



JONES DAY
COMMENTARY

NYSE FURTHER LIMITS DISCRETIONARY VOTING BY BROKERS

On January 25, 2012, the New York Stock Exchange announced revisions to NYSE Rule 452. Under the new rule, which is effective immediately, brokers will not be able to vote their clients' uninstructed shares on certain corporate governance proposals. This change has immediate implications for issuers with a corporate governance proposal on the ballot for their 2012 annual meeting.

CHANGES TO THE APPLICATION OF RULE 452

Rule 452 governs discretionary voting by brokers when their clients have not provided instructions on how to vote shares held by brokers on behalf of their clients. Rule 452 permits brokers to vote uninstructed shares on "routine" proposals but not on "non-routine" proposals. Because the NYSE rules govern how a NYSE-licensed broker may vote shares held on behalf of its clients (including shares of companies listed on other exchanges), Rule 452 also affects voting at companies listed on NASDAQ. As a result

of this change to the application of Rule 452, broker non-votes may have a significant effect on the outcome of corporate governance proposals.

Under revised Rule 452, brokers are no longer permitted to vote uninstructed shares with respect to certain corporate governance proposals that are now considered "non-routine." Examples described by the NYSE as corporate governance proposals affected by this new rule include proposals:

- Declassifying the board;
- Providing for majority voting in director elections;
- Eliminating supermajority voting requirements;
- Providing for the use of written consents by stockholders;
- Providing rights to call a special meeting; and
- Eliminating certain types of anti-takeover provisions.

Although the rule does not specifically address additional items, other types of corporate governance proposals that could be affected may include

proposals separating the roles of Chairman and CEO, requiring an independent Chairman, limiting stockholder suits to a specific jurisdiction, eliminating cumulative or dual-class voting rights, redeeming poison pills, and reincorporating the company.

IMPLICATIONS

The change in the application of Rule 452 and the resulting increase in the number of broker non-votes may assist activist stockholders in having a greater impact on implementing several of their corporate governance initiatives.

If a corporate governance proposal is on the ballot this year, it will be important to determine whether the new broker voting prohibitions will apply to the proposal. If brokers are prohibited from voting without instructions, it will be even more important for issuers, their proxy solicitors, and their investor relations team to actively engage with stockholders in advance of the meeting to gain support for their position on any proposal.

The Information Memo from the NYSE is available at http://www.nyse.com/nysenotices/nyse/information-memos/detail;jsessionid=67CE122197654D5FE7E56EB91C2E9AB1?memo_id=12-4.

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