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PUBLISHED: MARCH 23, 2009

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## Amendment Proposed to NYSE Rule 452

On February 26, 2009, the New York Stock Exchange (NYSE) filed with the Securities and Exchange Commission (SEC) the fourth, and final, version of its proposal to amend NYSE Rule 452, which would eliminate broker discretionary voting for the election of directors for all issuers except registered investment companies. The SEC published a notice for comments to the proposed amendment to Rule 452 in the Federal Register on March 6, 2009 (SEC Release No. 34-59464). This final proposal is subject to a 21-day open comment period ending March 27, 2009.

### **The Current NYSE Rule 452**

NYSE Rule 452 and SEC rules currently require brokers to send proxy materials to the beneficial owners of shares of a public company and request instructions on voting. If the brokers do not receive instructions at least 10 days prior to the annual meeting, the broker may cast its votes on behalf of the beneficial owners with respect to all "routine" matters, including uncontested director elections. Brokers may not cast votes involving "non-routine" matters, which usually include "contested" matters and matters that may substantially affect the rights or privileges of stockholders.

### **The Proposed Amendment**

In 2005, the NYSE established the Proxy Working Group (PWG) for the purpose of examining the rules related to the proxy voting process. The PWG issued a report and an addendum to the report recommending that the NYSE amend Rule 452 to eliminate the ability of brokers to vote in uncontested director elections. The recommendations of the PWG focused on the PWG's conclusion that, under evolving standards of corporate governance, the election of directors is the primary means of holding directors accountable to shareholders and, accordingly, should not be left to brokers in the absence of instructions from the owners of the underlying economic interest in the

corporation. The PWG's recommendations also were influenced by concerns over the impact of broker discretionary voting in the context of new types of shareholder activism, such as "just vote no" campaigns, that do not involve a traditional "proxy contest."

The proposed amendment to Rule 452 would make uncontested director elections a "non-routine" matter. The proposed changes, if accepted, would prohibit brokers from voting on the election of directors, whether contested or uncontested, absent specific instructions from the beneficial owner of the shares. The amendment would not apply to investment companies registered under the Investment Company Act of 1940, as amended.

### **Projected Effective Date for the Proposed Amendment**

The proposed amendment to Rule 452 would be applicable to proxy voting for shareholder meetings held on or after January 1, 2010; however, if the amendment is not approved by August 31, 2009, the amendment's effectiveness would be delayed by at least an additional four months and would not fall within the first half of 2010. The amendment to Rule 452 will not apply to meetings scheduled prior to the amendment's effectiveness and properly adjourned to a date on or after the amendment's effectiveness.

### **The Practical Effect of Approval**

Proponents of the proposal to amend Rule 452 believe that the current rule gives too much discretion to brokers whose votes normally are cast in support of the current directors' recommendations and, therefore, makes it difficult for shareholders to challenge an incumbent board. Activist shareholders have concerns that the exercise of discretionary broker voting in favor of the recommendations of the incumbent board thwarts their attempts to affect corporate governance by initiating "just vote no" campaigns without incurring the significant costs associated with initiating a drawn-out election contest. The elimination of broker discretionary voting could give more strength to these "just vote no" campaigns and cause an increase in the growing activism of certain institutional investors.

Opponents of the amendment to Rule 452 contend that eliminating discretionary broker voting of uninstructed shares could make it difficult for companies to establish a quorum for their annual shareholder meetings unless the agenda includes at least one other "routine" matter (such as ratification of the independent accountant) for which discretionary voting is permitted. Opponents believe that the additional time and money that will be required to solicit the votes necessary to establish a quorum will result in unnecessary increases in the costs of holding annual shareholders meetings. While the PWG recognized that the amendment to Rule 452 could have a significant impact on the director election process, the PWG concluded in its report that such costs were worth the gain in the interest of better corporate governance and transparency in the election process.

### **Submission of Comments**

Interested persons and companies may submit comments to the SEC in support of, or in opposition

to, the proposed Rule 452 amendment through the SEC's Internet comment form, via e-mail (including in the subject line "File Number SR-NYSE-2006-92") or via mail. The comment period ends on March 27, 2009.

**Contact Info**

If you have any questions about the amendment to NYSE Rule 452, please contact your Husch Blackwell Sanders attorney.

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