CHAPTER 12

"STREET NAME" REGISTRATION & THE PROXY SOLICITATION PROCESS

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§ 12.1 INTRODUCTION

[1] Overview

The single greatest source of confusion in the proxy process is undoubtedly the separation of legal and beneficial ownership resulting from what is commonly referred to as "street name" registration. The vast majority of publicly traded shares in the United States are registered on companies' books not in the name of beneficial owners—*i.e.*, those investors who paid for, and have the right to vote and dispose of, the shares—but rather in the name of "Cede & Co.," the name used by The Depository Trust Company ("DTC").[1]

Shares registered in this manner are commonly referred to as being held in "street name." The street name registration system was created to facilitate securities trading, eliminate paperwork and preserve the confidentiality of beneficial owners' identities. DTC holds the shares on behalf of banks and brokers, which in turn hold on behalf of their clients (who are the underlying beneficial owners or other intermediaries). The result of this "daisy chain" model of ownership is that DTC—and not the beneficial owners—is considered the "legal" owner of the shares and therefore technically possesses all the rights incident thereto. (Exhibit 1 illustrates a typical public company's share ownership structure.)

Because DTC acts merely as custodian of the shares, and has no beneficial interest in them, a number of complex mechanisms have been created to transfer its legal rights down the "daisy chain" to the ultimate beneficial owners. These mechanisms have become an integral—and often misunderstood—part of the proxy process and are largely responsible for the mistakes and confusion that arise during proxy solicitations. This chapter provides practitioners with a detailed explanation of what street name registration is, why it exists, and how to avoid the pitfalls it presents in the proxy solicitation process.

[2] Why Some Investors Prefer Street Name Registration

In light of the fact that beneficial owners are divested of the rights incident to legal ownership when they hold their shares in street name, it is worth examining some of the benefits offered by street name registration:

- Active traders keep their shares in street name in order to expedite stock transfers and subsequent reregistration;

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1. Street name shares may also be registered in the name of an investor's bank or broker on a company's share register.

- Individuals who do not want to store the certificates themselves will leave them with their stockbroker who, in turn, will register the shares in the broker's name;
- Corporate raiders or arbitrageurs often register shares in street name to hide their positions and identities from target companies (at least until their holdings exceed 5% of the total outstanding issue and they are required to file a Schedule 13D with the Securities and Exchange Commission);
- Some shareholders (primarily non-U.S. shareholders) will register their holdings in street name to hide their identities from U.S. taxing authorities;
- Shareholders purchasing shares on margin from their brokers are required to register the shares in their brokers' names until the shares have been paid in full; and
- Pension funds subject to ERISA must keep their assets in trust, thereby creating a large number of pension fund shares registered in bank nominee name.[2]

Although it increases costs and technical complexity, street name registration simplifies recordkeeping, expedites trading and preserves shareowners' anonymity.

[3] Problems Associated with Street Name Registration

Even the most seasoned practitioner will occasionally stumble over the intricacies of street name registration in the context of a proxy solicitation. The failure to fully understand street name registration can have drastic results, including:

- Votes being thrown out due to technical deficiencies;
- Denial of access to a company's stocklist and other corporate records;
- Denial of appraisal rights in a merger;
- Erroneous tabulation of so-called "broker nonvotes"; and/or
- Failure to obtain votes from loaned shares or shares purchased after the record date.

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2. Heard & Sherman, *Conflicts of Interest in the Proxy Voting System* (1987), p. 74 (hereinafter "Heard & Sherman").

From the issuer's perspective, street name registration obfuscates the identities of many of its actual owners, unless they have not objected to disclosure of their identities (so-called "NOBOs"), as discussed below. This presents a formidable impediment to directly communicating with its owners in "crisis" situations (*e.g.*, responding to hostile offers or attempting to obtain votes required for passage of material proposals).

§ 12.2 "LEGAL" VS. "BENEFICIAL" OWNERSHIP OF STOCK

[1] Legal Ownership

There is a variety of rights which are incident to share ownership, including the right to vote, the right to inspect a company's books and records, and the right to dissent from a merger and demand appraisal. Whether one may assert these rights depends on the nature of one's ownership interest. In Delaware, as in nearly every other jurisdiction, these rights belong solely to the "legal" owner of the stock.[3]

A company's share register sets forth the legal owners of that company's stock. The legal owners of the stock are commonly referred to as either the "registered" owners of the shares, because the owners' names appear on the company's share register or, where there is a record date (*e.g.*, for voting or dividend purposes), the "record" owners, because they legally own the shares on the record date.[4] Legal owners often hold share certificates that represent their ownership interests in the company.

[2] Beneficial Ownership

The largest "legal" owner of most public companies' shares is The Depository Trust Company ("DTC"), the world's largest securities depository.[5] DTC registers its shares on companies' share registers under the name "Cede & Co."[6]

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3. *See, e.g., In re Giant Portland Cement Company*, 21 A.2d 697 (Del. Ch. 1941) ("The right to vote shares of corporate stock having voting powers has always been incident to legal ownership.").

4. Legal, record, and registered ownership are synonymous and used interchangeably in this chapter.

5. The depository system was created in the 1960s to overcome the paper crunch caused by the rising volume of stock trading. Prior to depositories, securities trading required the transfer of physical share certificates. According to DTC, it holds 83% of the shares of all NYSE-listed companies, 70% of all Nasdaq-listed companies' shares, and 71% of all Amex-listed companies' shares (*source:* DTC 1998 Annual Report).

6. Lawyers' confusion regarding street-name ownership and the depository system is best evidenced by the fact that "Cede & Co." is frequently listed in proxy statements as a holder of greater than 5% of a company's securities (pursuant to Item 6(d) of Regulation 14A of the Securities Exchange Act of 1934 (the "Exchange Act")) although DTC has no beneficial interest in such shares as required in Item 403 of Regulation S-K.

DTC is owned by its "participants," which are the member organizations of the various national stock exchanges (*e.g.*, State Street Bank, Merrill Lynch, Goldman Sachs & Co.).[7] Although DTC is the legal owner of the shares in its vaults, it has no "beneficial" interest in them. "Beneficial" ownership is generally defined as encompassing the right to vote and dispose of the shares.[8] Shares "legally" owned by DTC are "beneficially" owned by its participants (if they hold for their own investment accounts) or its participants' clients. Shares deposited at DTC—or otherwise registered on a company's books in the name of an entity other than the beneficial owner—are said to be registered in "street name."[9]

Transactions involving street name shares are conducted using DTC's electronic "book-entry" system of accounting for share transfers. When one participant's client sells shares in a particular company, that participant's DTC account is debited and the purchasing participant's account is credited by the same amount. DTC's "book-entry" system negates the need to keep a large inventory of physical stock certificates. The shares of each company held by DTC are typically represented by only one or more immobilized jumbo stock certificates held in DTC's vaults.[10]

> *Example.* John Investor purchased 1,000 shares of IBM common stock through Merrill Lynch, his broker (a DTC participant). John Investor's shares are a small fraction of the total shares deposited in Merrill Lynch's participant account (*i.e.*, 10 million), which in turn are a small fraction of the total number of IBM shares represented by certificates held in DTC's vaults (*i.e.*, 100 million). (DTC's entire position (100 million) is represented on IBM's share register under the name "Cede & Co.") After John Investor gave his broker the instruction to purchase the shares, his broker obtained them in the market from one or more sellers, each of which ultimately had its own DTC participant account. To effectuate the trade, DTC reduced the selling participants' accounts by an aggregate of 1,000 and increased Merrill Lynch's account by 1,000.

