

THE STA

SECURITIES TRANSFER ASSOCIATION, INC.

November 9, 2011

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Subject: Request for Regulatory Action to Prohibit Unnecessary Proxy Processing Fees for Separately Managed Accounts Sponsored by Broker-Dealers

Dear Mr. Greifeld:

On behalf of The Securities Transfer Association (“STA”), my purpose in writing is to formally request a review and corrective regulatory action by The NASDAQ Stock Market LLC (“NASDAQ”), to prohibit Broadridge Financial Solutions, Inc. (“Broadridge”) and its broker-dealer clients from engaging in a practice of charging public companies (“issuers”) for proxy processing, suppression, voting, and other fees for separately managed accounts at the beneficial owner level.

Many broker-dealers subject to oversight by NASDAQ and the Financial Industry Regulatory Authority (“FINRA”) are sponsors of separately managed account programs for investors who seek to delegate investment discretion and proxy voting authority to an investment adviser. Typically, these are investors who lack the expertise and/or the time to manage their own investments. Since a fully-diversified discretionary account may include hundreds of investment positions, these investors are usually not interested in receiving what could be a voluminous amount of proxy materials, especially for investments they are not selecting themselves.

For a number of years now, Broadridge has been charging issuers a series of fees for proxy processing, suppression, and voting activities in separately managed accounts at the beneficial owner level,

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. This fee practice conflicts with SEC and Self-Regulatory Organization (“SRO”) rules and rule interpretations that require an issuer to provide only one proxy package to investment advisers with proxy voting authority for a group of beneficial owners in discretionary accounts.

Many of NASDAQ’s rules are based on rules developed by FINRA, which was formerly the National Association of Securities Dealers (“NASD”). Specifically NASDAQ Rule 2251, Forwarding of Proxy and Other Issuer-Related Materials, states the following:

- (a) Nasdaq Members shall comply with FINRA Rule 2251 as if such Rule were part of Nasdaq’s Rules.
- (b) For purposes of this Rule, the guidance adopted by FINRA with respect to reasonable rates of reimbursement as provided by FINRA Rule 2251 and the accompanying supplementary material is hereby adopted as the guidance of the Nasdaq Board.
- (c) For purposes of this Rule: (1) references to FINRA shall be construed as references to Nasdaq, and (2) references to Rule 2251 shall be construed as references to Nasdaq Rule 2251.¹

FINRA has been aware of this practice for several years now. In October 2007, a senior FINRA executive, Anand Ramtahal, delivered a speech at a SIFMA Proxy Symposium and was quoted in Securities Industry News as stating that broker-dealers should not be charging processing or suppression fees for separately managed accounts.² 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.”³

¹ NASDAQ Rule 2251, available at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F3%5F1&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F>.

² Chris Kentouris, “Finra To Investigate Proxy Suppression Fees for SMAs,” Securities Industry News, Oct. 19, 2007, available at <http://www.securitiestechologymonitor.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.

³ Id.

It has been four years since Mr. Ramtahal's public remarks and FINRA does not appear to have completed an investigation into this practice, nor has FINRA taken any publicly documented action to prohibit this practice.⁴

To remedy this situation, the STA sent a letter to FINRA on October 31, 2011, requesting a review and corrective action by FINRA to prohibit these proxy fees from being charged to issuers.⁵ The STA also raised the separately managed accounts issue with the SEC in 2010, and a discussion of the problem was highlighted in the 2010 SEC Concept Release on the U.S. Proxy System.⁶ Additionally, the STA is aware that the New York Stock Exchange ("NYSE") Proxy Fee Advisory Committee is evaluating this issue, as a part of its broader review of the current fee schedule for proxy processing and distribution services.

The STA is now also formally requesting a review and corrective regulatory action by NASDAQ of this issue. While NYSE has historically taken a leading role in evaluating and establishing the proxy fee schedule, both NASDAQ and FINRA have their own separate rulebooks and FINRA is the primary SRO responsible for the oversight of broker-dealers and their activities. NASDAQ and FINRA proxy rules are also relied on by issuers listed on the NASDAQ exchange, as NYSE rules only can apply to issuers listed on that exchange.

The STA requests that NASDAQ act expeditiously in this matter, as the 2012 proxy season will begin in just a few months and issuers should not be charged these unnecessary proxy fees for another year of annual meetings.

What follows is a more detailed description of the separately managed accounts problem, including an analysis of the legal and regulatory issues involved.

I. The Regulatory Framework for Issuer Payment of Proxy Fees

Section 14 of the Securities Exchange Act of 1934 ("Exchange Act") provides the Securities and Exchange Commission ("SEC") with authority over the solicitation of proxies by, or on behalf of, public companies which issue registered securities (i.e.,

⁴ A search of FINRA's website did not disclose any documentation of an investigation or subsequent regulatory or disciplinary action regarding proxy processing or suppression fees for separately managed accounts. See www.finra.org (last visited Oct. 28, 2011).

⁵ Letter from Charles Rossi, President, The Securities Transfer Association, to Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, October 31, 2011, available at <http://www.stai.org/pdfs/2011-10-ketchum-letter.pdf>.

⁶ See Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42,982, at 42,997 (July 22, 2010).

