

MEMO# 23362

March 27, 2009

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

[23362]

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 14-09
ETF ADVISORY COMMITTEE No. 8-09
SEC RULES MEMBERS No. 34-09
SMALL FUNDS MEMBERS No. 23-09 RE: ICI LETTER ON NYSE PROPOSAL REGARDING
BROKER VOTING ON ELECTIONS OF DIRECTORS AND INVESTMENT ADVISORY CONTRACTS

The Institute filed the attached comment letter with the Securities and Exchange Commission 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 letter, which generally supports the proposed changes, is summarized below.

Eliminating Broker Discretionary Voting on the Election of Investment Company Directors

The 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 investment companies for several reasons. First, the proposal would create significant difficulties for investment companies in achieving quorums, and, in turn, would occasion unnecessary delays in electing investment company directors. In addition, to encourage shareholders to vote their proxies, investment companies would be forced to adjourn meetings and/or engage in multiple solicitations, thereby significantly increasing costs to investment companies. The proposal also would have a disproportionate impact on investment companies as opposed to operating companies. 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 investment companies and their shareholders bear these steep additional costs.

Exception from the Proposal for Business Development Companies

The amended NYSE proposal would except "registered investment companies." The letter points out that by drafting the exception to include only "registered" investment companies, the exception would not include business development companies ("BDCs"). The letter recommends that the NYSE make a technical change to the proposed language of amended Rule 452 to clarify that BDCs 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. 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.

Voting on Investment Advisory Contracts

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 investment company shareholders should be required to vote. The letter notes that given the importance of the identity of the adviser and the services it provides to investment company 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.

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[Attachment](#)

endnotes

[1] See [Memorandum](#) to Closed-End Investment Company Members No.11-09, SEC Rules Members No. 24-09, and Small Funds Members No. 17-09 [23298], dated March 5, 2009.

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