

NYSE Proposes to Eliminate Broker Discretionary Voting in Director Elections

Columbus

52 East Gay St.
Post Office Box 1008
Columbus, Ohio 43216
tel 614.464.6400

Washington

1828 L Street N.W.
Eleventh Floor
Washington, D.C. 20036
tel 202.467.8800

Cleveland

1375 East Ninth St.
2100 One Cleveland Ctr.
Cleveland, Ohio 44114
tel 216.479.6100

Cincinnati

221 East Fourth St.
Suite 2000, Atrium Two
Post Office Box 0236
Cincinnati, Ohio 45201
tel 513.723.4000

Alexandria

277 South Washington St.
Suite 310
Alexandria, VA 22314
tel 703.837.6999

Akron

106 South Main St.
Suite 1100
Akron, Ohio 44308
tel 330.208.1000

Houston

700 Louisiana Street
Suite 4100
Houston, TX 77002
tel 713.588.7000

On February 26, 2009, the New York Stock Exchange filed with the Securities and Exchange Commission a proposed amendment to NYSE Rule 452, *Giving Proxies by Member Organizations*, that would eliminate broker discretionary voting in the election of directors.¹

Under current proxy rules, brokers are required to deliver proxy materials to beneficial owners and request that beneficial owners provide voting instructions. If brokers have not received voting instructions by the tenth day preceding the meeting date, Rule 452 allows brokers to vote uninstructed shares on certain matters which the NYSE considers to be “routine.”

Uncontested director elections are currently considered by the NYSE to be “routine” matters on which brokers are permitted to cast discretionary votes. The proposed amendment to Rule 452 would add director elections to the list of items identified by the NYSE as “non-routine,” thereby eliminating broker discretionary voting in the election of directors.

The proposed amendment is likely to increase the costs of uncontested elections, as issuers may have to expend more money and effort to reach shareholders who previously did not vote to establish quorums at shareholder meetings. These costs may increase substantially with the rise of majority

voting for directors, as issuers will have to obtain votes from shareholders who may not realize that their failure to vote constitutes a “no” vote. The NYSE believes that these increased costs and difficulties are necessary to ensure better corporate governance and transparency in the director election process.

The proposed amendment must be approved by the SEC before it takes effect and will be the subject of a public comment period following publication in the Federal Register. If approved by the SEC on or before August 31, 2009, the proposed amendment will be applicable to shareholder meetings held on or after January 1, 2010. If the proposed amendment is approved by the SEC after August 31, 2009, its 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 proposed amendment will not apply to companies registered under the Investment Company Act of 1940.

For more information regarding the proposed amendment, please contact your regular Vorys attorney or a member of the Vorys Corporate and Finance Group by calling 614.464.6400.

¹ The NYSE originally filed this rule change in October 2006 and filed amendments to the proposed rule change in May 2007 and June 2007. This amendment updates the provision regarding the effective date of the proposed rule change and reflects minor SEC staff comments on the June 2007 amendment.

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