“issuers”).⁷ SEC regulations leave control over the actual distribution of proxy materials to beneficial owners with broker-dealers and banks.⁸

Issuers seeking to distribute proxy and other materials to their beneficial owners are responsible for: (1) providing adequate quantities of proxy materials to broker-dealers and banks; and (2) paying the “reasonable expenses” of sending such materials to beneficial owners.⁹ A broker-dealer or a bank is only required to distribute proxy materials to beneficial owners if it is provided with a satisfactory assurance that its reasonable expenses will be reimbursed by the issuer.¹⁰

The SEC has delegated responsibility to SROs under its jurisdiction to establish the fees that issuers must pay for proxy processing and distribution services.¹¹ As noted earlier, the NYSE has taken the lead in establishing the proxy fee structure for brokers, banks, and issuers. Similar rules have been adopted by NASDAQ and FINRA, the industry regulator of broker-dealers. The rules developed by each SRO to establish proxy procedures and the fee structure for proxy services are submitted to the SEC for approval, pursuant to Section 19(b) of the Exchange Act.¹²

NYSE, NASDAQ, and FINRA rules establish the procedures for proxy processing and distribution, including the promulgation of identical fee schedules for reimbursement of the “reasonable expenses” incurred by broker-dealers for proxy processing and distribution.¹³

These proxy rules only apply to the member organizations for each SRO and, in the case of a stock exchange, to public companies listed on that exchange.¹⁴ In other

⁷ See 15 U.S.C. § 78n. See also 15 U.S.C. § 78w(a)(1) (“The Commission ... shall ... have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter ...”).

⁸ See 17 C.F.R. § 240.14a-13(a)(4).

⁹ Id.; and 17 C.F.R. § 240.14a-13 (a)(5) (“Upon the request of any record holder or respondent bank that is supplied with proxy soliciting material and/or annual reports to security holders pursuant to paragraph (a)(4) of this section, pay its reasonable expenses for completing the sending of such material to beneficial owners.”).

¹⁰ See, e.g., 17 C.F.R. § 240.14b-1(c)(2) (“A broker or dealer need not satisfy ... [i]ts obligations under ... this section if the registrant or other soliciting person, as applicable, does not provide assurance of reimbursement of the broker’s or dealer’s reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by ... this section.”).

¹¹ See SEC Release No. 34-21900, 50 Fed. Reg. 13,297, at 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.”).

¹² 15 U.S.C. § 78s(b).

¹³ See NYSE Rules 451 and 465, and section 402.10 of the NYSE Listed Company Manual; NASDAQ Rule 2251; and FINRA Rule 2251.

¹⁴ See SEC Release No. 34-38406, 62 Fed. Reg. 13,922, at 13,930 (Mar. 24, 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

words, NYSE rules only apply to broker-dealers that are members of the NYSE and to NYSE-listed issuers. NASDAQ rules only apply to broker-dealers that are members of NASDAQ and to NASDAQ-listed issuers. Finally, FINRA rules only apply to broker-dealers which are its members and to any other persons or entities over which it has jurisdiction.

NYSE has promulgated Rule 451 to govern the distribution of proxy materials and Rule 465 to govern the distribution of interim reports and other materials being sent to beneficial owners by issuers.¹⁵ NASDAQ has adopted Rule 2251 and FINRA has adopted its own Rule 2251, which, as noted before, is incorporated by reference into NASDAQ Rules.¹⁶ All of these Rules include an approved fee schedule for proxy services involving beneficial owners.

II. Issuers are Paying Unnecessary Proxy Fees for Broker-Dealer Discretionary Accounts

As is well known, the substantial majority of broker-dealers and banks have outsourced proxy processing and distribution functions to Broadridge, a service provider (and central intermediary) that compiles contact information and share positions for beneficial owners as of a record date for an issuer. On behalf of its broker-dealer and bank clients, Broadridge also manages proxy distribution, tabulation, and communications activities, in connection with an annual or special meeting of shareholders.

For a number of years, Broadridge has been charging proxy fees to issuers for beneficial owner accounts in which the customer has delegated investment discretion and proxy voting authority to an investment adviser (*i.e.*, discretionary accounts). Even though only one proxy package needs to be provided to an investment adviser possessing

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.”).

¹⁵ See NYSE Rule 451.90 (“The Exchange has approved the following as fair and reasonable rates of reimbursement of member organizations for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with proxy solicitations pursuant to Rule 451 and in mailing interim reports or other material pursuant to Rule 465.”); and NYSE Rule 465.20 (“The Exchange has approved the following as fair and reasonable rates of reimbursement of member organizations for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with proxy solicitations pursuant to Rule 451 and in mailing interim reports or other materials pursuant to Rule 465.”).

¹⁶ See NASDAQ Rule 2251 and FINRA Rule 2251. FINRA received approval in 2009 to combine NASD Rule 2260 and NASD IM-2260 into a single rule that has now been renumbered as FINRA Rule 2251 in the Consolidated FINRA Rulebook. See SEC Release No. 34-61052, 74 Fed. Reg. 62,857 (Dec. 1, 2009). NASDAQ received approval in 2010 to combine NASDAQ Rule 2260 and IM-2260 into new NASDAQ Rule 2251, which continued to incorporate the requirements of the corresponding FINRA rule. See SEC Release No. 34-62771, 75 Fed. Reg. 53,989 (Sept. 2, 2010).

this authority, Broadridge is charging proxy processing, suppression, Notice and Access, and ProxyEdge fees to issuers for these accounts at the beneficial owner level.¹⁷

Typically, there are two types of broker-dealer discretionary accounts—wrap fee accounts and separately managed accounts—although both function in the same manner with respect to proxy voting activities. A wrap fee account is an arrangement between a broker-dealer, investment adviser, or other financial intermediary and an investor in which the latter receives discretionary investment advisory, execution, clearing, and custodial services in a bundled form.¹⁸ In exchange for these bundled services, the investor pays an all inclusive or “wrap” fee, determined as a percentage of the assets held in the wrap fee account.

