



NYSE Announces Effective Date for Proposal to Eliminate Broker Discretionary Voting, Suspends \$1 Price Requirement and Extends Lowering of Market Cap Requirement

On February 26, 2009, the New York Stock Exchange (NYSE) announced:

- Revision of its proposal to amend NYSE Rule 452 to eliminate broker discretionary voting on the election of directors for shareholder meetings held on or after January 1, 2010;
- Suspension of the \$1.00 closing price requirement until June 30, 2009; and
- Extension of the temporary lowering of the market capitalization requirement from \$25 million to \$15 million until June 30, 2009.

Effective Date for Proposal to Eliminate Broker Discretionary Voting

On February 26, 2009, the NYSE revised its proposal to amend Rule 452 to provide that the election of directors is not a routine matter for which NYSE member firm brokers would be permitted to cast votes for uninstructed shares. The NYSE amended rule would be applicable to proxy voting for shareholder meetings held on or after January 1, 2010. The proposed amendment to Rule 452 must be approved by the SEC and will be subject to a public comment period once published in the Federal Register. In the event the proposed amendment is not approved by the SEC prior to August 31, 2009, the effective date would be delayed to a date that is at least four months after the approval date and that does not fall within the first six months of the 2010 calendar year. The rule would not be applicable to investment companies.

The proposal reflects the work of the Proxy Working Group created by the NYSE in April 2005 and was first proposed by the NYSE in October 2006. The proposal had been delayed by the SEC while it continued its broader review of shareholder access issues. Rule 452, titled “*Giving Proxies by Member Organizations*,” currently allows brokers to vote on “routine” proposals if the beneficial owner has not provided specific voting instructions to the broker at least 10 days before a scheduled meeting. Uncontested elections of directors are currently considered a “routine” proposal. Contested elections only include those elections that are the subject of a counter-solicitation or are part of a proposal that is being opposed by management. Contested elections do not include so-called “just vote no” campaigns. Because brokers generally vote uninstructed shares in accordance with the board’s recommendations, shareholder activists have argued that the current rule has had the effect of dampening shareholders’ efforts to express disapproval of a board’s conduct through a “just vote no” campaign.

For those companies that have adopted majority voting, the elimination of discretionary voting will make it more difficult for incumbent directors to achieve a majority of the vote. While most companies elect directors by plurality vote, an increasing number of companies have adopted majority voting either voluntarily or in response to investor demands or have instituted requirements that their directors voluntarily resign if they do not receive a majority of the votes cast. Consequently, companies should consult with their proxy advisors and legal counsel to assess the probable impact of the rule change on their annual meeting and the election of their directors.

Suspension of \$1 Minimum Closing Price and Lowering of \$25 Million Market Capitalization Requirements

On February 26, 2009, the NYSE also announced that it will suspend until June 30, 2009, the requirement in Section 802.01C of the Listed Company Manual that listed companies maintain a \$1.00 minimum closing price and will extend its temporary

lowering of its minimum market capitalization requirement from \$25 million to \$15 million. The NYSE has requested that the SEC waive the five business day notice period and 30-day period that would normally be required prior to these changes to the listing criteria becoming operative. It is anticipated that the SEC will agree to waive these notice periods and that the temporary suspension will become effective immediately.

NYSE listed companies are considered out of compliance if the average closing price of the security as reported on the consolidated tape is less than \$1.00 over a consecutive 30-day period, and, once notified, have six months to regain compliance. Under the proposed suspension, companies will not be notified of new events of noncompliance with the price requirement during the suspension period.

Any company that is not in compliance with the \$1.00 minimum closing price or \$25 million market capitalization requirement at the time the rule becomes effective and that does not regain compliance prior to June 30, 2009, will recommence its compliance period when the temporary rule expires on June 30, 2009. For example, if a company has been noncompliant for four months when the rule takes effect and the company does not regain compliance during the suspension period, the company would have an additional two months starting on June 30, 2009, to regain compliance. Following the temporary rule suspension, any new events of noncompliance with the NYSE's stock price continued listing standard would be determined based on a consecutive 30 trading-day period commencing on June 30, 2009.

The NYSE's announcement follows similar action taken by the Nasdaq Stock Market on December 19, 2008, to suspend its \$1.00 minimum bid price and market value of publicly available shares requirement until April 20, 2009.

Both exchanges have cited the extreme volatility and large declines in the U.S. and global markets as necessitating the suspension of their continued listing criteria.

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