Weil

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Alert

SEC Disclosure and Corporate Governance

Broker Discretionary Voting on Executive Compensation Matters Eliminated

On September 9, 2010, the SEC approved an amendment to NYSE Rule 452 that prohibits any member broker from voting on an executive compensation matter without customer instructions. This amendment, which is immediately effective, implements Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1]

The new prohibition on broker discretionary voting will extend not only to the "say-on-pay" and other executive compensation votes added by Section 951 of the Dodd-Frank Act, but also to any kind of executive compensation matter that is the subject of a shareholder vote. It will affect all member brokers voting shares of companies listed on the NYSE, Nasdaq or other national securities exchange, or not listed at all. The same voting practices are likely to be followed by bank custodians, consistent with current practices.

The amendment to NYSE Rule 452 and related changes to the NYSE Listed Company Manual Section 402.08 add any matter that "relates to executive compensation" to the list of matters on which member brokers may not give or authorize a proxy to vote customer shares without instructions from beneficial owners. According to the commentary, a matter "relating to executive compensation" includes – but is not limited to – the three advisory votes required by Section 951 of the Dodd-Frank Act (i.e., "say-on-pay," "say-when-on-pay," and advisory votes on "golden parachutes").

As noted above, Rule 452 as amended eliminates broker discretionary voting on any kind of executive compensation matter that is the subject of a shareholder vote. This could include, for example, cash-based incentive plans for executive officers (irrespective of the impact on average annual income), executive officer performance measures and other executive compensation matters that may be presented to shareholders in accordance with stock exchange rules and/or Section 162(m) of the Internal Revenue Code.[2]

Under Section 957 of the Dodd-Frank Act, the SEC is authorized to determine by rule any other "significant matters," beyond executive compensation, as to which national securities exchanges must prohibit broker discretionary voting. The SEC has not to date identified any such other "significant matters."

1 SEC Release No. 34-62874; File No. SR-NYSE-2010-59 (September 9, 2010). For a detailed discussion of the provisions of the Dodd-Frank Act relating to executive compensation and corporate governance, see our Weil Briefing "Challenges of the Next Proxy Season: What to Expect from the Dodd-Frank Act and How to Begin to Prepare" (July 22, 2010) *available at* http://www.weil.com/news/pubdetail.aspx?pub=9876.

2 Member brokers may not vote without customer instructions even if broker discretionary voting would otherwise be permitted pursuant to Item 12 (relating to equity compensation plans or material revisions of existing equity compensation plans), Item 13 (relating to certain new profit-sharing or special remuneration plans), or any other item under NYSE Rule 452.11 and NYSE Listed Company Manual Section 402.08.

If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil or to any member of the Firm's Public Company Advisory Group:

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