



# THE ALTMAN PROXY ALERT

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July 7, 2009

## **SEC APPROVES ELIMINATION OF BROKER VOTING ON DIRECTOR ELECTIONS**

On July 1, 2009, the SEC voted to amend NYSE Rule 452 to eliminate broker discretionary voting for the election of directors.

The Commission also released two proposals for public comment which we will discuss in more detail in our weekly Governance & Proxy Review e-newsletter. The first regarding "say on pay" votes for TARP recipients, and the second to enhance corporate disclosures and to change several other proxy rules. Lastly, Commission Chairman Mary Schapiro stated that the Commission would undertake a review of the proxy "plumbing" issues during the balance of this year.

### **Amendments to Rule 452**

The Commission voted 3-2 in favor of approving the NYSE proposal. Commissioners Casey and Paredes dissented from the majority on the NYSE proposal. Both held the view that the Rule 452 issue should be examined within the context of the broader proxy voting and shareholder communications system.

### **The New Rule 452 and Potential Impact on Issuers**

#### **Effective Date:**

The amendment applies to proxy voting for stockholder meetings held on January 1, 2010 and after.

#### **Which Companies Are Affected?**

All NYSE, NASDAQ, and AMEX companies with the exception of companies registered under the Investment Company Act of 1940 will be affected by the removal of the discretionary vote on director elections. NYSE Rule 452 (Ten Day Rule) impacts brokerage firms that are members of the NYSE and their ability to vote on behalf of their customers, rather than applying to issuers listed on that exchange.

#### **Potential Negative Impact Expected:**

A review of the historical voting patterns of retail holders indicates that the loss of the discretionary vote will have a significant negative impact on companies with considerable retail brokerage stock ownership. A minimum of two-thirds and perhaps a much larger percentage of all retail brokerage shares do not typically vote unless being prompted to do so by proactive solicitation efforts. With the loss of the broker discretionary vote many companies will face serious challenges. We expect:

- Companies that do not generally ask shareholders to ratify their audit firm or have some other “routine” proposal on the agenda may not receive the necessary vote requirement to achieve quorum at annual meetings.
- With “Notice & Access”, which refers to the electronic delivery of proxy material, the retail voting responses will drop significantly compared to the traditional mailing of proxy material.
- The increasing movement of director elections to a majority vote requirement along with the loss of the broker discretionary vote will raise the bar for directors to be successfully elected.
- The continued inability to communicate directly with Objecting Beneficial Owners (OBO’s) of stock will continue to hinder solicitation efforts for stockholder approval on agenda items
- “Vote No Campaigns” and other shareholder activism against boards and individual directors is likely to increase and have greater impact as activists seize the opportunity to pressure companies with low vote response rates because of the loss of the broker discretionary vote on election of directors.
- Greater influence on director elections by institutional shareholders, hedge funds and proxy advisory firms on the voting process.

Elimination of Rule 452 will make director elections and annual meetings in 2010 more difficult for issuers. With the significant drop in retail voting at companies that use “notice & access”, majority voting for director elections becoming the norm and the greater chance for vote no campaigns by activists, the elimination of Rule 452 with regard to director elections has sealed the fate of the “routine” election of directors at many companies.

Issuers with sizeable retail holdings will need to thoughtfully analyze the impact of this change well in advance of their annual meetings and have a plan in place to ensure an uneventful re-election process.

If you have any questions regarding the amended Rule 452, please feel free to contact Kenneth L. Altman or Paul Schulman.

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