



March 31, 2009

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

**Re: Proposed Amendment to New York Stock Exchange Rule 452  
(Release No. 34-59464; File No. SR-NYSE-2006-92)**

Dear Ms. Murphy:

The American Business Conference (ABC) is a Washington-based coalition of CEOs of midsize growth companies founded in 1981 by Arthur Levitt, Jr. The current chairman of ABC is Alfred West, Chairman and CEO of SEI Investments, Oaks, Pennsylvania. ABC is submitting this comment letter in response to the proposal of the New York Stock Exchange (NYSE) to amend its Rule 452 for the purpose of denying the use of the broker discretionary vote in uncontested director elections.

***General Comment on the NYSE Proposal*** It is astonishing to realize that ABC has been involved in the debate over the application of the broker discretionary vote for nearly seven years. Beginning in 2002 up until the present moment, ABC has presented its views on the broker discretionary vote in comment letters to the Commission, to the press, in memoranda to the policy community, and in presentations before the NYSE's Proxy Working Group and a 2007 Commission Roundtable on proxy mechanics.<sup>1</sup>

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<sup>1</sup> See, e.g., Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Re: Release No. 34-466620; File No. SR-NYSE-2002-46; Regarding Voting of Proxies, October 31, 2002; Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Re: Security Holder Director Nominations (Release 34-48626, File No. S7-19-03, March 31, 2004; John Endean, "A Snipe Hunt," *Directors and Boards*, First Quarter, 2007; Mary Beth Kissane, "Breaking the Broker Vote" Corporate Secretary, July 2007, pp. 30 – 32; Friends of ABC Memorandum, Re: Report of the New York Stock Exchange's Proxy Working Group, October 12, 2006.

We do not begrudge this investment of time and effort. However, we must admit that the emergence – really, the reemergence – of the NYSE’s proposal is disheartening.

**Given the changes made in the application of the broker discretionary vote since the NYSE Proxy Working Group first advanced this proposal in 2006, given that the version of the proposal currently before the Commission does not in the least take cognizance of those changes, and given that the Proxy Working Group itself, in its comment letter on this proposal, seems to be having second thoughts about changing Rule 452 at this time, we do not understand the purpose of this entire exercise.**

Accordingly, we urge the Commission to recognize the NYSE’s proposed amendment to the broker discretionary vote for what it is: an anachronism from three years ago that is not worth further consideration.

***The Broker Vote has been effectively reformed for the benefit of individual investors***

In a comment letter to the Commission in 2002, ABC expressed its agreement with the institutional investor community that the broker discretionary vote, *as it was then administered*, served, at least potentially, as a thumb on the scale for management. This was so because brokers, when they decided to vote uninstructed shares beneficially owned by their clients on routine matters, typically did so in line with the recommendations of company management.

Unlike some in the institutional investor community, we did not call for the scrapping of the broker discretionary vote. We pointed out that the broker discretionary vote was indispensable for the ability of companies to achieve quorum for their annual meetings without going to the expense of hiring proxy solicitors to round up votes simply to allow a meeting to proceed. Virtually all observers, including the Council of Institutional Investors, expressed a desire to retain the broker vote for quorum purposes.

But reaching quorum with the broker vote had larger implications. Under state law, the broker vote could not be used to attain quorum absent the presence of other routine matters on the proxy ballot for which it could also be employed. After years of reducing the number of matters defined by the NYSE as routine,

there were only two left: ratification of the appointment of an auditor and the uncontested election of directors. A continued process of whittling away at the definition of routine for Rule 452 purposes would endanger the ability to employ the broker discretionary vote to reach quorum.

In any event, it seemed to ABC that the use of the broker discretionary vote in uncontested director elections was entirely appropriate. Such elections are never in doubt and in theory a director under the plurality system could be elected with just one vote. However, in the real world, no new director wants to be elected with one vote. Accordingly in order that their directors are elected by a significant percentage of shareholder votes, companies, if denied the broker vote, would have to hire proxy solicitors. Companies with majority voting for directors would have to do the same, a potential cost that probably has impeded the adoption of majority voting at companies otherwise open to that change.

Because smaller and midsize companies tend to have larger amounts of their stock in individual hands, the cost of paying solicitors and the attendant printing, postage, and telephone bills, would fall disproportionately on them. This paper chase to obtain votes for an election that is not in doubt -- and therefore is the epitome of a "routine" matter -- we likened to a snipe hunt.

To keep the benefits of the broker discretionary vote while addressing the concerns of the politically powerful institutional investor community, ABC made two recommendations. First, since institutional dissatisfaction with the broker discretionary vote appeared centered on the vote's presumed distortional effect in so-called "Just Vote No" campaigns, we recommended labeling a "Just Vote No" campaign "nonroutine." That would mean that in the election of a director targeted in a "Just Vote No" campaign, the broker discretionary vote would not apply.

Second, and more important, we called for reform of the broker discretionary vote itself through the adoption of proportional voting, on a broker-by-broker basis. In other words, if those clients of XYZ Securities Firm who chose to return their proxies voted 80/20 in favor a particular director, the uninstructed shares would be voted in the same proportion. Thus the thumb of management would be removed from the scale and the likely views of individual investors would be more fairly represented.

