SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60215; File No. SR-NYSE-2006-92)

July 1, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting for the Election of Directors, Except for Companies Registered under the Investment Company Act of 1940, and to Codify Two Previously Published Interpretations that Do Not Permit Broker Discretionary Voting for Material Amendments to Investment Advisory Contracts with an Investment Company

I. Introduction

On October 24, 2006, the New York Stock Exchange LLC ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual ("Manual") to eliminate broker discretionary voting for the election of directors. On May 23, 2007, the Exchange filed Amendment No. 1 to the proposed rule change to exempt companies registered under the Investment Company Act of 1940 ("1940 Act") from the ban on broker discretionary voting for the election of directors. On June 28, 2007, the Exchange filed Amendment No. 2 to the proposed rule change, to codify two previously published interpretations[3] that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company. On February 26, 2009, the Exchange filed and withdrew Amendment No. 3 to the proposed rule change for

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release Nos. 30697 (May 13, 1992), 57 FR 21434 (May 20, 1992) (SR-NYSE-92-05) (approval order) and 52569 (October 6, 2005), 70 FR 60118 (October 14, 2005) (SR-NYSE-2005-61) (notice of filing and immediate effectiveness).

technical reasons. On February 26, 2009, the Exchange filed Amendment No. 4 to the proposed rule change. Amendment No. 4 superseded and replaced the proposal in its entirety. The Commission published the proposed rule change, as modified by Amendment No. 4, for comment in the Federal Register on March 6, 2009.[4] The Commission received 153 comments from 137 commenters on the proposal.[5] This order approves the proposed rule change, as modified by Amendment No. 4.

II. Description of the Proposal and Background

A. Description of the Proposal

The Exchange proposes amending NYSE Rule 452 and Section 402.08 of the Manual (together, "NYSE Rule 452") to eliminate broker discretionary voting for all elections of directors at shareholder meetings held on or after January 1, 2010,[6] whether contested or not, except for companies registered under the 1940 Act. Currently, NYSE Rule 452 permits brokers to vote without voting instructions from the beneficial owner on uncontested elections of directors.[7] Specifically, the NYSE proposal would add to the list of enumerated items for which

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4 See Securities Exchange Act Release No. 59464 (February 26, 2009), 74 FR 9864 (March 6, 2009) ("Notice").

5 See Comment letters in the Commission's Public Reference Room or on the Commission's Web site at www.sec.gov. For a complete list of comment letters and the short cites to letters used here, see Appendix A, attached hereto.

6 The proposed change to NYSE Rule 452 would not apply to a meeting that was originally scheduled to be held prior to January 1, 2010, but was properly adjourned to a date on or after the effective date.

7 As discussed in more detail below, under current NYSE Rule 452 a broker can vote without instruction from the beneficial owner provided "the person in the member organization giving or authorizing the giving of the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock." See current NYSE Rule 452.10(3). Items where a broker is allowed to vote without specific instructions from the beneficial owner under Rule 452 are often referred to as "routine"

a member generally may not give a proxy to vote without instructions from the beneficial owner, the "election of directors." The proposal contains a specific exception, however, for companies registered under the 1940 Act.

In addition, the Exchange proposes amending NYSE Rule 452 to codify two previously published interpretations.[8] First, the NYSE proposes codifying that NYSE Rule 452 would preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company. Second, the NYSE proposes codifying that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment adviser for which shareholder approval is required by the 1940 Act and the rules thereunder.

B. Background

A shareholder of a public company may hold shares either directly, as the record holder, or indirectly, as the beneficial holder, with the shares held in the name of the beneficial shareholder's broker-dealer, bank nominee, or custodian ("securities intermediary"), which is the record holder. The latter generally is referred to as holding securities in "street name."

The NYSE's discretionary voting rule dates back to 1937. Historically, the majority of shareholders held their shares directly as record holders. In 1976, for example, shareholders held approximately 71% of securities of record (in their own name), while only approximately 29% of

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matters. NYSE Rule 452 also currently contains a list of eighteen enumerated items where the broker may not vote without specific voting instructions from the beneficial owner. See Notice, supra note 4 and infra note 14.

8 The codification will place the interpretations into the rule text of Rule 452.

securities were held by securities intermediaries in street name.[9] The number of beneficial owners holding securities in street name, however, has increased significantly since 1976,[10] with the result that securities intermediaries, on behalf of beneficial owners, now hold a substantial majority of exchange traded securities.[11] As a result, NYSE's discretionary voting rule has taken on increased significance in the voting of corporate shares at annual meetings.

Under Rule 451, when a public company furnishes proxy materials to its record shareholders, securities intermediaries that hold securities in street name must deliver the proxy materials to the beneficial shareholders within a certain time frame and request voting instructions from the beneficial shareholders.[12] If beneficial shareholders return voting instructions, the securities intermediaries vote their shares accordingly. However, if beneficial

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9 Final Report of the U.S. Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities (December 3, 1976), at 54.

10 This is due, among other things, to the advent of margin accounts, technological developments, and clearing efficiencies.

11 It has been estimated that approximately 85% of exchange traded shares are held by securities intermediaries in street name. See Securities Exchange Act Release No. 50758 (November 30, 2004), 69 FR 70852 (December 7, 2004) (noting that, at the end of 2002, the Depository Trust Company ("DTC") had on deposit approximately 84% of the shares issued by domestic companies listed on the NYSE and approximately 88% of the shares issued by domestic companies listed on the Nasdaq Stock Exchange). Securities held in "street name" by securities intermediaries are deposited at the DTC.

12 See NYSE Rule 451(b)(1) (providing, in part, that for matters which may be voted without instructions under Rule 452, if voting instructions "are not received by the tenth day before the meeting, the proxy may be given at discretion by the owner of record of the stock; provided . . . the proxy soliciting material is transmitted to the beneficial owner of the stock . . . at least fifteen days before the meeting."); see also Rule 14b-1, 17 CFR 240.14b-1. Rule 14b-1 under the Act does not require brokers or dealers to request voting instructions from beneficial owners, but they are required under that Rule to forward the proxy materials to the beneficial owners within a certain timeframe. However, Rule 14b-2, 17 CFR 240.14b-2, which applies to banks that exercise fiduciary powers, requires banks to forward proxy materials to beneficial owners within a certain timeframe, as well as an executed proxy or a request for voting instructions.

shareholders do not return voting instructions, securities intermediaries may, in certain situations, vote their shares at the intermediaries' discretion. Specifically, if voting instructions have not been received by the tenth day preceding the meeting date, under current NYSE Rule 452, brokers may vote on behalf of the beneficial shareholders on certain matters where there is no contest and the item does not include authorization for a merger, consolidation, or any matter which may substantially affect the rights or privileges of the stock.[13] The rule also contains eighteen specific items on which the broker generally may not vote without instructions from the beneficial owner.[14] Items where the broker can vote without instructions are referred to as

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13 See supra note 7.

14 See Notice, supra note 4. Presently, NYSE Rule 452 lists 18 specific matters that cannot be voted by the broker without instructions and are often referred to as "non-routine" matters. These 18 categories are a matter that: (1) is not submitted to stockholders by means of a proxy statement comparable to that specified in Schedule 14-A of the Commission; (2) is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management (i.e., a contest); (3) relates to a merger or consolidation (except when the company's proposal is to merge with its own wholly owned subsidiary, provided its shareholders dissenting thereto do not have rights of appraisal); (4) involves right of appraisal; (5) authorizes mortgaging of property; (6) authorizes or creates indebtedness or increases the authorized amount of indebtedness; (7) authorizes or creates a preferred stock or increases the authorized amount of an existing preferred stock; (8) alters the terms or conditions of existing stock or indebtedness; (9) involves waiver or modification of preemptive rights (except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock option or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares); (10) changes existing quorum requirements with respect to stockholder meetings; (11) alters voting provisions or the proportionate voting power of a stock, or the number of its votes per share (except where cumulative voting provisions govern the number of votes per share for election of directors and the company's proposal involves a change in the number of its directors by not more than 10% or not more than one); (12) authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by subsection 8 of Section 303A of the Exchange's Listed Company Manual); (13) authorizes (a) a new profit-sharing or special remuneration plan, or a new retirement plan, the annual cost of which will amount to more than 10% of average annual income before taxes for the preceding five years, or (b) the amendment of an existing plan which would bring its cost above 10% of such average annual income before taxes, but

"routine" matters. Among other matters, the "uncontested" election of directors is considered a "routine" matter under current NYSE Rule 452, and thus can be voted by the broker in its discretion if the beneficial owner has not returned voting instructions within the required time period.

With the large proportion of shares now held in street name, the impact of the broker vote on the election of directors has become increasingly significant.[15] In the view of some commenters, brokers tend to vote in accordance with management's recommendation.[16] According to the NYSE, in recent years its interpretation of a "contested election" has been questioned by a variety of persons,[17] as an increasing number of proxy campaigns have targeted the election of directors without a formal contest. These campaigns generally do not involve a

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exceptions may be made in cases of (a) retirement plans based on agreement or negotiations with labor unions (or which have been or are to be approved by such unions), and (b) any related retirement plan for benefit of non-union employees having terms substantially equivalent to the terms of such union-negotiated plan, which is submitted for action of stockholders concurrently with such union-negotiated plan; (14) changes the purposes or powers of a company to an extent which would permit it to change to a materially different line of business and it is the company's stated intention to make such a change; (15) authorizes the acquisition of property, assets, or a company, where the consideration to be given has a fair value approximating 20% or more of the market value of the previously outstanding shares; (16) authorizes the sale or other disposition of assets or earning power approximating 20% or more of those existing prior to the transaction; (17) authorizes a transaction not in the ordinary course of business in which an officer, director or substantial security holder has a direct or indirect interest; and (18) reduces earned surplus by 51% or more, or reduces earned surplus to an amount less than the aggregate of three years' common stock dividends computed at the current dividend rate.

15 See e.g., FSBA 2 Letter; see generally AFSCME Letter; CII 4 Letter; Colorado PERA Letter; CTW Letter; CTW 2 Letter; and FSBA Letter.

16 See CFA 2 Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; Cox Letter; CTW Letter; CTW 2 Letter; FSBA 2 Letter; Glass Lewis Letter; Hermes Equity Letter; NYSBA Sec. Reg. Letter; OPERS Letter; Relational Investors Letter; TIAA-CREF Letter; and Trillium Letter; see also Notice, supra note 4; Report and Recommendation of the Proxy Working Group, dated June 5, 2006 ("PWG Report"), at 9.

17 See Notice, supra note 4.

competing slate of directors or a formal counter-solicitation opposed by management, and hence, are not considered "contests" by the NYSE under NYSE Rule 452.[18] Examples of these campaigns include "just vote no" or "withhold" campaigns, where one or more investors express dissatisfaction with the performance of the company or its management, and urge shareholders to withhold their votes for one or more of management's nominees for director. NYSE views director elections subject to these campaigns as eligible for broker discretionary voting under current Rule 452.[19] Concerns have been expressed that, in certain "just vote no" or "withhold" campaigns, the broker vote for management has made the difference and allowed directors subject to these campaigns to be elected, which would not have happened but for NYSE's discretionary voting rule.[20]

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18 See NYSE Rule 452.11(2).

19 See Notice, supra note 4.

20 See AFSCME Letter; CalPERS 3 Letter; CtW Letter; CtW 2 Letter; FSBA Letter; FSBA 2 Letter; and Glass Lewis Letter; see also PWG Report, infra note 16, at 9. Several commenters stated that rather than eliminating the broker vote for all elections of directors the Commission should address the problem by making NYSE redefine what constitutes a contested election, see ABA Fed. Reg. Letter; ABC Letter; Alston Letter; BB&T Letter; see also Suburban Letter (urging further consideration of this alternative), and make alternative proxy contest strategies such as "just vote no" campaigns a contest that is not subject to broker discretionary voting under NYSE Rule 452. See ABC Letter; ABC 2 Letter; ABC 3 Letter; Alston Letter; Broadridge Letter (suggesting that the NYSE rules be defined to eliminate broker votes where there is a controversy, such as a "just vote no" campaign); see also ABA Fed. Reg. Letter. The Commission notes that the Proxy Working Group, see infra note 21, considered this approach but noted that expanding the definition of contest to include "just vote no" campaigns, especially in light of the increased use of the internet to run proxy contests, could raise significant practical difficulties, such as defining what is a campaign or whether there are any limitations or other minimal requirements for a contest. See PWG Report, infra note 16, at 20. Moreover, the Commission notes that merely redefining what constitutes a contested election would still allow brokers who do not have an economic interest in the company to vote in director elections that are uncontested and would not further the goals of the proposed rule change. See infra notes 21 through 23 and accompanying text. Finally, the Commission notes that the NYSE, in making its proposal, reviewed the PWG Report, as well as comments submitted to the NYSE on the PWG recommendation. The NYSE states in its rule filing that its proposal on Rule 452 was being made in light of the

In April 2005, the NYSE formed a working group to review its rules regarding the proxy voting process ("Proxy Working Group"). The Proxy Working Group was composed of representatives from listed companies, NYSE member organizations, lawyers, institutional investors, and individual investors.[21] The Proxy Working Group reviewed applicable NYSE rules relating to the proxy process and proxy fees, with a particular focus on NYSE Rule 452.[22] The Proxy Working Group ultimately issued a report recommending that the election of directors be ineligible for broker discretionary voting under NYSE Rule 452, with the result that brokers holding shares in street name could not vote on the election of directors, whether the election is contested or uncontested, without specific voting instructions from the beneficial owners. The Proxy Working Group believed that the election of directors could no longer be viewed as a "routine" matter in the life of a corporation. According to the Proxy Working Group, it "is well

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recommendations of the Proxy Working Group and its own conclusions that the election of directors should no longer be deemed a "routine matter" under its rules.