It is important to understand that DTC legally owned those shares both before and after the transaction—it merely shifted them from one account to another.

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7. As of the end of 1998, DTC had 143 bank participants, 385 broker participants and 14 participants that are clearing agencies and securities exchanges (*source:* DTC 1998 Annual Report).

8. *See* Exchange Act Rule 13d-3(a).

9. Technically, shares registered through DTC in the names of banks or brokers are said to be held in "street name," while shares registered in the name of a bank nominee account are said to be held in "nominee name." In practice, however, the phrase "street name" includes shares held in nominee name.

10. The immobilized jumbo certificates are the direct result of Section 17A(f) of the Exchange Act, in which Congress instructed the SEC to "use its authority . . . to end the physical movement of securities certificates. . . ."

Because John Investor is not the legal owner of his shares, he does not have any rights incident to "legal" ownership, *i.e.*, the authority to grant a proxy to vote at IBM's annual meeting; the right to inspect IBM's corporate books and records; and the right to demand appraisal of his shares if IBM were to be acquired. The next section discusses the established mechanisms through which John Investor can assert the legal rights incident to the shares he beneficially owns.

§ 12.3 ASSERTION OF "LEGAL" RIGHTS BY "BENEFICIAL" OWNERS

[1] Right to Vote Shares/Grant Proxies

Pursuant to state corporate law, only legal owners of stock on the record date are entitled to vote shares or grant proxies in connection with a shareholder meeting.[11] Registered shareholders may either attend the shareholder meeting and vote their shares (using a ballot) or authorize another to act as their "proxy" at the meeting and vote their shares in accordance with their voting instructions. The latter method is accomplished by using a proxy card, which typically grants proxy authority on one side and gives voting instructions and is executed on the other.

Street name holders, on the other hand, are not technically entitled to vote shares or grant proxy authority. Those rights reside with DTC as the legal owner of all street name shares. Because DTC has no beneficial interest in its shares, however, it has devised a mechanism to pass on its voting rights. This mechanism, called the "omnibus proxy," provides for the transfer of DTC's voting rights to its clients—the bank and broker participants.[12] According to DTC, "the omnibus proxy is an assignment. Cede & Co., the shareholder of record, assigns to each participant the voting rights associated with the shares in that participant's DTC account as of the record date."[13] The omnibus proxy, then, confers voting authority upon bank and broker participants with respect to the shares held in their DTC accounts on the record date. It is important to understand that, absent special

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11. *See* Note 3, *infra*. *See also Enstar Corp. v. Senouf*, 535 A.2d 1351, 1354-55 (Del. 1987) (hereinafter, "*Enstar*"), *citing American Hardward Corp. v. Savage Arms Corp.*, 136 A.2d 690, 692 (Del. 1957) ("If an owner of stock chooses to register his shares in the name of a nominee, he takes the risks attendant upon such an arrangement, including the risk that he may not receive notice of corporate proceedings, or be able to obtain a proxy from his nominee. The corporation, except in special cases, is entitled to recognize the exclusive right of the registered owner to vote.")

12. The details underlying DTC's issuance of an omnibus proxy are generally set forth in the contracts between DTC and each of its participants. Thus, DTC is now typically contractually required to issue omnibus proxies with respect to shares in its custody.

13. Heard & Sherman, at 78.

circumstances, proxy authority is never transferred down to the ultimate beneficial owners.[14]

Although authorized to physically vote shares held in their clients' accounts, brokers and banks are generally prohibited from deciding *how* to vote those shares.[15] Brokers are restricted by stock exchange rules, and banks by contractual arrangements with their customers.

[a] Brokers and the "Ten-Day Rule"

Subject to certain exceptions, stock exchange regulations generally prohibit member organizations (*i.e.*, brokers) from voting shares unless they beneficially own such shares.[16] Brokers who are members of the NYSE do, however, have "discretionary" authority to vote such shares if two conditions are met: (i) the subject matter of the vote has been deemed "routine" by the NYSE;[17] and (ii) the broker has not received voting instructions from the beneficial owner by the tenth day preceding the meeting date.[18] This discretionary voting mechanism is sometimes referred to as the "ten-day rule."[19]

A "broker nonvote" occurs when a broker has not received voting instructions from its client, and either declines to exercise its discretionary voting authority or is barred from doing so because the proposal is nonroutine.[20] Considerable confusion has arisen concerning the tabulation of discretionary broker

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14. A beneficial owner can obtain actual proxy/voting authority by requesting a "legal proxy" from its bank or broker pursuant to which its bank or broker formally confers all its rights as record holder (which rights were passed to it ultimately from DTC). *See* Note 54 and accompanying text, *infra*.

15. This restriction does not apply to shares that are beneficially held by such banks or brokers.

16. *See, e.g.*, Rules 450 and 452 of the New York Stock Exchange. The other major stock exchanges have similar voting restrictions. *See* Rule 576(b) of the American Stock Exchange.

17. The New York Stock Exchange makes the determination as to whether a particular proposal will be considered "routine" for purposes of discretionary voting. Its determinations are circulated to its member firms in a weekly newsletter called *The New York Stock Exchange Weekly Bulletin*. Examples of nonroutine matters include any contested proposals, merger proposals, authorizations or creations of preferred stock and issuances of shares exceeding more than 5% of the outstanding shares. NYSE Listed Company Manual § 402.08(B).

18. This "ten-day rule" applies if the broker transmits the proxy materials to the beneficial owner at least 15 days prior to the meeting date. If the broker sends proxy materials to the beneficial owners more than 25 days prior to the meeting date, the broker may cast a discretionary vote if it has not received voting instructions at least 15 days prior to the meeting date. NYSE Rule 451(b). Absent an active solicitation (*e.g.*, telephone campaign, reminder mailing), brokers will typically receive voting instructions from only about 30% of shares held in broker retail name.

19. On June 30, 2003, the Securities and Exchange Commission approved amendments to NYSE Rule 452, effective September 28, 2003, prohibiting brokers from exercising their discretionary voting authority with respect to all equity-compensation plan proposals. *See* Release No. 34-48108.

20. The tabulation of broker nonvotes is discussed in § 12.4[2], *infra*.

votes and broker nonvotes. Neither category applies to shareholder proposals, which are considered nonroutine by the NYSE. Many investor rights advocates, including the Council of Institutional Investors, have publicly challenged this practice of discretionary broker voting on routine matters—which was originally established to help issuers achieve quorum at meetings involving nonroutine matters—as undermining the corporate democratic process.[21]

In early 2005, the New York Stock Exchange (NYSE) formed a working group to review its rules governing proxy voting by member firms. The working group is charged with considering reforms in this area including, in particular, reviewing NYSE Rule 452 (permitting discretionary broker voting) and Rule 465 (addressing communications between companies and shareholders).

