 1940, SEC Release No. IC-21260, 60 Fed. Reg. 39,574, at 39,575 (footnote 7)(Aug. 2, 1995) ("The [SEC] staff is of the view that an investment advisory program generally is not incidental to a sponsor's broker-dealer business and, at least in a wrap fee program, the sponsor's portion of the wrap fee is special compensation."); Certain Broker-Dealers Deemed Not To Be Investment Advisers, SEC Release No. 34-51523, 70 Fed. Reg. 20,424, at 20,437 (Apr. 19, 2005), vacated on other grounds by Financial Planning Ass'n v. SEC, 482 F.3d 481 (D.C. Cir. 2007) ("[W]e are re-affirming our long-held view that advisory services provided by certain broker-dealers in connection with wrap fee programs are not solely incidental to brokerage."); and Id. at footnote 182 ("We have viewed brokers-sponsored wrap fee programs as being subject to the Advisers Act.").

[25] 15 U.S.C. § 80b-6 (Prohibited Transactions by Investment Advisers).

[26] SEC v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963).

[27] See In the Matter of Oakwood Counselors, Inc., 1997 SEC LEXIS 304, at *12(Feb. 10, 1997) ("Sections 206(1) and (2) establish a fiduciary duty for investment advisers to act for the benefit of their clients."); and In the Matter of Kingsley, Jennison, McNulty & Morse, Inc., Initial Decision Release No. 24, 1991 SEC LEXIS 2587, at *8-9 (Nov. 14, 1991) ("… the Commission referred to the fiduciary principle as being that a fiduciary cannot use trust assets to benefit himself ….").

actually occurring at the investment adviser level.[28] Even though these payments are not obtained directly from investor funds, they are being derived indirectly from the investor, as a shareholder in each of the issuers making these proxy fee payments.

SEC rules and interpretations establish a framework in which an investment adviser is permitted to obtain proxy voting authority along with investment discretion in these accounts. Pursuant to delegated authority, the investment adviser receives proxy materials and votes proxies in lieu of the beneficial owner. For broker-dealers sponsoring wrap fee account and separately managed account programs, proxy materials and voting forms are consolidated or householded, requiring only one proxy package to be sent to each institution sponsoring such a program for this purpose. The SEC's long-standing position on wrap fee accounts has been that issuers only need to provide proxy materials to an investment adviser sponsoring such accounts. This should also be the standard when proxy voting authority has been delegated by a beneficial owner in a separately managed account.

III. These Proxy Fees Are Not Authorized Under SRO Rules

As noted earlier, the NYSE Proxy Fee Advisory Committee is evaluating the separately managed accounts issue, as a part of its broader review of the current fee schedule for proxy processing and distribution services. However, as of this writing, the Committee has not released its recommendations and no NYSE rule amendments have been proposed.

The regulatory histories of the proxy processing, paper and postage elimination, and other related fees do not contain any language authorizing the imposition of these fees on separately managed accounts at the beneficial owner level. In fact, these proxy fees were all established for other purposes, such as to reimburse broker-dealers and their agents for actually delivering proxy materials through the mails and to provide an incentive to eliminate the need for mailing proxy materials to certain beneficial owners.[29]

Despite the regulatory histories of these fees, SIFMA and NYSE Regulation exchanged correspondence on this issue in 2008. On February 11, 2008, SIFMA sent a memorandum to NYSE Regulation stating its understanding that "NYSE has looked into the practice of broker-dealers' charging Suppression Fees to Issuers for Managed Accounts and concluded that this practice is within the original intent and letter of Rule 465."[30] See Attachment #2.

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[28] Similarly, Rule 10b-10 of the Securities Exchange Act of 1934 makes it unlawful for a broker-dealer to effect any transaction for a customer's account unless the broker-dealer, at or before the completion of the transaction, provides the customer with written notification disclosing "[t]he amount of any remuneration received or to be received by the broker from such customer in connection with the transaction …." 17 C.F.R. § 240.10b-10(a)(2)(i)(B).

