



**SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS**

521 FIFTH AVENUE • NEW YORK, NY 10175 • P 212.681.2000 • F 212.681.2005 • WWW.GOVERNANCEPROFESSIONALS.ORG

March 20, 2009

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
Attention: Ms. Elizabeth M. Murphy, Secretary
Via e-mail: rule-comments@sec.gov

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

The Society of Corporate Secretaries & Governance Professionals is a professional association, founded in 1946, with over 3,500 members who serve more than 2,500 issuers. Responsibilities of our members include supporting the work of corporate boards of directors, their committees and executive management regarding corporate governance and disclosure. Our members are generally responsible for issuer compliance with the securities laws and regulations, corporate law and stock exchange listing requirements, and have been on the front line in implementing the structural changes necessitated by the Sarbanes-Oxley Act of 2002 and the related rules of the Securities and Exchange Commission (“SEC”), the Public Company Accounting Oversight Board and the national securities exchanges. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

We request that the SEC consider our comments in connection with the NYSE’s proposed rule change to amend its Rule 452 to eliminate broker discretionary voting for election of directors. As discussed in more detail below, the Society believes that this proposed rule change must be considered in the context of the many issues currently facing the proxy voting system. There are few subjects that the Society takes as seriously as this one. The proxy voting system plays a critical role in the governance of our companies, and it is a process over which most of our members have direct responsibility.

As we have stated in the past, there are significant problems with the current proxy voting system, and we continue to support and indeed encourage constructive and balanced proposals to improve it. However, given the interrelationship of the various components of the proxy voting system, consideration of any changes should be appropriately comprehensive. The proxy system should, as it is intended, reflect the views of all shareholders, along with those of management and the board, on what are the best interests of the company.

In this regard, the NYSE Proxy Working Group in its Report and Recommendations of the Proxy Working Group, dated June 5, 2006 (the Report), recommended that adoption of their proposal to eliminate discretionary voting be considered together with other measures designed to educate retail voters, and improve issuers' ability to reach out to those voters.

The Broker Discretionary Vote Reflects Retail Shareholder Sentiment

We are well aware that some have criticized broker discretionary voting because it does not reflect actual votes cast by the beneficial owners of those shares. However, any effort to address this criticism must also acknowledge that the broker discretionary vote, despite its imperfections, does reflect the overall views of a significant but otherwise seriously under-represented shareholder constituency, the "street name" retail holders. Broadridge Financial Solutions, Inc., estimates that, in 2007, more than 98% of retail shareholders who provided voting instructions to their brokers supported the boards' nominees for director. If brokers exercised their discretionary authority in support of the board's nominees, their votes largely squared with retail shareholder sentiment.

Indeed, the broker vote under Rule 452 has become an even more perfect measure of the views of retail shareholders within only the past year. Since the Proxy Working Group studied the matter and issued its Report, at least ten of the largest brokers, representing more than 40% of the market, have instituted proportional voting policies for voting uninstructed shares. Those brokers now vote uninstructed shares in the same proportion as the actual retail vote. Because brokers implement proportional voting policies under their Rule 452 discretionary voting authority, the approval of the instant proposals would abruptly end this practice, at least in director elections

Declining levels of retail shareholder voting means that it is more important than ever to preserve the retail shareholder voice in the proxy voting process. We continue to support the Notice & Access framework under the proxy rules; we believe the trend toward electronic proxy communications is inevitable and irreversible, and that, under the right circumstances, electronic communications will become a valuable tool in reaching out to retail shareholders. However, issuers using the Notice & Access model are seeing even lower participation by retail shareholders compared to previous voting levels, which levels were already less than ideal. While issuers are taking steps intended to address this decline in retail shareholder voting, this is clearly the wrong time to implement new proposals that would further erode retail shareholders' voice in the proxy voting process.

Accordingly, broker discretionary voting in director elections may be an imperfect mechanism, but it should only be eliminated in connection with an approach that more clearly and directly includes the voice of retail shareholders in the proxy voting process.

Elimination of the Broker Vote Would De-Stabilize the Proxy Voting System

Removal of the retail shareholder voice from the proxy process, without simultaneous implementation of countervailing measures, would de-stabilize the proxy voting process by shifting disproportionate weight to the views of institutional investors.

The proxy voting process already suffers from the significant growth and voting power of the proxy advisory services such as Risk Metrics Group, Inc., Glass Lewis & Co., and Proxy Governance, Inc. Further erosion of the retail shareholder voice in the proxy voting process will only further augment the power that these largely unregulated firms exercise.

