

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

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**In the Matter of the:**

New York Stock Exchange LLC


**Regarding an Order Disapproving**

Proposed Rule Change to Amend its Rules  
Establishing Maximum Fee Rates to be Charged  
by Member Organizations for Forwarding Proxy  
and Other Materials to Beneficial Owners  
(File No. SR-NYSE-2020-96)

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**STATEMENT OF FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.**  
**URGING THE SECURITIES AND EXCHANGE COMMISSION TO AFFIRM**  
**ITS DISAPPROVAL OF SR-NYSE-2020-96**

Dated: February 1, 2022

By:   
Robert Colby  
Executive Vice President and Chief Legal  
Officer  
FINRA

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**FINRA’S STATEMENT URGING THE SECURITIES AND EXCHANGE  
COMMISSION TO AFFIRM ITS DISAPPROVAL OF SR-NYSE-2020-96**

The Financial Industry Regulatory Authority, Inc. (“FINRA”) respectfully submits this statement in connection with the Commission’s order granting the petition (“Petition”) to review the disapproval, pursuant to delegated authority, of the New York Stock Exchange LLC’s (“NYSE”) proposed rule change (File No. SR-NYSE-2020-96) (“Proposal”) to amend its rules establishing maximum fee rates to be charged by member organizations for forwarding proxy and other materials to beneficial owners.<sup>1</sup> The Petition Order states in part that any party to the action or other person may file a written statement in support of or in opposition to the Disapproval Order on or before February 3, 2022.

As discussed below, FINRA believes that the Disapproval Order was correct and consistent with standards under the Securities Exchange Act of 1934 (“Exchange Act”) and Commission rules for approving or disapproving proposed rule changes filed by a self-regulatory organization. FINRA urges the Commission to affirm the Disapproval Order.

**I. Background**

**a. Exchange Act Rule 14b-1**

Exchange Act Rule 14b-1, among other things, requires a registered broker-dealer, upon receipt of a proxy, other proxy soliciting material, information statement, or annual report to securities holders from the issuer or other soliciting person, to forward such materials to its customers who are beneficial owners of the issuer’s securities no later than five business days

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<sup>1</sup> See Securities Exchange Act Release No. 93934 (January 7, 2022), 87 FR 2189 (January 13, 2022) (“Petition Order”); see also Securities Exchange Act Release No. 92700 (August 18, 2021), 86 FR 47351 (August 24, 2021) (“Disapproval Order”).

after receipt of such materials.<sup>2</sup> A broker-dealer is not obligated to forward proxy and other materials to beneficial owners if the issuer or other soliciting person does not provide assurance of reimbursement of the broker-dealer’s “reasonable” expenses, both direct and indirect, incurred in connection with performing its obligations imposed by these requirements.<sup>3</sup> Rule 14b-1 does not specify what fees are considered “reasonable” in connection with forwarding proxy and other materials to beneficial owners.

b. NYSE and Other SRO Proxy Expense Reimbursement Rules

For many decades, the NYSE, as an exchange that both lists securities for issuers and regulates its member broker-dealers, has taken the lead in setting rules governing the processing and forwarding of proxy and other issuer-related materials to beneficial owners of securities that are held in “street name” at a broker-dealer.<sup>4</sup> Among other things, these rules set maximum rates of reimbursement for expenses incurred in processing and forwarding shareholder materials to

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<sup>2</sup> See Exchange Act Rule 14b-1(b)(2), 17 CFR 240.14b-1(b)(2). Exchange Act Rule 14b-2 imposes similar obligations on banks, associations and other entities that exercise fiduciary powers. See 17 CFR 240.14b-2(b)(3).

<sup>3</sup> See Exchange Act Rule 14b-1(c)(2), 17 CFR 240.14b-1(c)(2).