21 Members of the Proxy Working Group at the time of the PWG Report were: Larry W. Sonsini, Chairman, Wilson Sonsini Goodrich & Rosati; Rosemary Berkery, Executive Vice President and General Counsel, Merrill Lynch & Co., Inc., represented by Kevin Moynihan of Merrill Lynch & Co.; Glenn Booraem, Principal and Assistant Fund Controller, Vanguard Group; Peter Clapman, Senior Vice President and Chief Counsel for Corporate Governance, TIAA-CREF; Margaret Foran, Vice President-Corporate Governance & Corporate Secretary, Pfizer, Inc.; Gary Glynn, President, US. Steel Pension Fund; Amy Goodman, Partner, Gibson, Dunn & Crutcher LLP; Richard H. Koppes, Of Counsel, Jones Day; Jeffrey L. McWaters, Chairman and Chief Executive Officer, Amerigroup Corporation; Stephen P. Norman, Corporate Secretary, American Express Company; James E. Parsons, Corporate and Securities Counsel, Exxon Mobil Corporation; Judith Smith, Managing Director, Morgan Stanley & Co.; Esta Stecher, Executive Vice President and General Counsel, Goldman Sachs & Co., represented by Beverly O'Toole of Goldman Sachs & Co.; and Kurt Stocker, Professor, Northwestern University, Medill School of Journalism. See PWG Report, supra note 16. The Exchange attached the PWG Report as part of the proposal. In August 2007, the Proxy Working Group issued an addendum to its report ("Addendum"), available as part of the Exchange's proposal.

22 In particular, the Proxy Working Group looked at NYSE Rules 450 to 460 and 465.

established under law . . . [that] 'the business and affairs of every corporation . . . shall be managed by or under the direction of' the board of directors. Investors, courts, regulators and others expect directors to be accountable for the corporate decision-making process, and the primary way that accountability is expressed is through the director election process."[23] The Proxy Working Group concluded that "[d]irectors are simply too important to the corporation for their election to ever be considered routine."[24] Although the Proxy Working Group recognized that the proposed change to Rule 452 may result in increased costs, it believed that "it is a cost required to be paid for better corporate governance . . . ."[25]

In August 2007, the Proxy Working Group issued an Addendum to its report, recommending that the proposed change to NYSE Rule 452 should not apply to investment companies registered under the 1940 Act. The Proxy Working Group concluded that an exception for registered investment companies was appropriate given the fact, among other things, that they are subject to a unique regulatory regime.[26]

III. Summary of Comments

The Commission received 153 comment letters from 137 commenters.[27] Twenty-eight commenters explicitly supported the proposal,[28] and twelve commenters explicitly opposed the

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23 See PWG Report, supra note 16, at 21 (citing Del. Code tit. 8, Section 141(b) (2005)).

24 See id.

25 See id.

26 See Addendum, supra note 21, at 3.

27 See supra note 5. NYSE also received 39 letters on the PWG Report and Recommendation related to amending Rule 452. NYSE submitted these letters as part of the proposal. See discussion in Notice, supra note 4, and Exhibit 2 to the NYSE's proposed rule change.

28 See AFSCME Letter; BCIMC Letter; CalPERS Letter; CalPERS 2 Letter; CalPERS 3 Letter; CalSTRS Letter; CCGG Letter; CCGG 2 Letter; CFA Letter; CFA 2 Letter; City of London Letter; CII Letter; CII 2 Letter; CII 3 Letter; CII 4 Letter; Colorado PERA

proposal.[29] Ninety-seven of the commenters neither explicitly supported nor opposed the proposal.[30] Ninety-five of these ninety-seven commenters expressed concerns with the proposal,[31] and ninety-three urged that the Commission not take action on the proposal at this

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Letter; Corporate Governance Letter; Cox Letter; CtW Letter; CtW 2 Letter; Dobkin Letter; FSBA Letter; FSBA 2 Letter; Glass Lewis Letter; GovernanceMetrics Letter; Gratzer Letter ("[e]liminate the rule"); Hagberg Letter; Hermes Equity Letter; ICI 4 Letter (supporting the proposal as amended); Newground Letter; OPERS Letter; PWG Letter (while the PWG continued to believe that the election of directors could no longer be considered a routine event in the life of a corporation, it also believed that the Commission should consider using the opportunity created by the NYSE's proposal to review the broader proxy process)(see discussion at Section IV.F, Commission Consideration of the Entire Proxy Process, further below); Railpen Letter; Relational Investors Letter; Sod'ali Letter; TIAA-CREF Letter; and Trillium Letter.

29 See ABC Letter; ABC 2 Letter; ABC 3 Letter; Altman Letter; AmEx Letter; Astoria Financial Letter; BB&T Letter; Corning Letter; FedEx Letter; FPL Letter; NIRI Letter; Stanton Letter; Suffolk Letter; and UQM Letter.

30 See ABA Fed. Reg. Letter; Aetna Letter; Agilent Letter; Alcoa Letter; Alston Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Broadridge Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Central Vermont Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Chevron Letter; Cigna Letter; Cincinnati Financial Letter; Computershare Letter; Connecticut Water Letter; ConocoPhillips Letter; Continental Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; First Financial Letter; Furniture Brands Letter; GE Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Gulf Letter; Harman Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; International Paper Letter; Intel Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; Manifest Letter; McKesson Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Royal Gold Letter; Ryder Letter; S&C Letter; SCC Letter; Schwab Letter; Securities Transfer Letter; SIFMA Letter; STA Letter; Standard Letter; StockTrans Letter; Suburban Letter; Superlattice Letter; Sutherland Letter; Synalloy Letter; Textron Letter; TI Letter; Unitrin Letter; Veeco Letter; Verizon Letter; Wachtell Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

31 See ABA Fed. Reg. Letter; Aetna Letter; Agilent Letter; Alcoa Letter; Alston Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Central Vermont Letter;

time.[32] One commenter stated that the proposal raised sufficient issues to warrant consideration by the full Commission at a public meeting, and that consideration of the proposal by delegated authority was inappropriate.[33]

Ceridian Letter; Chamber of Commerce 2 Letter; Chevron Letter; Cigna Letter; Cincinnati Financial Letter; Computershare Letter; Connecticut Water Letter; ConocoPhillips Letter; Continental Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; First Financial Letter; Furniture Brands Letter; GE Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Gulf Letter; Harman Letter; Helmerich Letter; Honeywell Letter; Illinois Stock; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; Manifest Letter; McKesson Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Royal Gold Letter; Ryder Letter; S&C Letter; SCC Letter; SCC 2 Letter; Schwab Letter; Securities Transfer Letter; STA Letter; Standard Letter; StockTrans Letter; Suburban Letter; Superlattice Letter; Sutherland Letter; Synalloy Letter; Textron Letter; TI Letter; Unitrin Letter; Veeco Letter; Verizon Letter; Wachtell Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

32 See ABA Fed. Reg. Letter; Aetna Letter; Agilent Letter; Alcoa Letter; Alston Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Central Vermont Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Chevron Letter; Cigna Letter; Cincinnati Financial Letter; Computershare Letter; Connecticut Water Letter; ConocoPhillips Letter; Continental Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; First Financial Letter; Furniture Brands Letter; GE Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Gulf Letter; Harman Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; Manifest Letter; McKesson Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Royal Gold Letter; Ryder Letter; S&C Letter; SCC Letter; Schwab Letter; Securities Transfer Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Synalloy Letter; Textron Letter; TI Letter; Unitrin Letter; Veeco Letter; Verizon Letter; Wachtell Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

33 See SCC 2 Letter.

IV. Discussion and Analysis of Comment Letters

After careful review and consideration of the comment letters, the Commission finds that the proposed rule change, as modified by Amendment No. 4, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[34] In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[35] which provides that the rules of the exchange must be designed to prevent

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34 In approving the proposed rule change, the Commission considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). The Commission notes that several commenters believed that the NYSE's proposal would make the proxy voting system less efficient. See Central Vermont Letter; Connecticut Water Letter; First Financial Letter; Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Quest Letter; Synalloy Letter; and Veeco Letter; see also Astoria Financial Letter ("[F]or many public companies, broker voting remains the most efficient means to obtain a quorum for shareholder meetings"); BB&T Letter (cost of obtaining quorum absent broker discretionary voting would "be an enormous loss to investors," and that "redefinition of what constitutes a 'contested' election is the most efficient manner to address the real corporate governance concerns implied by the Amendment"); and Governance Professionals Letter ("The focus should be on solutions that contain costs and make the proxy voting system more efficient, rather than on increased costs and inefficiency."); but see Relational Investors Letter ("The new administrative burdens created by this amendment are far outweighed by the benefits to efficient and effective corporate governance."); see also PWG Report, supra note 16. As discussed further below, the Commission believes that the NYSE's proposed rule change should better enfranchise shareholders, and thereby enhance corporate governance and accountability, by assuring that voting is determined by those with an economic interest in the company on matters as critical as the election of directors, rather than permitting brokers to cast votes without instructions for shares beneficially owned by their customers, when the broker has no economic interest in those shares. Therefore, the Commission believes the NYSE's proposed rule change should protect investors and the public interest. Further, the Commission does not believe that the proposed change will necessarily make the voting process materially less efficient. The mechanics of the proxy voting procedure as to how beneficial owners return voting instructions to their brokers are not changing. NYSE Rule 452 would continue to allow the broker to vote on other routine matters, such as the ratification of independent auditors, which will help companies meet quorum requirements, and therefore alleviate the efficiency concerns raised by commenters. As discussed further below, pursuant to Section 19(b) and after reviewing the comments, the Commission believes the proposed rule change should be approved.

35 15 U.S.C. 78f(b)(5).

fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission, Congress, states, investors and other market participants have long recognized the critical role that directors play in a corporation. The board of directors has ultimate responsibility for the management of the business and the affairs of the company.[36] Shareholders, through their vote, vest with the directors they elect this critical duty to manage the company with which they have entrusted their resources.[37] The board of directors generally does not participate in the daily business affairs of the company. It delegates these responsibilities to management the board selects and supervises. The board, however, ultimately is accountable to shareholders for corporate decisions.[38] The most fundamental way in which shareholders can ensure that directors remain accountable to them for the directors' performance of these critical duties is through the director election process.[39]

As discussed below, the Commission believes that it is reasonable and consistent with the Act for NYSE to determine that the election of directors should no longer be an item eligible for

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36 See, e.g., Del. Code Ann. Tit. 8, Section 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").

37 See e.g., PWG Report, supra note 16, at 21; see also Bruce A. Toth and Jason L. Booth, The Board of Directors, Corp. Prac. Series (BNA), at A-3.

38 See Toth and Booth, The Board of Directors, Corp. Prac. Series, at A-3.

39 See PWG Report, supra note 16, at 21.

broker discretionary voting, particularly given the large proportion of shares that today are held in street name, the importance of corporate governance and accountability expressed through the election process, and the concern that the broker vote could potentially distort election results.[40] As the Proxy Working Group also concluded, the election of directors is not a "routine" issue for either the corporation or the shareholders; it is a key event in the operation and direction of the corporation and the shareholders' exercise of their rights and interests as the owners of the corporation.[41] As such, the Commission believes that NYSE's proposal should better enfranchise shareholders by helping assure that votes on matters as critical as the election of directors are determined by those with an economic interest in the company,[42] rather than the broker who has no such economic interest, and also should enhance corporate governance and accountability to shareholders.

The Commission also believes that the NYSE's proposed change codifying existing NYSE interpretations of NYSE Rule 452 is consistent with the requirements of the Act. As discussed below, these proposed amendments will codify two previous interpretations that were adopted by the NYSE to help ensure the full and effective voting rights of investment company

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40 Broker votes can distort election results both by changing the outcome of an election and by creating a perception that a candidate (or group of candidates) has greater support than would be the case considering only the votes of beneficial owners. That perception, and in particular an understanding of the lack of substantial support for a director, even if he or she receives enough votes to be elected, can affect the decisions of the board and shareholders. See e.g., PWG Report, supra note 16, at 9 and n. 12.

