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**Business Law Section**  
**Committee on Securities Regulation**

March 27, 2009

Ms. Elizabeth Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Release No. 34-59464 (File No. SR-NYSE-2006-92)  
Proposal to Amend NYSE Rule 452 and Listed Company  
Manual Section 402.08 to Eliminate Broker Discretionary  
Voting for the Election of Directors

Ladies and Gentlemen:

The Committee on Securities Regulation of the Business Law Section of the New York State Bar Association (the "NYSBA Committee") is pleased to have the opportunity to comment on the Proposal to Amend NYSE Rule 452 and Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors.

The NYSBA Committee is composed of members of the New York State Bar Association, a principal part of whose practice is in securities regulation. The NYSBA Committee includes lawyers in private practice and corporation law departments. A draft of this letter was reviewed by certain members of the NYSBA Committee. The views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

For the reasons set out below, we believe that the proposed amendment to Rule 452, which would bar NYSE member firms from voting uninstructed shares in uncontested elections of directors, should be re-examined in light of current circumstances. The proposed amendment was endorsed as one element of a package of recommendations in the Report on Recommendations of the Proxy Working Group to the

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New York Stock Exchange, delivered in June 2006. None of the other recommendations in that Report – including with respect to shareholder education, improvements in issuer communications with beneficial owners, and further study of the role of various institutional advisory services and proxy voting groups – have been implemented. Since the proposal to amend Rule 452 was released in 2006, there have also been other significant changes that bear importantly on the situation the proposal was intended to address.

For purposes of the current discussion, we accept the Working Group’s conclusion that for a variety of reasons, in light of current practice and the prevailing corporate governance environment, elections of directors are not “routine”, and should not be treated as such. However, we do not believe that eliminating the broker discretionary vote in uncontested director elections is the best way to enhance the shareholder voting process, in light of circumstances as they have evolved since the proposal was originally made. For a number of reasons discussed below, at the very least, the proposed amendment, and the possible alternatives to it, deserve further consideration.

It is important that the proposed amendment not be considered in isolation. The proposed amendment clearly would, absent other measures, result in a reduction in the number of shares voted at most annual meetings. We believe this would create real problems for many issuers who, for example, would be challenged to obtain a quorum for their annual meetings. In its report, the Working Group noted that it “was continually struck by the integrated nature of the proxy process, and how changing one part of this process impacts many other parts.” As a consequence, the Working Group stressed that amending Rule 452 “to make the uncontested election of directors a ‘non-routine’ matter *must* include as a critical component a large scale education effort to inform shareholders about the mechanics of the proxy voting process.” (emphasis added). No such effort has been undertaken.

The potential problem is exacerbated by the impact, to date, of the implementation of the Commission’s e-proxy initiative, which has led to a sharp decrease in the levels of voting by retail shareholders of issuers that have used it. Following the 2008 proxy season, Broadridge reported that companies using e-proxy had experienced a 73% drop in the number of retail accounts voting, and a 52% drop in the number of retail shares voting.<sup>1</sup> If this trend is not reversed, the loss of the broker discretionary vote will

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<sup>1</sup> Cited in John W. White, Director, Division of Corporation Finance, Speech by SEC Staff: Corporation Finance in 2008 – A Year of Progress (August 11, 2008), available on the Commission’s website.

have a bigger impact than was expected at the time the Working Group initially completed their study and proposed the change to Rule 452.

Unfortunately, most retail shareholders fail to exercise their right to vote for the election of directors, which is, at its core, the source of the problem. Many retail shareholders do not understand the importance of voting their proxies and, in many cases, shareholders have been relying on the current proxy voting system, expecting that certain matters, such as uncontested election of directors, will be resolved as the board of directors recommends. We agree with the Working Group's conclusion that there should be an effective undertaking to educate shareholders on the importance of voting their shares. The fact that this has not taken place increases the potential adverse effects of now simply adopting the proposed amendment to Rule 452.

The Working Group also recommended that the NYSE should support a review by the SEC of the existing shareholder communication rules and specifically the distinction between objecting beneficial owners (OBOs) and non-objecting beneficial owners (NOBOs). Many retail shareholders do not understand the distinction between OBOs and NOBOs, and recent fears of identity theft and other privacy concerns have resulted in a growing number of shareholders objecting to the disclosure of their identity. However, research cited in the Working Group's report showed that an overwhelming majority of investors would choose to be NOBOs once they were provided with information about the differences between being a NOBO and an OBO. Again, since the suggested efforts to improve shareholder communications have not been made, the risks of simply adopting the proposed amendment to Rule 452 are heightened.

At the same time, since 2006, many more issuers have adopted a majority voting standard for elections of directors. This is generally viewed as a positive development from a corporate governance perspective. This trend may be discouraged if the proposed amendment to Rule 452 becomes effective. The difficulty of gathering a majority vote without the broker discretionary vote may prove a burden corporations are unwilling to shoulder.

Most significantly, since the Working Group report, a number of brokers have adopted proportional voting of uninstructed shares: these brokers vote all uninstructed shares in proportion to the voting instructions actually received from their customers. These brokers include Ameritrade, Goldman Sachs, Merrill Lynch, Morgan Stanley and others. We believe there is a very fair argument that in the current environment, proportional voting is a better way to address the issue of broker voting of uninstructed shares. Under the proposed amendment to Rule 452, in a vote requiring majority approval, uninstructed shares are all effectively considered "no" votes. This is quite unlikely to reflect accurately the decisions that informed shareholders actually would have made. Proportional voting, when compared to existing practice (in which brokers

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vote uninstructed shares as management recommends), more accurately reflects the intent of the shareholders as a body and avoids many of the corporate governance problems raised by critics of the broker discretionary vote.

We respectfully submit that for all of the foregoing reasons, this proposed amendment to Rule 452 should be re-examined in light of current circumstances.

Respectfully submitted,

COMMITTEE ON SECURITIES  
REGULATION

By:   
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Jeffrey W. Rubin  
Chair of the Committee

cc: Mary L. Schapiro, Chairman  
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