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April 3, 2009

By Electronic and United States Mail

Securities and Exchange Commission

100 F Street, NE

Washington, D.C. 20549-1090

Attn: Ms. Elizabeth Murphy, Secretary

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:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its February 26, 2009 release referenced above (the "Proposing Release")<sup>1</sup>.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section of Business Law of the ABA, nor does it necessarily reflect the views of all members of the Committee.

We are submitting this letter in connection with the proposal by the New York Stock Exchange ("NYSE") to eliminate broker discretionary voting for the election of

<sup>1</sup> 74 Fed. Reg., Vol. 43, p. 9864 (March 6, 2009).

directors.<sup>2</sup> NYSE Rule 452 currently allows brokers to vote on “routine” proposals if the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. The NYSE proposed these amendments based on the recommendations of the Proxy Working Group created by the NYSE<sup>3</sup> and based on the NYSE’s own conclusion that the election of directors should no longer be deemed to be a “routine matter.”

For the reasons set out below, we are concerned that adoption of the proposal would increase confusion about the voting process, and thus risk disenfranchising shareholders, and increase the cost of uncontested director elections. Moreover, we believe that changes that have occurred in the shareholder voting process since the publication of the Proxy Working Group Report, including the adoption of e-proxy and the increased use of proportional voting by brokers, call into question the desirability of the proposed rule change. Surveys have shown that participation in voting by retail investors has diminished significantly due to their unfamiliarity with online accessibility of proxy materials and online voting procedures under the e-proxy procedures. This is particularly true for those retail investors, comprising the vast majority, whose securities are held through brokerage accounts and who therefore receive e-voting instructions and access to materials through intermediaries rather than directly from the issuer. We understand that the Commission and its Staff have been advised of these concerns and are considering steps to address them, but such steps have not been taken to date.

For all of these reasons, we recommend that the Commission not approve the adoption of the amendments at this time. Should the Commission determine to move ahead with adoption, we recommend that it consider the revisions mentioned below and also consider delaying the effective date of the amendments until the important related issues mentioned above can also be considered and dealt with effectively. Our reasons are discussed below.

### **Background – The Proxy Working Group Report**

Currently under Rule 452, brokers may give a proxy to vote stock without customer instructions on an action so long as the person giving or authorizing the proxy has no knowledge of any contest as to the action, the action is adequately disclosed to shareholders and the action does not include authorization for a merger, consolidation or any other matter which may affect substantially the rights or privileges of such stock. Rule 452 specifies 18 matters as to which brokers are not authorized to give a proxy without instructions from beneficial owners.<sup>4</sup> These include matters which are generally considered to be extraordinary, as well any matter that “is

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<sup>2</sup> The proposal would amend NYSE Rule 452, titled “*Giving Proxies by Member Organization*,” and corresponding NYSE Listed Company Manual section 402.08. The proposal would not apply to companies registered under the Investment Company Act of 1940.

<sup>3</sup> Report and Recommendations of the Proxy Working Group to the New York Stock Exchange (June 5, 2006) (the “Proxy Working Group Report”).

<sup>4</sup> Note .11 to Rule 452, “When member organization may not vote without customer instructions” provides that “generally speaking, a member may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon” involves any of the 18 matters specified in the note.

the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management (*i.e.*, a contest).”

As the Proxy Working Group noted, on the most basic level, the problem with broker voting is that it allows someone (*i.e.*, the broker) who does not have an economic interest in the corporation the opportunity to vote on matters that are presented at a meeting of shareholders. A second problem is that historically brokers have generally cast uninstructed shares overwhelmingly in support of the board’s recommendations, which provides a significant advantage to the incumbent board in director elections and other routine matters. The Proxy Working Group considered three principal alternatives to address these problems: (i) that broker discretionary voting be abolished, (ii) that uninstructed shares be voted on a proportional basis with instructed shares, and (iii) that the election of directors be designated as a “non-routine” matter. The Proxy Working Group Report concluded by recommending that as part of a package of recommendations Rule 452 be amended to provide that the election of directors is a “non-routine” matter<sup>5</sup>. However, in a 2007 Addendum to its report, the Proxy Voting Group indicated that it planned to review brokers’ experience with proportional voting and consider whether it was a viable alternative. The Addendum also discussed another alternative, Client Directed Voting, and indicated that the Proxy Voting Group would continue to evaluate its advantages and disadvantages.

