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October 20, 2010

Via e-mail to rule-comments@sec.gov

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Concept Release on the U.S. Proxy System (File No. S7-14-10)

Dear Ms. Murphy:

The Investment Company Institute[1] appreciates the opportunity to provide its views in response to the Securities and Exchange Commission's concept release seeking comment on various aspects of the U.S. proxy system.[2] Proxy voting is important to investment companies[3] in their dual roles as institutional investors and issuers. As institutional investors seeking to maximize value for their shareholders, investment companies have specific responsibilities with respect to proxy voting. In addition, because they frequently hold large positions in the companies in which they invest, investment companies (as institutional investors) are aware that their votes may significantly affect the outcome of particular voting matters. As issuers, investment companies prepare proxy solicitation materials in connection with meetings of their shareholders. Accordingly, ICI and its members have a strong interest in a well-functioning, cost-efficient proxy system that facilitates the ability of

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of the ICI manage $11.51 trillion and serve over 90 million shareholders.

[2] *See Concept Release on the U.S. Proxy System,* SEC Release Nos. 34-62495; IA-3052; IC 29340 (July 14, 2010), 75 FR 42982 (July 22, 2010) ("Release").

[3] We use the terms "investment companies" and "funds" interchangeably in this letter.

shareholders to vote their proxies.[4] We support the Commission's comprehensive review of this complex system and believe that it is particularly timely given the changes that have occurred in communications technology in recent years.

Our comments include the following, all of which are discussed in greater detail below.

- SEC rules should permit issuers to communicate directly with their shareholders by eliminating the regulatory categories of "objecting" beneficial owners ("OBOs"), who object to having their names and addresses provided to an issuer, and "non-objecting" beneficial owners ("NOBOs") who do not so object. As part of this change, SEC rules should continue to permit the use of nominee accounts.

- SEC rules should impose a standardized method that shareholders may use to confirm votes. Such rules should require issuers to bear the cost of confirmation and prohibit confirming a shareholder's vote to any person other than the shareholder or his or her designated agent.

- SEC rules should permit—but not require—issuers to disclose matters to be voted upon in advance of the record date.

- SEC rules should require all institutional investors subject to the Commission's jurisdiction to disclose how they voted their proxies.

- The SEC should *not* revise Form N-PX to impose additional disclosure requirements on funds.

- The SEC should take steps to reduce costs and increase competition related to the distribution of proxy material and other issuer-prepared materials to beneficial shareholders.

- The SEC should permit client-directed voting with a view toward increasing voting participation rates by retail shareholders.

- The SEC should permit issuers that wish to rely on the "notice and access" model for distributing proxy materials to include a proxy card in the same mailing with the Notice of Internet Availability of Proxy Materials ("Notice").

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[4] *See, e.g.,* Letter from Elizabeth R. Krentzman, General Counsel, Investment Company Institute, to Catherine R. Kinney, President and Co-Chief Operating Officer, NYSE Group, Inc., dated July 18, 2006 (commenting on the New York Stock Exchange's Proxy Working Group Report of June 5, 2006).

- The SEC should not impose data tagging requirements on proxy statement or voting information forms unless it can establish that expected benefits to investors would justify the associated costs.

- The SEC should not modify the current regulatory scheme for proxy advisory firms.

- SEC rules should accommodate issuers' use of dual record dates.

1. Communications and Shareholder Participation

Issuer Communication with Shareholders. The Release seeks comment on ways in which issuers' communications with shareholders and the level of shareholder participation in the proxy voting process might be improved. To achieve this, we recommend that the SEC eliminate the OBO/NOBO distinction for all shareholders, including investment company shareholders. This change would make it easier for issuers to communicate with their shareholders thereby reducing costs, and it would help to eliminate the inefficiencies, discussed below, that result from the current system due to the layers of intermediaries positioned between issuers and their shareholders.

Eliminating the OBO/NOBO distinction would facilitate investment companies' efforts to communicate with the large number of retail shareholders[5] that purchase fund shares through intermediaries and choose the OBO designation.[6] It additionally would reduce costs for issuers to

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[5] In deciding to approve an amendment to NYSE Rule 452 prohibiting broker voting for all issuers *except* investment companies, the Commission cited as a consideration the heightened problems that registered investment companies have in achieving quorums because of their disproportionately large retail shareholder base. Institute data shows that retail shareholders held about forty-five percent of the value of operating company shares as of December 2009, sixty-one percent of the value of mutual fund shares as of December 2009, and approximately ninety-five percent of the value of closed-end shares as of December 2008. This data was consistent with data as of year-end 2005 that formed the basis for the Institute's report finding that engaging in multiple solicitations causes typical proxy costs to more than double from $1.65 to $3.68 for each shareholder account and expense ratios to rise between one to two basis points, on average, with some investment companies' expense ratios increasing more than five basis points. *See Costs of Eliminating Discretionary Broker Voting on Uncontested Elections of Investment Company Directors,* Investment Company Institute (December 18, 2006) ("ICI Report"), at pp. 3-4 available at http://www.ici.org/pdf/wht_broker_voting.pdf.

