

NEW YORK STOCK EXCHANGE LLC

NYSE HEARING PANEL DECISION 06-55

April 18, 2006

UBS SECURITIES LLC
MEMBER ORGANIZATION

* * *

Violated NYSE Rule 452 by submitting votes for more shares than it was entitled to vote in proxy matters; failed to implement policies and procedures to accurately adjust its record of stock ownership to ensure that it did not vote more shares than it was entitled to vote in proxy matters; tendered more votes than it was entitled to vote in proxy matters; violated NYSE Rule 401 by failing to reconcile its record of stock ownership to ensure that it did not submit votes for more shares than it was entitled to vote in proxy matters; violated NYSE Rule 342 by failing to supervise proxy operations to prevent over-voting and failing to provide for and implement written procedures for proxy operations and supervision of proxy function and proxy service provider; violated NYSE Rule 476(a)(10) by supplying inaccurate responses on NYSE survey – Consent to censure and \$600,000 fine.

Appearances:

For the Division of Enforcement
Matthew L. Moore, Esq.
Allen D. Boyer, Esq.

For Respondent Firm
Scott A. Edelman, Esq.

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A Hearing Panel on behalf of the New York Stock Exchange LLC (“NYSE”) met to consider a Stipulation of Facts and Consent to Penalty entered into between the Division of Enforcement of NYSE Regulation, Inc. (“Enforcement”) and UBS Securities LLC (“Respondent Firm” or the “Firm”), a member organization. Without admitting or denying guilt, Respondent Firm consented to a finding by the Hearing Panel that it:

- I. Violated NYSE Rule 452, in that, on one or more occasions, Respondent Firm submitted votes for more shares than it was entitled to vote in proxy matters.
- II. Violated NYSE Rule 476(a)(6) in that Respondent Firm engaged in conduct inconsistent with just and equitable principles of trade in that Respondent Firm:

- (a) failed to implement adequate policies and procedures to accurately adjust its record of stock ownership to ensure that it did not vote more shares than it was entitled to vote in proxy matters; and
 - (b) on numerous occasions, tendered more votes than it was entitled to vote in proxy matters.
- III. Violated NYSE Rule 401 by failing to adhere to principles of good business practices in that Respondent Firm failed, on numerous occasions, to reconcile its record of stock ownership so as to ensure that it did not submit votes for more shares than it was entitled to vote in proxy matters.
- IV. Violated NYSE Rule 342 in that Respondent Firm failed to:
- (a) supervise proxy operations to prevent over-voting;
 - (b) provide for and implement written procedures for proxy operations and supervision of the proxy function; and
 - (c) provide for and implement written procedures for supervision of its proxy service provider.
- V. Violated NYSE Rule 476(a)(10) in that Respondent Firm supplied one or more inaccurate responses on a survey directed to it by the NYSE.

For the sole purpose of settling this disciplinary proceeding, Enforcement and Respondent Firm stipulate to certain facts, the substance of which follows:*

Background and Jurisdiction

1. UBS Securities LLC became a member organization of the NYSE on September 6, 1985. It is principally owned by UBS AG (formed through the June 1998 merger of Union Bank of Switzerland with Swiss Bank Corporation) and is engaged in the business of global investment banking, securities trading, and asset management. The principal office of the Firm is located in Stamford, Connecticut.
2. The NYSE Member Firm Regulation Division (“MFR”) referred this matter to Enforcement in February 2005. The referral followed a Special Financial, Operational and Supervision examination conducted in April 2004, which disclosed deficiencies in proxy operations and functions at the Firm. This examination followed up on possible proxy over-voting by the Firm as was disclosed by the Firm’s response to a survey conducted by MFR in December 2003.

* Hearing Panel Note: The facts, allegations, and conclusions contained in paragraphs 1 to 32 are taken from the executed Stipulation of Facts and Consent to Penalty between Enforcement and Respondent Firm. No changes have been made to the stipulated paragraphs by the Hearing Panel, except that certain names have been deleted to protect the privacy of non-parties.