[29] See Letter from Charles Rossi, President, The Securities Transfer Association, to Richard G. Ketchum, Chairman and Chief Executive Officer, Financial Industry Regulatory Authority, at 15-17, October 31, 2011, available at http://www.stai.org/pdfs/2011-10-ketchum-letter.pdf; and Letter from Charles Rossi, President, The Securities Transfer Association, to Robert Greifeld, Chief Executive Officer and President, The NASDAQ OMX Group, at 16-18, November 9, 2011, available at http://www.stai.org/pdfs/2011-11-sta-letter-to-robert-greifeld-nasdaq.pdf.

[30] Memorandum from Donald D. Kittell, Chief Financial Officer, SIFMA, to Rick Ketchum, NYSE, February 11, 2008. This correspondence cites to the wrong NYSE Rule, as Rule 451 governs the distribution of proxy materials (and not interim reports). Further, SIFMA took the opposite position in a 2006 comment letter, regarding the householding of proxy materials to investment advisers using the Broadridge ProxyEdge service. See Donald D.

NYSE Regulation responded on April 29, 2008, and confirmed that "your understanding of our February 5th discussion, as set forth in your Memorandum, is correct."[31] See Attachment #3. This letter was sent despite the SEC interpretations noted above and in apparent conflict with a 1994 NYSE Information Memo that states:

> Member organizations may wish to provide consolidated proxies and related materials to investment advisers designated by beneficial owners to exercise voting discretion. To facilitate this process, member organizations should prepare a consolidated proxy (or voting instruction form) and distribute such material to investment advisers.[32]

This private exchange of correspondence does not have any legal effect, as it fails to meet SEC standards for a "stated policy, practice or interpretation" of an SRO.[33] While there is an exception for an interpretation that is "reasonably and fairly implied by an existing rule" of an SRO, this correspondence does not meet current SEC standards for this exception either.[34] Additionally, this exchange of correspondence has no binding effect because it was not made public or "generally available," as is required under the current SEC rule on this topic.[35]

For these reasons, these proxy fees are without appropriate regulatory authority and may only be charged to issuers pursuant to an actual SRO rule change, which has not occurred to date.[36]

Kittell, Securities Industry Association, to Nancy Morris, Secretary, Securities and Exchange Commission, at 4, February 13, 2006, available at http://www.sec.gov/comments/s7-14-10/s71410-4.pdf ("With ProxyEdge, only one set of proxy materials, rather than multiple sets, is mailed to investors who want paper materials. … For example, if a money manager has 200 [managed] accounts that hold shares of IBM, ProxyEdge will avoid the delivery of 199 sets of proxy materials and send only one set.").

[31] Letter from Richard Ketchum, Chief Executive Officer, NYSE Regulation, to Donald D. Kittell, Chief Financial Officer, SIFMA, April 29, 2008.

[32] NYSE Information Memo, September 7, 1994.

[33] Pursuant to SEC Rule 19b-4(c), a stated policy, practice, or interpretation of an SRO is deemed to be a proposed rule change that must be filed with the SEC, pursuant to Section 19(b) of the Exchange Act, unless an exception applies. 17 C.F.R. § 240.19b-4(c). There are two exceptions listed in this SEC rule, and the second exception, applying to SRO "housekeeping" matters, does not apply to this set of facts. See Filings by Self-Regulatory Organizations of Proposed Rule Changes, SEC Release No. 34-17258, 1980 SEC LEXIS 418, at footnote 79 (Oct. 30, 1980) ("[An] administrative stated policy, practice, or interpretation having implications beyond housekeeping matters would not, of course, apply for this exception.").

