

Regulatory Notice

14-03

Proxy Rate Reimbursement and Enhanced Brokers' Internet Platforms

Amendments to FINRA Rule 2251

Effective Date: January 1, 2014

Executive Summary

Effective January 1, 2014, FINRA has amended the provisions of FINRA Rule 2251 regarding rates of reimbursement for expenses incurred in processing and forwarding of proxy and other issuer-related materials. The rule change also establishes a specified success fee for the development of qualified Internet platforms for proxy voting purposes (the Enhanced Brokers' Internet Platform or EBIP). The rule change conforms to provisions the Securities and Exchange Commission (SEC) has approved and the New York Stock Exchange (NYSE) has already adopted.

As discussed further in this *Notice*, the rule change requires that any FINRA member firm that is not also a member of the NYSE with a qualifying EBIP must provide notice to FINRA.¹

The text of the rule change is available as Attachment A at www.finra.org/notices/14-03. A summary chart that matches the new FINRA rule provisions with the corresponding NYSE rule provisions appears at the end of this *Notice*.

Questions regarding this *Notice*, other than EBIP notifications, should be directed to Adam H. Arkel, Associate General Counsel, Office of General Counsel, at (202) 728-6961.

Firms should direct EBIP notifications, and questions related to such notifications, to their Regulatory Coordinator.

January 2014

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Senior Management

Key Topics

- ▶ Enhanced Brokers' Internet Platform
- ▶ Proxy Rate Reimbursement

Referenced Rules & Notices

- ▶ FINRA Rule 2251
- ▶ NYSE Information Memo 14-03
- ▶ NYSE Rule 451.90
- ▶ NYSE Rule 451.92
- ▶ SEA Rule 14b-1
- ▶ SEA Rule 14b-2



Financial Industry Regulatory Authority

Background & Discussion

FINRA Rule 2251 requires FINRA member firms to transmit proxy materials and other communications to beneficial owners of securities and limits the circumstances in which FINRA member firms may vote proxies without instructions from those beneficial owners.² The rule also sets forth the rate reimbursement provisions pursuant to which firms are entitled to receive fees in connection with the rule's forwarding obligations.

On October 18, 2013, the SEC approved a proposed rule change by the NYSE³ to amend its proxy rate reimbursement rules and to establish a specified success fee for the development of qualified EBIPs. Consistent with the NYSE action, FINRA filed, for immediate effectiveness, a rule change to conform FINRA Rule 2251 to the proxy rate reimbursement rules adopted by the NYSE, including the provisions with respect to EBIPs (specifically, NYSE Rules 451.90 and 451.92).⁴ The rule change became effective January 1, 2014.

The new provisions under FINRA Rule 2251 correspond, in virtually identical language, to the NYSE's new provisions under NYSE Rules 451.90 and 451.92. For reference, the summary chart at the end of this *Notice* matches the new FINRA provisions with the corresponding new NYSE provisions. A summary of the new rate reimbursement and EBIP provisions follows below.

- ▶ **Processing Unit Fees:** New FINRA Rule 2251.01(a)(1)(B) establishes, for each set of proxy material, *i.e.*, proxy statement, form of proxy and annual report when processed as a unit, a Processing Unit Fee based on the following schedule according to the number of nominee⁵ accounts through which the issuer's securities are beneficially owned:
 - ▶ 50 cents for each account up to 10,000 accounts;
 - ▶ 47 cents for each account above 10,000 accounts, up to 100,000 accounts;
 - ▶ 39 cents for each account above 100,000 accounts, up to 300,000 accounts;
 - ▶ 34 cents for each account above 300,000 accounts, up to 500,000 accounts;
 - ▶ 32 cents for each account above 500,000 accounts.

The new rule provides that, under the above schedule, a firm may charge the issuer the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. The rule provides that references to the number of accounts means the number of accounts holding securities of the issuer at any nominee that is providing distribution services without the services of an intermediary, or when an intermediary⁶ is involved, the aggregate number of nominee accounts with beneficial ownership in the issuer served by the intermediary. Further, the rule provides that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the Processing Unit Fee shall be \$1.00 per account, in lieu of the fees in the above schedule.

