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July 19, 2013

NYSE Voting Requirements

NYSE Eliminates 50% Quorum Requirement

SUMMARY

On July 11, 2013, the Securities and Exchange Commission published a proposal by the New York Stock Exchange to amend Section 312.07 of the Listed Company Manual, which became effective immediately. Section 312.07 has been revised to remove the requirement that the total votes cast on proposals requiring shareholder approval under the NYSE rules must represent over 50% in interest of all securities entitled to vote on the proposal. The release notes that listed companies are subject to quorum requirements under the laws of their states of incorporation and their governing documents and that requiring companies to comply with a separate NYSE quorum requirement causes confusion and is not necessary for investor protection. In addition, neither NASDAQ nor NYSE MKT has a similar quorum requirement and the removal eliminates a long-standing difference in the treatment of broker non-votes for quorum purposes.

The NYSE rules continue to provide that matters requiring shareholder approval under NYSE rules must receive the support of a majority of votes cast (that is, votes cast "for" must exceed votes cast "against" plus abstentions); the recent change eliminates only the separate quorum requirement.

CHANGES TO VOTING REQUIREMENTS

Section 312.07 of the NYSE Listed Company Manual establishes voting requirements for matters that require shareholder approval under NYSE rules—these include adoption of or material amendment to equity compensation plans, stock issuances in excess of 20% of the outstanding voting power, stock issuances to certain related parties and stock issuances that would result in a change in control (in each

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case subject to certain exceptions). Prior to the amendments that took effect on July 11, 2013,[1] Section 312.07 required that two factors had to be satisfied in order to approve a matter:

> (1) a majority of votes cast must have approved the matter, and

> (2) total votes cast must have represented over 50% in interest of all securities entitled to vote.

The requirement under (2), which has now been eliminated, was in addition to any quorum requirements that applied to listed companies under the laws of their states of incorporation or in their by-laws or other governing documents. For example, Delaware allows companies to establish their own quorum requirements in their governing documents, provided that the quorum must be at least one-third of the shares entitled to vote on the proposal. If no quorum requirement is set forth in the governing documents, a quorum of 50% of the shares entitled to vote on the matter is required.[2] As a result of the NYSE quorum requirement, listed companies were required to disclose and apply two quorum standards—the NYSE standard as well as the applicable standard in their governing documents or under state law—for these proposals, causing confusion for both companies and shareholders. Neither NASDAQ nor the NYSE MKT exchanges have a quorum requirement analogous to Section 312.07, which was another reason cited by the NYSE to support the removal.

In addition, the NYSE notes that confusion has been caused by the different treatment of broker non-votes by the NYSE and under some state laws for quorum purposes. In calculating the total votes cast for purposes of (2) above, all votes "for," "against" and "abstain" are counted towards the total votes cast, but broker non-votes[3] are not counted for quorum purposes because they are not "votes cast." Under state law, however, broker non-votes are generally deemed to be "present and entitled to vote" for quorum purposes so long as there is at least one discretionary matter (such as auditor ratification) to be voted on at the meeting. This difference has made it more difficult for companies to satisfy the NYSE quorum requirement than it is to satisfy the quorum requirement in their governing documents or under state law, and has long been a source of confusion for listed companies and shareholders.

Listed companies should note, however, that Section 310.00 of the Listed Company Manual contains a general quorum requirement that still applies to all shareholder meetings. Section 310.00 does not

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[1] *See* Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Section 312.07 of the Listed Company Manual to Remove the 50% Quorum Requirement and Add Certain Clarifying Language, SEC Rel. No. 34-69970; File No. SR-NYSE-2013-47 (July 11, 2013), *available at* http://www.sec.gov/rules/sro/nyse/2013/34-69970.pdf

[2] *See* 8 Del. C. § 216.

[3] "Broker non-votes" occur when a broker has not received voting instructions from a beneficial owner to vote on a particular matter and, under NYSE rules, the matter is "non-discretionary," meaning that the broker is not permitted to use its discretion to cast a vote on that matter. The matters for which NYSE rules require shareholder approval are non-discretionary matters, so there will typically be a number of broker non-votes.

provide a specific percentage for a quorum to be present, but states that the quorum required for any meeting should be "sufficiently high to insure a representative vote." In the case of approvals for the listing of new or additional securities, the NYSE gives careful consideration to quorums that are set at less than a majority of the outstanding shares, but will generally not object to reasonable lesser quorum requirements if the company solicits proxies for shareholder meetings. In a footnote in the release, the NYSE states it is not aware of any listed company with a quorum requirement of less than one-third of outstanding shares (except for foreign private issuers relying on Section 103.00 of the Listed Company Manual) and that, going forward, it will not list a company (other than a foreign private issuer) with a quorum requirement of less than one-third of outstanding shares.

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