3. By letter dated February 22, 2005, Enforcement notified the Firm of its investigation.

Overview

4. As set forth more particularly below, during the period from about January 2000 to April 2004 (“the Relevant Period”), the Firm: (a) voted more shares than it was entitled to vote in proxy matters (“over-voting”) in numerous instances;¹ (b) failed to implement adequate policies and procedures to accurately adjust its records and failed to reconcile its stock ownership records so as to ensure that it would not vote more shares than it was entitled to vote; and (c) failed to supervise the proxy function and to have written procedures in place for proxy operations and supervision, and for the supervision of its proxy service provider, in violation of NYSE Rule 342. Additionally, in December 2003, the Firm provided inaccurate answers on a survey conducted by the NYSE on industry proxy voting matters, in violation of NYSE Rule 476(a)(10).

Background Of The Proxy Process

5. Pursuant to NYSE Rule 451, a member organization is required to transmit proxy materials to the beneficial owners of stocks that it holds in street name when a person soliciting proxies supplies such material and provides assurance for reimbursement of expenses.
6. Pursuant to NYSE Rule 452, a member organization is required to “give or authorize the giving of a proxy for stock registered in its name, or in the name of its nominee, at the direction of the beneficial owner.”
7. To accomplish the obligations embodied in NYSE 452, member organizations must collect and transmit to the issuer any voting instructions given by Shareholders of the security for which proxies are solicited. Member organizations typically contract with a proxy service provider to distribute the proxy materials, collect the voting instructions from Shareholders, and transmit those instructions to the transfer agent engaged by the issuer to tabulate the votes (“the Tabulator”).
8. Matters in which a Firm may vote without customer instructions and matters in which it may not are defined by NYSE Rules 452.10 and 452.11. For certain routine matters included on corporate ballots, proxies may be voted by a member organization, on a discretionary basis, absent the receipt of votes cast by Shareholders.
9. For each proxy solicitation, the Tabulator compares the proxy votes submitted on behalf of the member organization and/or its customers with the number of shares reflected on the records of the Depository Trust and Clearing Corporation (“DTCC”) for the member organization on the applicable record date. The number of shares

¹ As used herein, “over-voting” by a broker-dealer means that the broker-dealer’s proxy service provider submitted proxies for more shares than the broker-dealer was entitled to vote on a specific proxy matter and does not mean that the transfer agent tabulating the votes (“the Tabulator”) necessarily counted these over-voted shares in determining the outcome of the proxy matter.

showing on the records of DTCC for the member organization, with certain adjustments, is the maximum number of shares (votes) that will be tallied by the Tabulator in determining the outcome of the proxy vote. If a member organization submits to the Tabulator more shares than are shown for the member organization on the records of DTCC, then it has over-voted.

10. There are no standard industry procedures that govern Tabulators' approach to dealing with over-voting. Tabulators may respond to over-votes with a variety of vote-counting procedures, including counting votes on a "first in-first voted" or "last in-first voted" basis, or disregarding altogether a vote submitted by a broker-dealer. Depending upon the procedure implemented by the Tabulator, certain customers' voting instructions may not be represented as originally given. Where permitted by statute or otherwise (as, for example, pursuant to § 231(d) of the Delaware General Corporation Law), Tabulators may consider reliable information, including consultations with persons with knowledge of the reasons for a particular proxy over-vote.
11. Failure to timely reconcile stock records on beneficial ownership may result in inaccurate instructions being given to the proxy service provider. If there is no reconciliation of stock records of beneficial ownership, customer votes may be allocated inaccurately, because customers with both long and short positions may receive requests for proxy voting instructions for too many shares. Similarly, if stock in margin accounts has been used for stock loans, both the margin account holder or holders and the recipient of the stock loan may submit voting instructions for the same stock. Failure to perform proper reconciliations may allocate more votes to customers than is proper.

The Firm's Proxy Service Provider

12. At all relevant times and continuing through the present, the Firm has used a proxy service provider (the "Agent"). The Agent receives notice of pending proxy actions on behalf of the Firm, accesses the Firm's stock record to identify the Firm's accounts that hold an issuer's securities on the record date, and determines the number of shares that are eligible to vote in the proxy vote. It then arranges with the issuer for which the proxy event is being held, or the Tabulator that is conducting the proxy poll for the issuer, to obtain the appropriate number of copies of the proxy-related material, which it then forwards to the beneficial owners of the issuer's security. Proxy instructions are generally returned directly to the Agent, which then reports the votes to the Tabulator.
13. The outsourcing of its proxy function to the Agent, as set forth above, did not relieve the Firm of the regulatory responsibility for compliance with the NYSE Rules relating to operation and supervision of the proxy function.

