REPORT ON THE SHAREHOLDER COMMUNICATIONS PROCESS WITH STREET NAME HOLDERS, AND THE NOBO-OBO MECHANISM

A Report by the SIFMA Proxy Working Group

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Introduction and Executive Summary

The U.S. Securities and Exchange Commission (SEC) has announced that it intends to reexamine the system through which shareholders communicate with issuers and vote their shares. An important part of the shareholder voting and communications system services millions of street name shareholders each year, who hold their shares indirectly through brokers and bank custodians.

The members of the Securities Industry and Financial Markets Association (SIFMA)[1] have a strong interest in ensuring that the shareholder communications and voting system continues to operate in a reliable, efficient and credible manner that serves the interest of their clients. Members also have an interest to ensure that important interests of their clients receive adequate protection, including the privacy rights of shareholders regarding the confidentiality of their personal information and trading decisions.

Clients benefit equally when issuers communicate with them on important matters. Members generally support enhancements to the shareholder communications system that promote such communications, so long as such enhancements do not diminish efficiency, reliability and credibility of the existing system, or impair other important interests of participants. It is accordingly the purpose of this paper to provide background and other factual information that may be helpful as members and other interested parties consider the current shareholder communications process, including commentary on the SEC's anticipated concept release.

Although the street name form of ownership has existed for nearly as long as the equity markets themselves, Congress and the SEC fostered its growth beginning in the 1970s. "Street name" holders are those shareholders who hold their shares through a broker or bank custodian. Under this form of ownership, shares are technically "owned" (through the Depository Trust and Clearing Corporation) by the broker, bank or other intermediary, so that only the broker or bank knows the identity of its client, the true beneficial holder. The other type of shareholder is a "registered" shareholder, who holds shares directly on the books of the issuer or its transfer agent.

Following the "paper crisis" of the 1960s, Congress concluded that street name ownership was a necessary foundation to the efficient functioning of the securities markets. To facilitate centralized processing, shares are "immobilized" at depositories so that transfers can be made through book entry on the records of those who deal directly with the true beneficial owners—the brokers and banks. This approach allows for the clearance and settlement of large volumes of trades without the inefficient and costly need to track and process individual paper stock certificates.

Although today some criticize modern trading systems as complex, the systems enable the processing of today's high volume of trading transactions. The simpler, certificate-based systems of the past have proved inadequate. Nor are these systems antiquated as some critics have asserted. They are in fact modern, technologically advanced and extremely efficient.

The growth of street name ownership—about 85% of all exchange-traded shares today[2]—and the efficient systems developed around it have paved the way to average daily trading volumes that now reach more than 5 billion shares, as compared to 15 million shares in 1970.[3]

The shareholder communications system, accordingly, has accepted as a given the street name form of ownership, which serves as a foundation for the efficiency of our capital markets. As street name ownership has grown, brokers have played an increasingly important role in the shareholder communications process and have a strong interest in ensuring that it operates effectively and reliably for the benefit of their clients. SEC and stock exchange rules provide a legal framework for this relationship, which among other things requires the prompt delivery of proxy materials and other communications to clients who are the beneficial owners of the shares.

Among the shareholder communication rules are the NOBO-OBO rules, which place limits on when issuers may obtain from brokers information about the beneficial holders of their shares.[4] A NOBO is a shareholder who has not objected to the disclosure of his or her name, address and share position. An OBO, or "objecting beneficial owner," is a shareholder who has objected to such disclosure, preferring that only the broker or bank have his or her personal information. Brokers are required to categorize clients as NOBOs by default, unless they have affirmatively asked to be OBOs. It is therefore not surprising that 73% of retail shareholders are NOBOs.[5]

The principal objective of the NOBO-OBO rules is to balance the interests of issuers, brokers and shareholders, both retail and institutional.[6] When the SEC first began to consider such a mechanism in 1981, the reconciliation of interests proved difficult.[7] Five more years would pass before the SEC would implement the mechanism, and this was after convening an SEC advisory committee and an NYSE advisory committee to discuss how to resolve the legitimate but differing interests of interested parties. The principal interests to be balanced against issuers' desire for more information included the following:

- Investors' interest in privacy—pointing to their desire to avoid having their name, address and share ownership information provided to parties other than their banks and brokers

- Brokers' interest in protecting their clients' privacy interests, as well as their own proprietary interests in their client affiliation information

- Operational efficiency and the allocation of related costs, including start-up costs such as software development, database maintenance and data storage

The SEC's determination to make NOBO status the default status for investors served the policy objective of promoting NOBO status. Providing investors with the opportunity to opt out of NOBO status addressed privacy concerns. The use of an intermediary to provide lists of NOBOs to issuers addressed brokers' concerns because it permitted the transmission of a client's name, address and share position without any ability to associate a particular shareholder with a particular broker.[8] It also provided data security for firms and their clients, insofar as it limited the risk that the information might "leak" into the public domain.

The intermediary structure also addressed efficiency, as the SEC stated in 1985 that "economies of scale will be realized by permitting [brokers and banks] to delegate this function to an intermediary which will maximize cost savings while minimizing burdens on brokers."[9] The NYSE would set reasonable reimbursement rates for obtaining a NOBO list, so that much of the ongoing costs would be born by issuers who made use of the information.

Insofar as the shareholder communications system has reflected a carefully considered balancing of interests, it stands to reason that it was not designed to serve fully and completely the interests or desires of any one participant. The NOBO-OBO mechanism, for instance, provides issuers with the names, contact information and share position data for many of their street name shareholders, while protecting the privacy rights of other shareholders who have opted out of such disclosure.

By design, the system served the policy objective of maximizing the number of NOBOs by imposing what the Commission described as a "non-objection standard," pursuant to which "brokers [are] required to disclose the beneficial owner information unless such owner specifically objects."[10] As explained below under "Analysis and Recommendations," evidence suggests that the current system accurately reflects the privacy preferences of retail investors, although it may be the case that it overstates somewhat the number of investors who are willing to disclose publicly their identities, contact information and share positions.

The shareholder communications system, furthermore, appears to have achieved the most important system-related goals: efficiency, reliability and credibility. In 2009, Broadridge Financial Solutions, Inc. (Broadridge) successfully processed well more than 600 billion shares, delivering more than 140 million sets of proxy materials for more than 13,000 shareholder meetings, with an average turnaround time of 2.15 days between receipt and distribution of proxy materials; Broadridge also coordinated between and among about 950 brokers and banks, and 6,500 issuers.[11] While some participants have expressed their frustration with certain aspects of the system, interested parties have reported overall satisfaction with its reliability, credibility and efficiency.[12]

Although there are other intermediaries that provide this type of service, Broadridge currently is the largest provider in the administration of the shareholder communications system and proxy voting process.[13] Broadridge's operations are subject to numerous quality control features, including but not limited to quarterly reports on vote accuracy, regulatory compliance and operational performance from an independent public accountant; a SAS 70

Type 2 review; and data security and back-up data storage at a different geographical location.

Furthermore, impartial third parties who are not participants in the system administer the process, thus avoiding actual and apparent conflicts of interest that could undermine its credibility. Periods of financial turmoil and constant threats of disruption by acts of terrorism accentuate the value of quality control, orderly processes and data security.

The current shareholder communications system likewise provides issuers with the ability to communicate with all of their street name holders efficiently and effectively. The vast majority of retail shareholders are either NOBOs or registered holders, meaning that their names appear either on a NOBO list or on the books of the issuer or its transfer agent. Accordingly, issuers today have the option of directly contacting most of their retail shareholders.[14] But more to the point: While issuers have "direct" contact information for these beneficial holders, they typically nonetheless will use an intermediary to communicate with them—such as a mail house, proxy solicitor or broker's agent. In all cases, in order to identify an issuer's shareholders at any given point in time, an agent must have the ability to aggregate, store and synthesize information from more than 950 nominees. Any alternative approach to shareholder communications also would necessarily involve intermediaries, processing time and the corresponding incurrence of costs.

