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March 27, 2009

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549
Via e-mail: rule-comments@sec.gov

Re: Proposed Amendment to New York Stock Exchange Rule 452, File Number SR-NYSE-2006-92

Dear Ms. Murphy:

I am submitting comments in response to the Securities and Exchange Commission (“Commission”) rules change notice based upon the recommendation of the New York Stock Exchange’s (“NYSE”) Proxy Working Group (“PWG”). The foregoing is aimed at addressing specific problems that would arise from the approval and implementation of an amended Rule 452, and at outlining a solution that would help redress the imbalance created should the Commission enact the PWG’s recommendation regarding this rule.

To assist the Commission, I am attaching my two earlier comment letters, the first, of July 14, 2006, to the NYSE; and the second, of May 23, 2007, to the Commission discussing these issues in greater detail.

Before I begin my comments, I would like to make two important points.

First, I am compelled to urge the Commission to extend the comment period on this issue to a total of at least 90 days. It is not clear why, given the decades long existence of Rule 452 and the years of study by the PWG (since 2005), the Commission needs to push this dramatic action forward while limiting the comment period to a mere 21 days.

This is no minor rule change that is being proposed. This amendment, as envisioned, may well lead to the disenfranchisement of a large portion of the retail investor community, and have a harsh and negative impact on many small- and mid-cap companies, as well as large-cap firms with significant numbers of retail owners. It will also provide an unfair advantage to some institutional investors (e.g. hedge funds), and increase the influence of proxy advisory firms with regard to companies where their influence is now limited. Although “change” is the watchword of the day, the issues brought forward by this proposal are complex, and the actions contemplated by the Commission will have a long-lasting and far-reaching effect on our capital markets, and on the rights and responsibilities of shareholders, both retail and institutional.

Letter to Elizabeth M. Murphy
March 27, 2009
Page 2

Our request to extend the comment period is made in consideration of the fact that a total of only 46 comment letters were submitted to the NYSE in response to the PWG draft. The size of the response points to a failure on the part of the NYSE to ensure wider issuer and investor comment. Considering the breadth and importance of the changes sought in this amendment, an extended comment period would potentially allow for greater participation from retail/small investors and almost certainly result in a greater response from corporations. The length of this comment period (21 days) is inadequate and may to some degree limit responses to the handful of firms, groups and organizations most intimately familiar with and active on these issues, while effectively excluding many companies and the vast majority of retail shareholders who lacked the time to carefully consider the issue and prepare a response.

Second, as a firm in the business of proxy solicitation with a client base that includes hundreds of small-cap companies, I must be honest with the Commission and disclose that your action in approving this amendment (with which I strongly disagree), or my suggestion for the creation of an All Beneficial Owners (“ABO”) status as a means of providing balance for issuers, will both greatly benefit The Altman Group directly as it will all other proxy solicitation firms. A Commission approval will expand the universe of companies requiring proxy solicitation services and lead to greater fees paid for proxy solicitation by companies and dissidents wishing to communicate with NOBO and OBO¹ holders, or to reach desired levels of shareholder participation in their effort to elect director nominees.

Summary

As stated in my two previous comment letters, I appreciate the time and effort of the members of the PWG as they worked to develop a set of recommendations aimed at streamlining the proxy management process, promoting greater transparency and strengthening corporate democracy.

However, I continue to believe the PWG’s recommendation to eliminate the broker discretionary vote in director elections will place an unreasonable financial burden on companies with a significant percentage of outstanding shares held by retail owners, or other companies with large numbers of retail owners, and will disenfranchise many of those same retail shareholders, thereby potentially concentrating voting power in the hands of institutional investors and proxy advisory services.

The acknowledged reality is that many institutional investors, lacking the resources and expertise to properly evaluate proxy votes, are dependent upon and strictly follow voting recommendations from

¹ The Securities and Exchange Commission’s rules allow for the disclosure of the name, address, and number of shares registered in the name of a broker or bank for any beneficial owner who does not object to such disclosure. Beneficial owners of this type are known as Non-Objecting Beneficial Owners (“NOBOs”). Those beneficial owners who choose not to have direct communication with the public company they are invested in are known as Objecting Beneficial Owners (“OBOs”).

