

Legal Alert: SEC Approves NYSE Proposal on Broker Discretionary Voting

KMK to Co-Host Directors Roundtable Event

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SEC Approves NYSE Proposal on Broker Discretionary Voting

On July 1, 2009, the SEC approved a proposal by the New York Stock Exchange to eliminate discretionary voting by brokers in all director elections, whether contested or not. Under the rule change as adopted, director elections will now be added to the list of matters which are not considered "routine." Consequently, NYSE member firms will not be able to vote shares in director elections without instructions from the beneficial owner. This rule change will be effective for all annual meetings held on or after January 1, 2010.

Because the rule change affects voting by NYSE member firms as opposed to voting on director elections for NYSE-listed issuers, the amendments will eliminate discretionary broker voting for all NYSE, Nasdaq and NYSE Amex listed companies.

The impact of this rule change on public companies will be substantial. First, many companies rely on broker votes to establish a quorum at a meeting. If there are not "non-routine" discretionary items to be voted on, then broker votes cannot be counted toward a quorum. For this reason, it is advisable for a company to ensure that a discretionary item, such as the ratification of the independent auditors, is on its annual meeting agenda. In addition, companies with majority vote standards for director elections could find it more difficult to elect board-proposed nominees and combat activist shareholders who are conducting withhold vote campaigns. This is because, traditionally, many brokers will cast discretionary votes in accordance with board recommendations.

KMK to Co-Host Directors Roundtable Program

On Wednesday, August 19, 2009, with the assistance of Directors Roundtable, KMK will co-host, with Great American Insurance Company, Deloitte & Touche LLP and Protiviti Inc., a program entitled, "Key Issues Facing Boards of Directors: Recent Developments in Securities Regulation, Risk Management & Liability." The keynote speaker is Marty Dunn, former acting director of the SEC's Division of Corporation Finance. Other speakers include several KMK partners and representatives of the co-hosting firms. The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for directors and their advisors. Please contact us if you would like more information regarding this program.

If you would like additional information about the issues addressed in this Advisory, please contact:

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