[6] Mutual funds have a significant portion of their shares held in street name. For mutual funds sold via a sales force, shares held in street name range from 78 percent to 100 percent of total fund shares with a median of 80 percent. Even mutual funds sold directly to investors have a considerable amount of their shares in street name. Half of mutual funds sold directly have at least 57 percent of total shares outstanding held in street name. Direct-sold mutual funds often are offered on platforms or supermarkets, and these shareholder accounts generally are held in street name. Estimates show that street holdings of closed-end fund shares range from a minimum of close to 70 percent to a maximum of 100 percent. Half of closed-end funds have at least 81 percent of their total shares outstanding held in street name. Fifty-two percent of fund shares held in street name are owned by shareholders who have indicated that issuers may not contact them. ICI Report at pp. 5 and 10.

communicate with NOBOs because it will no longer be necessary to reimburse intermediaries for their costs in preparing NOBO lists.[7] Obtaining a quorum can be extremely difficult and expensive for retail-oriented funds.[8] Eliminating this feature of the proxy process should make it easier for investment companies and other issuers to obtain a quorum and get matters voted upon when only beneficial owners, not brokers acting on their behalf, are permitted to vote.[9]

We recognize that some investors may want to remain anonymous. Accordingly, in eliminating the OBO/NOBO distinction, we recommend that the Commission continue to allow the use of nominee accounts. A nominee account permits a shareholder to enter into an agreement (perhaps for a fee) that transfers the shareholder's securities into the name of the broker-dealer. Permitting this accommodation will enable those investors who so choose to remain anonymous. For example, an institutional investor in the process of increasing its stake in a particular issuer may not want to disclose its current trading activity or ownership position to company management or others. As we have stated in several letters to the Commission,[10] preserving the confidentiality of fund trading information is an issue of great concern to ICI and its members. Any premature or improper disclosure of this information can lead to frontrunning of a fund's trades, adversely impacting the price of the stock that the fund is buying or selling.

2. <u>Accuracy, Transparency, and Efficiency of the Voting Process</u>

Over-Voting and Under-Voting. The Release discusses concerns that have been expressed about the accuracy, transparency, and efficiency of the proxy process and how this may result in the over-voting or under-voting of shares. Because of the lack of transparency in the current system, our

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[7] Under current NYSE rules, an issuer is required to pay 65 cents per name, plus reasonable expenses of the broker-dealer's agent in providing the information. While we do not have specific cost data, it is obvious that for companies with large retail shareholder bases, like investment companies, this expense is significant.

[8] *See* ICI Report at p. 11 (in nearly 60 percent of shareholder meetings that contained at least one non-routine matter at least one re-solicitation of shareholders was necessary to achieve a quorum).

[9] When funds believe additional measures are necessary to obtain a quorum, which is often the case, they encourage shareholders to vote via follow-up mailings or phone solicitation. While all shareholders receive reminder mailings, under the existing proxy rules, only NOBOs can be contacted by either the fund or its third-party solicitor to obtain votes over the phone. The failure to achieve a quorum for a shareholders' meeting, or obtain sufficient votes to approve a proposal despite overwhelming support from investors who voted, can result in a significant expenditure of time, money, and effort for no benefit.

[10] *See, e.g.,* Letters from Paul Schott Stevens, President, Investment Company Institute, to Christopher Cox, Chairman, Securities and Exchange Commission, dated September 14, 2005, August 29, 2006, and September 19, 2008; and Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated February 22, 2010 (comment letter on the Commission's examination of the current regulation of non-public trading interests).

members have concerns about whether their shares have been over-voted or under-voted. They have an interest in having a system in which voting results are not subject to these types of potential distortions. Eliminating the OBO/NOBO distinction, as we recommended above, will have the added benefit of making the proxy system more transparent. By providing issuers more access to information about shareholders and their votes, this increased transparency should make it easier to identify mismatches between the number of shares entitled to vote and those voted.

Vote Confirmation. The Release states that a number of market participants have raised concerns regarding the inability to confirm whether an investor's shares have been voted in accordance with the investor's instructions. Our members share this concern and report that they have experienced difficulties in confirming votes they cast in their capacity as institutional shareholders due either to the complexity of the current process, its lack of transparency, or because participants in the voting process are unwilling or unable to share voting information with each other or with investors.[11] And yet, as institutional shareholders, it is possible that the votes they cast on an issue might have a significant impact on the final outcome.