Proxy voting firms affect more votes than do brokers voting under Rule 452, and for many issuers, it is the proxy voting recommendations of the proxy advisory firms that often decide the results of the annual stockholders' meeting. Significantly, the advisory services influence proxy votes while lacking an economic interest in the shares that are voted, which is the very same criticism that is leveled at discretionary broker voting. While we understand that institutional investors have a need for an efficient way to cast votes over large portfolios of securities, we note that these firms exercise great discretion without any regulatory oversight, and without any standardized disclosure of conflicts of interest and business practices and processes.

Earlier this month, the Millstein Center for Corporate Governance and Performance, which is part of the Yale School of Management, reported on its study of the proxy advisory firms, and its conclusions only highlight the concerns we raise.¹ The report notes that some institutional investors delegate all proxy voting responsibility to their advisors, and even among those which retain in-house analytical expertise, some recommendations from proxy advisors are accepted without further analysis. Overall, the report "finds that the proxy voting system in the US . . . is chronically subject to criticism that it is short on integrity sufficient to ensure trust." It finds further that "[t]hreats include conflicts of interest, opacity, technical faults in the chain by which ballots are transmitted, and a shortage of resources devoted to informed decision-making."

Other Consequences of Eliminating the Broker Vote in Director Elections

Elimination of the broker discretionary vote in the absence of consideration of the other measures discussed in this letter would have significant costs. Approval of the proposals, for instance, would clearly lead to higher proxy solicitation fees incurred by issuers. We do not believe that these costs, and the proposals to address them, have been adequately studied, and we urge the Commission to do so before amending Rule 452.

It could as well become difficult for some issuers, particularly smaller and medium-sized issuers, to achieve quorum. Some have suggested that issuers concerned about achieving a quorum make it a point to include on their proxy cards proposals that are considered "routine" under Rule 452, such as a proposal to ratify the company's outside accountants. By including such a "routine" proposal, most issuers should be able to count broker

¹ That study, entitled "Voting Integrity: Practices for Investors and the Global Proxy Advisory Industry," is available at <http://millstein.som.yale.edu>.

discretionary votes in achieving quorum. However, we believe that such a solution would simply be bad policy – forcing issuers to include proposals that may not be warranted in individual cases simply to serve a completely unrelated purpose of achieving a quorum for the shareholders meeting.

It is a core principal of sound corporate governance that management exercise its unfettered business judgment in recommending matters for shareholder approval, based on the merits of such matters themselves. It would be inconsistent to compel the addition of extraneous proposals merely to ensure a quorum.

Absent adding extraneous resolutions to the agendas of shareholder meetings in order to attain a quorum, issuers would have to take additional and repeated measures (from among those currently available) to reach out to their shareholders in order to garner a quorum. These measures, which include third party proxy solicitors, and the mailing of printed materials, would significantly increase a company's expenses for an otherwise routine shareholder vote. These expenses are particularly burdensome on smaller- and medium-sized issuers, and those with significant retail ownership. The additional costs will have an impact on all companies, and they will be particularly acute in the current economic environment. The focus should be on solutions that contain costs and make the proxy voting system more efficient, rather than on increased costs and inefficiency.

The Commission Should Take A More Comprehensive, Balanced Approach

We accordingly urge the Commission to refrain from approving the NYSE proposals in isolation. As we have stated numerous times in the past, the Commission should refrain from changing any isolated parts of the proxy system before a comprehensive re-examination of that system, and we concur in the comment letter submitted on these proposals by the Shareholder Communications Coalition, dated March 27, 2009.

However, if the Commission decides to proceed with the current proposals, we urge that at the very least it first examine other, more proximate, reforms that would help to avoid effective disenfranchisement of a large segment of “street name” retail shareholders, and an overall de-stabilization of the proxy voting system.

The Commission should consider the following measures:

Client Directed Voting: We believe that the Commission should thoroughly examine the concept of “client directed voting,” or “CDV,” which would provide retail shareholders with a more efficient means to register their votes. CDV would help to put retail shareholders on a par with institutional holders, which have been able to use proxy advisors to facilitate their voting. In addition, we believe the implementation of client directed voting would encourage greater retail shareholder participation in the voting process.

There are legitimate reasons why retail shareholders may choose not to vote given the current regulatory framework. An individual investor with a portfolio of dozens of

securities may simply lack the time and resources to review dozens of proxy statements and related materials; he or she may have delegated investment authority to the broker or other financial advisor, in which case it would be logical for the investor to assume that voting in the perceived best interest of the investor is one of the things that the advisor is doing; or the investor may, as suggested by the Proxy Working Group, assume that the shares will be voted as recommended by the board and therefore only give instructions if a contrary position is desired.² Unlike institutional investors, which despite in-house staff and other resources, often rely on proxy advisory firms, these resources are generally unavailable to retail investors.

