

March 27, 2009

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090  
Via email [rule-comments@sec.gov](mailto:rule-comments@sec.gov) and UPS

Re: File Number SR-NYSE-2006-92

Dear Ms. Murphy:

Teachers Insurance and Annuity Association and College Retirement Equities Fund (collectively, “TIAA-CREF”) urges the Securities and Exchange Commission (“SEC” or “Commission”) to approve the proposal by the New York Stock Exchange (“NYSE”) to amend Rule 452 to eliminate broker discretionary voting in the election of directors. TIAA-CREF ([www.tiaa-cref.org](http://www.tiaa-cref.org)) is a national financial services organization and the leading provider of retirement services in the academic, research, medical and cultural fields with \$363 billion in combined assets under management as of December 31, 2008. We have supported the NYSE’s proposed rule change since it was first recommended by the Proxy Working Group to the NYSE (see attached letter to the NYSE, dated June 29, 2006). Indeed, our own Policy Statement on Corporate Governance<sup>1</sup> also recommends such a change.

The election of directors is a fundamental right afforded to shareholders of corporations and should not be classified as “routine.” Allowing discretionary broker votes to be submitted on this issue without input from the beneficial holder, generally in support of all director nominees without regard for context or circumstance, undermines this right. This is of particular importance as shareholders develop more sophisticated policies for voting on all matters. Moreover, the current standardized default voting process weakens the impact of important governance reforms such as majority voting in director elections.

In this regard, only yesterday Chairman Schapiro noted that although the Commission has “a variety of means to promote fair corporate voting” it “...has not gone far enough in this...area. And so I intend to make proxy access - meaningful opportunities for a company's owners to nominate its directors - a critical part of the Commission's agenda in the coming months.” (Testimony of Chairman Schapiro bef. the S. Banking, Housing and Urb. Affs.

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<sup>1</sup> Available at [http://www.tiaa-cref.org/pubs/pdf/governance\\_policy.pdf](http://www.tiaa-cref.org/pubs/pdf/governance_policy.pdf).

Com, dated March 26, 2009). In order to make Chairman Schapiro's objective effective, however, it will be critical to approve the NYSE proposal.

The primary objection to the proposal has been the concern that if discretionary broker voting is disallowed, a company may not be able to achieve a quorum. This objection assumes that the vote on directors determines a quorum. That does not have to be the case, however. Other "routine" items, such as ratification of auditors, could be used to establish a quorum. In the alternative, the NYSE could consider permitting brokers to cast uninstructed votes as an "abstain," thereby assuring their presence for quorum purposes but not influencing the outcome of the vote. This approach could be used for director elections, ratification of auditors or any other matter presented for a shareholder vote.

We believe that other alternatives under consideration, such as proportional voting, could further complicate the proxy voting system and result in potential abuses. The Proxy Working Group analyzed this approach and rejected it for reasons that continue to be valid. Proportional voting violates the one-share-one-vote principle, makes questionable assumptions about the intentions of beneficial owners who do not submit voting instructions, offers opportunities for manipulation and increases the complexity and cost of the voting process.

As Chairman Schapiro has recognized, given the importance of the board's role in the governance and strategic oversight of corporations, shareholder voting in director elections is a fundamental aspect of corporate governance and should no longer be characterized as "routine" or treated as "discretionary." Accordingly, TIAA-CREF urges the Commission to approve the NYSE's proposal to amend Rule 452 both because it will more accurately reflect shareholder interests and, more fundamentally, because such a shareholder voice will enhance corporate governance in general.

Please do not hesitate to contact me at (212) 916-5647 with any additional questions or concerns. We also would be pleased to meet with the staff to discuss our views in more detail if that would be helpful.

Very truly yours,

A handwritten signature in black ink, appearing to read "Hye-Won Choi", with a long horizontal flourish extending to the right.

Hye-Won Choi  
Senior Vice President and  
Head of Corporate Governance  
TIAA-CREF

cc:

Mary Schapiro, Chair

Kathleen Casey, Commissioner

Elisse Walter, Commissioner

Luis Aguilar, Commissioner

Troy Paredes, Commissioner

Erik Sirri – Director, Division of Trading & Markets

Daniel M. Gallagher, Deputy Director, Division of Trading & Markets

Shelly Parratt – Acting Director, Division of Corporation Finance

Brian Breheny – Deputy Director, Division of Corporation Finance



**John C. Wilcox**  
Senior Vice President,  
Head of Corporate Governance  
Tel:212.916.5404  
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June 29, 2006

Mr. Stephen Walsh  
Vice President, Operations  
The New York Stock Exchange  
20 Broad Street  
New York, NY 10005

Via email – nyseclientservices@nyse.com

Re: Report and Recommendations of the Proxy Working Group

Dear Steve:

I am writing on behalf of Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF) in response to the request for comments on the Report and Recommendations of the Proxy Working Group to the New York Stock Exchange.

