

ALSTON & BIRD LLP

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Via Electronic Transmission

Ms. Elizabeth M. Murphy
Secretary
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
Washington, D.C. 20549-0609

**Re: File No. SR-NYSE-2006-92; Release No. 34-59464
Comment Letter of Alston & Bird LLP**

Dear Ms. Murphy:

This letter responds to the Commission's request for comments on the proposed amendments to New York Stock Exchange ("NYSE") Rule 452. Please note that the views expressed in this letter are those of certain partners of this law firm who participated in the preparation of this letter and are not necessarily the views of our clients.

We believe that the elimination of broker discretionary voting in director elections will have a significant negative impact on issuers that will fall disproportionately on smaller issuers, while failing to produce election results that more accurately reflect investor sentiment. This is particularly true when considered in light of recent changes in accepted principles of good corporate governance and the adoption of the notice and access alternative for proxy delivery. We urge the Commission to consider less detrimental alternatives before approving such a fundamental change to the director election process. We also urge the Commission to consider changes to Rule 452 not by themselves, but as a part of a larger review of the shareholder voting and proxy process.

The proposed amendment to NYSE Rule 452 would classify an uncontested election of the board of directors as a non-routine matter. As a non-routine matter, brokers will be prohibited from voting in director elections without specific voting instructions from the beneficial owner of the shares. The NYSE currently considers an uncontested election of directors a routine matter, and brokers may vote on such matters if they have not received specific voting instructions from the beneficial owner of the stock at least 10 days prior to the meeting.

We have described below our concerns created by the proposed amendment to NYSE Rule 452:

A. Inability to Obtain a Quorum

As the NYSE noted in its proposed amendment to Rule 452, “[o]ne of the most important results of broker votes of uninstructed shares is their use in establishing a quorum at shareholder meetings.” The quorum standard adopted by most companies requires the presence, in person or by proxy, of a majority of the outstanding shares entitled to vote. Because broker votes are shares “entitled to vote” on the election of directors, broker votes contribute to the establishment of a quorum, even though most other matters considered at a stockholders’ meeting are typically classified as non-routine. With the proposed amendment to NYSE Rule 452, companies will likely face significant difficulty in obtaining a quorum and may have to actively solicit proxies to conduct business. Although companies may choose to adopt a less stringent standard to establish a quorum¹, other corporate governance concerns may often limit the attractiveness of this alternative.²

An inability to establish a quorum becomes more likely when considered with the new notice and access model of the e-proxy rules. According to Broadridge Financial Solutions (“Broadridge”), retail share participation dropped by half for companies that implemented the notice and access model during the 2008 proxy season, from 34% of retail shares voted to 17% of retail shares voted. In addition, when measured by the number of accounts, retail share participation declined by approximately 75%. Combined with the elimination of broker discretionary voting, issuers could face substantial difficulty establishing a quorum, as they can no longer rely on the broker vote to establish a quorum and make up for the declining retail share participation. Broadridge analyzed data from meetings for 1,297 NYSE listed companies and found that if discretionary voting by brokers were eliminated, the number that would have been unable to obtain a quorum would increase from 101 to 224. Smaller issuers, who tend to have a more fragmented stockholder base, would be most often affected and often forced to expend scarce resources to solicit stockholder votes.

B. Increased Costs of Annual Stockholders’ Meetings

In an effort to counteract the impact of the proposed amendment to NYSE Rule 452 on the quorum and increasingly common majority vote requirements for election of directors, issuers may be forced to actively solicit stockholder votes. The cost of uncontested elections would materially increase as a result, requiring issuers to invest more time and money to obtain votes from stockholders. As the NYSE’s Proxy Working Group acknowledged, the consequence of eliminating discretionary voting for directors

¹ For example, Delaware law allows companies to adopt a quorum requirement of as few as one-third of the shares entitled to vote.

² For example, decreasing the number of shares required for a quorum would make it easier to obtain stockholder approval for most matters, which simply require approval from a majority of the shares present and entitled to vote at a stockholder meeting. This could result in increased influence for stockholders that own significant blocks of shares, particularly for companies that allow stockholders to call a special meeting.

“could fall most dramatically on smaller issuers, who have a smaller proportion of institutional investors and/or have greater difficulty in contacting stockholders and convincing them to vote on uncontested elections.” Of course, these incremental costs would add to the already substantial costs associated with being a public company at a time when these costs have made public equity ownership unattractive for many companies.

Broadridge also found that when discretionary voting by brokers is eliminated companies tended to obtain a quorum closer to the date of their meetings. According to Broadridge, 611 companies achieved a quorum 15 days before their meeting under current Rule 452. Assuming the elimination of discretionary voting by brokers, that number falls 83%, to 103 companies. Due to the considerable planning that goes into holding a stockholder’s meeting, eliminating discretionary voting by brokers would cause companies to increase the intensity of their solicitation efforts to ensure that a quorum is obtained. Again, we believe smaller issuers would be most harmed by being forced to expend these resources.

C. Heightened Influence of Certain Shareholders

Broker discretionary voting represents a substantial percentage of the votes traditionally cast in director elections. By eliminating broker discretionary voting, the remaining voting stockholders increase their influence over the process. For a corporation that has adopted majority voting for directors, nominees will need substantial support from activist stockholders and may increase their influence. To the extent the Commission is concerned that the current rule gives incumbent directors an unfair advantage, we believe the Commission should consider alternatives such as proportionate voting

D. Discretionary Broker Voting is Consistent with Stockholder Intent

Discretionary voting by brokers may be consistent with stockholder intent. With Rule 452’s long history, it may be that many stockholders rely on Rule 452 if they are inclined to vote consistently with the board’s recommendations. Similarly, stockholders who do not want to vote as recommended by the board will direct their broker’s how to vote their shares which preempts discretionary voting under Rule 452.

A study by Broadridge indicates that eliminating discretionary voting by brokers would lead to different results in a relatively small number of cases.³ The study also indicates that election outcomes are more sensitive to changes in election type (i.e. majority or plurality) than they are to a change in whether or not discretionary broker voting is allowed. Eliminating broker discretionary voting would, therefore, not appear

³ The Broadridge study found that the exclusion of broker discretionary votes would lead to the percentage of directors at companies with a majority voting standard receiving at least 25% withhold or against votes increasing from 2.5% to 3.6%.

to generate election results that are significantly more beneficial to stockholders or the company, particularly considering the costs and logistical difficulties described above.

E. Alternative Measures

We urge the Commission to explore alternative measures that will improve the transparency of the election process and corporate governance without handicapping smaller companies and drowning the voice of individual investors. The Commission could consider an amendment to the NYSE's definition of "contest" to include alternative proxy contest strategies, such as "just vote no" campaigns, in order to address the concerns of the current critics. In addition, the Commission could explore proportional voting, which several large brokers have already adopted, in which the brokers vote uninstructed shares in proportion to the returns received from retail holders. We believe that the Commission should take a comprehensive approach to the concerns with current NYSE Rule 452, examining the impact of the majority vote movement and the notice and access e-proxy model, before approving an amendment to the rule.

We appreciate the opportunity to submit this letter and look forward to hearing the Commission's decision regarding the proposed amendment to NYSE Rule 452.

Respectfully submitted,

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