## Discussion

At the outset, although we acknowledge the appropriateness of questioning why brokers, with no beneficial interest in a corporation, should be able to vote uninstructed shares, we believe that any “solution” which does not consider the expectations of shareholders and the likely consequences to public companies could resolve one issue but create others. Our substantive concerns with the proposal relate to the potential shareholder disenfranchisement, potential disruption to the voting process and the costs of the proxy solicitation process, which ultimately are born by shareholders.

1. *The Proxy Working Group’s recommendations were intended to be considered together, rather than on an individual basis.*

The Proxy Working Group’s recommendations with respect to the corporate voting process were presented as a package, with each of the elements reinforcing the others. For example, many shareholders currently may believe that there is no reason to vote a proxy if they intend to support the director slate recommended by the Board, because their proxies would be voted for that slate in any event<sup>6</sup>. In this regard, the Proxy Voting Group stated that “any plan to

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<sup>5</sup> The Proxy Working Group Report stated that the election of directors “can no longer be considered a ‘routine’ event in the life of a corporation., because “[d]irectors have authority over the most fundamental issues of corporate governance today, while investors, regulators, courts and others have all recognized the critical role directors play in the life of a corporation.” We note that this has always been the case, and that there are few matters addressed at stockholder meetings that are more routine than director elections.

<sup>6</sup> The Proxy Working Group Report notes that this has been the understanding of shareholders for many decades.

amend Rule 452 to make the 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) This has become even more important because, as has been noted, retail voting levels by companies that have implemented e-proxy are sharply lower than proxies solicited through the mails<sup>7</sup>. Thus, approval of the NYSE proposal, rather than improving the quality of voting, may undermine legitimate shareholder expectations as to how the voting process will operate. In addition to recommending greater investor education, the Proxy Working Group made a number of other recommendations that were intended to enhance the voting process. In our view, the adoption of one element of the recommendations without simultaneous consideration of the others could undermine the synergies that were contemplated, and not necessarily improve governance in line with shareholder expectations.

2. *The proposed amendments would impose additional costs.*

The Proxy Working Group Report notes that the proposed change

“is likely to increase the costs of uncontested elections, as issuers will have to spend more money and effort to reach shareholders who previously did not vote. These costs may increase substantially with the rise of majority voting for directors, as issuers have to obtain the votes from shareholders who may not realize the impact from their failure to vote... These consequences could fall most dramatically on smaller issuers, who have a smaller proportion of institutional investors and/or greater difficulty in contacting shareholders and convincing them to vote in uncontested elections.”

When the Proxy Working Group issued its report in 2006, the cost issue was not sufficient to deter it from recommending amendments to Rule 452. From the vantage of 2009, we believe greater consideration needs to be given to the financial burdens the proposed amendments might impose. Today, most companies are wrestling with the problems created by the most profound global recession in decades and, in many cases, facing basic questions as to whether they will be able to survive, and shareholders are reeling from the tremendous loss in the value of their portfolios. Although we know of no reliable estimates of the costs of implementing the proposed amendments, the imposition of **any** additional costs to comply with the proposed amendments to Rule 452 seems to us untimely and unjustified. As the Proxy Working Group Report notes, this burden will be disproportionately borne by smaller public companies, and may also be disproportionately borne by companies that, in order to better reflect shareholder concerns about the process by which directors are elected, have adopted majority vote provisions for directors.

We urge that consideration of the proposal be deferred until the nation’s economy is under less stress.

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<sup>7</sup> See speech by 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.

3. *The proposed amendments should explore possible alternatives for defining "contested."*

The Proxy Working Group cited a number of reasons why elections should not be considered routine, but they fit broadly into two general categories. One category relates to the growth of almost entirely independent boards and the increasing recognition of the critical role of directors. It is not clear to us why the fact that boards are increasingly made up of independent directors suggests in any way that their election is other than routine. Moreover, although we agree that directors play a critical role in corporate governance and that recent events have highlighted that role, directors have always been responsible for managing or overseeing the management of the corporation. We are not persuaded that any change in public attention directed to the role of directors justifies, for all corporations and in all cases, making the election of directors non-routine.

