



Enhancing the Return on Capital  
Through Increased Accountability

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.; Room 10900  
Washington, D.C. 20549

May 15, 2009

Dear Ms. Murphy:

This is a petition to request that the Commission amend Rule 14a-4(b)(1) to prohibit conferring discretionary authority to issuers with respect to non-votes on the voter information form or proxy.

**Amend Rule 14a-4(b)(1) as follows:**

Means shall be provided in the voter information form and form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office. Neither a voter information form nor A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the beneficial owner or security holder, provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case. When votes are cast and fields are left blank, the beneficial owner or security holder shall be deemed to have abstained on those matters. Furthermore, when votes are cast using an electronic platform a subsequent screen before final submission must warn the security holder in large-font bold-face red type that each field left blank will be treated as an abstention, and that no vote will be cast on their behalf regarding those matters.

**Background**

In discussions with a representative of Broadridge Financial Solutions (Broadridge), which process most proxies, it appears the current format used by their ProxyVote platform was developed many years ago before Broadridge took over this portion of their business. At that time banks and brokers typically voted discretionary proxies in lockstep with management, whereas today many vote in proportion to the votes of their clients. ProxyVote has not kept up with these changes, since the current system continues to replace all blank votes with votes as recommended by soliciting committees.

Additionally, it can be argued the format used by ProxyVote falls short of full compliance with SEC regulations with regard to notifying the voter being solicited

as to how blank votes are counted. However, even if the regulations are strictly followed, shareowners would still be disenfranchised, since the current rules confer discretionary authority to change blank votes.

When a retail shareowner using Broadridge's [proxyvote.com](https://proxyvote.com) platform votes for or against at least one item on a proxy but fails to vote on other items, each item they fail to vote is cast in favor of the company's recommended position.

So, for example, I vote to "abstain" on ratification of the auditors but leave all other fields on the proxy blank. Then I press, "Submit." The next screen tells me I am voting to abstain on ratification of the auditors and it then shows me voting *with management* on election of directors and on every other issue. Looking closely, I see a very small asterisk next to each of these votes. Searching the page, I see this statement in very small type: "\*No vote entered. Your vote will be cast as recommended by the soliciting committee."

Even though current regulations confer discretionary authority to change blank votes, it appears open to interpretation that Broadridge's ProxyVote system may not fully comply with SEC, [Rule 14a-4\(b\)\(1\)](#). That section requires that when the security holder does not specify a choice, a proxy may confer discretionary authority "provided that the form of proxy states in **bold-face type** how it is intended to vote the shares represented by the proxy in **each such case.**" (my emphasis)

Instead of highlighting each ignored item in bold as now being voted per management or the soliciting committee, ProxyVote places an asterisk in small type next to the item. Then, it uses a single note (\*No vote entered. Your vote will be cast as recommended by the soliciting committee.) in small type and, again, this single note is not in bold as appears to be required. This format appears to fall short of both the provisions and spirit of the rule. Instead of boldly highlighting the changed vote for each issue (counting directors as one issue) to call it to the voter's attention, the asterisks and small single note make it very likely that the voter will miss the changes being made.

According to a Broadridge representative:

Beneficial owners who use proxyvote.com are communicating voting instructions to their bank/broker—they are not voting a proxy. SEC Rule 14a-4(b)(1) pertains to "forms of proxy", not voting instructions. The requirement about displaying language in bold-face pertains to a "form of proxy, not a voting instruction. The voting information form (vif) doesn't comply with rules regulating the "form of proxy" because the vif is not a proxy.

Substantively, proxyvote.com discloses to users the effect of not indicating

a selection on agenda items, and then shows them how it will be submitted.

Broadridge says that shareowners using ProxyVote are communicating "voting instructions" to their bank/broker. They are not voting a proxy. Since SEC Rule 14a-4(b)(1) pertains to "forms of proxy," not the "voting instruction form," there is no violation, according to Broadridge.

However, subdivision (1) refers to the "person solicited" and the need to afford them opportunity to specify their choices. The person being solicited is the beneficial shareowner. Therefore, unless the subdivision applies both to a voting instruction and a proxy, the requirements to indicate with bold-face type how each field left blank will be voted loses meaning.

## **Enforcement**

While the Commission considers this rulemaking petition, we request the Division of Enforcement take immediate action to ensure compliance with existing Rule 14a-4(b)(1). If the Commission agrees with Broadridge's interpretation of the current law, we hope the Commission will help convince bankers, brokers and Broadridge to voluntarily modify their system so that retail shareowners are informed of changed nonvotes using red bold-face type for each instance. Shareowners would then at least be in a position to make more informed decisions. We would hope this would be an interim measure until the suggested rulemaking is promulgated and discretion is revoked.

## **Reasons for requesting Amendments**

Just as the NYSE has proposed changes to Rule 452 to better secure the rights of shareowners, we are proposing this rule amendment for much the same reason. The NYSE recognized that election of directors is not a "non-routine" matter and that discretionary authority should not be deferred to an investor's broker. The SEC appears poised to approve those changes. However, without changes similar to those we suggest, many votes will continue to be deferred to brokers/banks and ultimately to management and boards because of the discretionary authority granted through the provisions of Rule 14a-4(b)(1).

We believe that when a shareowner casts a blank vote, it should be counted as cast. The integrity of the proxy voting system demands it. Items left blank should be counted as abstentions. Those voting electronically should be warned of each skipped item. Non-votes, like more clearly indicated votes, should not be changed to reflect the voting preferences or recommendations of brokers, bankers, management, board or the soliciting committee, since these parties may have interests not fully aligned with those of shareowners. The same principle

applies to all items on the proxy, including votes for directors, company and shareowner proposals.

When we vote in civic elections, a governing body doesn't fill in our non-votes. If we have not formed an opinion, sometimes we defer to what we hope are more informed voters. That does not mean we want someone to step in and cast our vote for us. We simply trust in the intelligence of others who do have the right to vote and who exercise that right. Why should our votes in corporate elections be different in this regard?

Biased counting is having a real impact. Unfortunately, it will not end when broker voting ends. Broker voting has already been eliminated on shareowner resolutions. Yet, the impact of granting discretionary authority to vote non-votes continues to tip the voting scales. For example, Ray T. Chevedden's proposal to allow 10% shareowners to call a special meeting lost by 0.3% of the vote recently at Bank of America. Without the biased count, it may have won.

The integrity of the voting system is critical. The SEC's current rule sends the wrong message to shareowners. It says, "don't worry about voting. If you leave an item blank, we will allow that vote to be assigned to someone else," regardless of possible conflicting or nonaligned interests. The current rule does not reinforce a robust market or vigilance by shareowners. It does not send a message that voting is important. Shareowners then become shareholders, without responsibilities, much like gamblers with betting slips. The Commission should encourage responsible *ownership*, not gambling.

The SEC should regulate the power relationships between actors in the market, not tip the balance to one party when the other fails to act. Instead, the SEC should remind each party of the importance of their respective roles. The current Rule 14a-4(b)(1) misaligns interests by yielding disproportionate control to brokers, bankers, managers and boards, instead of educating and engaging shareowners. Please adopt the requested amendments.

Please direct questions concerning this petition to James McRitchie, who is authorized to speak for the co-filers on the substance of this petition.

Sincerely,

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The following have agreed to be listed as co-filers:

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Rule 14a-8 proposal proponent since 1996

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Mark Latham  
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Eric M. Jackson, Ph.D.  
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