### *Proportional Voting: What the Data Say*

We regret that the idea of declaring “Just Vote No” director campaigns “nonroutine” has yet to gain much traction. We have been pleased, however, to see that proportional voting has increasingly become the norm in uncontested director elections. Today, thanks to a recommendation to brokerage firms by their trade association, most large brokerage houses vote their uninstructed shares on a proportional basis.

On February 3, 2009, Broadridge, the leading proxy processor, released the first comprehensive analysis of proportional voting using calendar year 2007 data. This analysis covers 1,297 annual meetings and 7,812 director elections. It demonstrates conclusively that proportional voting works to both keep costs down for issuers while reflecting more accurately than the traditional broker vote the views of individual shareholders.

On the issue of cost, the Broadridge data show that both the traditional broker discretionary vote and the proportionally-voted broker discretionary vote facilitate the ability of companies to attain quorum in a timely and economical manner. Without the broker vote, 508 companies that reached quorum fifteen days before their annual meeting would have found the attainment of quorum pushed closer to the day of the meeting, while 123 companies would not have attained quorum at all. Obviously, under such a scenario, the affected companies would have had to spend shareholder money for proxy solicitors.

Broadridge first looked at 373 NYSE-listed firms with majority voting policies. In companies with majority voting for directors, the average “for” vote *counting only instructed proxies* was 94.85%. Assuming use of the traditional broker discretionary vote, in which uninstructed proxies are voted in favor of management recommendations, the average “for” vote was 95.93%. Using proportional voting, the average “for” vote was 95.04%. As we had argued it would, the proportional vote more closely mirrored the instructed share vote than the traditional broker discretionary vote.

The 373 firms held a total of 2,718 uncontested director elections. Counting only instructed proxies, a mere eight of those directors received less than 50% “for” votes. With a traditional broker vote, that number drops to six. With a proportionately-voted broker discretionary vote, the number of directors with less than 50% “for” votes was seven. Again, the proportional voting more closely mirrored the instructed vote although, again, the number of elections in question was miniscule.

Broadridge then looked at the 924 NYSE companies that had plurality voting for directors. In those companies, the average “for” vote counting only instructed proxies was 90.03%. Assuming use of the traditional broker discretionary vote, the average “for” vote was 92.00%. Using proportional voting, the average “for” vote was 90.33%. Again, the proportional vote more closely mirrored the instructed share vote than the traditional broker vote. In fact, the difference between the vote with instructed proxies and the proportional vote was negligible.

**In summary, we read the Broadridge data as solid proof of the efficacy of proportional voting both in reflecting the views of individual shareholders and in containing costs for issuers and their shareholders. Regrettably, the current NYSE proposal does not take cognizance of any of this in its proposal to deny the use of the broker discretionary vote in uncontested director elections. For its part, the Commission, we suggest, must consider these data as it evaluates the NYSE’s proposal.**

### *The Proxy Working Group Changes Course*

As noted above, it was the 2006 report of the NYSE’s Proxy Working Group that led to the current proposed change in Rule 452. In its report, the Proxy Working Group repudiated efforts to reform the broker discretionary vote as it was applied to uncontested director elections. Instead, in a bit of rhetorical jujitsu, it upended common sense by declaring all director elections to be, by definition, “nonroutine.” Wrote the Proxy Working Group in its 2006 report:

... {I}t is important to recognize that the election of a director, *even where the election is uncontested*, is not a routine event in the life of a corporation. Directors are simply too important to the corporation for their election to ever be considered routine. *While this is likely to result in some greater costs and difficulties for issuers*, it is a cost *required* to be paid for better corporate governance and transparency of the election process. [emphasis added]

Obviously directors are important “to the corporation” – who could argue otherwise? But that truism hardly speaks to the fact that an uncontested election – the only kind of director election to which the broker discretionary

vote applies – cannot reasonably be considered anything else but routine. “Routine” and “important” are not antonyms. The beating of one’s heart is “routine.” Most would also agree it is important.

Perhaps anticipating reader skepticism regarding its diktat on the “nonroutine” nature of uncontested elections, the Proxy Working Group also attacked proportional voting. It said that proportional voting was a “somewhat attractive” idea but not an “optimum” solution. Why only “somewhat attractive?” The Proxy Working Group alleged that proportional voting “may be subject to abuse.” The Group did not explain how, practically, this sort of “abuse” could be pulled off and why.

This was puzzling. At the time of the issuance of the Proxy Working Group’s report, one brokerage firm, Charles Schwab, had already been voting its uninstructed shares proportionally without a hint of abuse – and without any inquiries that we know of from the Proxy Working Group about Schwab’s experience. ABC concluded that the Group’s unsubstantiated, entirely hypothetical claims against proportional voting were little more than intellectual skywriting – striking but vaporous.<sup>2</sup> The infuriating thing about the Group’s claims is that they are still to this day being cited uncritically by others, in spite of the experience of the last two years when proportional voting has been put into wide practice.<sup>3</sup>

In its comment letter dated March 25, 2009, to the Commission, the Proxy Working Group seems to have changed course.<sup>4</sup> To be sure, it stands by its view that all director elections are nonroutine. But this categorical imperative is no longer quite as categorical or as imperative, apparently, as it was three years ago.