Accordingly, we support the Commission's examination of this issue and encourage the adoption of rules that enable shareholders to confirm their votes. In particular, the Commission should adopt a rule imposing a standardized method—with specified time frames—that issuers (or their agents) must use to confirm votes upon request by a shareholder. Such a rule would require that issuers have access to all information necessary to confirm votes to shareholders (or their agents). This approach would have several benefits. It would ensure that the confirmation process is the same without regard to the issuer or proxy, provide certainty regarding the timing of the confirmation process, and facilitate the Commission's ability to inspect compliance with the confirmation requirements.

We also strongly recommend that issuers be prohibited from providing vote confirmation information to anyone other than the requesting shareholder (or its agent). This would protect shareholders' privacy interests. We do not believe that shareholders would support a system that would subject each vote, shortly after the time it is cast, to public scrutiny. To avoid this, the Commission should limit to whom an issuer may confirm a vote.

Proxy Voting by Institutional Securities Lenders. In light of the current practice of sending out proxy statements after the record date, the Release seeks input on whether institutions that lend securities have sufficient information in advance of the record date in order to determine whether to recall securities.

[11] As issuers, our members report that their shareholders rarely, if ever, seek confirmation of their votes; however, some firms routinely provide confirmation of certain types of votes (*e.g.,* confirming an investor's telephonic voting instructions by means of a letter to the address of record, especially in the case of closed-end fund proxy contests).

Our members have long been in the business of loaning securities and have been able to develop methods to monitor corporate developments and make arrangements to recall shares in the event of a vote on a material matter. Given this, we do not believe it is essential for the Commission to adopt additional regulations to facilitate the recall of securities for voting purposes. Further, our members are concerned that requiring issuers to publicly disclose the meeting agenda in advance of the record date might exacerbate concerns associated with empty voting.[12] For example, if a company announces in advance of a record date that the agenda will include a controversial merger proposal, investors may acquire the right to vote shares in advance of the record date merely to affect the outcome of the vote on the matter.

On balance, we would not object to the Commission permitting—but not requiring—issuers to disclose matters to be voted on in advance of the record date. We recommend that an issuer have the flexibility to determine whether to provide advance notice and, if it chooses to do so, the degree of specificity of such disclosure. For example, issuers could provide advance notice of an upcoming record date and meeting date along with either specific agenda items to be voted on or, instead, state that either only routine matters, non-routine matters, or both will be voted upon (without providing more detail on the substance of these matters). This approach would enable issuers to provide advance notice to their shareholders when they believe it is in the best interests of the company to do so or avoid providing advance notice if they are concerned that it may result in empty voting.[13]

Proxy Vote Disclosure. The Release notes the "significant role" that "institutional securities lenders" such as insurance companies, pension funds, mutual funds, and college endowments play in the proxy voting process and seeks comment on whether increased disclosure of their votes might improve the transparency of the voting process. Interestingly, however, the *only* increased disclosure of votes mentioned as a potential regulatory response to address any such concerns is increased disclosure by registered management investment companies—the only institutional investors that are currently required to publicly disclose their proxy votes. [14]

We support enhancing the transparency of votes cast not just by institutional lenders, but by institutional investors more generally. We recognize that, pursuant to the recent financial services legislation, institutional investors will be required to disclose their advisory votes on executive pay

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[12] *See* Release at pp. 137-150 (discussing the Commission's concerns).

[13] If the Commission adopts this approach, rules of the self-regulatory organizations (*e.g.,* NYSE Rules 401.01 and 401.02) would have to be revised to conform to Commission requirements.

[14] *See* Rule 30b1-4 under the Investment Company Act.

packages and golden parachutes, which is a step in the right direction.[15] To provide greater transparency, we recommend that *all* proxy votes cast by such investors be required to be disclosed.

Although the fund industry did not support requiring funds to publicly disclose their votes when it was first proposed, funds have since become accustomed to complying with this unique disclosure requirement. As a result of the requirement, in 2008 ICI was able to conduct the broadest study of funds' proxy votes ever undertaken, covering more than 3.5 million proxy votes cast in 2007 by 160 of the largest fund families.[16] That research indicates, among other things, that: (1) funds devote substantial resources to proxy voting; (2) funds vote proxies in accordance with their board-approved guidelines; (3) funds do not reflexively vote "with management," as some critics claim, but rather make nuanced judgments in determining how to vote on both management and shareholder proposals in order to promote the best interests of funds and their shareholders; and (4) fund voting patterns are often broadly consistent with vote recommendations of proxy advisory firms, although here also our research shows that funds do not reflexively adopt the recommendations of proxy advisors.

Fund proxy vote disclosure thus makes it possible to inform the public debate on how funds use the corporate franchise. It is not currently possible, however, to examine how fund votes compare with those of other institutional investors because those investors are not required to disclose their proxy votes. Instead of increasing funds' proxy vote disclosure obligations, we recommend that the Commission expand to all institutional investors the transparency currently provided by funds.[17]

Proxy Distribution Fees. The Release notes that one of the most persistent of all the concerns expressed to the Commission's staff, particularly by issuers, involves the structure and amount of fees charged for the distribution of proxy and related materials to beneficial shareholders. We very much share these concerns and strongly urge the Commission to take steps to reduce costs and increase competition related to the distribution of proxy and other issuer-prepared material to beneficial shareholders. The current system—in which the proxy service provider is selected by the broker but

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[15] *See* Section 951 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. An exception applies for investors already required to disclose their votes.