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 advice concerning the selection of other investment advisers) and the execution of client transactions.”¹⁹ This definition is intended to apply to wrap fee arrangements that are part of a wrap fee “program,” a term that typically describes arrangements that have some degree of uniformity among participating clients.²⁰

Separately managed accounts are not expressly defined by SEC rules, although they certainly include wrap fee programs.²¹ These accounts operate in the same fashion, where multiple beneficial owners delegate investment discretion and proxy voting authority to a single investment manager, as a part of an institutional program sponsored by a broker-dealer or other financial intermediary.

¹⁷ Additionally, an issuer is assessed these proxy fees each and every year, even though a discretionary account needs to be coded a single time at account opening by a broker-dealer.

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 17 C.F.R. § 275.204-3(h)(5).

²⁰ 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.”)

²¹ See Amendments to Form ADV, SEC Release No. IA-3060, 75 Fed. Register 49,234, at 49,246 (footnote 182) (Aug. 12, 2010) (“Under wrap fee programs, which are sometimes referred to as ‘separately managed accounts,’ advisory clients pay a specified fee for investment advisory services and the execution of transactions. The advisory services may include portfolio management and/or advice concerning selection of other advisers, and the fee is not based directly upon transactions in the client’s account.”).

Separately managed accounts have become a much larger portion of the retail market in recent years, with assets of more than \$1 trillion.²² These accounts were developed as an alternative to both wrap fee accounts and retail and institutional mutual funds.

In each case, with both wrap fee accounts and separately managed accounts, the individual investor has delegated investment decisions to a broker-dealer and/or an investment adviser. For several years now, the SEC has required registration under the Investment Advisers Act for broker-dealers offering these types of advisory services, as this activity does not qualify for the broker-dealer exception to the Advisers Act.²³

For both wrap fee accounts and separately managed accounts, a broker-dealer or investment adviser which exercises investment discretion over the account is also typically authorized by the account agreement to vote proxies on behalf of such beneficial owner, as the need arises.

The documentation and data processing for both wrap fee accounts and separately managed accounts are standardized within a broker-dealer's accounting platform; and 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.

The STA is familiar with Broadridge's viewpoint that the processing functions involved with separately managed accounts are very complex and require extensive recordkeeping applications.²⁴ However, for the purpose of proxy voting, these accounts only require the distribution of one proxy package for each investment adviser possessing delegated voting authority. Therefore, the STA believes that the coding and management of these accounts should not be the responsibility of issuers; and issuers should not be charged proxy fees for these activities.

²² Don F. Wilkinson, Separately Managed Accounts: In the Mainstream, Producers Web, July 10, 2006; and Ian Salisbury, Mergers May Reshape Managed Accounts, The Wall Street Journal, March 11, 2009, at D3.

²³ 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.").

²⁴ 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>.

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, acting as the central intermediary responsible for compiling a list of beneficial owners eligible to participate in a shareholder meeting.

III. The Proxy Fees Being Charged for Separately Managed Accounts Are Significant to Issuers

In October 2011, the STA released an analysis of Broadridge invoices to twenty different issuers, in which the STA compared these invoices to the prices which would be charged by transfer agents in a free market system for proxy processing and distribution services.²⁵

The issuer invoices reviewed by STA indicate that Broadridge did not charge these issuers any proxy processing or distribution fees for wrap fee accounts. However, Broadridge did charge these issuers several different proxy processing and distribution fees for separately managed accounts, at the beneficial owner level. As noted earlier, this is occurring even though only one proxy package is actually being delivered to a broker-dealer (or other financial intermediary) with the authority to vote a proxy on behalf of underlying beneficial owners.

Based on information in the possession of the STA, issuers are being charged the following proxy fees for separately managed accounts: (1) a basic processing and intermediary fee of as much as \$0.50; (2) a paper and postage elimination fee of as much as \$0.50; (3) a Notice and Access fee of as much as \$0.25; and (4) a ProxyEdge voting fee of \$0.06. The following is a description of each of these four fees:

A. Processing Fees. Broadridge is charging 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.

Additionally, the processing fees charged by Broadridge include costs for print communications services. However, Broadridge does not reduce this fee for positions that do not require paper communications services.

²⁵ 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> (hereinafter "STA 2011 Transfer Agent Survey").

B. Paper and Postage Elimination Fee. Broadridge charges a paper and postage elimination fee of \$0.50 for each beneficial owner position within a separately managed account. The original intent of this fee was to create an incentive for broker-dealers and their agents to suppress the need to mail proxy materials to certain beneficial owners, such as when “householding” is used or when a shareholder requests (and receives) proxy materials via electronic delivery. This fee is charged to the issuer for each annual or special meeting.

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. As noted earlier, Broadridge is charging this “suppression” fee for beneficial owners in separately managed accounts, even though these accounts do not receive proxy materials because the underlying investors have delegated investment and voting responsibilities to an investment adviser.²⁶

C. Notice and Access Fee. Broadridge charges a 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.

As of this writing, no SRO has adopted a regulated fee schedule for Notice and Access fees and so the fees that Broadridge and its broker-dealer clients charge are completely unregulated. Currently, Broadridge charges a tiered fee, starting at \$0.25 per position for the first 10,000 beneficial owners and then reducing it to \$0.05 per position for any beneficial owner positions that exceed 500,000.²⁷

D. ProxyEdge Voting Fee. Broadridge has a voting service called ProxyEdge and it charges a fee of \$0.06 for each beneficial owner position within a separately managed account. This per position voting fee is charged by Broadridge even though beneficial owners in separately managed accounts do not cast any proxy votes, pursuant to their written brokerage account agreements. Instead, this fee should only be applied once for each institution voting as the investment adviser, on behalf of the firm’s separately managed accounts.

