

Proposed Rule Change by **New York Stock Exchange**  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

<b>Initial</b> <input checked="" type="checkbox"/>	<b>Amendment</b> <input type="checkbox"/>	<b>Withdrawal</b> <input type="checkbox"/>	<b>Section 19(b)(2)</b> <input checked="" type="checkbox"/>	<b>Section 19(b)(3)(A)</b> <input type="checkbox"/>	<b>Section 19(b)(3)(B)</b> <input type="checkbox"/>
			Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters).

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name  Last Name   
Title   
E-mail   
Telephone  Fax

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,  
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date   
By  Assistant Secretary  
(Name) (Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information**

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) The text of proposed amendments to NYSE Rule 452 and NYSE Listed Company Manual Section 402.08 are set forth in Exhibit 5.
- (b) Except as otherwise noted below, the Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

- (a) Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange's governing documents. Therefore, the Exchange's internal procedures with respect to the proposed rule change are complete.
- (b) The persons from the Exchange staff prepared to respond to questions and comments on the proposed rule changes are:

Stephen Walsh  
Vice President  
Operations  
(212) 656-6240

Annemarie Tierney  
Assistant General Counsel  
Office of General Counsel  
(212) 656-5216

3. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

(a) Purpose

The NYSE is proposing to amend NYSE Rule 452 to eliminate broker discretionary voting for the election of directors. Rule 452, titled "*Giving Proxies by Member Organizations*," allows brokers to vote on "routine" proposals if the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

Current Requirements of NYSE Rule 452

Under the current NYSE and SEC proxy rules, brokers must deliver proxy materials to beneficial owners and request voting instructions in return. If voting

instructions have not been received by the tenth day preceding the meeting date, Rule 452 provides that brokers may vote on certain matters deemed “routine” by the NYSE. One of the most important results of broker votes of uninstructed shares is their use in establishing a quorum at shareholder meetings.

Among the other matters which the current NYSE Rule 452 defines as routine is an “uncontested” election for a company’s board of directors.<sup>1</sup> Such elections remain the general practice in corporate America today, with contested elections occurring relatively infrequently. According to ADP, there were only thirty-four officially contested elections in calendar year 2004.

However in recent years the definition of a “contested election” has been questioned by a number of parties and interest groups.<sup>2</sup> This is because of the rise of a number of new types of proxy campaigns, including “just vote no” campaigns. Because these campaigns often do not result in competing solicitations, historically these efforts have not been considered “contests” for purposes of NYSE Rule 452, and thus broker votes have been counted. This has drawn the ire of some investor groups since generally brokers vote uninstructed shares in accordance with the incumbent board’s recommendations.

On “non-routine” matters, which generally speaking are those involving a contest or any matter which may affect substantially the rights or privileges of stockholders, NYSE rules prohibit brokers from voting without receiving instructions from the beneficial owners. At present, the NYSE Rule 452.11 lists

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<sup>1</sup> Rule 452.11(2) defines a “contest” as a matter that “is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management.”

<sup>2</sup> For example, in 2002, the Council of Institutional Investors publicly criticized the NYSE’s definition of “contests” as “problematic” because it fails to classify as contests “just vote no” campaigns, it fails to recognize the use of the Internet as a means of contesting management, it puts ADP in an inappropriate and conflicted role, and it is inconsistent with securities laws which recognize the validity of exempt solicitations. In a letter to the SEC dated June 13, 2003, Institutional Shareholders Services expressed concern that because “the NYSE classifies the election of directors as a routine voting item unless a full-blown proxy contest has erupted,” the efforts of shareholders to express disapproval of board actions at companies like Sprint and Tyco in the 2003 proxy season were “watered down by broker votes.” Moreover, in their presentations to the Working Group, several groups recommended that the definition of a contest be expanded or changed, including the AFL-CIO and the American Business Conference.

by way of example eighteen such “non-routine” matters, including items such as stockholder proposals, and mergers or consolidations.

#### NYSE Proxy Working Group

The Proxy Working Group was created by the NYSE in April 2005 to review the NYSE rules regulating the proxy voting process, and more specifically to review and make recommendations with respect to NYSE Rules 450-460 (with a particular focus on Rule 452) and 465. In creating the Working Group, the NYSE sought to obtain a wide diversity of views as well as a broad range of expertise. As a result, the Working Group contains representatives from a number of different constituencies, all of whom have significant experience with the proxy voting process.

