

# COUNCIL OF INSTITUTIONAL INVESTORS

May 21, 2008

Shelley E. Parratt  
Deputy Director  
Division of Corporation Finance  
Securities and Exchange Commission  
Washington, DC 20549

Dear Ms. Parratt:

Thank you for your recent letter describing why the Securities and Exchange Commission has declined to publish proposed changes to the NYSE Euronext's Rule 452. I am following up with some additional concerns raised by your response.

First, in the year since NYSE Euronext submitted its revised proposal on broker voting, the Council is not aware of any substantive steps taken to date by the Commission to “address multiple proxy issues on a comprehensive, rather than fragmented, basis.” The Council is very concerned that this promised comprehensive approach is being used as a roadblock against publishing and approving the proposed changes to Rule 452. The Council does not believe a discrete change such as amending Rule 452—which currently taints the proxy voting system by stuffing the ballot box for management—should be held hostage to a broad, time-consuming review of the proxy voting system.

Second, the Council is puzzled that the Commission's release of the proposed changes to Rule 452 changes would somehow be slowed due to a “fundamental objective of better aligning the federally-regulated proxy system with the state-authorized rights of shareholders to determine the directors of the companies that they own.” We firmly believe that amending Rule 452 as proposed by NYSE Euronext will only enhance shareowners' state-authorized rights by ensuring that votes for directors are meaningful and uncorrupted by broker votes.

Finally, the Council is very concerned that the Commission appears to be considering alternatives—such as proportional voting—to the proposed changes to Rule 452. We believe these alternatives could further complicate the already complex proxy voting process and result in abuses.

The NYSE's Proxy Working Group studied proportional voting in particular and rejected it as an alternative to amending Rule 452. As detailed in the June 5, 2006, "Report and Recommendations of the Proxy Working Group to the New York Stock Exchange:"

"Proportional voting does not have the same disadvantages as discretionary voting under Rule 452 with respect to brokers voting uninstructed shares in favor of the board's recommendations and would eliminate the need for the NYSE to determine which matters are "routine." Yet in many ways proportional voting creates its own set of problems. First, on a fundamental level proportional voting continues to assign votes to shares that have not been voted by the beneficial owners. Second, proportional voting may result in an increase in the influence of shareholders who do choose to vote, since they will obtain additional votes from shareholders who have not voted. Third, some institutional investors have expressed concern that it would make it easier for companies to achieve approval for matters which are currently not considered routine, since under a proportional voting system some percentage of the votes that are now considered "no" votes because they are not voted would be voted in favor of the proposal. Finally, as described above the Working Group believes there is a possibility that a proportional voting system may be subject to abuse depending upon how it is implemented. For all of these reasons, the Working Group concluded that while a proportional voting system was somewhat attractive, it is not the optimum result."

The Council believes the problems with proportional voting are severe.

- (1) Proportional voting perpetuates the distortions to voting outcomes currently caused by broker voting by assigning votes to shares that in fact have not voted. Such an approach is wholly inappropriate since it is impossible to interpret the silence of beneficial owners and the end result is that uninstructed shares may be counted in ways that run counter to owners' intentions.
- (2) Proportional voting results in a violation of one-share, one-vote, a core governance policy long supported by the Council and investors around the globe. It does so by inappropriately magnifying the influence of owners who have chosen to vote.
- (3) Proportional voting opens the door to abuse. For example, a group—such as insiders or hedge funds—could deliberately transfer their shares into broker accounts in order to expand their voting power through mirror voting.

The need to address broker voting has grown more urgent due to two recent events. First, press reports suggest that the Commission's electronic delivery rules have resulted in a decrease in the number of individual shareowners voting at annual meetings. If this is the case, then the number of broker votes has increased on "routine" items. This unintended consequence—one feared by the Council and noted in its February 8, 2006, comment letter to the Commission—heightens the need for the Commission to release and finalize the NYSE proposal.

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Second, an ever growing number of U.S. companies are adopting majority voting for directors. Some 66 percent of companies in the Standard and Poor's 500 Index have adopted some form of majority voting, according to a study published in November, 2007 by Claudia H. Allen, partner and chair of the Corporate Governance Practice Group at Neal Gerber Eisenberg. Majority voting is trickling down to mid- and small-cap companies, too; the study found that a total of 534 companies have adopted majority voting in some form. This trend to majority voting for director elections highlights the "non-routine," important nature of the election of directors and the need for meaningful voting results free of broker votes.

We are deeply disappointed with the Commission's failure to release the NYSE Euronext proposal for public comment. The stock exchange has been a profile in courage on this issue. It created a bi-partisan Proxy Working Group to study the issue, it put no restrictions on the Proxy Working Group's review, and it embraced the Working Group's recommendations by submitting to the Commission the proposal to amend Rule 452. It is time for the Commission to step up on this important issue.

We would be happy to respond if you have any questions or need additional information.

Sincerely,



Ann Yerger  
Executive Director

cc: Christopher Cox, Chair, Securities and Exchange Commission  
Paul S. Atkins, Commissioner, Securities and Exchange Commission  
Kathleen L. Casey, Commissioner, Securities and Exchange Commission