Over-Voting By The Firm

14. For 2003 and 2004, the Firm submitted more proxy votes than it was entitled to cast in connection with proxy matters in all ten instances for which information was requested. For example, in 2003, the Firm cast a total of 2,731,367 shares in a proxy

matter involving “XYZ” (record date March 7, 2003). According to the information maintained at DTCC, the Firm in fact was entitled to vote only 1,848,090 shares. Thus, the Firm submitted votes for 883,277 shares more than it was entitled to vote. The over-votes in the other proxy matters sampled for 2003 and 2004 ranged from 1,624 shares to 550,456 shares.

15. For 2002, a sampling of nine proxy matters identified six instances in which the Firm submitted more proxy votes than it was entitled to cast in connection with proxy matters. For example, the Firm cast a total of 3,411,773 shares in a proxy matter involving “ABC” (record date March 5, 2002). According to the information maintained at DTCC, the Firm in fact was entitled to vote only 2,507,444 shares. Thus, the Firm submitted votes for 904,329 shares more than it was entitled to vote. The over-votes in the other proxy matters sampled for 2002 ranged from 30,500 shares to 1,067,976 shares.

The Firm Failed To Appropriately Net Positions In Proprietary and Customer Accounts and Voted Long Shares That Were Out on Loan or Not in the Firm’s Possession or Control

16. Over-votes were caused by: (a) the Firm’s failure to net proprietary long positions against proprietary short positions before it voted the long shares; (b) the Firm’s failure to net customer long positions against related customer short positions; and (c) by the Firm’s voting customer long shares when these securities in fact were out on loan.
17. The Firm’s failure to conduct independent supervisory review of proxy voting results also contributed to over-voting because this omission prevented the Firm from remedying the over-vote before the Agent’s submission of proxies to the Tabulator – for example, by instructing the Agent to exclude those proxy votes relating to long shares not in the Firm’s possession or control.
18. Prior to the Special Examination in April 2004, the Firm made no effort to affirm that its books and records relating to beneficial share ownership were duly reconciled in connection with proxy voting matters, but rather relied completely upon records maintained by the Agent. These records were originally created by the Firm and provided to the Agent and reflected inaccuracies deriving from the Firm’s failure to duly reconcile its records of beneficial ownership. In this period, the Firm customarily voted its total long positions minus outstanding stock borrows, making no further adjustments or reconciliations. The Firm reconciled its records of beneficial ownership only on the relatively infrequent occasions when a proxy was solicited (*i.e.*, in a contested matter) or when a beneficial owner advised the Firm that he or she wished to attend a corporate meeting and participate in person.
19. In the period before December 2003, the Firm had notice that over-votes were occurring. Approximately once a month, a Tabulator conducting a proxy vote contacted the Firm concerning a “position break,” *i.e.*, an over-vote situation, advising the Firm that the number of proxy votes submitted for the Firm by the Agent was greater than the amount shown for the Firm on the records of DTCC. Despite

this notice that over-votes were occurring, the Firm did not undertake to reconcile account positions generally or in connection with corporate events involving proxy voting, nor did the Firm take other steps to avoid over-voting.

20. No instances were uncovered in which an over-vote improperly affected the outcome of a proxy vote or in which a shareholder who attempted to vote his or her shares was disenfranchised and lost his or her vote.
21. Nonetheless, by submitting an over-vote, the Firm subjected its customers to the risk that their proxy votes would not be accepted. Tabulators have no standard approach for dealing with over-voting. The lack of any uniform procedure raises the possibility that Tabulators may employ procedures that cause votes to be lost. In counting the votes received in a proxy solicitation, the Tabulator compares the proxy votes submitted by a broker-dealer on behalf of the Shareholders with the number of shares reflected on the records of DTCC for the applicable record date. Where a broker-dealer has over-voted, the Tabulator is faced with the problem of which shares to count (in reaching the DTCC level) and which to disregard (as exceeding the DTCC level). In the lack of an established procedure for resolving such situations, if faced by an unduly large number of proxy votes (because the total has been inflated by an over-vote), a Tabulator may count votes on a “first in-first voted” or “last in-first voted” basis, or disregard altogether a vote submitted from a street-name nominee holder on the basis that inaccuracies give it no confidence in the validity of the submission. If the “first in-first voted” approach is adopted, late-arriving customer votes are discarded.

