



Via Email

April 5, 2013

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

Re: File Number SR-NYSE-2013-07¹

Dear Ms. Murphy:

I am writing on behalf of the Council of Institutional Investors (“CII”), a non-profit association of corporate, public and union employee benefit plans with combined assets in excess of \$3 trillion.² CII members are large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers.

The purpose of this letter is to provide our comments on the New York Stock Exchange LLC’s (“NYSE”) proposed rule change amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual (“Proposed Rule”).³

At the outset, we note that CII’s membership approved policies support an effective and efficient proxy voting system that includes the following characteristics:

- Timeliness—Voting related communications should reach eligible voters in sufficient time to allow for careful review of the materials and to facilitate voter participation.

¹ Notice of Filing of Proposed Rule Change Amending NYSE Rule 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Exchange Act Release No. 68,936 (Feb. 15, 2013), <http://www.sec.gov/rules/sro/nyse/2013/34-68936.pdf> [hereinafter Proposed Rule].

² For more information about the Council of Institutional Investors (“CII”) and its members, please visit the CII’s website at <http://www.cii.org/members>.

³ Proposed Rule, supra note 1, at 1.

- Accessibility—Technology should be used to improve the proxy voting process. However, mechanisms should be in place to ensure that shareowners receive proxy materials and can vote even if they do not use electronic voting and communications methods.
- Accuracy—All votes properly cast should be correctly tallied.
- Certainty—The proxy voting system should provide for end-to-end confirmation enabling both companies and shareowners to confirm that votes properly cast were included in the final tally as directed.
- Cost-effectiveness—The costs of transmitting proxy materials and votes should be reasonable.⁴

In addition, CII's membership approved policies identify two specific practices that our members believe *do not* serve investors and may lead to inaccurate proxy voting results—uninstructed broker voting and bundled voting. Our long-standing policies with respect to those two practices state:

- 3.7 Broker Votes: Uninstructed broker votes and abstentions should be counted only for purposes of a quorum.
- 3.8 Bundled Voting: Shareowners should be allowed to vote on unrelated issues separately. Individual voting issues (particularly those amending a company's charter), bylaws or anti-takeover provisions should not be bundled.⁵

⁴ CII, Policies on Other Issues, Effective and Efficient Proxy Voting (Adopted Apr. 13, 2010), http://www.cii.org/policies_other_issues#effective_proxy_voting.

⁵ CII, Policies on Corporate Governance §§ 3.7-3.8 (updated Oct. 5, 2012), http://www.cii.org/corp_gov_policies.

We commend the NYSE for their decision last year to narrow, consistent with our “Broker Votes” policy, the types of routine proposals on which brokers may vote customers’ uninstructed shares.⁶ We agree that further limiting the instances of uninstructed broker voting further increases the likelihood that “final vote tallies . . . reflect the wishes of the beneficial owners of the stock”⁷

We also applaud the recent decision of the United States District Court for the Southern District of New York (“Court”) reaffirming the broad scope of the Securities and Exchange Commission’s (“SEC” or “Commission”) “unbundling” rules.⁸ Those rules, consistent with our “Bundled Voting” policy, require distinct voting items on each separate matter in a management proposal.⁹ As the Court explained:

the “unbundling” rules serve a dual purpose: “to permit shareholders to [(1)] communicate to the board of directors their views on each of the matters put to a vote, and [(2)] not be forced to approve or disapprove a package of items and thus approve matters they might not if presented independently.”¹⁰

⁶ Information Memo, NYSE Euronext, Application of Rule 452 to Certain Types of Corporate Governance Proxy Proposals (Jan. 25, 2012), [http://www.nyse.com/nyse/nyse/information-memos/pdf?memo_id=12-4](http://www.nyse.com/nyse/nyse/nyse/information-memos/pdf?memo_id=12-4) (“In light of . . . recent congressional and public policy trends disfavoring broker voting of uninstructed shares, the Exchange has determined that it will no longer continue its previous approach under Rule 452 of allowing member organizations to vote on such proposals without specific client instructions.”).