While we understand that some issuers have expressed frustration that they may communicate with OBOs only through an intermediary that they have not chosen, it is important to keep in mind that issuers may reach even these shareholders expeditiously through the services of a broker's agent. Issuers may send electronic communications—frequently on a same-day basis—to the growing numbers of shareholders who have provided email information. For instance, the number of sets of proxy materials that Broadridge delivered electronically grew from 42,873 in 1998 to 21,183,845 in 2009.[15] Since that time, the number of investors agreeing to e-delivery through Broadridge has grown by 32% to 28 million as of May 1, 2010.[16]

Based on our review of the shareholder communications and voting system, we would advance the following observations and recommendations:

- All participants should support and facilitate issuers' decisions to communicate with their shareholders. While issuers can already do so under the current system, brokers should support any modifications to that system that would further enhance an issuer's ability to communicate, without undermining the credibility, reliability or efficiency of the system, or impairing important interests and reasonable expectations of other participants, including modifications related to technological improvements that could reduce costs.

- The growing acceptance of new technologies that facilitate Internet and other electronic communications between issuers and shareholders will inevitably result in more channels of communication at lower cost. Regulatory policy should further

support and encourage the willingness of shareholders to communicate electronically. While we believe that a variety of new and existing technologies will offer a number of opportunities to enhance issuer-shareholder communications, we support the establishment of e-forums sponsored by issuers to provide validated shareholder access to a substantial part of an issuer's shareholder base. We believe that such e-forums can become a universal utility for shareholder communications that will facilitate economical, instantaneous communications between issuers and their shareholders, and encourage greater retail shareholder participation in the proxy process.

- Clients look to their brokers to provide guidance, and to protect their legitimate interests, when it comes to matters affecting their accounts. While clients rely on their brokers to effect transactions in securities, they also expect that each broker will provide a consolidated and uniform source of information and support with respect to multiple securities included in a given client account. Proxy voting is an important area of support. Under the current system, an individual broker is able to facilitate proxy voting by presenting a single voting format (whether electronic or paper), and a single contact for resolution of questions and problems. Brokers accordingly are in a position to address client needs in a holistic manner, and provide an overall positive client experience.

  Brokers indeed have long played an important role in facilitating proxy voting, such as by educating clients and by responding to thousands of client inquiries each year. To further enhance that role, the Commission may consider additional measures to facilitate proxy voting (e.g., the establishment of a "client directed voting"[17] platform implemented by brokers and bank custodians).

  Alternative proposals that in varying degrees would remove brokers and their agents from the proxy communications and voting process could lead to a deterioration in clients' overall experience, undermine their legitimate expectations, and possibly cause further reductions in retail participation in proxy voting.

- Privacy is another important interest that clients look to their brokers to protect. Investors have a continuing, strong interest in privacy. Anecdotally, we understand that firms have from time to time received complaints from clients—who had defaulted to NOBO status—with respect to unwanted communications from issuers or their proxy solicitors. On the question of when a firm should be forced to disclose its clients' identity and share positions against its clients' wishes, Congress and the SEC long ago struck a balance under Section 13(d) of the Exchange Act to reflect when the public interest was sufficiently strong to outweigh investors' strong privacy interest in their personal records. Only significant shareholders that represent more than 5% of a class of equity securities listed on a national securities exchange (or otherwise registered under Section 12 of the Exchange Act) would be forced to make such disclosures. This balance reflects the significance both Congress and the SEC have long attributed to the privacy interests of investors in the United States.

- We recommend that the shareholder communications and proxy voting system continue to treat all categories of shareholders equally. A requirement that investors go through additional procedures such as opening "nominee" or other supplemental accounts in order to protect their privacy rights—or pay a fee for maintaining OBO status—would impact retail shareholders disproportionately because individual investors generally lack the monetary, staffing and other resources of institutional holders.[18] The effect could be to further erode retail shareholder participation in a proxy voting system that already suffers from a fundamental imbalance caused by low rates of retail voting.

- A re-examination of the current system should be implemented with a view to preserving high levels of security, reliability and efficiency. Among the efficiencies that the system should preserve is the savings that issuers have enjoyed as the result of the decrease in paper mailing costs based on large and growing databases and systems necessary to process email addresses and other client information (e.g., through electronic or Internet delivery, householding and specialized account processing). According to Broadridge, these issuer savings for the transactions that it administered were $413,751,465 during the 2009 proxy season, and about $800 million for the year.[19]

  Proposals to establish multiple "side-by-side" systems, along with proposals to "cascade" proxy cards to individual investors, should be carefully scrutinized from an operational and economic standpoint. Among other things, we believe that alternative solutions that create multiple additional processes, or that fragment the number of actors who have responsibility for administering the system, could undermine reliability and efficiency and result in higher costs for many issuers and their shareholders. Fragmentation of the process, furthermore, could create a confusing and unfavorable experience for clients—and in our view further erode retail shareholder proxy participation. As noted above, clients expect each broker to provide a consolidated and uniform source of information and support with respect to multiple securities included in their accounts. Finally, fragmentation of the process could likely have adverse implications for regulatory compliance as responsibilities are re-allocated among issuers and numerous additional parties, and for data security, leading to some risk of "leakage" of clients' personal information, as well as a firm's proprietary data.

- Any modifications to the current system should not compromise the security of a brokerage firm's proprietary or confidential information, such as its information on client affiliations.

- In order to preserve the credibility and integrity of the shareholder communications system—and avoid the type of actual or apparent conflicts of interest that have hampered other intermediaries in different contexts—the system should continue to be administered by impartial third parties, and accordingly should not become an issuer-directed or investor-directed process.

- We recommend that the status of clients as NOBOs or OBOs should be refreshed in a neutral manner that does not encourage clients to select any particular status. For street name holders who use a firm's website to review their account information and indicate their preferences, this objective could be accomplished by a website page or feature, or via an email message, that indicates the client's status as a NOBO or OBO, includes a neutrally worded, plain-English explanatory background about the distinction, and provides easy means to change the client's status electronically. Issuers and brokers should share the cost of this effort.

The following is a summary of the contents of this paper:

Section I summarizes the history and background related to the shareholder communications system, including the decision by Congress and the SEC to foster street name ownership, and the adaptation of workable systems for issuer-beneficial holder communications that take into account the interests of all interested parties.

Section II describes the current shareholder communications and proxy voting system, including its efficiency and reliability, and how its development reflected a careful balancing of interests among shareholders, issuers and intermediaries. This Section also describes the relationship between brokers and their clients, and the role that brokers play in protecting client interests.

Section III explains our support for sensible and balanced enhancements to the system for shareholder communications and proxy voting, but without sacrificing the important benefits and features of the current system, including its efficiency, reliability and credibility, as well as the strong interest that many shareholders have in maintaining their privacy.

I. History and Background

Congress and the SEC encouraged the growth of street name ownership because it was necessary to the efficiency of our securities markets. In doing so, the SEC established mechanisms that enabled issuers to communicate with all of their shareholders. Under these mechanisms, issuers could also learn the names, addresses and share positions of their street name shareholders who are categorized as NOBOs. Under the rules, NOBO status is the default, so that a shareholder who wishes to be considered an OBO must affirmatively request such status with his or her broker or bank.[20]

Currently, approximately 73% of retail shareholders are NOBOs.[21] For institutional holders, the proportion is nearly the reverse. Most institutional shareholders—about 71%—are OBOs, accounting for about 91% of all institutionally held shares.[22] Because a majority of shares outstanding are held by institutional investors, it stands to reason that a vast majority of those shares are held in accounts classified as OBOs.[23] Institutional shareholders have traditionally preferred OBO status for a number of reasons, including the desire to avoid

becoming subject to unwanted proxy solicitation efforts, and concern that trading strategies might be reverse engineered by third parties.