[34] 17 C.F.R. § 240.19b-4(c); See also Communications to and From Exchange Trading Facilities, SEC Release No. 13594, 42 Fed. Reg. 29,986 (June 3, 1977) ("The Commission is of the view that any … unpublished policies that would impose restrictions or other requirements not found in published NYSE rules should be filed for consideration by the Commission and public comment under Section 19(b) of the [Exchange] Act."); and Filings by Self-Regulatory Organizations of Proposed Rule Changes, SEC Release No. 34-17258, 1980 SEC LEXIS 418, at *41-42 (Oct. 30, 1980) ("It is clear, however, that a stated policy, practice, or interpretation that prescribes extensive and specific limitations on particular types of transactions or conduct that are not apparent from the face of the existing rule is not 'reasonably and fairly implied' by the rule.").

[35] See 17 C.F.R. § 240.19b-4(b) and § 240.19b-4(d).

[36] An additional point is that this exchange of correspondence with NYSE Regulation, even if valid, could not apply to NASDAQ issuers, as the SEC has made it very clear that proxy rules promulgated by a stock exchange only apply to public companies listed on that exchange. See SEC Release No. 34-38406, 62 Fed. Reg. 13,922, at 13,930 (Mar. 24,

IV. The Brokerage Industry Advocated for a Framework in Which Beneficial Owners Can Delegate Their Proxy Voting Authority

For many years, NYSE rules required broker-dealers to forward proxy materials to all their beneficial owners, even in circumstances when a beneficial owner formally delegated proxy voting authority to his or her broker-dealer or investment adviser.[37] As noted earlier, and at the request of the brokerage industry, these proxy voting rules were amended in 1994-95 by the NYSE and the National Association of Securities Dealers (NASD)—the predecessor to FINRA—to permit a beneficial owner to delegate proxy voting authority in an account in which investment discretion is delegated.[38]

These NYSE and NASD rule changes provided that a broker-dealer and/or investment adviser can be authorized to vote a proxy in lieu of a beneficial owner, when authorized to do so. The beneficial owner must instruct the member organization in writing to send proxy material to the beneficial owner's designated investment adviser. This person must be registered as an investment adviser under the Investment Advisers Act (or under state law) and must be exercising investment discretion over the account, pursuant to an advisory contract with the beneficial owner.[39]

The Securities Industry Association (SIA)—the predecessor organization to SIFMA—and several individual broker-dealers expressed strong support for these proxy voting amendments, in comment letters to the SEC.[40] As an example, the SIA comment letter said the following about why beneficial owners do not need to receive proxy materials or vote proxies, when investment discretion and proxy voting authority have been delegated in an investment advisory account:

> The SIA Committee states that clients with investment advisory accounts generally do not need to receive issuer mailings or proxy materials since it is

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1997) ("… [A]s the NYSE has noted, member firms, non-member firms and banks historically have used the NYSE guidelines for all mailings, which provide uniformity in the industry. The Commission, however, believes that the reimbursement structure apply to member firms and not to issuers and Section 19(b) does not provide the NYSE with the authority to enforce the reimbursement of these fees on issuers that are not listed on the NYSE and do not use its facilities. This approach is consistent with Section 6(b)(4) of the Act, which allows an exchange to adopt equitable fees for its members, issuers, and other persons using its facilities.").

[37] See Former NYSE Rule 451.60 ("Duty to transmit even when requested not to.—The proxy material must be sent to a beneficial owner even though such owner has instructed the member organization not to do so.").

[38] See SEC Release No. 34-34596, 59 Fed. Reg. 45,050 (Aug. 31, 1994). A similar rule change was approved by the SEC in 1995 for NASD members. See SEC Release No. 34-35681, 60 Fed. Reg. 25, 749 (May 5, 1995).

[39] See NYSE Rules 450, 451(a), 451.60, 452, 465. These provisions were extended to state-registered investment advisers in a subsequent amendment to NYSE rules in 2003. See SEC Release No. 34-47458, 68 Fed. Reg. 12,131 (Mar. 13, 2003).