[b] Banks

Banks often hold, in a fiduciary or custodial capacity, large amounts of corporate equities on behalf of beneficial owners (primarily trusts and pension funds). They are frequently prohibited from voting the securities held in their accounts as a result of express arrangements with the beneficial owners.[22] In cases where the bank does not have voting authority, the federal proxy rules give banks the option of either (i) forwarding proxies that have been executed in blank to be filled in by the beneficial owners and returned to the issuer, or (ii) requesting voting instructions from the beneficial owners and completing and returning the proxies themselves.[23] Banks that hold shares in nominee name on behalf of smaller, regional banks[24] are required by the federal proxy rules to execute omnibus proxies, including powers of substitution, in favor of its respondent banks and to forward such omnibus proxy to the registrant.[25] In this regard, the larger, nominee banks are prohibited from voting the "piggybacked" shares

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21. An example of a controversy surrounding the application of the ten-day rule involved Greenway Partners' proxy fight with Venator. Greenway submitted proxy materials to brokers to be mailed only to holders of 5,000 or more Venator shares. Although there clearly was a "contest"—which is considered "nonroutine" for discretionary voting purposes—the NYSE ruled that brokers could nevertheless vote the uninstructed shares of clients holding less than 5,000 shares (*i.e.*, those who did not receive Greenway's proxy materials). Council Research Service Alert, Vol. 4 (July 21, 1999).

22. These arrangements range from permitting the bank to vote on all matters, routine matters, only, or no matters. *See* Heard & Sherman, at 79-80.

23. Exchange Act Rule 14b-2(b)(3). Banks using ADP (discussed *infra*) generally opt for the latter method, while banks that handle the proxy mailing process internally generally prefer the former method.

24. Frequently, smaller regional banks will deposit their shares at larger banks, which, in turn, deposit those shares at national banks. This process is commonly referred to as "piggybacking."

25. Exchange Act Rule 14b-2(b)(2). It is noteworthy that clearing agencies registered under Section 17A of the Exchange Act (such as DTC) are not required to execute an omnibus proxy in this fashion, because they are exempted from the definition of "entity that exercises fiduciary powers" in Rule 14a-1(c) of the Exchange Act. As discussed earlier, DTC is generally contractually bound to issue omnibus proxies to its participants.

in their accounts. It is important to note that, absent an independent arrangement with their clients, banks have no discretionary voting authority as do brokers under stock exchange rules.

[c] Automatic Data Processing (ADP)

For many years, banks and brokers maintained proxy departments that handled the back-office administrative process of distributing proxy materials and tabulating votes themselves. Today, however, the overwhelming majority[26] have eliminated their proxy departments and subcontracted these processes out to the Investor Communications Division of Automatic Data Processing (commonly referred to as "ADP"). To make these arrangements work, ADP's bank and broker clients formally transfer to ADP the proxy authority they received from DTC (via the Omnibus Proxy) via powers of attorney.

ADP mails directly to each beneficial owner a proxy statement and, importantly, a voting instruction form (referred to as a "VIF") rather than a proxy card. Beneficial owners do not receive proxy cards because they are not vested with the right to vote shares or to grant proxy authority—those rights belong only to legal owners (or their designees). Beneficial owners merely have the right to instruct how their shares are to be voted by ADP (attorney-in-fact of the DTC participants), which they accomplish by returning a VIF or, in the case of shares held in broker name, by passively allowing their shares to be voted under the ten-day rule.

It is important to note that because VIFs are technically not "proxies"—they merely communicate voting instructions—they are not subject to state laws governing the validity of proxies. As a result, ADP is able to offer telephone and Internet voting to all beneficial owners, regardless of any restrictions imposed by the subject company's state of incorporation.[27] In addition, the VIFs are not subject to review by Inspectors of Election during the tabulation of voted proxies.

[2] Right to Inspect a Company's Books and Records

Section 220 of the Delaware General Corporation Law[28] grants "stockholders" the right "to inspect . . . a list of [a company's] stockholders, and its other books and records, and to make copies or extracts therefrom." Section 220(a) defines "stockholder" as "a stockholder of record in a stock corporation."

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26. Two noteworthy exceptions are Bank of New York and Dean Witter.

27. It should be noted that ADP does not offer electronic return of voting instructions in proxy contests.

28. Because most of corporate America is incorporated in Delaware, we have chosen to focus on its corporate statutes.

As a result, beneficial (street name) owners do not have this right. A common reason for denial of a demand to inspect a company's books and records is that the demand was not made by a stockholder of record.

There are two methods by which street name holders may inspect a company's books and records. The first is to have a portion of the holder's shares

[*Next page is 12-11.*]

transferred from street name onto the company's share register, which currently takes three trading days to settle. The second is to obtain a demand letter from Cede & Co. (the legal owner of the shares). This is generally accomplished by instructing the bank or broker participant to request DTC to issue a demand letter in the name of Cede & Co. on behalf of the beneficial owner. (Model forms are set forth in Exhibits 2 and 3.) A Cede & Co. demand letter may be obtained in as little as one business day.

[3] Right to Demand Appraisal Rights

Section 262 of the DGCL grants a "stockholder" the right to demand the "fair value of his shares of stock" in lieu of receiving merger consideration, provided certain conditions are satisfied. Section 262(a) defines "stockholder" as "a holder of record of stock in a stock corporation." Therefore, like the right of inspection, the right to demand appraisal of one's shares is not technically available to beneficial owners of stock.[29] Instead, a beneficial owner must either: (i) register its shares in its own name prior to the record date; or (ii) cause its bank or broker participant to instruct DTC to cause Cede & Co. to demand appraisal on its behalf.

§ 12.4 TABULATION ISSUES

The tabulation of abstentions[30] and so-called "broker nonvotes"—and the proxy statement disclosure relating thereto[31] —is another commonly misunderstood topic.[32] There are two primary issues that arise in the context of any shareholder meeting: (i) is a quorum present? and (ii) have the proposals received enough "For" votes to pass? The treatment of abstentions and broker nonvotes often directly impacts the outcome of these issues.

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29. *Edgerly v. Hechinger*, 1998 Del. Ch. LEXIS 177 (beneficial owner's attempt to assert appraisal rights under DGCL § 262 denied because Cede & Co. was record holder at all relevant times). *See also Enstar*, at 1356 ("In the interest of promoting certainty in the appraisal process, . . . a valid demand must be executed by or on behalf of the holder of record, whether that holder is the beneficial owner, a trustee, agent or nominee.").

30. Although tabulation of abstentions is not really impacted by street name registration, it is commonly addressed in connection with the tabulation of broker nonvotes. *See* Item 21 of Exchange Act Schedule 14A.

31. Unfortunately, drafting of the language explaining the quorum calculation and the vote required for passage of particular proposals is often considered "boilerplate" and left to less experienced persons at the company or its law firm.

32. For a more comprehensive analysis of this topic, *see* Lang, Robert Todd, "The Director Election Process: Analysis and Alternatives," INSIGHTS, September 2004, p. 16; Wilcox, John C., "What Next for the 10-Day Rule?" Corporate Governance Advisor, Sept./Oct. 2003, p.12; Hanks, James J., Jr., "Disclosure of Vote Requirements and the Treatment of Abstentions and Broker Non-Votes Under the Proxy Rules," INSIGHTS, December 1998, p.24 (hereinafter, "Hanks"); and Dixon, Catherine T., "The SEC's Expanded Requirements: Disclosure of Proxy Voting Tabulation Procedures and Results," INSIGHTS, December 1993, p.11 (hereinafter, "Dixon").