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

²⁶ See Letter from Charles V. Callan, SVP Regulatory Affairs, Broadridge Financial Solutions, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, at 7, Oct. 14, 2010, available at <http://www.sec.gov/comments/s7-14-10/s71410-77.pdf> (“For incentive fee purposes, the suppression of a mailing for a separately managed account is treated the same way as the suppression of a mailing by electronic delivery, ProxyEdge or householding.”).

²⁷ For positions between 10,001-100,000, the fee is \$0.20 per position; for positions between 100,001-200,000, the fee is \$0.15 per position; and for positions between 200,001-500,000, the fee is \$0.10 per position. For beneficial owner positions that total 6,000 or less, Broadridge charges a flat fee of \$1,500.

each beneficial owner position.²⁸ For an issuer not using the Notice and Access format, these fees can total as much as \$1.06 for each beneficial owner position.²⁹

Under this Broadridge 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 retail investor level.

In the STA's recent analysis of twenty Broadridge invoices, the STA found more than \$700,000 in unnecessary charges from Broadridge for proxy processing and distribution activities involving separately managed accounts, or more than \$35,000 per issuer.³⁰ These charges comprised 19.76% of the total charges (in dollar terms) by Broadridge in these invoices.³¹

Based on all of the information in its possession, the STA estimates that issuers are being charged more than \$50 million a year for these processing activities, while issuers are told by Broadridge that this "special processing" activity is resulting in cost savings of hundreds of millions of dollars in printing and postage expenses.³²

The STA believes 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 by Broadridge. As stated earlier, 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 Broadridge 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.

²⁸ 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.

²⁹ 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.

³⁰ STA 2011 Transfer Agent Survey at 9.

³¹ Id.

³² 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, STA estimates 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.

In these circumstances, Broadridge is charging its entire fee schedule 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, the STA is aware of an issuer being charged approximately \$33,000 by Broadridge 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 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 STA believes that the Broadridge 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.

IV. Proxy Fees Being Charged at the Beneficial Owner Level For Separately Managed Accounts Are Not Authorized By Current Regulatory Rules or Rule Interpretations

Current SEC and SRO rules permit beneficial owners to delegate proxy voting authority to an investment adviser. Over the years, SEC and SRO rule interpretations have stated that only one set of proxy materials need to be provided to an investment adviser possessing proxy voting authority for a group of beneficial owners in discretionary accounts. The SEC has been particularly clear on this point regarding wrap fee accounts; and there is no functional difference—at least for proxy voting purposes—between a wrap fee account and a separately managed account.

Additionally, the regulatory histories of the proxy processing, suppression, and other related fees do not contain any language authorizing the imposition of these fees for separately managed accounts. In fact, these individual 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.

Through the Securities Industry and Financial Markets Association (“SIFMA”), Broadridge has attempted to have a non-public exchange of correspondence with NYSE Regulation about this proxy fee practice, involving an individual who now works as an employee of Broadridge. This exchange of correspondence mentions NYSE Rule 465 and does not apply to the appropriate NYSE Rule involved in proxy solicitation activities and fees (i.e., NYSE Rule 451). Finally, SEC rules are very clear that the imposition of these types of proxy fees involve a “stated policy, practice, or interpretation” under the

Exchange Act, rendering these fees invalid without an express SRO rule change approved by the SEC.

Quite simply, there is no legal or regulatory basis for Broadridge to charge proxy fees to issuers at the beneficial owner level for separately managed accounts. What follows is a more detailed discussion of the legal and regulatory arguments for why this is the case.

A. Beneficial Owners Are Permitted to Delegate Proxy Voting Authority to Investment Advisers in Separately Managed Accounts

For many years, NYSE rules required broker-dealers to forward proxy materials to each of their beneficial owners, even when an owner has formally delegated proxy voting authority to his or her broker-dealer or investment adviser.³³ At the request of the brokerage industry, these proxy voting rules were amended in 1994-95 by the NYSE and the NASD to permit a beneficial owner to delegate proxy voting authority in an account in which investment discretion is delegated.³⁴

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 instructed 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 of 1940 (or under state law) and must be exercising investment discretion over the account, pursuant to an advisory contract with the beneficial owner.³⁵

The Securities Industry Association ("SIA")—the predecessor organization to SIFMA—and individual broker-dealers expressed strong support for these proxy voting amendments, in comment letters to the SEC.³⁶ As an example, the SIA comment letter said the following about why beneficial owners do not need to receive proxy materials or

³³ 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.").

³⁴ 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).

³⁵ 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).

³⁶ 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.").

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 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.³⁷

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.³⁸

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 an issuer's stock to inform any NASD member that is the holder of

³⁷ SEC Release No. 34-34596, 59 Fed. Reg. 45,050, at 45,051 (Aug. 31, 1994). See also Letter from Kenneth S. Spiner, General Counsel, Merrill Lynch, to Jonathan Katz, Secretary, Securities and Exchange Commission (Jan. 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."). In 2008, Merrill Lynch agreed to be acquired by Bank of America.

³⁸ Id. at 45,053. After these Rule changes were approved by the SEC, the NYSE issued an Information Memo stating that "[m]ember 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." NYSE Information Memo, September 7, 1994.