[40] SEC Release No. 34-34596, 59 Fed. Reg. 45,050, at 45,051-45,052 (Aug. 31, 1994) (Comment letters from the Securities Industry Association (SIA), Sanford C. Bernstein, Dean Witter, Merrill Lynch, and Davenport & Co.). See also Letter from Paul S. Gottlieb, Chairman, SIA Investment Adviser Committee, and Gerald T. Lins, Chairman, SIA Investment Company Committee, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, at 2, Dec. 6, 2002 ("Indeed, SIA was a major proponent of SEC-approved amendments to SRO rules which enable proxy material to be forwarded directly to investment managers, rather than beneficial owners, in order to facilitate the advisers' ability to vote such proxies.").

> the adviser that has the authority and obligation to decide upon purchases and sales in the account. Clients frequently have little or no role in the selection of specific securities in a discretionary account and thus, they often have little or no familiarity with or knowledge of issuers and will be ill equipped to vote provide [sic] from such issuers.[41]

In approving these NYSE Rule amendments, the SEC stated the following in its Release:

> The Commission believes that allowing investors to designate an investment adviser to receive proxy and related issuer materials and vote their proxies removes impediments to a free and open market. As noted by the commenters, investors have been requesting that investment advisers be authorized to receive issuer materials and vote proxies for the investor. Investors choosing an investment adviser arrangement may feel that they do not need to receive issuer information since the investment adviser is making investment decisions on the investor's behalf. The Commission acknowledges that investors might view the receipt of issuers [sic] materials and the ability to vote proxies as part of the investment adviser's continuing activities in managing customer accounts.[42]

This NYSE rule change was followed by SEC approval of a NASD rule change that mirrored the NYSE amendments:

> The rule change approved today will allow a beneficial owner of any issuer's stock to inform any NASD member that is the holder of record of that stock that the beneficial owner has authorized a designated registered investment adviser to receive and vote proxies and to receive issuer material in lieu of the beneficial owner.[43]

The regulatory history of these SRO rule changes—which were supported widely by the brokerage industry—clearly describes the process by which an investor may delegate proxy voting authority to a broker-dealer and/or investment adviser. After such a delegation occurs, the sponsor of an investment advisory program is to: (1) receive proxy materials in lieu of the beneficial owners who made the delegation, and (2) vote proxies on behalf of these beneficial owners. Once this delegation takes place, broker-dealers and their agents should not be permitted to charge issuers for proxy fees at the beneficial owner level. Instead, an issuer's obligation should be limited to providing one package of proxy materials to each sponsor of an investment advisory program.

V. The Proxy Fees being Charged to Issuers for Separately Managed Accounts Are More than $50 Million a Year

[41] Id. at 45,051.
[42] Id. at 45,053.
[43] SEC Release No. 34-35681, 60 Fed. Reg. 25,749, at *3 (May 5, 1995).

Based on information in the possession of the STA and the SSA, issuers are being charged the following proxy fees, by broker-dealers and their agents, for separately managed accounts:

- A $0.40 basic processing fee and a $0.10 intermediary fee for each beneficial owner position within a separately managed account, adding up to a total processing fee of $0.50 per position. These fees drop to $0.45 per position for issuers with 200,000 or more beneficial owners.

- A paper and postage elimination fee of $0.50 for each beneficial owner position within a separately managed account. This fee is reduced to $0.40 per position for issuers using the Notice and Access format. This fee is also reduced to $0.25 per position for large issuers, i.e., those with 200,000 or more beneficial owners.

- A Notice and Access fee of between $0.05 and $0.25 for each beneficial owner position within a separately managed account. These fees are charged when an issuer elects the Notice and Access format authorized by the SEC. These fees are currently unregulated by an SRO.[44]

- A proxy voting fee of $0.06 for each beneficial owner position within a separately managed account. This per position fee is charged by Broadridge through its ProxyEdge voting service even though beneficial owners in separately managed accounts do not cast any proxy votes, pursuant to their written brokerage account agreements.[45]

