

Public Company Control Alert: NYSE Acts to Further Limit Broker Votes on Specified Corporate Governance Proposals

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On January 25, 2012, the New York Stock Exchange issued an [Information Memo](#) to its member organizations stating that effective immediately, brokers may not vote on corporate governance proposals supported by company management without instructions from their clients. NYSE's rules affect the voting of all shares held in "street name" by NYSE member organizations, regardless of whether the vote is for an issuer listed on the NYSE. This new position follows a recent regulatory and legislative trend disfavoring discretionary broker voting. The notification is a significant departure from historical practice where brokers used their discretion to cast votes on behalf of "street name" shareholders who fail to provide voting instructions with respect to what were previously viewed as "routine" matters. The NYSE's new position will affect the voting dynamics for company-supported governance proposals, including those that companies may put forward this proxy season to avoid shareholder proposals on similar matters.

Background

NYSE Rule 452 allows a member organization (broker) to use its discretion to cast votes on behalf of "street name" shareholders who do not return the proxy card to the broker within 10 days prior to the shareholder meeting. However, such discretionary voting is not permitted with respect to "non-routine" matters. Historically, corporate governance proposals that were supported by company management were considered routine matters. Beginning in 2010, the NYSE prohibited broker discretionary voting in the context of director elections, which was codified in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Dodd-Frank Act also prohibited brokers from voting shares on executive compensation proposals without specific client instruction. The NYSE's new position with respect to company-supported corporate governance proposals is the most recent limit on broker discretionary voting. When brokers do not vote a share they hold in street name because of a lack of instructions, it is referred to a "broker non-vote."

What changed?

The Information Memo indicated the following examples of company-supported governance proposals that would no longer be considered routine:

- de-staggering a company's board of directors;
- majority voting in the election of directors;
- eliminating super majority voting provisions;
- providing for the use of written consent;
- providing rights to call a special meeting; and
- certain types of anti-takeover provision overrides.

Why is this significant?

Brokers that typically voted in favor of these type of company-supported proposals will no longer have discretion to do so. These proposals usually must be implemented through an amendment to the company's articles or certificate of incorporation, and as such amendments typically require the affirmative vote of at least a majority of the outstanding shares, broker non-votes will have the same effect as "against" votes. Depending on the composition of shareholders, the loss of broker discretionary votes may have a material effect on the ability of a company to obtain shareholder approval for a company-supported governance proposal. The problem will be exacerbated where a proxy advisory firm recommends against the proposal. Until this rule change, discretionary broker votes countered to some degree the negative votes from holders that followed the recommendations of proxy advisory firms.

Under Delaware law, where brokers have discretionary authority to vote on any matter on the ballot, all shares they hold in street name will be considered present for quorum purposes. If brokers do not have discretionary authority to vote on any matter, shares that were not instructed on any matter are not considered present for quorum purposes. In the past, a company-supported governance proposal would be discretionary and therefore would be enough on its own to cause all street name shares to be present at a meeting for quorum purposes. That will no longer be the case.

What should you do now?

If you plan to have a company-supported governance proposal on your annual meeting agenda, it will be more important than ever to analyze the shareholder base and consider early engagement with key shareholders and the likely recommendations of the proxy advisory firms. Proxy solicitation firms can be invaluable in this analysis, and can also help to “get out the vote” of holders that may not otherwise return instruction cards.

These new rules should also be taken into account in connection with consideration of pre-empting a received or expected shareholder proposal on corporate governance matters.

Finally, if there will be other proposals on the agenda and obtaining a quorum for the meeting is a potential concern, companies might consider another proposal to support a quorum. Ratification of auditors and an increase in authorized common shares are examples of proposals that brokers may still vote uninstructed shares.

What if you have questions?

For any questions or more information on these or any related matters, please contact any attorney in the firm’s corporate practice group. A list of such attorneys can be found by clicking [Lawyers](#); on this page.

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