Letter to Elizabeth M. Murphy
March 27, 2009
Page 3

the proxy advisory services.² This dependence creates a situation where the proxy advisory firms wield a powerful influence on the direction of shareholder votes equal to or greater than the broker discretionary vote as presently allowed under Rule 452. Combined with the elimination of the broker vote, this increase in the influence of the proxy advisory services may thereby lead to a concentration of voting power as well as a weakening of corporate democracy in the U.S. capital markets.

Discussion

In my letter dated July 14, 2006, I detailed an interim solution designed to address a number of concerns held by members of the issuer and investor communities. I recommended the Commission undertake the elimination of the NOBO and OBO distinction and suggested the creation of a category of ABOs (All Beneficial Owners) *solely with regard to record dates for votes at companies' annual or special meetings or in other cases requiring shareholder action*. Governance observers and parties interested in the mechanics of proxy voting are aware of the prospects for additional reforms to the proxy voting process. Both issuers and investors have identified the issue of outmoded beneficial ownership rules and the need for greater transparency therein as a major concern. It is clear that action in this area by the Commission is necessary.

I have identified three significant weaknesses that will primarily afflict operating companies, whose investor base is composed of retail shareholders owning a significant percentage of the outstanding shares, if the broker discretionary vote in director elections is eliminated:

- Difficulty in achieving quorum;
- Imbalance in voting power; and
- Voting rights question is not addressed

First, companies lacking significant institutional ownership will find it increasingly difficult to gain a separate quorum for the election of directors. These companies, many with retail holders in “street name” owning a majority of shares outstanding, will need to retain (at additional cost) proxy solicitation firms to conduct outreach campaigns to NOBO holders. The bottom-line for retail-held issuers is that they will be required to bear a higher cost in an often frustrating attempt to solicit their owners to gain an appropriate level of votes for director elections. In many cases, these are companies with fewer financial resources to bear the burden of a large scale retail proxy solicitation.

Second, elimination of the broker discretionary vote will magnify the power and influence of large institutional investors³, some of whom are short-term owners seeking to financially engineer a company's stock for a quick profit at the expense of long-term investors (small and large). This prospect, given companies' poor historic experience with instructional voting by retail holders and a well-documented decline in direct involvement by retail investors as a result of the Notice and

² “Voting Integrity: Practices for Investors and the Global Proxy Advisory Industry,” a study on Institutional Investors, Proxy Advisory firms and the proxy voting process conducted by the Millstein Center for Corporate Governance and Performance, which is part of the Yale School of Management. The study is available at <http://millstein.som.yale.edu>.

³ This term is used and intended to encompass a wide variety of investors – from hedge funds to public employee pension funds.

Letter to Elizabeth M. Murphy
March 27, 2009
Page 4

Access model of material distribution, dramatically highlights the impact that the decline in retail owner participation may have in the voting process. A change to Rule 452 will result in further disenfranchisement of retail investors and greater concentration of voting power in the hands of the institutional investor community.

This is an especially important point, as companies during their life-cycle inevitably have significant *non-routine* issues to present to shareholders in their proxy. Examples range from Say on Pay resolutions and the growing trend toward adoption of the majority vote standard to ratification of Employee Stock Option Plans. Such situations demonstrate the utility of the ABO concept, which will allow companies to reach out and communicate with *all* record date holders. The Commission's approval of the proposed change to Rule 452 will create the possibility that issuers may not elect their director nominees as a result of block voting by institutions and the inability of companies to adequately communicate with all retail shareowners. In contrast, adoption of an ABO methodology will allow votes on significant issues to better reflect the wishes of those shareholders who are now not known to a company, but whose votes could be actively solicited in the future.

Finally, the proposed Rule 452 revision fails to address the lack of transparency inherent in the current proxy voting process. The public pension funds, the Taft-Hartley funds, and commentators who have been the loudest and staunchest advocates for eliminating use of the broker vote in the director election process have failed to address the other half of the equation – the need for greater transparency as to who actually holds voting rights.