The Proxy Working Group has now taken the very curious position of asking the Commission to extend its comment period for this rulemaking – *a rulemaking it first proposed and, at the Group’s instigation, the NYSE has pushed for*

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<sup>2</sup> To address one of the hypothetical “abuse” scenarios, brokerage firms have institute proportional voting in a way that eliminates any potential for a large shareholder to affect the “mirror” against which broker votes are voted proportionally. Those who continue to cite this concern do not identify the additional situations they envision.

<sup>3</sup> See *e.g.*, Letter of Jonathan D. Urick, Research Analyst, Council of Institutional Investors, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Re: SR-NYSE-2006-92, March 19, 2009. Mr. Urick contends that proportional voting is “deeply problematic” citing the 2006 contentions of the NYSE Proxy Working Group.

<sup>4</sup> Letter of Larry Sonsini, Chairman, Proxy Working Group, to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re: File No. SR-NYSE-2006-92, March 25, 2009.

*several years.* In making this astounding request, coming as it were in the final scene of the fifth act, the NYSE Proxy Working Group hopes the added time it asks for will be used “to review the broader proxy process.”<sup>5</sup>

Given its new viewpoint, it would have been nice if the Proxy Working Group had simply asked the NYSE not to propose the change to Rule 452 in the first place. This would have saved the rest of us a great deal of time. In any event, as the NYSE Proxy Working Group knows, the Business Roundtable (BRT), an association of very large companies, representatives of which serve on the NYSE Proxy Working Group, has had a petition before the Commission calling upon the Commission to “conduct a thorough review of the current shareholder communications system” focusing on a review of the beneficial shareholder proxy process system.<sup>6</sup>

The BRT petition has made little headway.<sup>7</sup> In our view, the NYSE Proxy Working Group is now trying to breathe life into the BRT initiative through an entirely inappropriate expansion of the comment period for this rulemaking. Whatever the merits of the BRT proposal, this comment period is not about an issue as large as the beneficial proxy process. **It is about the fate of the broker discretionary vote in uncontested director elections – no more and no less.**

### Conclusion

**In a subject area like corporate governance, in which unintended consequences so often flow from reform, ABC regards the broker discretionary vote as a small, but real, success story.**

Applicable to only a few routine matters, the broker discretionary vote saves all issuers – particularly smaller public companies – and their shareholders money, while, when voted proportionately, capturing with remarkable precision the sentiments of beneficial shareowners.

Some will always object that the broker discretionary vote assigns votes to beneficial owners who do not in fact vote and that this is in some sense not

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<sup>5</sup> Larry Sonsini to Elizabeth M. Murphy, March 25, 2009, *ibid*.

<sup>6</sup> Request for Rulemaking Regarding Shareholder Communications, No. 4-493 (April 12, 2004).

<sup>7</sup> ABC’s views on the BRT petition can be found in Letter of John Endean to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission Re: Rule No. 4-493, Business Roundtable Petition for Rulemaking Regarding Shareholder Communications, July 15, 2004.

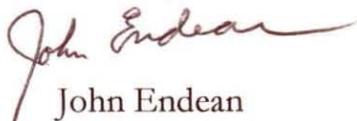
fair. But if this is a problem, is it not also a problem that pension funds and other institutional investors vote their proxies without soliciting the views of the workers or taxpayers who are the beneficial owners of those shares? We do not see the difference.

The blunt truth is that in recent years, the rate of individual shareholder voting has plummeted. This has been in part due to the Commission's adoption of Notice and Access rules in the face of warnings from ABC and others about the consequences for individual participation. ABC believes that for the Commission to accept now the NYSE's proposed change to Rule 452 would add to this serious problem.

We understand that we have entered a period that is likely to be characterized by new regulation. What the Commission must guard against, we think, will be the tendency of all sorts of interests to submit proposals for regulatory action in the hope that, in the current environment, they might just get enacted. We think that is what is happening here. A three-year old proposal that heretofore was not acted upon by the Commission has been brought back for Commission consideration, unchanged. Not even its initial champion, the NYSE Proxy Working Group seems in much of a hurry to see its adoption.

We do not want to be misunderstood. We do not think the broker discretionary vote is sufficient in and of itself. ABC's own preference would be for the Commission to move on past the broker discretionary vote toward Client Directed Voting. In the meantime, however, to further truncate the use of the broker discretionary vote, as the proposal under discussion advocates, represents a step backward, a step the Commission should not take.

Sincerely,



John Endean  
President

cc: Mary Schapiro – Chairman, U.S. Securities and Exchange Commission  
Kathleen Casey – Commissioner, U.S. Securities and Exchange  
Commission  
Elisse Walter – Commissioner, U.S. Securities and Exchange Commission  
Luis Aguilar – Commissioner, U.S. Securities and Exchange Commission  
Troy Paredes – Commissioner, U.S. Securities and Exchange Commission  
Erik Sirri – Director, Division of Trading & Markets