

## Client Alert

## NYSE Proposes to Eliminate Discretionary Broker-Dealer Voting for the Election of Directors

On October 24, 2006, the New York Stock Exchange (NYSE) filed a proposed rule change with the United States (US) Securities and Exchange Commission (SEC) that would eliminate discretionary broker-dealer voting for the election of the board of directors.<sup>1</sup>

Under the current NYSE Rule 452, titled "Giving Proxies by Member Organizations," broker-dealers are allowed to vote on certain routine proposals introduced at a shareholder meeting if the beneficial owner of the applicable security has not provided voting instructions to the broker-dealer at least ten (10) days before a scheduled shareholder meeting. Historically, under NYSE Rule 452, one of the items interpreted as "routine" and thus allowed discretionary voting by the broker-dealer was the uncontested election of a company's board of directors.<sup>2</sup>

Recognizing the importance of the election of board of directors even where the election is uncontested and also recognizing the significant effect on the rights or privileges of shareholders, the NYSE has proposed the rule amendment to specifically include the election of a company's board of directors in the list of "non-routine" matters which should not be voted by broker-dealers without receiving instructions from the beneficial owners.<sup>3</sup>

The proposed rule amendment to NYSE Rule 452 and the corresponding NYSE Listed Company Manual Section 402.08, if approved by the SEC, will be applicable to proxy voting for shareholders' meetings of issuers (whose securities are listed on the NYSE) held on or after January 1, 2008, except to the extent that a shareholders' meeting was originally scheduled to be held in 2007, but was adjourned to 2008.

We do not expect that the adoption of this amendment will significantly affect the votes received by non-US companies that are "Foreign Private Issuers" insofar as broker-dealers have, consistent with NYSE Rule 452.11, treated the solicitation of votes by "Foreign Private Issuers" as non-routine items (given that non-US companies who are "Foreign Private Issuers" are exempt from the US proxy rules and do not, as a matter of course, distribute proxy statements that comply with the US proxy rules).<sup>4</sup>

For US companies the treatment of the election of persons to a company's board of directors as a non-routine matter could have a significant effect on the number of votes received. This may be of a concern given the recent attacks by shareholder activists on the plurality voting system for director elections and the corporate governance responses adopted by many companies (*i.e.*, forced resignation of directors in the event of a majority "withhold" of votes).

Should you have any questions on the subject of this proposed rule amendment, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com) or Karen M. McCarthy at 212.336.2529 (kmmccarthy@pbwt.com).

## Endnotes

- <sup>1</sup> The proposed rule change filed by the NYSE was filed under File No. SR-NYSE-2006-92 (October 24, 2006).
- <sup>2</sup> NYSE Rule 452.11(2) defines a "contest" as a matter that "is the subject of counter-solicitation, or is part of a proposal made by a stockholder which is being opposed by management."
- <sup>3</sup> NYSE's list of "non-routine" matters which should not be subject to discretionary broker-dealer voting may be found in Rule 452.11 of the NYSE Rules. Non-routine matters include matters for which stockholders do not receive proxy statements compliant with the US proxy rules (which has the effect of making all proxy solicitations for "Foreign Private Issuers" non-routine).
- <sup>4</sup> Non-US issuers that are "Foreign Private Issuers" as defined in Rule 3b-4 of the US Securities Exchange Act of 1934, as amended (Exchange Act), are exempt from the US proxy rules pursuant to Rule 3a12-3 of the Exchange Act. Non-US issuers will qualify as "Foreign Private Issuers" unless (i) more than 50% of issuer's voting securities are held of record, directly or indirectly, by residents of the US, and (ii) any one or more of the following applies: (x) the majority of the executive officers or directors are US citizens or residents, (y) more than 50% of the issuer's assets are located in the US, or (z) the business of the issuer is administered principally in the US.

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