

NYSE Amends Section 312.07 of Listed Company Manual to Remove 50 Percent Quorum Requirement

Effective July 11, 2013, Section 312.07 of the New York Stock Exchange (NYSE) Listed Company Manual was amended to remove the requirement that the total votes cast on a proposal for which the Manual requires shareholder approval represent over 50 percent in interest of all securities entitled to vote on the proposal.

The NYSE Listed Company Manual (Manual) requires shareholder approval for various matters, including the adoption of equity compensation plans and the issuance of common stock, or of securities convertible into or exercisable for common stock, in excess of specified thresholds.

Prior to the July 11, 2013 amendment, Section 312.07 of the Manual specified: “Where shareholder approval is a prerequisite to the listing of any additional or new securities of a listed company, the minimum vote which will constitute shareholder approval for listing purposes is defined as approval by a majority of votes cast on a proposal in a proxy bearing on the particular matter, *provided* that the total vote cast on the proposal represents over 50% in interest of all securities entitled to vote on the proposal.” In the amendment, the NYSE has clarified that the rule pertains not only to matters for which shareholder approval is a prerequisite to the listing of additional or new securities, but to *any* matter for which the Manual requires shareholder approval. More significantly, the amendment has eliminated the requirement that the total votes cast on such matter represent over 50 percent in interest of the securities entitled to vote.¹

In explanation of the change, the NYSE noted that listed companies are subject to quorum requirements under the laws of their states of incorporation, and that companies’ bylaws or other governing documents frequently include more stringent voting requirements than imposed by state law. In light of these protections, the NYSE determined that the quorum requirement of Section 312.07 (i.e., the requirement that the votes cast exceed 50 percent) was unnecessary. The NYSE also noted that a separate NYSE quorum requirement applicable to a limited category of proposals was confusing, as it required companies to disclose and apply two separate quorum requirements with respect to those matters, while applying only the requirements of their certificate of incorporation or bylaws or state law for all other proposals being voted on at the meeting. Finally, the NYSE noted that neither NASDAQ nor the NYSE MKT has such a requirement.

The practical implications of this amendment are significant in light of the treatment of shares held by brokers as registered holders on behalf of beneficial owners who do not provide voting instructions. Brokers can use their discretion to vote uninstructed shares on “routine” matters, but may not vote uninstructed shares on “non-routine” matters (which now include most proposals, including the election of directors, executive compensation matters and many corporate governance matters). Currently, NYSE-

1 Section 312.07 now reads: “Where shareholder approval is a prerequisite to the listing of any additional or new securities of a listed company, or where any matter requires shareholder approval, the minimum vote which will constitute shareholder approval for such purposes is defined as approval by a majority of votes cast on a proposal in a proxy bearing on the particular matter.”

listed companies with low voter turnout often achieve a “meeting” quorum by including one routine proposal on their annual meeting ballot (such as ratification of the company’s selection of auditors), so that shares with respect to which brokers did not receive instructions can be deemed “present” at the meeting for quorum purposes. However, the NYSE did not treat broker non-votes on non-routine matters as votes “cast” for purposes of its quorum requirement, even when a meeting quorum was present. As a result, the pre-amendment NYSE additional quorum requirement resulted in the failure of proposals approved by a majority of the shares voted on the matter if a quorum was present at the meeting but the number of votes cast did not also represent over 50 percent in interest of all securities entitled to vote. The removal of this additional quorum hurdle should enable issuers with low voter turnout to obtain shareholder approval of many proposals that would otherwise have failed.

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