[1] Abstentions

An "abstention" represents a shareholder's affirmative choice to decline to vote on a proposal other than the election of directors (for directors, the choice is limited to "For" or "Withhold"). Abstained shares are considered to be "present" and "entitled to vote" at the meeting (because one must be present and entitled to vote in order to properly abstain); therefore they are included in quorum calculations. Abstentions are not, however, considered "votes cast."[33] Therefore, where a majority of "votes cast" is required for passage, abstentions will have no effect, but where a proposal requires a majority of the shares "present" at the meeting or "present and entitled to vote on the subject matter," abstentions will have the effect of votes cast "Against."

[2] Broker Nonvotes

As discussed above, brokers are permitted pursuant to Rule 452 of the NYSE to exercise discretionary voting authority on routine proposals when they have not received timely voting instructions from their clients. A "broker nonvote" occurs when a broker has not received voting instructions from its client, and either declines to exercise its discretionary voting authority or is barred from doing so because the proposal is nonroutine. There cannot be a broker nonvote on a routine proposal.[34] Where a single proxy form contains both routine and nonroutine proposals, the NYSE permits brokers to vote in the absence of instructions if they

33. *Larkin v. Baltimore Bancorp*, 769 F.Supp. 919, 921, n.1 (D. Md.), *aff'd*, 948 F.2d 1281 (4th Cir. 1991); *Bank of New York Co., Inc. v. Irving Bank Corp.*, 531 N.Y.S.2d 730 (N.Y. S. Ct. 1988). This distinction can be crucial to the outcome of a vote where a "majority of votes cast" is required to successfully pass a proposal (*e.g.*, New York or Pennsylvania).

34. It is *not* considered a "broker nonvote" if a broker fails to cast a discretionary vote on a routine proposal. However, there is confusion surrounding the meaning of "broker non-votes." The term is sometimes used to describe the difference between the higher vote cast on a routine matter and the lower vote cast on a non-routine matter at a shareholder meeting. For example, if a shareholder meeting included two proposals—(1) the uncontested election of directors (a "routine" matter) and (2) a proposal to amend the corporate charter that is ruled to be "material" by the NYSE—the difference in the final tabulation between the vote cast on directors and the vote cast on the charter amendment is sometimes referred to as the "broker non-vote." The meaning and accuracy of the quantifications can be questioned, however, because assumptions are made that cannot be verified about the intentions of the brokers' customers who have withheld voting instructions. In withhold campaigns that are exempt under Rule 14a-2(b)(1), the election of directors is disputed but is not currently deemed a "contest" by the NYSE and is therefore "routine" under the 10-day rule. This creates an anomalous situation in which discretionary broker votes can be cast in a disputed election. The "broker non-vote," calculated as the difference between quorum (the highest vote on a routine matter) and the instructed vote on a non-routine matter, thus becomes a measure used by dissidents to claim that unfair "vote padding" supports incumbent directors. Activists maintain that the NYSE should not permit 10-day rule voting on withhold campaigns.

physically cross out those portions where they have no voting discretion (the crossed-out portions are the "nonvotes").[35]

Broker nonvotes are not considered "votes cast" and therefore have no impact when a "majority of votes cast" is required. In addition, broker nonvote shares are considered to be "present" at the meeting because the broker has properly executed and returned the proxy.[36] The greatest confusion relates to whether broker nonvote shares may be properly considered "entitled to vote," where the statute or charter provision so requires.

[a] Delaware—Section 216(2)

Section 216(2) of the DGCL requires "the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter...." for the approval of proposals other than the election of directors, unless otherwise stipulated in the company's charter or bylaws. Thus, the only shares to be included in the majority calculation are those shares that are (i) present and (ii) entitled to vote on the subject matter. As discussed above, broker nonvote shares are considered "present" at the meeting. Most commentators and practitioners believe, however, that broker nonvote shares are not "entitled to vote on the subject matter" and therefore should be excluded from the majority calculation for purposes of Section 216(2).[37]

This majority position is likely rooted in dicta taken from *Berlin v. Emerald Partners*, in which the Delaware Supreme Court examined whether unique quorum and majority requirements set forth in a corporate charter had been satisfied.[38] The charter required "the presence in person or by proxy of the holders of not less than 80% *of the voting securities* of the Corporation" to achieve quorum.[39] Passage of the proposal (a merger) required "the affirmative vote

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35. NYSE Listed Company Manual, § 402.08(D). Proxies granted in this context are referred to as "limited proxies." Interestingly, the proxies provided by brokers and their agents generally do *not* physically cross out the nonroutine proposals, probably because they each have enough clients that they receive at least some small number of voting instructions on the nonroutine proposals. In the rare instances when they receive no voting instructions, non-ADP banks and brokers will generally write the number of shares they are voting on each proposal ("0" on the nonroutine proposal). ADP issues a master proxy on behalf of its broker clients, which aggregates the number of instructed shares on nonroutine proposals (again, "0" if there are none—this is quite rare due to the large number of ADP clients).

36. *Berlin v. Emerald Partners*, 552 A.2d 482 (Del. 1988).

37. *See, e.g.*, Balotti, R. Franklin et al., *Meetings of Stockholders* (3d ed.), § 9.2 ("It has been held that shares represented by a limited proxy which does not authorize the proxyholder to vote on a specific proposal are not considered 'entitled to vote' on that proposal."); Dixon, at 14 ("Nonvotes on proposals, conversely, have no impact on the outcome of the vote since they reflect the withholding of power to vote on either matter and thus are not 'shares entitled to vote.'").

38. 552 A.2d 482 (Del. 1988).

39. *Id.* at 486 (emphasis added).

of 66-2/3% *of the voting power present*, in person or by proxy at such meeting. . . ."[40] After finding that the charter provisions in question were not applicable, the Court elected nonetheless to "assume, arguendo" that they were. It is important to note that the Court's lengthy dicta interpreted the charter provisions and not Section 216(2).

Under the heading "Quorum/Voting Power Distinguished," the Court first noted that Section 216 permits a company, subject to certain restrictions, to set its own quorum and voting requirements in its corporate organizational documents.[41] Turning to the specific language of the charter in question, the Court found that:

> [A] stockholder who is present by proxy for voting purposes may not be voting power present for all purposes. Voting power present is synonymous with the number of shares represented which are 'entitled to vote on the subject matter.' 8 Del. C. § 216(2) (Supp. 1988) . . . However, if the stockholder is represented by a limited proxy[42] and does not empower its holder to vote on a particular proposal, then the shares represented by that proxy cannot be considered as part of the voting power present with respect to that proposal.
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> Therefore . . . the legal and practical effect of executing a limited proxy is that a stockholder will contribute to the establishment of a quorum and will be bound by a majority decision of the voting power present on a proposal from which he has withheld the authority to vote. 8 Del. §§ 212, 216 (1983 & Supp. 1988) . . .
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> In certain instances, the brokers may vote the street name stock in their own discretion. However, with respect to [non-routine proposals], the brokers must obtain specified voting instructions from the beneficial owner before the broker can vote, or give a proxy, on these nondiscretionary matters. . . .
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> [W]here a proposal is nondiscretionary and the broker or fiduciary record holder receives no instructions from the beneficial owner, voting power on that proposal has been withheld. The shares presented by a limited proxy cannot be considered as part of the voting power present on a nondiscretionary proposal from which power has been withheld by crossing it out or otherwise.[43]

After *Berlin*, the generally accepted position among practitioners has been to exclude broker nonvotes from majority calculations under Section 216(2)

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40. *Id.* (emphasis added).
41. *Id.* at 491.
42. *See* Note 34 and accompanying text, *infra.*
43. *Id.* (some citations omitted).

because, although "present" for quorum purposes, they are not considered "entitled to vote."