Taken together, these four different proxy fees add significant costs to an issuer with a large number of beneficial owner positions in separately managed accounts. For an issuer using the Notice and Access format, these fees can total as much as $1.21 for each beneficial owner position.[46] For an issuer not using the Notice and Access format, these fees can total as much as $1.06 for each beneficial owner position.[47]

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[44] The largest broker-dealer agent, Broadridge charges a tiered Notice and Access fee. For the first 6,000 positions, the fee is $1,500. Over 6,000 positions, the incremental fees are: (1) $0.25 per position for 6,001-10,000 positions; (2) $0.20 per position for 10,001-100,000 positions; (3) $0.15 per position for 100,001-200,000 positions; (4) $0.10 per position for 200,001-500,000 positions; and (5) $0.05 per position for more than 500,000 positions. Broadridge Fee Schedule, available at http://www.broadridge.com/investor-communications/us/corporations/pdfs/Reference_Rev1_31.pdf.

[45] Charging this fee at the beneficial owner level appears to be inconsistent with the operation of the Broadridge ProxyEdge service. See Letter from Donald D. Kittell, Securities Industry Association, to Nancy Morris, Secretary, Securities and Exchange Commission, at 4, Feb. 13, 2006, available at http://www.sec.gov/comments/s7-14-10/s71410-4.pdf ("With ProxyEdge, only one set of proxy materials, rather than multiple sets, is mailed to investors who want paper materials. For investors who have chosen electronic delivery, Proxy Edge sends a URL for the website containing proxy materials (if the materials are available electronically). For example, if a money manager has 200 accounts that hold shares of IBM, ProxyEdge will avoid the delivery of 199 sets of proxy materials and send only one set.").

[46] For smaller issuers using a Notice and Access format, these charges result in a basic processing and intermediary fee of $0.50, a paper and postage elimination fee of $0.40, a Notice and Access fee of $0.25, and a ProxyEdge voting fee of $0.06.

[47] For smaller issuers using a non-Notice and Access format, these charges result in a basic processing and intermediary fee of $0.50, a paper and postage elimination fee of $0.50, and a ProxyEdge voting fee of $0.06.

Under this proxy fee practice, an issuer with 50,000 beneficial owners in separately managed accounts may be paying more than $50,000 in unnecessary charges for beneficial owner positions that are, by account agreement, not receiving proxy materials or voting proxies at the beneficial owner level.

In a recent analysis of Broadridge invoices to twenty different issuers, the STA found more than $700,000 in charges for proxy processing and distribution activities involving separately managed accounts, or more than $35,000 per issuer.[48] These charges comprised 19.76% of the total charges (in dollar terms) by Broadridge in these invoices.[49]

The STA and the SSA estimate that issuers as a group are being charged more than $50 million a year for these proxy processing activities, while issuers are being told that this "special processing" activity is resulting in cost savings of hundreds of millions of dollars in printing and postage expenses.[50]

The STA and the SSA believe that the $5.00 to $6.00 in cost savings to an issuer by not having to mail a proxy package to a beneficial owner in a separately managed account should not be offset by a $1.06 to $1.21 charge to an issuer for proxy processing and distribution activities. As discussed below, the processing of separately managed accounts should be handled by the broker-dealers which are collecting their own fees for these accounts, in which investors have delegated investment discretion and proxy voting authority. These activities should not be the responsibility of issuers.

The fees charged by broker-dealers and their agents may be even greater, on a per position basis, for separately managed accounts that hold less than a single share of an issuer's securities. In these circumstances, issuers are being charged all of the fees mentioned above for each fractional share, escalating even more the proxy costs to issuers for these accounts.

For example, a new entrant in the marketplace for separately managed accounts—Curian Capital LLC—transacts in fractional shares for its customers. During the 2011 proxy season, several transfer agents became aware of an issuer being charged approximately $33,000 to suppress the printing and mailing of approximately 43,000 separately managed accounts holding approximately 360,000 shares. Some of these positions were held in fractional form, primarily

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[48] See The Securities Transfer Association, 2011 Transfer Agent Survey to Estimate the Costs of a Market-Based Proxy Distribution System, at 9 (Oct. 3, 2011), available at http://www.stai.org/pdfs/sta-survey-proxy-processing-costs-10-3-11.pdf.