Failure to Supervise Proxy Function – NYSE Rule 342

22. Pursuant to NYSE Rule 342(a), each “business activity” of a member organization “shall be under the supervision and control of the . . . member organization establishing it and of the personnel delegated such authority and responsibility.”
23. During the Relevant Period, the Firm did not maintain written policies and procedures with regard to reviewing the proxy voting results compiled by the Agent, nor did the Firm have a policy that provided for the review of possible over-voting.
24. During the Relevant Period, there was no procedure in place at the Firm for review of the Agent’s work, and no reviews were performed. The Firm did not conduct independent supervisory reviews of the proxy voting results compiled by the Agent, or otherwise monitor for evidence of proxy errors, including possible over-voting. Although the Firm provided for audits of the Corporate Actions department, these audits did not examine the proxy function. In addition, the Firm failed to maintain records documenting its relationship with the Agent, including those that defined the Agent’s responsibilities, and this limited the Firm’s ability to exercise effective oversight.

Inaccurate Responses to MFR Proxy Survey

25. In December 2003, MFR conducted a survey (“the Survey”) of NYSE member

organizations concerning proxy voting of shares held in street name, operational and supervisory procedures on proxy voting, and record-keeping of relevant records, with a view to identifying possible instances of over-voting and related violations. In responding to the Survey, the Firm supplied inaccurate responses to certain questions relating to supervisory procedures and reconciliation of its records on beneficial ownership of street-name.

26. The Survey contained eight questions (to be answered by checking Yes or No, or by short statements) and a request for information on five proxy votes submitted by the Firm for specified proxy matters during 2003. It was provided to the Firm on Wednesday, December 10, 2003, and a response was requested by the close of business on Friday, December 12, 2003.
27. To Question 1, "Does the firm have written supervisory procedures for the Proxy Department?" the Firm responded "Yes." This was inaccurate, in that the Firm had no written supervisory procedures.
28. To Question 7, "Does the firm adjust its long stock record positions in determining beneficial ownership on record date prior to proxy mailings?" the Firm responded "Yes." This was inaccurate, as the Firm adjusted its long positions only when a customer contacted the Firm with a view toward participating directly at a proxy polling.
29. To Question 8, "Does the firm net its proprietary positions to determine shares voted?" the Firm responded "Yes." This was inaccurate, as the Firm netted its proprietary positions only when a third party made a request that required the Firm to compare its records against DTCC.
30. In or around April 2004, as Firm personnel prepared for the arrival of the MFR team that would conduct the Special Examination, compliance and legal personnel at the Firm scrutinized the response that the Firm had supplied in December 2003, and determined that the above responses should be corrected. This was done prior to the arrival of the examiners on the Firm premises, and a corrected survey response was then provided to the MFR examiners upon their arrival. In addition, Firm personnel briefed the examiners, upon their arrival, about deficiencies in the Firm's procedures.

Other Factors

31. Following the Special Examination, the Firm put into place new procedures and enhanced systems to facilitate its oversight of the proxy function. The Firm has subscribed to an over-vote notification service offered by the Agent, which Firm personnel review daily to ascertain whether over-voting situations exist. With regard to maintaining access to proxy records, the Firm utilizes a Web-based application provided by the Agent that provides the Firm with access to reports on proxy voting and records maintained for the Firm on the Agent's computer systems. The Firm has represented that further revisions to procedures will provide for the retention of Affidavits of Compliance by the Agent and a copy of an outside auditor's annual report on the adequacy of the Agent's performance of its proxy obligations.

32. Enforcement has also considered the following:

- (a) the extensive length of time over which the Firm's operational and supervisory failures allowed over-voting;
- (b) the Firm's prior disciplinary record; and
- (c) that while no instances were disclosed in which the Firm's over-voting actually disenfranchised individual shareholders or improperly affected a corporate proxy vote, nonetheless, the Firm's operational and supervisory failures allowed proxy over-votes that (i) called into question the process of proxy polling, (ii) threatened the voting rights of shareholders who held their shares in street name at UBS, and (iii) created the perception of careless handling of customer votes, thereby causing harm to the securities industry.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Respondent Firm guilty as set forth above by unanimous vote.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Respondent Firm of a censure and a fine of \$600,000.

For the Hearing Panel

Peggy Kuo - Chief Hearing Officer
Panelists:
John Cirrito
John P. O'Brien