Practical Solutions

To Improve The Proxy Voting System

A proposal submitted to:

The Securities and Exchange Commission

by

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Practical Solutions To Improve The Proxy Voting System

Weaknesses in the proxy plumbing system are emerging as a priority for policy-makers. Indeed, a number of companies responding to the Proposing Release from the Securities and Exchange Commission on "Facilitating Shareholder Director Nominations" [1] ("Proxy Access") urged the Commission to first address plumbing issues such as the NOBO/OBO system, issues arising from share lending/borrowing practices, and the role of proxy advisory firms. In this paper we will examine systemic problems affecting all public companies, and offer some proposals on how to fix them. It is our hope that the proposals detailed below will help further shift the discussion at a policy-making level from one of reviewing complaints and assessing problems to one of working out practical solutions.

Let us start by acknowledging comments from SEC Chairman Mary Schapiro at the July 1, 2009 SEC Open Meeting in which she stated that the Commission will commence a review of the proxy voting and shareholder communications system this year. It was also welcome news to hear Chairman Schapiro state on September 17, 2009, that: "… eliminating broker non-votes in director elections, along with the potential for proxy access in the 2010 proxy season, will place a greater spotlight on some of the long-smoldering concerns about the mechanics of the proxy voting process within the United States. I have committed to looking at these additional issues — including OBO/NOBOs, and the role of proxy advisory and voting services — in the next few months."[2] Another constructive development was the announcement by the SEC's Investor Advisory Committee that it has formed three subcommittees that will focus on investor education, investor protection, and the mechanics of shareholder voting and communications. There were also reports in early October that the SEC has delayed action on proxy access in order to have additional time to review the more than 500 comment letters submitted to it in response to its proposed rules on that subject. Some of those letters, as we detail in a forthcoming report,[3] urged the SEC to focus on reforming the proxy voting system. Last, but not least, a proposing release from the SEC dated October 14, 2009,[4] indicated that the Commission is considering modifications to Notice & Access ("N&A") provisions and "soliciting comment on…how best to advance the Commission's regulatory interest in informed shareholder participation" as steps to address steep declines in response rates for retail shareowners resulting from implementation of N&A. As a result of these deliberations, we hope that a careful and comprehensive assessment of proxy plumbing issues will lead to proposals from the SEC to reform a system that is now widely perceived by publicly-traded corporations to be working against the long-term interests of companies and shareholders.

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[1] "SEC: Facilitating Shareholder Director Nominations [Release Nos. 33–9046; 34–60089; IC– 28765; File No. S7–10–09]," *Federal Register*, Vol. 74, No. 116, Thursday, June 18, 2009.

[2] Chairman Mary L. Schapiro, "Address to Transatlantic Corporate Governance Dialogue," Sept. 17, 2009. http://www.sec.gov/news/speech/2009/spch091709mls.htm

[3] The Altman Group, *Content Analysis: Comments on the Proposed Rule "Facilitating Shareholder Director Nominations"* (scheduled for release in the second half of October 2009).

[4] Securities and Exchange Commission,"Amendments to Rules Requiring Internet Availability of Proxy Materials" [Release Nos. 33-9073; 34-60825; IC-28946; File No. S7-22-09]. October 14, 2009. http://www.sec.gov/rules/proposed/2009/33-9073.pdf

Impact of Amended Rule 452

The NYSE and SEC are, whether intentionally or not, in the process of creating a tiered system of corporate voting that is correlated with the composition of a company's shareholder base. The SEC's recent approval of Amended NYSE Rule 452, which eliminates the right of brokerage firms to vote clients' uninstructed shares in routine director elections, will have a disproportionately negative impact on smaller companies. These companies, with generally smaller market capitalizations (in particular those with stock prices below $5 per share) and a relatively large percentage of their shares held by retail shareowners, will face challenges from both a smaller volume of votes from brokerage firms in favor of the board's nominees, and investors/groups with narrow and short-term interests that will seek to take advantage of the changed playing field. Moreover, many millions of retail investors have relied for decades, even generations, on their brokers to exercise their voting rights in director elections, and will be blind-sided by Amended Rule 452 next year because they will still be expecting their brokers to vote for them (and thus be effectively disenfranchised). This is likely to be a far larger group of shareowners than some policy-makers are expecting.

The idea that Rule 452 needed changing had been championed for years by a small number of activist investors. The initiative for revising Rule 452 gained momentum after the high visibility of the Walt Disney board election in 2004. Some contend that this election for directors was decided by the uninstructed broker vote. Recent investor opposition to board nominees at large financial institutions, including Citibank, Washington Mutual and Bank of America, where a number of directors were likely elected on the strength of the uninstructed broker vote, may also have been a catalyst for recent SEC approval of the amendment to NYSE Rule 452.

Concern by regulators that votes by brokers for non-responding clients are a form of "empty voting" (in which the brokerage firm exercises a vote without having an economic interest) apparently bolstered support at a policy-making level for Amended Rule 452. Recently, Commissioner Elisse B. Walter commented that the amendments to NYSE Rule 452: "are designed to help assure that voting rights on critical matters like director elections are exercised by those with an economic interest in the company, rather than by brokers…I do not share the skeptics' view that, by returning the right to vote to shareholders, the amendments to Rule 452 will in fact disenfranchise retail shareholders. To the contrary, these amendments will ensure that the ballots cast by retail shareholders reflect their own decisions, not the decisions of their brokers."[5] The SEC has been using language indicating that all director elections are "critical," while there is a stated objective in the SEC's order approving Amended Rule 452 of ensuring that director elections are "determined by those with an economic interest in the company."[6] Consistent with these standards, Amended Rule 452 needs to be followed by additional reforms, including measures to address such issues as "empty voting" by activists and others, and steps to enable companies to engage more retail shareholders in the director election process (including reform of the OBO/NOBO system).

Absent a withhold vote campaign, the impact of changes to Rule 452 on non-contested director elections at most large- and mega-cap companies will be small. The vast majority of shares of NYSE-listed companies, along with certain NASDAQ OMX-listed companies, are primarily held by institutional investors that vote in high percentages, year in and year out. Even if a mega-cap NYSE company has 150,000 retail

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[5] Commissioner Elisse B. Walter, "SEC Rulemaking – Advancing the Law to Protect Investors," Comments before the 48th Annual Corporate Counsel Institute (Northwestern University School of Law, Oct. 2, 2009. http://www.sec.gov/news/speech/2009/spch100209ebw.htm

[6] SEC Release No. 34-60215, File No. SR-NYSE-2006-92: "Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452…" July 1, 2009. http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf

shareholders, the impact of Amended Rule 452 on proxy votes from these shareowners will likely be very small in percentage terms compared with that of a smaller company having low institutional ownership and as few as several thousand retail shareholders.