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.³⁹

A similar circumstance exists with banks, when a bank serves in a capacity in which it has been delegated proxy voting authority and becomes the beneficial owner for this purpose. SEC proxy regulations applying to banks define the term “beneficial owner” as including any person “who has or shares, pursuant to an instrument, agreement, or otherwise, the power to vote, or to direct the voting of a security.”⁴⁰ In adopting this language in 1986, the SEC stated that beneficial ownership for this purpose can be determined by looking to a contractual relationship or customary business practice between the bank and its client:

The phrase ‘pursuant to an instrument, agreement or otherwise’ has been added to make clear that beneficial ownership can be determined by looking to a contractual relationship or customary bank practice. For example, if a bank acting as trustee of a revocable trust votes the securities held in a trust, pursuant to the trust agreement or its customary practice, the bank is the beneficial owner for purposes of the shareholder communications rules despite the fact that the principal may revoke the trust at any time. Similarly, in an irrevocable trust situation, the bank, acting as trustee, is the beneficial owner of the securities despite the fact that the principal has an unlimited right to withdraw the corpus of the trust.⁴¹

The STA believes that 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, investment adviser, or other financial intermediary. After such a delegation occurs, the financial intermediary is to receive proxy materials in lieu of the beneficial owners making the delegation and is to vote proxies on behalf of these beneficial owners.

B. SEC Householding Rules Are Clear That Investment Advisers Overseeing Discretionary Accounts Do Not Need More Than One Proxy Package

This issue came up again when the SEC updated its householding rules in 1999-2000. In its proposed rule, the SEC noted that its proposed householding rules do not apply to an investor’s delegation of proxy voting authority to an investment adviser and

³⁹ SEC Release No. 34-35681, 60 Fed. Reg. 25,749, at *3 (May 5, 1995).

⁴⁰ 17 C.F.R. § 240.14b-2(a)(2).

⁴¹ SEC Release No. 34-23847, 51 Fed. Reg. 44,267, at footnote 55 (Dec. 9, 1986).

asked for comment on this issue, as it was unlikely that a single person or entity making proxy voting decisions would need more than one copy of the materials:

The proposed rules also would allow companies to accommodate requests in writing from the investment advisers and investment managers that companies and/or intermediaries send them only one copy of a company's annual report and proxy statement or information statement, rather than a separate copy on behalf of each shareholder for whom they are authorized to make proxy voting decisions. 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.*⁴² (emphasis added)

The SEC's final rules on householding stated the following:

While we believe that companies and intermediaries could easily comply with the householding rules by obtaining either written or implied consent from investment advisers, we are also 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.⁴³

The STA believes that the SEC's rules on householding clarified the point that investment advisers with delegated authority to vote proxies on behalf of discretionary accounts do not need more than one copy of the proxy materials, in order to perform this function.

⁴² SEC Release No. 33-7767, 64 Fed. Reg. 62,548, at 62, 554 (Nov. 16, 1999).

⁴³ SEC Release No. 33-7912, 65 Fed. Reg. 65,736, at 65,744 (Nov. 2, 2000). See also, e.g., Letter from Alison E. Baur, Vice President and Senior Corporate Counsel, Charles Schwab & Co., Inc., to Jonathan G. Katz, Secretary, Securities and Exchange Commission, at 2-3, Jan. 14, 2000 ("As the Commission points out, SRO rules permit beneficial owners to designate a registered investment adviser to receive proxy materials and vote proxies on their behalf, and under these circumstances it is unlikely that a single investment adviser making the voting decision would need more than one copy of the proxy materials. We agree with the Commission's view that the delivery of multiple proxy materials to an investment adviser is unnecessary, and believe that companies and intermediaries should have the ability to 'consolidate' proxy materials to investment advisers without having to rely on [SEC rules on householding].").

C. The Proxy Fees Currently Authorized Are Not Intended to Apply to Separately Managed Accounts at the Beneficial Owner Level

The fees for proxy processing, paper and postage elimination, and ProxyEdge voting were never intended to apply to beneficial owners within separately managed accounts.

1. Basic Processing Fee. The first of these fees—the basic processing fee—was intended to be charged only when a proxy package is actually being delivered to a beneficial owner. As noted by the SEC in 1999:

Under the fee structure in effect prior to March 14, 1997, NYSE member firms were permitted to charge NYSE issuers a basic processing fee of \$.60-\$.70 for each proxy package (i.e., proxy statement, form of proxy, and annual report) *delivered to a beneficial owner*.⁴⁴ (emphasis added)

The STA believes that a proxy processing fee should not be charged in circumstances, like separately managed accounts, where there is no delivery of proxy materials at the beneficial owner level. Instead, this fee should only be charged for the one proxy package which is to be delivered to the investment adviser responsible for proxy voting on behalf of these accounts.

2. Paper and Postage Elimination Fee. Similarly, the paper and postage elimination fee was never intended to apply to beneficial owner accounts which have delegated investment discretion and proxy voting authority to an investment adviser.

Since 1997, the SEC has authorized this “incentive” fee, to encourage brokers and Broadridge to reduce beneficial owner mailing costs. Under this incentive program, issuers are charged a “suppression” fee for the elimination of proxy mailings in two very narrow circumstances. The first circumstance involves the use of householding, where multiple proxy instruction forms and a single set of paper materials are included in one envelope to beneficial owners residing at the same address. This householding process can include the consolidation of multiple accounts held by the same beneficial owner.

In the second circumstance, the incentive fee was intended to encourage brokerage firms to increase the electronic delivery of proxy materials, either through electronic transmission of proxy materials to multiple beneficial owners and accounts, or through electronic distribution of proxy materials to a household.

⁴⁴ SEC Release No. 34-41177, 64 Fed. Reg. 14,294, at 14,295 (Mar. 24, 1999). See also SEC Release No. 34-41549, 64 Fed. Reg. 35, 228, at 35,229 (June 30, 1999) (“Reducing the suggested rate of reimbursement from \$.50 to \$.45 for each set of proxy materials (i.e., proxy statement, form of proxy, and annual report when mailed as a unit.”)); and SEC Release No. 34-45644, 67 Fed. Reg. 15,440 (Apr. 1, 2002) (reducing the basic mailing fee paid by large issuers to \$0.45).

