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American Business Conference A Coalition of Growth Companies

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CHAIRMAN'S CORRESPONDENCE UNIT

June 25, 2007

The Honorable Christopher Cox
Chairman
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Dear Chairman Cox:

Thank you again for the opportunity to participate in the Commission's Roundtable on Proxy Voting Mechanics last month. It was an enlightening experience in many ways.

Since that time, I have reviewed developments in regard to the proposal of the New York Stock Exchange (NYSE) to eliminate the use of the broker vote in all director elections. I would like to share with you some additional thoughts on this matter, more or less as an extension of my remarks.

Although I did not know it then, just prior to the Roundtable on May 24, the NYSE revised its proposal by eliminating from the proposed rule's purview the election of directors of investment companies. As a result, investment companies would still be entitled to use the broker vote for director elections.

This "carve out" for investment companies seems to be in response to the complaints by the Investment Company Institute (ICI) to the effect that elimination of the broker vote would impose unjustified new costs on small and midsize investment companies. A well-publicized report issued by ICI earlier this year concluded that if the broker vote did not apply to director elections, mutual fund expense ratios "could rise by approximately 1 to 2 basis points owing to higher proxy costs." Funds with "smaller average account balances and more than the normal difficulties in obtaining voted proxies," would be especially hard hit. According to ICI, they would see their expense ratios increase by as much as 5 basis points.

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I congratulate ICI for successfully educating the NYSE about these matters just in time for the Roundtable. Nevertheless, the decision of the NYSE to provide a "carve out" for investment companies raises questions the Commission ought to ponder carefully.

First, the "carve out" fatally undermines the Exchange's contention that designating director elections as "nonroutine" is necessary because "the election of a director, even where the election is uncontested, is not a routine event." In my opinion, as I made clear at the Roundtable, this assertion on its face is nonsensical. Still, if the NYSE intends to press this curious idea, how does it account for letting investment companies off the hook? Surely it cannot be the Exchange's view that "better corporate governance and transparency of the election process" is a value irrelevant to mutual funds, which are the nation's most important repository of what Louis Brandeis called "other peoples' money."

Even those inclined to tolerate the NYSE's episodic application of its principles must ask why smaller public companies ought not to be part of the "carve out" offered to investment companies. After all, the predicament of small and midsize public companies is identical to that of small and midsize investment companies. The NYSE has itself stipulated that the elimination of the broker vote for director elections would entail new costs for issuers which would "fall most dramatically on smaller issuers, who have a smaller proportion of institutional investors and/or have greater difficulty in contacting shareholders and convincing them to vote in uncontested elections." Does this not exactly mirror the objection to the proposed rule made by ICI? It is hard to see, on the merits, why the NYSE provides relief to one group and not to the other.

Let me be clear that *at this time* my organization does not support an expansion of the "carve out" to include smaller public companies. By and large, we believe that "carve outs" are bad public policy.

Instead, we think the broker vote can be reformed in a way that ought to be acceptable to all parties. At the Roundtable, as you may recall, I spoke in favor of broker-by-broker proportional voting, which is now being tested by brokerdealers associated with the Securities Industry and Financial Markets Association. As an alternative, I also supported the idea of declaring "nonroutine" all director elections that are subject to "just vote no" campaigns.

Since the Roundtable, I have had the chance of reviewing the proposal, made by Mr. Steve Norman of American Express, for "client directed voting." Mr. Norman's idea seems to my group to have much merit, especially since it is predicated upon shareholder instruction to brokers. Mr. Norman, a member of the NYSE Proxy Working Group, is a widely recognized expert on the proxy process. He deserves considerable credit for moving beyond the Working Group's simplistic recommendation to eliminate the broker vote in favor of an idea that more accurately addresses the complexity of the issue.

The Commission now has heard of at least three responsible options for reforming the broker vote. Under those circumstances, I respectfully suggest that the Commission ought to look with a skeptical eye on the NYSE's puzzling persistence in favoring the elimination of the broker vote in director elections. The NYSE has not offered to the Commission a credible cost and benefit analysis of its proposal and it has shown itself all too willing to offer a "carve out" to an organization with sufficient clout and noisemaking skills to get what it wants. This ought not to be the way regulations are made.

Sincerely,

John Endean

John Endean
President

cc: The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth
The Honorable Kathleen L. Casey
Mr. Erik R. Sirri
Mr. John White
Ms. Elizabeth Murphy