41 See PWG Report, supra note 16, at 21.

42 The Commission recognizes that, even under the NYSE's proposal, certain situations will continue to exist where a person with an economic interest in a company may not be able to vote the shares, such as when shares are purchased after the record date for a shareholder meeting. Nevertheless, the NYSE's proposal should make substantial strides in aligning a securityholder's voting decision on director elections with the economic interest in the shares, as it will prohibit a broker holding shares in street name, who does not have an economic interest in the company, from voting on behalf of the beneficial owner in director elections.

shareholders on material matters.[43] The Commission believes that these changes are consistent with the requirements under Section 6(b)(5) of the Act[44] that the rules of the Exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

A. Increased Costs for Companies to Achieve Quorum

Several commenters believed that the NYSE's proposal to eliminate the broker discretionary vote would make it more difficult for companies to obtain a quorum[45] and elect directors.[46] Some commenters believed that the relatively low retail shareholder participation rate in corporate elections would increase the difficulty of obtaining a quorum under NYSE's proposal.[47] Commenters also stated that the proposal would increase the cost to a company of

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43 See supra note 3. Two commenters supported the proposal regarding investment advisory contracts. See CFA 2 Letter and ICI 4 Letter.

44 15 U.S.C. 78f(b)(5).

45 See ABA Fed. Reg. Letter; ABC 3 Letter; Alston Letter; Altman Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Chamber of Commerce Letter; Chamber of Commerce 2 Letter; Cigna Letter; Computershare Letter; ConocoPhillips Letter; Crescent Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; Exxon Mobil Letter; FPL Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Harman Letter; Helmerich Letter; ICI Letter; ICI 2 Letter; ICI 3 Letter; ICI 4 Letter; Intel Letter; International Paper Letter; Johnson Letter; J.P. Morgan Letter; Medco Letter; NS Letter; NYSBA Sec. Reg. Letter; Office Depot Letter; Peabody Letter; Pfizer Letter; Royal Gold Letter; Ryder Letter; S&C Letter; Schwab Letter; Securities Transfer Letter; STA Letter; Suburban Letter; Textron Letter; TI Letter; Unitrin Letter; UQM Letter; Verizon Letter; Wachtell Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; YRC Letter; see also CII Letter; and CII 2 Letter; see also Sutherland Letter.

46 See ICI Letter; ICI 2 Letter; ICI 3, and ICI 4 Letter.

47 See Alston Letter; Intel Letter; S&C Letter; Suburban Letter; and Wachtell Letter.

obtaining a quorum,[48] by requiring them to incur higher proxy solicitation costs[49] in order to communicate with shareholders, urge them to participate in director elections[50] and support board-nominated candidates.[51] For example, one commenter believed that it would need "to retain a proxy solicitor even in the absence of a 'contest' . . . just to attempt to achieve a quorum."[52] Several commenters noted that smaller issuers, in particular, would be negatively affected by the NYSE proposal, given their tendency to have a higher proportion of retail

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48 See ABC Letter; Agilent Letter; Astoria Financial Letter; Central Vermont Letter; Connecticut Water Letter; First Financial Letter; ICI 3 Letter; Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Quest Letter; Schwab Letter; Suburban Letter; Suffolk Bank Letter; Synalloy Letter; Veeco Letter; and Wachtell Letter; see also Sutherland Letter.

49 See ABC Letter; Chamber of Commerce Letter; Chamber of Commerce 2 Letter; Governance Professionals Letter; ICI 2 Letter; ICI 3 Letter; ICI 4 Letter; NIRI Letter; Praxair Letter; Quest Letter; Realogy Letter; Ryder Letter; Schwab Letter; STA Letter; Suburban Letter; Suffolk Bank Letter; Textron Letter; and YRC Letter; see also ABC Letter.

50 See ABA Fed. Reg. Letter; ABC Letter; Aetna Letter; Aglient Letter; Alston Letter; Altman Letter; AmEx Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BB&T Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Ceridian Letter; Cigna Letter; ConocoPhillips Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; FPL Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Harman Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; Office Depot Letter; Peabody Letter; Pfizer Letter; Praxair Letter; Realogy Letter; Ryder Letter; SCC Letter; Synalloy Letter; Textron Letter; UQM Letter, Whirlpool Letter; Xerox Letter; and YRC Letter.

51 See FedEx Letter.

52 See Suburban Letter; see also ABC Letter (stating that in "2004, had the broker vote not been in effect, 85 percent of NYSE companies would have been working to reach quorum in the final nine days before their meetings while 23 percent would not have reached quorum by the meeting date. . . . [C]ompanies uncertain of their ability to reach quorum . . . would be forced to hire proxy solicitors. . . . ").

shareholders,[53] so that smaller issuers would have to expend a disproportionate amount of additional resources to solicit shareholder votes, and obtain a quorum.[54]

Some commenters also expressed concern with, or noted the shortcomings of, the current system of communicating with shareholders,[55] and stated that the proposal should be evaluated in connection with a review of shareholder communication rules.[56] Three commenters expressed

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53 See ABC 3 Letter; Agilent Letter; Alston Letter; AmEx Letter; Central Vermont Letter; Computershare Letter; Connecticut Water Letter; First Financial Letter; Governance Professionals Letter; Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Quest Letter; SCC Letter; and Synalloy Letter; see also Sutherland Letter (stating that the exemption should also apply to business development companies).

54 See ABA Fed. Reg. Letter; ABC 3 Letter; Agilent Letter; Alston Letter; AmEx Letter; Astoria Financial Letter; Central Vermont Letter; Chamber of Commerce 2 Letter; Computershare Letter; Connecticut Water Letter; Crescent Letter; First Financial Letter; Governance Professionals Letter; Helmerich Letter; Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Quest Letter; Synalloy Letter; and Washington Banking Letter; see also Sutherland Letter.

55 See Alcoa Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Chevron Letter; Cincinnati Financial Letter; Computershare Letter; ConocoPhillips Letter; Continental Letter; Corning Letter; Crescent Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; FPL Letter; GE Letter; General Mills Letter; GM Letter; Gulf Letter; Helmerich Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Johnson Letter; Manifest Letter; Medco Letter; MGE Letter; NIRI Letter; NS Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; PWG Letter; Realogy Letter; Routh Letter; Royal Gold Letter; Ryder Letter; STA Letter; Securities Transfer Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Textron Letter; Unitrin Letter; Verizon Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

56 See Aetna Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Cigna Letter; Cincinnati Financial Letter; Computershare Letter; ConocoPhillips Letter; Continental Letter; Corning Letter; Crescent Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; FedEx Letter; Fidelity Letter; First American Letter; GE Letter; General Mills Letter; GM Letter; Gulf Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Johnson Letter; NS Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Realogy Letter; Routh Letter; Ryder Letter; STA

concern that the proposed rule change could magnify the difficulties issuers have in communicating with shareholders, especially with objecting beneficial owners ("OBOs").[57] Commenters recommended that Commission rules be revised to facilitate the ability of issuers to contact shareholders directly.[58] According to one commenter, "[p]ermitting issuers to communicate with their shareholders . . . will enable them to 'get out the vote,' enhancing their ability to obtain needed quorums and successfully re-solicit shareholders, if necessary."[59]

Other commenters believed that quorum concerns were not a valid reason for allowing brokers to continue to vote uninstructed shares in the election of directors.[60] For example, one commenter believed that the participation of institutional investors would assure a quorum for most issuers, except for a limited number of small companies.[61] Moreover, several commenters believed that quorum concerns could be addressed simply by including a "routine" item on the ballot,[62] such as the ratification of auditors,[63] or with appropriate changes in state law to permit

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Letter; Securities Transfer Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Textron Letter; TI Letter; Unitrin Letter; Verizon Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

57 See Alcoa Letter; Corning Letter; and NIRI Letter.

OBOs are shareholders who object to having their names and addresses disclosed to companies whose shares they own.

58 See Alcoa Letter; Computershare Letter; Corning Letter; ICI Letter; ICI 2 Letter; NIRI Letter; PWG Letter; STA Letter; and TI Letter; see also Chamber of Commerce 2 Letter (stating that any amendment to Rule 452 should be accompanied by an improved shareholder communication system).

59 See ICI 2 Letter.

60 See CII 4 Letter; Colorado PERA Letter; FSBA Letter; FSBA 2 Letter; Glass Lewis Letter; Hagberg Letter; and TIAA-CREF Letter; see also CCGG Letter (elimination of U.S. broker non-votes would not adversely impact the ability of Canadian issuers to obtain quorum).

61 See Glass Lewis Letter.

62 See Hagberg Letter; Glass Lewis Letter; and TIAA-CREF Letter.

shares held by brokers to count solely for purposes of establishing quorum.[64] Also, another commenter believed that "issuers can communicate effectively to shareholders through established, robust and efficient systems currently in place."[65]

The Commission acknowledges commenters' concerns regarding the potential for the proposed rule change to impact the ability of some companies to achieve quorum. For example, the Proxy Working Group recognized that smaller issuers may have certain increased costs in obtaining quorum due to the high percentage of shares held by retail investors.[66] However, as noted by several commenters, issuers with a large institutional shareholder base or with another routine matter on their proxies, such as ratification of independent auditors, should not face material additional difficulties in achieving a quorum. [67] The Commission notes that a majority of companies other than registered investment companies include the ratification of independent auditors as a matter for shareholders to approve, even though such approval is not required by law, [68] so that these companies should not, as a practical matter, encounter the quorum issue as articulated by the commenters. Quorum concerns for other companies, including small

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63 See CII Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; Glass Lewis Letter; Hagberg Letter; and TIAA-CREF Letter; contra ICI 3 Letter (stating that "[a]sking funds to take this action for the sole purpose of achieving a quorum" is unacceptable since funds have not been required to ratify the selection of fund auditors since 2001.).

64 See CalPERS Letter; Computershare Letter; FSBA 2 Letter; ICI 2 Letter; S&C Letter; Sod'ali Letter; and TIAA-CREF Letter; see also Suburban Letter (urging further consideration of this alternative).

65 See SIFMA Letter.

66 See Addendum, supra note 21, at 3; see also PWG Report, supra note 16, at 21.

67 See CII Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; Glass Lewis Letter; Hagberg Letter; and TIAA-CREF Letter.

68 See CII 4 Letter (stating that including an auditor ratification "resolution on the proxy is a step that many corporations already take on their own and one that the Council believes is a best practice for all public companies").

companies, may be addressed to the extent that these companies include an item on their ballot that may be considered a routine matter. The Commission also notes a report showing that, if NYSE's proposal were implemented, most companies would nevertheless achieve quorum, albeit at a date closer to their annual meetings than previously.[69] More fundamentally, however, although issuers may incur increased proxy solicitation costs under the NYSE's proposal, the Commission agrees with the NYSE and the Proxy Working Group that these costs are justified by, among other things, assuring voting on matters as critical as the election of directors can no longer be determined by brokers without instructions from the beneficial owner, thereby enhancing corporate governance and accountability.[70] Moreover, to the extent there are issues regarding establishing a quorum, we do not believe having uninstructed votes cast on the election of a director by broker-dealers who lack the shareholders' economic interests in the corporation is the appropriate way to address the issue.

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69 See Broadridge Letter and attached report, Updated Analysis of the Broker Vote, dated February 3, 2009. Moreover, the Commission notes that NYSE's proposed rule change is consistent with the rules of other self-regulatory organizations. For example, the Financial Industry Regulatory Authority, Inc. ("FINRA") and The NASDAQ Stock Market LLC ("Nasdaq") do not permit broker discretionary voting for their members, unless they do so pursuant to the rules of another national securities exchange of which they are also a member and the member clearly indicates which rule it is following. See National Association of Securities Dealers, Inc. ("NASD") Rule 2260 and Nasdaq Rule 2260. We note that NYSE Rule 452 is a member rule. Accordingly, NYSE members would follow the NYSE rule regardless of where a security is listed. Further, while other self-regulatory organizations currently allow discretionary voting, we would expect these markets to make changes to conform to the NYSE's new rules to eliminate any disparities involving voting depending on where shares are held. See NYSE Amex Equities Rule 452 and Chicago Board Options Exchange, Incorporated Rule 31.74.

70 See PWG Report, supra note 16, at 21 and Notice, supra note 4. With respect to concerns raised by commenters regarding communications with shareholders, the Commission notes that the proposed rule change would not alter the existing system of shareholder communications, which is outside the scope of NYSE's proposed rule change.

As discussed further below,[71] the Commission believes that shareholder education is important for encouraging retail shareholders to vote, and could play a key role both in reducing any additional proxy solicitation costs incurred by companies, as well as achieving the policy goal of fostering investor participation in corporate governance. The Commission notes that the Proxy Working Group has established an Investor Education Sub-Committee. The Commission supports the Proxy Working Group's efforts to develop, and encourages the NYSE and its member firms to implement, an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the importance of voting.

B. Disenfranchising Retail Shareholders and Growing Influence of Third Parties

Several commenters stated that the proposal could disenfranchise individual shareholders,[72] because eliminating broker discretionary voting may be counter to shareholders' assumptions that their brokers would vote on their behalf if they did not vote.[73] Other

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71 See infra Section IV.D., Shareholder Education.

