

**MEMO# 33731**

August 19, 2021

# **SEC Disapproves NYSE Proposal to Transfer Oversight of Processing Fee Schedule to FINRA**

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TO: ICI Members  
Operations Committee  
Proxy Working Group  
SEC Rules Committee  
Transfer Agent Advisory Committee SUBJECTS: Compliance  
Disclosure  
Distribution  
Fees and Expenses  
Intermediary Oversight  
Operations RE: SEC Disapproves NYSE Proposal to Transfer Oversight of Processing Fee Schedule to FINRA

On August 18, the Securities and Exchange Commission, pursuant to delegated authority, issued an order ("Order") disapproving the New York Stock Exchange's (NYSE) proposed rule change on maximum fees to be charged by member organizations for forwarding proxy and other materials to beneficial owners.[\[1\]](#) As explained in more detail below, the SEC found that NYSE failed to demonstrate that the proposed rule change would, as required by Section 6(b)(5) of the Securities Exchange Act of 1934 ("1934 Act"), promote just and equitable principles of trade, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[\[2\]](#)

## **Background**

NYSE's proposed rule change would have directed NYSE member organizations that also are FINRA member firms to comply with FINRA Rule 2251's fee schedule of approved charges for reimbursement rates for forwarding proxy and other materials to beneficial owners.[\[3\]](#) The NYSE proposal also would have eliminated the existing NYSE fee schedule that is the corollary of the FINRA fee schedule. As the SEC acknowledges, these actions would have resulted in FINRA, rather than NYSE, being responsible for setting the maximum reimbursement rates and maintaining the fee schedule under its rules.

ICI submitted two comment letters on NYSE's proposed rule change.<sup>[4]</sup> Given that neither NYSE nor FINRA wants responsibility for determining what constitutes reasonable processing fees, we urged the SEC to take action to reform the broken, outdated processing fee framework. We recommended that the Commission, in the near term, issue a statement reminding broker-dealers and their agents that the 1934 Act requires processing fees to be "reasonable" and that the mere existence of a fee schedule does not eliminate this overarching Commission requirement. Longer term, we recommended specific actions the Commission should take to permit funds to choose their own vendors and negotiate the price funds pay to deliver materials to beneficial owners. We explained that these actions would benefit fund shareholders, potentially saving them hundreds of millions of dollars a year.

## **Order**

In finding that NYSE has not demonstrated that its proposed rule change is consistent with the 1934 Act,<sup>[5]</sup> the SEC disagrees with NYSE's view that FINRA is in a better position to take the lead in setting maximum reimbursement rates for the distribution of proxy and other issuer materials to beneficial owners. NYSE had asserted that FINRA should have responsibility for overseeing the processing fee schedule because all broker-dealers that hold shares in "street name" for their customers are FINRA members, while only some are NYSE members, and a large number of issuers, including fund issuers, are not listed on the NYSE. The SEC disagrees with NYSE's reasoning, emphasizing that NYSE, unlike FINRA, has a regulatory relationship with both broker-dealers and issuers in setting reimbursement rates. The SEC asserts that:

In contrast [to FINRA], for the many years that the Exchange has been the lead SRO in this area, it has demonstrated the ability, as a primary listing market that has relationships with both brokers and issuers, to consider the interests of both of these important constituencies when it periodically develops proposals to update the reimbursement rate schedule pursuant to Section 19(b)(2) of the Act. In so doing, the Exchange performs an important SRO function of generating proposals that provide a basis for the Commission to find that the proposed updated rates constitute an equitable allocation of reasonable fees. As an outgrowth of this process and as approved by the Commission, the NYSE rate schedule sets the maximum level of "reasonable" reimbursement that is accepted as the industry standard for what may be sought by any broker and must be paid by any issuer. In turn, as a consensus product representing broker and issuer interests, the NYSE rate schedule helps ensure that beneficial owners receive proxy and other issuer materials in a timely manner and as required by the Commission's rules.<sup>[6]</sup>

The Commission states that NYSE's historical ability to "duly consider both brokers' and issuers' interests—an ability that, based on the record here, FINRA does not possess—is critical to an equitable and fair process for determining what rates would constitute reasonable reimbursement . . ."<sup>[7]</sup> It cites, as examples of NYSE's ability to achieve a "consensus view of the issuers and the broker-dealers involved," NYSE's 2010 formation of a Proxy Fee Advisory Committee (PFAC),<sup>[8]</sup> which was composed of issuers, broker-dealers, one mutual fund company, and NYSE representatives, as well as the 2013 revisions to NYSE's reimbursement schedule.<sup>[9]</sup>

The Commission explicitly acknowledges that almost all commenters on the proposed rule

change "urged comprehensive, Commission-led reform to the current reimbursement structure," citing letters from ICI and its members, among others.<sup>[10]</sup> It concludes, however, that "such reform is beyond the scope of this proposed rule change" and notes that NYSE did not intend its proposed rule change to take a position on the appropriateness of the current fee schedules.

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#### endnotes

[1] The SEC's order is available at <https://www.sec.gov/rules/sro/nyse/2021/34-92700.pdf>.

[2] Section 6(b)(5) requires, in full, that:

The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange.

[3] Following the SEC's publication of the proposed rule change in December 2020, in February 2021, the Commission designated a longer time period to consider the rule submission. In March, the Commission issued an order to determine whether to approve or disapprove the proposed rule change. In June, the Commission designated a longer period for Commission action on the rule and stated that it would approve or disapprove the proposed rule change by August 18.

[4] ICI's January and May comment letters are available, respectively, at <https://www.sec.gov/comments/sr-nyse-2020-96/srnyse202096-8221270-227699.pdf> and <https://www.ici.org/system/files/2021-05/33531a.pdf>.

[5] See *supra* note 2.

[6] Order at 11.

[7] *Id.* at 12-13.

[8] The PFAC, however, recommended revisiting the fee schedule in three years (i.e., 2016) to ensure that the fees were operating as the predominant vendor represented. The recommended review never took place. For a detailed history of the NYSE fee schedule, *please see* Appendix A of ICI's October 2018 letter to the SEC on its request for comment on processing fees, available at [https://www.ici.org/pdf/18\\_ici\\_processing\\_fees\\_ltr.pdf](https://www.ici.org/pdf/18_ici_processing_fees_ltr.pdf).

[9] The SEC cites ICI's January and May 2021 letters, described above, as another example of NYSE's role in developing a consensus view of issuers and broker-dealers, noting that issuers may provide perspective based on their experience paying to distribute materials to shareholders who do not hold in street name (emphasis added). Order at n.49 It does not cite to ICI's March and June 2013 letters that raised serious concerns with NYSE's 2013 proposed rule changes, emphasizing the problems with the current processing fee framework and opposing aspects of NYSE's proposed rules changes that failed to create an incentive to reduce fees. We reiterated the need for an independent review of the current fee structure, which has never taken place, noting that NYSE historically has relied almost exclusively on vendor-provided data with very little outside information or analysis. See Appendix A of ICI's October 2018 letter, available at [https://www.ici.org/pdf/18\\_ici\\_processing\\_fees\\_ltr.pdf](https://www.ici.org/pdf/18_ici_processing_fees_ltr.pdf).

[10] Order at n.52.