A. A National System for Clearance and Settlement

Although street name ownership has existed in one form or another likely for as long as there have been equity markets, Congress directed the SEC to promote street name ownership following the paper crisis of the 1960s in which over 100 firms failed. As the SEC explained in its own report on the crisis:

> A veritable explosion in trading volume clogged an inadequate machinery for the control and delivery of securities. Failures to deliver securities and to make payment ricocheted through the industry and firms lost control of their records and of the securities in their possession or charged for them. Operational conditions deteriorated so severely that securities markets were required to cease trading one day each week at one point, and later to limit daily trading hours.[24]

Upon its review of the underlying causes, the SEC sought authority to foster a modern approach to clearance and settlement. In 1975, Congress responded by amending the Securities Exchange Act of 1934 (Exchange Act) to add Section 17A, entitled "National System for Clearance and Settlement of Securities Transactions." Section 17A opens with the finding that:

> The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.[25]

Section 17A, among other things, provides for the registration of "clearing agencies" (defined to include depositories), and "transfer agents," each subject to regulation by the SEC. Paragraph (e) directs that "[t]he [SEC] shall use its authority under this title to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities . . . ."

Accordingly, as a leading authority observed, "[a]t least since the early 1970's, a 'certificateless society' has been a goal of federal securities regulation."[26] Today, most street name shares are held in a depository. In the United States, the Depository Trust & Clearing Corporation (DTCC) is currently the sole depository.

The same year that Congress adopted Section 17A, it directed the SEC to study street name ownership, as well as various problems and issues associated with it, including the need to ensure adequate channels of communication between issuers and street name holders. The SEC conducted a lengthy and elaborate study, referenced most commonly as the "Street Name Study." The Street Name Study found that the system worked reasonably well, including the distribution of proxy materials.[27] The SEC considered and rejected a proposed

system for direct communications between issuers and street beneficial holders, for reasons that still hold true today, that:

> the advances made in securities transaction processing since the paperwork crisis of the late 1960's depend on the use of nominee name arrangements. Wholesale registration of securities in the name of the beneficial owner would, under current practice, require that the completion of transactions be accompanied by certificate delivery and transfer of record ownership. Under such conditions and at current volume levels, the securities industry could not effect transactions in a timely manner.[28]

At approximately the same time, the SEC embarked on a multi-year effort to adopt and refine its rules to require that brokers and banks promptly forward proxy materials and other issuer-beneficial holder communications.[29] While the SEC initially lacked authority to order the prompt forwarding of such material by banks, in 1985 Congress amended the Exchange Act to provide such authority.

The resulting SEC and stock exchange rules place on brokers and banks primary regulatory responsibility for the prompt forwarding of proxy materials and other issuer communications to street name holders. Rule 14a-13 requires that issuers—in advance of a meeting of shareholders and within prescribed timeframes—request from brokers and banks information about whether they hold the issuer's shares, and, if so, the number of copies of proxy materials necessary to supply such materials to beneficial holders. The issuer must follow through by providing the requisite number of copies to each record holder. Rules 14b-1 and 14b-2 require brokers and banks, respectively, to respond to such inquiries by issuers directly or through their agents, and to disseminate proxy materials, also within prescribed timeframes.

The NYSE similarly has adopted rules that require brokers to distribute both proxy materials and other issuer-shareholder communications, to vote proxies as instructed by their clients, and to maintain corresponding records. Under its Rule 465, the exchange likewise sets "fair and reasonable rates of reimbursement" to which brokers are entitled for disseminating proxy and other materials and the generation of NOBO lists.

In the mid-1980s, the SEC commenced a process to further refine the system for street name shareholder communications to provide for direct communications between issuers and street name holders.

B. Direct Communications: The NOBO-OBO Mechanism

Prompted largely by a continuing desire of some issuers to communicate directly with their street name shareholders, in 1981 the SEC established the Advisory Committee on Shareholder Communications to examine a handful of issues, including the possibility of providing issuers with the names of street name shareholders.[30] The Advisory Committee consisted of representatives from issuers, brokers, banks and stock exchanges. It conducted 12 days of public hearings, and received numerous comment letters. The Committee

recommended that the SEC propose a new system to permit issuers to identify street name holders, but noted several obstacles, including the need to respect privacy rights, such that any new process would apply only to "consenting" beneficial owners. In particular, the Advisory Committee "believed that any standard should safeguard the privacy interests of brokerage customers, . . ."[31]

The Committee considered the desire of some issuers to distribute their own proxy materials directly or through their own agents, but rejected the idea, reportedly based on concern that an alternative system of issuer-directed distribution "could have proved unwieldy, unworkable, and unpopular."[32]

The SEC soon thereafter proposed new rules that largely tracked the Committee's recommendations. Five more years, however, would pass before the rules were implemented on January 1, 1986, due largely to the need to balance the legitimate but differing interests and objectives of participants. This was only after the NYSE convened yet another advisory committee consisting of interested parties.[33] The principal interests to be balanced against issuers' desire for direct contact information for beneficial owners included the following:

- Investors' interest in privacy—pointing to their desire to avoid having their name, address and share ownership information provided to parties other than their banks and brokers

- Brokers' interest in protecting their clients' privacy interests, as well as their own proprietary interests in their client affiliation information

- Operational efficiency, and the allocation of related costs, including start-up costs such as software development, database maintenance and data storage

Providing investors the opportunity to opt out of disclosure to issuers addressed their privacy concerns. The use of a single intermediary to synthesize and distribute NOBO lists addressed brokers' concerns because it permitted the transmission of a client's name, address and share position without any ability to associate the shareholder with a particular broker. In the SEC's view, the intermediary structure also addressed concerns about efficiency, as the agency stated in 1985 that "economies of scale will be realized permitting [brokers and banks] to delegate this function to an intermediary which will maximize cost savings while minimizing burdens on brokers."[34]

When the SEC adopted its new rules to govern the NOBO-OBO mechanism, following the advice of the advisory committee convened by the NYSE, it encouraged the consolidation of responsibility for administering NOBO lists into a single intermediary.[35] It did so primarily because standardization and centralized processing in its view would minimize start-up costs and result in efficiencies from economies of scale, and because it provided brokers with some measure of assurance that their client affiliations would be protected.

The NOBO-OBO mechanism operates in the following manner:

1. When a broker opens an account with a new client, the client must elect whether he or she wishes to be categorized as a NOBO or as an OBO. Unless the client affirmatively indicates that he or she wishes to be an OBO, the client is classified as a NOBO by default. The client may, however, at any time request to be switched from one category to the other, either orally or in writing. Nothing in the rule precludes a broker from refreshing the decision with the client from time to time, or from educating the client on the implications of his or her election.

2. An issuer may at any time request a copy of a list of NOBOs who have positions in its shares. The list provides a client's name, address and share position. The issuer may contact the listed shareholders directly—generally by mail or telephone—or through the services of a proxy solicitor or other agent.

3. Following the conclusions of the Advisory Committee on Shareholder Communications, the rules preclude issuers from sending proxy materials (with the exception of the annual report) to NOBOs.

II. The Current Shareholder Communications System

A. The Role of Brokers and Their Agents

When it comes to matters affecting their accounts, clients look to their brokers to provide guidance, to protect their legitimate interests, and to provide a consolidated and uniform source of information and support, including with respect to proxy voting. Many of the most important aspects of this role are well understood, but others are not. Brokers protect shareholder interests including privacy; they represent a consistent source of investor education about the proxy voting system; and they provide an efficient, reliable and credible platform for shareholder communications that has been finely tuned over decades of operation.

