

Notice to Members

MARCH 2003

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KEY TOPICS

IM-2260
Proxy Reimbursement Rates

INFORMATIONAL

Proxy Reimbursement Rates

NASD Adopts Amendments to IM-2260 Regarding Rates of Reimbursement for Expenses Incurred in Forwarding Proxy and Other Material; **Effective Immediately**

Executive Summary

NASD has adopted amendments to IM-2260 regarding rates of reimbursement for expenses incurred in forwarding proxy materials, annual reports, information statements, and other materials. The amendments establish approved rates of reimbursement that conform to proxy reimbursement rates already adopted by the New York Stock Exchange (NYSE) and the American Stock Exchange (Amex) and approved by the Securities and Exchange Commission (SEC). The amendments became effective immediately upon filing with the SEC on February 12, 2003.

Included with this *Notice* is Attachment A, the text of amended IM-2260.

Questions/Further Information

Questions concerning this *Notice* may be directed to Shirley H. Weiss, Associate General Counsel, Office of General Counsel, NASD Regulatory Policy and Oversight, at (202) 728-8844.

Background and Discussion

The SEC's proxy rules, Rules 14a-13, 14b-1, and 14b-2 under the Securities Exchange Act of 1934, do not specify the fees that nominees can charge issuers for distributing proxy materials; rather, they state that issuers must reimburse nominees for "reasonable expenses" incurred. NASD IM-2260 governs the reimbursement of members for costs incurred in forwarding proxy materials, annual reports, information statements, and other materials.¹

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The amendments to IM-2260 conform NASD's fee structure to that of the New York Stock Exchange (NYSE) and the American Stock Exchange (Amex), as approved by the SEC. IM-2260, as amended, also permits members to request reimbursement of expenses at less than the rates set forth in IM-2260, but it requires members to notify and obtain consent from the person soliciting proxies or the company for reimbursement at rates higher than the approved rates or for items or services not specifically referenced in IM-2260. IM-2260, as amended, further advises members that they are not required to transmit more than one annual report, interim report, proxy statement, or other material to beneficial owners with more than one account (including trust accounts); and that they may eliminate multiple transmissions of reports, statements, or other materials to beneficial owners having the same address, provided they comply with applicable SEC rules. IM-2260 continues to provide that a member providing materials under Rule 2260 may not charge for envelopes that are furnished by the issuer, the trustee, or a person soliciting proxies.

The SEC approved the NYSE's current fee structure on March 25, 2002,² following numerous meetings of the Proxy Voting Review Committee (the "Committee"), a private initiative that was established to review the NYSE's pilot fee program and the proxy process in general.³ The SEC found that "the Committee's

recommended fee reductions [for "large issuers"] were reasonable and should help to alleviate the burden and cost that large issuers currently bear in the proxy distribution process and more fairly allocate the cost among large issuers and small issuers."⁴ The SEC concluded that the NYSE's proposed fee changes were reasonable and fairly allocated, did not discriminate among issuers, and did not impose any unnecessary burdens on competition. On June 3, 2002, the Amex amended its proxy reimbursement fees to conform to those of the NYSE.⁵

By conforming its proxy reimbursement guidelines to those adopted by the NYSE and Amex, NASD is adopting reimbursement rates that the Commission has already determined are reasonable and fairly allocated, do not discriminate among issuers, and do not impose any unnecessary burdens on competition.

Effective Date

The amendments to IM-2260 are effective immediately.

Endnotes

- 1 Members should note that Rule 2260(c)(2) provides that a member may give a proxy to vote any stock pursuant to the rules of any national securities exchange to which the member is also responsible provided that the member's records clearly indicate which procedure it is following. In such case, the member would also change the rates of reimbursement approved by that exchange.
- 2 Exchange Act Rel. No. 45644 (March 25, 2002). The SEC emphasized that permanent approval of the NYSE's pilot program did not end the discussion of proxy fee reform. The SEC urged the NYSE and the Committee to continue discussing proxy fee reform with the eventual goal that the marketplace, rather than self-regulatory organizations, will establish reasonable and competitive proxy reimbursement fees. The SEC also stated that it expected the NYSE to continue to monitor its fees "to ensure they are related to 'reasonable expenses' of the NYSE's member brokers in accordance with the Act, and propose changes where appropriate."
- 3 The Committee concluded that the NYSE's Proxy Reimbursement Guidelines, which had been established in a pilot program and approved by the SEC on March 14, 1997, had been instrumental in setting the costs that issuers incurred in having broker/dealers and intermediaries transmit proxy and other materials to security holders at fair and reasonable levels. On that basis, the Committee voted, with NASD abstaining, to seek permanent approval of the pilot program guidelines, with some modifications to reflect the economies of scale of large issuers, defined by the Committee as companies that have in excess of 200,000 street name shareholders (approximately 200 companies). The Committee voted to reduce the basic mailing fee from 50 cents to 40 cents; increase the suggested per-nominee fee for

intermediaries that coordinate the proxy and mailing activities of multiple nominees to \$20.10 per set of material required for "small issuers" and \$20.05 per set of material required for "large issuers"; and reduce from 50 cents to 25 cents the incentive fee for initial mailings of the materials of large issuers.