<sup>4</sup> See NYSE Rules 451 (Processing and Transmission of Proxy Materials) and 465 (Processing and Transmission of Interim Reports and Other Material). A security is held in “street name” if a shareholder, or beneficial owner, holds securities in book-entry form through a securities intermediary, such as a broker-dealer or bank. A beneficial owner does not own the securities directly. Instead, as a customer of the securities intermediary, the beneficial owner has an entitlement to the rights associated with ownership of the securities. See Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982, 42985 (July 22, 2010) (Concept Release on the U.S. Proxy System).

beneficial owners of securities (“NYSE fee schedule”). The NYSE Listing Company Manual also includes the NYSE fee schedule for the information of companies listed on the NYSE.<sup>5</sup>

Other SROs, including FINRA, whose members hold securities on behalf of customers in street name also have rules requiring their member organizations to forward proxy materials and other distributions on behalf of companies to street name account holders.<sup>6</sup> These SROs have largely followed the lead of the NYSE in prescribing rates of reimbursement to satisfy Rule 14b-1’s standard of reasonable compensation. Consistent with longstanding practice, FINRA recently revised FINRA Rule 2251 to conform that rule’s reimbursement provisions with changes adopted by the NYSE.<sup>7</sup>

c. NYSE Processing Fee Proposal

As discussed in the Petition Order, on December 15, 2020, the Commission issued a notice of filing of the Proposal with the Commission pursuant to Exchange Act Section 19(b)(1)<sup>8</sup> and Rule 19b-4<sup>9</sup> thereunder.<sup>10</sup> The Proposal would have revised NYSE Rule 451 Supplementary

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<sup>5</sup> See NYSE Listing Company Manual, Section 402.10.

<sup>6</sup> See, e.g., FINRA Rule 2251 (Processing and Forwarding of Proxy and Other Issuer-Related Materials) and The Nasdaq Stock Market, General Regulation 9, Section 6.

<sup>7</sup> See Regulatory Notice 22-02 (FINRA Amends Rule 2251 Regarding Reimbursement Rates for Processing and Forwarding Proxy and Other Issuer-Related Materials) (January 2022). FINRA has acted on multiple occasions to conform its reimbursement provisions with the NYSE’s. See infra note 29.

<sup>8</sup> 15 U.S.C. 78s(b)(1).

<sup>9</sup> 17 CFR 240.19b-4.

<sup>10</sup> See Securities Exchange Act Release No. 90677 (December 15, 2020), 85 FR 83119 (December 21, 2020) (Notice of Filing of File No. SR-NYSE-2020-96) (“Proposing Release”). On February 1, 2021, the Commission designated a longer time within which to act on the Proposal. See Securities Exchange Act Release No. 91025 (February 1, 2021), 86 FR 8420 (February 5, 2021).



Material .90 by eliminating the NYSE fee schedule and replacing it with text stating that, in determining fair and reasonable rates of reimbursement for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with copies of proxy solicitations and the processing of proxy and other material, member organizations must comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member. The Proposal also would have amended NYSE Rule 465 Supplementary Material .20 by deleting its cross-reference to Rule 451's fee schedule and replacing it with text that is essentially the same as amended Rule 451 Supplementary Material .90. Further, the Proposal would have deleted Section 402.10 of the NYSE Listed Company Manual, which currently provides the Rule 451 fee schedule.<sup>11</sup>

The NYSE asserted that these proposed rule changes are appropriate on the ground that all NYSE member organizations are members of FINRA, and that all broker-dealers that are not NYSE members but that hold securities in street name are also FINRA members. Additionally, the NYSE noted that "a large percentage" of affected issuers are listed on other exchanges or are not listed on any exchange (such as mutual funds). The NYSE stated that "[g]iven the significant evolution of the securities industry during the period in which the NYSE has taken the lead in establishing proxy distribution rates, the NYSE does not believe that it is best positioned to retain this responsibility going forward."<sup>12</sup> On March 18, 2021, the Commission

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<sup>11</sup> See Exhibit 5 to the Proposing Release, available on [www.sec.gov](http://www.sec.gov). The Proposal would not have altered current rule text in Rule 451 Supplementary Material .90 allowing member organizations to receive reimbursement for actual postage, envelope and communications expenses, but would have included this current rule text in amended Rule 465 Supplementary Material .20.