When first approved in 1997, the SEC said the following about this new incentive fee:

The [NYSE] also is proposing a new incentive fee to compensate member organizations and/or intermediaries for eliminating the need to send materials in paper form. The Exchange believes that this fee will encourage member organizations to apply technology to sort materials so that multiple proxy instruction forms are included in a single envelope with a single set of materials to be mailed to the same household.⁴⁵

In 1999, the SEC re-affirmed its intent regarding this fee by stating that “[t]he paper elimination fee was intended to serve as an incentive to use technologies, such as electronic mail, to reduce the number of paper mailings sent to beneficial owners.”⁴⁶ A review of subsequent Federal Register notices on proxy fees clearly indicates that the original purpose of the incentive fee has not changed in subsequent years, including in 2002, when the SEC approved the NYSE request to permanently adopt the incentive fee.⁴⁷ Additionally, public statements by Broadridge and its predecessor, Automatic Data Processing (“ADP”), confirm that the purpose of the incentive fee is to reduce proxy mailing costs through the use of householding and by increasing electronic delivery of proxy materials.⁴⁸

As stated earlier, the STA believes that any proxy processing that needs to occur by a broker-dealer to segregate and suppress its separately managed accounts from its non-discretionary accounts should be handled by a broker-dealer before any information is transmitted to Broadridge. If Broadridge is involved in the coding process, then this

⁴⁵ SEC Release No. 34-38406, 62 Fed. Reg. 13,922, at 13,294 (Mar. 24, 1997).

⁴⁶ SEC Release No. 34-41177, 64 Fed. Reg. 14,294, at 14,296 (Mar. 24, 1999). Since 2003, the terms and conditions for the same paper elimination fee have been contained in NASD IM-2260, now FINRA Rule 2251. See SEC Release No. 34-47392, 68 Fed. Reg. 9,730 (Feb. 28, 2003); and Notice to Members, Proxy Reimbursement Rates, National Association of Securities Dealers, March 2003, at 130. This language and fee schedule are also contained in NYSE Rules 451.90, 465.20, and NYSE Listed Company Manual 402.10.

⁴⁷ See SEC Release No. 34-39774, 63 Fed. Reg. 14,745 (Mar. 26, 1998); SEC Release No. 34-41177, 64 Fed. Reg. 14, 294 (Mar. 24, 1999); SEC Release No. 34-45263, 67 Fed. Reg. 2,264 (Jan. 16, 2002); and SEC Release No. 34-45644, 67 Fed. Reg. 15,440 (Apr. 1, 2002).

⁴⁸ Claude Solnik, “ADP fees for online proxies come under fire,” Long Island Business News, June 15, 2001, available at <http://libn.com/2001/06/15/adp-fees-for-online-proxies-come-under-fire/> (“It’s a paper and postage elimination fee ... [w]e have technology and have to continue to develop technologies to eliminate these proxies.” (quoting Maryellen Andersen, Vice President, Corporate and Institutional Relations, ADP)); and Chris Kentouris, “Finra To Investigate Proxy Suppression Fees for SMAs,” Securities Industry News, October 19, 2007, available at <http://www.securitiestechologymonitor.com/news/21609-1.html> (“[The suppression fees were established] to incentivize broker-dealers to create the necessary technology and procedures to reduce proxy mailings.” (quoting Chuck Callan, Senior Vice President, Regulatory Affairs, Broadridge)).

activity should remain a matter between Broadridge and its client. The broker-dealer is being paid an advisory fee to oversee its separately managed accounts and, when proxy voting authority is delegated by its customers, these types of account should be flagged by each broker-dealer and not subjected to proxy processing that results in suppression fees being charged to an issuer, except for the one proxy package that is to be provided to the appropriate investment adviser.

3. ProxyEdge Voting Fee. A third fee that is being charged inappropriately, and outside of the scope of its original intent, is the Broadridge ProxyEdge voting fee. This fee is charged primarily for electronic proxy voting by institutions. By design, the ProxyEdge service is structured to avoid sending multiple proxy packages to money managers, when only one package is required for voting purposes:

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.⁴⁹

The STA believes that it is a particularly egregious practice for Broadridge to charge issuers at the beneficial owner level for proxy voting services when the beneficial owners are not casting any votes and, instead, have transferred their voting authority to an investment adviser. Broadridge should only be charging one ProxyEdge voting fee for each vote that is actually being cast—by the designated investment adviser—and not charging issuers \$0.06 for each beneficial owner who has delegated his or her proxy voting authority.

D. The SEC Position on Proxy Voting in Wrap Fee Accounts is Clear That Proxy Materials Are to be Provided Only to the Investment Adviser

The SEC's position on wrap fee accounts has been that issuers only need to provide proxy materials to an investment adviser when proxy voting authority has been delegated. In adopting Rule 3a-4 under the Investment Company Act of 1940—a safe harbor from registration under the Act for managed accounts—the SEC stated the following 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,

⁴⁹ 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>.

annual reports, need be furnished only to the party exercising the delegated voting authority.⁵⁰

The SEC informally confirmed this position last year in its Concept Release on the U.S. Proxy System.⁵¹

The STA believes that there should not be any distinction between wrap fee accounts and separately managed accounts, for purposes of proxy processing and distribution activities under the SEC-approved fee schedule for these activities. These accounts should be coded and processed by the broker-dealer as an internal matter and before submission of other beneficial owner information to Broadridge, as stated earlier.⁵²

E. The Imposition of Proxy Fees to Separately Managed Accounts is Invalid Without an SRO Rule Change Approved by the SEC

The imposition of proxy processing fees, paper and postage elimination fees, and other proxy-related charges is invalid without an SRO rule change that is expressly approved by the SEC. Under the Exchange Act, the “stated policies, practices, and interpretations” of an SRO must be submitted to the SEC for approval.⁵³ SEC Rule 19b-4 under the Exchange Act defines “stated policy, practice, or interpretation” to mean, in part, “[a]ny material aspect of the operation of the facilities of the self-regulatory organization” or “[a]ny statement made generally available” that “establishes or changes any standard, limit, or guideline” with respect to “the rights, obligations, or privileges” of persons or the “meaning, administration, or enforcement of an existing rule.”⁵⁴

⁵⁰ SEC Release Nos. IC-22579 and IA-1623, 1997 SEC LEXIS 673, at *47 (Mar. 24, 1997).

