

March 25, 2009

**VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL**

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

**Re: File No. SR-NYSE-2006-92  
Proposed Rule Change to Eliminate Broker Discretionary Voting for the Election of Directors**

Dear Ms. Murphy:

This letter is being submitted by the Proxy Working Group of the New York Stock Exchange. We thank you for the opportunity to comment on the NYSE's proposed rule change to amend Rule 452 to eliminate broker discretionary voting for the election of directors.

The NYSE established the Proxy Working Group in April 2005 to review the NYSE rules regulating the proxy voting process, and more specifically to review and make recommendations with respect to NYSE Rules 450-460 (with a particular focus on Rule 452). The Proxy Working Group includes representatives from a number of different constituencies, all of whom have significant experience with the proxy voting process.<sup>1</sup> In beginning this process the NYSE and the Proxy Working Group were aware of a number of questions arising in recent years concerning the proxy rules, as well as technological and other developments that have significantly impacted the proxy voting process. The Proxy Working Group was also aware that its consideration of these issues took place during a time of fundamental changes in technology and evolving understandings of "best practices" of corporate governance, both of which have had a broad impact on the proxy voting process. These changes have continued, as evidenced by the growth of proportional voting and majority voting for directors, as discussed below.

The Proxy Working Group issued its original report in June 2006 (the "2006 Report"), and issued an addendum to its original report in August 2007 (the "2007 Addendum"). The Report included among its recommendations that the "NYSE should amend Rule 452 to make the election of directors a 'Non-Routine' matter" and therefore brokers should no longer be

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<sup>1</sup> A list of the members of the Proxy Working Group is attached at Exhibit A hereto.

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permitted to vote the shares of beneficial owners who do not give specific voting instructions with respect to the uncontested election of directors.<sup>2</sup> It is this recommendation that forms the core of the NYSE's current proposed rule change.

The Proxy Working Group continues to believe that the election of directors can no longer be considered a "routine" event in the life of a corporation. Directors have authority over the most fundamental issues of corporate governance today, and investors, regulators, courts and others have all recognized the critical role of directors in the life of a corporation. Accordingly, the Proxy Working Group recommended, and continues to support, the amendment of Rule 452 to eliminate broker discretionary voting for the election of directors.

At the same time, and as explicitly discussed in its Report, the Proxy Working Group was continually struck by the integrated nature of the proxy process, and how changing one part of this process impacts many of its other parts. For example, the Proxy Working Group's Report recognized that "potential changes to Rule 452 immediately raised questions about the ability of an issuer to educate and to communicate with its shareholders about the importance of voting in the election of directors."<sup>3</sup> The Proxy Working Group noted that this need increases with the movement towards majority voting for directors, a movement which has grown considerably since the Proxy Working Group's 2006 Report was issued.

Because of the integrated nature of the proxy system, the Proxy Working Group's Report included a number of specific recommendations related to the proxy process, including recommendations that the Proxy Working Group believed should occur as part of the process of amending Rule 452. For example, as noted in the Report, the Proxy Working Group believes that "any plan to 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."<sup>4</sup>

The Proxy Working Group's recommendation with respect to the need for further education was based in part upon research obtained by the NYSE at the request of the Proxy

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<sup>2</sup> Under the current NYSE and SEC proxy rules, brokers must deliver proxy material to owners and request voting instructions in return. If voting instructions have not been received by the tenth day preceding the meeting date, NYSE Rule 452 permits brokers to vote in their discretion on certain matters deemed "routine" by the NYSE (Rule 452 is also known as the "10 day rule"). The NYSE has amended Rule 452 a number of times since its adoption in 1937, and currently identifies 18 items that are not considered "routine." However, among the matters still considered "routine", and thus still eligible for broker discretionary voting, is the uncontested election of directors.

<sup>3</sup> See 2006 Report at 3.

<sup>4</sup> See 2006 Report at 4.

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Working Group, which indicated a general lack of understanding in the investor community with respect to the proxy voting process. The Proxy Working Group continues to believe that a large scale investor education effort is a critical component of the proposed amendment to Rule 452, as the Proxy Working Group believes that this general lack of understanding concerning the proxy process not only continues to exist but may even have increased since the original findings by the Proxy Working Group. In the absence of such an education effort, there is a danger that investors' questions about the proxy process will remain, leading to an even greater decline of retail investors in the proxy process.

Given the potential impact that eliminating broker voting of uninstructed shares in director elections would have on elections, the Proxy Working Group also noted in its Report that "there is a significant need for more effective communications between issuers and shareholders."<sup>5</sup> As part of this effort, the Proxy Working Group created a sub-committee focused on the proxy process and shareholder communications. This sub-committee began deliberations in October 2006, and over the course of several months received presentations from a number of groups and representatives in the proxy process, and was comprised of representatives of a number of different groups in the process, including brokers, issuers and others. The focus of the sub-committee's work was the feasibility of giving both issuers and others greater flexibility to choose among competing providers of shareholder communications services, while retaining the current system's protections for proprietary broker-data, shareholder privacy and integrity of the vote tabulation process.<sup>6</sup> The Proxy Working Group continues to believe that there is a significant need for the SEC to review its existing shareholder communications rules to make it easier for issuers to communicate with beneficial owners.<sup>7</sup>

It is also important to note that in the course of its deliberations, the Proxy Working Group considered various alternative methods for eliminating broker discretionary voting for directors, the most significant of which was a system of "Proportional Voting." Following the publication of the Proxy Working Group's Report in 2006, the Securities Industry and Financial Markets Association ("SIFMA") issued a "best practices" memorandum and recommendation to

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<sup>5</sup> Id.