- ▶ **Intermediaries:** New FINRA Rule 2251.01(a)(1)(C) establishes the following supplemental fees for intermediaries:
 - ▶ \$22.00 for each nominee served by the intermediary that has at least one account beneficially owning shares in the issuer;
 - ▶ an Intermediary Unit Fee for each set of proxy material, based on the following schedule according to the number of nominee accounts through which the issuer's securities are beneficially owned:
 - 14 cents for each account up to 10,000 accounts;
 - 13 cents for each account above 10,000 accounts, up to 100,000 accounts;
 - 11 cents for each account above 100,000 accounts, up to 300,000 accounts;
 - 9 cents for each account above 300,000 accounts, up to 500,000 accounts;
 - 7 cents for each account above 500,000 accounts.

The new rule provides that, under the above schedule, a firm may charge the issuer the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. For special meetings, the rule provides that the Intermediary Unit Fee shall be based on the following schedule, in lieu of the fees described in the schedule above:

- 19 cents for each account up to 10,000 accounts;
- 18 cents for each account above 10,000 accounts, up to 100,000 accounts;
- 16 cents for each account above 100,000 accounts, up to 300,000 accounts;
- 14 cents for each account above 300,000 accounts, up to 500,000 accounts;
- 12 cents for each account above 500,000 accounts.

The new rule provides that, under the above schedule, a firm may charge the issuer the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. For purposes of the rule, a special meeting is a meeting other than the issuer's meeting for the election of directors. Further, the rule provides that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the Intermediary Unit Fee shall be 25 cents per account, with a minimum fee of \$5,000 per soliciting entity, in lieu of the fees described in the two schedules given above, as the case may be. Where there are separate solicitations by management and an opponent, the opponent is to be separately billed for the costs of its solicitation.

- ▶ **Proxy Follow-up Material:** The rule change revises FINRA Rule 2251.01(a)(2) to establish, for each set of proxy follow-up material, a Processing Unit Fee of 40 cents per account, except for those relating to an issuer's annual meeting for the election of directors, for which the Processing Unit Fee shall be 20 cents per account.
- ▶ **Beneficial Ownership Information:** FINRA Rule 2251.01(a)(3) establishes a rate of six and one-half cents per name of non-objecting beneficial owner (NOBO) provided to the issuer pursuant to the issuer's request. Under the rule change, Rule 2251.01(a)(3) is revised to provide that, where the non-objecting beneficial ownership information is not furnished directly to the issuer by the firm, but is furnished through an agent designated by the firm, the issuer will be expected to pay in addition the following fee to the agent, with a minimum fee of \$100 per requested list:
 - ▶ 10 cents per name for the first 10,000 names or portion thereof;
 - ▶ 5 cents per name for additional names up to 100,000 names; and
 - ▶ 4 cents per name above 100,000.

The new rule provides that any firm that designates an agent for the purpose of furnishing requesting issuers with beneficial ownership information pursuant to SEA Rule 14b-1(c) and thereafter cancels that designation or appoints a new agent for such purpose should promptly inform interested issuers. As revised by the rule change, the rule further provides that, when an issuer requests beneficial ownership information as of a date which is the record date for an annual or special meeting or a solicitation of written shareholder consent, the issuer may ask to eliminate names holding more or less than a specified number of shares, or names of shareholders that have already voted, and the issuer may not be charged a fee for the NOBO names so eliminated. In all other cases the issuer may be charged for all the names in the NOBO list.

- ▶ **Interim Report, Post Meeting Report and Other Material:** The rule change revises FINRA Rule 2251.01(a)(4) to establish for interim reports, annual reports if processed separately, post meeting reports, or other material, a Processing Unit Fee of 15 cents per account.
- ▶ **Preference Management Fees:** The rule change establishes a new Preference Management Fee that replaces the "Incentive Fees" provisions under FINRA Rule 2251.01(a)(5). Specifically, the new rule establishes, with respect to each account for which the nominee has eliminated the need to send materials in paper format through the mails (or by courier service), a Preference Management Fee in the following amount:
 - ▶ 32 cents for each set of proxy material described in new FINRA Rule 2251.01(a)(1) (B); provided, however, that if the account is a Managed Account (as defined in new FINRA Rule 2251.01(a)(7), below), the Preference Management Fee shall be 16 cents.
 - ▶ 10 cents for each set of material described in either FINRA Rule 2251.01(a)(2) or (a)(4), as discussed above.