<sup>12</sup> See Proposing Release, 85 FR 83119.

instituted proceedings under Section 19(b)(2)(B) of the Exchange Act<sup>13</sup> to determine whether to approve or disapprove the Proposal.<sup>14</sup>

During this time, FINRA submitted two comment letters opposing approval of the Proposal.<sup>15</sup> In both letters, FINRA stated that the rule filing would impose new obligations on FINRA without the NYSE having engaged in any coordination or notice with FINRA. FINRA noted that historically the NYSE has taken the lead on proxy distribution fee schedules, and that FINRA has consistently and promptly adopted in its own rules any changes to the fee schedules set by the NYSE.

FINRA explained that, unlike the NYSE, it does not have a listing relationship with any issuers, and thus is not equipped to replace the NYSE in its current proxy fee-setting role. Accordingly, FINRA stated that if the Commission approved the Proposal, FINRA would be strongly inclined in the interest of regulatory clarity and harmonization to revise its proxy fee rules in accord with the NYSE's proposed rule amendments. FINRA urged that, if the Commission were inclined to approve the Proposal, then the Commission should first prescribe

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<sup>13</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>14</sup> See Securities Exchange Act Release No. 91359 (March 18, 2021), 86 FR 15734 (March 24, 2021). On June 11, 2021, the Commission designated a longer time for proceedings to determine whether to approve or disapprove the Proposal. See Securities Exchange Act Release No. 92154 (June 11, 2021), 86 FR 32301 (June 17, 2021).

<sup>15</sup> See Letter from Marcia Asquith, Executive Vice President, Board & External Relations, FINRA, to J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission (SEC), dated January 11, 2021, and Letter from Marcia Asquith, Executive Vice President, Board & External Relations, FINRA, to Vanessa Countryman, Secretary, SEC, dated April 14, 2021, available on [www.sec.gov](http://www.sec.gov).

these fees itself, as the Commission is in the best position to determine what standards should govern broker-dealer fees for forwarding and processing proxy and other materials.

On August 18, 2021, after consideration of the record for the Proposal, the Division of Trading and Markets (“Division”), pursuant to delegated authority, issued the Disapproval Order.<sup>16</sup> The Disapproval Order noted that under Exchange Act Section 19(b)(2)(C),<sup>17</sup> the Commission shall approve an SRO’s proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that apply to the SRO. The Disapproval Order further stated that the Commission shall disapprove a proposed rule change if it does not make such a finding. The order also cited Rule 700(b)(3) of the SEC’s Rules of Practice<sup>18</sup> that the burden to demonstrate that a proposed rule change is consistent with the Exchange Act and its rules is on the SRO that proposed the rule change, and that a mere assertion that the proposed rule change is consistent with those requirements is insufficient.<sup>19</sup>

The Disapproval Order concluded that the NYSE failed to meet this burden, and thus the Commission must disapprove the Proposal. In particular, the Disapproval Order extensively discussed the fact that the Proposal would not only repeal the NYSE’s current proxy fee schedule; it also would make FINRA the lead regulator with respect to maximum proxy fee reimbursement rates. The order noted that, unlike the NYSE, FINRA does not have a

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<sup>16</sup> See Securities Exchange Act Release No. 92700 (August 18, 2021), 86 FR 47351 (August 24, 2021).

<sup>17</sup> See 15 U.S.C. 78s(b)(2)(C).

<sup>18</sup> See 17 CFR 201.700(b)(3).

<sup>19</sup> See Disapproval Order, 86 FR 47352-47353.

relationship with issuers, and that the NYSE had not explained, in the absence of these relationships, why FINRA is better positioned to become lead regulator for proxy reimbursement rates. Moreover, the order stated that the NYSE's arguments did not provide a sufficient basis for the Commission to find that the Proposal would be consistent with Exchange Act Section 6(b)(5), because the NYSE did not demonstrate how issuers' interests would continue to be adequately considered, and not unfairly discriminated against if the NYSE relinquished its lead role in this area.