The impact of Amended Rule 452 on smaller companies, including many of those listed on the NASDAQ OMX exchange, will be much more significant. The market capitalizations and generally lower stock prices for NASDAQ-listed companies tend to lead to higher levels of retail ownership, and therefore broker votes (in percentage terms), when compared to the average NYSE-listed issuer. Furthermore, many institutions have policies that prohibit purchases of shares of a company with a price of less than $5. All of which has contributed to the formation of a marketplace in which many small-cap companies have 40-50%, or more, of their shares regularly voted on routine issues by brokerage firms.

The impact of Amended Rule 452 on small/micro-cap companies was central to an earlier proposal from The Altman Group to exempt such companies from the rule. In comments submitted for the SEC's review of Amended Rule 452, The Altman Group urged the SEC to consider expanding the NYSE's exemption from the prohibition in NYSE Rule 452 on broker discretionary voting in director elections to include not only registered investment companies, but also small-cap companies (due to their disproportionately large retail shareholder bases). The SEC did not expand the exemption, but did note in its order approving the amendments that it "understands the concerns raised" (citing, at note 154, "Altman Group Letter; ICI 4 Letter, and Sutherland Letter").[7]

Impact of Notice & Access on Voting by Retail Shareowners

To their credit, regulators have started to address the issue of sharp declines in retail shareowner response rates due to implementation of notice and access. The SEC published, on October 14, 2009, a proposing release to change the notice and access model to: (1) "provide additional flexibility regarding the format of the Notice of Internet Availability of Proxy Materials that is sent to shareholders"; (2) create "a new rule that will permit issuers and soliciting shareholders to include explanatory materials regarding the process of receiving and reviewing proxy materials and voting"; and (3) adopt "revisions to the timeframe for delivering a Notice to shareholders when a soliciting person other than the issuer relies on the notice-only option."[8] The SEC indicated in the release that it is proposing these changes because:

> "(W)e are concerned by statistics indicating lower shareholder response rates to proxy solicitations when the notice-only option is used. According to Broadridge, the percentage of 'retail' shares voted by shareholders in issuers using the notice-only option for distribution to some portion of their beneficial owners is lower than the percentage in issuers that exclusively use the full-set delivery option to provide proxy materials to their shareholders. In addition, when comparing between shareholders in issuers that used both the notice-only and full set delivery options, the response rates of retail shares voted by shareholders that received notice-only was half that of shareholders that received full set delivery. With regard to the effect on voting by retail account holders, rather than retail shares voted, statistics provided by Broadridge indicate even lower voting response rates for retail accounts that received notice-only instead of full-set delivery."

[7] Ibid., p.40.
[8] Securities and Exchange Commission, "Amendments to Rules Requiring Internet Availability of Proxy Materials" [Release Nos. 33-9073; 34-60825; IC-28946; File No. S7-22-09]. October 14, 2009. http://www.sec.gov/rules/proposed/2009/33-9073.pdf

As reported by Broadridge, data on "retail voting response" rates at companies using N&A for votes during the period from 7/1/08 to 6/30/09 showed that the percentage of retail accounts voted were: 64.26% of those who previously requested to always receive full package materials; 72.31% of those who responded to a notice and requested a full package of materials; and 19.8% of those who received a full package because the issuer chose to send full package materials to a subset of shareholders. In sharp contrast, a mere 4.03% of retail accounts that received only a notice voted their shares. The total percentage of retail accounts voted was just 12.72%.[9]

Commissioner Luis A. Aguilar commented earlier this year on N&A implementation: "As many of you are aware, the number of shareholders who voted through companies using the notice and access model dropped dramatically. Retail investor voting, in particular, plummeted. Some reports indicated less than 5 percent of individual investors voted at meetings held by companies that used e-proxy in late 2007 and early 2008. Other statistics compared the level of participation by the same investors before and after the notice and access model was put in place, and found decreases of over 30% for large investors, and over 60% for smaller investors…(W)e should make sure that cost savings come without compromising effectiveness and adversely impacting an investor's exercise of their rights. That seems to have happened here, and we need to fix e-Proxy or scrap it."[10]

Next year, the situation will only get worse. Amended NYSE Rule 452 goes into effect on January 1, 2010, and will result in steep declines in total retail votes. Companies struggling to bolster retail votes due to the impact of Amended NYSE Rule 452 will be less likely to adopt or continue using N&A. Our assessment is that the Commission likely acted to propose rule changes with regard to notice and access in order to both address lower levels of shareowner participation than anticipated (in response to a worsening situation, since retail shareowners were already voting at low levels on instructional proposals before the advent of N&A) and to hopefully mitigate further declines in retail voting that companies will experience next year if they use N&A in an Amended Rule 452 environment. Focusing simply on declining rates of participation under N&A misses the much more significant trend reflected in what were very low levels of retail shareowner participation even before N&A was first implemented. Moreover, institutional owners, who control a large percentage of shares outstanding for most companies, vote a much greater percentage of the shares they own than do retail owners (who vote, even under a traditional proxy distribution method, at well under 50% of shares held). For a number of reasons described both here and below, the right of retail shareowners to fully participate, and have a voice, in the election of directors (even if through the uninstructed vote from brokers) has now been marginalized to such a degree that it is simply untrue to say that their interests will be adequately represented going forward.

The new Proposing Release from the SEC admitted that the proposed changes will only start to address the problem: "We note that there appears to have been some confusion among shareholders regarding the operation of the notice and access model…There may be other reasons why shareholder participation under the notice and access model, especially by individual shareholders, is lower, and we are soliciting comment on why the participation rates are lower and how best to advance the Commission's regulatory interest in informed shareholder participation."[11]

Our view is that regulators should focus on advancing a broader system-wide objective of increasing retail shareowner participation in the voting process. As we explain in more detail in the next section, a

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[9] Broadridge, "Notice and Access: Statistical Overview of Use With Beneficial Owners," as of June 30, 2009. http://www.broadridge.com/notice-and-access/NAStatsStory.pdf

[10] Commissioner Luis A. Aguilar, "Increasing Accountability and Transparency to Investors," Remarks at "The SEC Speaks 2009," Washington, D.C., February 6, 2009. http://www.sec.gov/news/speech/2009/spch020609laa.htm

[11] Securities and Exchange Commission, "Amendments to Rules Requiring Internet Availability of Proxy Materials" [Release Nos. 33-9073; 34-60825; IC-28946; File No. S7-22-09]. October 14, 2009.

combination of factors has accelerated the rate of decline in total retail participation, both as a percentage of shares held by retail shareowners and by the number of owners voting. These factors reflect a systemic challenge for the SEC: one that can only be adequately addressed through broader reforms of the proxy voting system that will lead to a substantial improvement in retail shareowner participation rates. Our view is that a critical missing element in the SEC's current array of proposed rules changes is an actual proposal to reform the OBO/NOBO system. Toward that end, we offer a solution in the text below (see All Beneficial Owner "ABO" Proposal).