[16] *See* Investment Company Institute, *Proxy Voting by Registered Investment Companies: Promoting the Interests of Fund Shareholders,* July 2008, ("ICI Proxy Paper") available at http://www.ici.org/pdf/per14-01.pdf. We expect to publish in the near future an updated study covering proxy votes cast by funds over the three-year period 2007 to 2009. The update examines trends in fund proxy voting over that period.

[17] We note that the Council of Institutional Investors ("CII") has recommended that its members voluntarily disclose proxy votes cast as part of CII's best disclosure principles for institutional investors. *See* http://www.cii.org/UserFiles/file/Statement%20on%20Best%20Disclosure%20Practices%20for%20Institutional%20Investors.pdf. The AFL-CIO voluntarily discloses certain proxy votes. *See* http://www.aflcio.org/corporatewatch/capital/proxyvoting.cfm.

paid by the issuer—by its very terms fails to create an incentive to reduce fees. Giving issuers the flexibility to choose providers to deliver their materials should accelerate the development of a more competitive marketplace, which should help rationalize fees and increase transparency.[18] The Commission should assign a very high priority to this endeavor, especially given that: (1) virtually all banks and brokers contract out the administrative process for proxy mailings to one vendor;[19] and (2) eight years have elapsed since the NYSE last modified the fee schedule.

Given that the current system is not guided by the principle of reasonable reimbursement, we recommend that the Commission: (1) conduct an independent third-party audit of the current fee structure to establish reasonable rates of reimbursement; (2) assess the reasonableness of the rates periodically thereafter; and (3) work toward the establishment of a more competitive marketplace for the distribution of proxy materials. Provided below are specific steps that the Commission should take to achieve a system that would allow for the delivery of proxy materials with a more reasonable rate structure.

A. Eliminate Rebates

Broker-dealers generally outsource their delivery obligations to proxy service providers. The proxy service provider contracts with the broker-dealer and acts as a billing and collection agent for that broker-dealer. As such, the proxy service provider: (1) bills issuers on behalf of the broker-dealer with which it has contracted; (2) collects the fees from the issuer to which the broker-dealer is entitled pursuant to self-regulatory organization ("SRO") rules; and (3) pays to the broker-dealer any difference between the fee the broker-dealer is entitled to collect and the amount the broker-dealer has agreed to pay the proxy service provider for its services. According to the Release, the primary proxy service provider currently bills issuers, on behalf of its broker-dealer clients, the maximum fees allowed by SRO rules. However, the fees charged to large broker-dealer clients sometimes are less than the maximum fees charged to issuers on the broker-dealers' behalf, resulting in monies being remitted by the primary proxy service provider to a subset of its broker-dealer clients.

Under Commission rules, a broker-dealer or bank need not deliver issuer proxy materials to its clients unless the issuer provides assurance of reimbursement of reasonable expenses incurred in distributing the materials. In approving the NYSE's permanent fee structure in 2002, the Commission indicated its expectation that the NYSE would monitor the fees on an ongoing basis to confirm their continued correlation to reasonable expenses. The practice of remitting monies to brokers strongly

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[18] One member reports that in a recent proxy, the beneficial account proxy vendor's per unit price was significantly higher than that of the registered account proxy vendor; thirty-eight percent of the total proxy costs were attributable to the twenty-nine percent of the total number of shareholder accounts serviced by the beneficial account holder.

[19] According to the Release, Broadridge is the service provider for most U.S. broker-dealers.

indicates that the current fees are higher than necessary to assure the required reimbursement and should be revised. Revised fees should reflect technological advances such as electronic delivery of proxy materials and related cost savings. We recommend that the Commission prohibit such remittances or require they be refunded to the issuer.

B. Rationalize Notice and Access Model Fees

Neither the NYSE nor any other SRO has established the maximum fees that member firms may charge issuers for delivery of proxy materials using the notice and access model. If an issuer elects the "notice-only" delivery option for any or all accounts, the primary proxy service provider currently charges an "Incremental Fee" in addition to the other fees permitted to be charged under SRO rules.[20] This Incremental Fee is charged to all accounts, even if the issuer has elected to continue "full set" delivery to some accounts.

It is not appropriate for special fees automatically to apply when issuers elect the notice only delivery option. Rather, any incremental fees only should be permitted if incremental costs associated with this delivery option are documented as necessary to allow for *reasonable* reimbursement. Even if the Commission determines that it is appropriate for such a fee to be charged, it is not reasonable for the fee to apply to *all* accounts, even those which receive the full set of proxy materials. Therefore, we recommend that the Commission review these fees with a view toward rationalizing them to reflect a rate that allows for no more than reasonable rates of reimbursement of expenses associated with the notice and access model.

