The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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March 18, 2009

ICI Draft Comment Letter On NYSE Proposal Regarding Broker Voting On Elections Of Directors And Investment Advisory Contracts

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TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 3-09ETF ADVISORY COMMITTEE No. 6-09SEC RULES COMMITTEE No. 12-09SMALL FUNDS COMMITTEE No. 4-09 RE: ICI DRAFT COMMENT LETTER ON NYSE PROPOSAL REGARDING BROKER VOTING ON ELECTIONS OF DIRECTORS AND INVESTMENT ADVISORY CONTRACTS

The Institute has prepared the attached draft comment letter on 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 draft letter, which generally supports the proposed changes, is summarized below.

Comments on the proposal must be filed with the Securities and Exchange Commission by Friday, March 27th. Please provide your comments on the draft letter as soon as possible but no later than March 25th to Dorothy Donohue by email (ddonohue@ici.org) or phone at (202) 218-3563.

The draft letter commends the NYSE and the Proxy Working Group ("Working Group") for amending the original proposal to preserve discretionary broker voting for

investment companies. It states that the Institute has a long-standing policy of supporting strong corporate governance and that we agree that shareholder voting for directors can be an important component of a robust corporate governance structure. The letter points out, however, that as applied to investment companies, the proposal would have no demonstrable benefits, and certainly none that come close to offsetting its costs.

The letter discusses the Institute's report, Costs of Eliminating Discretionary Broker Voting on Uncontested Elections of Investment Company Directors ("Report"), which found that the proposal would have adverse effects on funds for several reasons. First, the proposal would create significant difficulties for funds in achieving quorums, and, in turn, would occasion unnecessary delays in electing fund directors. In addition, to encourage shareholders to vote their proxies, funds would be forced to adjourn meetings and/or engage in multiple solicitations, thereby significantly increasing costs to funds. The proposal also would have a disproportionate impact on funds as opposed to operating companies. Because funds have a far higher proportion of retail shareholders than most operating companies and retail shareholders are less likely than institutional investors to vote their proxies, funds would incur disproportionately greater costs from the elimination of discretionary broker voting. Finally, because the elections that are the subject of the NYSE proposal are uncontested, the same directors, in virtually every case, would be elected whether or not funds and their shareholders bear these steep additional costs.

The amended NYSE proposal would except "registered investment companies" from the elimination of discretionary broker voting. The letter points out that by drafting the exception to include only "registered" investment companies, the exception would not include a segment of the investment company industry known as business development companies, or BDCs. The letter recommends that the NYSE make a technical change to the proposed language of amended Rule 452 to clarify that business development companies that elect to be regulated under the Investment Company Act also be excepted from the proposal.

The letter states that BDCs share many of the same characteristics of registered investment companies and, most significantly, the two characteristics of investment companies that the Working Group attached particular significance to in creating the exception – the regulatory structure for investment companies under the Investment Company Act and the large retail shareholder base of investment companies. In addition, the letter points out that from what we can tell, it appears that the omission of BDCs from the exception was unintentional, as the discussion in the Institute's Report and prior comment letters, as well as in the NYSE's amended proposals (and its discussion of the Working Group's views in those proposals) refer only to "investment companies" and not to "registered investment companies." The letter concludes that it would therefore be consistent with the Working Group's reasoning to treat BDCs for purposes of the proposal in the same manner as registered investment companies.

The letter supports codifying in Rule 452 certain NYSE interpretations regarding

investment advisory contracts. It states that we agree that: (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, are the types of non-routine matters on which fund shareholders should be required to vote. The letter states that as a legal matter, funds generally are organized as corporations or business trusts with a board of directors or trustees. Practically speaking, however, funds are a means through which investors obtain the services of the fund's investment adviser. When investors become shareholders of a fund, they already have chosen the adviser in the context of the disclosures in the fund's prospectus and other documents that set forth the material facts concerning the adviser, the fund's investment objectives, strategy and risks, the management fee structure, and other expenses of investing in the fund. The letter concludes that given the importance of the identity of the adviser and the services it provides to fund shareholders, the benefits of shareholders' voting on a material amendment to an advisory contract or an advisory contract with new investment adviser outweigh the costs associated with such a requirement.

Dorothy M. Donohue
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Attachment

endnotes

[1] See Memorandum to Closed-End Investment Company Committee No. 2-09, ETF Advisory Committee No. 5-09, SEC Rules Committee No. 11-09, and Small Funds Committee No. 2-09 [23297], dated March 5, 2009.