Exclusion of Retail Shareowners

The combination of Amended Rule 452 and N&A, even in an amended form, will lead to the practical exclusion of many retail shareowners from the corporate election process. The impact of N&A on retail voting has been dramatic, but had no effect on director elections as long as Rule 452 permitted brokers to vote for all non-instructing clients. Looking ahead to 2010, companies face a system in which the only companies likely to be enthusiastic about using N&A will be those with retail ownership bases that are not large enough in percentage terms to warrant spending money to mail all individual investors full sets of proxy materials, and who will therefore save significant dollars by implementing N&A. However, the retail ownership bases of many publicly-traded companies are large enough, and the negative impacts of both N&A and Amended Rule 452 on retail vote totals will be substantial enough, to convince thousands of companies, both large and small, to permanently avoid or stop using N&A, even if the SEC's recently proposed rule changes for N&A result in modestly improved response rates from retail shareowners. This forecast of N&A use might change if companies could obtain the information they need to mount more cost-effective and broader-reaching proxy solicitation campaigns while using N&A.

Unless the systematic exclusion of retail shareowners from corporate elections is dealt with, recent and upcoming changes in the proxy process may undermine the efficacy of the proxy voting system. Consider the following:

- The elimination of Rule 452 voting on director elections, without providing access to all retail owner names for corporations to contact and solicit, unduly concentrates voting power in the hands of institutional investors (activists in particular) and proxy advisory firms.

- While we have been advocating the need for investor education for 3½ years, we are skeptical of the long-term impact of such education efforts. Education efforts alone will never succeed in engaging a significant portion of the retail shareowner universe on a sustained basis. As a result, companies must be able to actively engage more retail shareowners in the voting process (our ABO proposal [detailed below] would enable companies, or their agents, to solicit all voters). Experience with soliciting NOBOs via telephone has shown that solicitation campaigns can, at times, boost participation rates to more than 50% of retail shares owned (a better result would be expected with regard to ABOs). The negative impact of Amended Rule 452 on retail shareowner participation in the corporate election process is likely to lead to extreme disappointment and increasing costs for many corporate issuers. One need only look at the percentage of retail shareowners who actually vote under N&A to get a glimpse of what the future may hold with regard to the lack of participation by retail shareowners in elections of directors from 2010 onward. Fortunately, it will be relatively easy to track changes in retail voting. What won't be easy to change are the behavior patterns of literally tens of millions of retail shareowners, who for the most part don't see voting for directors as an important responsibility

because no one has ever educated them that it is. In addition, many retail shareowners will not take the time to vote, while others are unlikely to vote without active encouragement (behavior patterns comparable to what is generally seen in state and local elections). The question then is: how many years will it take to get retail shareowners "up the learning curve" on these changes, and then motivated enough to participate in numbers sufficient to create an appropriate balance between retail and institutional participation rates in an Amended Rule 452 environment? Therein lies the crux of the problem. Generations of shareholders have not been educated about the need to involve themselves in the proxy voting process. Now, a radical change in that process is occurring, and a substantial retail investor education effort, which the NYSE Proxy Working Group acknowledged a need for in the spring of 2006, is not even out of the starting gate. In this context, it is easy to understand the distress that many companies feel over having to now grapple with the loss of broker voting on routine director elections.

- The current system of mailing proxy voting forms to street name holders has in itself reduced voting by retail shareowners. The templated Broadridge Voting Instruction Form (VIF), which is used to solicit street name votes, is not easy to read or understand. The generic plastic polywrap mailing package, which is used by Broadridge (and others) to mail proxy materials to shareowners, results in the delivery of a package that is not necessarily identifiable as coming from the company that the investor has a connection to. This has created a disconnect in which shareholders do not associate the materials they receive with the company they have invested in. Fortunately, the Commission's recent proposing release on "Amendments to Rules Requiring Internet Availability of Proxy Materials" indicated that the SEC is now looking closely at how the content of a form (N&A-related, but potentially others) can influence shareowner participation in the election process.

- The interests of retail shareowners have become so marginalized that the current discussion about reforming the process for director elections has, until now, focused on a range of issues, but not yet the right of a company to have open access to the identities of all of its owners and the ability to actively solicit these parties (in order to increase the numbers and percentage of shares represented on instructional proposal votes).

Collectively, these factors and others have contributed to a system in which voter participation by retail shareowners has been declining for the last 30+ years (and at a more rapid pace at companies using N&A), while at the same time the influence of institutional investors and proxy advisory firms has increased sharply. Indeed, there have been rules put in place that require money managers, pension funds, mutual funds and others to take a more active role in voting proxies. Institutions, faced with a fiduciary obligation to vote and forced by the complexity of receiving, analyzing, and acting upon numerous proxy statements, have with good reason turned increasingly to outside parties to assist them. In contrast, retail shareowners holding in street name, who generally lack knowledge of, or the financial resources to hire, a proxy advisory firm, will soon be stripped of an ability to rely on their brokers to vote their shares without specific instructions in uncontested director elections. In addition, some are concerned that the election process in place today can involve synthetic votes, and votes from parties investing for only a few days simply to influence voting results, or votes cast or influenced by non-shareholders. This combination of factors raises questions about inequities in, and the integrity of, the proxy process, which we believe the SEC can address, in part, by enabling direct solicitation by companies of all of their shareholders.

Retail shareholders, as a group, are seeing their influence and interests being marginalized. Over the years there have been remarkably few complaints voiced by retail shareowners over the issue of brokers voting on their behalf. Countless millions of shareowners, along with the NYSE and other regulators (until recently), accepted that there was nothing wrong with this approach to director elections. Now regulators are pulling out a safety net in terms of ensuring that the interests of retail shareowners are at least represented in practice when it comes to routine broker voting on director elections. At the same time, we are likely to see continued block-like voting by certain institutional owners in response to policies they have developed or recommendations made to them by proxy advisory firms. Moreover, the playing field is being restructured without any substantive effort (to date) to address the underlying causes of retail voter apathy, including the need for investor education.

Some thirty years ago most shares were held by registered owners with identities that were known to corporations. In 1976, approximately 71% of securities were held in that manner, while approximately 29% were held in street name. By 2005, some 85% of exchange traded securities were held in street name.[12] As retail held shares transitioned from mostly identified to mostly hidden behind "street names," and institutional ownership moved from nominee registration to bank and brokerage firm registration, primarily through accounts custodied at Depository Trust Company ("DTC"), the question of whether to enable companies to learn the identity of owners was examined on several occasions. The SEC has in the past promoted transparency by putting in place requirements for public filings under SEC Rules 13(f), 13(g) and 13(d), and the NOBO/OBO system (to identify non-objecting owners). While such disclosures only provide partial data as to ownership, historically they were widely seen as generally sufficient for corporate needs in an environment in which levels of retail shareowner participation in director elections were far higher than we are likely to see from 2010 onward. However, the playing field when it comes to retail votes has been changing for a number of years already.

