

LEGAL UPDATES

PUBLISHED: JULY 15, 2009

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SEC Approves Amendment to NYSE Rule 452

On July 1, 2009, the Securities and Exchange Commission approved an amendment to NYSE Rule 452 and Section 402.08 of the NYSE Listed Company Manual that eliminates discretionary voting by brokers in uncontested director elections.

Under the amended Rule, uncontested director elections held on or after January 1, 2010, will be considered "non-routine" matters and, therefore, covered brokers will be prohibited from casting votes without instructions from beneficial owners. As explained below, the amended Rule is likely to affect all public companies, not just NYSE listed companies.

The Amendment

Rule 452 allows brokers to exercise discretionary voting on behalf of shareholders in all matters that are considered "routine" if the broker transmitted proxy solicitation materials to beneficial owners and did not receive voting instructions from such beneficial owners at least 10 days prior to the company's scheduled shareholder meeting. However, brokers are not permitted to exercise discretionary voting in matters that are considered "non-routine," which usually include "contested" matters and matters that may substantially affect the rights or privileges of shareholders. Prior to the amendment, uncontested director elections were considered routine matters, and brokers could exercise their discretion to vote uninstructed shares in an uncontested election of directors. Beginning in 2010, uncontested director elections will be considered non-routine matters, and brokers will be prohibited from voting uninstructed shares.

The Impact

Because NYSE Rule 452 governs all brokers who are members of the NYSE, amended Rule 452 is likely to impact nearly every U.S. public company,

regardless of whether the company is listed on the NYSE. Amended Rule 452 may significantly impact companies in the following ways:

Increased Influence of Institutional Investors

Generally, uninstructed shares are held by retail shareholders (individual investors) who do not provide voting instructions to their brokers. As a result, the amended Rule may decrease the number of votes by retail shareholders and proportionally increase the number of votes of institutional shareholders. This potential increase in institutional shareholder voting power could, therefore, increase the effectiveness of "vote no" campaigns against directors by shareholder activists and special interest groups. "Vote no" campaigns are one of the methods used by these groups to sway votes in favor of certain director candidates or slates.

Reassessment of E-Proxy Notice and Access

A number of companies that have adopted the notice-and-access e-proxy delivery method have seen a significant decrease in proxy voting by retail shareholders. These companies may want to consider returning to a full-set delivery of proxy materials in order to increase retail votes to offset the loss of broker discretionary votes.

Increased Difficulty Establishing a Quorum

The amended Rule may make it more difficult for some companies to establish the quorum necessary to conduct business at annual meetings unless a "routine matter" - such as the ratification of a company's auditors or an amendment to a company's Articles of Incorporation increasing the number of authorized shares of stock for general corporate purposes - is on the company's agenda. Under current NYSE Rules, only broker discretionary votes on routine matters may be counted towards a quorum. Because uncontested elections will no longer be considered "routine" matters, broker discretionary votes will not be counted towards a quorum.

Increased Difficulty Establishing a Majority Vote

The amended Rule may make it difficult for companies that require directors to be elected by a majority vote of its shareholders to ensure the election of the management's slate of directors. Because uncontested elections will no longer be considered "routine" matters, broker discretionary votes will not be counted towards the majority vote.

Increased Costs

The amended Rule may force companies to incur additional costs to solicit shareholder votes in order to establish a quorum, achieve a majority vote, or defend against "vote no" campaigns. Additional costs may result from engaging proxy solicitation firms, issuing additional proxy materials, and accelerating the proxy statement preparation process in order to increase the amount of time that proxies may be solicited.

What This Means to You

Clients are encouraged to consider taking the following actions:

Consider placing at least one "routine" matter on the ballot each year

Reconsider the use of e-proxy rules

Prepare and mail proxy materials early in order to give shareholders ample time to vote

Send supplemental proxy materials and follow up with shareholders to ensure participation

Consider the need to hire a proxy solicitor to contact shareholders and encourage them to vote

Contact Info

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