By dealing primarily through their financial intermediaries for shareholder communications-related services, investors benefit from a consistent and user-friendly service for every security in a portfolio. The current system, administered by brokers and banks, is "portfolio oriented," in the sense that clients interact with their broker or bank in managing the voting of all positions in their portfolio. An alternative issuer-directed model would be "position oriented," in the sense that clients could be forced to interact with a variety of different actors, differing formats and different voting options, in attempting to vote their shares, depending on the security being voted. Any re-examination of the current system should take into account investors' interest in a preserving an efficient, user-friendly service experience.

Typically under tight timeframes for prompt delivery, brokers and their agents coordinate and distribute more than 140 million sets of proxy materials each year for more than 13,000 annual meetings; they process shareholders' voting instructions; they maintain sizable "shareholder preference" databases containing email addresses and consents to enable

electronic delivery, householding and "notice and access"; and they maintain platforms for electronic voting for both retail and institutional holders. In addition, brokers and their agents coordinate between issuers and individual brokers and banks to ensure that sufficient proxy materials are available for delivery.

Each brokerage firm individually plays an important and substantive role in facilitating proxy voting by attending to clients' questions, needs and interests. Among other things, brokers have historically been a consistent source of investor education about the proxy process, and the federal proxy rules have long recognized their role in responding to client questions.[36] Brokers and their proxy operations groups field thousands of investor questions each year. In addition, Broadridge has stated that it responds to thousands of inquiries that it receives directly each year, as undoubtedly do other brokers' agents.

Often through proxy services departments, brokers provide a myriad of other services, such as verifying and updating clients' personal information; coordination of external voting agents/investment managers; maintenance of other records such as those relating to NOBO-OBO status; resolution of failing trades prior to record date; management of returned mail, including proxy materials; and obtaining or provision of legal proxies for clients who wish to attend a shareholders meeting. Brokers furthermore collect and maintain databases reflecting the preferences of clients who have chosen to follow the voting recommendations of advisors.

Brokers play an important role in protecting their clients' interest in privacy both as a traditional part of the client relationship, as well as under requirements of federal regulation and SEC rules. Title V of the Gramm Leach Bliley Act provides that "[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." [37]

B. Reliability, Efficiency and Credibility

The shareholder communications system, furthermore, appears to have achieved the most important system-related goals: efficiency, reliability and credibility.[38] In 2009, the largest intermediary providing proxy services successfully processed hundreds of billions of shares and more than 264 million shareholder positions, for over 13,000 shareholders meetings, with an average turnaround time of 2.15 days between receipt and distribution of proxy materials; it also coordinated between and among about 950 brokers and banks, and 6,500 issuers.[39] While some participants have expressed their frustration with aspects of the system, interested parties have reported overall satisfaction with its reliability, credibility and efficiency .[40]

After speaking with numerous investors and other parties, the Proxy Working Group established by the New York Stock Exchange echoed in its June 5, 2006, Report the view that the process "is viewed by the institutional community as impartial, reliable, and efficiently administered." The Report further stated that "[a]ccording to many parties . . . the current proxy communication system is generally efficient and accurate."[41]

The Proxy Voting Review Committee, a group that had previously studied the proxy voting process four years earlier—and similarly included representatives from all interested parties—in its report "acknowledged the extraordinary reliability and accuracy provided by ADP [the predecessor to Broadridge] in servicing this market," and predicted that "[a]ccuracy and reliability levels will continue at near flawless levels."[42]

The modern shareholder communications process has in fact over several decades maintained a high level of credibility among all of its participants. One principal factor has been the system's administration by parties who are impartial to the principal players, issuers and investors. The proxy process, accordingly, has generally avoided becoming beset by allegations of actual or apparent conflicts of interest that have impacted intermediaries in other contexts.

One institutional investor wrote the following in response to an SEC rulemaking petition that urged the agency to adopt an issuer-directed model for shareholder communications:

> Under the present system, ADP [now Broadridge] acts as a neutral third party intermediary between shareholders and companies. The [rulemaking] petition will instead give companies control over the ability of shareholders to communicate with each other. In addition, the . . . petition will transfer responsibility for collecting voting instructions to companies, thereby increasing the risk of election fraud.[43]

The underlying framework upon which the shareholder communications and proxy voting system must operate was designed for a different purpose—the secure and efficient execution and settlement of securities transactions. Nonetheless, in facilitating shareholder communications and proxy voting, the system has over several decades attained a notable level of efficiency and reliability.

Broadridge reports that it has invested more than $1 billion over the past 10 years, with the majority of those investments in the shareholder communications portion of its business. This figure does not include investments made by other intermediaries that provide proxy distribution and shareholder communications services. More efficient and technologically advanced processes result in cost savings for issuers and other participants, even while they require additional upfront and other costs incurred by those who implement the improvements.

Over time, brokers agents have eliminated some of the key cost factors by collecting growing databases containing email addresses for investors who receive proxy materials and other communications via electronic delivery. The total annual savings to issuers was approximately $800 million in 2009, when coupled with efficiencies resulting from "householding," where the issuer may send one set of proxy materials to a single household that includes multiple shareholders, and specialized account processing, where an issuer may limit distribution to an account manager.[44]

Electronic communications and other means of reducing paper mailings result in significant cost savings because printing and postage costs contribute significantly to the overall cost of

shareholder communications. The average cost of printing a full set of proxy materials is about $4.32 per unit, based on a 2008 survey.[45] Postage is the second largest component. Postage for a full set of proxy materials is about $0.97 per set.[46] Thus, the elimination of paper mailings saves issuers about $5.29 per set of proxy materials.

To provide an incentive to brokers and their agents to capture savings resulting from the elimination of paper mailings, in 1997 the NYSE incorporated an incentive fee into applicable reimbursement rates. This "suppression incentive" fee ranges from $0.25 to $0.50, depending on the number of accounts holding the issuer's shares.[47] This incentive fee was established based on the premise that an issuer would prefer to spend up to $0.50 in order to save about $5.29, for net savings of about $4.79 per mailing.[48] The fee would help to defray costs incurred by brokers and their agents in adapting new technologies and maintaining databases, web tools for client interaction and outreach, and other systems that would benefit primarily issuers and their shareholders.

Even today, there are significant costs associated with obtaining email addresses and consents to electronic delivery in the first instance, and ensuring that they remain current. Efforts to obtain email addresses and consents include educational, promotional, and incentive campaigns. While the number of shareholders who have consented to electronic delivery is significant and growing, it still represents only about one-third of street name holders.[49]

The task, furthermore, of maintaining systems and databases enabling the electronic delivery of proxy materials and other communications is an ongoing effort. These include web-based locations where beneficial holders can sign up for (or deregister from) electronic delivery; maintenance of related databases; coordination with the issuer to, among other things, confirm the URL at which the materials will be available; customization of email notices; quality controls designed to ensure that emails are distributed; systems designed to ensure that the emails are not blocked by spam filters or other obstacles; and systems to address and in some cases overcome failed email deliveries. The databases containing the emails, furthermore, must be secure, backed up in the event of data loss, and should be resilient (such as maintenance of redundant data centers).

Alternative electronic communication channels are in their infancy, but should continue to multiply and grow—just as electronic delivery of proxy materials grew exponentially in popularity in only a few short years. For example, under new rules permitting the establishment of electronic shareholder forums, issuers may establish web-based forums that facilitate orderly communications between and among issuers and their shareholders.

Due to technological and other improvements, the shareholder communications system is continuously growing in its capabilities. One example is its potential to provide vote confirmations to all shareholders. While some have suggested that vote confirmations are only possible if proxy cards are "cascaded" down to beneficial holders, such confirmations are in fact possible today under the current system. For example, when Broadridge serves as the tabulator in connection with the proxy vote, it can issue a confirmation to an institutional

investor using its ProxyEdge® platform that the investor's vote has been included in the vote. Retail investors have not generally sought vote confirmations. However, if demand for this service existed, Broadridge has stated that it could also provide such confirmations to retail investors. That is, it could confirm that the total vote submitted by a broker is included in the overall voting results, and that an individual investor's vote is included in that broker's vote. When Broadridge is not the tabulator, it can provide the same information so long as the tabulator confirms that the vote Broadridge has sent on behalf of brokers is included in the vote.