Various factors have contributed to retail shareowners voting less often, and representing a smaller percentage of the total number of shares voted at annual meetings on instructional proposals (director elections will become instructional in 2010). First, and foremost, has been the growing power of institutional investors, who now control a much larger percentage of the floats of most publicly-traded companies compared to a generation ago. Retail shareowners are also busier today, and more apathetic about proxy voting. Retail shareowners who are contacted and asked to vote generally give two reasons for why they have not voted: 1) they thought that their broker would take care of voting for them; or 2) they consider their positions "small," and wonder whether their votes would really matter. However, these factors alone cannot fully explain the scale of the decline in retail voting, at least on a percentage of shares held basis.

In light of the Commission's recently released proposals for rule changes affecting notice and access, it is clear that the SEC is keenly aware of the substantial impact that the design of a "form" can have on retail owner participation in corporate elections. Transfer agents, who routinely mail materials to registered shareholders, suggest that they get higher response rates from first mailings than Broadridge does as the proxy agent for virtually all brokers. What could cause this disparity? The Voting Instruction Form used by Broadridge may be a factor. The VIF itself is confusing, does not "feel" as if it has come from the actual corporate issuer, and is not easy to understand or complete. From the issuer's perspective, the VIF cannot be customized, is not user-friendly, and is not the form that is actually filed with the SEC. In addition, among the other differences between transfer agent mailings to registered owners and Broadridge mailings to street name holders are the mail and solicitation advantages that can be realized with direct mailings and solicitation

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[12] Reports and data as cited in SEC Release No. 34-60215, File No. SR-NYSE-2006-92: "Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as modified by Amendment No. 4, to Amend NYSE Rule 452…" July 1, 2009.

calls to registered owners as compared to problems with how street name accounts are now handled (with mailing delays, high costs, and limitations on who can be called [NOBOs only]).

We now have in place a system with a vendor determining for corporate America what the voting forms being mailed to street name shareholders look like, while low response rates when using these forms can create the need for more mailings. Years ago, when companies delivered proxy materials directly to brokerage firms, it was the company proxy card that was usually mailed in a brokerage firm envelope, thereby creating a more direct link between a corporation, a shareowner, and the firm that the shareowner held shares through. (We acknowledge that the proxy card with appointment language may not be the appropriate instrument to send to street name holders.) Even today, before Amended Rule 452 takes effect, many corporations seeking to pass instructional proposals are compelled to complete follow-up mailings through Broadridge due to high rates of retail shareowners failing to return the first VIF sent to them and the inability of companies to solicit OBOs. Use of the VIF instead of a more user friendly form has likely contributed to the long-term decline in retail voting, while a similar problem with regard to notices sent to retail shareowners for N&A appears to have accelerated that decline. When solicitation calls are limited to NOBOs in difficult solicitation campaigns, more mailings become a necessity not a luxury. With more and more unlisted phone numbers and cell phones reducing the universe of NOBOs that can be contacted by telephone, follow-up mailings through Broadridge, with associated increases in cost, will become even more prevalent in the future -- unless there are changes to the existing system. Moreover, as a result of significant staffing declines in proxy departments at brokerage firms, which have been driven, in part, over the last thirty years by moves to outsource certain operations to Broadridge, there has also been a substantial downgrading of support to corporations that seek help from brokerage firms in securing the votes of non-responding beneficial owners.

All of these factors indicate that the "street name" solicitation system does not work as well as the direct communications system available for mailing and contacting shareholders who own shares in their own name and not through a broker or bank. Certainly, given that retail shareholders who vote are generally supportive of management, but much less likely to vote than are institutional shareholders, the SEC must move to create a balance between the rights of a company to secure votes from all retail shareowners holding in street name, and the current system which can easily produce a tidal wave of votes against a board member or board recommended proposal from institutions and activists who vote themselves, or from others whose vote is influenced, or cast, by a proxy advisory firm.

That is where things stand today. It is not a system designed to encourage retail shareowner participation in the voting process. Change is necessary. While we welcomed news on October 14th that the SEC has proposed changes to notice and access rules, we do not believe that changes adopted will result in a significant increase in retail shareowner participation rates. A more targeted approach to getting more retail shareowners involved in voting at company meetings is needed. Moreover, it is also clear that total votes cast in non-contested director elections will decline at virtually every public company annual meeting held in 2010. In light of this prospect, the SEC should consider reforms that would help companies increase total voter participation. Our recommended strategy starts with the following proposal.

All Beneficial Owner (ABO) Proposal

Let us begin by offering some background on the development of our thinking on what we call the ABO proposal. As proxy solicitors, we are constantly impressed by the fact that a significant percentage of NOBOs contacted by telephone because they have not yet voted their shares for a particular company's meeting do then take the time to vote their shares. The high level of interest and involvement by non-responding retail shareowners when "engaged in the process" convinces us, more than anything else, that

access to all shareowner names under an ABO system will help to improve rates of retail owner participation in the proxy voting process.

In July 2006 we communicated with Catherine Kinney, then President of the NYSE, to express our opposition to the Proxy Working Group (PWG) proposal to amend Rule 452. We also commented on the composition of the PWG, as we felt it had a disproportionately large-cap view of the world. In that communication, we first proposed that the NYSE not seek implementation of its proposed change to Rule 452 unless two things occurred: 1) an All Beneficial Owner approach for corporate meetings be implemented in conjunction with any change to Rule 452; and 2) implementation of a comprehensive investor education effort. The need for a robust investor education effort is something that the SEC acknowledged in its July 1, 2009 order approving Amended Rule 452: "The Commission supports the Proxy Working Group'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."[13] Unfortunately, as of mid-October 2009, it was quite clear that there will be insufficient time for the NYSE and its member firms to educate all investors about the rule change before it goes into effect in January 2010.

On July 1, 2007, we communicated to the SEC our opposition to the PWG proposal and reiterated our recommended approach. An ABO model was proposed by us as a reasonable counter-balance to a proposed change to Rule 452. In that communication, and again in a letter dated March 27, 2009, in response to an SEC request for comments on the proposed change in Rule 452, we suggested that the SEC tie any implementation of a changed Rule 452 to the elimination of the distinction between NOBOs and OBOs, and the establishment of ABOs, at least with regard to record dates for annual or special meetings. While others have called for a complete elimination of the distinction between NOBOs and OBOs, with all shareholder names available to the company at all times, and with nominee registration an option for shareholders, we have proposed the ABO methodology as a practical solution to address mailing and solicitation issues through the disclosure of all shareowner names only for use at annual and special meetings, and for a limited number of other circumstances.

We are expanding our request for ABO access to include information requests for corporate actions, including rights offerings, exchange offers and tender offers, as well as for required and voluntary regulatory mailings by mutual funds and other issuers. All securities, including equity and debt, would be subject to ABO rules. The OBO/NOBO distinction would also be replaced by ABO for noteholders and bondholders in any instance where a corporate debtor is either: (1) negotiating a plan of reorganization under Chapter 11 of the Bankruptcy Code, or is seeking creditor approval of such a plan; or (2) negotiating, or has submitted, a "pre-packaged" plan for the approval of its creditors.