The new rule provides that the Preference Management Fee is in addition to, and not in lieu of, the other fees set forth under FINRA Rule 2251.01.

- ▶ **Notice and Access Fees:** New FINRA Rule 2251.01(a)(6) provides that, when an issuer elects to utilize Notice and Access for a proxy distribution, there is an incremental fee based on all nominee accounts through which the issuer's securities are beneficially owned as follows:
 - ▶ 25 cents for each account up to 10,000 accounts;
 - ▶ 20 cents for each account over 10,000 accounts, up to 100,000 accounts;
 - ▶ 15 cents for each account over 100,000 accounts, up to 200,000 accounts;
 - ▶ 10 cents for each account over 200,000 accounts, up to 500,000 accounts;
 - ▶ 5 cents for each account over 500,000 accounts.

The new rule provides that, under the above schedule, a firm may charge the issuer the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only on additional accounts in the additional tiers. The rule further provides that follow up notices will not incur an incremental fee for Notice and Access. In addition, no incremental fee will be imposed for fulfillment transactions (*i.e.*, a full package sent to a notice recipient at the recipient's request), although out of pocket costs such as postage will be passed on as in ordinary distributions.

- ▶ **Managed Accounts:** New FINRA Rule 2251.01(a)(7) provides that, notwithstanding any other provision under the rule, no fee shall be imposed for a nominee account that is a Managed Account and contains five or fewer shares or units of the security involved. The rule defines "Managed Account" to mean an account at a nominee which is invested in a portfolio of securities selected by a professional adviser, and for which the account holder is charged a separate asset-based fee for a range of services which may include ongoing advice, custody and execution services. The adviser can be either employed by or affiliated with the nominee, or a separate investment advisor contracted for the purpose of selecting investment portfolios for the managed account. Requiring that investments or changes to the account be approved by the client shall not preclude an account from being a "Managed Account," nor shall the fact that commissions or transaction-based charges are imposed in addition to the asset-based fee. New FINRA Rule 2251.01(a)(7) further provides that, notwithstanding any other provision under the rule, no fee shall be imposed for any nominee account which contains only a fractional share, *i.e.*, less than one share or unit of the security involved.
- ▶ **EBIPs:** New FINRA Rule 2251.01(a)(8) provides that, during the period ending December 31, 2018, there shall be a supplemental fee of 99 cents for each new account that elects, and each full package recipient among a brokerage firm's accounts that converts to, electronic delivery while having access to an EBIP. The rule provides that this fee does not apply to electronic delivery consents captured by issuers (for example, through

an open-enrollment program), nor to positions held in Managed Accounts (as defined in FINRA Rule 2251.01(a)(7)) nor to accounts voted by investment managers using electronic voting platforms.⁷ The rule provides that this is a one-time fee, meaning that an issuer may be billed this fee by a particular firm only once for each account covered by this rule. Further, billing for this fee should be separately indicated on the issuer's invoice and must await the next proxy or consent solicitation by the issuer that follows the triggering election of electronic delivery by an eligible account. Accounts receiving a notice pursuant to the use of notice and access by the issuer, and accounts to which mailing is suppressed by householding, will not trigger the fee under the rule change. The new rule further provides:

- ▶ To qualify under the rule, an EBIP must provide notices of upcoming corporate votes (including record and shareholder meeting dates) and the ability to access proxy materials and a voting instruction form, and cast the vote, through the investor's account page on the member firm's website without an additional log-in.
- ▶ Any firm that is not also a member of the NYSE with a qualifying EBIP must provide notice thereof to FINRA.⁸ Firms must provide such notification, either in hard copy or electronically, to their Regulatory Coordinator. The written notification must include:⁹
 - firm name;
 - firm CRD number;
 - intermediary (if one is used), including any intermediary identification/customer number or code;
 - date the EBIP became operational (for EBIPs already in operation on January 1, 2014, the firm may indicate January 1, 2014, as the date); and,
 - specific description of any limitations on the availability of the EBIP to the firm's customers (*e.g.*, if the EBIP is available only to a certain segment of the firm's customers).

