

THE REVIEW OF  
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AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

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## DETERMINING AND DISCLOSING THE EFFECT OF BROKER NON-VOTES

*Brokers may vote uninstructed shares only on matters that are discretionary under NYSE Rule 452. The authors discuss the NYSE rule and the effect of broker non-votes under various voting and quorum standards under Delaware law. They suggest practitioners be particularly attentive to the disclosure of the effect of broker non-votes in proxy statements. They also caution that since the regulations are seldom perfectly clear, issuers and practitioners will often benefit by seeking NYSE guidance on whether brokers have discretion to vote uninstructed shares on specific proposals.*

By John Mark Zeberkiewicz and Robert B. Greco \*

In the past year, stockholder-plaintiffs' firms have seized on the confusion surrounding the treatment of so-called "broker non-votes" and have asserted claims challenging the effectiveness of various corporate actions — principally increases in authorized capital stock and reverse stock splits — on the basis that the disclosure in the proxy statement as to the effect of broker non-votes was materially misleading. Several corporations have received stockholder demand letters as a result of such alleged disclosure deficiencies and at least one was the target of a lawsuit seeking to invalidate a reverse stock split.<sup>1</sup> Due to the plaintiffs' scrutiny of proxy statements, issuers and their counsel should take additional measures to ensure that they have accurately

determined and disclosed how broker non-votes, if any, will be treated.

Rule 452 of the New York Stock Exchange governs the ability of brokers to vote shares they hold on behalf of beneficial owners that fail to submit voting instructions for matters brought before a stockholders' meeting. As Rule 452 applies to all brokers that are members of the NYSE, it applies to both shares listed on the NYSE, as well as those listed on other securities exchanges.<sup>2</sup> In circumstances where brokers are prohibited from voting uninstructed shares on at least one proposal to be brought before a meeting of stockholders, but retain discretionary authority over one or more other proposals, the brokers may vote the uninstructed shares by proxy on the discretionary

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<sup>1</sup> See, e.g., Amended and Supplemented Complaint, *Patel v. Galena Biopharma, Inc.*, C.A. No. 2017-0325-JTL (Del. Ch. June 2, 2017).

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<sup>2</sup> SEC Rel. No. 34-60215, at 20 n.69 (2009).

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