In June 2006, the Proxy Working Group prepared a draft report and a series of recommendations relating to their findings. In this report, the Proxy Working Group expressed its belief that the election of directors should no longer be viewed as routine under Rule 452 and thus that brokers should no longer be permitted to cast uninstructed shares for the election of directors.

The Proxy Working Group report notes that this proposed change could significantly impact the director election process. For example, it is likely to increase the costs of uncontested elections, as issuers will have to spend more money and effort to reach shareholders who previously did not vote. These costs may increase substantially with the rise of majority voting for directors, as issuers have to obtain the votes from shareholders who may not realize that their failure to vote constitutes a “no” vote. Such a change may also increase the influence of special interest groups or others with a particular agenda to challenge an incumbent board, at the expense of smaller shareholders. These consequences could fall most dramatically on smaller issuers, who have a smaller proportion of institutional investors and/or have greater difficulty in contacting shareholders and convincing them to vote in uncontested elections.

Despite these potential difficulties, the Proxy Working Group stated in its report that it is important to recognize that the election of a director, even where the election is uncontested, is not a routine event in the life of a corporation. While this is likely to result in some greater costs and difficulties for issuers, it is a cost required to be paid for better corporate governance and transparency of the election process.

In light of the recommendations of the Proxy Working Group and based on the NYSE’s own conclusion that the election of directors should no longer be deemed to be a “routine matter,” the NYSE proposes to amend NYSE Rule 452, and corresponding NYSE Listed Company Manual Section 402.08, to eliminate broker discretionary voting for the election of directors.

Effective Date

The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

(b) Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>3</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, 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.

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period specified in Section 19(b)(2)<sup>4</sup> of the Exchange Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

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<sup>3</sup> 15 U.S.C. 78f(b)(5).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

This proposed rule change is not based on the rules of another self-regulatory organization or of the Commission.

9. Exhibits

Exhibit 1 - Form of Notice for Publication in the Federal Register

Exhibit 5 - Text of the Proposed Rule Change

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

[Date]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange LLC Relating to NYSE Rule 452 and Listed Company Manual Section 402.08

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934, (the “Exchange Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on October 24, 2006, the New York Stock Exchange LLC (the “Exchange” or “NYSE”) filed with the Securities and Exchange Commission the proposed rule change as described in items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE is proposing to amend NYSE Rule 452 to eliminate broker discretionary voting for the election of directors. Rule 452, titled “*Giving Proxies by Member Organizations*,” allows brokers to vote on “routine” proposals if the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

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<sup>1</sup> 15 U.S.C. 78s (b) (1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in item IV below and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The NYSE is proposing to amend NYSE Rule 452 to eliminate broker discretionary voting for the election of directors. Rule 452, titled “*Giving Proxies by Member Organizations*,” allows brokers to vote on “routine” proposals if the beneficial owner of the stock has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

Current Requirements of NYSE Rule 452

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Among the other matters which the current NYSE Rule 452 defines as routine is an “uncontested” election for a company’s board of directors.<sup>4</sup> Such elections remain the general practice in corporate America today, with contested elections occurring relatively infrequently. According to ADP, there were only thirty-four officially contested elections in calendar year 2004.

However in recent years the definition of a “contested election” has been questioned by a number of parties and interest groups.<sup>5</sup> This is because of the rise of a number of new types of proxy campaigns, including “just vote no” campaigns. Because these campaigns often do not result in competing solicitations, historically these efforts have not been considered “contests” for purposes of NYSE Rule 452, and thus broker votes have been counted. This has drawn the ire of some investor groups since generally brokers vote uninstructed shares in accordance with the incumbent board’s recommendations.

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<sup>4</sup> Rule 452.11(2) defines a “contest” as a matter that “is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management.”

<sup>5</sup> For example, in 2002, the Council of Institutional Investors publicly criticized the NYSE’s definition of “contests” as “problematic” because it fails to classify as contests “just vote no” campaigns, it fails to recognize the use of the Internet as a means of contesting management, it puts ADP in an inappropriate and conflicted role, and it is inconsistent with securities laws which recognize the validity of exempt solicitations. In a letter to the SEC dated June 13, 2003, Institutional Shareholders Services expressed concern that because “the NYSE classifies the election of directors as a routine voting item unless a full-blown proxy contest has erupted,” the efforts of shareholders to express disapproval of board actions at companies like Sprint and Tyco in the 2003 proxy season were “watered down by broker votes.” Moreover, in their presentations to the Working Group, several groups recommended that the definition of a contest be expanded or changed, including the AFL-CIO and the American Business Conference.