Because there is no case law directly on point,[44] it is worth examining whether this well-accepted practice is accurate under a strict interpretation of the statute. Section 216(2) requires that shares used in the majority calculation be, among other things, "entitled to vote on the subject matter." A literal reading of Section 216(2) indicates that the phrase "entitled to vote" modifies the *shares*, not the representative or proxy holder.[45] The phrase "entitled to vote" may have been included to ensure that certain classes of voting preferred stock be included in the vote, and/or that only voting shares that were outstanding on the record date be counted. It might be argued that, if its intent were otherwise, the legislature would have drafted a provision requiring "the affirmative vote of a majority of the shares present at the meeting *and voted* on the subject matter."

In addition, extending *Berlin*'s apparent proposition that broker nonvotes are not "entitled to vote" on nonroutine proposals generally to the DGCL could lead to startling results. For instance, Section 251 of the DGCL requires that mergers be approved by a majority of "the outstanding stock of the corporation *entitled to vote thereon*. . . . " (emphasis added). If broker nonvotes are not considered "entitled to vote," they would be omitted from the denominator of the majority calculation, thereby reducing the number of "For" votes required to pass the proposal to less than an absolute majority. A similar result would be reached with respect to charter amendments, transfers of all or substantially all of a corporation's assets or dissolution.[46] In other words, by applying *Berlin* literally, a company could reduce the number of "For" votes required to pass proposals regarding these fundamental corporate changes by coupling them with routine proposals (*e.g.*, election of directors or ratification of auditors). The actual language of Section 216(2) and the nonsensical results attained when the popular interpretation is applied to similar provisions of the DGCL would therefore appear to support the conclusion that broker nonvote shares should be considered "entitled to vote" for purposes of Section 216(2).

[b] Exchange Act Rule 16b-3(d)

Exchange Act Rule 16b-3(d) requires that certain executive compensation plans be approved by "the affirmative vote of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting" of shareholders, language that is substantially similar (but not identical) to DGCL Section 216(2). In a no-action letter issued to the American Bar Association in 1993, the SEC stated that "broker nonvotes should not be considered shares

44. The language in *Berlin* was dicta; the case was reversed prior to the Court's analysis of the charter provisions.

45. *See* Hanks, at 26-28.

46. DGCL §§ 242(b)(1), 271(a) and 275(b).

entitled to vote because the broker and the proxy holder do not have the authority to vote the shares with regard to the plan."[47] Thus, broker nonvotes are accorded the same treatment under Rule 16b-3(d) as Section 216(2).

[3] Summary Chart

The following chart summarizes the treatment of abstentions and broker nonvotes for the most common quorum and vote requirements:

	Treatment	
Requirement[48]	**Abstentions**	**Broker Nonvotes**
Majority of the shares entitled to vote, present in person or by proxy. (DGCL §216(1)—quorum)	Considered "present" and "entitled to vote"; included in the numerator.	Not considered "entitled to vote"; excluded from quorum calculation.[49]
Majority of shares present in person or represented by proxy.	Considered "present"; included in the denominator but not the numerator; same effect as "Against" votes.	Considered "present"; included in the denominator but not the numerator; same effect as "Against" votes.
Majority of the shares present in person or by proxy at the meeting and entitled to vote on the matter. (DGCL §216(2); Exchange Act Rule 16b-3(d) (but "entitled to vote *at a meeting*"))	Considered "present" and "entitled to vote"; included in the denominator but not the numerator; same effect as "Against" votes.	Not conisdered shares "entitled to vote" and thus not included in the calculation, but reduce the aggregate number of "For" votes required to pass the proposal.
Majority of votes cast. (New York, Pennsylvania)	Not considered "votes cast" and thus not included in the calculation, but reduce the aggregate number of "For" votes required to pass the proposal.	Not considered "votes cast" and thus not included in the calculation, but reduce the aggregate number of "For" votes required to pass the proposal.
Majority of shares outstanding.	Included in the denominator, but not the numerator; same effect as "Against" votes.	Included in the denominator, but not the numerator; same effect as "Against" votes.

47. American Bar Ass'n, SEC No-Action Letter, 1993 SEC No-Act. LEXIS 782 (June 24, 1993).

48. Note that these requirements may generally be altered by a provision in the company's charter or by-laws.

49. It is theoretically possible that a company could receive broker nonvotes when there is a single, nonroutine proposal. In the vast majority of cases, the quorum is established on the routine proposals where there are broker discretionary votes. *See* Hanks, at 28, n.4 (questioning whether broker's delivery of nonvote may conflict with beneficial owner's decision *not* to be present for quorum purposes).

§ 12.5 POST-RECORD DATE SALES AND SHARE LENDING

When a corporation sets a record date in connection with a shareholder meeting, only the holders of record are entitled to vote at that meeting. The corporation is entitled to rely exclusively upon the contents of the share registry to determine record ownership.[50] Two issues frequently come up in connection with voting rights: (i) who is entitled to vote shares purchased after the record date but before the meeting? and (ii) who is entitled to vote shares that have been loaned to another investor (before or after the record date)?

[1] Post-Record Date Stock Sales

Only the legal holder as of the record date is entitled to vote and grant proxies with respect to its shares, and issuers and inspectors of election are not generally required to look further than the share register to determine whether one is entitled to vote.[51] The record date mechanism enables the issuer to ascertain who is entitled to vote, to print a proper number of proxy statements and proxy cards and to disseminate them to the holders an appropriate amount of time in advance of the meeting.[52]

When shares are purchased after the record date but before the meeting, the question arises as to who is entitled to vote the purchased shares. For instance, over the course of a proxy contest, it is not uncommon for contestants to attempt to increase their voting power by purchasing additional shares after the record date and prior to the meeting. The post-record date purchaser, however, is *not* the legal owner as of the record date and is not permitted to vote this stock directly even if no vote or proxy is ultimately presented by the record owner.[53] To overcome this problem, purchasers who wish to vote the shares require, as a

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50. *See, e.g., Shaw v. Foster*, 663 A.2d 464, 469-70 (Del. 1995).

51. DGCL § 212; *see also In re Giant Portland Cement Co.*, 21 A.2d 697, 701 (Del. Ch. 1941).

52. In Delaware, notice of the meeting must be given at least ten but no more than 60 days in advance of the meeting. DGCL § 222(b). The federal securities laws do not stipulate when proxy materials must be sent, but do require the issuer to give 20 business days' notice to banks and brokers to allow them time to capture the record date holders and otherwise prepare for the solicitation. Exchange Act Rule 14a-13. The New York Stock Exchange recommends, but does not require, that listed companies distribute proxy materials at least 30 days in advance of the meeting. NYSE Listed Company Manual § 402.05.

