

NYSE Re-files Rule Amendment with SEC to Eliminate Broker Discretion in Director Elections

On February 26, 2009, the New York Stock Exchange LLC (“NYSE”) filed with the Securities and Exchange Commission (“SEC”) an amendment to its proposed change to NYSE Rule 452 and corresponding NYSE Listed Company Manual Section 402.08.¹ The current rule and the proposed amendments are summarized below.

I. Current NYSE Rule 452 and NYSE Listed Company Manual Section 402.08

Current NYSE Rule 452 provides that brokers may vote on certain matters deemed “routine” by the NYSE if the broker delivers proxy materials to beneficial owners and does not receive voting instructions by the date specified in the statement accompanying such proxy materials.² An “uncontested” election for a company’s board of directors is treated as routine.³ NYSE Rule 452 also provides a list of 18 matters that are deemed as non-routine and thus brokers cannot vote uninstructed shares for these matters.⁴

In April 2005, the NYSE created the Proxy Working Group to review the NYSE rules regulating the proxy voting process.⁵ In its June 2006 draft report, the Proxy Working Group recommended, among other things, that the election of directors, whether uncontested or not, should no longer be viewed as routine under NYSE Rule 452 and thus brokers should no longer be permitted to cast uninstructed shares for the election of directors.⁶

¹ The NYSE’s filing with the SEC relating to the proposed amendment is available at: [http://apps.nyse.com/commdata/pub19b4.nsf/docs/BA0AE7652975AD9D8525756A00108384/\\$FILE/NYSE-2006-92%20A4.pdf](http://apps.nyse.com/commdata/pub19b4.nsf/docs/BA0AE7652975AD9D8525756A00108384/$FILE/NYSE-2006-92%20A4.pdf)

Current NYSE Rules are available at: http://rules.nyse.com/NYSE/NYSE_Rules/

Current NYSE Listed Company Manual Sections are available at: http://www.nyse.com/Frameset.html?nyseref=http%3A//www.nyse.com/regulation/nyse/1182508124422.html&displayPage=/lcm/lcm_section.html

² NYSE Rule 451 provides a timeline to be used in such statement.

³ NYSE Rule 452.11(2) defines a “contest” as a matter that “is the subject of a counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management.”

⁴ NYSE Rule 452.11(1)-(18) enumerates matters for which brokers may not vote uninstructed shares.

⁵ As noted in the NYSE’s filing and in the NYSE Proxy Working Group Report, the NYSE sought to obtain a wide diversity of views as well as a broad range of expertise in creating the Proxy Working Group. Members of the Proxy Working Group are from different constituencies and all have significant experience with the proxy voting process. Members included representatives from issuers, NYSE member organizations, the legal community, institutional investors and individual investors. Staff of the NYSE, SEC and National Association of Securities Dealers (now part of Financial Industry Regulatory Authority) attended various meetings of the Proxy Working Group.

⁶ The NYSE Proxy Working Group Report is attached as Exhibit 3 to the NYSE’s filing of the amendment.

II. Proposed Amendments to NYSE Rule 452 and NYSE Listed Company Manual Section 402.08

In October 2006, the NYSE filed with the SEC its first proposed change to NYSE Rule 452. This proposed change added the election of directors to the enumerated list of matters deemed non-routine. The NYSE subsequently filed two amendments to its initial filing in order to exempt companies registered under the Investment Company Act of 1940 from having to treat the election of directors as a non-routine matter and to codify the interpretation that material changes to an investment advisory contract with an investment company is a non-routine matter.

The NYSE's latest proposed amendment includes the above proposed changes and updates the effective date of the proposed amendment. The proposed amendment will be applicable to proxy voting for shareholder meetings held on or after January 1, 2010. In the event the proposed amendment is not approved by the SEC until after August 31, 2009, the effective date will be delayed to a date which is at least four months after the approval date, and which does not fall within the first six months of the calendar year. The amendment would not apply to a meeting that was originally scheduled to be held prior to the effective date but was properly adjourned to a date on or after the effective date.

III. Issues with Proposed Amendment Noted by the Proxy Working Group

The Proxy Working Group noted that the elimination of broker discretionary voting for uninstructed shares in the election of directors would increase the cost for issuers to reach out to shareholders and obtain their votes and make it more difficult for companies to establish a quorum for shareholder meetings as well as elect directors for companies that use majority voting rather than plurality voting. The Proxy Working Group also noted that these difficulties may have a larger impact on smaller companies, but viewed the change as "a cost required to be paid for better corporate governance and transparency of the election process."

IV. Process

The SEC will solicit comments on the NYSE's proposed amendment before approving the changes to the rule. The SEC published notice of the proposed amendment on its website and interested persons will have 21 days from the date of publication of the notice in the Federal Register to submit comments.⁷ Within 35 days of the date of publication of the notice in the Federal Register, or within such longer period of up to 90 days if the SEC determines such longer period is appropriate or within such longer period as to which the NYSE consents, the SEC will either approve the proposed amendment or institute proceedings to determine whether the proposed amendment should be disapproved.

The proposed amendment may be a priority for at least some of the new commissioners of the SEC. In remarks made earlier this month, Commissioner Elisse B. Walter stated: "Another area where I believe the Commission can act to increase shareholder participation concerns the NYSE's proposed amendments to Rule 452 that would eliminate uninstructed broker votes from director elections. As you probably know, the Exchange's request has been held in abeyance at the Commission for over two years. I believe that we should move forward and determine whether to adopt these amendments."⁸ We believe the SEC will act quickly on this

⁷ Notice is available at: <http://www.sec.gov/rules/sro/nyse/2009/34-59464.pdf>

⁸ Remarks before the Practising Law Institute on February 18, 2009 available at: <http://www.sec.gov/news/speech/2009/spch021809ebw.htm>

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as the new administration and regulators refocus on corporate governance and overhaul rules with respect to proxy voting, proxy access and beneficial ownership reporting.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Leakhena Mom at 212.701.3330 or lmom@cahill.com.