4 *Id.*

5 Exchange Act Rel. No. 46146 (June 28, 2002).

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ATTACHMENT A

New language is underlined; deletions are in brackets.

IM-2260. [Suggested] Approved Rates of Reimbursement

(a) The [Board of Governors has determined that the] following [suggested] approved rates of reimbursement for expenses incurred in forwarding proxy material, annual reports, information statements and other material [are to be used as a guide by members:] shall be considered reasonable rates of reimbursement. In addition to the charges specified in this schedule, members also are entitled to receive reimbursement for: (1) actual postage costs (including return postage at the lowest available rate); (2) the actual cost of envelopes (provided they are not furnished by the issuer, the trustee, or a person soliciting proxies); and (3) any actual communication expenses (excluding overhead) incurred in receiving voting returns either telephonically or electronically.

(1) Charges for Initial Proxy and/or Annual Report Mailings

(A) [60] 40 cents for each set of proxy material, i.e., proxy statement, form of proxy and annual report when mailed as a unit, unless an opposition proxy statement has been furnished to securities holders, [plus postage,] with a minimum of \$5.00 for all sets mailed;

(B) [20] 15 cents for each copy, plus postage, for annual reports, which are mailed separately from the proxy material pursuant to the instruction of the person soliciting proxies with a minimum of \$3.00 for all sets mailed[.];

(C) \$1.00 for each set of proxy material, i.e., proxy statement, form of proxy and annual report when mailed as a unit, for a meeting for which an opposition proxy statement has been furnished to security holders, with a minimum of \$5.00 for all sets mailed;

(D) NASD has approved, as fair and reasonable, the following supplemental proxy fees for intermediaries that coordinate multiple nominees: \$20.00 per nominee plus (i) 10 cents for each set of proxy material, with respect to issuers whose shares are held in fewer than 200,000 nominee accounts, or (ii) 5 cents for each set of proxy material, with respect to issuers whose shares are held in at least 200,000 nominee accounts.

(2) Charges for Proxy Follow-Up Mailings

[(A)] 40 cents for each set of follow-up material, plus postage[, when the follow-up material is mailed to all beneficial owners;].

[(B)] 60 cents for each set of follow-up material, plus postage, when the follow-up material is mailed only to beneficial owners who have not responded to the initial mailing.]

[(3)] Surcharge for Proxy Solicitation

Eighteen and one-half cents for each set of proxy material, i.e., proxy statement, form of proxy and annual report when mailed as a unit, for the period from April 1, 1986 to March 31, 1987 as a surcharge in addition to the appropriate charges specified herein.]

[(4)] (3) [Additional Fee for Proxy Solicitation] Charge for Providing Beneficial Ownership Information

Six and one-half cents per [shareholder] name of non-objecting beneficial owner provided to the issuer pursuant to the issuer's request. Where the non-objecting beneficial ownership information is not furnished directly to the issuer by the member, but is furnished through an agent designated by the member, the issuer will be expected to pay the reasonable expenses of the agent in providing such information, in addition to the rate described above. (See SEC Rules 14a-13(b) and 14c-7(b) under the Securities Exchange Act of 1934 and notes thereto.)

Any member that designates an agent for the purpose of furnishing requesting issuers with beneficial ownership information pursuant to SEC Rule 14b-1(c) and thereafter cancels that designation or appoints a new agent for such purpose should promptly inform interested issuers.

[(5)] (4) Charges for Interim Report, Post Meeting Report and Other Material Mailings

[30] 15 cents for each copy, plus postage, for interim reports, post meeting reports, or other material with a minimum of \$2.00 for all sets mailed.

[(6)] (5) Incentive Fees

An "incentive fee" (as defined below) for proxy material mailings, including the annual report, and 10 cents for interim report mailings, with respect to each account where the member has eliminated the need to send materials in paper format through the mails (such as by including multiple proxy ballots or forms in one envelope with one set of material mailed to the same household, by distributing multiple proxy ballots or forms electronically thereby reducing the sets of material mailed, or by distributing some or all material electronically) shall be: (i) 25 cents with respect to issuers whose shares are held in at least 200,000 nominee accounts; and (ii) 50 cents with respect to issuers whose shares are held in fewer than 200,000 nominee accounts.

[(b) Members may charge for envelopes, provided that they are not furnished by the issuer, the trustee, or a person soliciting proxies.]

[(c)] (b) Members are reminded that Rule 2430 requires that any such charges must be reasonable. Members may request reimbursement of expenses at less than the approved rates; however, no member may seek reimbursement at rates higher than the approved rates or for items or services not specifically listed above without the prior notification to and consent of the person soliciting proxies or the company. [Accordingly, this is a guide and a member may request reimbursement of expenses at other rates after taking into consideration all relevant factors.]

(c) Rule 2260 requires members to forward promptly issuer-supplied annual reports, interim reports, proxy statements and other material to beneficial owners. Members are not required to transmit more than one annual report, interim report, proxy statement or other material to beneficial owners with more than one account (including trust accounts). In addition, member organizations may eliminate multiple transmissions of reports, statements or other materials to beneficial owners having the same address, provided they comply with applicable SEC rules with respect thereto (see SEC Rule 14b-1 under the Act).

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