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New York Stock Exchange Rule Goes into Effect Prohibiting Discretionary Broker Voting on Uncontested Director Elections

The Securities and Exchange Commission has recently approved a long-anticipated and controversial amendment to the New York Stock Exchange Rules that fundamentally changes the way public companies elect boards of directors.

Under the amended Rule 452, brokers holding shares in "street name" for their clients are prohibited from voting in any director elections—contested and uncontested—on behalf of their clients without receiving specific voting instructions from those clients. Except for stockholder meetings commenced in 2009 and adjourned to this year, this rule is effective for all stockholder meetings held in 2010 and thereafter.

The amendment to Rule 452 affects more companies than just those listed on the NYSE. The American Stock Exchange is likely to adopt a similar rule, and Rule 452 already applies to New York Stock Exchange-licensed brokers that hold stock in Nasdaq-listed companies. As a result, the effects of Rule 452 are or will soon be felt by almost all public companies.

The amendment to Rule 452 does not apply to companies registered under the Investment Company Act of 1940.

Prior Rule

Brokers not receiving voting instructions from their respective beneficial owners of stock may vote shares of such stock in their discretion on "routine" and uncontested matters. Prior to the amendment to Rule 452, the elections of directors in uncontested votes were considered routine matters in which brokers could vote without instructions from their clients. Historically, in these instances, brokers voted overwhelmingly for the directors nominated by management. Consequently, it was common for management slates to receive the votes of 90 percent or more of all outstanding shares at an annual meeting of stockholders, and the existence of a quorum was guaranteed.

Planning Considerations

Now that brokers are prohibited from using their discretion in director elections, public companies may wish to consider the following:

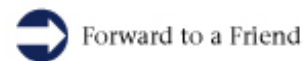
- To ensure a quorum for a legal meeting, there should be at least one "routine" matter on which brokers can vote without instruction. One such matter is the selection of the auditors for the coming year. Brokers are entitled to vote on this matter without client instruction, and

this establishes the presence of a quorum for a meeting.

- Know your stockholders. If there are a small number of stockholders who control significant blocks of stock, cumulatively amounting to more than approximately a quarter of your outstanding stock, and if you know that you can count on their votes, it should not be difficult to elect a slate of directors chosen by management.
- Educate your stockholders. Consider preparing separate materials in proxy statements or shareholder letters to emphasize the importance for stockholders to instruct their brokers regarding director elections. This is especially true for companies that have a large amount of retail stockholders.
- Pay attention to proxy advisory groups, such as RiskMetrics (ISS), because such groups' recommendations now have more of an effect on the outcome of uncontested director elections. You may wish to discuss with your lawyers the necessity to review and revise your company's corporate governing policies to increase the chances of proxy advisory groups recommending to their clients that they vote in favor of management's proposals.
- Review the requirements of your charter, bylaws and governing statute. If only a plurality of votes is required to elect a director, only one more "yes" than "no" or "against" is required as long as a valid quorum is established. If, on the other hand, a majority of votes is required (as opposed to just a plurality), it may be much more difficult to achieve the necessary vote without the broker votes previously cast. This is especially true if a "just vote no" or similar campaign is waged by a vocal minority of the stockholders.
- To achieve a sufficient amount of votes, consider whether a proxy solicitor should be engaged and whether additional mailings and call campaigns are needed. Also, consider whether sufficient numbers of your stockholders who hold their shares in street name will take the initiative to instruct their brokers without these measures.

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