The ABO solution requires no new technologies, and only marginal changes in existing software, to be implemented. Nor does this solution require substantial new spending by banks or brokers. For ABO to work it merely requires the SEC to amend a rule that would permit Broadridge, or any other party acting in a similar capacity, to share all names (NOBOs and OBOs, collectively ABOs) with an issuer. The rule change would allow companies the right to request a complete list (i.e., an ABO, or All Beneficial Owners, list) of all their shareholders as of a specific record date. Under ABO, the names of all shareowners (indicating shares held) would be disclosed, including those shareholders who have registered their shares through a nominee account. Companies would not be required to request an ABO list, but would be guaranteed the right to do so. All foreign accounts must also be required to be identified under our ABO methodology. Our vision is not focused exclusively on U.S. markets. Foreign depositories (peers of the DTC), as well as global and local custodians domiciled outside of the U.S., should also be required to identify all beneficial owner names.

[13] Ibid., p.21.

Additional costs incurred as a result of initiatives like ABO, which seek to correct major deficiencies in the proxy voting system and deal with issues surrounding the accuracy and fairness of proxy vote counts, are a necessary price to pay for ensuring integrity in the voting process. It is reasonable to consider that corporations ordering an ABO list pay some nominal fee to offset these costs, just as they currently do for a NOBO list. On the other hand, an ABO solution might lead to cost savings for companies and dissidents by reducing the expense associated with mailings to shareholders and proxy solicitation campaigns (because parties will be able to focus solicitation efforts on their larger retail holders with positions held in street name). Confident that they can get the votes they need under ABO, this may actually generate more interest from corporations in using notice and access. If the SEC ultimately decides against the complete elimination of the distinction between NOBOs and OBOs, we believe our ABO proposal, which limits a company's access to an ABO list to generally no more than one or several days per year, adequately addresses the question that some will raise about any new disclosure system being used to "track trading."

With increasing numbers of companies adopting majority voting for director elections (and the possibility that the U.S. Congress might eventually mandate majority voting for all public corporations), companies (large and small) will be facing ever growing numbers of close votes, that is, votes in which small swings in total votes cast from any segment of the shareholder base may determine the final outcome. We expect to see substantial growth in the number of situations in which the votes, or non-votes, of even a small percentage of the retail shareholder base could be the difference between a director remaining on the board or having to tender a resignation. Moreover, the SEC is currently considering new rules on "proxy access," and reviewing an array of proposals from companies in response to its Proposing Release on "Facilitating Shareholder Director Nominations," which raise the prospect of a sharply escalating number of proxy contests over coming years. Numerous companies submitting comments to the SEC on Proposed Rule 14a-11 have proposed an array of new vote "thresholds," e.g., to determine eligibility for resubmissions of shareholder nominations. (The Altman Group will soon publish a comprehensive study of all 500+ letters submitted to the SEC on proxy access, which we will forward to the SEC.) While we wait for the SEC's decision, sometime in early 2010, on proposed rules for proxy access, the trend is clear - there will be a very sharp increase over coming years in the number of proxy fights and close votes.

If weaknesses in the current proxy voting system are allowed to continue in this environment, then pressure for change will mount as parties lose close votes that could otherwise have been won given full access to all shareholder names. Retail shareowners are far more likely to support management in a contested election or challenging proposal vote than are larger owners or accounts influenced by proxy advisory firms. The ABO model, in our view, is the only workable and fair solution for both companies and dissidents alike, each of which will gain an opportunity to actively solicit heretofore unknown holders.

Some activists, pleased with the steady move toward large owners consolidating their power in corporate elections, may oppose the ABO concept simply because it allows a company to contact all of its retail shareholders (who are generally supportive of management) and gain a comprehensive accounting of all parties that own its shares, including non-filers such as small hedge funds and institutional owners. Of course, since ABO names would be available to all parties engaged in proxy contests (depending on applicable state statutes), any such opposition should be discounted.

Arguments about a need to protect clients from direct contact with the companies they are invested in ring hollow. Many foreign markets require greater levels of disclosure to companies of beneficial ownership – all without negative consequences for market participants. Use of NOBO lists in the U.S. by corporations over the last 25 years has not created confidentiality problems for either brokerage firms or their clients.

In our view, no reasonable argument can be made to deny a company the right to obtain and use for solicitation purposes a fully transparent and reconciled list of its own shareholders in order to establish who

actually has the right to vote at a meeting. This "right" is one held by all of a company's shareholders, and not just large or sophisticated owners. It is a shareholder right to expect that the proxy voting process will be structured to maximize participation from all shareholders rather than be tilted in favor of particular groups of shareholders, including those required by regulation or law to vote, or parties that may even be capable of gaming the process. In a speech delivered on May 20, 2009, SEC Chairman Mary Schapiro declared that shareholders have a "fundamental right to nominate and elect members to company Boards of Directors."[14] If we assume that nearly all of the shareholders who will exercise the "fundamental right to nominate" directors will come from the ranks of activists, institutions and other sophisticated shareholders, then we must expect regulators to put into place policies that will ensure that all shareholders, including retail shareowners, are actively encouraged through various solicitation techniques to participate in the process to "elect members to company Boards of Directors." What concerns us most is ensuring that the "elect" part of Chairman Schapiro's statement is ultimately interpreted to mean that all retail shareowners have a fundamental right to fully participate in the election of directors, and not be effectively excluded as a result of rules and processes governing the proxy voting system.

When it comes to identifying and communicating directly with all their securities holders, solvent companies should not have fewer rights than a company operating under the protection of the U.S. Bankruptcy Code. In 1991, Bankruptcy Judge Harold Abramson ordered that the names of all securities holders be identified to enable direct solicitation of them, both NOBO and OBO, in the Southland Corporation bankruptcy case. The Judge ordered all securityholder names to be disgorged, both debt and equity holders, in part to ensure that there was a direct audit trail from the vote cast by a securityholder to the tabulation of the securityholder's vote. This situation also led to this author playing a role, nearly eighteen years ago, in developing a new vote methodology still in use today by public companies in the United States.

As a result of questions of law raised by the Abramson decision in Southland concerning, among other issues, numerosity and duplicative voting (issues under the bankruptcy code of some importance), the law firm Weil, Gotshal & Manges asked me to devise a methodology that would enable public company debtors, in cases where a pre-packaged bankruptcy vote was being used (meaning there is no judge to order the disgorgement of securityholder records), to complete votes under the rigorous standard set by Judge Abramson. The method developed, which I coined the Ballot/Master Ballot voting system, has been the standard vote methodology used in public company bankruptcy cases in the U.S. for more than 15 years and has been used in many hundreds of public company bankruptcy votes. The Ballot/Master Ballot voting system is one of two standard securityholder voting methodologies used in the U.S. since 1991. The other is the corporate election system, which is under review at this time. It is also interesting to note that when Broadridge mails bankruptcy voting materials they use actual beneficial owner ballot forms provided to them, and not a VIF. Under an ABO system a debtor could, without a court order, identify and solicit votes from all creditors in the same way a corporation could identify and solicit all of its owners with regard to an annual or special meeting.

