

MEMO# 23297

March 5, 2009

SEC Publishes For Comment NYSE Proposal Regarding Broker Voting On Elections Of Directors And Investment Advisory Contracts

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 2-09
ETF ADVISORY COMMITTEE No. 5-09
SEC RULES COMMITTEE No. 11-09
SMALL FUNDS COMMITTEE No. 2-09 RE: SEC PUBLISHES FOR COMMENT NYSE PROPOSAL REGARDING BROKER VOTING ON ELECTIONS OF DIRECTORS AND INVESTMENT ADVISORY CONTRACTS

The Securities and Exchange Commission recently published for comment a proposal filed by the New York Stock Exchange to amend NYSE Rule 452. [\[1\]](#) Under the proposed amendments: (i) broker discretionary voting for the election of directors would be eliminated for all issuers except registered investment companies; and (ii) NYSE interpretations related to broker voting on investment company advisory contracts would be codified in Rule 452. The proposed amendments are summarized below.

Comments on the proposal are due to the SEC no later than 21 days after publication in the Federal Register. Please provide any comments you would like the Institute to consider including in a comment letter to Dorothy Donohue by email at ddonohue@ici.org or phone at 202 218-3563 as soon as possible but in any event no later than March 12th.

Broker Discretionary Voting on Election of Directors

The Release explains that Rule 452 currently allows discretionary broker voting with respect to uncontested director elections. According to the Release, the NYSE created a Proxy Working Group (“PWG”) in April 2005 to review, and recommend changes to, NYSE rules regulating the proxy voting process. In June 2006, the Proxy Working Group recommended eliminating discretionary broker voting for the election of directors, including investment company directors. The NYSE filed a proposal with the SEC in October 2006 reflecting that recommendation. The Release states that the PWG reviewed comments and materials submitted by the Institute and other representatives of investment companies concerning the difficulties such companies would have if broker discretionary voting were eliminated for director elections. The PWG particularly considered the Institute’s research report delineating the increased costs and burdens that would be experienced by funds as a result of the proposal. [\[2\]](#) The PWG also considered that investment companies are subject to distinct regulation under the Investment Company Act of 1940.

In light of the PWG’s recommendation, the NYSE filed an amended proposal with the SEC that would preserve discretionary broker voting for registered investment companies. [\[3\]](#) The SEC is now publishing for comment a virtually identical NYSE proposal.

The proposed amendment generally would be applicable with respect to shareholder meetings held on or after January 1, 2010.

Voting on Investment Advisory Contracts

On non-routine matters, which generally are those involving any matter which may affect substantially the rights or privileges of shareholders, NYSE rules prohibit discretionary broker voting. Rule 452 currently lists, by way of example, eighteen such non-routine matters. In addition to these specific matters, the NYSE has interpreted Rule 452 to preclude discretionary broker voting on: (i) a material amendment to an investment company’s investment advisory contract; and (ii) an investment company’s investment advisory contract with a new investment adviser, which approval is required by the Investment Company Act of 1940 or the rules thereunder. [\[4\]](#) Under the proposal, these interpretations would be codified in Rule 452.

Dorothy M. Donohue
Senior Associate Counsel

endnotes

[1] See Securities Exchange Act Rel. No. 59464 (February 26, 2009), which is available at <http://www.sec.gov/rules/sro/nyse/2009/34-59464.pdf> (“Release”).

[2] See Costs of Eliminating Discretionary Broker Voting on Uncontested Elections of Investment Company Directors (December 18, 2006).

[3] See NYSE File No.SR-2006-92, Amendment No. 1 (May 23, 2007).

[4] For example, broker discretionary voting is not permitted with respect to an advisory contract between an investment company and a new investment adviser due to an assignment of the investment company’s investment advisory contract, including an assignment caused by a change in control of the investment adviser that is a party to the assigned contract.

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