53. *Tracy v. Brentwood Village Corp.*, 59 A.2d 708, 709 (Del. Ch. 1948); *see also* Thomas, Randall S. & Dixon, Catherine T., *Aranow & Einhorn on Proxy Contests for Corporate Control (3d. Ed.)*, § 14.03[B] (hereinafter "Aranow & Einhorn").

condition of the purchase, that sellers execute irrevocable proxies in favor of the purchaser.[54]

If the shares are purchased directly from a registered holder, the irrevocable proxy is issued directly from the registered holder in favor of the purchaser. If, however, the shares are purchased on the open market—*i.e.*, not pursuant to a privately negotiated transaction with a registered holder—it becomes considerably more difficult for the purchaser to ensure that the shares are voted in its favor. The purchaser must identify the beneficial owner of a large block of shares, contact the beneficial owner directly and negotiate the sale. Because the beneficial owner selling the shares is not the "holder of record," it does not have the authority to grant an irrevocable proxy. Therefore, it must first obtain a "legal proxy"[55] from its custodian giving it the power to grant an irrevocable proxy to the purchaser. Because this process is cumbersome, contestants are advised to endeavor to acquire as many shares as possible in advance of the record date.[56]

[2] Loaned Stock

Shares are frequently loaned for legitimate business purposes, *i.e.*, in connection with "short sales."[57] When shares are loaned by an institutional investor or its custodian prior to the record date, it is the borrower (or other record date holder)—not the institutional lender—that is entitled to vote those shares.

> *Example.* Corporation sets record date of January 1 for its March 1 annual meeting. Institution—which holds 1,000,000 shares of Corporation stock—loans 200,000 shares to Short Seller on December 20. To effectuate the loan, the shares are transferred from Institution's custodian bank (a DTC participant) to Short Seller's custodian bank (also a DTC participant). On December 22, Short Seller sells the 200,000 shares on the open market to a variety of unknown purchasers. On January 1, DTC issues an Omnibus Proxy in favor of its participants, reflecting their record date positions. On February 1,

54. *See, e.g., Commonwealth Associates v. Providence Health Care, Inc.*, 641 A.2d 155, 156 (Del. Ch. 1993). In certain circumstances, it may be preferable to obtain a power of attorney from the seller in lieu of a proxy because it affords greater flexibility in exercising the voting power of the stock. Aranow & Einhorn, 12.03[B]. Note that it is not necessary that the trade settle prior to exercising proxy powers because the irrevocable proxy becomes effective upon execution.

55. *See* Note 14, *supra.*

56. *See* Constance E. Bagley & David J. Berger, *Proxy Contests and Corporate Control: Strategic Considerations*, 69 C.P.S. (BNA) at A-52, for legal caveats regarding the acquisition of shares in this context.

57. A "short sale" of stock is a transaction in which the short seller sells borrowed shares to a purchaser at a fixed price in the expectation of a decline in price. If the price declines, the short seller profits by repurchasing the shares in the market at the lower price and returning them to the lender.

> Short Seller uses a portion of the proceeds from the previous sale to repurchase an equal number of shares on the open market, and causes its custodian bank to return them to Institution's custodian bank. The loaned shares, however, resided on January 1 in the DTC accounts of the *custodians of the unknown purchasers of the loaned shares* from Short Seller—not the account of Institution's custodian bank. Therefore, Institution is only entitled to give voting instructions with respect to the 800,000 shares.

Although this practice of share lending by institutions does not often result in errors in the voting process, it has been addressed by the Department of Labor.[57.1] In a letter issued to an institutional investor advisory firm in 1992, the DOL cautioned that ERISA fiduciaries (*e.g.*, certain large pension funds) should be mindful of the value of the voting rights attached to the security they lend.[58] Share lending satisfies one fiduciary duty—maximization of the value of the assets under management—while arguably diminishing another—maximization of voting rights on important corporate matters. The DOL concluded that the "potential inability to vote on proxy proposals that may arise while the loan is outstanding . . . should be considered by a fiduciary as part of the decision to loan shares of stock."[58.1] The DOL's letter has been interpreted as requiring ERISA fiduciaries to have some system in place to ensure they are in physical possession of shares on the record date for meetings at which significant proposals are being considered.[59]

Share lending also can present problems when shares held in so-called "margin accounts" are loaned by brokers. An investor can purchase shares "on margin" by putting a percentage of the total cost down and borrowing the rest from his or her broker. The shares purchased in this fashion are typically pledged as collateral for the loan and, pursuant to a standard margin agreement, may be loaned by the broker without notice to the investor. NYSE rules obligate brokers to provide proxy materials and request voting instructions from the beneficial owners of shares in the brokers' "possession or control" on the

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57.1. In 2004, the International Corporate Governance Network (ICGN) formed a committee on securities lending to address the cross border proxy issues raised by lending of securities. The committee is in the process of developing a code of best practice related to securities lending. The code would contain guidelines that would apply to all of the parties in a lending transaction—lenders, borrowers, issuers, and intermediaries. *See* www.icgn.org.

58. Letter to James E. Heard from Ivan L. Strasfeld dated February 20, 1992.

58.1. Exhibit 4, *infra*, is an example of a securities lending policy statement by the College Retirement Equities Fund (CREF), which is the principal retirement fund for employees in the education and research fields in the United States. CREF's policy, which is centered around the fiduciary duty it owes its participants, has been approved by the trustees of the fund. *See* www.tiaa-cref.org.

59. Margaret Price, *Stock Lending, Proxy Votes Don't Always Mix*, Pensions & Investments (March 16, 1992).

record date.[60] In addition, a broker may only vote—whether pursuant to client voting instructions or the broker discretionary vote—the shares that are in its possession or control on the record date.

Shares that have been loaned are no longer in the lending broker's possession or control. However, in response to a Congressional inquiry relating to this issue, the NYSE took the position that NYSE Rule 451 still requires the dissemination of proxy materials and the requesting of voting instructions with respect to those shares.[61] The NYSE also indicated that voting instructions for shares on loan are routinely assigned to other unvoted shares in the broker's possession.[62] In other words, the NYSE appears to permit the practice of assigning voting instructions to shares with respect to which voting instructions have not been received, so long as there is no "overvote"—*i.e.,* the votes do not exceed the shares in the broker's possession on the record date. The following example illustrates this practice:

> *Example.* Merrill Lynch holds 1,000,000 shares of IBM on behalf of its clients, with 500,000 of such shares in margin accounts. Merrill Lynch loans 250,000 of the margin shares prior to the record date for an upcoming IBM shareholders meeting. Merrill Lynch's record date position—*i.e.,* the number of shares it is entitled to vote—is 750,000. Merrill Lynch disseminates IBM proxy materials to, and solicits voting instructions from, the holders of the original 1,000,000 shares. The beneficial owners of the 250,000 loaned shares issue voting instructions to vote those shares "FOR" the proposals. The remaining beneficial owners issue instructions for vote 200,000 shares "FOR" and 250,000 shares "AGAINST." 300,000 shares remain uninstructed. Merrill Lynch is only entitled to vote its record date position, or 750,000 shares. The vote would be 200,000 "FOR," 250,000 "AGAINST," and the remaining 300,000 would be voted in Merrill Lynch's discretion (if routine proposal) or not voted at all (if nonroutine). However, under the NYSE's interpretation, Merrill Lynch would be permitted to apply the voting instructions from the beneficial owners of the loaned shares to 250,000 of the uninstructed shares. Thus, the final vote would be 450,000 votes "FOR," 250,000 votes "AGAINST," and only 50,000 voted in Merrill Lynch's discretion or not at all.