C. Issuer's Ability to Communicate with Retail Shareholders

Issuers should be encouraged to communicate with their shareholders, and we support enhancements that would make such communications easier without impairing the integrity of the system or the interests of other participants. We believe, however, that issuers can already communicate efficiently and reliably with all of their shareholders, including street name holders. Most issuers should also have direct contact information for a significant number—if not a vast majority—of their retail holders who are either registered holders or NOBOs. Approximately 15% of all exchange-traded shares are held by registered holders, and about 73% of all street name holders are NOBOs.[50]

The "Plumbing" of Issuer-Shareholder Communications

Some issuers have expressed a desire to communicate directly with all of their retail shareholders. At least in theory, if an issuer has a shareholder's name and address it could call or write the shareholder directly. As noted above, most issuers should have such contact information for a significant number of their retail holders who are either registered holders or street name holders categorized as NOBOs. As for the balance of street name holders who are OBOs, issuers may communicate through intermediaries.

As a practical matter, it is unclear that such indirect communications through intermediaries involve any more process, complexity or cost than direct communications, since issuers typically use intermediaries such as mail houses, transfer agents or proxy solicitors for direct communications as well. In either case, if an issuer wishes to deliver a communication, it must obtain an updated list of its shareholders, requiring one or more intermediaries to collect, aggregate and synthesize the information, and then deliver it to the issuer or its agent in a timely fashion. Thus, the debate over direct vs. indirect communications boils down to who chooses the intermediary used to deliver the communication. If the issuer has direct contact information for a shareholder—as in the case of a NOBO—it can hire its own distribution agent for informal, interim communications. If it does not have direct contact information—as in the case of an OBO—or if it is distributing proxy materials, it must use an intermediary that is chosen by the broker.

A system in which each issuer appoints its own distribution agent could reverse efficiencies developed in the current system that have resulted in significant cost savings for issuers and their shareholders. Such efficiencies include electronic communications, which cut down on some of the significant expenses of shareholder communications, e.g., printing and postage

costs, as explained more fully above under "Reliability, Efficiency and Credibility." Because of their role in making proxy distributions, brokers' intermediaries have generally collected consents to electronic delivery of proxy materials—which permits them to send a good proportion of a distribution electronically—as well as databases reflecting when a single distribution may be made for the benefit of numerous holders (e.g., when it is permissible to send one set of materials to a single household). Under alternative scenarios, it is not clear that issuers or their agents would be able to utilize the information in these databases, and electronic deliveries, householding and the availability of sources of significant savings could be reduced.

It is, in all events, difficult to imagine how an efficient or coherent system could be designed that would involve each of the thousands of public companies in the United States hiring a different distribution agent and separately negotiating with—and coordinating among—between 100 and 500 bank or broker nominees holding shares on behalf of their street name shareholders.

Under the current system, distributions made through a broker's intermediary are at "reasonable reimbursement" rates set by the NYSE, which have been periodically studied and reviewed by various advisory panels consisting of interested parties. The NYSE reviewed and revised the rates in 1986, and then again between 1997 and 2002.

In 1997, the NYSE proposed a substantial reduction in the reimbursement rates, but also a new nominee coordination fee, and the "suppression incentive" fee designed to provide an incentive to brokers and their agents to eliminate paper shareholder communications.[51] The NYSE proposed that the new fee structure would be applied during a one-year pilot program. Following that one-year pilot, the exchange would retain a certified public accounting firm to audit the results "by examining the costs and experiences of the issuers, NYSE member organizations and intermediaries during the pilot," including the results of operations of ADP's [now Broadridge's] shareholder communications group."[52]

The NYSE extended the duration of the pilot several times, during which it adjusted the fee structure in a few respects without modifying the overall approach. During this period, Price Waterhouse LLP conducted two audits at the behest of the NYSE. The SEC reported that its staff also conducted an "in-depth" review and analysis, including interviews with proxy industry participants, and reviewed comment letters submitted by interested parties.[53] The SEC encouraged the formation of an industry committee to review the proposed rate structure, and representatives of issuers, brokers, investors and other interests formed the Proxy Voting Review Committee in 2001. The committee concluded that the proposed fee structure was "fair and reasonable," and recommended its permanent approval.

In recommending approval of the proposed fee structure, the Proxy Voting Review Committee recognized that critical importance of preserving the reliability of the current shareholder communications system.[54] In this connection, it noted that "[i]nstitutions will not support any reduction/deterioration in service levels and capabilities from what exists today." It noted that "[o]ther fee structures reviewed by the committee would cause

significant controversy without improving the current cost and reliability benefits." The SEC approved the new rates in 2002.[55]

SEC Rules Provide Wide Latitude for Issuer-Shareholder Communications

As already noted, issuers can communicate with all of their shareholders, NOBOs, OBOs and registered holders. The SEC's rules on shareholder communications, furthermore, provide wide latitude for issuer-shareholder communications. These rules govern the content of an issuer's proxy communications with its shareholders. They restrict such communications only to prevent the use of materially incomplete and/or inaccurate statements.

Because the communications rules focus on communications that influence proxy voting, they only apply to "solicitations." As defined in the rules, a "solicitation" is any communication that requests a shareholder to vote in favor or against a matter, or to abstain from voting on a matter.

Many communications simply do not bear on a current or anticipated proxy vote, and they accordingly are not solicitations. Hence, their content is not regulated under the proxy rules. A letter from the CEO, for instance, discussing the current economic climate and its impact on the company's business would not ordinarily be a solicitation. However, a letter urging shareholders to support an anticipated company-sponsored "say-on-pay" proposal ordinarily would be a solicitation because it seeks to influence the outcome of an anticipated vote.

Even if a communication is a solicitation, issuers have wide latitude under the shareholder communications rules. That is because an exemption allows issuers to communicate with shareholders on such matters.

In 1999, the SEC amended Rule 14a-12 to permit issuers to communicate with their shareholders orally or in writing about a matter that the company expects to be presented at the next annual meeting.[56] This is the exemption upon which issuers often rely today in communicating with their large institutional holders. In most cases, the company relying on the exemption must file with the SEC any written material that it uses, and include some legends.

The Distribution of Proxy Materials

In contrast to all other types of communications, issuers may not as a practical matter directly distribute proxy materials to any of their shareholders, including NOBOs. Proxy materials (with the exception of the annual report) must be distributed through brokers, banks and their agents. However, proxy materials are required to be distributed to shareholders, and have the same format and substance regardless of the identity of the distributing intermediary. Accordingly, the question of whether or not issuers should be permitted to distribute proxy materials is purely a logistical one, and does not implicate the scope, substance or ease of issuer-shareholder communications.

In limiting the distribution of proxy materials to brokers and their agents, the SEC acted on advice of its Advisory Committee on Shareholder Communications, which reportedly was concerned that an issuer-directed distribution model "could have proved unwieldy, unworkable, and unpopular."[57] Under a different approach, some shareholders would have received proxy materials from the broker or its agent, and some from the issuer or its agent. The SEC likely wanted to avoid the potential confusion to investors and overall disorderly process that could ensue if each of more than 6,000 issuers and their various agents—in addition to more than 900 brokers and banks—could distribute the materials.

The current system, administered by brokers and banks, is "portfolio oriented," in the sense that clients interact with their broker or bank in managing the voting of all positions in their portfolio. An issuer-directed model would be "position oriented," in the sense that clients would have to interact with a variety of different actors in attempting to vote their shares.