FINRA is considering alternative methods of notification, such as through Firm Gateway, and will announce any changes to the notification procedures in a future *Regulatory Notice*.

- ▶ Conversions to electronic delivery by accounts with access to an EBIP need to be tracked for the purpose of reporting the activity to FINRA when requested, as do records of marketing efforts to encourage account holders to use the EBIP. In addition, records need to be maintained and reported to FINRA when requested regarding the proportion of non-institutional accounts that vote proxies after being provided access to an EBIP.

The guidance applicable to the new NYSE proxy rate rules as set forth in the SEC's NYSE Proxy Rate Rules Approval Order apply to Rule 2251 as revised by the rule change.¹⁰

Summary Chart

TOPIC	NEW FINRA RULE . . .	CORRESPONDS TO NYSE RULE . . .
Definition of Nominee	FINRA Rule 2251.01(a)(1)(A)(i)	NYSE Rule 451.90(1)(a)(i)
Definition of Intermediary	FINRA Rule 2251.01(a)(1)(A)(ii)	NYSE Rule 451.90(1)(a)(ii)
Processing Unit Fees	FINRA Rule 2251.01(a)(1)(B)	NYSE Rule 451.90(1)(b)
Supplemental Fees for Intermediaries	FINRA Rule 2251.01(a)(1)(C)	NYSE Rule 451.90(1)(c)
Proxy Follow-Up Material	FINRA Rule 2251.01(a)(2)	NYSE Rule 451.90(2)
Beneficial Ownership Information	FINRA Rule 2251.01(a)(3)	NYSE Rule 451.92
Interim Report, Post-Meeting Report and Other Material	FINRA Rule 2251.01(a)(4)	NYSE Rule 451.90(3)
Preference Management Fees	FINRA Rule 2251.01(a)(5)	NYSE Rule 451.90(4)
Notice and Access Fees	FINRA Rule 2251.01(a)(6)	NYSE Rule 451.90(5)
Managed Accounts	FINRA Rule 2251.01(a)(7)	NYSE Rule 451.90(6)
EBIPs	FINRA Rule 2251.01(a)(8)	NYSE Rule 451.90(7)

Endnotes

1. FINRA member firms that are NYSE members should refer to [NYSE Information Memo 14-03](#).
2. FINRA Rule 2251 was adopted as a consolidation of former NASD Rule 2260 and IM-2260 as part of FINRA's rulebook consolidation process. See Securities Exchange Act Release No. 61052 (November 23, 2009), 74 FR 62857 (December 1, 2009) (Order Granting Approval of Proposed Rule Change; File No. SR-FINRA-2009-066).
3. See Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530 (October 24, 2013) (Order Granting Approval of Proposed Rule Change; File No. SR-NYSE-2013-07) (NYSE Proxy Rate Rules Approval Order).
4. See Securities Exchange Act Release No. 71272 (January 9, 2014), 79 FR 2741 (January 15, 2014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR-FINRA-2013-056).
5. New FINRA Rule 2251.01(a)(1)(A)(i) defines "nominee" to mean a broker or bank subject to SEA Rule 14b-1 or Rule 14b-2, respectively.
6. New FINRA Rule 2251.01(a)(1)(A)(ii) defines "intermediary" to mean a proxy service provider that coordinates the distribution of proxy or other materials for multiple nominees.
7. Member firms should note that the EBIP fee does not apply to accounts that converted to electronic delivery prior to January 1, 2014.
8. Under the new NYSE proxy rate rules, the notification applies to NYSE member organizations as to the NYSE. To avoid regulatory duplication, the new FINRA rule applies the EBIP notification requirement only to FINRA member firms that are not NYSE members. However, as discussed in this *Notice*, all FINRA member firms would need to maintain, and would be subject to requests by FINRA for, the specified EBIP tracking information and records.
9. FINRA may specify a more detailed form for EBIP reporting at a future date. FINRA has not done so at this time.
10. See note 3.