⁷ Comm. on Banking, Hous. & Urban Affairs, Restoring Am. Fin. Stability Act, S. Rep. at 111 (2d Sess. 2010), <http://www.banking.senate.gov/public/files/RAFSAPostedCommitteeReport.pdf>.

⁸ Greenlight Capital v. Apple, Inc., No. 13 Civ. 900, at 2, 6 (S.D.N.Y. Feb. 22, 2013), <http://www.law.du.edu/documents/corporate-governance/takeovers/greenlight/opinion-einhornvappledecisiononpimotion.pdf>; see Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Elisse B. Walter, Chairman, U.S. Securities and Exchange Commission 3 (Mar. 13, 2013), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/03_13_13_letter_to_SEC_on_unbundling.pdf (Requesting that the “ Commission consider a modest reallocation of its existing resources to establish an effective and efficient process for identifying clear violations of the Commission’s proxy rules.”).

⁹ Greenlight Capital at 6.

¹⁰ *Id.*

The above referenced CII policies lead us to have concerns about the Proposed Rule's "success fee" for enhanced brokers' internet platforms ("EBIPs").¹¹ Those concerns are related to the Proposed Rule's stated intent of the fee to "persuade firms to develop and encourage the use of EBIPs by their customers, *providing a benefit to investors and to corporate governance generally . . .*"¹²

While we continue to support the use of technology to improve the proxy voting process, we question whether encouraging greater use of EBIPs that distribute voting instruction forms ("VIFs") would, at least in their current form, truly benefit investors and corporate governance generally. We, therefore, would respectfully request that before the Commission finalizes the Proposed Rule, or takes any other actions that may encourage the greater use of EBIPs, that it first address the following four related issues that are central to our concerns:

1. Regulatory Oversight: CII believes that VIFs, including those distributed to beneficial shareowners by EBIPs, should be subject to the same degree of SEC oversight as are proxy ballots. While we recognize that the SEC staff employs only a selective review process for proxy statements,¹³ that process, importantly, includes staff published guidance regarding the preparation of proxies, and staff comments on proxies that it believes are materially deficient in explanation or clarity. We believe the SEC's process improves the accuracy of the proxy voting system and a similar process should be established for VIFs, including those distributed by EBIPs.
2. Voting Options: CII believes that EBIPs that distribute VIFs to beneficial shareowners should be prohibited from presenting voting options in a manner that unfairly tilts votes in favor of management recommendations. We note that the SEC staff only recently prohibited EBIPs service providers from offering a single "vote all items with management" button without including a similar button to "vote all items against management recommendations."¹⁴ It is our understanding that existing compliance with this important new guidance may be inconsistent across service providers. We encourage continued staff efforts to ensure that all EBIPs service providers are complying with the guidance. We also would support staff consideration of whether any additional voting options guidance is needed to safeguard the accuracy of voting on EBIPs.

¹¹ Proposed Rule, *supra* note 1, at 37.

¹² *Id.* at 44 (emphasis added).

¹³ See Letter from Jeff Mahoney at 3 (commenting on how the selective review process could be improved).

¹⁴ See Ross Kerber, *Proxy Site Dump One-Click Vote Button on SEC Concerns*, Reuters, Mar. 20, 2013, <http://news.yahoo.com/proxy-sites-dump-one-click-vote-button-sec-185954839--sector.html>.

April 5, 2013

Page 5 of 5

3. Presentation: CII believes that VIFs, including those distributed to beneficial shareowners by EBIPs, should be prohibited from describing proxy ballot items using wording, headings, or fonts that differ from those used on the related proxy card. CII believes that accurate voting is more likely when all voting forms, whether paper or electronic, have a consistent presentation.
4. Prohibited Broker Voting: CII believes that VIFs, including those distributed to beneficial shareowners by EBIPs, should not be permitted to tally unmarked shareowner votes in favor of management's recommendations when the underlying voting items are otherwise ineligible for discretionary voting by brokers. We believe that such a practice allows EBIPs service providers to make an "end run" around the broker voting requirements of NYSE Rule 452 and electronically "stuff the ballot box" for management.

As always, we would welcome the opportunity to discuss the above concerns with you in more detail at your convenience. Please feel free to contact me directly at (202) 261-7081 or jeff@cii.org.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel