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March 27, 2009

Via email: rule-comments@sec.gov

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

Re: Proposed Amendments to NYSE Rule 452 and Listed Company Manual Section 402.08 – File No. SR-NYSE-2006-92

Dear Ms. Murphy:

This letter is in response to Release No. 34-59464 (the "*Proposing Release*") in which the Commission solicits comments on proposed amendments to New York Stock Exchange Rule 452, and corresponding changes to Listed Company Manual Section 402.08, to eliminate broker discretionary voting for the election of directors.

While we agree on the importance of director elections, we believe that these amendments should not be adopted without a more complete evaluation of the changes in market practice and regulation since the amendments were first proposed in 2006. These amendments have the potential to impose significant burdens on issuers and to disrupt the annual meeting process, as recognized in the June 2006 Report of the NYSE Proxy Working Group (the "*2006 Report*") and in the Proposing Release. For example, the elimination of broker voting in director elections could cause some issuers to face great difficulty in obtaining a quorum at their annual meeting, and could significantly realign the relative power and influence of activist shareholders as compared to shareholders generally. As described further below, there have been a number of significant relevant developments since 2006, many of which were highlighted by the Proxy Working Group in the 2006 Report as potential factors affecting their recommendations. We believe the NYSE should take steps to evaluate the impact of these developments before adopting this potentially far-reaching rule change.

In addition, the proposed amendments implement only one component of a set of recommendations included in the 2006 Report. We do not believe that these amendments should be adopted separately from the related and interconnected measures recommended by the Proxy Working Group, including shareholder education and communication efforts and the potential to permit brokers to include unvoted shares for quorum purposes.

A. Developments in Market Practice and Regulation since the 2006 Report

In the 2006 Report, the Proxy Working Group commented on the "integrated nature" of the proxy process and "how changing one part of this process impacts many other parts." The Proxy Working Group took extraordinary care in assessing the numerous competing and interlocking factors in coming to its recommendations. Due to the complexity of the issue, the 2006 Report recommended that "in light of continuing technological and governance developments, including developments which make it easier to communicate with shareholders, possible regulatory and/or statutory changes impacting shareholder elections, and educational efforts, the NYSE should continue to evaluate the future need for broker discretionary voting under Rule 452."

We believe that a number of important developments over the past few years, many of which were specifically identified in the 2006 Report as factors in their analysis, greatly impact the relative costs and benefits of the proposed amendments, and necessitate an updated detailed analysis similar to that undertaken in 2006.

1. E-Proxy Rules.

The 2006 Report noted that "[i]ncreasing use of the internet and technological advances are changing the way issuers communicate with shareholders," and indicated that the Commission had recently proposed rules permitting electronic delivery of proxy materials, including through a "notice and access" process whereby the shareholder would receive only a notice as to the internet availability of the proxy materials. These e-proxy rules were adopted in 2007 and were first put to broad use in the 2008 proxy season. In addition, in November 2007, the Commission issued new rules that clarify the application of the federal securities laws to electronic shareholder forums, which include "chat rooms" or other internet-based discussion groups relating to a company and its securities.

While issuer and shareholder practice surrounding the electronic delivery of proxies is still evolving, the experiences of the 2008 proxy season have made clear that companies taking advantage of the efficiencies of notice and access have faced a sharp decrease in retail voting turnout. In an August 2008 speech, John White, Director of the

Commission's Division of Corporation Finance, noted that issuers taking advantage of notice and access in 2008 had seen a drop of over 73% in the number of retail accounts voting, and a 52% drop in the number of retail shares voting.[1] It remains unclear whether e-proxy delivery will gain widespread acceptance. Surveys indicate that a large number of companies refrained from utilizing a notice and access model in 2008 because they were waiting to see the experience of the early adopters. It is also unclear whether the decline in shareholder voting participation in 2008 was an inevitable outgrowth of notice and access or instead was just due to issuers and shareholders grappling with a new and unfamiliar system. Furthermore, it remains unclear whether electronic shareholder forums, under the new Commission rules, have served to aid communication among shareholders or between issuers and shareholders in a manner relevant to the recommendations of the Proxy Working Group.

The level of retail voting will be a factor in determining the impact of the elimination of broker discretionary voting in director elections. According to the 2006 Report and the Proposing Release, the key difficulties raised by the elimination of broker discretionary voting in director elections include (i) an increased difficulty for companies to obtain a quorum to conduct business at their annual meeting and (ii) increased influence of special interest groups that may have an agenda that is not shared by the majority of shareholders. Lower voting levels by beneficial owners will magnify both of these problems. The elimination of broker discretionary voting on director elections may result in the absence of any items on the meeting agenda on which brokers can vote. In that case, the unvoted shares will normally not be counted toward a quorum (absent rule and/or state law changes to address this issue as described in Section B below). In addition, reduced voting by retail shareholders will increase the relative power of the minority of shareholders who may be actively pursuing their own special interests in opposing the incumbent directors.

We believe that the ongoing impact of the e-proxy rules and developments in shareholder communications must be taken into account in assessing whether the benefits of the proposed amendments outweigh the costs. Specifically, this analysis should take into account the experiences of issuers and shareholders during the 2009 proxy season, including the degree to which notice and access is utilized by issuers, the level and outcome of shareholder votes, the manner and impact of shareholder communications, and the success of companies in achieving a quorum.

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[1] *See* John W. White, *Corporation Finance – A Year of Progress*, Speech to the American Bar Association, Section of Business Law (Aug. 11, 2008), *available at* http://www.sec.gov/news/speech/2008/spch081108jww.htm. Mr. White cited a survey by Broadridge, Inc.

2. Proportional Voting

The 2006 Report considered proportional voting as a potential alternative to the elimination of broker discretionary voting. Proportional voting would require brokers to vote unvoted shares in the same proportion as voted shares – either on a company-wide basis or based on the voted shares from the broker's customers. Pursuant to NYSE policy, NYSE member firms utilize a proportional voting approach with respect to the shares of their own parent company. The 2006 Report noted that at least one brokerage firm, Charles Schwab, had recently adopted the approach of voting unvoted client shares on discretionary matters in proportion to the votes of all client shares. The 2006 Report concluded that a proportional voting system was an attractive alternative to the elimination of discretionary voting, but determined that, given the uncertainty around its implementation and impact, it was "not the optimum result."

Since the 2006 Report, proportional voting has been voluntarily adopted by a number of other large brokerage firms, including Ameritrade, Goldman Sachs, Merrill Lynch, Morgan Stanley and others. This trend toward proportional voting alleviates one of the primary concerns with the broker discretionary voting regime – the historical tendency of brokers to vote unvoted shares in the manner recommended by management. In addition, proportional voting would seem to avoid the main pitfalls of the current proposed change – *i.e.*, the difficulty for companies to obtain a quorum and the increased influence of special interest shareholders.

The fact that an increasing number of brokers now have experience with proportional voting provides an opportunity for a reassessment of its merits as an alternative to the elimination of broker discretionary voting for elections. The 2006 Report raised a number of practical concerns with implementing proportional voting, which should be revisited in light of the practical experiences of market participants that have adopted it.

3. Increase in Majority Voting

The 2006 Report noted that the impact of the elimination of broker discretionary voting on director elections would be heightened as a result of the trend toward majority voting for directors. The 2006 Report stated 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."

At the time of the 2006 Report, a relatively small number of companies had adopted some form of majority voting in director elections (most commonly, a

provision providing for a director who does not receive a majority vote to tender his or her resignation). Since the 2006 Report, majority voting has now become the norm in director elections, at least at large companies. The majority of companies in the S&P 500 have adopted a majority voting standard (66% as of November 2007, compared to 16% as of February 2006, according to one survey),[2] and majority voting among smaller companies has been increasing.

If broker discretionary voting on director elections were eliminated, it could be significantly more difficult for companies to obtain the "for" votes necessary to overcome a "vote no" campaign by activist shareholders. Even where only a small number of shareholders oppose the incumbent board, the generally low turnout by retail investors would mean that, absent broker discretionary votes, issuers would have to spend significant resources to reach out to additional retail investors who have not felt compelled to vote either way.

The widespread trend toward majority voting and the increased incidence of campaigns against incumbent directors represent significant departures from the factual assumptions underlying the Proxy Working Group's recommendation, and support the view that an additional updated analysis is called for. Again, this analysis should take into consideration the experiences and lessons of the 2009 proxy season.

B. Additional Recommendations in the 2006 Report

The elimination of broker discretionary voting in director elections is only one of several interrelated recommendations included in the 2006 Report. The recommendations in the 2006 Report were presented as a package of reforms, designed to work together. Without further analysis, we do not believe the Commission should approve a single aspect of these recommendations in the absence of action being taken on the others.

Most importantly, the Proxy Working Group focused heavily on the need for enhanced voter education and communication. The 2006 Report provided 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" and recommended that the NYSE "convene another committee, which would include representatives of all of the groups involved in the shareholder communication process, to consider how to improve

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[2] *See Study of Majority Voting in Director Elections*, by Claudia H. Allen of Neal, Gerber & Eisenberg LLP (updated November 2007), *available at* http://www.ngelaw.com/files/upload/majoritystudy111207.pdf.

communications between issuers and beneficial owners." We are not aware that any significant steps have been taken to implement these recommendations.

As described above, low voting participation by retail shareholders is at the heart of many of the problems with the proxy process. In the face of low voting levels, broker discretion raises the concern that a significant portion of the votes in director election are by brokers with no financial stake in the company. However, if brokers cannot exercise discretion, then the low voting levels lead to difficulties in achieving a quorum and exaggerated influence of special interest shareholders. Surveys cited in the 2006 Report, and those conducted since then, indicate that the vast majority of retail shareholders do not vote, and also suggest widespread confusion by retail shareholders over the proxy process, broker discretion and NOBO/OBO status. While notice and access was designed to advance investor communication, surveys conducted after the 2008 proxy season indicate that, even among the minority of retail shareholders who voted, most did not review the internet proxy materials before voting. We agree with the Proxy Working Group that any elimination of broker discretionary voting must be accompanied by efforts to address these underlying issues.

The 2006 Report also recommended that the NYSE engage a third party to analyze and make recommendations regarding the fee and oversight structure for administrative proxy service providers, and that the NYSE urge the Commission to study the role of voting determinations being made by entities that do not have an economic interest in the company, such as shareholder advisory services. We agree with the Proxy Working Group that any revision to the proxy process must take these matters into account. An updated analysis should take into consideration developments that have occurred in these areas since 2006, including changes to the role of proxy service providers arising from the notice and access model, and the increased influence of shareholder advisory services.[3]

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[3] Since 2006, there has been greater focus on another category of entity that may impact the outcome of shareholder votes, despite having little or no economic interest in the company – large shareholders that may have hedged their stake through derivative transactions. The impact of derivative-based shareholder positions on the proxy process has been an increased area of focus since the court decision in *CSX Corp. v. The Children's Investment Fund Management (UK) LLP* (S.D.N.Y. 2008), in which the court held that two funds violated SEC rules by not including shares held through derivative positions in their beneficial ownership reporting. An updated analysis of the proxy process should consider the impact of this development.

The 2006 Report also recommends that the NYSE continue to consider the critical role that broker voting has played in allowing issuers to achieve a quorum, and to consult with state law experts to determine if changes in state corporation law might be appropriate. We believe that any proposal to eliminate broker discretionary voting in director elections should be accompanied by consideration of rule changes that would permit brokers to cause unvoted share to count toward a quorum, even if the broker does not have discretion to vote on any agenda items. For example, the NYSE rules could expressly permit a broker to submit a proxy that gives no authority to vote on any matter, but that indicates that the represented shares should be counted as present or represented at the meeting for quorum purposes. As noted in the 2006 Report, the treatment of such proxies under state law is unclear, and any analysis of this issue should involve coordinated efforts among the NYSE and state law experts.

In short, while we agree that uncontested director elections are of vital importance to shareholders, we do not believe that the Commission should approve the proposed amendments separately from the other recommendations in the 2006 Report, which were presented as an interconnected set of reforms. In addition, market and regulatory developments have occurred since the 2006 Report that greatly impact the analysis and conclusions of the Proxy Working Group. The Proxy Working Group specifically noted the integrated and dynamic nature of the proxy process and advised that its recommendations warranted continued evaluation as circumstances changed. We believe that the care and thought that went into the 2006 Report warrant an equally careful and thoughtful reexamination before action is taken.

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We appreciate this opportunity to comment on the proposed amendments, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to Glen Schleyer (212-558-7284) in our New York office or Janet Geldzahler (202-956-7515) in our Washington, D.C. office.

Very truly yours,

SULLIVAN & CROMWELL LLP