NYSE rules prohibit brokers from voting without receiving instructions from the beneficial owners. At present, the NYSE Rule 452.11 lists by way of example eighteen such “non-routine” matters, including items such as stockholder proposals, and mergers or consolidations.

#### NYSE Proxy Working Group

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In June 2006, the Proxy Working Group prepared a draft report and a series of recommendations relating to their findings. In this report, the Proxy Working Group expressed its belief that the election of directors should no longer be viewed as routine under Rule 452 and thus that brokers should no longer be permitted to cast uninstructed shares for the election of directors.

The Proxy Working Group report notes that this proposed change could significantly impact the director election process. For example, it is likely to increase the costs of uncontested elections, as issuers will have to spend more money and effort to reach shareholders who previously did not vote. These costs may increase substantially with the rise of majority voting for directors, as issuers have to obtain the votes from shareholders who may not realize that their failure to vote constitutes a “no” vote. Such a

change may also increase the influence of special interest groups or others with a particular agenda to challenge an incumbent board, at the expense of smaller shareholders. These consequences could fall most dramatically on smaller issuers, who have a smaller proportion of institutional investors and/or have greater difficulty in contacting shareholders and convincing them to vote in uncontested elections.

Despite these potential difficulties, the Proxy Working Group stated in its report that it is important to recognize that the election of a director, even where the election is uncontested, is not a routine event in the life of a corporation. While this is likely to result in some greater costs and difficulties for issuers, it is a cost required to be paid for better corporate governance and transparency of the election process.

In light of the recommendations of the Proxy Working Group and based on the NYSE's own conclusion that the election of directors should no longer be deemed to be a "routine matter," the NYSE proposes to amend NYSE Rule 452, and corresponding NYSE Listed Company Manual Section 402.08, to eliminate broker discretionary voting for the election of directors.

#### Effective Date

The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

#### 2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>6</sup> that an exchange have rules that are designed to

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<sup>6</sup> 15 U.S.C. 78f(b)(5).

prevent fraudulent and manipulative acts and practices, 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- a) by order approve the proposed rule change, or
- b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2006-92 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy Morris, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-NYSE-2006-92. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File

number SR-NYSE-2006-92 and should be submitted by [insert date 21 days from date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

Nancy Morris  
Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).

## Text of the Proposed Rule Change

Additions are underscored. Deletions are [bracketed].

**NYSE Rules**

\* \* \* \* \*

**Rule 452. Giving Proxies by Member Organization**

A member organization shall give or authorize the giving of a proxy for stock registered in its name, or in the name of its nominee, at the direction of the beneficial owner. If the stock is not in the control or possession of the member organization, satisfactory proof of the beneficial ownership as of the record date may be required.

**Voting member organization holdings as executor, etc.**

A member organization may give or authorize the giving of a proxy to vote any stock registered in its name, or in the name of its nominee, if such member organization holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote.

**Voting procedure without instructions**

A member organization which has transmitted proxy soliciting material to the beneficial owner of stock or to an investment adviser, registered either under the Investment Advisers Act of 1940 or under the laws of a state, who exercises investment discretion pursuant to an advisory contract for the beneficial owner and has been designated in writing by the beneficial owner of such stock (hereinafter "designated investment adviser") to receive soliciting material in lieu of the beneficial owner and solicited voting instructions in accordance with the provisions of Rule 451 [§2451], and which has not received instructions from the beneficial owner or from the beneficial owner's designated investment adviser by the date specified in the statement accompanying such material, may give or authorize the giving of a proxy to voted such stock, 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 other matter which may affect substantially the rights or privileges of such stock.

**Instructions on stock in names of other member organizations**

A member organization which has in its possession or control stock registered in the name of another member organization, and which has solicited voting instructions in accordance with the provisions of Rule 451(b)(1) [¶2451], shall

- (1) Forward to the second member organization any voting instructions received from the beneficial owner, or
- (2) if the proxy-soliciting material has been transmitted to the beneficial owner of the stock in accordance with Rule 451 [¶2451] and no instructions have been received by the date specified in the statement accompanying such material, notify the second member organization of such fact in order that such member organization may give the proxy as provided in the third paragraph of this rule.