⁵¹ 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?”).

⁵² Further evidence of the regulatory intent to keep wrap account processing at the broker-dealer level can be reviewed at SEC Release No. 34-38058, 61 Fed. Reg. 68,082, at 68084 (footnote 6) (December 26, 1996) (“[Brokerage firms] maintain some staff in a proxy department to handle such tasks as balancing depository positions on record date, changing investor records, answering inquiries and performing other work not covered by the subcontract [with the central intermediary]. The [brokerage] firm’s systems department also needs to maintain proxy-related programs for separating wrap accounts and the communications equipment to interface electronically with an intermediary on both search date and record date.”).

⁵³ Section 19(b)(1) of the Exchange Act requires SROs, including national securities exchanges and registered securities associations, to file with the SEC any proposed rule change. 15 U.S.C. § 78s(b)(1). Section 3(a)(27) of the Act defines “rules” to include “the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing . . . and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.” 15 U.S.C. § 78c(a)(27).

⁵⁴ 17 C.F.R. §240.19b-4(b).

While there is an exception for stated policies, practices, or interpretations that are “reasonably and fairly implied” by an existing rule of the SRO, the STA does believe that this exception can be applied to SRO rules regarding proxy fees being charged for separately managed accounts at the beneficial owner level.⁵⁵

The SEC has interpreted the “reasonably and fairly implied” exception on a case by case basis; however, the SEC has warned that a stated policy, practice or interpretation that involves transactions or conduct that are “not apparent from the face of the existing rule” is not reasonably and fairly implied by the rule.⁵⁶ The SEC has also stated that a second exception to the rule—the “concerned solely with the administration” exception—applies only to policies, practices and interpretations that deal with “housekeeping matters.”⁵⁷ Finally, the SEC requires a stated policy, practice or interpretation to be a written and public statement of the particular policy, practice or interpretation, something that has not occurred here.⁵⁸

The STA believes it is clear that existing SEC and SRO rules and interpretations require that only one proxy package is to be sent to an investment adviser which has been delegated proxy voting authority by beneficial owners in separately managed accounts. The regulatory histories of the proxy fees that have been authorized by SRO and SEC rulemaking do not contain any language in which this practice of charging proxy fees at the beneficial owner level for these accounts is authorized. And there is no language that can help to develop an argument that these fees may be implied from the regulatory approvals involved.

⁵⁵ Pursuant to SEC Rule 19b-4(c), a stated policy, practice, or interpretation is a proposed rule change that must be filed with the SEC pursuant to Section 19(b) of the Exchange Act unless it is “reasonably and fairly implied by an existing rule of the self-regulatory organization” or is “concerned solely with the administration of the self-regulatory organization and is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization.” 17 C.F.R. § 240.19b-4(c).

⁵⁶ See In the Matter of the Application of William J. Higgins, 48 S.E.C. 713 (May 6, 1987); 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.”).

⁵⁷ 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, qualify for this exception.”).

⁵⁸ See In the Matter of William J. Higgins, 48 S.E.C. 713 (May 6, 1987). 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.”).

For these reasons, the STA believes that 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.

F. NYSE-SIFMA Correspondence on the Issue of Separately Managed Accounts is Invalid and Does Not Apply to NASDAQ or FINRA

In 2008, NYSE Regulation sent a letter to an officer of SIFMA (who is now employed with Broadridge) about separately managed accounts. This letter indicated that it would be permissible to charge suppression fees for “managed accounts” under NYSE Rule 465. A copy of this letter and an earlier letter from SIFMA are attached.

The first problem with this correspondence is that it cites to the wrong NYSE Rule. As noted above, NYSE Rule 465 governs the distribution of interim reports and other material being sent to beneficial owners by issuers.⁵⁹ A different NYSE provision, Rule 451, governs the distribution of proxy materials, which is what is at issue regarding separately managed accounts.⁶⁰

A second problem with this correspondence is that it does not meet the standards of a “stated policy, practice, or interpretation” of an SRO. As stated earlier, this correspondence: (1) has not been made public or “generally available” as a written statement by any SRO; (2) it does not contain a written explanation of a particular policy, practice, or interpretation by an SRO; (3) it cannot be considered a policy, practice, or interpretation that can be “reasonably or fairly implied”; and (4) it has not been submitted to the SEC by any SRO as a rule amendment.

A final point is that the language used in this letter does not apply to either NASDAQ or FINRA, which have their own rules as separate SROs.

For these reasons, the STA believes that this NYSE-SIFMA correspondence does not authorize Broadridge or its broker-dealer clients to charge proxy fees to issuers for separately managed accounts at the beneficial owner level. Instead, the STA believes these proxy fees are invalid under current regulatory rules. The STA also believes that, under any circumstance, this correspondence does not apply to either NASDAQ or FINRA and to issuers which are listed on the NASDAQ Stock Market.

V. Conclusion

Without any express regulatory authority and contrary to existing regulatory rules and their interpretations, Broadridge and its broker-dealer clients are charging processing fees, paper and postage elimination fees, Notice and Access fees (where appropriate), and

⁵⁹ See supra note 13.

