

## Update – NYSE Expands Range of “Broker May Not Vote” Matters Under Rule 452

Yesterday, the New York Stock Exchange (NYSE) released Information Memo 12-4, “Application of Rule 452 to Certain Types of Corporate Governance Proxy Proposals,” establishing significant new restrictions on broker discretionary voting.<sup>1</sup> Citing “recent congressional and public policy trends disfavoring broker voting of uninstructed shares,” Information Memo 12-4 provides that matters previously considered by the NYSE to be “Broker May Vote” under Rule 452 will, going forward, be treated as “Broker May Not Vote” matters.

### Background

NYSE Rule 452 permits brokers to vote on “routine” proposals when the beneficial owner of the stock fails to provide “specific” voting instructions to the broker at least 10 days before a scheduled meeting. These routine proposals are known as “Broker May Vote” matters, and while Rule 452 does not provide explicit examples of so-called “Broker May Vote” matters, the NYSE has historically addressed this by ruling that particular routine proposals are deemed “Broker May Vote” matters. These include 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.

Rule 452 also provides numerous examples of non-routine matters that brokers are specifically not entitled to vote on without instruction, so-called “Broker May Not Vote” matters. It is no secret that the NYSE’s view on broker discretionary voting under Rule 452 has grown increasingly dim over the past few years, and the list of “Broker May Not Vote” matters was expanded accordingly in July 2009 and again in September 2010, with amendments to Rule 452 adding the election of directors, regardless of whether the election is contested, and executive compensation as “Broker May Not Vote” matters.<sup>2</sup>

The release of Information Memo 12-4 signals a significant new curtailment of the practice of broker discretionary voting. Observing that “the approach to broker voting of uninstructed shares has narrowed through changes in [NYSE] rules as well as through legislative action,” the NYSE “determined that it will no longer continue its previous approach under Rule 452 of allowing [brokers] to vote on such proposals without specific client

<sup>1</sup> NYSE Information Memo 12-4, available at [http://www.nyse.com/nysenotices/nyse/information-memos/detail;jsessionid=0610BF54CEE27E065651385975C6C1B?memo\\_id=12-4](http://www.nyse.com/nysenotices/nyse/information-memos/detail;jsessionid=0610BF54CEE27E065651385975C6C1B?memo_id=12-4).

<sup>2</sup> SEC Release No. 34-60215; File No. SR-NYSE-2006-92 (July 1, 2009), available at <http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf> and SEC Release No. 34-62874; File No. SR-NYSE-2010-59 (September 9, 2010), available at <http://www.sec.gov/rules/sro/nyse/2010/34-62874.pdf>.

instructions.” In short, matters previously deemed “Broker May Vote” are henceforth to be treated as “Broker May Not Vote.” Important to note is the fact that Rule 452 governs the conduct of the brokers, and so this change affects voting of shares on these matters by brokers that are NYSE members for all public companies, regardless of whether the company is NYSE-listed.<sup>3</sup>

## Significance

Companies in the near future may have to invest more time and money in successfully reaching shareholders who may not be aware that failure to vote constitutes a “no” vote. This is relevant not only to securing sufficient votes for particular matters now considered “Broker May Not Vote,” but, more importantly, to securing a quorum necessary to conduct any business at a shareholder meeting. This issue, raised in a prior Alston & Bird Securities Law Advisory,<sup>4</sup> highlights one, perhaps unintended, consequence of Information Memo 12-4, the increased difficulty of securing a quorum for the conduct of business at shareholder meetings. Notably, the standard for establishing a quorum for the conduct of business at a shareholder meeting is often that a majority of the shares “entitled to vote” are present in person or by proxy. Because brokers will no longer be entitled to vote upon a broad range of matters without receiving customer instructions, it may be more difficult for some corporations to establish a quorum to conduct business at a shareholder meeting and may require an active solicitation for each shareholder meeting. Although Delaware law, for example, allows a corporation, through its certificate of incorporation or bylaws, to reduce the quorum requirement to as low as one-third of the number of shares entitled to vote, a number of competing corporate governance and anti-takeover considerations may limit the attractiveness of this alternative.

An additional question that stands out in the wake of Information Memo 12-4 is what matters remain routine and subject to broker discretionary voting under Rule 452. One matter that does appear to remain subject to broker discretionary voting is the ratification of auditors.<sup>5</sup> As such, for as long as the ratification of auditors remains subject to broker discretionary voting, it may be critical to include that vote in annual meetings as the surest way to ensure that a quorum is achieved.

*This alert was written by Marshall Chalmers, Carol McGee and Scott Ortwein.*

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<sup>3</sup> McLevey, Judith, “Corporate Governance Proxy Proposals & Rule 452,” (January 25, 2012), available at <http://exchanges.nyx.com/node/2172>.

<sup>4</sup> See “Update – NYSE Continues with Elimination of Broker Non-Votes,” (March 4, 2009), available at [http://www.alston.com/financial\\_services\\_advisory\\_nyse52](http://www.alston.com/financial_services_advisory_nyse52).

<sup>5</sup> See <http://exchanges.nyx.com/node/2172>.

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