72 See Aetna Letter; Alcoa Letter; Altman Letter; AmEx Letter; Andarko Letter; Arvin Meritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Chevron Letter; Cigna Letter; Cincinnati Financial Letter; Continental Letter; ConocoPhillips Letter; Corning Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Fidelity Letter; First Financial Letter; FPL Letter; Furniture Brands Letter; General Mills Letter; GM Letter; Gulf Letter; Harman Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Ryder Letter; SCC Letter; STA Letter; Standard Letter; Stanton Letter; StockTrans Letter; Superlattice Letter; Synalloy Letter; Textron Letter; TI Letter; Veeco Letter; Verizon Letter; Wachtell Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

73 See Aetna Letter; Alcoa Letter; AmEx Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Cigna Letter; ConocoPhillips Letter; Crescent Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; FPL Letter; General Mills Letter; GM Letter; Harman Letter; International Paper Letter; Johnson Letter;

commenters believed that the proposed rule change would shift voting power toward small blocks of voters[74] and special interest groups wishing to use minority stock positions to pursue their own special interests,[75] and non-investment objectives.[76] Moreover, several commenters expressed concern that retail shareholder participation in company elections has decreased in recent years,[77] especially under e-proxy,[78] so that the NYSE's proposal would shift disproportionate weight to institutional investors,[79] and increase power in the hands of the few shareholders who vote.[80]

Medco Letter; NS Letter; Office Depot Letter; Peabody Letter; Pfizer Letter; Praxair Letter; Realogy Letter; Ryder Letter; STA Letter; Textron Letter; Verizon Letter; Wachtell Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

74 See UQM Letter.

75 See Astoria Financial Letter; Chamber of Commerce 2 Letter; and S&C Letter.

76 See Chamber of Commerce Letter and Chamber of Commerce 2 Letter.

77 See Agilent Letter; Alcoa Letter; Alston Letter; Altman Letter; Central Vermont Letter; Chevron Letter; Computershare Letter; Connecticut Water Letter; Corporate Governance Letter; DTE Letter; Eli Lilly Letter; Exxon Mobil Letter; First Financial Letter; Furniture Brands Letter; Governance Professionals Letter; McKesson Letter; Medco Letter; Monster Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Provident Letter; Provident Financial Letter; Quest Letter; S&C Letter; Synalloy Letter; Veeco Letter; and Wachtell Letter.

78 See AFSCME Letter; Agilent Letter; Alcoa Letter; Alston Letter; Altman Letter; Central Vermont Letter; Chevron Letter; CII 4 Letter; Colorado PERA Letter; Connecticut Water Letter; Corporate Governance Letter; DTE Letter; Exxon Mobil Letter; First Financial Letter; Furniture Brands Letter; Governance Professionals Letter; McKesson Letter; Monster Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Provident Letter; Provident Financial Letter; Quest Letter; S&C Letter; Synalloy Letter; and Wachtell Letter.

79 See Agilent Letter; Altman Letter; AmEx Letter; BB&T Letter; Central Vermont Letter; Chevron Letter; Connecticut Water Letter; Corning Letter; DTE Letter; First Financial Letter; Furniture Brands Letter; Governance Professionals Letter; Intel Letter; Jacksonville Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; Monster Letter; Nucor Letter; Provident Letter; Provident Financial Letter; Quest Letter; Stanton Letter; Synalloy Letter; Veeco Letter; and Wachtell Letter.

80 See Alston Letter and NIRI Letter. Another commenter opined that the proposal confuses civic governance with corporate governance. See Suffolk Bank Letter.

Several commenters also believed that eliminating broker discretionary voting could increase the influence of proxy advisory firms, which provide, among other things, voting recommendations to their institutional investor clients.[81] A number of commenters expressed concerns about the degree of influence that proxy advisory firms have in corporate elections.[82] Other commenters expressed concern that stock lending and financial derivatives,[83] as well as

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81 See Aetna Letter; Agilent Letter; Alcoa Letter; Altman Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Central Vermont Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Cigna Letter; Connecticut Water Letter; ConocoPhillips Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; First Financial Letter; FPL Letter; Furniture Brands Letter; General Mills Letter; GM Letter; Governance Professionals Letter; Harman Letter; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; Monster Letter; NIRI Letter; NS Letter; Nucor Letter; Office Depot Letter; Peabody Letter; Pfizer Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Ryder Letter; SCC Letter; Synalloy Letter; Textron Letter; Veeco Letter; Wachtell Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter. Another commenter stated that the proposal might result in a conflict of interest for proxy advisory firms. See Cardinal Letter.

82 See Cincinnati Financial Letter; Computershare Letter; Continental Letter; Corning Letter; Crescent Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; Gulf Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; Manifest Letter; MGE Letter; OTC Letter; Otter Tail Letter; Platinum Letter; Routh Letter; Royal Gold Letter; S&C Letter; Securities Transfer Letter; Standard Letter; StockTrans Letter; Superlattice Letter; TI Letter; and Washington Banking Letter.

Other commenters noted the lack of competition in the current proxy distribution process. See SCC Letter; and STA Letter. Some commenters suggested that the role of proxy service providers be evaluated in conjunction with the proposal. See Cincinnati Financial Letter; Continental Letter; Crescent Letter; EV Letter; Fidelity Letter; First American Letter; Gulf Letter, Illinois Stock Letter; MGE Letter; OTC Letter; Otter Tail Letter; Platinum Letter; Routh Letter; S&C Letter; Securities Transfer Letter; Standard Letter; StockTrans letter; and Superlattice Letter. The Commission notes that these issues are outside the scope of NYSE's proposal.

83 See Alcoa Letter; Cardinal Letter; Cincinnati Financial Letter; Continental Letter; Crescent Letter; EV Letter; Fidelity Letter; First American Letter; Gulf Letter; Helmerich Letter; Illinois Stock Letter; MGE Letter; OTC Letter; Otter Tail Letter; Platinum Letter; Routh Letter; Royal Gold Letter; Securities Transfer Letter; SCC Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Unitrin Letter; and Washington Banking Letter.

the impact of over-voting and under-voting,[84] distort the shareholder voting process. Commenters urged the Commission to consider these issues in conjunction with the proposal.[85]

However, other commenters believed that the proposal would ensure that voting results were not distorted by broker votes[86] and that the true owners of corporations were not disenfranchised.[87] For example, one commenter stated that "eliminating the ability of brokers to vote uninstructed client shares for the election of directors is an important first step in improving shareholder democracy and enhancing the integrity of the proxy voting system."[88] Several commenters opined that continuing to count broker votes would diminish the strides being made toward more effective corporate governance, and stressed the importance of shareholder

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84 See Cardinal Letter; Cincinnati Financial Letter; Continental Letter; Crescent Letter; EV Letter; Fidelity Letter; First American Letter; Gulf Letter; Helmerich Letter; Illinois Stock Letter; MGE Letter; OTC Letter; Otter Tail Letter; Platinum Letter; Routh Letter; Royal Gold Letter; Securities Transfer Letter; SCC Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Unitrin Letter; and Washington Banking Letter; contra SIFMA Letter. Over-voting occurs when a broker-dealer casts more votes on behalf of itself and its customers than it is entitled to cast. An under-vote occurs when the broker-dealer casts less votes on behalf of itself and its customers than it is entitled to cast.

85 See Cardinal Letter; Cincinnati Financial Letter; Continental Letter; Crescent Letter; EV Letter; Fidelity Letter; First American Letter; Gulf Letter; Helmerich Letter; Illinois Stock Letter; Manifest Letter; OTC Letter; Otter Tail Letter; Platinum Letter, Routh Letter; Royal Gold Letter; Securities Transfer Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Unitrin Letter; and Washington Banking Letter. One commenter, however, stated that brokers are able to accurately calculate the number of equity shares eligible for voting, as "broker-dealers are required to have robust and precise accounting systems in place to ensure the integrity of their records of share ownership." See SIFMA Letter.

86 See AFSCME Letter; CCGG Letter; CCGG 2 Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; FSBA Letter; FSBA 2 Letter; Glass Lewis Letter; Hagberg Letter; OPERS Letter; Railpen Letter; see also CalPERS Letter (proposal would "increase the credibility and fairness of the election process"); CtW Letter; CtW 2 Letter; and Trillium Letter.

87 See CtW Letter; CtW 2 Letter; FSBA Letter; FSBA 2 Letter; Glass Lewis Letter; Railpen Letter; Relational Investors Letter (also noting that brokers do not have direct economic interest); and Trillium Letter.

88 See CCGG 2 Letter.

participation as more issuers move towards majority voting standards for the election of directors.[89] Commenters also suggested that the broker vote may have impacted the result in some recent corporate elections.[90]

The Commission does not believe that the proposal would disenfranchise retail shareholders, but would instead be enfranchising since it helps assure that only those with an economic interest in a company may vote on matters as critical as the election of directors. Moreover, the Commission notes that research conducted on behalf of the Proxy Working Group indicates that the NYSE's proposal may, in fact, be consistent with an assumption of many shareholders that only they can vote their shares.[91] As noted above, the Commission also encourages the efforts of the Proxy Working Group to develop an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the importance of voting.

As to the concerns that the proposal could increase the impact of special interest groups holding minority share positions, the Commission believes that it is not a basis for not approving the proposed rule change. Even if this is the result in some cases, it remains consistent with the

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89 See CII 4 Letter; Colorado PERA Letter; CtW Letter; Hermes Equity Letter; Railpen Letter; and TIAA-CREF Letter.

90 See AFSCME Letter; CalPERS 3 Letter; CtW Letter; CtW 2 Letter; FSBA Letter; FSBA 2 Letter; and Glass Lewis Letter.

91 See Investor Attitudes Study, attached as Exhibit B to the NYSE's proposal, at page 18 ("Investor Attitudes Study"). The Investor Attitudes Study showed that while 37 percent of stockholders believed that if they did not vote their proxy on routine matters their shares may be voted by their brokers; 30 percent of stockholders believed that if they did not vote their proxy, their shares would not be voted. The Investor Attitudes Study showed that even those stockholders who understood that their broker may vote their shares failed to completely understand how those shares could be voted. Out of the 37 percent cited to in the Investor Attitudes Study, 10 percent of stockholders believed that their shares would be voted by their brokerage firm based on the firm's preference; while 27 percent believed that their brokerage firm would vote in accordance with the Board of Director's or the company's recommendations. See Investor Attitudes Study at 18.

purposes of the proposed rule change, including assuring that investors with an economic interest in the company vote on matters as critical as the election of directors, thereby enhancing corporate governance and accountability.

With regard to the concern that proxy advisory firm recommendations could have increased influence on director elections,[92] the Commission notes that issues relating to the use of proxy advisory services by institutions and others, and whether that use should be further regulated, is a matter that will be considered by the Commission as it examines broader proxy issues. It is not, however, germane to, and does not need to be resolved to approve, the NYSE's proposal. While the Commission acknowledges the possibility that, with the elimination of the broker vote, the vote of institutions or others that use proxy advisory services may, at least in the short term, represent a larger percentage of the votes returned in director elections, the Commission believes the goals of the NYSE's proposal, as described above, are consistent with Section 6(b)(5) of the Act[93] in that the proposal should protect investors and the public interest by barring brokers from voting on behalf of investors in uncontested elections of directors when they have no economic interest in the corporation or the outcome. The Commission further notes that institutional investors, whether relying on proxy advisory firms or not, must vote the institutions' own shares and, in so doing, must discharge their fiduciary duties to act in the best interest of their investors and avoid conflicts of interest; institutions are not relieved of their fiduciary responsibilities simply by following the recommendations of a proxy advisor.[94]

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92 See notes supra 81 and 82 and accompanying text.

93 15 U.S.C. 78f(b)(5).

94 See, e.g., 29 U.S.C. 1104 (setting forth the fiduciary duties under the Employee Retirement Income Security Act).

The Commission has also considered the various other concerns raised by commenters about the broader proxy process, including the impact of stock lending and financial derivatives, and over-voting and under-voting issues.[95] While the Commission will separately address issues such as these as it examines proxy and voting matters generally, they do not directly implicate the NYSE's proposal. The fact that there may be more to be done in these areas is not a reason for disapproving the NYSE's proposal if, as the Commission believes, the NYSE's proposed rule change is consistent with Section 6(b)(5) of the Act.[96]

C. Impact on Companies with Majority Vote Standards for Election of Directors

Several commenters raised concerns about the particular impact the proposal could have on companies that have adopted a majority vote standard for the election of directors.[97] Typically, companies that have adopted a majority vote standard require each director to receive a majority of the votes cast in order to be elected.[98] Historically, most public companies elected

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95 See supra notes 83, 84, 85 and accompanying text.