[49] Id.

[50] In its most recent summary of key statistics on the 2011 proxy season, Broadridge claims to have saved issuers as much as $262,193,344 in printing and postage costs for not having to mail packages to beneficial owners in separately managed accounts, using an assumption of a cost savings of $5.80 per package. This implies that Broadridge processed and charged issuers for 45,205,748 beneficial owner positions in separately managed accounts during the period in question, which is for the first half of the 2011 proxy season. If accurate, it is estimated that issuers may have paid more than $40 million in unnecessary charges for this part of the 2011 proxy season and, over a full year, more than $50 million in unnecessary charges. See Broadridge Financial Solutions, 2011 Proxy Season Key Statistics & Performance Rating, undated, available at http://www.broadridge.com/investor-communications/us/Proxy_Stats_2011.pdf.

through separately managed accounts held by Curian, where the beneficial owners in these "mini" separately managed accounts did not receive any proxy materials and did not cast a single vote for any of their shares.

The practice of charging proxy fees at the beneficial owner level for separately managed accounts imposes significant and unnecessary costs on all issuers with beneficial owners in broker-dealer discretionary accounts. Across all issuers with annual meetings, this cost may be more than $50 million a year.

VI. Processing Activities in These Accounts Are the Responsibility of the Broker-Dealer and Not the Issuer

The documentation and data processing for both wrap fee accounts and separately managed accounts are standardized within a broker-dealer's accounting platform. Both types of accounts are flagged at the time they are created for the broker-dealer's own purposes, as well as to suppress transaction confirmations and issuer communications at the beneficial owner level.

Both the STA and the SSA acknowledge Broadridge's position that the processing functions involved with separately managed accounts are very complex and require extensive recordkeeping applications.[51] However, for the purpose of proxy voting, these accounts only require the distribution of one proxy package—either by mail or electronically—for each investment adviser possessing delegated voting authority. Therefore, the coding and management of these accounts at the beneficial owner level should not be the responsibility of issuers; and issuers should not be charged proxy fees for these activities.

Broker-dealers and their agents are not charging issuers for wrap fee account processing for its clients enrolled in these programs. There is no reason why separately managed accounts should be treated differently, at least with respect to proxy voting.

The broker-dealers which sponsor these discretionary account programs are well-compensated for their services, primarily through asset-based fees applied to these individual accounts. Any processing or programming functions necessary to segregate these accounts for proxy voting purposes should take place at the broker-dealer level and before any information is transmitted to Broadridge, in its capacity as the central intermediary responsible for compiling a list of beneficial owners eligible to participate in a shareholder meeting. If Broadridge is involved in the coding process, then this activity should remain a matter between Broadridge and its clients.

STA and SSA understand that at least one large broker-dealer—Merrill Lynch—does not send to Broadridge (or to other broker-dealer agents) any beneficial owner information for customers in its wrap fee account and separately managed account programs. Thus, issuers are not

[51] See Letter from Charles V. Callan, SVP Regulatory Affairs, Broadridge Financial Solutions, to Elizabeth M. Murphy, U.S. Securities and Exchange Commission, at 7-8 (Oct. 14, 2010), available at http://www.sec.gov/comments/s7-14-10/s71410-77.pdf.

charged for processing or other activities by broker-dealers or their agents for these accounts. This position is consistent with an earlier comment letter by Merrill Lynch on proxy voting.[52]

Issuers should not be responsible for paying broker-dealers and their agents for proxy processing and other activities in beneficial owner accounts, in circumstances where proxy voting authority has been delegated to the sponsor of an advisory program. These processing and other activities should be the sole responsibility of the broker-dealer.