<sup>6</sup> See 2007 Addendum at 6. The SEC also had a series of roundtable discussions on the proxy process in May 2007 which the NYSE and certain members of the Proxy Working Group participated at which several participants discussed the need for the SEC to undertake a broad review of the proxy voting and shareholder communication systems.

<sup>7</sup> The 2006 Report and 2007 Addendum contain a number of other items that the Proxy Working Group continues to view as critical. For example, the Proxy Working Group continues to believe the SEC should study the role of groups making voting recommendations and/or decisions over shares in which they do not own or have an economic interest, as the influence of these groups has continued to grow since the 2006 Report. See 2006 Report at 5-6.

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its members which suggested that uninstructed retail shares should be voted in proportion to shares voted by other retail shareholders at the particular broker rather than at the discretion of the broker. The Proxy Working Group held a number of discussions, both among its members and with representatives of SIFMA, concerning this development, and informed SIFMA that it had no objection to the members of SIFMA moving forward with this form of proportional voting.<sup>8</sup> According to a November 2008 analysis by Broadridge of the Impact of the Broker Vote, including the use of proportional voting by certain brokers, the broker vote “had a significant impact on the ability of companies to attain quorum at an early stage” but had “almost no impact on the outcome of director elections.”<sup>9</sup>

In sum, while the Proxy Working Group continues to believe that the election of directors can no longer be considered a “routine” event in the life of a corporation, even if that election is uncontested, the Proxy Working Group believes that the SEC should consider using the opportunity created by this proposed rule change to review the broader proxy process. The Proxy Working Group believes that, as an initial next step in this process, it may be appropriate to briefly extend the comment period concerning the proposed amendment to Rule 452 to receive comments on some of these broader issues because, as the Working Group stated in its Report, “fundamentally the proxy voting process is an integrated system and the rules established by the SEC, as well as the various states, all have a substantial impact on the NYSE’s Rules.”<sup>10</sup>

The Proxy Working Group hopes these comments are helpful to the SEC as it deliberates the proposed changes to Rule 452 and considers other possible changes to the proxy voting system. Members of the Proxy Working Group were gratified by the actions taken by the NYSE in creating the Proxy Working Group as a forum to look at these issues within the broader framework of the proxy voting system, and were also pleased by the roundtable discussions held by the SEC in May 2007. The Proxy Working Group believes that the time has come for the SEC to engage in a system-wide review of the current proxy system, and consider changes that take advantage of technological advances to increase efficiencies and reduce costs while protecting the varied interests of all participants in the proxy process, including investors, issuers and others. We would be happy to participate in this effort and to provide additional information to the SEC on this matter at the SEC’s request.

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<sup>8</sup> See generally 2007 Addendum at 3-4.

<sup>9</sup> See “Analysis of the Impact of the Broker Vote,” Broadridge, November 12, 2008.

<sup>10</sup> 2006 Report at 29.

Wilson Sonsini Goodrich & Rosati  
PROFESSIONAL CORPORATION

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Thank you for your consideration.

Sincerely,

Handwritten signature of Larry W. Sonsini in black ink, written in a cursive style. The signature includes the name "Larry W. Sonsini" followed by a stylized flourish that appears to be "by DLB".

Larry W. Sonsini  
Chairman  
Proxy Working Group

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**EXHIBIT A**

**MEMBERS OF THE PROXY WORKING GROUP \***

Larry W. Sonsini,  
(Committee Chairman)

William Adams, Nuveen Investments, Inc.  
Glenn Booraem, Vanguard Group  
Gwenn Carr, MetLife, Inc.  
Peter Clapman, Governance For Owners USA  
Peggy Foran, Sara Lee Corporation.  
Gary Glynn, U.S. Steel & Carnegie Pension Fund  
Amy Goodman, Gibson, Dunn & Crutcher  
Myron Kandel, CNN  
Cary Klafter, Intel Corporation  
Daniel Kosowky, Morgan Stanley  
Michael McAlevey, General Electric  
Jeffrey McWaters, Amerigroup Corp.  
Kevin Moynihan, Merrill Lynch  
Stephen Norman, American Express Company  
Douglas Ober, The Adams Express Company  
Beverly O'Toole, Goldman Sachs & Co.  
James Parsons, Exxon Mobil Corporation  
Kurt Stocker, Professor, Northwestern University

In addition, staff of the SEC, NASD and NYSE attended various Working Group Meetings and David J. Berger, a partner at Wilson Sonsini Goodrich & Rosati, served as counsel to the Working Group

\* Affiliations listed for informational purposes only