Our ABO and related proposals (discussed below) are a call for companies to have the right to obtain more comprehensive "ownership" information, and to be able to use that information for mailing and solicitation purposes. We are not seeking to make it a requirement that they do so. The current system creates tremendous disparities in terms of direct shareholder communications and solicitation opportunities. Why should one company, simply because it is able to identify 80% of its shares from 13F filings and another 10% from NOBO disclosure, have a substantial advantage in terms of conducting effective and broad-based solicitation campaigns over a smaller company that has holders controlling 10% of its shares filing 13Fs and

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[14] Chairman Mary L. Schapiro, "Statement at SEC Open Meeting on Facilitating Shareholder Director Nominations," May 20, 2009. http://www.sec.gov/news/speech/2009/spch052009mls.htm

35% of its shareholders disclosed as NOBOs? In addition, the lists of owners provided by brokerage firms and banks to Broadridge can at times enable too many parties, and hence some non-record date shares, to vote at a meeting, while at the same time shielding the identities of many beneficial owners. Is this really what the SEC and NYSE intend to have as the proxy voting system of the future?

Modernizing the Proxy Mailing and Tabulation Process

We hope that the SEC, as part of its current review of proxy plumbing issues, will examine the financial incentives underpinning a proxy voting system that has as its foundation extremely low response rates from retail shareowners. At minimum, we recommend that the SEC encourage the NYSE to mandate that brokerage firms allocate funds for investor education. After all, brokerage firms have invested little, if any, of the monies paid to them directly by corporations or on a firm-by-firm basis by Broadridge to help deal with brokerage industry issues that have led to declines in votes received by corporations from retail shareholders on instructional proposals.

As is well known, Broadridge has a virtual monopoly position with regard to the distribution of materials and the tabulation of votes from clients of brokerage firms and banks. We do not believe that corporations and retail shareowners are well served by a monopolistic system that uses what some contend is non-market rate pricing, and places unnecessary distance between the votes of shareholders and the corporations or dissidents who need or want those votes.

While rules governing annual meetings drive a substantial revenue stream toward brokerage firms and Broadridge, the corporations who pay NYSE-approved and other rates have neither control over the process nor any ability to change it. In our view, it is the corporate issuers and their shareholders who should be the primary beneficiaries of economies of scale realized through increased efficiencies and greater volumes of mail processed than in years past. If brokerage firms determine that it is in their interest to hire a third party to handle the mailing and processing of proxy materials, the resulting efficiencies should be translated into reduced costs to the corporations footing the bills. Issuers should also be able to choose other parties with possibly more cost-effective approaches to handling mailings to shareholders as well as proxy mailings and tabulations, if they exist.

It is our opinion that the SEC should consider the establishment of an alternate mailing methodology that will create an opportunity for parties other than Broadridge to mail proxy and other materials and tabulate the votes of street name holders, if a corporation deems such a step to be in their best interest. Companies paying the fees for services should be able to undertake N&A and other mailings directly to beneficial owners, and mail proxy materials using a customized proxy form. Even so, Broadridge would likely continue to service the significant majority of all mailing and tabulation projects. Broadridge could also offer mailing and tabulation services using an ABO system. The quality, service and price offered might then become the deciding factors in terms of which vendor a corporation selects to undertake projects under ABO. Needed changes to facilitate such a system might include having each broker assign voting rights through an omnibus proxy process to its clients in much the same way DTC assigns voting rights to its participants. Any new mailing process used by any party, including Broadridge, should be available to be audited by qualified third parties. Of course, there will be issues to work out, such as how electronic votes from institutions using the Broadridge, RiskMetrics, or other voting platforms will be dealt with, or what procedures need to be established to ensure the integrity of votes received directly by corporations or their agents (by mail, telephone, electronically, or voice votes). Such issues are currently being dealt with effectively through procedures established for registered owners.

In addition, the concept of an aggregator of shareholder information, which could make NOBO/OBO (or ABO) and record date information available to a variety of entities, including Broadridge, is one put forward by other commentators. We believe this idea merits very serious consideration by the SEC.

The current proxy mailing process is also facing scrutiny as the SEC considers new rules on proxy access. Numerous companies submitting responses to the SEC's Proposing Release on "Facilitating Shareholder Director Nominations" were critical of the proposed mandate for a universal proxy card that will include both management and shareholder nominees (and more nominees than open board seats). A number of companies urged the SEC to allow companies to have the flexibility to design "user friendly" proxy cards and notices, as well as include a single vote option for the company's nominees as a group – on what could otherwise be a very confusing (for retail shareowners) universal proxy card. Some also asked for greater freedom to include educational materials with "notice" mailings. In our view, the proxy mailing process under the proposed proxy access rules must be flexible enough to permit a "best practice" to emerge as the industry standard and not necessarily default to a model put forward by Broadridge or representatives of the brokerage industry.

Any new mailing/voting system approved by the SEC for use by corporations or their selected agents must preserve the right of a corporation to secure the uninstructed vote for auditors available under Amended Rule 452 to establish quorum at a shareholder meeting. The brokerage firms must also be required, when the issuer (under an ABO system) selects a vendor other than Broadridge to handle the mailing and tabulation of votes, to exercise their rights to vote uninstructed shares under Amended Rule 452 on all routine proposals in exactly the same manner as they handle the process when Broadridge uses the existing mailing/tabulation methodology. Any new system without these requirements will not be workable. In this regard, while there are some complicated issues that will need to be resolved, we are confident that workable solutions can be found.

As for market acceptance of the ABO concept, we strongly believe that a significantly greater number of companies will order ABO lists than have previously ordered NOBO lists. Corporations seeking to either secure additional votes to elect directors or generally increase the number of shares voting in director elections will ensure that this occurs. Furthermore, many more companies are likely to order ABO lists to actively solicit owners for director votes and in support of various proposals than will elect to use an alternate mailing approach under ABO.

In our view, the objective of reform should not be to impose a universal system, but rather to make available more choices, and more cost-effective solutions, to all companies. Indeed, we do not want new rules imposing a new mailing/voting system on companies that are content to continue using the current Broadridge-centered system. On a related note, we do not think the SEC should mandate use of a new mail/tabulation system under ABO, but might simply wish to consider whether to require its use in certain situations, including proxy fights, withhold campaigns, merger votes, or other special situations.

Audit Trail Under the ABO Process

There have been complaints about the inability to audit street name votes in close proposal votes, withhold vote campaigns, and proxy fights. It is interesting to note that the records of transfer agents and other parties receiving and recording votes of registered owners are fully auditable. Proxy solicitors also digitally record calls when securing telephone votes from shareholders and then send confirmation letters, creating both a fully auditable trail of each conversation they have and an opportunity for an owner to change a vote if they wish to do so. A clear audit trail is not generally available with regard to the VIFs received for street name accounts under the current system.