C. Limit Incentive Fees

Issuers currently pay an "Incentive Fee" ranging from $0.25 to $0.50 per beneficial owner account (depending on the number of beneficial owner accounts) when the need to mail materials in paper format has been eliminated, for instance, when duplicative mailings to multiple accounts at the same address have been eliminated. This fee originally was intended to provide an incentive to securities intermediaries to reduce proxy costs on behalf of issuers because intermediaries otherwise might not be motivated to do the coding required to reduce an issuer's forwarding costs. Once a paper mailing is suppressed, however, the securities intermediary or its agent collects the Incentive Fee, not only for the year in which the shareholder makes the election, but also for every subsequent year. This is so even though the continuing role of the securities intermediary, or its agent, in eliminating the paper mailing is limited to keeping track of the shareholder's election in subsequent years.

We do not believe that charging this fee *ad infinitum* is consistent with the fee's original purpose or can be justified as being reasonable reimbursement for the issuer's costs. We therefore

[20] The Incremental Fee for 1 to 6000 positions is $1500. Above 6000, the fee is charged on a per-account basis, and varies from $0.05 to $0.25 per account depending on the number of positions in excess of 6000.

recommend that the Commission allow for a one-time reimbursement of the Incentive Fee upon the elimination of paper mailings for an account, rather than on an ongoing basis.

3. Communications and Shareholder Participation

Means to facilitate retail investor participation. The Release expresses concern over the historically low retail investor participation rates in the proxy voting process and offers as a potential regulatory response allowing for advance voting instructions (or so-called "client-directed voting").[21] The low rate of retail investor participation is of particular concern to funds because of the large number of retail shareholders that own fund shares. Accordingly, we strongly support permitting client-directed voting as a mechanism to increase voting rates by retail shareholders.

The Commission's concern that an investor would be providing initial voting instructions at the time he or she opens a brokerage account,[22] and therefore before receiving a proxy statement for a particular issue, could be addressed in a variety of ways. For example, the Commission could require issuers to disclose prominently in proxy materials that the investor's advance voting instructions are revocable at any time simply by voting the proxy sent to them by the record date. If the Commission pursues this approach, customers should be provided with sufficient information to make an informed choice and should not be steered to one option over the other.

Improving the Use of the Internet for Distribution of Proxy Material. As part of its consideration of ways to facilitate retail investor participation in the proxy voting process, the Release discusses and seeks comment on possible further revisions to the "notice and access" model for distributing proxy materials that the Commission adopted in 2007. Of particular note, the Release inquires whether the Commission should consider amending its rules to permit inclusion of a proxy card or voting information form ("VIF") with the required Notice. Consistent with our previous comments on this topic, ICI strongly supports such an amendment.[23] We believe that allowing issuers to include a proxy

[21] This concept contemplates that brokers, proxy advisory firms, or other third parties offering voting platforms would solicit voting instructions from retail investors on particular topics in advance of their receiving the proxy materials from companies. The advance voting instructions would be applied to proxy cards related to the investors' securities holdings, unless the investor changed those instructions. Investors would not be required to provide advance voting instructions.

[22] We recommend that the Commission allow an investor to provide these instructions at the time he or she opens an account with *any* financial intermediary or directly with a fund.

[23] *See* Letter from Robert C. Grohowski, Senior Counsel, Investment Company Institute, to Ms. Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, dated November 20, 2009; Letter from Elizabeth Krentzman, General Counsel, Investment Company Institute, to Ms. Nancy M. Morris, Secretary, U.S Securities and Exchange Commission, dated March 30, 2007.

card[24] in the same mailing with the Notice would improve shareholder voting participation, reduce costs, and encourage greater use of the notice and access model.

As the Release indicates, the Commission's initial notice and access proposal would have allowed soliciting parties to include a proxy card with the Notice, but the Commission ultimately prohibited inclusion of the proxy card with the Notice based on some commentators' concerns that separating the proxy card from the proxy statement could lead to uninformed voting. We continue to believe that it is unrealistic to expect that the separation of the proxy card from the Notice will achieve the Commission's goal of preventing uninformed voting. As a practical matter, the current provision requiring that if a proxy card is sent, it must be sent separately from, and at least 10 days after, the Notice simply adds steps to the proxy solicitation process. It does not increase the likelihood that a shareholder who is disinclined to read proxy materials will do so and has no benefit for shareholders who can find the proxy materials on their own on the Internet.