### **Signed proxies for stock in names of other member organizations**

A member organization which has in its possession or control stock registered in the name of another member organization, and which desires to transmit signed proxies pursuant to the provisions of Rule 451(b)(2) [¶2451], shall obtain the requisite number of signed proxies from such holder of record.

• • • *Supplementary Material:* -----

### **Giving a Proxy To Vote Stock**

**.10** When member organization may vote without customer instructions.—Rule 452, above, provides that a member organization may give a proxy to vote stock provided that:

- (1) It has transmitted proxy soliciting material to the beneficial owner of stock or to the beneficial owner's designated investment adviser in accordance with Rule 451 [¶2451], and
- (2) it has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and
- (3) 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 of any matter which may affect substantially the rights or privileges of such stock.

**.11** When member organization may not vote without customer instructions.—In the list of meetings of stockholders appearing in the Weekly Bulletin, after proxy material has been reviewed by the Exchange, each meeting will be designated by an appropriate symbol to indicate either (a) that members may vote

a proxy without instructions of beneficial owners, (b) that members may not vote specific matters on the proxy, or (c) that members may not vote the entire proxy.

Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

- (1) is not submitted to stockholders by means of a proxy statement comparable to that specified in Schedule 14-A of the Securities and Exchange 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 (see Item 12));
- (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.

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;

(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[.]; or

(19) is the election of directors.

## **.12 Proportionate voting for auction rate preferred securities.—**

Notwithstanding any other provision of Rule 452, a member organization may vote auction rate preferred securities \* with auction reset periods of one year or less in

proportion to the voting instructions received from holders of the same class (or of the same series where the item must be voted upon separately by each series), in accordance with the provisions established below:

- (1) It has transmitted proxy soliciting material to the beneficial owner of the auction rate preferred securities or to the beneficial owner's designated investment adviser in accordance with Rule 451 [¶2451], and
- (2) It has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and
- (3) A minimum of 30% of the outstanding shares of the same class or series (where a series vote may be required) has been voted by preferred security holders, and
- (4) Less than 10% of the outstanding shares of the same class or series (where a series vote may be required) voted against the proposal, and
- (5) For any proposal as to which both the common and preferred holders vote as a single class. Proportional voting will not be allowed unless common shareholders approve the proposal, and
- (6) A majority of the independent directors of the issuer's board of directors approved the matter, and
- (7) Adequate disclosure of proportional voting has been provided to beneficial holders.

**.13 Discretionary and non-discretionary proposals in one proxy form.**—In some cases, a proxy form may contain proposals, some of which may be acted upon at the discretion of the member organization in the absence of instructions, and others which may be voted only in accordance with the directions of the beneficial owner. This should be indicated in the letter of transmittal. In such cases, the member organization may vote the proxy in the absence of instructions if it physically crosses out those portions where it does not have discretion.

**.14 Cancellation of discretionary proxy where counter-solicitation develops.**—Where a discretionary proxy has been given in good faith under the rules and counter-solicitation develops at a later date, thereby creating a "contest," the question as to whether or not the discretionary proxy should then be cancelled is a matter which each member organization must decide for itself. After a contest has developed no further proxies should be given except at the direction of beneficial owners.

**.15 Subsequent proxy.**—Where a member organization gives a subsequent proxy, it should clearly indicate whether the proxy is in addition to, in substitution for or in revocation of any prior proxy.

**.16 Signing and dating a proxy—designating shares covered.**—All proxies should be dated and should show the number of shares voted. Since manual signatures are sometimes illegible, a member organization should also either type or rubber-stamp its name on such proxy.

**.17 Proxy records.**—Records covering the solicitation of proxies shall show the following:

- (1) The date of receipt of the proxy material from the issuer or other person soliciting the proxies;
- (2) names of customers to whom the material is sent together with date of mailing;
- (3) all voting instructions showing whether verbal or written; and
- (4) a summary of all proxies voted by the member organization clearly setting forth total shares voted for or against or not voted for each proposal to be acted upon at the meeting.

Verbal voting instructions may be accepted provided a record is kept of the instructions of the beneficial owner and the instructions are retained by the member organization. The record shall also indicate the date of the receipt of the instructions and the name of the recipient.

Instructions from beneficial owners may also be accepted by member organizations or their agents through the use of an automated telephone voting system, which has been approved by the Exchange. Such a system shall utilize an identification code for beneficial owners and provide an opportunity for beneficial owners to validate votes to ensure that they were received correctly. Records of voting including the date of receipt of instructions and the name of the recipient must be retained by the member organization or their agent.