While the Disapproval Order did not foreclose the possibility that issuers' interests could be adequately considered, it stated that the NYSE did not provide sufficient information in the record on this point, particularly given that approving the Proposal would make FINRA the de facto lead SRO for rate setting.<sup>20</sup> Moreover, the order stated that the NYSE's "historical approach underscores the ability to duly consider both brokers' and issuers' interests – an ability that, based on the record here, FINRA does not possess – is critical to an equitable and fair process for determining what rates are set in a manner that, consistent with Section 6(b)(5), promotes just and equitable principles of trade."<sup>21</sup>

#### d. NYSE Petition

The Petition asserts that the NYSE no longer wishes to regulate in the area of proxy fees, purportedly due to changes in the way issuers transmit proxies and other materials to their shareholders, and that FINRA is best positioned to assume this role until some unknown future

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<sup>20</sup> See id. at 47353-47354.

<sup>21</sup> See id. at 47354.

date on which the SEC would establish a reasonableness standard for proxy fees under Exchange Act Rule 14b-1. The Petition makes several arguments in support of its position.

First, the Petition states that while Exchange Rules 14b-1 and 14b-2 place the transmittal obligation on broker-dealers and banks, those entities do not in practice forward proxy materials themselves. Rather, these entities contract with a small number of third-party vendors, which are not members of any SRO, to handle the proxy forwarding.<sup>22</sup>

Second, the Petition notes that, with the exception of the NYSE and FINRA, no exchange or other SRO includes a maximum proxy expense reimbursement schedule in its rules. Rather, these SROs provide that expense reimbursements must be reasonable and that members of these SROs must comply with maximum fee schedules published by other SROs.<sup>23</sup>

Third, the Petition claims that NYSE's existing proxy rules no longer reflect its current position in the competitive landscape among exchanges or any specific core competency of the NYSE. It argues that these rules are not the product of any recent initiative, but rather are an artifact of its historical role in this area. In particular, it observes that a significant percentage of the largest companies list their stocks on other exchanges and that mutual funds do not list on the NYSE. While it concedes that a subset of broker-dealers are NYSE member organizations, many are not, nor are commercial banks. It also contends that there is no statutory requirement

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<sup>22</sup> See Petition for Review of Order Disapproving The New York Stock Exchange LLC's Proposed Rule Change to Amend Its Rules Establishing Maximum Fee Rates to be Charged by Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners, available on [www.sec.gov](http://www.sec.gov), at 7.

<sup>23</sup> See *id.* at 7-8.

for the NYSE to update its proxy fee schedule, nor do its own rules require it to review its rates or publish new ones.<sup>24</sup>

The Petition argues that none of the rationales offered in the Disapproval Order justify treating the NYSE differently from other exchanges on the issue of proxy expense reimbursement rates. It asserts that the NYSE has no relationship with mutual funds that generate a substantial percentage of proxy materials, banks that are required to forward such materials, or vendors that actually receive expense reimbursement payments from issuers. It further argues that FINRA is better positioned because all broker-dealers that are required to forward proxy materials are FINRA members.

The Petition also argues that the Disapproval Order improperly holds the NYSE to “a vague and unknowable standard for amending its rules” because it requires the NYSE to show that FINRA, “a different self-regulatory organization over which NYSE has no control – could adequately take into account issuer interests in setting proxy expense reimbursement rates.”<sup>25</sup> The Petition concludes that the Commission should set aside the Disapproval Order because it “arbitrarily and capriciously treats the NYSE differently from other exchanges, relies on a rationale that is untethered to the rule change NYSE actually proposed, and arbitrarily imposes an unmeetable evidentiary burden.”<sup>26</sup>

For the reasons discussed below, FINRA believes that the Commission should affirm the Disapproval Order.

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<sup>24</sup> See Petition at 8-11.

<sup>25</sup> See id. at 3-4.

<sup>26</sup> See id. at 17.