Moreover, as we previously indicated, separating the proxy card from the Notice may cause confusion among shareholders who are inclined to vote, as evidenced by reports of shareholders attempting to vote by returning a marked copy of a Notice.[25] Those shareholders likely expected a proxy card in the mailing, and were confused when they were unable to find one. For any shareholders who were prepared to cast their votes at the time of, or shortly after, receiving the Notice (at which time they had access to the proxy materials if they wished to read them), the mandated delay is an inconvenience and may result in fewer votes being cast. Permitting inclusion of a proxy card with the required Notice would address these problems and thus may help increase voting rates. Currently, the prospect of decreased voter participation is a disincentive to our members to utilize the notice and access model. Lower voting rates may require funds to engage in additional solicitations to achieve a quorum, which entails substantial additional costs.

Permitting the proxy card to be mailed with the Notice would reduce costs and, consequently, encourage more widespread use of the notice and access model. Most obviously, having to make two mailings substantially reduces or possibly may eliminate the cost savings that might otherwise be achieved through the notice and access model.[26] It is our understanding that the cost of two small mailings (*i.e.,* the Notice and the proxy card) is virtually equivalent to one mailing (*i.e.,* the complete package of proxy materials).[27] In addition, because issuers cannot send a proxy card with the Notice,

[24] References to "proxy cards" in this section of our letter are also intended to encompass VIFs.

[25] *See* Letter from Robert C. Grohowski, Senior Counsel, Investment Company Institute, to Ms. Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, dated November 20, 2009.

[26] While mailing a proxy card technically is optional, our members have indicated that doing so is a practical necessity to encourage sufficient voter response.

[27] For example, an independent service provider may charge a flat "per piece" fee for stuffing, labeling, and mailing envelopes regardless of whether the insert is a proxy card or a proxy statement.

those issuers that do not already offer other ways for shareholders to execute proxies (such as a secure electronic voting platform or a separate telephone number manned by a tabulating agent) would have to set up systems to do so if they wish to use the notice and access model.

For all of these reasons, ICI strongly urges the Commission to permit inclusion of a proxy card with the Notice.

Data Tagging Proxy-Related Materials. The Release requests comment on whether issuers should be permitted or required to provide proxy statement and voting information in interactive data format.[28] The goal would be to enhance the level and quality of shareholder participation in the proxy voting process.

ICI is highly skeptical that providing either proxy statement or voting information in interactive data format would have any significant impact on the level or quality of shareholder participation or provide other measurable benefits, particularly in the fund context. With respect to potential benefits, the Release makes a vague and sweeping generalization, stating that "[i]f issuers provided reportable items in interactive data format, shareholders may be able to more easily obtain specific information about issuers, compare information across different issuers, and observe how issuer-specific information changes over time as the same issuer continues to file in an interactive data format."[29] There is no discussion of any different considerations that might come into play for different types of issuers. For example, the Release seems to ignore the vast amount of information that funds already provide or make easily available to their shareholders, both pursuant to regulatory requirements and voluntarily. We are not aware of any fund shareholder interest in having proxy statement or voting information in interactive data format.

The Release gives no indication of how data tagging regarding presentation of fund proxy statements in interactive data format might be expected to yield the suggested benefits. Indeed, it is difficult to imagine how the ability to sort or compare among funds in an automated fashion would be useful to shareholders. When a fund shareholder is asked to vote for fund directors, approve changes to the fund's investment advisory contract, or ratify the fund's auditors, for example, it would be highly unusual for different funds' proxy materials to contain information relevant to the shareholder's voting decision. In addition, fund proxy statements tend to be composed largely of narrative information, which can raise challenges where data tagging is concerned.[30]

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[28] This section of the Release uses the term "proxy statement and voting information" to refer collectively to the information required by Schedule 14A, Schedule 14C, Item 5.07 of Form 8-K and Form N-PX. Release at n. 203.

[29] Release at p. 99.

[30] *See, e.g.,* Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Ms. Florence E. Harmon, Acting Secretary, U.S. Securities and Exchange Commission, dated Aug. 1, 2008 (commenting on SEC proposal to mandate

In considering whether voting information reported on Form N-PX should be presented in interactive data format, it might seem at first blush that such information would lend itself more readily to data tagging. But service providers have already developed systems for collecting and sorting Form N-PX data that have made it possible for interested parties, such as academics or other third parties, to analyze that data. Consequently, it is unclear what additional benefit a data tagging requirement would provide.[31] Also, as indicated in the Release, there is a significant practical issue, *i.e.,* how to provide for uniform identification of each matter voted across different funds.

If the Commission were to mandate data tagging of fund proxy statements or Form N-PX, it is clear that funds would incur increased costs.[32] There would also be costs associated with rendering interactive data in human-readable form, although it is not clear who would bear those costs. With respect to Form N-PX, imposing a tagging requirement would likely require service providers that currently gather and process this data (*e.g.,* ISS) to revamp their existing systems. Fund shareholders do not currently bear the costs of facilitating analysis of Form N-PX data. Given that the demand for fund voting information generally does not come from fund shareholders (and it is already available to those shareholders who want it), it seems inappropriate to saddle fund shareholders with these additional costs.