One of the key advantages of using the ABO methodology would be that for the first time there would be an audit trail available to verify votes cast by clients of banks and brokers in all elections in which a company chooses to take control of the mailing/tabulation process from Broadridge or the company selects Broadridge to handle its mailing/tabulation using the ABO approach. The value of this approach would be most evident in confirming votes in close elections, withhold campaigns, or proxy fights. The ABO methodology might add to the cost of tabulating results in certain situations, but the objective of verifiable results is surely worth the price.

Who Benefits from ABO?

With an ABO system in place, regulators would benefit from more transparency, greater disclosure, and increased participation in the voting process by retail shareowners, which would also improve the integrity of the proxy voting system. Corporations and other parties soliciting votes in a close election would benefit by ensuring that their messages reach "all" shareholders. Retail shareholders would benefit by having a greater say in corporate decision-making than is possible under the system that will come into effect on January 1, 2010. Voting results would also represent more closely than through the current system the will of "all" shareholders. Under ABO, non-contested solicitation campaigns would generally be more effective, completed faster, and involve fewer follow-up mailings. While The Altman Group and its competitors, as proxy solicitors, might arguably benefit from access to additional names identified under ABO, revenues from telephone solicitation fees associated with many assignments would actually decline. This is because a smaller number of larger holders could be contacted in order to reach client objectives. With proxy solicitors expected to benefit from increased demand for their services as a result of Amended Rule 452, adoption of ABO will help to hold down the costs to companies of solicitation efforts that were not necessary when brokers could vote uninstructed shares for directors.

Other Issues:

While the ABO proposal addresses one of the most critical problems that we see in terms of "proxy plumbing" issues, there are a range of other weaknesses in the mechanics of the proxy process that also need to be addressed. In the following analysis, our description of each issue is followed by a possible solution. We recognize that some of the issues are complex. What we present below are *possible* solutions, which should be viewed as starting points for further discussion. We remain open to considering alternative approaches to fixing each problem.

Overvoting

Overvoting usually results from the practice of share lending due to short sales or brokers who do not net out their long and short positions, which can sometimes lead to a broker having clients cast more votes than the firm has in its position at DTC. While the problem of overvoting is not as prevalent as it was just a few years ago, it still persists because some brokerage firms apparently prefer not to pre-reconcile voting rights with regard to annual meetings. As a result, there is still a serious question as to whether accurate voting lists are always being used.

Altman Solution: A complete list of owners (as available in an ABO system), segregated by share amounts associated with each firm, would enable companies to easily identify potential overvote situations, e.g.,

situations where brokers or banks identify more shares than DTC records indicate are eligible to vote. The issue of transparency and overvoting by brokers could be addressed via this simple change. Some in the financial community may feel pressured by the challenges and difficulties associated with pre-reconciling voting rights. If the lists they now produce are accurate, then no additional work would be required. However, if the lists are inaccurate, then obviously the reporting process needs to be improved. With an increasing number of votes each year ending up with very small margins of victory or defeat, this issue must be dealt with.

Shares on Loan / "Empty Voting"

Firms using borrowed shares, derivatives, and other transactions to influence the outcomes of votes -- with minimal or even a negative economic interest, so-called "empty voting," is an issue raised by former SEC Commissioner Paul S. Atkins back in January 2007.[15] He did so following publication of an article on the problem by Professors Henry Hu (now Director of the Commission's new Division of Risk, Strategy, and Financial Innovation) and Bernard Black titled "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership."[16] Despite the view of many on Wall Street that existing regulations and practices render concerns about "empty voting" of little or no consequence, it is clear to us, and in the record of submissions to the SEC by various companies that many corporations view this particular issue as one of significant concern. Since the issue of uninstructed broker voting without an "economic interest" in the company ("empty voting") played a role in the decision to Amend Rule 452, the SEC should now address the issue of "empty votes" by activist investors and others.

Changes in voting rights for institutions that have loaned out shares, and the often undisclosed changes in voting power for those who have borrowed shares or passed them along to new owners on the buy side of short sales, present a complex issue when it comes to promoting transparency with regard to voting rights. Corporations looking at 13F reports have no way of knowing how many shares reporting institutions can actually vote, net of any loaned or borrowed shares. Another issue is the lack of timely disclosures of substantial changes in voting rights in the period of time from the end of a calendar quarter through the record date for a vote. In addition, institutions have commented that if they were made aware of what issues were being considered at an annual meeting in advance of the record date they would have an opportunity to make a decision as to whether or not to lend shares, or recall shares already loaned out in order to reclaim their voting rights.

Altman Solutions. We have two distinctly different proposals.

First—Substantial differences in voting rights vs. disclosed ownership should, in itself, be subject to disclosure. Contingent upon a triggering event (e.g., a defined % change), the SEC should consider requiring 13(f) filing institutions to not only identify holdings, but also voting rights in their control as well as those passed to others through loans. Such disclosures should not necessarily be limited to the end of each quarter.

Second—The SEC should seek to establish a voluntary system that would enable corporations, on a pre-record date basis, to inform interested parties of the nature of the agenda items that will be considered at the annual meeting. For example, companies with routine agendas can so indicate. Because of market sensitive

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[15] http://www.sec.gov/news/speech/2007/spch012207psa.htm
[16] Hu, Henry T.C. and Black, Bernard S., "The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership," *Southern California Law Review*, Vol. 79, pp. 811-908, 2006.

information or other issues requiring confidentiality, companies would not be required to participate in this system. A company could also identify that they will have a non-routine agenda, and even identify the type of agenda items to be considered if they choose to do so. Such a system, which we first conceived of and discussed in July 2009 with Hye-Won Choi, in her capacity as the head of corporate governance at TIAA-CREF, would enable institutions to determine whether they wish to recall shares out on loan based on the agenda items to be considered.

Opaque Ownership

The use of financial derivatives to obscure a shareowner's actual ownership position (and/or non-disclosed voting rights) from an issuer poses significant challenges for companies. The requirement to disclose artificial ownership or voting positions is still murky and not specifically covered by Commission disclosure rules requiring transparency of ownership positions, even in those cases where an entity would otherwise be required to file under 13(d),13(f) or 13(g).

Altman Solution: The SEC should require all beneficial owners who have disposed of voting rights in excess of a pre-determined percentage, and within a time frame surrounding the record date of a particular company's meeting, to identify any situation where they have voting rights for fewer shares than are being disclosed in their 13F or other filings. Likewise, all parties who have increased their voting rights substantially should also be required to file in a timely manner - so that previously undisclosed voting blocks will become information accessible to corporate issuers. A privacy argument has been used in the past by institutions that do not wish to have their ownership or derivative positions disclosed, fearing it might reveal trading strategies. While periodic public disclosures might be done within 13F filings (for example, adding a column disclosing total actual voting rights in a company's stock after accounting for loans or other items that result in a material change in net voting rights), event-driven reports could be structured as confidential disclosures made available solely to the issuer or its agent, and only for a narrow range of record dates, including those for the company's annual meeting, special meetings, an exchange offer, bankruptcy vote, etc.