TIAA-CREF is a national financial services organization that serves as the principal retirement system for the nation's educational, non-profit and research communities. CREF holds shares in more than 5,500 companies, both domestic and foreign. We serve more than 3 million participants and manage in excess of \$380 billion in assets. For more than 30 years we have been a leading advocate on behalf of shareholder rights and good corporate governance. We have always been an active and diligent user of the proxy voting system.

We would like to begin by expressing our appreciation for the Proxy Working Group's thoroughness and care in investigating and analyzing these important issues. The Report is highly informative and its recommendations are balanced and supported by reasoning that we find highly persuasive. We strongly support all of the Report's recommendations.

1. We agree that the NYSE should amend Rule 452 to make the election of directors a non-routine matter. We endorse the Working Group's conclusion that "the election of directors can no longer be considered a 'routine' event in the life of a corporation." This has long been the view of TIAA-CREF. While we recognize that this rule change might affect the ability of certain companies to achieve quorum, we believe that

the quorum problem can be addressed separately and that solutions are readily available. For example, a company could introduce a resolution on its proxy enabling shareholders to check a box authorizing their shares to be present for quorum. If the NYSE authorized brokers to vote uninstructed shares for this type of resolution, the shares could be present for quorum without influencing the results of director elections or any other matters presented for shareholder approval. In the alternative, if shareholders were given the right to vote For, Against or Abstain on director elections (instead of the current choice of For or Withhold), the NYSE could authorize brokers to cast uninstructed shares as Abstains, thereby causing the votes to be present for quorum without influencing election results. These solutions might require changes in state law or corporate charters, but such changes would certainly be worth the effort and should encounter little resistance on the part of companies or lawmakers. We strongly oppose suggestions to introduce proportional voting. We think that administrative complexity and cost, plus the difficulty of educating beneficial owners, make proportional voting an unacceptable alternative.

2. We agree that the NYSE should take a lead in educating investors about the proxy voting system. We were not surprised that the Working Group's survey indicated widespread confusion about how the proxy system works. The proposed rule change, which would simplify the proxy voting system, would also simplify the process of educating beneficial owners. Indeed, if broker discretionary voting were eliminated altogether, the voting system would be easier to understand and the process of educating beneficial owners as to their voting responsibilities would be further simplified.
3. We agree that the NYSE should support efforts to improve the ability of issuers to communicate with beneficial owners, and we support the creation of another NYSE committee for this purpose. As the Report notes, there are important questions, some raised by the Business Roundtable rulemaking petition, relating to the structure, costs, efficiency and fairness of our current proxy system. These issues need to be reviewed in the context of a comprehensive examination of the entire system of shareholder communication and proxy voting.
4. We agree that the NYSE should continue to evaluate the need for broker discretionary voting. It is our expectation that the NYSE will be able to eliminate the practice entirely as soon as regulatory changes, improvements in technology and systems efficiency have reduced the need for discretionary votes to achieve quorum.
5. We agree that the NYSE should engage an independent third party to analyze and make recommendations regarding the fees paid pursuant to Rule 465. The Working Group's analysis of the history and the pros and cons of current fee-setting arrangements is informative and balanced and takes into account all the conflicting viewpoints surrounding this complicated question. We agree that the time has come for a thorough and objective review of fees. The goal should be to eliminate inefficiencies, reduce costs, introduce competition and switch from regulatory to market-based controls.
6. We agree that the NYSE should request the SEC to study the role and impact of intermediaries on the proxy voting process, particularly the activities of brokers, custodians, advisory services and other agents that do not have an economic interest. There has been widespread media coverage of the role of these intermediaries, which has in turn generated public concern about conflicts and undue influence on proxy voting. In addition,

there are concerns about the separation of voting rights from ownership in the context of stock lending, hedging and derivative investments. These concerns strike at the integrity of proxy voting and our system of corporate governance. A study under the auspices of the SEC would inform the investing public and increase confidence in the capital markets.

We would be happy to discuss our views on these issues in greater detail.

Sincerely,

A handwritten signature in black ink, appearing to read "John Wilcox", written in a cursive style.

John Wilcox