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NYSE Tightens the Loop on Broker Discretionary Voting; What's the Impact on Proxy Solicitations?

The New York Stock Exchange ("NYSE" or "Exchange") has further narrowed the scope of corporate resolutions that can be voted on by brokers without instruction from their clients. On January 25, 2012, the Exchange issued an Information Memo regarding the application of NYSE Rule 452 to "Certain Types of Corporate Governance Proxy Proposals."ⁱ The Memo states that, in light of "recent congressional and public policy trends disfavoring broker voting of uninstructed shares, the Exchange has determined that it will no longer continue its previous approach under Rule 452 of allowing member organizations to vote on [Corporate Governance Proxy Proposals] without specific client instructions."ⁱⁱ The change is effective immediately and reverses the Exchange's previous policy of permitting discretionary voting on "shareholder friendly" governance proposals provided that management was recommending in favor of the resolution (the NYSE deemed similar proposals to be "non-routine" if management was recommending against the resolution or made no recommendation on the resolution). While the list of corporate governance proposals that the change applies to is not necessarily meant to be exhaustive, the Memo mentions as examples proposals to, "de-stagger the board of directors, majority voting in the election of directors, eliminating supermajority voting requirements, providing for the use of consents, providing rights to call a special meeting, and certain types of anti-takeover provision overrides."ⁱⁱⁱ

This is the latest in a series of changes to Rule 452 whereby regulators and legislators have sought to narrow the scope of broker discretionary voting. In 2010, the rule was amended to prohibit brokers from issuing a discretionary vote on uncontested director elections. The rule was more recently amended by the Dodd-Frank Act to prohibit broker discretionary voting on executive compensation-related agenda items. The latest change virtually eliminates discretionary voting altogether with the exception of a few items. Importantly, the rule change does not apply to general requests for an increase in authorized common stock or proposals relating to the ratification of auditors, which many companies rely on to help achieve quorum. However, the change could have a considerable impact on companies seeking certain governance-related changes.

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Over the past decade, many companies have sought to eliminate anti-takeover provisions and adopt majority voting in uncontested director elections to make their governance profile more "shareholder friendly." However, many of these "shareholder friendly" changes require companies to amend their Charter or Certificate of Incorporation, which themselves tend to have supermajority vote requirements attached. In fact, according to our research from the 2011 proxy season, 19 of the 36 companies that submitted management resolutions to repeal their classified board structure required a vote of two-thirds of outstanding shares or more for approval and 31 of the 36 companies requiring at least a majority of shares outstanding support.^{iv}

Companies with significant retail investor components are obviously most affected by the loss of discretionary voting. A company that is considering submitting any of the affected proposals to a shareholder vote during the 2012 proxy season is encouraged to analyze its shareholder base to ascertain the potential impact of this change. The company should also plan its solicitation strategy accordingly to ensure a successful result.

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If you have any questions, please feel free to contact your Georgeson Account Executive or:

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i NYSE Regulations Inc., Application of Rule 452 to Certain Types of Corporate Governance Proxy Proposals, (January 25, 2012) (available at: http://www.nyse.com/nyse/nyse/nyse/rule-changes/detail;sessionId=349BA7BC77EE8FE17070D3369D1A0BCE?memo_id=12-4).

ii Id.

iii Id.

iv Georgeson Inc., 2011 Annual Corporate Governance Review, (November 2011).