While it may be true that companies will no longer be able to, as one activist characterized it, 'stuff the ballot box' with the broker vote, it is equally true that neither advocates nor issuers truly know who actually owns all of the rights to vote a companies' shares.

There are some serious problems left unaddressed by this proposed rule change that an ABO system will help remedy:

Empty Voting.⁴ The decoupling of voting rights from economic interest in a company's shares is a serious concern for issuers. This problem is most closely identified with the share lending activities conducted by large institutional investors. For example, an investor (perhaps a hedge fund) borrows stock from an institution (public pension fund or foundation) prior to the company's record date. The hedge fund returns these shares to the institution immediately after the record date. As the holder of record, the hedge fund has purposefully positioned itself to vote the shares and influence the election of directors through support of dissident candidates (perhaps their own nominees), or shareholder resolutions without the economic risks attendant to share ownership.

- ✓ ABO Solution: The Commission's adoption of the ABO concept would address some concerns around share loan programs by enabling a company to identify at least some of the

⁴ The term is meant to describe a situation where voting power has been "emptied" of a corresponding economic interest.

institutions with shares out on loan and also identify hedge funds and other investors whose share positions have shown significant increases as of the record date.⁵

Opaque Ownership. The use of financial derivatives by hedge funds and other institutional investors to shield their ownership (and/or non-disclosed voting rights) from an issuer poses significant challenges to a company seeking to determine who is entitled to vote shares at a meeting of shareholders. These artificial ownership or voting positions are not covered by Commission disclosure rules requiring transparency of ownership positions exceeding 5%.

- ✓ **ABO Solution:** The 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 their trading strategy. The ABO concept could be structured to deal with this issue. All beneficial owners who have disposed of voting rights in excess of a pre-determined percentage would be required to identify all situations where they have voting rights for fewer shares than are disclosed as shares owned by such entity. Under our ABO proposal such information would not be made public but would be available solely to the issuer and only for that one record date per year (presuming the company does not also have a special meeting for some other purpose at another time) pertaining to the annual meeting.

Over-Voting. Over-voting usually results from share lending and short sales and describes a problem confronting issuers when a broker is faced with the prospect of its clients casting more votes than the firm is entitled to cast. As most brokerage firms prefer to not pre-reconcile voting rights with regard to all annual meetings, there is a question as to whether accurate voting lists are always used.

- ✓ **ABO Solution:** A complete list of owners, segregated by firm and share amount, will enable companies to easily identify over-vote situations, e.g. situations where brokers or banks identify more shares than The Depository Trust Company's records indicate are eligible to vote. The issue of transparency and over-voting by brokers would be addressed via this change. While the financial community will complain of the challenges associated with pre-reconciling voting rights, those very objections likely confirm the seriousness of the problem of actually establishing who is eligible to vote.

Proxy Contests – Cost and Outcome Concerns. While the bulk of my discussion has been focused on problems and costs that an amended Rule 452 would impose on companies in a non-contested annual meeting context, there are financial and other burdens placed in the path of both corporations and dissident shareholders in their efforts to communicate directly with OBOs or with limited numbers of street name holders (both NOBOs and OBOs) during a proxy contest. Given that many/most proxy fights are decided by a margin of less than 5% of outstanding shares, it can be

⁵ An additional benefit, if acted on by the Commission would be to add a new element to the U.S. disclosure regime requiring all investors to disclose stock borrowing and derivative transactions that have an impact on voting rights as of record dates for meetings. ABO disclosure would be an important mechanism for advancing the voting system in our markets to a point where the identity of all parties entitled to cast votes at the meeting is brought into clear view.

Letter to Elizabeth M. Murphy
March 27, 2009
Page 6

assumed that active solicitation of all beneficial owners might result in a change in the outcome of some contested elections.

- ✓ **ABO Solution:** If an ABO system were in place for proxy contests, it would permit direct communications with all securities holders for company and dissident alike. This would allow the will of all shareholders to be the deciding factor in a contest rather than the current system that has proxy advisory firms and NOBOs accounting for a disproportionate percent of shares voted. Further, by making available the complete list of beneficial owner names, corporations and dissidents can then selectively mail their supplemental communications as they see fit and not be forced to pay mailing and other fees that are currently assessed by Broadridge in a non-competitive environment.