**.20 Retention of records.**—All proxy solicitation records, originals of all communications received and copies of all communications sent relating to such solicitation, shall be retained for a period of not less than three years, the first two years in an easily accessible place.

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**Listed Company Manual**

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## **402.00 Proxies**

### **402.08 Giving a Proxy to Vote Stock**

(A) When Member Organization May Vote Without Customer Instructions Rule 452 provides that a member organization may give a proxy to vote stock if:

(1) it has transmitted proxy soliciting material to the beneficial owner of stock or to the beneficial owner's designated investment adviser in accordance with Rule 451, and

(2) it has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and (3) 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 shareholders and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock.

(B) When Member Organization May Not Vote Without Customer Instructions Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

1. is not submitted to stockholders by means of a proxy statement comparable to that specified in Schedule 14-A of the Securities and Exchange 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; given except at the direction of beneficial owners.

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;

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 Section 303A.08 of the 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.

Should there be more than one plan being considered at the same meeting, all costs are aggregated.

Exception 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;
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[.]; or

19. is the election of directors.

(C) Proportionate voting for auction rate preferred securities

Notwithstanding any other provision of Rule 452, a member organization may vote auction rate preferred securities\* with auction reset periods of one year or less in proportion to the voting instructions received from holders of the same class (or of the same series where the item must be voted upon separately by each series), in accordance with the provisions established below:

- (1) It has transmitted proxy soliciting material to the beneficial owner of the auction rate preferred securities or to the beneficial owner's designated investment adviser in accordance with Rule 451 [¶ 2451], and
- (2) It has not received voting instructions from the beneficial owner or from the beneficial owner's designated investment adviser, by the date specified in the statement accompanying such material, and
- (3) A minimum of 30% of the outstanding shares of the same class or series (where a series vote may be required) has been voted by preferred security holders, and
- (4) Less than 10% of the outstanding shares of the same class or series (where a series vote may be required) voted against the proposal, and
- (5) For any proposal as to which both the common and preferred holders vote as a single class, proportional voting will not be allowed unless common shareholders approve the proposal, and
- (6) A majority of the independent directors of the issuer's board of directors approved the matter, and
- (7) Adequate disclosure of proportional voting has been provided to beneficial holders.

(D) Discretionary and Non-Discretionary Proposals in One Proxy Form

In some cases, a proxy form may contain proposals, some of which may be acted upon at the discretion of the member organization in the absence of instructions, and others which may be voted only in accordance with the directions of the beneficial owner. This should be indicated in the letter of transmittal. In such cases, the member organization may vote the proxy in the absence of instructions if it physically crosses out those portions where it does not have discretion.

(E) Cancellation of Discretionary Proxy Where Counter-Solicitation Develops

Where a discretionary proxy has been given in good faith under the rules and counter-solicitation develops at a later date, thereby creating a "contest", the question as to whether or not the discretionary proxy should then be cancelled is a matter which each member organization must decide for itself. After a contest has developed, no further proxies should be given except at the direction of beneficial owners.

(F) Subsequent Proxy

Where a member organization gives a subsequent proxy, it should clearly indicate whether the proxy is in addition to, in substitution for, or in revocation of any prior proxy.

(G) Signing and Dating Proxy—Designating Shares Covered

All proxies should be dated and should show the number of shares voted. Since manual signatures are sometimes illegible, a member organization should also either type or rubber-stamp its name on such proxy signed by it.

(H) Proxy Records

Records covering the solicitation of proxies shall show the following:

- (1) The date of receipt of the proxy material from the issuer or other person soliciting the proxies;
- (2) names of customers to whom the material is sent together with date of mailings;
- (3) all voting instructions showing whether verbal or written;
- (4) a summary of all proxies voted by the member organization clearly setting forth total shares voted for or against or not voted for each proposal to be acted upon at the meeting.

Verbal voting instructions may be accepted provided a record is kept of instructions of the beneficial owner and the instructions are retained by the member organization. The record shall also indicate the date of the receipt of the instructions and the name of the recipient.

Retention of Records—

All proxy solicitation records, originals of all communications received and copies of all communications sent relating to such solicitation, shall be retained for a period of not less than three years, the first two years in an easily accessible place.

\* For purposes of this rule, an auction rate preferred security shall be deemed a preferred security pursuant to which the dividend rate is established periodically by auction or remarketing at specified "reset periods".