

## Alert

### **NYSE Rule 452 Amended to Eliminate Broker Discretionary Voting In Uncontested Elections**

#### ***2010 Annual Meeting Planning Starts Now for Many Companies***

**July 2, 2009**

Yesterday, the SEC approved the NYSE's proposed rule change to Rule 452 to eliminate broker discretionary voting of shares held in street name in uncontested director elections. The rule change applies to all public companies other than investment companies and generally will apply to all annual shareholder meetings beginning in 2010.

Rule 452 allows brokers to exercise discretionary voting authority with respect to routine matters when they have not been instructed by the beneficial owners of the shares at least 10 days before the scheduled meeting. Previously, uncontested director elections were classified as routine. The rule change is significant given the large number of shares held in street name at most public companies, and because brokers often vote uninstructed shares in favor of the company's director slate. Rule 452 governs brokers, not NYSE-listed companies. Therefore, the rule change applies to all public companies, not just those listed on the NYSE.

For many public companies, the amendment of Rule 452, coupled with other fairly recent and proposed changes to the annual meeting and director election process, will require significant additional planning in advance of the 2010 annual meeting season. In many cases, the amendment of Rule 452 will require changes to the annual meeting process, including both the timeline and budget, although public companies will need to tailor their approach to their particular shareholder base, voting patterns and bylaw provisions. Factors that will need to be considered include:

- The mix of retail and institutional investors, and of "NOBOs" and "OBOs;"
- Historical voting patterns;
- Whether other routine matters typically are included in the annual meeting proxy statement;
- The approval requirement for electing directors; and
- Potential recommendations by proxy advisory services.

Some of the items that public companies already are starting to think about include educational outreach to retail shareholders and the use of additional soliciting materials to increase retail voting, the pros and cons of e-proxy and the inclusion of routine matters in the proxy statement (such as auditor ratification) to make it easier to achieve a quorum for the meeting.

Since the imminent amendment of Rule 452, Schulte Roth & Zabel has been working with many of its public company clients, as well as institutional investors, to navigate the myriad considerations raised by the rule change and to develop strategies for the 2010 annual meeting season. Please contact any of the partners listed below, or any of your other SRZ contacts, if we can assist you in your planning.

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