In the proxy voting process, transparency should be paramount and, like risk mitigation, should be among the primary focuses of the Commission, the stock exchanges, and the issuer and investor communities. I would strongly encourage the Commission, if it intends to approve amending Rule 452 as proposed, to concurrently set in motion the required legislative action necessary to establish an ABO process as a means of providing balance for all issuers, particularly companies with large numbers of retail share owners.

I believe the establishment of ABO status is a fair action for the Commission to undertake. It is a level of authority that bankruptcy judges already possess and have selectively been willing to exercise to ensure that companies in bankruptcy have the opportunity to communicate with all securities holders.⁶ Operating companies should not have fewer rights – especially when it comes to the right to identify and communicate with all their securities holders – than a company operating under the protection of the U.S. Bankruptcy Courts.

Fairness Demands an Exemption for Operating Companies with Circumstances Identical to Investment Companies

I appreciate and endorse the actions of the PWG in exempting investment companies from the proposed change to Rule 452. I question the logic used by the PWG and NYSE in failing to adopt an exemption for similarly situated corporations. I do not understand why issuers that have circumstances mirroring those of investment companies, i.e., a high percentage of retail ownership and burdensome cost concerns, do not receive identical treatment to investment companies. Perhaps the Commission, in approving this amendment, can provide a safe harbor for such corporations.

A Final Suggestion for Improvement to Reform the Proxy Process

⁶ In 1991, Bankruptcy Judge Harold Abramson, U.S. Bankruptcy Court for the Northern District, Texas, Dallas Division in Case No. 390-37119-HCA-11 ordered a disgorgement of the names of all securities holders to enable direct solicitation of all security holders (both NOBO and OBO) in the Southland Bankruptcy case.

Letter to Elizabeth M. Murphy
March 27, 2009
Page 7

Any serious discussion of proxy voting and the management of the proxy solicitation process requires individuals with solid experience and intimate knowledge of the intricacies of the proxy process. The PWG failed to have any members who had direct involvement, at the practitioner level, in the proxy solicitation industry. To my thinking, this demonstrates that there may have been a true lack of understanding of the complexities associated with the proxy management process, especially for companies held primarily by retail owners. The PWG and the Communications and Proxy Process Subcommittee should put in place an effort that ensures balanced participation from experienced proxy solicitation and transfer agent professionals, in addition to corporate representatives, as a part of any ongoing activities.

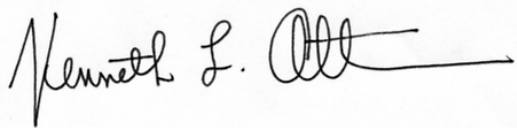
Conclusion

In closing, I will quote my May 23, 2007 comment letter to the SEC: “[w]hat is needed is a system that creates a true register of owners able to vote at a meeting rather than perpetuate a system that no longer reflects the standard that other global markets are moving to in terms of establishing the identity of owners eligible to vote at a meeting.”

I also make a final plea to the Commission to extend the comment period on this issue to no less than a total of 90 days. Discussions of investor education in the PWG report and recommendation ring hollow when it is clear that substantial efforts to educate retail owners on the pending changes have not been carried out. It is as if a class of voters totaling tens of millions of people were suddenly empowered to vote but were not informed of their rights or how to exercise them. This is patently unfair and not in the best tradition of our democracy.

Please feel free to contact me if I may be of further assistance on these issues.

Sincerely,



Kenneth L. Altman
President
The Altman Group, Inc.

Letter to Elizabeth M. Murphy
March 27, 2009
Page 8

cc: Mary Shapiro – Chairman – U.S. Securities and Exchange Commission
Kathleen Casey – Commissioner, U.S. Securities and Exchange Commission
Elisse Walter – Commissioner, U.S. Securities and Exchange Commission
Luis Aguilar – Commissioner, U.S. Securities and Exchange Commission
Troy Paredes – Commissioner, U.S. Securities and Exchange Commission
Erik Sirri – Director, Division of Trading & Markets
Shelly Parratt – Acting Director, Division of Corporation Finance
Brian Breheny – Deputy Director, Division of Corporation Finance