

SEC Approves NYSE Amex Rule Eliminating Broker

Discretionary Voting in Director Elections

On December 23, 2009, NYSE Amex LLC (the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule to eliminate broker discretionary voting on the election of directors, other than for companies registered under the Investment Company Act of 1940. The proposal modifies NYSE Amex Equities Rule 452 ("Rule 452") to add "the election of directors" to the list of matters on which member organizations are not entitled to give a proxy to vote without instructions from the beneficial owner. Additionally, the proposal requires a corresponding change to Section 723 of the NYSE Amex Company Guide ("Section 723").

The amendments are identical to the amendments adopted by the New York Stock Exchange ("NYSE"), as approved by the Commission on July 1, 2009, to NYSE Rule 452 and Section 402.08 of the NYSE Listed Company Manual. In the July 1, 2009 Approval Order granting approval of the NYSE amendments, the Commission stated that "while other self-regulatory organizations currently allow discretionary voting, we would expect these markets to make changes to conform to the NYSE's new rules to eliminate any disparities involving voting depending on where shares are held." As such, on January 5, 2010, the Commission released notice that the filing by the Exchange proposing the abovementioned amendments shall be deemed effective as of the filing date based on, among other things, their conformity with the view of the Commission. Thus, the proposed amendments shall be effective for shareholder meetings held on or after January 1, 2010.

These amendments (with the NYSE amendments) may create difficulties for companies in 2010. In the event companies do not include a "routine" item on their annual meeting agendas, many companies may find it difficult to achieve a quorum at their annual meeting. Broker discretionary votes represent, in many instances, a significant percentage of the total shares represented at an annual meeting; and, under the amendments, if a company does not have a "routine" item on the meeting agenda, broker votes will not count toward a quorum. Additionally, the election of directors may become more difficult for companies that have adopted majority voting provisions in their by-laws. These companies may not have the benefit of broker discretionary votes, which will increase the difficulty in achieving the requisite number of affirmative votes.

In addition to these amendments, the filing by the Exchange also proposes codification of its interpretation of Rule 452 and Section 723 relating to broker discretionary voting on an investment company's investment advisory contract with a new investment advisory. Specifically, the Exchange has long interpreted Rule 452 and Section 723 to prohibit a member organization from giving a proxy to vote shares registered in its name absent instruction from the beneficial holder of the shares on any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment adviser. This interpretation has now been codified.

If you have any questions regarding the amendments, please contact John Henry at jhenry@millermartin.com, Clint Cromwell at ccromwell@millermartin.com or any other member of Miller & Martin's [Securities Practice Group](#).

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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