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SEC Approves NYSE Proposal to Eliminate Discretionary Broker Voting in Uncontested Director Elections

On July 1, 2009, the SEC voted to approve a New York Stock Exchange rule amendment that eliminates discretionary broker voting in uncontested director elections. The amendment is effective for proxy voting for shareholder meetings held on or after January 1, 2010. The amendment does not apply to meetings that were scheduled to be held prior to the effective date, but are adjourned to a date on or after January 1, 2010.

Currently, NYSE Rule 452 allows brokers to vote on "routine" proposals when the beneficial owner of the stock fails to provide specific voting instructions to the broker at least 10 days before a scheduled meeting. Rule 452 currently treats uncontested director elections as a "routine" proposal. The amendment changes this for all companies with shares listed on NYSE, Nasdaq or AMEX (other than for issuers that are investment companies registered under the Investment Company Act of 1940). Now, any broker that is a member of NYSE will be prohibited from voting in such elections absent specific voting instructions from the beneficial owner of the stock.

The NYSE originally proposed these amendments on October 24, 2006 and subsequently filed additional amendments on May 23, 2007, June 27, 2007 and February 26, 2009. The rule changes stem from the conclusion of the NYSE Proxy Working Group created in 2005 that "it is important to recognize that the election of a director, even where the election is uncontested, is not a routine event in the life of a corporation." While contested elections occur relatively

infrequently, in recent years new types of proxy campaigns, including "just vote no" campaigns, have arisen. These campaigns often do not result in competing solicitations for purposes of Rule 452, so they were not considered contested and uninstructed broker votes have been counted. This drew some criticism from investor groups promoting proxy campaigns against management because brokers generally vote uninstructed shares in accordance with management's recommendations.

The NYSE Proxy Working Group recognized that the elimination of discretionary broker voting for the election of directors could significantly impact the director election process and shareholder meetings. For example, it would likely increase the cost of uncontested elections for companies that have a high percentage of retail stock ownership, because they will need to spend more money and effort to encourage shareholders to vote. These additional costs may increase substantially for companies that have adopted majority voting for directors. Companies may also have difficulties in obtaining a quorum if no other "routine" matters, such as ratification of auditors, are on the agenda. The rule change also may give large shareholders, such as institutional investors and hedge funds, and proxy advisory firms more influence in director elections.

The NYSE recognized that investment companies, which tend to have disproportionately large retail shareholder bases, would face an undue burden if broker discretionary voting for directors were

eliminated, particularly since they frequently do not have other “routine” matters on the agenda for their shareholder meetings. As a result, the amendment to NYSE Rule 452 excepts

investment companies registered under the Investment Company Act of 1940 from the elimination of broker discretionary voting.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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