96 See also supra note 42.

97 See Aetna Letter; Alcoa Letter; Anadarko Letter; ArvinMeritor Letter; Astoria Financial Letter; Avery Letter; Avis Letter; BB&T Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Ceridian Letter; Cigna Letter; ConocoPhillips Letter; CSX Letter; Cummins Letter; Eaton Letter; Eli Lilly Letter; FedEx Letter; FPL Letter; GE Letter; General Mills Letter; GM Letter; Harman Letter; Helmerich Letter; International Paper Letter; Johnson Letter; J.P. Morgan Letter; Medco Letter; NS Letter; Office Depot Letter; Peabody Letter; Pfizer Letter; Praxair Letter; Royal Gold Letter; Ryder Letter; S&C Letter; Textron Letter; TI Letter; Unitrin Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

98 Some companies have also adopted a policy that requires a director to resign if not elected by a majority of the votes cast, since under the laws of certain states, if an incumbent director is not elected, he or she continues to serve as a holdover director until a successor is duly elected and qualified. See generally S&C Letter. See also Delaware General Corporation Law Section 141(b) ("Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.") and California Corporation Code Section 301(b) ("Each director, including a director elected to fill a vacancy, shall hold office until the expiration of the term for which elected and until a successor has been elected and qualified.").

directors under a plurality vote standard, meaning that the person(s) receiving the most votes would serve as a director regardless of whether the shares voted for that person constituted a majority of the shares cast.[99]

Several commenters believed that companies employing a majority vote standard for director elections may have particular difficulty in obtaining majority support for director nominees were NYSE's proposal to be approved.[100] Specifically, commenters noted that the elimination of broker discretionary voting, coupled with majority voting, would make it more difficult for these companies to obtain adequate votes to overcome a "vote no" campaign by activist shareholders,[101] and thus would disproportionately empower minority shareholder groups.[102] Two commenters suggested that the difficulty of obtaining a majority vote without broker discretionary voting might discourage issuers from adopting a majority vote standard.[103]

According to an analysis submitted by one commenter, however, in calendar year 2007, 373 NYSE-listed companies had majority vote standard for the election of directors.[104]

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99 See PWG Report, supra note 16, at 12-13. Many companies with a majority vote standard for election of directors retain a plurality vote standard in the event of a contested election of directors. As noted by commenters, in recent years, a trend toward majority voting has emerged. See text accompanying note 89, supra.

100 See FedEx Letter; Helmerich Letter; Royal Gold Letter; Unitrin Letter; Wachtell Letter; and Washington Banking Letter.

101 See Alcoa Letter and S&C Letter.

102 See BB&T Letter.

103 See NYSBA Sec. Reg. Letter and Wachtell Letter.

104 See Broadridge Letter and attached analysis. The Corporate Library reports that as of December 2008, 49.5 percent of companies in the S&P 500 had made the switch to majority voting for director elections and another 18.4 percent had, while retaining a plurality standard, adopted a policy requiring that a director who does not receive majority support must submit his or her resignation. On the other hand, the plurality voting standard is still the standard at the majority of smaller companies in the Russell 1000 and 3000 indices, with 54.5 percent of companies in the Russell 1000 and 74.9 percent of the companies in the Russell 3000 still using a straight plurality voting

Analyzing the elections of those majority vote companies, the analysis found that only eight out of 2,718 directors received at least 50 percent withhold votes based on actual votes from returned proxy cards by shareholders, while six directors received at least 50 percent withhold votes using broker voting.[105] Thus, according to the commenter, only two more directors out of 2,718 failed to receive a majority without broker votes.

While NYSE's proposal may make it somewhat more difficult for a director in a majority vote company to survive a "just vote no" or similar campaign, the Commission continues to believe the proposal is consistent with the requirements of Section 6(b)(5) of the Act, which requires that the rules of an exchange be designed to protect investors and the public interest, by assuring that voting on matters as critical as the election of directors can no longer be determined by brokers without instructions from the beneficial owner, thereby enhancing corporate governance and accountability. In making this determination, the Commission recognizes that the increasing percentage of shares held in street name, in conjunction with the greater use of just vote no or withhold vote campaigns may have resulted in broker voting under Rule 452 affecting voting on certain non-contested director elections in ways not contemplated in 1937. Accordingly, in light of these developments and concerns, we believe it is consistent with Section 6(b)(5) of the Act for the NYSE to determine that their member brokers should no longer be voting without instructions on behalf of their customers in director elections.

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standard. See The Corporate Library Analyst Alert, December 2008. As noted earlier, under a plurality vote standard, the person receiving the most votes will serve as the director. Thus, companies that elect directors under a plurality vote standard would have less difficulty in obtaining votes to overcome a "just vote no" or "withhold" campaign.

105 Broadridge also found that seven directors out of 2,718 directors received greater than or equal to 50 percent withhold votes based on proportional voting. See id.

D. Shareholder Education

Several commenters believed that shareholder education was a critical component to making NYSE's proposal workable,[106] and shareholders would need to be educated about the proxy process and the importance of voting before the proposal could be implemented.[107] One commenter stated that the "potential adverse effects" of the proposal were increased if the proposal were adopted without shareholder education.[108] Another commenter believed that director elections should only become ineligible for broker voting when the NYSE and other constituents were satisfied that shareholders would exercise their voting rights.[109] Commenters emphasized the importance of shareholder education with respect to voting rights and director elections,[110] and some commenters urged the Commission (either alone or in conjunction with others) to undertake educational efforts designed to increase voting participation by retail shareholders.[111] One commenter stated that shareholders would generally benefit from shareholder education about broker discretionary voting,[112] while other commenters indicated that approval of the proposal should be in conjunction with a shareholder education initiative.[113]

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106 See Business Roundtable Letter; Chamber of Commerce 2 Letter; Crescent Letter; GE Letter; and PWG Letter. But see Suburban Letter.

107 See Chamber of Commerce 2 Letter; Governance Professionals Letter; ICI Letter; and ICI 2 Letter.

108 See NYSBA Sec. Reg. Letter.

109 See ICI Letter and ICI 2 Letter.

110 See Sod'ali Letter; and Verizon Letter.

111 See Corporate Governance Letter (also encouraging the Commission to encourage institutional investors to announce their proxy votes in advance of meetings and facilitating the development of systems like the Investor Suffrage Movement and ProxyDemocracy) and NIRI Letter.

112 See Broadridge Letter.

113 See Computershare Letter; Newground Letter; and S&C Letter.

As noted above, the Commission supports the Proxy Working Group's efforts to develop, and encourages NYSE and its member firms to implement, an investor education effort to inform investors about the amendments to NYSE Rule 452, the proxy voting process, and the importance of voting. The Commission believes the proposal offers substantial investor benefits, as noted above, so that its implementation should not be delayed. In addition, because implementation of the proposal will not occur until January 2010, there should be sufficient time for NYSE to inform market participants of the changes to its rules on broker discretionary voting.

E. Alternatives of Proportional Voting and Client Directed Voting

While not part of the NYSE's proposal, several commenters discussed proportional voting in their letters. In general, under proportional voting, a broker would vote shares held by it in street name, for which voting instructions for directors have not been received, in proportion to the votes cast by other retail clients of that broker.[114] Some commenters endorsed the concept of proportional voting in general,[115] and several supported proportional voting as an alternative to the NYSE's proposal.[116] Other commenters stated that proportional voting should be

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114 Proportional voting may be implemented in two ways. Each broker would vote based on the proportion of the votes cast: (1) held by such broker or (2) held by all brokers. Proportional voting also could reflect the entirety of votes cast, not just the retail vote.

115 See ABA Fed. Reg. Letter; ABC Letter; ABC 3 Letter; Agilent Letter; AmEx Letter; Connecticut Water Letter; DTE Letter; Exxon Mobil Letter; First Financial Letter; Furniture Brands Letter; GE Letter; Governance Professionals Letter; Honeywell Letter; ICI Letter; ICI 2 Letter; Jacksonville Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; Monster Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Provident Letter; Provident Financial Letter; Quest Letter; S&C Letter; Schwab Letter; SIFMA Letter; Synalloy Letter; TI Letter; Veeco Letter; and Wachtell Letter; see also PWG Letter (no objection to members of SIFMA implementing proportional voting).

116 See ABA Sec. Reg. Letter; ABC Letter (supporting proportional voting on a broker-by-broker basis); ABC 2 Letter (supporting proportional voting on a broker-by-broker basis); ABC 3 Letter; Agilent Letter; Alston Letter; BB&T Letter; Broadridge Letter; Business Roundtable Letter; Connecticut Water Letter; DTE Letter; First Financial Letter;

considered as part of a comprehensive review of the proxy voting system.[117] Several commenters were concerned that proportional voting, although potentially effective, would be eliminated under the proposal.[118] Commenters stated that proportional voting could provide an even more accurate reflection of the sentiment of retail shareholders than eliminating broker discretionary voting.[119]

Several commenters also discussed client directed voting as an alternative to the proposal,[120] or believed that client directed voting should be considered in conjunction with the

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Furniture Brands Letter; ICI Letter; ICI 2 Letter (recommending proportional voting only in instances where a minimum number of beneficial owners vote, or alternatively, a minimum percentage of shares outstanding are voted); Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Provident Financial Letter; Quest Letter; S&C Letter; Schwab Letter (proportional voting is a "better first step" than eliminating discretionary broker voting); Synalloy Letter; TI Letter; Unitrin Letter; and Veeco Letter.

117 See AmEx Letter; Chamber of Commerce 2 Letter; Governance Professionals Letter; and Honeywell Letter. Other commenters believed that proportional voting and/or client directed voting should be considered in conjunction with any change to NYSE Rule 452. See Exxon Mobil Letter; and J.P. Morgan Letter.

118 See ABA Fed. Reg. Letter; Agilent Letter; Business Roundtable Letter; Connecticut Water Letter; DTE Letter; First Financial Letter; Furniture Brands Letter; GE Letter; Governance Professionals Letter; Jacksonville Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; Monster Letter; Nucor Letter; Provident Letter; Provident Financial Letter; Quest Letter; Synalloy Letter; Veeco Letter; and Wachtell Letter; see also Intel Letter.

119 See ABA Fed. Reg. Letter; ABC 3 Letter; Chevron Letter; Connecticut Water Letter; First Financial Letter; Furniture Brands Letter; GE Letter; Jacksonville Letter; J.P. Morgan Letter; McKesson Letter; Medco Letter; Monster Letter; Nucor Letter; NYSBA Sec. Reg. Letter; Provident Letter; Provident Financial Letter; Quest Letter; Synalloy Letter; and Veeco Letter.

120 See ABA Fed. Reg. Letter; ABC 2 Letter; ABC 3 Letter; Agilent Letter; Business Roundtable Letter; Chamber of Commerce 2 Letter; Connecticut Water Letter; DTE Letter; First Financial Letter; Furniture Brands Letter; GE Letter; Intel Letter; Jacksonville Letter; McKesson Letter; Monster Letter; Nucor Letter; Provident Letter; Provident Financial Letter; Quest Letter; Synalloy Letter; and Veeco Letter.

proposal.[121] Under client directed voting, for those elections where the beneficial owners fail to return specific voting instructions, brokers would vote the shares according to the beneficial owners' standing directions. These standing directions could be given by beneficial owners at the time they sign their brokerage agreements, or periodically thereafter. Some commenters believed that client directed voting had merit, either to complement the NYSE's proposal or as an alternative.[122]

On the other hand, several commenters stated that eliminating broker discretionary voting is preferable to these alternative approaches, including proportional voting.[123] Some commenters believed that proportional voting could complicate the proxy voting process and result in abuses,[124] continue to compromise the integrity of proxy voting,[125] or provide "a disproportionate weight to the votes of disaffected shareholders."[126] Other commenters stated that proportional voting violates the "one share, one vote" principle.[127] Still other commenters recommended further research and consideration on this alternative.[128]

For the reasons discussed above, the Commission continues to believe that it is consistent with the requirements of Section 6(b)(5) of the Act to protect investors and the public interest for

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121 See AmEx Letter; Governance Professionals Letter; Honeywell Letter; and J.P. Morgan Letter; and SCC Letter.

122 See ABC 2 Letter; ABC 3 Letter; GE Letter; and Jacksonville Letter.

123 See CalSTRS Letter, CCGG 2 Letter; CII Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; FSBA 2 Letter; Hagberg Letter; Sod'ali Letter; and TIAA-CREF Letter.

124 See CII Letter; CII 2 Letter; CII 4 Letter; Colorado PERA Letter; and TIAA-CREF Letter.

125 See CCGG 2 Letter.

126 See Hagberg Letter.

127 See CalSTRS Letter; CII 4 Letter; Colorado PERA Letter; Sod'ali Letter; and TIAA-CREF Letter.

128 See ABA Fed. Reg. Letter; Alston Letter; CalPERS Letter (recommending proportional voting for those matters requiring a majority or more to pass); Suburban Letter.

NYSE to eliminate broker discretionary voting in director elections. While several commenters believed that proportional voting would most accurately represent the retail vote, the Commission notes that proportional voting could have a distortive impact, depending on how it is implemented.[129] In addition, proportional voting would allow votes to be cast by someone other than the person with an economic interest in the security.[130] With respect to client directed voting, the Commission notes that it raises a variety of questions and concerns, such as requiring shareholders to make a voting determination in advance of receiving a proxy statement with the disclosures mandated under the federal securities laws and without consideration of the issues to be voted upon. Finally, the Commission notes that the fact that there may be other reasonable alternatives does not mean that the rule change proposed by the NYSE is inconsistent with Section 6(b)(5) of the Act.[131] For the reasons discussed above, the Commission finds the proposed rule change consistent with the requirements of the Act.