VII. Conclusion

For all the reasons stated herein, STA and SSA petition the SEC to issue an interpretive release with guidance, clarifying that broker-dealers and their agents are prohibited from charging issuers for proxy processing, suppression, voting, and other fees for wrap fee accounts and separately managed accounts, at the beneficial owner level. This fee prohibition should apply to any circumstance in which a beneficial owner has instructed in writing that an investment adviser is to receive issuer proxy materials and vote his or her proxies in lieu of the beneficial owner.

It is not necessary for the SEC to evaluate any operational or investment differences between wrap fee accounts and separately managed accounts, as the only relevant issue here is whether or not a beneficial owner has delegated his or her proxy voting authority to an investment adviser as a part of broker-dealer advisory program. If the investor has made such a delegation, then the account should be suppressed by the broker-dealer and the name of the beneficial owner should not be sent to Broadridge (or to another broker-dealer agent) for the purpose of receiving proxy materials and voting on proxy matters.

In the alternative, the STA and the SSA petition the SEC for an emergency or interim order to direct issuers to place the full amount of any disputed proxy fees into an escrow account until these issues are resolved through rulemaking by the SEC.

This type of relief was granted by the SEC in a 1983 dispute over the fees to be paid to NASDAQ for providing market data to interested parties on the bid, ask, and quotation size of each market maker for a NASDAQ-listed security. In July 1983, the Institutional Networks Corporation (Instinet) filed an application for SEC review of a NASDAQ proposal it opposed. The SEC responded within a month with an interim relief order.[53] The SEC's interim relief order directed the establishment of an escrow account by Instinet, where the full amount of the disputed fees would be placed, until the Commission resolved the dispute through an amended NASDAQ rule.[54]

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[52] See Letter from Kenneth S. Spirer, General Counsel, Merrill Lynch, to Jonathan Katz, Secretary, Securities and Exchange Commission, January 27, 1994 ("Merrill Lynch states that it believes that the proposed amendments appropriately recognize the increased utilization of registered investment advisers by its clients and appropriately permit its clients to designate the investment adviser to vote proxies and receive proxy related materials with respect to securities in clients' managed accounts.").

[53] Order Instituting Proceeding and Granting Temporary Stay; NASD Decision, SEC Release No. 34-20088, 1983 SEC LEXIS 2746 (Aug. 16, 1983).

[54] Id. at *32.

It is very unlikely that new SRO rules on proxy distribution fees will be proposed and approved before the end of calendar year 2012. This timing problem will result in issuers paying more than $50 million in fees for separately managed accounts—fees that the STA and the SSA do not believe are "reasonable" or authorized under current SEC and SRO rules and interpretations.

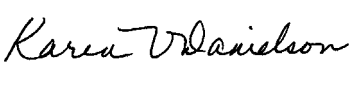
If the SEC chooses not to issue an interpretive release with guidance to directly address this problem, then it should consider issuing an emergency or interim order to direct the establishment of an escrow account, where issuers can remit these disputed proxy fees, until the issue is resolved through rulemaking by the SEC.

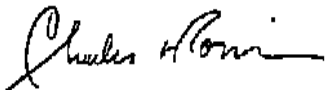
The STA and the SSA are prepared to create an escrow arrangement for this purpose. For the 2012 proxy season, and until rulemaking is completed on this issue, issuers could remit into this escrow account the full amount of proxy processing fees, paper and postage elimination fees, Notice and Access fees (where appropriate), and ProxyEdge voting fees for separately managed accounts at the beneficial owner level. This would occur in each circumstance in which a beneficial owner has instructed in writing that his or her investment adviser is to receive issuer proxy materials and vote his or her proxies in lieu of the beneficial owner.

Since the 2012 proxy season is now underway, the STA and the SSA urge prompt action by the SEC to address this issue, so that these unnecessary fees are not paid to broker-dealers and their agents during this Calendar year.

Thank you for your consideration of this Petition.

Sincerely,





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Attachments

cc: The Honorable Mary L. Schapiro
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