The second category of items relates to the increasing prevalence of internet communications and "just say no" campaigns. These do not fit easily into a definition of "contested." It is no doubt frustrating to those unhappy with the management of a corporation, but who do not have the interest or resources to undertake a proxy campaign on their own, that broker votes can often act as a "thumb on the scale" in favor of the management slate. We believe, however, that the solution is not to make each and every election of directors a non-routine matter. Instead, we urge the Commission to ask the NYSE to explore at greater length possible alternatives. One possibility would be to consider an election "contested" if, on the date set for the submission of shareholder proposals under Rule 14a-8, shareholders who had held a certain percentage of the outstanding shares for a designated period of time, and who intended to hold those shares through the date of the meeting, filed a request to have the election of directors treated as non-routine. Another possibility would be to consider an election to be non-routine if, in any election for directors at the last annual meeting, more than a certain percentage of the shares were voted against a director or indicated an instruction to withhold authority to vote in favor. Our concern is that simply designating all elections as non-routine is much too blunt an instrument and will sweep into it many elections that are truly routine and for which the proposed rule changes would undermine shareholder intent and add costs without any commensurate benefit. That additional cost comes about mostly as a result of issues relating to obtaining a quorum, which we discuss below.

4. *Adoption of the proposed amendments could have state law quorum ramifications.*

The Proxy Working Group Report indicates that the adoption of amendments to Rule 452 could affect the ability of a public company to have a quorum present at an annual meeting of shareholders, noting "the Working Group believes it is important to consider the critical role broker voting has played in allowing issuers to achieve a quorum for shareholder meetings, and to address this issue as part of any change to Rule 452. In this regard, the NYSE should consult with state law experts to determine if changes in state corporation law might be appropriate." If the proposed amendments to Rule 452 risk the possibility that any public company will be unable to obtain the quorum necessary to hold the meeting, we suggest that consideration of the Rule amendment be deferred until sufficient review has been undertaken and completed. The

inability of a public company to hold a meeting of shareholders by reason of a lack of a quorum would be of significant detrimental consequence to the company and its shareholders. We did not see in the proposal any indication that the review recommended by the Proxy Working Group has been undertaken, and therefore we caution that the adoption of the proposed amendments could give rise to issues that could, contrary to the Commission's goal of investor protection, serve to disenfranchise shareholders and prevent the smooth operation of the entire shareholder meeting process.

5. *Proportional voting and client directed voting deserve further consideration.*

Although the Proxy Working Group considered and initially rejected a system by which brokers would vote uninstructed shares on a proportional basis, its 2007 Addendum noted developments in this area and said that it plans to review brokers' experience and consider whether proportional voting is a viable alternative. The Proxy Working Group also discussed a suggestion on "client directed voting," which would permit a brokerage customer to designate in the brokerage agreement how it wants its shares voted in all elections. This direction, which would be "good until cancelled," might include direction to (i) vote in accordance with the board's recommendation, (ii) vote against the board's recommendation, (iii) abstain from voting and (iv) vote proportionally with the member firm's retail clients' instructed votes on the same issue. Such a system could help to increase retail participation in the voting process without the burden that some retail investors may perceive when receiving multiple notice and access notices or full sets of proxy materials with voting instruction forms. We note that a number of major brokers are now voting uninstructed shares in proportion to the votes they do receive, and believe that proportional voting more properly reflects retail investor sentiment and may encourage greater retail participation in the election process. Without a system like proportional voting there is a risk that voting power of institutions and other who vote their shares will be magnified when the votes of retail investors are not present. We believe that the Commission and the NYSE should explore in more detail whether applying proportional voting and client directed voting would more accurately reflect shareholder intentions than would making all director election non-routine, which would preclude the use of proportional voting.

**Conclusions and Recommendations**

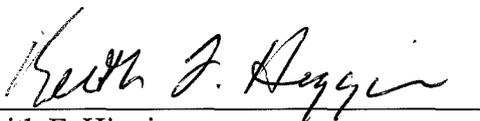
For the reasons set forth above, we respectfully suggest that the Commission not approve at this time the adoption of the proposed amendments to Rule 452. In the meantime, we believe the NYSE should explore alternatives to better reflect shareholder intentions and prevent companies, and consequently their shareholders, from having to incur additional costs to ensure a quorum for their annual meetings.

If the Commission decides to adopt the proposed amendments, we respectfully suggest that it apply the proposed amendments initially only to large accelerated filers, so as to not unfairly burden smaller public companies and to provide time to observe the effect of the proposed amendments in operation.

Securities and Exchange Commission  
April 3, 2009

The Committee appreciates the opportunity to comment on the proposal and respectfully request that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and its Staff and to respond to any questions.

Respectfully submitted,



Keith F. Higgins  
Chair, Committee on Federal Regulation of Securities

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