Based on the foregoing, we believe that mandating data tagging of fund proxy statements or Form N-PX would entail unnecessary additional costs for funds with little or no benefit to shareholders. We therefore oppose such requirements. At a minimum, the Commission should refrain from further considering new data tagging requirements for funds with respect to proxy statement or Form N-PX information until (1) experience has been gained with the data tagging requirements the Commission has already adopted for funds, and (2) that experience is carefully analyzed. As the Release notes, beginning next year open-end management investment companies will be required to submit XBRL-tagged versions of the risk/return summary section of their prospectuses to the Commission.[33] Experience with this requirement will make it possible to collect data about the costs and benefits of tagging certain fund disclosures. That information must be an important component of a thorough cost-benefit analysis of any potential additional data tagging requirements for funds. Of course, while

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XBRL tagging of the risk/return summary in mutual fund prospectuses). Operating companies would likely face similar challenges with data tagging narrative information.

[31] Instead of requiring funds—the only institutional investors that are currently required to disclose publicly their proxy votes—to provide voting information in interactive data format, the Commission should require other institutional investors to disclose their votes, as discussed earlier in this letter.

[32] For example, the Release indicates that the Commission anticipates that "any interactive data format version of the information permitted or required would not replace the traditional format version, at least not initially." Release at n. 218.

[33] The requirement applies to initial registration statements, or post-effective amendments that are annual updates to effective registration statements and that become effective after January 1, 2011. In addition, beginning this December money market funds will have to file XML-tagged portfolio holdings information with the Commission.

experience with XBRL-tagging of the risk/return summary should provide valuable information for a thorough cost-benefit analysis, the Commission also must take into account that different considerations arise in the context of proxy-related information.[34]

Funds, like other issuers, have an incentive to encourage greater shareholder participation in proxy voting, so it stands to reason that they would embrace cost-effective measures that could be expected to have this effect. Based on funds' experience with the voluntary risk/return summary XBRL tagging program, however, we do not anticipate that there would be a high level of interest in participating in a voluntary tagging program for proxy statement or voting information; the benefits to fund shareholders simply have not been demonstrated.

4. Relationship between Voting Power and Economic Interest

Proxy Advisory Firms. After describing the role of proxy advisory firms and the variety of functions they perform to assist institutional investors in exercising their voting rights, the Release seeks comment on a number of potential issues raised by institutional investors' use of these firms (*e.g.,* whether the information provided is materially inaccurate or whether incomplete analyses are provided to institutional investors).

Our members have been in the business of voting proxies for a long time, and many of them have extensive experience with using the services proxy advisory firms offer. These services provide administrative efficiencies where, for example, a fund complex has many funds and perhaps thousands of individual portfolio securities to vote.[35] Funds and their advisers use the services to varying degrees. Some funds subscribe to proxy advisory firms to follow trends in proxy proposals and voting patterns. Others may use vote recommendations of proxy advisory firms to help them decide how to vote on particular proxy proposals, such as those that are not clearly resolved by funds' voting guidelines or that raise conflicts of interest. Still other funds—such as those that are part of smaller fund families with more limited resources—may rely more heavily on proxy advisory firms to guide their votes.[36] Thus,

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[34] The Commission would similarly need to demonstrate that the expected benefits of requiring data tagging of operating company proxy statements or voting information would justify its costs.

[35] For example, there were 3,525,885 votes cast by 2,973 registered investment companies in 160 of the largest fund families on proposals at companies in the Russell 3000 during the 2007 N-PX reporting year (July 1, 2006 through June 30, 2007). For this and information on funds' use of proxy advisory services, *see* ICI Proxy Voting Paper.

[36] These variations in fund adviser usage of proxy advisory firms' services is in keeping with a recent GAO Report on proxy advisory firms, which found that large institutional investors' reliance on proxy advisory firms was limited because, for example, they have in-house staff to assess proxy vote issues and only use the research and recommendations offered by proxy advisory firms to supplement such research. In contrast, small institutional investors have limited resources to conduct their own research and tend to rely more heavily on the research and recommendations offered by proxy advisory firms. Like large institutional shareholders, however, small institutions are ultimately responsible for proxy voting decisions and retain the right to override recommendations made by advisory firms. *See United States Government Accountability Office Report to*

contrary to the possible implication in the Release, fund advisers do not blindly follow possibly inaccurate proxy advisory firm recommendations.[37] Given the processes and regulatory protections that govern fund voting, described below, we do not believe the potential issues identified in the Release raise significant concerns in the fund context.

