

Client Alert

August 2009

ELIMINATION OF BROKER DISCRETIONARY VOTING IN DIRECTOR ELECTIONS

Marc L. Brown

On July 1, 2009, the Securities and Exchange Commission approved an amendment to New York Stock Exchange Rule 452, which governs the matters on which brokers may vote in their discretion in the absence of voting instructions from street name holders. *Amended Rule 452 eliminates the ability of brokers to vote in their discretion with respect to elections of directors, including uncontested elections.*

A public company should consider the following consequences of amended NYSE Rule 452:

- Prior to the adoption of amended NYSE Rule 452, a broker could vote in favor of management's slate of directors in an uncontested election of directors if the broker did not receive voting instructions from the street name holder. Under the amended rule, a broker will no longer be allowed to vote in favor of management's director slate without receiving voting instructions from the street name holder.
- NYSE Rule 452 applies to all brokers that are members of the New York Stock Exchange. Therefore, the amended rule affects all public companies that have stock held in street name, not just NYSE-listed companies.
- The amended rule applies to stockholder meetings held on or after January 1, 2010.
- If the only matter to be voted on at an annual meeting of stockholders is the election of directors, a company may have difficulty obtaining a quorum since shares held by brokers who do not receive voting instructions from street name holders will not be counted for purposes of establishing a quorum. Since NYSE Rule 452 still allows brokers to vote uninstructed shares for the ratification of a company's appointment of its independent registered public accounting firm, a company should consider including that item as a matter to be voted upon at the annual meeting in order to ensure that a quorum for the meeting is obtained.
- If a company's bylaws state that a director nominee must receive the affirmative vote of a majority of the votes cast in respect of his or her election in order to be elected as a director, management's slate of directors may not be elected if there is a strong vote "no" or "withhold" campaign led by activist stockholders, or if a proxy advisory firm such as RiskMetrics Group recommends that stockholders do not vote in favor of management's slate. By contrast, if a company's bylaws state simply that the specified number of director nominees receiving the highest number of affirmative votes will be elected as directors, it will be easier to assure election of management's slate of directors since "no" or "withhold" votes will not affect the results of the election.
- A company should consider working more closely with its proxy solicitation adviser, or hiring such an adviser, in order to identify and implement strategies designed to obtain broker voting instructions from an increased number of street name holders. Increased proxy solicitation efforts may become advisable or necessary.