A single investor, for instance, who holds a portfolio of 15 securities with Broker ABC, might receive voter instruction forms in up to 15 different formats from up to the same number of distributing agents. If the investor had a question about proxy voting or sought a vote confirmation, he or she would have to determine which agent had sent the materials. Even more significantly from the point of view of efficiency, it is unclear whether all of the agents would provide electronic or telephone voting as an option; insofar as some of them did offer such alternative voting, the investor would have to vote different positions on different platforms. This assumes, of course, that the client will have provided each of the agents appropriate consents to electronic delivery, coupled with current email address information.

The appeal of electronic voting, as a practical matter, including the cost savings that accrue to issuers, could diminish.[58] Along the same lines, there is no requirement that intermediaries provide many of the services that are currently available. For instance, intermediaries may not accommodate issuers who wish to make use of the "notice and access" approach to the delivery of proxy materials.

Another consequence of such an approach could be the fragmentation of regulatory responsibility, and the potential breakdown of regulatory controls. Under current rules, issuers on the one hand, and brokers and bank custodians on the other, have clearly defined roles in the proxy distribution and voting process. Within prescribed timeframes, issuers must inquire of intermediaries whether they hold their shares, and if so, on behalf of how many accounts. Brokers and banks in turn must—also within prescribed timeframes—deliver the proxy materials and process corresponding vote instructions. Additional participants in the process necessarily would have to assume these regulatory responsibilities to the extent of their involvement.

In all events, any evaluation of the cost, efficiency and overall desirability of alternative systems should take into account whether such distribution agents would implement additional measures that facilitate the proxy distribution and voting system. These include quality controls and compliance programs; a process to estimate materials requirements; appropriate voting media; multiple distribution and voting methods to the extent offered; an

Internet delivery (notice and access) service to the extent offered; daily vote reporting updates; customer service for investor inquiries and problems; databases containing appropriate consents and other client information; and a means to coordinate with other agents in order to report all street name votes at the close of the polls.

III. Analysis and Recommendations

Congress and the SEC fostered the growth of street name share ownership out of necessity for the orderly and efficient operation of the securities markets in the United States. Street name ownership made possible a centralized system for the processing of securities transactions such that transfers could be made through book entry on the records of the firms that deal directly with the ultimate beneficial owners. The system is neither overly complex nor antiquated—as some have asserted—but modern and extremely efficient.

Any complexity in the shareholder communications system has been a natural result of the need for that system to "piggyback" on the systems developed for a different purpose—the efficient clearance and settlement of securities transactions. It is important to keep in mind, however, that any such complexity is likely to be reduced and possibly even erased over time as electronic communications grow in scope and functionality. A communication sent by email is not only significantly less costly than a paper communication, but also in many cases can be delivered on a same-day basis. In addition to email, other electronic means of communication are only in their infancy but also likely to grow. Electronic shareholder forums, for instance, can permit communications between and among the issuer and shareholders in a reliable, efficient and controlled manner.

Under a system of street name ownership, issuers do not have direct contact information for all beneficial shareholders. Issuers and their transfer agents do have such information for registered shareholders, which make up about 15% of all exchange-traded shares. As for street name holders, the SEC struck a balance in the 1980s based on principles that are still true today. The agency established a system for providing shareholder contact information to issuers, but it permitted street name holders to protect their privacy interests by objecting to such disclosure. The NOBO-OBO mechanism served the policy objective of encouraging disclosure of shareholder contact information by making NOBO status the default. However, a shareholder could ask to become an OBO.

The privacy interest of retail investors in their names, addresses and trading histories has not diminished since the 1980s. If anything, it likely has only intensified with growing general societal interest in privacy and data protection. This is evidenced by the adoption of the "do not call" list earlier in the decade, legislative proposals on data protection, and most recently, the controversy over privacy on Facebook.[59] The suggestion that investors no longer care about the privacy of the personal information maintained by brokerage firms and bank custodians is contrary in our view to clear societal trends that suggest that investors likely care more about their privacy than they did 30 years ago.

On the question of when information regarding a shareholder's identity and share positions should be <u>required</u> to become a matter of public record, Congress and the SEC long ago

struck a different balance under Section 13(d) of the Exchange Act, requiring disclosure only after acquisition of a significant block of an issuer's voting securities.

Shareholders classified as OBOs furthermore are generally active investors, or at least no less so than NOBOs. The premise of some critics that NOBOs are more likely to become active investors and vote proxies is inconsistent with the data. Among all OBOs, 30% of accounts (representing 76% of the shares held by OBOs) voted in calendar year 2009. Among NOBOs, 16% of accounts (representing 33% of shares held by NOBOs) voted that year. Among individual accounts, 17% of OBO accounts voted, representing 34% of the shares, while 15% of individual NOBOs voted, representing 25% of the shares.[60]

Most OBOs may well have chosen that classification for good reason. The average share position attributed to individual OBOs is significantly higher than those held by individual NOBOs.[61] A shareholder who holds a more sizable position in an issuer's securities is more likely to be contacted by an issuer or its solicitor—absent the privacy protections permitted under current rules.

The NYSE Proxy Working Group commissioned the 2006 "Investor Attitudes Study" to survey a relatively small group of 579 individual shareholders.[62] According to those surveyed, 36% of shareholders indicated that they would prefer OBO status, and 64% said that they would elect NOBO status. Shareholders in the former group cited privacy concerns, a desire to avoid solicitations, and security/fraud issues. Importantly, this result is roughly consistent with the actual proportion of individual shareholders who have requested OBO status, which is 27%, and the disparity in the numbers suggests that the current system perhaps somewhat understates the total number of shareholders who would elect to be OBOs if asked again today.

Some have taken the results of the 2006 survey which purports to reflect retail shareholder views—and made some comparisons that we believe are not meaningful. For example, one group recently published statistics comparing the number of individual investors that the survey suggested would prefer OBO status (36%) to the total percentage of shares held by both institutional and individual OBOs, reported to be in the 70% to 80% range.[63] This comparison is not meaningful because the 36% number and the 70% to 80% number do not reflect comparable data. The 2006 study provides the percentage of *individuals* polled who would choose OBO status. It is compared to the second statistic, which reflects the percentage of *shares* held by all OBOs, both individual *and institutional* investors.[64] To be meaningful, the second number—which is compared to the 36% of individual investors who the study suggests would elect privacy—should be the percentage of individual accounts actually classified as OBOs today (27%).

Thus, in any review of the shareholder communications process, investors' interest in privacy should receive as much weight today as it did in the 1980s. Other interests that the SEC balanced in the 1980s are also equally valid today. The agency, for instance, encouraged the use of a single intermediary to compile and synthesize information about NOBOs in order to

protect brokers' proprietary interest in client lists, among other reasons. The use of a multiplicity of intermediaries could have resulted in the "leakage" of such information.

Just as the shareholder communications system was formed following a balancing of interests, so should any modifications to that system take into account the legitimate interests of each participant. In reviewing the current system for shareholder communications and proxy voting, we suggest that parties consider the following recommendations:

1. Preserve the broker's role which has historically facilitated the proxy process: Historically, brokers have facilitated proxy voting, and served as a consistent source of investor education about the process. The SEC and others have recently emphasized the need for more investor education about proxy voting, and for further measures to facilitate retail shareholder voting. Modifications to the current system that diminish or eliminate the broker's role would undermine those goals. Similarly, insofar as brokers carry primary regulatory responsibility for the administration of the system, diminishing their role would inevitably have the effect of diffusing that responsibility among other participants.

   Clients look to their brokers to provide guidance and support, and to protect their legitimate interests, when it comes to matters affecting their accounts. Accounts typically contain multiple securities, and clients expect that brokers will provide a consolidated and uniform source of related information and support, including with respect to proxy voting. Under the current system, an individual broker and its agent is able to facilitate its clients proxy voting by presenting a single voting format (whether electronic or paper), and by offering a single contact for resolution of questions and problems. To further enhance that role, the Commission may consider additional measures to facilitate proxy voting (e.g., the establishment of a "client directed voting" platform implemented by brokers and bank custodians).