A fund's board of directors has the right and obligation to vote proxies relating to the fund's portfolio securities. A fund's directors typically delegate decisions about the voting of portfolio company proxies to the fund's investment adviser, in recognition that proxy voting is part of the investment advisory process. This delegation, importantly, is subject to the board's continuing oversight, which includes, for example, establishing fund proxy voting policies, including safeguards to help limit conflicts of interest.[38]

When fund investment advisers vote proxies on behalf of a fund, it becomes part of the investment management function and proxies must be voted in a manner consistent with their fiduciary duty to manage the fund in the best interests of the fund and its shareholders. In addition, investment advisers are subject to a specific SEC rule on proxy voting. This rule requires that an investment adviser adopt and implement policies and procedures reasonably designed to ensure that the adviser votes proxies in the best interests of its clients (including any funds for which it acts as investment adviser), and that the procedures address material conflicts that may arise between the adviser's interests and those of its clients. This rule also requires investment advisers to describe their voting policies and procedures to clients, and upon request, to provide clients with a copy of those policies and procedures.[39]

In light of these processes and protections, particularly fund advisers' expertise to evaluate information provided by proxy advisory firms, we question the need for additional regulation of proxy advisory firms. For example, we are concerned that if the Commission requires proxy advisory firms to file their voting recommendations with the Commission as proxy soliciting material, the costs of doing so ultimately would be passed on to funds and their shareholders (and other proxy advisory firm

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Congressional Requesters: Corporate Shareholder Meetings: Issues Relating to Firms that Advise Institutional Investors on Proxy Voting (June 2007).

[37] *See* Release at p. 114 ("[t]o the extent that proxy advisory firms develop, disseminate, and implement their voting recommendations without adequate accountability for informational accuracy … informed shareholder voting might likewise be impaired.").

[38] For a discussion of fund proxy voting responsibilities and the oversight function of fund boards, see IDC/ICI Proxy Voting Paper.

[39] *See* Rule 206(4)-6 under the Investment Advisers Act of 1940.

clients).[40] Because funds are fully capable of evaluating the quality of proxy advisory firms' recommendations, these costs would be incurred without any corresponding benefit.[41]

Dual Record Dates. The Release requests comment on whether the Commission should explore taking steps to accommodate issuers that are permitted under state law to use separate record dates for determining which shareholders are entitled to receive notice of an upcoming meeting and which are entitled to vote.[42]

The Institute supports revising SEC rules to permit issuers to avail themselves of these state law changes.[43] We believe that boards of directors should have the flexibility to determine whether there is merit in separating these two dates, and that the Commission's rules should accommodate—not frustrate—this determination. As the SEC considers steps to enhance the efficiency of the proxy system, it might find that the time frames in the current rules that regulate the distribution of proxy materials might be able to be shortened, facilitating the ability of issuers to use dual record dates.[44] Further, accommodating state law revisions such as those in Delaware should help address the Commission's concerns with empty voting (by allowing for a shorter time period between the record and meeting dates).

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We support the Commission's consideration of comprehensive changes to improve the proxy voting infrastructure. We believe that there are a number of steps that the Commission can take to enhance the accuracy, transparency and efficiency of the U.S. proxy system. In particular, eliminating

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[40] *See* Release at p. 122 (suggesting this as a possible way to provide more transparency in how proxy advisory firms formulate their voting recommendations).

[41] Further, as the Commission points out, proxy advisory firms already are subject to the antifraud provisions in Rule 14a-9, which should help to diminish concerns with their rendering misleading or inaccurate voting advice.

[42] While Delaware law permits a voting record date to be as late as the date of the meeting, the Commission's proxy rules require a period of time between the mailing of materials and the meeting date. Under a dual record date system, the investors to whom the materials must be mailed (that is, those investors who are entitled to vote at the meeting) would not be identified until the voting record date. As a result, issuers are limited in how close to the meeting date their voting record date can be.

[43] Eliminating the OBO/NOBO distinction, as discussed above, will make it easier for issuers to implement dual record dates by facilitating their ability to communicate with shareholders.

[44] *See, e.g.,* Rule 14c-2(b) (requiring information statements to be distributed to shareholders entitled to vote at least 20 calendar days prior to the meeting date).

the distinction between OBOs and NOBOs, thereby permitting issuers to communicate more easily with their shareholders, will go a long way toward addressing the Commission's concerns with increasing retail investor participation, assuring that institutional investors' votes are tabulated accurately through vote confirmations, under-voting, and over-voting. Moreover, permitting issuers to supply proxy cards along with the Notice when relying on the Commission's notice and access model to distribute proxy materials should serve the dual purposes of enhancing retail investor participation while reducing costs for issuers and their shareholders. Requiring all institutional investors, not just funds, to disclose how they voted their proxies will greatly increase the transparency of proxy voting. Finally, the rationalization of proxy distribution fees and the development of a more competitive marketplace will inure to the benefit of issuers and shareholders alike.

If you have any questions or need additional information, please contact me at (202) 326-5815, Dorothy Donohue at (202) 218-3563, Tami Salmon at (202) 326-5825, or Frances Stadler at (202) 326-5822.

Sincerely,

/s/

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General Counsel

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Division of Investment Management