## II. Discussion

The Petition seeks to make two major regulatory changes: first, to relieve the NYSE of its historic role as lead SRO with respect to maximum proxy reimbursement rates, and second, to assign this role to FINRA. As FINRA discussed in both its comment letters on the Proposal, to FINRA's knowledge, the NYSE staff did not contact any FINRA staff regarding the Proposal either before or after it was filed with the Commission. The NYSE staff made no effort to determine if FINRA is capable of taking the lead in this area, nor did it include FINRA staff in discussions with the Commission staff concerning the Proposal. Instead, the NYSE presumed that FINRA is ready, willing, and able to take on this role. The Disapproval Order rightly asks the NYSE how it reached this presumption. FINRA does not understand the NYSE's rationale to assign its regulatory role to FINRA.

The NYSE goes to great length to assert that times have changed, and that FINRA is perfectly positioned to take over the NYSE's regulatory responsibilities in this area. But the NYSE's arguments do not sustain this proposition. First, it notes that many large issuers do not list on the NYSE. While that may be true, it does not make FINRA more qualified, given that FINRA has no listing relationships with issuers whatsoever. Apparently, the NYSE believes that it's better for an SRO with no relationships with issuers to assume the lead role in this area than an SRO that has listing relationships with at least some issuers.

Next, the NYSE argues that it should be relieved of its responsibilities because it has no member relationships with mutual funds or banks, who are both key players in proxy distribution

and fee reimbursement. Again, one must ask why FINRA is better equipped to take on the NYSE's role, given that no mutual fund or commercial bank is a FINRA member.<sup>27</sup>

The NYSE then argues that the NYSE is in no position to regulate proxy fee reimbursement rates because the vendors that actually distribute shareholder materials and collect fees for these services from issuers are not NYSE member organizations. Given that these vendors likewise are not FINRA members, this rationale does not support shifting the NYSE's regulatory role to FINRA.

Lastly, the NYSE tries to assert that its departure from its historical fee setting role is not impactful because all broker-dealers are subject to FINRA's proxy fee rate schedule.<sup>28</sup> What the NYSE somehow leaves out is that FINRA has never set the rates contained in its own proxy fee schedule; instead, FINRA has consistently and routinely deferred to the NYSE's historical lead role in this area. Every time the NYSE amended its proxy fee schedule, FINRA has filed a follow-on proposed rule change to its fee schedule stating its intent to conform it to the NYSE's schedule.<sup>29</sup>

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<sup>27</sup> While principal underwriters of mutual funds typically are FINRA members, the investment companies themselves, their investment advisers, and other fund service providers such as sub-advisers, administrators, and transfer agents, are not.

<sup>28</sup> See Petition at 20 (“To the extent that any SRO has a market-wide reach in this space, it is FINRA, whose rate schedule applies to every broker-dealer”).

<sup>29</sup> FINRA has expressly stated this intention, on multiple occasions, in rule filings that amended the FINRA proxy reimbursement provisions to conform with changes adopted by the NYSE multiple times. See Securities Exchange Act Release No. 93769 (December 14, 2021), 86 FR 71936 (December 20, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2021-032). See also Securities Exchange Act Release No. 71272 (January 9, 2014), 79 FR 2741 (January 15, 2014) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2013-056); Securities Exchange Act Release No. 47392 (February 21, 2003), 68 FR 9730 (February 28, 2003) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2003-019).



Exchanges and FINRA have a range of overlapping SRO functions, which in some cases have been allocated through formal agreements pursuant to statutory provisions or otherwise coordinated through contractual arrangements, customs, and practices codified in SRO rules, all generally subject Commission oversight. FINRA believes that a unilateral reassignment of these functions to another SRO also is subject to the oversight of the Commission.

Moreover, FINRA believes that it is inappropriate, and unsound as a matter of public policy, for the NYSE to expect to assign to FINRA a major lead regulatory role simply by filing a rule change to abdicate its historical function, and the NYSE lacks the authority to petition the Commission to make such an assignment. FINRA believes that, if it will be required to take on regulatory responsibilities from the NYSE, it should be done only as part of a rulemaking or other regulatory action to which FINRA is a party. To be clear, FINRA has no interest in taking on the responsibilities to serve as lead SRO in establishing and maintaining maximum proxy distribution reimbursement rates.