   Alternative proposals that in varying degrees would remove brokers and their agents from the proxy communications and voting process could lead to a deterioration in clients' overall experience, undermine their legitimate expectations, and possibly cause further reductions in retail participation in proxy voting.

2. Protect privacy interests. Investors have a continuing, strong interest in privacy, and brokers have an equal interest in asserting that interest on behalf of their clients. We understand that firms have from time to time received complaints from clients about unwanted communications from issuers or their proxy solicitors. On the question of when a firm should be forced to disclose its client's identity and shares, Congress and the SEC long ago created a high hurdle under Section 13(d) of the Exchange Act before the public interest was sufficiently strong to outweigh investors' strong privacy interest in their personal records. This balance reflects the significance both Congress and the SEC have long attributed to the privacy interests of investors in the United States.

3. Respect the privacy interests of all shareholder constituencies equally. All shareholders, whether retail or institutional, should enjoy the same opportunity to protect the privacy of their personal information and trading histories. We do not support an approach that would treat all shareholders the same only on the surface, while in substance depriving retail shareholders of their privacy rights. A requirement that shareholders pay a fee to maintain the privacy of their accounts, or go through elaborate procedures, may likely have such a disproportionate impact.

4. Preserve reliability and efficiency. As it has developed over several decades, the current system has demonstrated a high degree of reliability and efficiency. Alternative approaches should not undermine those qualities. This means that there should be only one system for shareholder communications and proxy voting, and that lines of regulatory responsibility under that system should remain clear and consistent. Among the efficiencies that the system should preserve is the savings that issuers have enjoyed as the result of the avoidance of paper mailing costs based on large and growing databases and related systems that compile and process email addresses and other client information (e.g., through electronic or Internet delivery, householding and specialized account processing).

   Alternative solutions that create multiple additional processes, or that fragment the number of actors who have responsibility for administering the system, could undermine reliability and efficiency and result in higher costs for many issuers and their shareholders. Insofar as issuers become responsible for proxy delivery and voting, they would incur new costs associated with regulatory compliance that currently are born by brokers and bank custodians. Fragmentation of the process, furthermore, could create a confusing and unfavorable experience for our clients—and in our view further erode retail shareholder proxy participation. Finally, it could likely have adverse implications for regulatory compliance as responsibilities are reallocated among issuers and numerous additional parties, and for data security, leading to some risk of "leakage" of clients' personal information and a firm's proprietary data.

   In particular, development of a second, "side-by-side" proxy voting system would result in confusion of processes, an almost certain inefficiency. If the reliability and efficiency of a new alternative system cannot be demonstrated to a high degree of certitude, it should not be established as a substitute to the current system, or as a "side-by-side" add-on to the current system. Along the same lines, a system where regulatory responsibility cannot be clearly demarcated could increase compliance costs while undermining compliance programs.

   A system that would "cascade" proxy cards and ultimate voting authority to all street name holders could similarly diffuse responsibility for prompt delivery of proxy materials, and for receipt and registration of completed proxies. This could result in confusion as intermediaries sought to manage the distribution of millions of proxy cards worldwide, and process voting returns. Such a process, furthermore, could reverse efficiencies that have been attained through electronic and Internet voting,

householding and specialized account processing, along with the corresponding significant savings that issuers have enjoyed.

5. Maintain data security. Any modifications to the current system should not compromise the security of a firm's other proprietary or confidential information, such as its information on client affiliations. An approach that fragments the number of actors in the system as a practical matter likely would also undermine the data security features of the current system, leading to inevitable "leakage" of clients' personal information and a firm's proprietary data.

6. Process should be administered by neutral parties. In order to protect the credibility of the shareholder communications and proxy voting system, the system should continue to be administered by neutral parties. The active involvement of interested parties in other systems has inevitably led to apparent or actual conflicts of interest that can be difficult to manage. Because it has been administered by neutral parties, the shareholder communications and proxy voting system has enjoyed a high degree of credibility from all participants.

7. Refresh NOBO/OBO status. We recommend that firms consider refreshing the status of its clients as NOBOs or OBOs in a neutral manner that does not encourage clients to select any particular status. For street name holders who use a firm's website to review their account information and indicate their preferences, this objective can be accomplished by a website page or feature, or via an email message, that indicates the client's status as a NOBO or OBO. It should include neutrally worded explanatory background about the distinction, and provide easy means to change a client's election electronically. Issuers and brokers should share the cost of this effort.

8. Accelerate the development of electronic communications. As noted above, the development of electronic communications has provided faster and cheaper options for issuers to communicate with shareholders, including their street name holders. Email communications eliminate postage and printing costs, which make up a significant part of the cost of shareholder communications. Regardless of the presence of intermediaries, electronic communications can be made quickly, often on a same-day basis. We believe that the growth of electronic communications will ultimately overcome any awkwardness that the modern approach to clearance and settlement (including the street name form of ownership) brings to the system for shareholder communications.

   In particular, while recognizing that other technological avenues should also be pursued, we support the establishment of e-forums sponsored by issuers to provide validated shareholder access to a substantial part of an issuer's shareholder base. In 2008, the SEC provided guidance for the establishment of such forums, and encouraged "shareholders, companies, or third parties acting on behalf of a shareholder or company, to take advantage of electronic shareholder forums to facilitate better communication among shareholders and between shareholders and

companies."[65] We believe that such e-forums can become a universal utility for shareholder communications that would facilitate economical, instantaneous communications between issuers and their shareholders, and encourage greater retail shareholder participation in the proxy process.

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

[2] Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors, Exchange Act Release No. 60215 (July 1, 2009), at 4, note 11.

[3] SIFMA Fact Book 2009, at 54.

[4] *See* Exchange Act Rules 14a-13, 14b-1, and 14b-2.

[5] According to Broadridge Financial Services, Inc. (Broadridge), for calendar year 2009. According to Broadridge, which administers the NOBO-OBO process, 27% of individual street name accounts are classified as OBOs.

[6] *See* "Facilitating Shareholder Communications Provisions," Securities Exchange Act Release No. 13408 (July 28, 1983) ("First Communications Release"); "Facilitating Shareholder Communications," Securities Exchange Act Release No. 14755 (Oct. 15, 1985) ("Second Communications Release").

[7] *See Id.* See also, J. Robert Brown, "The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?," 13 J. Corp. L 683, at 734-740 (1987-88) ("The Brown Article); and Request for Comments on Issues to be Addressed by Advisory Committee on Shareholder Communications, Exchange Act Release No. 18195 (Oct. 21, 1981).

[8] *See, e.g.*, The Brown Article, at 737 ("The Intermediary not only was expected to simplify the system, but also to help maintain confidentiality by deleting the name of the broker supplying the names.").

[9] Second Communications Release, at 3, and 5-6.

[10] Second Communications Release, at 5-6.

[11] 2009 Proxy Season: Key Statistics & Performance Ratings, published by Broadridge. Other data also provided by Broadridge. According to Broadridge, issuers typically have to coordinate with between 100 and 500 nominees in connection with their annual meeting, depending on the size of their shareholder base. The average number of nominees is 100, but that includes the smallest issuers.

[12] *See, e.g.*, Report and Recommendations of the Proxy Working Group of the New York Stock Exchange, June 5, 2006 ["Report of the NYSE Proxy Working Group"], at 25; Proxy Voting Review Committee; Report To The Securities And Exchange Commission Executive Summary, Nov. 28, 2001 ["PVRC Report"]; and The NOBO-OBO Distinction in Beneficial Ownership: Implications for Shareowner Communications and Voting (Feb. 18, 2010), by Alan L. Beller and Janet L. Fisher, assisted by Rebecca M. Tabb, Cleary Gottlieb Steen & Hamilton LLP, on behalf of the Counsel of Institutional Investors ["CII White Paper"], at 13 & 21.

[13] Other providers include Mediant Communications, Inc., ProxyTrust, and INVeSHARE.