60. NYSE Listed Company Manual § 402.06(B) (citing NYSE Rule 451).

61. *Letter from the NYSE to the Commerce, Consumer and Monetary Affairs Subcommittee of the Committee on Government Relations dated February 19, 1991.*

62. *Id.* ("Longstanding experience has shown that not all beneficial owners return proxy instructions and there are ample votes associated with the unreturned proxies to allow interested beneficial owners to vote.")

It is clear from this example that the NYSE's position can directly impact the outcome of a close vote. If, in this example, the borrower of the 250,000 shares issued voting instructions to its broker, those 250,000 shares would have effectively been voted twice on the same proposal. The NYSE stated that it has no formal guidelines addressing the situation where voting instructions were returned to Merrill Lynch with respect to more than 500,000 of the shares that were not loaned (bringing the total number of shares instructed to more than 750,000).

§ 12.6 CONCLUSION

Street name ownership presents a variety of complex issues to corporations, shareholders and their advisors in the context of the proxy process. Failure to review carefully the corporation's charter and by-laws, the laws of the state of its incorporation, federal securities laws and the rules of its stock exchange can result in critical errors that mean the difference between success and failure in a proxy campaign.

The isssues discussed in this chapter have traditionally been technical matters of concern primarily to lawyers and corporate secretaries overseeing the conduct of shareholder meetings. With the passage of Sarbanes-Oxley Act, share voting has achieved greater prominence as a means of achieving corporate accountability and protection of shareholder rights. More recently, the SEC's director election proposal has raised serious questions about the fairness and adequacy of the proxy process.[63] The Business Roundtable has submitted a rule-making petition calling for fundamental reform of the shareholder communications systems, with particular attention to street name accounts.[64] If the business Roundtable proposals were implemented, back office procedures for street name accounts would be simplified. Companies would benefit through direct communication with beneficial owners, greater transparency, and reduced costs. Shareholdrers would benefit through the creation of an audit trail, end-to-end vote confirmation, and elimination of discretionary broker voting under the NYSE 10-day rule. Finally, the issue of majority voting for the election of directors of public companies, which has received broad attention recently in the investment community, also implicates shareholder communications. In June 2005, the American Bar Association's Committee on Corporate Laws released a "Discussion Paper on Voting by Shareholders for the Election of Directors." The Discussion Paper reviews alternatives to the standard of plurality voting for diretors including the adoption of a majority standard as well as

63. Proposed Rule: Security Holder Director Nominations, SEC Release No. 34-48286 (October 14, 2003) at www.sec.gov. *See* "Shareholder Access to the Corporate Ballot" (L. Bebchuk, ed. Harvard University Press, 2004.)

64. Business Roundtable Petition for Rulemaking Regarding Shareholders Communications, Rule No. 4-493, at www.sec.gov.

other "hybrid" approaches. The Discussion Paper also identifies issues that would be raised at the state level as a consequence of such changes and possible related amendments to the Model Business Corporation Act. Counsel should monitor these developments carefully.

[*Next page is 12-21.*]

EXHIBIT 1—CUSTODIAL OWNERSHIP CHART

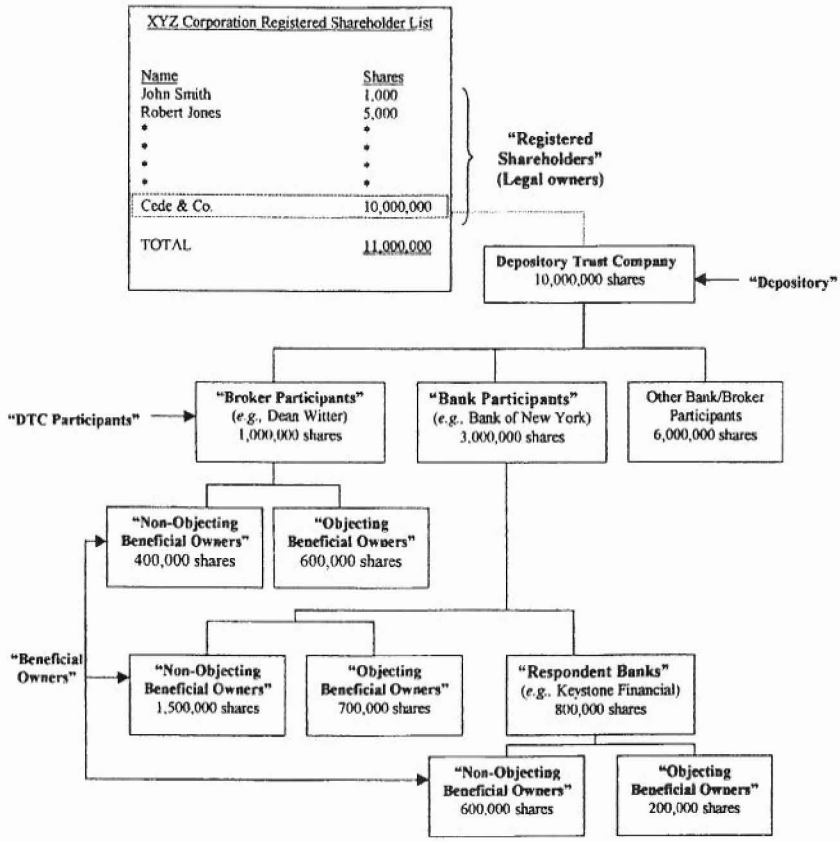

EXHIBIT 2—SAMPLE DTC PARTICIPANT REQUEST FOR STOCKLIST DEMAND LETTER—DELAWARE CORPORATION

[DTC PARTICIPANT LETTERHEAD]

[DATE]

The Depository Trust Company

Proxy Department
55 Water Street–50th Floor
New York, NY 10041

Re: [COMPANY NAME & CUSIP NUMBER; PARTICIPANT DTC ACCOUNT NUMBER]

Gentlemen:

Please cause your nominee, Cede & Co., to sign the attached letter and affidavit, and have Cede & Co.'s signature notarized, in order to enable our customer, [BENEFICIAL OWNER'S NAME] ("Customer"), to exercise rights to inspect the stock ledger and corporate records of [COMPANY NAME], a Delaware corporation (the "Company"), with respect to _____ shares (the "Shares") of the above-referenced securities credited to our DTC Participant account on the date hereof.

In addition to acknowledging that this request is subject to the indemnification provided for in DTC Rule 6, the undersigned certifies to DTC and Cede & Co. that the information and facts set forth in the attached letter are true and correct, including the following:

1. The Shares credited to our DTC Participant account are beneficially owned by Customer;

2. Customer will bear the reasonable costs incurred by the Company, including those of its transfer agent(s) and/or registrar(s) in connection with the production of the information requested in the attached documents; and

3. The purpose of the demand is as described in the attached letter.

Please make the requested letter and affidavit available as soon as possible to _____.