If the Commission were nonetheless inclined to grant the NYSE's petition, FINRA believes that the Commission is in the best position to determine what standards should govern broker-dealer fees for forwarding and processing proxy and other materials, and whether those fees should be subject to a maximum fee schedule similar to the fee provisions in NYSE Rule 451. Exchange Act Rule 14b-1 requires broker-dealers to forward issuer materials and establishes a reasonableness standard for the reimbursement of expenses.

If the Commission allows the NYSE to end its fee setting role, but believes that specific fee schedules are still needed, the Commission should prescribe those fees. The Commission has plenary jurisdiction over securities industry participants that have an interest in these matters, including not only broker-dealers, but also issuers that list their securities on national securities

exchanges, and mutual funds and other issuers that do not. FINRA believes that the Commission is well positioned to develop a comprehensive approach to resolve the disagreements and concerns that industry participants have with the current regulatory structure for governing fees imposed for processing and forwarding proxies and other shareholder materials.<sup>30</sup>

Because of these concerns, FINRA respectfully recommends that the Commission affirm the Disapproval Order and not allow the NYSE to repeal its proxy fee schedule until these larger issues regarding the appropriate structure to regulate fees for forwarding and processing proxy and other materials have been properly presented, discussed, and considered.<sup>31</sup>

Should the Commission set aside the Disapproval Order, FINRA likely will follow its longstanding practice of conforming its proxy fee rules to corresponding NYSE proxy fee rule changes. FINRA believes that if the Commission were to accept the NYSE's arguments as to why it should not be setting proxy distribution reimbursement rates, as discussed above, those arguments apply even more strongly to FINRA. Thus, FINRA likely would propose to rescind its fee schedule for forwarding and processing shareholder materials, allowing the Commission to move forward on these matters unfettered by current SRO rules.

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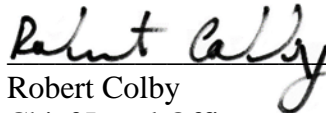
<sup>30</sup> In the past SEC, NYSE and FINRA staff have discussed hosting an industry roundtable on these fees, and FINRA believes it would be productive to restart those conversations to plan a roundtable (virtual or otherwise) in the future to discuss these issues.

<sup>31</sup> FINRA understands that the mutual fund industry shares the view that the Commission is in the best position to determine what rules should apply to forwarding and processing shareholder materials. See Letter from Susan Olson, General Counsel, Investment Company Institute (ICI), to Brent J. Fields, Secretary, SEC, dated October 31, 2018 (comments of ICI in response to the SEC's Request for Comments on the Processing Fees Charged by Intermediaries for Distributing Materials Other Than Proxy Materials to Fund Investors, SEC Release No. 33-10505 (June 5, 2018)), at page 31, available on [www.sec.gov](http://www.sec.gov).

### III. Conclusion

FINRA appreciates the opportunity to submit this statement on the NYSE's petition to have the Commission set aside the Division's order disapproving the NYSE proposal to rescind its existing rules governing the fees that broker-dealers may impose to process and forward proxies and other materials to beneficial owners of securities held in street name. As discussed above, FINRA remains concerned that the Proposal is premature and incorrectly predicated on FINRA assuming primary responsibility for a regulatory regime that it has never led, and which FINRA is not best equipped to lead.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Colby", is written over a horizontal line.

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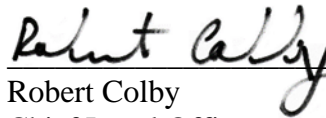
**CERTIFICATE OF SERVICE**

I, Robert Colby, Chief Legal Office of FINRA, hereby certify that on February 1, 2022, I caused to be served copies of the attached Statement of Financial Industry Regulatory Authority, Inc. Urging the Securities and Exchange Commission to Affirm Its Disapproval of SR-NYSE-2020-96, on the U.S. Securities and Exchange Commission at the following address:

Vanessa A. Countryman  
Secretary  
Securities and Exchange Commission  
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(via email)  
Secretarys-Office@sec.gov

Dated: February 1, 2022  
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