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Prohibition of Discretionary Proxy Voting by Broker-Dealers Affects Stockholder Meetings Held on or After January 1, 2010: NYSE Rule 452

On July 1, 2009, the Securities and Exchange Commission approved a New York Stock Exchange proposed rule change that eliminates broker discretionary voting for non-contested elections of directors. The amended rule will apply to proxy voting for stockholder meetings held on or after January 1, 2010. Because NYSE Rule 452 applies to brokers, the amendment applies not only to issuers listed on the NYSE, but also to issuers listed on other exchanges such as NASDAQ or NYSE Amex.

The Current Rule

Under the current rule, a broker dealer is allowed to vote via proxy on behalf of registered shareholders provided that (i) it has delivered proxy materials to the beneficial owner of the stock, requesting instructions on how to vote the shares and (ii) it has not received voting instructions from the beneficial owner by the required date. Brokers, however, cannot vote on certain “non-routine” matters that are listed in the current rule; generally matters that would substantially affect stockholder rights and privileges, such as mergers or the creation or amendment of the terms or conditions of existing stock. Historically, “uncontested” elections of directors were considered to be routine matters and were not subject to NYSE Rule 452. As a result, brokers had discretion to vote uninstructed shares in an uncontested election of directors.

The Revised Rule

Under Revised Rule 452, uncontested elections of directors have been included in the list of “non-routine” matters. As a result, brokers will be prohibited from voting in uncontested elections unless they have received voting instructions from the beneficial owners.

The revision was largely based on the findings of the Proxy Working Group, a collaborative effort created by the NYSE in April 2005 to review the rules regulating the proxy voting process. The Proxy Working Group recommended the revision in an effort to encourage better corporate governance and transparency in the election process. The Revised Rule seeks to address concerns that broker discretionary voting for directors has impacted election results.

Impact

The Revised Rule will affect an issuer’s ability to establish a quorum of shareholders entitled to vote. The elimination of discretionary broker voting of uninstructed shares will prohibit broker votes from counting towards the quorum threshold if the agenda does not include at least one “routine” or “discretionary” matter for which broker discretionary voting is permitted. Issuers will likely incur higher costs to successfully reach stockholders who may not be aware of the change in voting procedures and the effect of

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not returning their proxy, as well as to garner the necessary votes to establish a quorum.

The Revised Rule will also affect issuers that have adopted a majority voting requirement for the election of directors. A consequence of eliminating brokers' votes is that fewer votes will be cast and counted in an election. Since fewer votes will be cast, it may be more difficult for a director standing for election to the board of an issuer that has adopted majority voting to receive the number of votes necessary for his or her election.

Finally, as a result of the Revised Rule, proxy advisory firms and special interest groups may gain more influence, especially in a "just vote no" or "withhold" vote campaign waged against an incumbent board. Individual investors of smaller issuers will be at the mercy of the institutional investors who may use their larger holdings to sway the outcome of corporate matters. Consequently, issuers may deem it necessary to spend considerable time and money to solicit the support of their institutional or activist shareholders.

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