Very truly yours,

[DTC PARTICIPANT NAME]

By:_____
Name:
Title:

EXHIBIT 3—SAMPLE DTC STOCKLIST DEMAND LETTER—DELAWARE CORPORATION

CEDE & CO.
c/o The Depository Trust Company
55 Water Street - 50th Floor
New York, NY 10041

[DATE]

[COMPANY NAME & ADDRESS]

Dear Ladies & Gentlemen:

Cede & Co., the nominee of The Depository Trust Company ("DTC"), is holder of record of outstanding shares of Common Stock, par value _____ per share (the "Common Stock"), of [COMPANY], a Delaware corporation (the "Company"). DTC is informed by its participant, [PARTICIPANT'S NAME] ("Participant"), that on the date hereof, _____ shares of Common Stock (the "Shares") credited to Participant's DTC account are beneficially owned by [BENEFICIAL OWNER], a customer of Participant (the "Customer").

At the request of Participant, on behalf of the Customer and pursuant to Section 220 of the Delaware General Corporation Law, Cede & Co., as holder of record of the Shares, hereby demands the right, during the usual hours for business, to inspect the following records and documents of the Company and to make copies or extracts therefrom:

1. A complete record or list of shareholders of the Company, certified by its transfer agent(s) or registrar(s), showing the name and address of each shareholder and the number of shares of stock registered in the name of each such shareholder, dated as of the date of this demand and updated as of the date which is set as the record date (the "Record Date") for the Company's _____ Annual Meeting of Shareholders (the "Meeting").

2. A magnetic computer tape list of the holders of the Company's stock, dated as of the date hereof and updated as of the Record Date, showing the name, address and number of shares held by each shareholder, such computer processing data as is necessary to make use of such magnetic computer tape, and a printout of such magnetic computer tape for verification purposes.

3. All daily transfer sheets now or hereafter in the Company's or its transfer agent's or registrar's possession or control, or which can reasonably be obtained from brokers, dealers, banks, clearing agencies, voting trustees or their nominees, showing the changes in the record or list of

shareholders of the Company referred to in paragraph (1) above from the date hereof through the Record Date.

4. All information and listings now or hereafter in the Company's possession or control, or which can reasonably be obtained from brokers, dealers, banks, clearing agencies, voting trustees or nominees of any central certificate depository system concerning the number and identity of, and the number of shares held by, the banks, brokers and other financial institutions holding the Company's stock as of the date of this demand, and updated as of the Record Date, including a breakdown (in alphabetical order, if available) of any holdings in the name of any depository (*e.g.*, Cede & Co.) or other nominee.

5. All omnibus proxies and related respondent bank listings issued pursuant to Rule 14b-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in connection with the solicitation described below and which now or hereafter are in the Company's possession or control, or which can reasonably be obtained by the Company.

6. All information now or hereafter in the Company's possession or control, or which can reasonably be obtained from brokers, dealers, banks, clearing agencies, voting trustees or nominees, acquired pursuant to Rule 14b-1(b) and/or Rule 14b-2(b) of the Exchange Act, or otherwise, concerning the names and addresses of, and the number of shares held by, the beneficial owners of the Company's stock whose shares are held of record by brokers, dealers, banks or their nominees, including, but not limited to, any list of non-objecting or consenting beneficial owners (commonly referred to as a "NOBO" or "COBO" list, respectively), in the format of a printout and magnetic tape, each in descending balance order, dated as of the date of this demand and updated as of the Record Date.

7. A complete magnetic tape record and list of shareholders of the Company who are participants in any Company employee stock ownership plan, employee stock purchase plan, dividend reinvestment plan or any similar plan in which voting of stock under the plan is controlled, directly or indirectly, individually or collectively, by such plan's participants, dated as of the date of this demand and updated as of the Record Date, and showing (i) the name and address of each such shareholder, (ii) the number of shares of stock of the Company held by any such plan in the name of each such participant and (iii) the method by which the Shareholder or its agents may communicate with each such participant.

Pursuant to Cede & Co.'s right to inspect the aforementioned documents of the Company and to make copies and extracts therefrom, Cede & Co. demands, at the request of Participant and on behalf of the Customer, that the Company immediately furnish to the Customer or its authorized representatives any modifications or additions to, or deletions from, any of the information referred to in paragraphs (1) through (7) above from the date of the list referred to in paragraph (1) to (7), as such modifications, additions or deletions become available to the Company or its agents or representatives.

Cede & Co. has been advised by Participant that the Customer will bear the reasonable costs incurred by the Company including those of its transfer agent(s) and/or registrar(s) in connection with the production of the information demanded. Cede & Co. has been advised by Participant that the purpose of this demand is to enable the Customer to communicate with its fellow Company shareholders on matters relating to their mutual interests as shareholders including, but not limited to, communications with respect to the Customer's solicitation of proxies in connection with the Meeting.

Cede & Co., at the request of Participant and on behalf of the Customer, hereby designates and authorizes [NAME AND ADDRESS OF CUSTOMER'S LAW FIRM] and Georgeson & Company Inc., Wall Street Plaza, New York, New York 10005, their partners and employees, and any other persons designated by them or by the Customer, acting singly or in any combination, to conduct, as its agents, the inspection and copying of the materials and information requested herein.

Please promptly advise _____ at (___) _____ where and when the requested information will be made available. Please promptly acknowledge receipt of this demand letter by signing the enclosed copy of this letter and returning it in the enclosed, postage-prepaid, self-addressed envelope.

While Cede & Co. is furnishing this demand as the stockholder of record of the Shares, it does so at the request of Participant and only as a nominal party for the Customer, the true party in interest. Cede & Co. has no interest in this matter other than to take those steps which are necessary to ensure that the Customer is not denied its rights as the beneficial owner of the Shares, and Cede & Co. assumes no further responsibility in this matter.

Very truly yours,

CEDE & CO.

By: _____

Title: _____

* * *

OATH

County of _____)
) ss.:
State of _____)

_____, having been first duly sworn according to law, deposes and says on this _____ day of _____, _____ that he is a partner of Cede & Co., that he is authorized on behalf of Cede & Co. to execute the foregoing demand for stockholder list and corporate records and to make the demand designations, authorizations and representations contained therein and that the facts and statements contained in the foregoing demand for a stocklist and corporate records are true and correct.

_____
Notary Public

EXHIBIT 4—COLLEGE RETIREMENT EQUITIES FUND POLICY STATEMENT ON SECURITIES LENDING

TIAA-CREF Investment Management LLC, as the investment adviser for CREF, has the responsibility to manage each CREF account to achieve the best possible returns consistent with their stated investment strategies. Accordingly, our policy on securities lending is guided solely by our responsibility to act in the best long-term economic interest of our participants.

When we lend portfolio securities, income from lending fees increases account returns but voting rights on the loaned shares are passed to the borrower. Our lending agreements give us the right to recall loaned shares. We recognize that voting rights are an important governance mechanism and that the exercise of voting rights may be necessary to protect the long-term value of our investments.

In keeping with our responsibility to our participants to achieve the best possible returns, we use our best efforts to evaluate the relative benefits of lending fees versus voting rights. If we believe that the benefit of lending is greater than the benefit of voting, we will not recall the loaned shares. If we believe that the benefit of voting is greater than the benefit of lending, we will refrain from lending the security or recall shares in order to vote them.

Our investment and lending staff, in consultation with our governance staff, are responsible for analyzing these issues and making determinations regarding lending and recalling of securities consistent with this policy.