⁶⁰ Id.

ProxyEdge voting fees for separately managed accounts at the beneficial owner level, despite the fact that only one proxy package is actually being provided to the broker-dealer and/or investment adviser sponsoring this type of investment advisory program.

The STA believes that there is no justification for these charges to issuers. Separately managed accounts are a large profit center for broker-dealers and the suppression of beneficial owner accounts which are enrolled in these discretionary investment programs should be the responsibility of each broker-dealer. Issuers should not be charged for these account positions once a delegation of proxy voting authority has been made by beneficial owners. Instead, issuers should only be charged for the one proxy package that is provided to the sponsor of these investment programs.

The practice of billing issuers for proxy fees in this manner is not a “reasonable expense” and is completely inconsistent with NYSE, NASDAQ, FINRA, and SEC rules (and rule interpretations), as noted above. This practice also is inconsistent with NASDAQ Rule 2110, which requires each member firm, in the conduct of its business, to “observe high standards of commercial honor and just and equitable principles of trade.”⁶¹

The practice of charging proxy processing, paper and postage elimination, Notice and Access, and Proxy Edge voting fees should be prohibited for separately managed accounts at the beneficial owner level. Broker-dealers and other financial intermediaries with investment discretion should be rolling up their subaccounts prior to transmitting data to Broadridge (or another service provider) for a proxy solicitation. Once Broadridge (or another service provider) has the data, then proxy fees for one nominee and a single Proxy Edge voting fee should be charged for the consolidated shares maintained by a broker-dealer or other institution with investment discretion and proxy voting authority.

This is not a new issue. FINRA has been aware of this issue in 2007.⁶² The STA brought this issue to the attention of the SEC in 2010,⁶³ and, currently, the NYSE Proxy Fee Advisory Committee is evaluating this fee practice, as a part of its broader evaluation of proxy distribution fees. The STA also filed a complaint with FINRA on October 31, 2011.

The STA believes that NASDAQ should conduct its own review of this proxy fee practice and take appropriate corrective regulatory action—through a written

⁶¹ NASDAQ Rule 2110, Standards of Commercial Honor and Principles of Trade, [available at http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F3%5F1&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F](http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F3%5F1&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F).

⁶² See *supra* note 1.

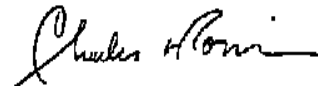
⁶³ See Letter from Thomas L. Montrone, The Securities Transfer Association, to Mary L. Schapiro, Chairman, Securities and Exchange Commission, June 2, 2010, [available at http://www.stai.org/pdfs/STA_Letter_to_SEC_re_Managed_Accounts_6-2-2010.pdf](http://www.stai.org/pdfs/STA_Letter_to_SEC_re_Managed_Accounts_6-2-2010.pdf).

interpretation or via an amendment to NASDAQ Rule 2251—to prohibit these proxy fees from being charged to NASDAQ issuers, at the beneficial owner level.

As stated earlier, the STA requests that NASDAQ address these issues in an expedited manner, as the 2012 proxy season is just a few months away and issuers should not have to continue to pay these unnecessary proxy fees for another year of annual meetings.

The STA is prepared to provide additional supporting information on the issues raised in this request and is willing to cooperate with NASDAQ (and FINRA) in any manner necessary to address this very significant problem for NASDAQ issuers.

Sincerely,



Charles Rossi
President
Securities Transfer Association

Attachments

cc's will be sent by regular mail on November 9, 2011.

cc: The Honorable Mary L. Schapiro
The Honorable Elisse B. Walter
The Honorable Luis A. Aguilar
The Honorable Troy A. Paredes
The Honorable Daniel Gallagher
Meredith Cross, Division of Corporation Finance
Robert Cook, Division of Trading and Markets
Thomas Kim, Division of Corporation Finance
Scott Cutler, New York Stock Exchange
Judith McLevey, New York Stock Exchange

 **NYSE Regulation**

Richard Ketchum
Chief Executive Officer
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April 29, 2008

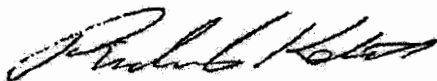
Donald D. Kittell
Chief Financial Officer
SIFMA
120 Broadway, 35th Floor
New York, NY 10017

Dear Don,

I received your Memorandum dated February 11, 2008 regarding "NYSE Rule 465: Proxy Suppression Fees on Managed Accounts", and can confirm to you that your understanding of our February 5th discussion, as set forth in your Memorandum, is correct.

Thank you for SIFMA's interest and cooperation, and we will welcome SIFMA's assistance in the ongoing work on this and other Proxy-related matters.

Sincerely,



Richard Ketchum
Chief Executive Officer
NYSE Regulation

Cc: Jim Duffy
Steve Walsh



MEMORANDUM

To: Rick Ketchum
NYSE

CC: Jim Duffy
NYSE

Steve Walsh
NYSE

From: Donald D. Kittell

Date: February 11, 2008

Subject: NYSE Rule 465: Proxy Suppression Fees on Managed Accounts

Thank you for your time last February 5, on this subject.

I would like to confirm my understanding of the NYSE's position on Suppression Fees on Managed Accounts under NYSE Rule 465.

Based on our discussions, I understand that the 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.

The NYSE is interested in reviewing whether the Rule needs to be amended in the future in light of the growth in Managed Accounts, changes in technology and other factors, and has asked its Proxy Working Group to conduct that review.

Please let me know if my understanding is accurate or needs to be modified.

SIFMA stands ready to assist the NYSE and the Proxy Working Group on its review of this and other Proxy-related matters.

Sincerely,

Donald D. Kittell
Chief Financial Officer

DDK:djk