

COUNCIL OF INSTITUTIONAL INVESTORS

Suite 500 • 888 17th Street, NW • Washington, DC 20006 • (202) 822-0800 • Fax (202) 822-0801 • www.cii.org

Via Email

March 19, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

*Re: Proposal to Eliminate Broker Discretionary Voting for the Election of Directors
(File Number: SR-NYSE-2006-92)*

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors, a nonprofit association of more than 130 public, corporate and union pension funds with combined assets of over \$3 trillion. As the leading voice for shareowner rights and strong corporate governance, the Council appreciates the opportunity to comment on the New York Stock Exchange's (NYSE) proposed rule change amending NYSE Rule 452 to eliminate broker discretionary voting for the election of directors. While the Council strongly supports this much needed reform, we believe an earlier effective date is in the best interest of investors. Absent a truly compelling reason to delay, the Council recommends amending the NYSE proposed rule to be effective immediately upon final approval by the Securities and Exchange Commission (SEC).

The Council has long advocated changes to Rule 452, and we believe eliminating the ability of brokers to vote uninstructed client shares for the election of directors is an important first step. This reform will significantly enhance the integrity of the proxy voting system by ensuring that voting results for director elections—possibly the most important vote cast by investors—are not distorted by broker votes. Council members from around the globe indicate that the U.S. is far behind much of the world on this issue as most developed nations do not allow brokers to vote without instruction.

Now over 70 years old, Rule 452 is out of date and unfair to shareowners. In the Council's opinion there is no public policy justification for the current "broker may vote" rule. In today's governance environment, no ballot item submitted for shareowner approval is so "routine" that brokers should have the ability to vote on the matter without instructions from the beneficial owners. As our longstanding corporate governance policy clearly states, "Broker non-votes and abstentions should be counted only for purposes of a quorum." Rule 452 taints the integrity of director elections by giving brokers—who have no fiduciary obligation to vote the shares in the best interests of beneficial owners—the ability to effectively stuff the ballot box for management.

Uninstructed broker votes distort director elections.

Recent data confirm that uninstructed broker votes distort director elections. In 2008, the Council commissioned a study from Broadridge Financial Solutions on the impact of the broker vote on director elections at NYSE-listed companies in 2007. This study updated similar data that Broadridge provided to the NYSE Proxy Working Group in April 2005. Though Broadridge found that eliminating discretionary broker votes would have prevented only two more directors from being elected, the study clearly indicates that broker voting often masks significant shareowner dissatisfaction.

According to Broadridge, if broker votes were excluded in 2007, 98 directors at companies with a majority-vote standard and 514 directors at companies with plurality voting would have received at least 25% withhold or against votes (compared to 68 and 384 directors, respectively, when broker votes were included). Uninstructed broker votes are thus obscuring these otherwise clear indicators of negative shareowner sentiment. While excluding broker votes would not radically change the outcome of director elections, companies would get a much better picture of shareowner dissatisfaction, and perhaps take action.

This long overdue reform is needed now more than ever.

The need to address broker voting has grown more urgent due to recent events. First, press reports suggest that the SEC'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 finalize the NYSE proposed rule.

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. The 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.

As more companies adopt majority voting, uninstructed broker votes have a greater potential to distort elections. Broadridge compiled the results of the election of 5,094 directors at the 924 NYSE-listed companies that had plurality voting in 2007 as if they had majority voting in place. When broker votes were excluded, the number of directors that failed to win majority support jumps 91% from 74 to 142 directors.

Finally, the ongoing financial crisis has deeply shaken investor confidence. The upcoming 2009 proxy season is a watershed opportunity for frustrated shareowners to hold boards accountable. The Council is thus deeply troubled by the January 1, 2010 effective date for the NYSE proposed rule change. Investors should vote in 2009 with confidence that these crucial director elections are fair and undistorted by broker votes. Shareowners have already waited far too long for this

important change, and the costs of further delaying this much needed reform are greater than ever. The Council firmly believes that there is no truly compelling reason to delay implementation until 2010. Absent such a reason, the NYSE proposed rule should be amended to be effective immediately upon finalization by the SEC.

Opponents' objections are completely without merit.

The Council recognizes that the NYSE proposal is opposed by some market participants. Nevertheless, we believe their objections are entirely without merit. Quorum concerns in particular are exaggerated. Though Broadridge's study indicates that some companies may take longer to achieve a quorum without uninstructed broker votes, the ability to actually attain a quorum without these votes would have remained unchanged at more than 90% of companies in 2007.

While quorum concerns may persist for some small companies and companies with large retail ownership, such limited concerns are no reason to distort director elections at all companies. Despite the Council's long held policy that uninstructed broker votes should not be counted for any proxy ballot initiative, persistent quorum concerns can be readily addressed by including broker votes for an auditor ratification resolution. Including such a resolution on the proxy is a step that many corporations already take on their own and one that the Council believes is a best practice for all public companies.

Alternative approaches such as proportional voting are deeply problematic.

The Council believes alternatives to the total elimination of uninstructed broker votes—such as proportional voting—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.
- 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.

In summary, while the Council of Institutional Investors strongly supports the elimination of broker votes for director elections, investors would be better served by a rule implementing this important change immediately upon final approval by the SEC. We appreciate the opportunity to express our views on this matter. Please feel free to contact me with any questions at (202) 261-7096 or jonathan@cii.org.

Sincerely,



Jonathan D. Urick
Research Analyst
Council of Institutional Investors