More Timely Disclosures

Issuers are now required to disclose the record date for their annual or special meetings earlier than they need to, which, given advances in technology, trading strategies, and the use of derivatives and stock loans, may work to a company's detriment. In contrast, institutions are submitting typically "stale" information with regard to ownership and voting rights. Technology has advanced far enough to consider leveling the playing field in terms of timeliness of disclosures. While the number of days for companies to give advance notice of a record date for an annual meeting can be easily changed, the more challenging hurdle will be to have institutional investors file more timely 13(f) disclosures.

Altman Solution: The advance notice requirement of a record date for an annual meeting should be reduced to 10 business days. Rule 13(f) filings should be due within 15 days after the close of the quarter. Consider the following scenario. Institutions can delay filing their 13F form for up to 45 days after the end of a quarter (in this example, for a position held as of March 31). Now, if that same date (March 31) is also the record date for a company's annual meeting held before May 15 (the final date for required 13F submissions showing holdings at March 31), the company may not have an accurate accounting of its "street" held institutional shareholder base and lack visibility as to who has voting rights for the annual meeting. Such

delay makes little sense when NOBO requests and company record date information are available on a several day turnaround basis from Broadridge. We also take note that a significant number of 13(f) reporting institutions (large and small) are not only able, but already have processes in place, to meet a quarter-end + 15 day filing schedule for their 13F forms. Moreover, many institutions subject to 13(f) filing requirements are also able to deliver quarterly statements to their clients within a few weeks after the end of each quarter.

Investor Education

Both the SEC, in its order approving Amended Rule 452, and the Proxy Working Group, in its report of June 5, 2006, have previously acknowledged the need for a substantial investor education effort on the proxy voting process and the impact of changes resulting from Amended Rule 452. However, no substantial education effort on this subject has ever been launched, let alone initiated in time to show significant progress in preparing individual shareowners for the transition in broker voting taking place on January 1. Perhaps the daunting nature of the task, or anticipated costs, have slowed progress. It is our view that the NYSE should never have issued the Proxy Working Group recommendation to amend Rule 452 without first outlining and then implementing an investor education process. The NYSE was aware, or all decision-makers should have been aware, that Amended Rule 452 was going to compound a long-term problem marked by low participation rates for retail shareowners with regard to instructional proposals.

Commissioner Elisse B. Walter recently commented that with regard to the implementation of Amended Rule 452: "We all need to make sure that shareholders understand these changes and what they mean for the upcoming proxy season. We at the SEC will be doing our part to educate investors, and I hope that all of you will do the same." [17] Since no education effort was started when the NYSE first asked for approval of Amended Rule 452, and here we are in late 2009 with no program in place, we offer below a possible starting point for what will have to be a long-term and sustained education program. It will take long-term and sustained efforts for investor education on proxy voting to have even a modest impact on retail shareholder participation in corporate elections. The scale of that task, as well as vote shortfalls, will only be partially ameliorated by a projected increase in the number of solicitation campaigns over coming years. Indeed, telephone solicitation efforts, which inform shareowners that their votes are important and that their brokers are not permitted to vote for them, should be viewed as another element of investor education. As a result, we encourage the SEC to establish a process for monitoring both investor education efforts and progress in improving participation by retail shareowners in the proxy voting system. The SEC should also track the impact on retail voting of solicitation campaigns, and compare the dramatic differences in results between companies using mail only vs. a combined mail and telephone solicitation approach.

Altman Solution: The NYSE should mandate that all member firms distribute educational information concerning "proxy voting" to all new clients from a pre-selected start date forward. The NYSE and NASDAQ OMX could also jointly prepare educational tutorials (print/videos/e-learning) on client voting that all brokers can refer clients to. Good educational information about voting is now available online from Broadridge.

As for existing retail shareowners, every member firm of the NYSE, as well as all other firms who clear through member firms, should be required to participate in an ongoing education effort that would require all firms to mail educational inserts concerning "voting" together with their statements to clients. These printed materials can be developed by individual firms for use with their clients, subject to an

[17] Commissioner Elisse B. Walter, "SEC Rulemaking – Advancing the Law to Protect Investors," Comments before the 48th Annual Corporate Counsel Institute (Northwestern University School of Law, Oct. 2, 2009).

established procedure, or the firm can use materials prepared and printed by a joint NASDAQ/NYSE committee.

Since firms are already paying for postage and the envelope used to mail monthly statements, the only incremental cost might be a few pennies per customer per month, to aid the cause of investor education. Given the revenue received over the years by the brokerage firms through their proxy departments on the fees paid to them by Broadridge (for the right to mail materials to their customers and charge corporate issuers for those mailings), it seems appropriate that brokers should be willing to incur a modest cost per account - paid over a period of time - in order to fund a multi-year education effort. The internet and e-mail could also be used, e.g., in cases where a broker distributes monthly statements electronically, and to support the information needs of shareholders who prefer to obtain information online. Details on this suggestion can be easily worked out in a short period of time because all of the mechanics are already in place. Informational inserts could also be included in proxy packages distributed by Broadridge or another party managing a mailing under ABO. The NYSE, individual brokerage firms or corporations could easily prepare explanatory materials concerning the importance of voting. Corporations would pay for any inserts they produce, but not for those prepared by brokerage firms or for any other education efforts undertaken by the NYSE or brokerage firms.

After years of discussion and no action by either the SEC or NYSE on a major education effort, Amended Rule 452 creates a new urgency for the NYSE to adopt, or the SEC to mandate the implementation of, an effective initial effort on this issue. We believe that such an effort can be undertaken inexpensively. The basic proposal outlined above could be implemented by the spring 2010 proxy season, particularly so if it is given a priority comparable to the Commission's apparent willingness to address problems with N&A on an expedited basis (including directing the Office of Investor Education and Advocacy to develop a program designed to educate and inform shareholders about the notice and access model).[18]

Any additional proposals adopted must be broad-based and designed to engage shareholders' interest. No doubt the NYSE, SEC, and others will wish to add other dimensions to the approach recommended here. We would wholeheartedly support such initiatives.

Conclusion:

Some of the issues that we have raised concerning the mechanics of the proxy voting system may appear on the surface to be difficult to resolve, but are open to practical solutions. In our view, it is most important to focus regulatory reviews and potential action on improving access to shareholder names through the adoption of ABO, which will help to increase participation rates of retail shareowners at all meetings where direct mail or telephone solicitation efforts are used. It is also vital to focus on increased accuracy of vote tabulations, which can be accomplished through the availability of an audit trail for the solicitation of street name holders conducted using the ABO approach. The ABO approach is a practical, inexpensive, and achievable solution. In addition, we look forward to exploring any solution that will ensure the integrity, fairness, and openness of proxy voting, as well as helping companies and other parties who are soliciting votes to identify and communicate with all shareowners who possess actual voting rights. Implementing any or all of the proposals outlined herein will go a long way toward meeting those objectives.

[18] Securities and Exchange Commission, "Amendments to Rules Requiring Internet Availability of Proxy Materials" [Release Nos. 33-9073; 34-60825; IC-28946; File No. S7-22-09]. October 14, 2009.