Client directed voting was discussed favorably at the Commission's 2007 Roundtable Discussion, noted above. It also received favorable comment from the Proxy Working Group. In the August 27, 2007 Addendum to the Report, the Proxy Working Group stated that it "continues to evaluate the advantages and disadvantages of CDV, in light of its recommendation to amend Rule 452 and other initiatives underway at the SEC." We do not believe that such a further evaluation has been undertaken, and we urge the Commission to complete that examination before proceeding to approve the current proposals submitted by the NYSE on Rule 452.

Proportional Voting: We urge the Commission to review the experience to date of brokers who have implemented proportional voting, which now includes at least ten of the largest broker, representing more than 40% of the market. While broker discretionary voting is an indirect and imperfect measure of retail shareholder sentiment, proportional voting is a better means of measuring such sentiment because it reflects actual voting patterns of similarly situated retail shareholders. Some brokers that have already implemented this approach in voting uninstructed shares following a "best practices" recommendation by the Securities Industry and Financial Markets Association (SIFMA). The Proxy Working Group reviewed proportional voting in the addendum to its Report, dated August 27, 2007, stating that it had "advised SIFMA that it had no objections to [its members] moving forward with this form of proportional voting" and that "it plans to review the brokers' experience and consider whether proportional voting is a viable alternative." To our knowledge, such a further review has not yet taken place, and the Commission should ensure that it has the benefit of this review before it proceeds on the current proposals on Rule 452.

Proportional voting may be used in combination with other measures that are designed to increase retail voting participation. The Proxy Working Group, for instance, began to consider a concept whereby client directed voting would be offered to retail investors, but proportional voting would apply by default. According to the Proxy Working Group, the

² The Proxy Working Group stated in its Report that "given that some form of Rule 452 has been in effect for approximately 70 years, a not unreasonable assumption may well be that shareholders who choose not to vote on 'routine' matters recognize that their shares are likely to be voted in accordance with the board's recommendation"

default position of proportional voting would ensure “that neither the company nor any dissident would receive a disproportionate advantage if the investor made no choice.”³

Brokers that currently use proportional voting under their Rule 452 would lose discretionary voting authority for director elections under the current proposal. This in turn would at least in large part bring an abrupt end to these creative experiments with proportional voting, and the data that they provide. We urge the Commission to study the brokers’ experience with this approach before approving the proposals at hand.

Notice & Access: Under current Rule 14a-16(f), issuers are not permitted to send a voter instruction form or proxy card along with the notice card when complying with their obligations under the federal proxy rules under the Notice & Access model. Issuers must wait at least 10 days before forwarding a voter instruction form or proxy card. We believe that it would facilitate retail shareholder voting to include a voting instruction form, with return envelope, with the first notice mailing, which would lead to higher voting levels. We also believe that shareholders are more likely to “take action” and review the proxy materials, and return voting instructions, if they receive the form with the initial mailing.

Regulation of Proxy Advisors: As discussed above, proxy advisory firms exercise great discretion without appropriate regulation and without adequate or uniform disclosure of conflicts of interest and business practices and processes. We urge that no action be taken on Rule 452 until the Commission implements appropriate measures to address these issues.

Investor Education: As the Proxy Working Group emphasized, any changes to the proxy voting system should be preceded by, or at least accompanied by, an organized effort to educate retail shareholders about the proxy voting system, and about the impact of their voting decisions. If the Commission adopts the proposals without first undertaking such an education effort, many shareholders likely will be under a mistaken assumption about the effect of their silence in proxy voting.

We respectfully submit that the Commission should focus on a constructive, positive means to improve retail investor participation in the proxy voting process, and not on simple elimination of an isolated part of the system that may be considered imperfect.

The Commission Should Extend the Comment Period

Finally, we urge the Commission at the very least to extend the comment period by an additional 90 days as permitted under Section 19(b)(2) of the Exchange Act to allow both the Commission and the interested parties additional time to collect relevant and updated data, and to complete the unfinished evaluation of the other measures outlined in this

³ August 27, 2007 Addendum to the Report and Recommendations of the Proxy Working Group To the New York Stock Exchange Dated June 5, 2006, at Part II.C. In order to preserve proportional voting as a default position for director elections, it may be necessary to preserve Rule 452 authority for that purpose.

letter. We would be happy to assist the Commission and its Staff in completing such evaluations, as well as in gathering relevant data.

Thank you for the opportunity to comment on this proposal and do not hesitate to contact us if you have any questions. If you have any questions, please feel free to call me at 212-270-0938.

Sincerely Yours,

Neila B. Radin
Chair, Securities Law Committee
The Society of Corporate Secretaries and Governance Professionals

cc: Mary Shapiro – 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
Shelly Parratt – Acting Director, Division of Corporation Finance
Brian Breheny – Deputy Director, Division of Corporation Finance