F. Commission Consideration of the Entire Proxy Process

Many commenters believed that NYSE's proposal to amend NYSE Rule 452 should not be viewed in isolation, but should be considered by the Commission as part of a comprehensive

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129 For example, of the 11 largest brokerage firms using proportional voting, only five of these firms used only the votes of retail account holders when "mirroring" votes for uninstructed retail shares. See Broadridge Letter. According to Broadridge, for purposes of its analysis, all uninstructed brokerage shares were voted on the basis of the instructions received from all brokerage account holders, including those of "professional" investors. Id.

130 See PWG Report, supra note 16, at 17-18.

131 15 U.S.C. 78(f)(b)(5). The Commission notes that, in this regard, Section 19(b) of the Act requires, among other things, that "[t]he Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organizations." 15 U.S.C. 78s(b)(2).

review of the proxy voting and shareholder communication system.[132] Certain commenters also raised concerns regarding the efficiency of shareholder communications and the proxy voting process as a whole, as well as the merits of other possible alternatives.[133] Commenters stated that the proposal should be examined in light of current circumstances,[134] such as the rapidly shifting corporate governance environment,[135] and in conjunction with alternatives.[136] Commenters urged the Commission not to take action on the proposal until the Commission completed its comprehensive review.[137] For example, one commenter believed that the

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132 See Alcoa Letter; Alston Letter; Anadarko Letter; Arvin Letter; Avery Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Cardinal Letter; Ceridian Letter; Cigna Letter; Cincinnati Financial Letter; Computershare Letter; Continental Letter; Corning Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; First Financial Letter; Furniture Brands Letter; GE Letter; General Mills Letter; GM Letter; Gulf Letter; Harman Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter; Manifest Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Ryder Letter; S&C Letter; SCC Letter; Securities Transfer Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Synalloy Letter; Textron Letter; TI Letter; Unitrin Letter; Veeco Letter; Verizon Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

133 See e.g., Aetna Letter; Agilent Letter; GE Letter; and McKesson Letter.

134 See NYSBA Sec. Reg. Letter and Wachtell Letter.

135 See Wachtell Letter.

136 See Central Vermont Letter; and Chevron Letter.

137 See Aetna Letter; Agilent Letter; Anadarko Letter; ArvinMeritor Letter; Avery Letter; Avis Letter; BNSF Letter; Boeing Letter; Business Roundtable Letter; CA Letter; Ceridian Letter; Chamber of Commerce 2 Letter; Cigna Letter; Cincinnati Financial Letter; Connecticut Water Letter; Conoco Phillips Letter; Continental Letter; Crescent Letter; CSX Letter; Cummins Letter; DTE Letter; Eaton Letter; Eli Lilly Letter; EV Letter; Exxon Mobil Letter; Fidelity Letter; First American Letter; First Financial Letter; Furniture Brands Letter; GE Letter; General Mills Letter; GM Letter; Gulf Letter; Harman Letter; Helmerich Letter; Honeywell Letter; Illinois Stock Letter; Intel Letter; International Paper Letter; Jacksonville Letter; Johnson Letter; J.P. Morgan Letter;

implementation of the NYSE's proposal without other changes to the proxy system could have "unintended and devastating consequences" in the form of increased costs to public companies to ensure quorum, undue influence of minority shareholders, and the like.[138] Moreover, another commenter noted that the Commission may be considering two proposals that relate to the proxy system: requiring companies to include shareholder-selected nominees in the company's proxy materials and allowing shareholders to vote on executive compensation ("say-on-pay").[139] This commenter believed that the Commission should consider NYSE's proposal at the same time as these two proposals, because the issues they raise are intertwined.[140]

In contrast, other commenters saw no reason to delay NYSE's proposal until other issues relating to the proxy voting system had been considered, as sufficient time and resources have been spent on the proposal's development, and it is justifiable as a stand-alone initiative.[141]

The Commission has analyzed and reviewed NYSE's proposal in light of the current proxy process, and with full knowledge that a variety of proxy and shareholder communication

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Manifest Letter; Medco Letter; MGE Letter; Monster Letter; NS Letter; Nucor Letter; Office Depot Letter; OTC Letter; Otter Tail Letter; P&G Letter; Peabody Letter; Pfizer Letter; Platinum Letter; Praxair Letter; Provident Letter; Provident Financial Letter; Quest Letter; Realogy Letter; Routh Letter; Ryder Letter; S&C Letter; SCC Letter; Securities Transfer Letter; STA Letter; Standard Letter; StockTrans Letter; Superlattice Letter; Synalloy Letter; Textron Letter; TI Letter; Unitrin Letter; Veeco Letter; Verizon Letter; Washington Banking Letter; Whirlpool Letter; Xcel Letter; Xerox Letter; and YRC Letter.

138 See NIRI Letter ("Some of these consequences include the potential for increased costs to public companies to ensure a quorum is achieved, an increased influence of proxy advisory firms through their voting recommendations, additional power in the hands of the few shareholders who vote, and a magnification of the shareholder communications limitations associated with objecting beneficial owners (OBO) who may be unsure of the meaning of this status and are unable to receive direct corporate communications.").

139 See Computershare Letter.

140 Id.

141 See Dobkin Letter and Hagberg Letter.

issues are under review. Given the benefits to investors of the proposal as discussed above, including assuring that voting on matters as critical as the election of directors can no longer be determined by brokers without instructions from the beneficial owner, thereby enhancing corporate governance and accountability, the Commission does not believe it is appropriate to delay action on the NYSE's proposal pending consideration of the myriad important and difficult issues relating to shareholder director nominations, proxy voting, and shareholder communication, which are outside the scope of NYSE's proposed rule change.[142] The Commission believes that approval of the proposal is warranted pursuant to Section 19(b) of the Act[143] even as it considers broader proxy issues in the near future. We do not believe that action on those issues will undermine the fundamental concept that decisions as significant as the election of the board of directors should be made by those with an economic interest in the company, rather than the brokers who have no such economic interest. Further, as noted earlier, under Section 19(b)(2) of the Act, the Commission must approve the proposal presented by NYSE if it finds the proposed rule change consistent with the Act and applicable rules and regulations thereunder.[144]

G. Exemptions for Registered Investment Companies under the Investment Company Act of 1940 and Requests for Additional Exemptions

Seven commenters either supported or did not oppose the exemption for registered investment companies.[145] However, some of these commenters, who support the exemption, recommended that it be reconsidered at a later date.[146]

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142 See Securities Act Release No. 9046 (June 10, 2009) (File No. S7-10-09).

143 15 U.S.C. 78s(b). See also supra note 131.

144 See 15 U.S.C. 78s(b)(2); see also supra note 131.

145 See Altman Letter; CalPERS Letter; CFA 2 Letter; CII Letter; FSBA Letter; FSBA 2 Letter; ICI 4 Letter (supporting amended proposal); and Sutherland Letter.

In addition, three commenters requested the exemption also include business development companies ("BDCs")[147] or smaller issuers, which tend to have a high percentage of retail ownership.[148] Another commenter believed the exemption favored registered investment companies over other issuers that face similar increased proxy solicitation costs and an increased risk of failed elections.[149] Yet another commenter stated that the proposed exemption was over-broad, as it included closed-end funds.[150] That commenter argued that unlike open-end funds,

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146 See CalPERS Letter ("CalPERS is not opposed to exempting investment companies from this proposed rule change in the short term"); CII Letter ("Given the corporate governance concerns surrounding mutual funds, we believe the proposed change should also apply to investment companies at some point in the not-too-distant future."); FSBA Letter (proposed exemption for investment companies "poses no problem, but this should be re-evaluated at some point"); and FSBA 2 Letter (proposed exemption "is currently warranted, but this should be re-evaluated in the future").

147 See ICI 4 Letter and Sutherland Letter.

148 See Altman Letter (requesting an exemption for issuers with similar circumstances to those of investment companies, such as those "with a high percentage of retail ownership and burdensome cost concerns"); see also Suburban Letter (requesting an exemption for Master Limited Partnerships because of the "disparate impact that such amendment would have on MLPs").

However, one commenter did not support approval of NYSE's proposal under any circumstances and questioned NYSE's rationale for letting "investment companies off the hook." See ABC 2 Letter (stating that it "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."); see also ABC 3 Letter (stating opposition to NYSE's proposal). This commenter noted that "the predicament of small and midsize public companies is identical to that of small and midsize investment companies . . . . It is hard to see, on the merits, why the NYSE provides relief to one group and not to the other." See ABC 2 Letter.

149 See Alcoa Letter.

150 See City of London Letter. The commenter noted that closed-end funds typically trade at a discount to net asset value, and suggested that investors in closed-end funds do not view themselves as having the option of "voting with [their] feet." Id.

closed-end funds typically have institutional bases, and do not have the same issues establishing quorum at shareholder meetings.[151]

The Commission believes that it is reasonable and consistent with the Act for the Exchange to exempt registered investment companies from the prohibition in NYSE Rule 452 on broker discretionary voting in director elections. NYSE relied on the Proxy Working Group's conclusion that the unique regulatory regime governing registered investment companies differentiated them from operating companies. In recommending the exemption for registered investment companies, the Proxy Working Group considered the heightened problems that registered investment companies face because of their disproportionately large retail shareholder base, that they often do not include other routine matters on the ballot,[152] which would allow a broker vote to count for quorum purposes, and that they are subject to the 1940 Act, which, among other things, also regulates shareholder participation in key decisions. The 1940 Act, for example, requires that a registered investment company obtain the approval of a majority of its voting securities before changing the nature of its business so as to cease to be an investment company, deviating from its concentration policy with respect to investments in any particular industry or group of industries, or changing its subclassification as an open-end company or closed-end company. The Commission believes that the different regulatory regime for registered investment companies supports the exemption, and finds the exemption should, among

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151 Id. But see ICI 2 Letter, which states that retail investors own ninety-eight percent of the value of closed-end funds. See also further discussion below on the basis for exempting registered investment companies under the 1940 Act from the NYSE's proposal.

152 See Rule 32a-4 under the 1940 Act, 17 CFR 270.32a-4, and infra note 156 and accompanying text.

other things, further the public interest and the protection of investors, consistent with Section 6(b)(5) of the Act.[153]

While the Commission understands the concerns raised by commenters urging NYSE to broaden the exemption, the Commission believes that there are sufficient differences between registered investment companies and other entities to conclude that NYSE's proposal is consistent with the Act.[154] For example, the regulation of BDCs and registered investment companies under the 1940 Act differs significantly. Particularly relevant here, the 1940 Act requires a BDC to seek ratification of the independent auditor, which is a routine item under NYSE Rule 452, at each annual meeting.[155] Adoption of the amendment will therefore have no effect on a BDC's ability to obtain a quorum, and expansion of the exemption for registered investment companies to include BDCs is unnecessary. A registered investment company, however, is exempt from the 1940 Act's auditor ratification requirement if it relies on a conditional exemptive rule under the 1940 Act.[156] That exemptive rule is not available to BDCs.

The Commission finds it reasonable for the NYSE to distinguish between registered investment companies and smaller issuers that may have a large retail shareholder base for purposes of allowing broker discretionary voting on director elections. While the Commission recognizes that small issuers could face similar concerns as registered investment companies as a result of the proposed changes to Rule 452, there are significant differences between small issuers and registered investment companies. For example, as noted by the Proxy Working Group, "the unique regulatory regime governing investment companies made such companies

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153 15 U.S.C. 78f(b)(5).

154 See Altman Group Letter; ICI 4 Letter; and Sutherland Letter.

155 See 15 U.S.C. 80a-31(a) and 15 U.S.C. 80a-59. See 17 CFR 270.32a-4.

156 Rule 32a-4 under the 1940 Act. See 17 CFR 270.32a-4.

sufficiently different from operating companies (regardless of size) that it was appropriate to treat such companies differently."[157] Further, operating companies frequently place an item that permits broker discretionary voting, such as the ratification of independent auditors, on the ballot, which will help them obtain quorum.[158] In contrast, pursuant to NYSE Rule 452, for registered investment companies, only the election of directors would qualify as a routine matter on their ballot for purposes of establishing quorum.

Because of these differences, the Commission believes that it is reasonable for the NYSE to distinguish between registered investment companies and other entities in defining the scope of the exemption, and therefore, believes the proposal is consistent with the requirements of Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

H. Implementation Date

The NYSE's proposal to eliminate broker discretionary voting for the election of directors would apply to shareholder meetings held on or after January 1, 2010, except to the extent that a meeting was originally scheduled to be held prior to that date but was properly adjourned to a date on or after it.[159] The Commission received several comments relating to the NYSE's proposed implementation date. One commenter recommended that, if the Commission approved the proposal, it should initially make the proposal applicable only to large accelerated

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157 See Addendum, supra note 21, at 3.

