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## Elimination of Discretionary Voting Warrants Fresh Look at Proxy Practices for 2010

by Gabriella A. Lombardi and Brian M. Wong

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*The Securities and Exchange Commission has approved an amendment to New York Stock Exchange (NYSE) Rule 452 to eliminate broker discretionary voting in uncontested director elections held on or after January 1, 2010. The rule change will prohibit brokers from casting votes in any director election if the beneficial holder has not instructed the broker how to vote.*

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Importantly, the rule applies to brokerage firms who are NYSE members, and impacts the brokers' ability to vote on behalf of their brokerage customers. Accordingly, the absence of broker discretionary votes in uncontested director elections will have an impact on all companies—not only those listed on the NYSE—that have street name holders. The new rule does not apply to companies registered under the Investment Company Act of 1940.

For future shareholder meetings, companies should consider including an auditor ratification proposal or one of the other shareholder action items on which Rule 452 allows brokerage firms to cast discretionary votes. This will help to ensure that a quorum is present to conduct business at a meeting. Companies should also review their proxy statement disclosure regarding shareholder voting and revise their disclosure as necessary.

Companies with majority voting provisions should consider how these provisions will be impacted by the absence of broker discretionary votes. Such companies should also pay particular attention to the voting guidelines issued by proxy advisory firms. Because many institutional investors vote in accordance with the advisory firms, a recommendation by a proxy advisory firm against a director or directors will make it more difficult to achieve a majority approval threshold. In addition, the absence of broker discretionary votes may have the effect of increasing the impact of “withhold the vote” campaigns, making outreach to and follow-up with shareholders all the more important.

Companies with large retail shareholder bases may wish to consider measures to increase retail shareholder voting, such as lengthening the proxy solicitation period or engaging a proxy solicitation firm. These companies may also wish to mail proxy materials to their retail shareholders instead of relying on Internet availability of proxy materials, as historical data indicate that retail shareholders are even less likely to vote when a proxy statement is not physically delivered to them.

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