

MEMO# 23633

July 15, 2009

SEC Approves NYSE Proposal Regarding Broker Voting on Elections of Directors and Investment Advisory Contracts

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 28-09
ETF ADVISORY COMMITTEE No. 21-09
SEC RULES MEMBERS No. 75-09
SMALL FUNDS MEMBERS No. 43-09 RE: SEC APPROVES NYSE PROPOSAL REGARDING
BROKER VOTING ON ELECTIONS OF DIRECTORS AND INVESTMENT ADVISORY CONTRACTS

The Securities and Exchange Commission has issued an order approving a proposal filed by the New York Stock Exchange to amend NYSE Rule 452. [\[1\]](#) Under the amendments: (i) broker discretionary voting for the election of directors is eliminated for all issuers except registered investment companies; and (ii) NYSE interpretations related to broker voting on investment company advisory contracts is codified in Rule 452. The most significant aspects of the order are summarized below.

Broker Discretionary Voting on Election of Directors

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 PWG 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. In response to comments and materials submitted by the Institute and other representatives of investment companies concerning the difficulties

funds would have if broker discretionary voting were eliminated for director elections, the NYSE filed an amended proposal with the SEC that would preserve discretionary broker voting for registered investment companies. [\[2\]](#) The SEC approval order eliminates broker discretionary voting for the election of directors for all issuers except for registered investment companies. [\[3\]](#)

The Release also expresses support for the PWG'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. The Release notes the Commission's intent to take up other issues raised by commenters on the proposal as part of a broader review of the proxy process. For example, the Commission intends to examine issues related to the use of proxy advisory services by institutions and whether that use should be further regulated; the impact of stock lending and financial derivatives, and over-voting and under-voting issues.

Business Development Companies

Despite the Institute's recommendation to the contrary, the Commission determined not to grant an expansion of the exemption for registered investment companies to include business development companies ("BDCs"). The Release stated that the regulation of BDCs and registered investment companies differs significantly and that "[p]articularly 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." [\[4\]](#) The Release stated that the adoption of the amendment to Rule 452 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.

Voting on Investment Advisory Contracts

The Release also codifies prior NYSE interpretations of 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. [\[5\]](#) The Institute's comment letter on the proposal supported such codification.

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endnotes

[1] See Securities Exchange Act Rel. No. 60215 (July 1, 2009), which is available at <http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf> (“Release”).

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

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

[4] The Release also stated that the exemption from the Investment Company Act’s auditor ratification requirement for a registered investment company if it relies on a conditional exemptive rule under the Act was not available to BDCs. See Release at p. 40.

[5] 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.