[14] Broadridge reports that among equity issuers (excluding mutual funds) few lists are requested for communications purposes. From April 1, 2009, through March 31, 2010, it processed 7,047 requests for NOBO lists. Of these, according to Broadridge 6,246 were for "information only" purposes. Of the 801 requests for distribution of interim communications, only 20 had been submitted for by companies with more than 100,000 street name holders.

[15] Data provided by Broadridge.

[16] Data provided by Broadridge. These numbers reflect U.S. beneficial ownership only, and do not include investors who have access to proxy materials over the Internet under a notice and access model.

[17] Under "client directed voting," clients would be invited to provide their brokers and bank custodians with standing instructions on how they wish to have their shares voted, but would retain the right to override those instructions at any time.

[18] In the context of retail investors, it is unclear what requiring retail investors to open "nominee accounts" would entail, since in substance street name holders already own their shares through nominees—the brokers and bank custodians. Presumably, however, retail investors would be required to go through additional paperwork to open additional separate accounts with the same intermediary, possibly incurring additional expense.

[19] Data provided by Broadridge, including 2009 Proxy Season: Key Statistics & Performance Ratings.

[20] *See* note 10, supra, and accompanying text.

[21] Data provided by Broadridge.

[22] *Id.*

[23] *Id.*

[24] The Brown Article, at 720, quoting the Securities & Exchange Commission, Study on Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. 231, 92nd Cong., 1st Sess. (1971), at 5-6.

[25] Securities Exchange Act of 1934, as amended, Section 17A.

[26] Seligman and Loss, Securities Regulation, (Aspen 2003), 3rd Ed. ,Volume 7, 2976.

[27] Final Report of the Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities (Dec. 3, 1976), at 42-43.

[28] *Id.* at 37.

[29] The Brown Article, at 725-745.

[30] *See* Advisory Committee on Shareholder Communications Establishment and Meeting, Exchange Act Release No. 17707 (Arpil 10, 1981); Request for Comments on Issues to be Addressed by Advisory Committee on Shareholder Communications, Exchange Act Release No. 18195 (Oct. 21, 1981).

[31] First Communications Release, at 5.

[32] The Brown Article, at 736.

[33] *See* Facilitating Shareholder Communications, Exchange Act Release No. 21901 (Mar. 28, 1985), at 2-3.

[34] Second Communications Release, at 3.

[35] *Id.* That intermediary was the Independent Election Corporation of America, or IECA, which has since been acquired by Broadridge.

[36] *See* Rule 14a-2(b)(3).

[37] Gramm-Leach-Bliley Act, 15 U.S.C, Subchapter I, § 6801 (Disclosure of Nonpublic Personal Information).

[38] There is further evidence that this high level of reliability has been maintained to date. For instance, Broadridge has hired Deloitte & Touche LLP to evaluate its performance on various criteria each year. These criteria are established, reviewed and updated periodically by an independent steering committee, which includes representatives of the broker, bank, issuer and investor communities. The criteria for 2009 included such factors as performance in distributing paper and electronic proxy materials, vote processing and electronic tabulation. Broadridge received an average score of 7.94 out of a possible 8.0 over a total of 7 performance criteria in 2009.2009 Proxy Season: Key Statistics & Performance Ratings, Broadridge Financial Solutions, Inc.

[39] *Id.*

[40] *See* note 12, supra.

[41] NYSE Proxy Working Group Report, at 25.

[42] PVRC Report, at 3.

[43] Letter from Barry McAnarney, Executive Director, Central Laborers' Pension, Welfare & Annuity Funds, dated Dec. 13, 2005, to Jonathan Katz, Secretary, Securities Exchange Commission, referencing file number 4-493 (BRT Petition for Rulemaking on Shareholder Communications).

[44] Data provided by Broadridge.

[45] NIRI Biennial Annual Report Survey, October 2008.

[46] 2009 Proxy Season: Key Statistics & Performance Ratings, Broadridge. As compared to the cost of printing and postage, the rates at which brokers are reimbursed for distributing proxy materials is between $0.40 and $0.50 depending on the accounts holding the issuer's shares, plus a nominee coordination fee of $20 per nominee. See NYSE Rule 465.

[47] NYSE Rule 465.

[48] The NYSE proposed the incentive fee because "the current fee structure does not provide incentives for nominees and other intermediaries to use the most current and efficient technology." The SEC concurred, noting that "[a] majority of the commenters also supported the proposal, believing that it would provide the industry with incentives to continue to develop new technologies that would help issuers reduce costs while improving communications with shareholders." Self-Regulatory Organizations; New York Stock Exchange, Inc. Order Granting Approval To Proposed Rule Change And Notice Of Filing And Order Granting Accelerated Approval To Amendment No. 1 To Proposed Rule Change Relating to A One-Year Pilot Program For Transmission Of Proxy And Other Shareholder Communication Material, Exchange Act Release No. 38406 (Mar. 14, 1997) ["1997 Reimbursement Rate Release"], at 2 and 8.

[49] Data provided by Broadridge.

[50] *Id.* and note 2, supra.

[51] 1997 Reimbursement Rate Release, supra.

[52] *Id.* at 4.

[53] Self-Regulatory Organizations; Order Approving Proposed Rule Change And Amendment No. 1 Thereto By The New York Stock Exchange, Inc. Amending Its Rules Regarding The Transmission Of Proxy And Other Shareholder Communication Material And The Proxy Reimbursement Guidelines Set Forth In Those Rules And Requesting Permanent Approval Of The Amended Proxy Reimbursement Guidelines, Exchange Act Release No. 45644 (Mar. 25, 2002) ["2002 Reimbursement Rate Release"], at 2 & 6.

[54] PVRC Report, at 2-3.

[55] 2002 Reimbursement Rate Release. The SEC's "notice and access" rules become effective in 2007. These rules permit issuers to deliver proxy materials by making them available on the Internet, followed by distribution of notices explaining where the materials may be accessed. The NYSE Proxy Working Group discussed whether and how the exchange should set rates under its Rule 465 pursuant to which brokers and bank custodians would be reimbursed for reasonable related costs. It concluded that at that stage the NYSE should not regulate the rates, in light of the novelty of the system, and in light of the fact that issuer participation is optional. The NYSE accordingly has not set rates covering "notice and access."

[56] Exchange Act Rule 14a-12.

[57] The Brown Article, at 736.

[58] According to Broadridge, of the votes that it processed in the 2009 proxy season, over 90% were submitted by Internet, ProxyEdge® or by phone. Broadridge's ProxyEdge® platform, which permits institutional investors to vote electronically, accounted for nearly 80% of all shares voted through the firm. 2009 Proxy Season: Key Statistics & Performance Ratings, Broadridge.

[59] *See, e.g.*, "Facebook Grapples With Privacy Issues," The Wall Street Journal, May 19, 2010, at B1.

[60] Data provided by Broadridge.

[61] According to Broadridge, share positions held by individual OBOs are on average 70% larger than those held by NOBOs. Information on an account by account basis was not available.

[62] The study states that it reflects "the findings of 579 online surveys among investors 18 years of age and older in the United States who own individual stocks and bonds outside of a 401(k) or other retirement plan and have made at least one trade of an individual stock in the last 12 months." Accordingly, it is a survey of retail shareholders. See Investor Attitudes Study, Conducted for NYSE Group, by Opinion Research Corporation, April 7, 2006, at 4.

[63] CII White paper, supra, at 17 & note 107 and accompanying text. See also note 5, supra, and accompanying text.

[64] Indeed, in contrast to retail investors, institutional investors predominantly are OBOs, and they reportedly hold a significant majority of publicly held shares. According to Broadridge, among institutional shareholders, 71% of accounts holding 91% of institutionally held shares, are OBOs.

[65] Electronic Shareholder Forums, Exchange Act Release No. 57172 (Jan. 18, 2008), at 18.

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