158 See supra Section IV.A, Increased Costs for Companies to Achieve Quorum.

159 NYSE also stated that in the event the proposal is not approved by the Commission on or before August 31, 2009, NYSE would delay the effective date to a date which is at least four months after the approval date, and which does not fall within the first six months of the calendar year. See Notice, supra note 4.

filers, so as to not "unfairly burden smaller public companies and to provide time to observe the effect of the proposed amendments in operation."[160] However, other commenters recommended that the proposed rule change be implemented earlier.[161]

The Commission believes that the NYSE's proposed implementation date is reasonable and consistent with the Act. The Commission believes that it is reasonable for the NYSE to implement the proposed rule to apply to all affected issuers at the same time because the NYSE appears to have provided sufficient time for these issuers to adjust to the proposed rule change. The Commission also believes that it is reasonable for the NYSE to delay the effective date of the proposed rule to shareholder meetings held on or after January 1, 2010. The Commission recognizes that, given the significance of the NYSE's proposed rule change, issuers may need additional time to prepare their proxy materials and inform investors of the changes resulting from the NYSE's proposal. Accordingly, the Commission believes that the NYSE's proposal to apply the proposed rule change to shareholder meetings held on or after January 1, 2010 is consistent with the Act.

I. Prior Interpretations to Rule 452

The Exchange proposes amending NYSE Rule 452 to codify two previously published interpretations, which were filed with the Commission pursuant to Section 19(b)(2) of the Act.[162]

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160 See ABA Fed. Reg. Letter.

161 See AFSCME Letter (recommending immediate implementation); CII 4 Letter (recommending immediate implementation); Colorado PERA Letter (requesting that the proposal become effective upon final approval); FSBA 2 Letter (recommending that the proposal be implemented earlier than 2010); Hermes Equity Letter (requesting that the Commission "allow the amendment to take effect as soon as possible"); OPERS letter (recommending that the proposal be implemented earlier than 2010); and Sod'ali Letter (recommending that the proposal be immediately effective).

162 See Securities Exchange Act Release Nos. 30697, supra note 3 (interpreting Rule 452 to allow members organizations to give a proxy on the initial approval of an investment advisory contract if the beneficial holder does not exercise his right to vote, but

First, the NYSE proposes codifying that NYSE Rule 452 would preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company. Second, the NYSE proposes codifying that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment adviser, which approval is required by the 1940 Act and the rules thereunder.

The Commission received two comment letters on NYSE's codification of its prior interpretations.[163] Both commenters supported this proposal.[164] For example, ICI stated that "[w]e agree that these matters are the types of non-routine matters on which investment company shareholders should be required to vote . . . . When investors become shareholders of an investment company, they already have chosen the adviser in the context of the disclosures in the investment company's prospectus and other documents . . . . Given the importance of the identity of the adviser and the services it provides to investment company shareholders, we believe the benefits of shareholders' voting on material amendment to an advisory contract or an advisory contract with a new investment adviser outweigh the costs associated with such a requirement."[165]

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precluding members organizations from giving proxies on material amendments to the investment advisory contracts without specific client instructions) and 52569, supra note 3 (interpreting Rule 452 to preclude member organizations from giving proxies on any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment adviser, which approval is required by the 1940 Act, without specific beneficial owners' voting instructions).

163 See CFA 2 Letter and ICI 4 Letter.

164 Id.

165 See ICI 4 Letter.

The Commission believes that the NYSE's codification of previously published interpretations is consistent with the Act and the rules and regulations thereunder. As the Commission has previously stated, "[f]ull and effective voting rights of investment company shareholders are an important aspect of the investment company structure."[166] The Commission believes that the NYSE, by codifying its prior interpretations to Rule 452, is providing greater transparency and ensuring the consistent application of its interpretations. Further, the proposed amendments codify existing NYSE interpretations, which were the subject of two prior rule filings.[167] Accordingly, these changes raise no new regulatory issues, and are consistent with the Act.

J. Conclusion

The Commission finds, for the reasons set forth above, that the Exchange's proposal, as modified by Amendment No. 4, is consistent with the requirements of the Act. In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[168] which provides that the rules of the exchange must be designed to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that it is reasonable and consistent with the Act for the NYSE to determine that the election of directors should no longer be an item eligible for broker discretionary voting. As noted above, the most fundamental way for shareholders to hold directors accountable for their performance of critical corporate duties is through the director election process. Given the large proportion of shares that today are held in street name, the

166 See Release No. 30697, supra note 3.

167 See supra note 3.

168 15 U.S.C. 78f(b)(5).

importance of corporate governance matters, and the concern that the broker vote can distort election results, the Commission believes it is appropriate for the NYSE to eliminate broker discretionary voting in director elections.[169] In making this determination, the Commission believes that the NYSE's proposal, among other things, furthers the protection of investors and the public interest by assuring that voting on matters as critical as the election of directors can no longer be determined by brokers without instructions from the beneficial owner, and thus should enhance corporate governance and accountability to shareholders.

The Commission also believes that the NYSE's proposed change codifying prior NYSE interpretations of NYSE Rule 452 is consistent with the requirements of the Act. These proposed amendments help to ensure the full and effective voting rights of investment company shareholders on material matters, and further, codify existing NYSE interpretations.

V. Conclusion

IT IS THEREFORE ORDERED, that pursuant to Section 19(b)(2) of the Act,[170] the proposed rule change, as modified by Amendment No. 4, is hereby approved.

By the Commission.

Elizabeth M. Murphy
Secretary

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169 As discussed above, NYSE does not propose to eliminate broker discretionary voting for registered investment companies under the 1940 Act.

170 15 U.S.C. 78s(b)(2).

Appendix A

List of comment letters received

Letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association, dated April 3, 2009 ("ABA Fed. Reg. Letter"); John Endean, President, American Business Conference, dated January 16, 2007 ("ABC Letter"); John Endean, President, American Business Conference, dated June 25, 2007 ("ABC 2 Letter"); John Endean, President, American Business Conference, dated March 31, 2009 ("ABC 3 Letter"); Judith H. Jones, Vice President and Corporate Secretary, Aetna Inc., dated March 26, 2009 ("Aetna Letter"); Charles Jurgonis, Plan Secretary, American Federation of State, County and Municipal Employees, AFL-CIO, dated March 26, 2009 ("AFSCME Letter"); D. Craig Nordlund, Senior Vice President, General Counsel and Secretary, Agilent Technologies, Inc., dated March 24, 2009 ("Agilent Letter"); Donna Dabney, Vice-President, Secretary, and Corporate Governance Counsel, Alcoa, Inc., dated March 24, 2009 ("Alcoa Letter"); David E. Brown, Mark F. McElreath, Justin R. Howard, and William S. Ortwein, Alston & Bird LLP, dated April 1, 2009 ("Alston Letter"); Kenneth L. Altman, President, The Altman Group, Inc., dated March 27, 2009 ("Altman Letter"); Stephen P. Norman, Secretary, American Express Company, dated March 27, 2009 ("AmEx Letter"); David L. Siddall, Vice President, Deputy General Counsel and Corporate Secretary, Anadarko Petroleum Corporation, dated March 25, 2009 ("Anadarko Letter"); Charles G. McClure, Chairman, Chief Executive Officer and President, ArvinMeritor, Inc., dated March 17, 2009 ("ArvinMeritor Letter"); Peter M. Finn, First Vice President, Regulatory Affairs, Astoria Financial Corporation, dated March 25, 2009 ("Astoria Financial Letter"); Dean A. Scarborough, President and Chief Executive Officer, Avery Dennison, dated March 16, 2009 ("Avery Letter"); Ronald L. Nelson, Chairman and Chief Executive Officer, Avis Budget Group, Inc., dated March 23, 2009 ("Avis Letter"); Frances B. Jones, Executive Vice President, Secretary, General Counsel and Chief Corporate Governance Officer, BB&T Corporation, dated March 26, 2009 ("BB&T Letter"); Doug Pearce, Chief Executive Officer and Chief Investment Officer, British Columbia Investment Management Corporation, dated March 31, 2009 ("BCIMC Letter"); Matthew K. Rose, Chairman, President and Chief Executive Officer, Burlington Northern Santa Fe Corporation, dated March 27, 2009 ("BNSF Letter"); Robert Schifellite, President, Investor Communication Solutions, Broadridge Financial Solutions, Inc., dated March 27, 2009 ("Broadridge Letter"); W. James McNerney, Jr., Chairman of the Board, President and Chief Executive Officer, The Boeing Company, dated March 26, 2009 ("Boeing Letter"); Anne M. Mulcahy, Chair, Corporate Leadership Initiative, Business Roundtable, dated March 25, 2009 (Business Roundtable Letter"); Clifford DuPree, Vice President, Corporate Governance and Corporate Secretary, CA, Inc., dated March 27, 2009 ("CA Letter"); Peter H. Mixon, General Counsel, CalPERS, dated June 25, 2007 ("CalPERS Letter"); Peter H. Mixon, General Counsel, CalPERS, dated October 26, 2007 ("CalPERS 2 Letter"); Dennis A. Johnson, Senior Portfolio Manager, CalPERS Corporate Governance, dated April 29, 2008 ("CalPERS 3 Letter"); Anne Sheehan, Director, Corporate Governance, California State Teacher's Retirement System, dated March 27, 2009 ("CalSTRS Letter"); Sally J. Curley, Senior Vice President, Cardinal Health, Inc., dated March 30, 2009 ("Cardinal Letter"); Doug Pearce, Chairman, Canadian Coalition for Good Governance, dated January 19, 2009 ("CCGG Letter"); Stephen Griggs, Executive Director, Canadian Coalition for Good Governance, dated March 27, 2009 ("CCGG 2 Letter"); Dale A. Rocheleau, Senior Vice President, General Counsel and Corporate

Secretary, Central Vermont Public Service Corporation, dated March 27, 2009 ("Central Vermont Letter"); Kathryn V. Marinello, Chairman and Chief Executive Officer; Ceridian Corporation, dated March 25, 2009 ("Ceridian Letter"); Kurt N. Schacht, Executive Director, CFA Institute Centre for Financial Market Integrity, dated March 31, 2008 ("CFA Letter"); Kurt N. Schacht, Managing Director, and James C. Allen, Director, CFA Institute Centre for Financial Market Integrity, dated March 27, 2009 ("CFA 2 Letter"); David Chavern, Senior Vice President and Chief Legal Officer, Chamber of Commerce of the United States of America, dated November 13, 2006 ("Chamber of Commerce Letter"); David T. Hirshmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness, United States Chamber of Commerce, dated March 27, 2009 ("Chamber of Commerce 2 Letter"); Lydia I. Beebe, Corporate Secretary and Chief Governance Officer, Chevron, dated March 27, 2009 ("Chevron Letter"); H. Edward Hanway, Chairman and Chief Executive Officer, Cigna Corporation, dated March 26, 2009 ("Cigna Letter"); Ann Yerger, Executive Director, Council of Institutional Investors, dated June 5, 2007 ("CII Letter"); Amy Borrus, Deputy Director, Council of Institutional Investors, dated November 5, 2007 ("CII 2 Letter"); Ann Yerger, Executive Director, Council of Institutional Investors, dated April 17, 2008 ("CII 3 Letter"); Jonathan D. Urick, Research Analyst, Council of Institutional Investors, dated March 19, 2009 ("CII 4 Letter"); Steven J. Johnston, Chief Financial Officer, Secretary and Treasurer, Cincinnati Financial Corporation, dated March 25, 2009 ("Cincinnati Financial Letter"); Barry M. Olliff, Chief Investment Officer, City of London Investment Company Limited, dated March 27, 2009 ("City of London Letter") (also requesting that the proposal not exempt closed-end funds registered under the Investment Company Act of 1940); Gregory W. Smith, General Counsel, Colorado Public Employees' Retirement Association, dated March 26, 2009 ("Colorado PERA Letter"); Paul Conn, President, Global Capital Markets, Computershare Limited, and David Drake, President, Georgeson Inc., dated March 27, 2009 ("Computershare Letter"); Daniel J. Meaney, Corporate Secretary, Connecticut Water Company, dated March 25, 2009 ("Connecticut Water Letter"); J.J. Mulva, Chairman and Chief Executive Officer, ConocoPhillips, dated March 26, 2009 ("ConocoPhillips Letter"); Steven G. Nelson, President and Chairman of the Board, Continental Stock Transfer and Trust Company, dated March 24, 2009 ("Continental Letter"); James B. Flaws, Vice Chairman and Chief Financial Officer, Corning Incorporated, dated March 24, 2009 ("Corning Letter"); James McRitchie, Publisher, Corporate Governance, dated March 13, 2009 ("Corporate Governance Letter"); Marc Cox, dated April 26, 2009 ("Cox Letter"); Barbara Trivedi, Shareholder Services Manager, Crescent Banking Company, dated March 25, 2009 ("Crescent Letter"); Ellen M. Fitzsimmons, Senior Vice President – Law and Public Affairs and General Counsel, CSX Corporation, dated March 18, 2009 ("CSX Letter"); William B. Patterson, Executive Director, CtW Investment Group, dated June 6, 2007 ("CtW Letter"); William B. Patterson, Executive Director, CtW Investment Group, dated April 17, 2008 ("CtW 2 Letter"); Tim Solso, Chairman and Chief Executive Officer, Cummins Inc., dated March 25, 2009 ("Cummins Letter"); David M. Dobkin, dated March 27, 2009 ("Dobkin Letter"); Patrick B. Carey, Associate General Counsel & Assistant Corporate Secretary, DTE Energy, dated March 27, 2009 ("DTE Letter"); Alexander M. Cutler, Chairman and Chief Executive Officer, Eaton Corporation, dated March 13, 2009 ("Eaton Letter"); Bronwen L Mantlo, Associate General Counsel and Assistant Secretary, dated March 26, 2009 ("Eli Lilly Letter"); Holly Roseberry, President, EV Innovations, Inc., dated March 25, 2009 ("EV Letter"); David S. Rosenthal, Vice President, Investor Relations and Secretary, Exxon Mobil Corporation, dated March 27, 2009 ("Exxon Mobil Letter"); Christine P. Richards,

Executive Vice President, General Counsel and Secretary, FedEx Corporation, dated March 26, 2009 ("FedEx Letter"); Kevin Kopaunik, President, Fidelity Transfer Company, dated March 24, 2009 ("Fidelity Letter"); Salli Marinov, President and Chief Executive Officer, First American Stock Transfer, Inc., dated March 24, 2009 ("First American Letter"); Dorothy B. Wright, Vice President and Corporate Secretary, First Financial Holdings, Inc., dated March 24, 2009 ("First Financial Letter"); Alissa E. Ballot, Vice President and Corporate Secretary, FPL Group, Inc., dated March 23, 2009 ("FPL Letter"); Michael McCauley, Director, Office of Corporate Governance, State Board of Administration of Florida, dated June 13, 2007 ("FSBA Letter"); Ashbel C. Williams, Executive Director and Chief Executive Officer, State Board of Administration of Florida, dated March 27, 2009 ("FSBA 2 Letter"); Jon D. Botsford, Senior Vice President, General Counsel and Secretary, Furniture Brands International, dated March 23, 2009 ("Furniture Brands Letter"); Michael R. McAlevey, Vice President and Chief Corporate, Securities and Finance Counsel, General Electric Company, dated April 13, 2009 ("GE Letter"); Roderick A. Palmore, Executive Vice President, General Counsel and Chief Compliance and Risk Management Officer, General Mills, dated March 17, 2009 ("General Mills Letter"); Robert McCormick, Chief Policy Officer, Glass Lewis & Co., dated March 13, 2009 ("Glass Lewis Letter"); G. Richard Wagoner, Jr., Chairman and Chief Executive Officer, General Motors Corporation, dated March 27, 2009 ("GM Letter"); Brian Connolly, Director of Sales, GovernanceMetrics International ("GovernanceMetrics Letter"); Neila B. Radin, Chair, Securities Law Committee, The Society of Corporate Secretaries and Governance Professionals, dated March 20, 2009 ("Governance Professionals Letter"); Steven Gratzer, dated April 27, 2009 ("Gratzer Letter"); William A. Little III, President, Gulf Registrar and Transfer Corporation, dated March 24, 2009 ("Gulf Letter"); Carl T. Hagberg, Chairman and CEO, Carl T. Hagberg and Associates, dated March 27, 2009 ("Hagberg Letter"); Dinesh C. Paliwal, Chairman and Chief Executive Officer, Harman International, dated March 26, 2009 ("Harman Letter"); Steven R. Mackey, Executive Vice President, Secretary and General Counsel, Helmerich & Payne, Inc., dated March 24, 2009 ("Helmerich Letter"); Bess Joffe, Associate Director, Hermes Equity Ownership Services Limited, dated March 20, 2009 ("Hermes Equity Letter"); Thomas F. Larkins, Vice President, Corporate Secretary and General Counsel, Honeywell, dated March 27, 2009 ("Honeywell Letter"); Paul Schott Stevens, President, Investment Company Institute, dated November 20, 2006 ("ICI Letter"); Paul Schott Stevens, President, Investment Company Institute, dated December 18, 2006 ("ICI 2 Letter"); Paul Schott Stevens, President, Investment Company Institute, dated February 20, 2007 ("ICI 3 Letter"); Karrie McMillian, General Counsel, Investment Company Institute, dated March 27, 2009 ("ICI 4 Letter") (supporting the proposal, as amended to exempt investment companies); Robert G. Pearson, President and Chief Executive Officer, Illinois Stock Transfer Company, dated March 24, 2009 ("Illinois Stock Letter"); Maura Abelin Smith, Senior Vice President, General Counsel and Corporate Secretary, International Paper Company, dated March 24, 2009 ("International Paper Letter"); Cary Klafter, Vice President, Legal and Corporate Affairs, Intel Corporation, dated March 26, 2009 ("Intel Letter"); Gilbert J. Pomar, III, President and Chief Executive Officer, and Valerie A. Kendall, EVP and Chief Financial Officer, Jacksonville Bancorp Inc., dated March 26, 2009 ("Jacksonville Letter"); Stephen A. Roell, Chairman and Chief Executive Officer, Johnson Controls, Inc., dated March 25, 2009 ("Johnson Letter"); Anthony J. Horan, Corporate Secretary, J.P.Morgan Chase & Co., dated March 27, 2009 ("J.P. Morgan Letter"); Sarah Wilson, Chief Executive, Manifest, dated March 27, 2009 ("Manifest Letter"); McKesson Corporation, dated March 27, 2009 ("McKesson Letter"); Thomas M. Moriaty, General Counsel, Secretary and

SVP, Medco Health Solutions, Inc., dated March 26, 2009 ("Medco Letter"); Kenneth G. Frassetto, Director – Treasury Management and Shareholder Services, MGE Energy, Inc., dated March 26, 2009 ("MGE Letter"); Michael C. Miller, Executive Vice President, General Counsel and Secretary, Monster Worldwide, Inc., dated March 24, 2009 ("Monster Letter"); Larry S. Dohrs, Vice President, Newground Social Investment, dated March 27, 2009 ("Newground Letter"); Jeffrey D. Morgan, CAE, President & CEO, National Investor Relations Institute, dated March 16, 2009 ("NIRI Letter"); C.W. Moorman, Chairman, President and Chief Executive Officer, Norfolk Southern Corporation, dated March 23, 2009 ("NS Letter"); Daniel R. DiMicco, Chairman, President and Chief Executive Officer, Nucor Corporation, dated March 25, 2009 ("Nucor Letter"); Jeffrey W. Rubin, Chair, Business Law Section, Committee on Securities Regulation, New York State Bar Association, dated March 27, 2009 ("NYSBA Sec. Reg. Letter"); Elisa D. Garcia, Executive Vice President and General Counsel, Office Depot, Inc., dated March 24, 2009 ("Office Depot Letter"); Chris DeRose, Chief Executive Officer, Ohio Public Employees Retirement System, dated March 24, 2009 ("OPERS Letter"); Toni Zaks, President, OTC Corporate Transfer Service, dated March 24, 2009 ("OTC Letter"); Loren K. Hanson, Assistant Secretary, Otter Tail Corporation, dated March 24, 2009 ("Otter Tail Letter"); E. J. Wunsch, Assistant Secretary and Associate General Counsel, The Procter & Gamble Company, dated March 27, 2009 ("P&G Letter"); Alexander C. Schoch, Executive Vice President, Chief Legal Officer and Secretary, Peabody Energy, dated March 17, 2009 ("Peabody Letter"); Matthew Lepore, Vice President, Chief President-Corporate Governance, Pfizer, dated March 27, 2009 ("Pfizer Letter"); Laura J. Cataldo, President and Chief Executive Officer, Platinum Stock Transfer, dated March 24, 2009 ("Platinum Letter"); James T. Breedlove, Senior Vice President, General Counsel and Secretary, Praxair, dated March 27, 2009 ("Praxair Letter"); Daniel Rothstein, Executive Vice President, Provident Bank, dated March 27, 2009 ("Provident Letter"); John F. Kuntz, General Counsel and Corporate Secretary, Provident Financial Services, Inc. ("Provident Financial Letter"); Larry W. Sonsini, Chairman, Proxy Working Group, dated March 25, 2009 ("PWG Letter"); William J. O'Shaughnessy, Jr., Assistant General Counsel and Corporate Secretary, Quest Diagnostics Incorporated, dated March 25, 2009 ("Quest Letter"); Frank Curtiss, Head of Corporate Governance, Railways Pension Trustee Company Limited, dated April 15, 2009 ("Railpen Letter"); Marilyn Wasser, Executive Vice President and General Counsel, Realogy Corporation, dated April 2, 2009 ("Realogy Letter"); Ralph V. Whitworth, Principal, Relational Investors LLC, dated March 12, 2009 ("Relational Investors Letter"); Jason Freeman, President, Routh Stock Transfer, Inc., dated March 24, 2009 ("Routh Letter"); Karen Gross, Vice President and Secretary, Royal Gold, Inc., dated March 23, 2009 ("Royal Gold Letter"); Robert D. Fatovic, Executive Vice President, Chief Legal Officer and Corporate Secretary, Ryder, dated March 26, 2009 ("Ryder Letter"); Sullivan & Cromwell LLP, dated March 27, 2009 ("S&C Letter"); Niels Holch, Executive Director, Shareholder Communications Coalition, dated March 27, 2009 ("SCC Letter"); Niels Holch, Executive Director, Shareholder Communications Coalition, dated April 24, 2009 ("SCC 2 Letter"); R. Scott McMillen, Vice President and Associate General Counsel, The Charles Schwab Corporation, dated March 27, 2009 ("Schwab Letter"); George Johnson, Vice President, Securities Transfer Corporation, dated March 24, 2009 ("Securities Transfer Letter"); Thomas F. Price, Managing Director, Securities Industry and Financial Markets Association ("SIFMA Letter") (noting that some of the assertions made by other commenters were "inaccurate and promote confusion," and presenting its own observations on those issues); John C. Wilcox, Chairman, Sod'ali, dated March 27, 2009 ("Sod'ali Letter"); Charles V. Rossi, President, The

Securities Transfer Association, Inc., dated March 27, 2009 ("STA Letter"); Mary Cleo Fernandez, Transfer Agent, Standard Registrar Transfer Agency, Inc., dated March 24, 2009 ("Standard Letter"); Robert M. Stanton, dated March 25, 2009 ("Stanton Letter"); Jonathan Miller, President, StockTrans, Inc., dated March 24, 2009 ("StockTrans Letter"); Paul Abel, General Counsel and Secretary, Suburban Propane Partners, L.P., dated November 16, 2006 ("Suburban Letter") (resubmitted on March 3, 2009); Douglas Ian Shaw, Senior Vice President and Corporate Secretary, Suffolk County National Bank, Suffolk Bancorp, dated March 13, 2009 ("Suffolk Letter"); Holly Roseberry, Director, Superlattice Power, Inc., dated March 25, 2009 ("Superlattice Letter"); Steven B. Boehm and Cynthia M. Krus, Sutherland Asbill and Brennan LLP, dated March 31, 2009 ("Sutherland Letter"); Cheryl C. Carter, Corporate Secretary, Synalloy Corporation, dated March 25, 2009 ("Synalloy Letter"); Lewis B. Campbell, Chairman and Chief Executive Officer, Textron Inc., dated March 30, 2009 ("Textron Letter"); Cynthia H. Haynes, Vice President, Assistant Secretary and Assistant General Counsel, Texas Instruments Incorporated, dated March 26, 2009 ("TI Letter"); Hye-Won Choi, Senior Vice President and Head of Corporate Governance, TIAA-CREF, dated March 27, 2009 ("TIAA-CREF Letter"); Jonas Kron, Senior Social Research Analyst, Trillium Asset Management, dated March 17, 2009 ("Trillium Letter"); Scott Renwick, Senior Vice President and General Counsel, Unitrin, dated March 27, 2009 ("Unitrin Letter"); Donald A. French, Treasurer, UQM Technologies, Inc., dated March 26, 2009 ("UQM Letter"); Gregory A. Robbins, Senior Vice President and General Counsel, Veeco Instruments Inc., dated March 26, 2009 ("Veeco Letter"); Marianne Drost, Senior Vice President, Deputy General Counsel and Corporate Secretary, Verizon Communications Inc., dated March 27, 2009 ("Verizon Letter"); David A. Katz, Wachtell, Lipton, Rosen & Katz, dated March 26, 2009 ("Wachtell Letter"); Shelly L. Angus, Senior Vice President, Investor Relations, Washington Banking Company, dated March 23, 2009 ("Washington Banking Letter"); Robert J. LaForest, Vice President and Associate General Counsel, Whirlpool Corporation, dated March 26, 2009 ("Whirlpool Letter"); Michael C. Connelly, Vice President and General Counsel, Xcel Energy, dated March 27, 2009 ("Xcel Letter"); Anne M. Mulcahy, Chairman and Chief Executive Officer, Xerox Corporation, dated March 25, 2009 ("Xerox Letter"); and William D. Zollars, Chairman of the Board, President and Chief Executive Officer, and YRC Worldwide Inc., dated March 25, 2009 ("YRC Letter").