

Legal Updates

Navigating Stockholder Meeting Voting Standards

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In connection with any stockholder meeting, public companies should review applicable voting standards and carefully prepare related proxy disclosures for each item that will be on the meeting agenda. Such a review focuses on answering the following questions:

1. What number of shares must be represented at a meeting for there to be a quorum to transact business?
2. What number of shares are required to approve each matter on the agenda?
3. With respect to director elections, what are the voting options and the implications of such options?
4. How are votes counted, including what are the effects of abstentions, withhold votes, broker non-votes, unsubmitted proxy cards, and stockholder unmarked votes (i.e., where a submitted proxy card omits a vote on a matter)?

The Securities and Exchange Commission (SEC) staff has in the past been critical of too frequent “poorly-drafted, ambiguous and sometimes incorrect” proxy disclosures regarding voting standards.¹ Inaccurate voting standard disclosure risks disclosure-related proxy lawsuits that could delay a meeting. Applying an inaccurate voting standard has also led to stockholder litigation challenging the outcome of a vote.

Background

Voting standards are governed by a mixture of state law, a company’s charter and bylaws, and stock exchange rules, and vary depending on the matter that is the subject of a vote. Disclosure of voting standards is governed by Item 21 of Schedule 14A under the Securities Exchange Act of 1934 (Exchange Act), which requires disclosure of the votes required for approval or election, including the effects of abstentions and broker non-votes and, as applicable, withhold votes. With regard to state law, this article focuses primarily on Delaware, given the large number of companies incorporated in Delaware. Many of the Delaware default rules discussed below vary in other states.

¹ ‘Sloppy,’ Wrong Proxy Disclosures May Necessitate SEC Rule, *Bloomberg Law* (Feb. 22, 2016).

Quorum

There must be a quorum, or minimum number of shares present and entitled to vote, before business may be conducted at a meeting. State laws generally provide a default quorum requirement and also permit adjustment of the required quorum, subject to certain limits, using the company's charter or bylaws.

Under Delaware General Corporation Law (DGCL) § 216(1), the default rule is that a quorum for a meeting of stockholders consists of "a majority of the shares entitled to vote, present in person or represented by proxy." Treasury stock and stock of a parent corporation held by a subsidiary or any entity controlled by the parent corporation, other than shares held in a fiduciary capacity, may not vote and are excluded from both the numerator and the denominator in the quorum calculation, per DGCL § 160(c). Notably, this means the number of shares outstanding for quorum purposes (i.e., the denominator in the calculation) may differ from the number of shares outstanding reported by a company's transfer agent. A company's organizational documents may alter the default quorum requirement but may not lower it to less than one-third of the shares entitled to vote at the meeting, per DGCL § 216.

Where a separate vote by a class or series or classes or series is required, the quorum calculation for the vote on the matter is tied to such class or series or classes or series under DGCL § 216(4). Where different class or series votes are required for different matters at a meeting, it is possible to have a quorum for certain proposals but not others.

Under the DGCL, meeting attendance for purposes of determining quorum is measured at the start of the meeting. After a quorum is established, it is maintained for the remainder of the meeting. Accordingly, if some shareholders leave the meeting after it starts, business can continue to be transacted as long as a quorum was present at the beginning.

Nasdaq is consistent with the DGCL minimum quorum requirement in that Nasdaq Rule 5620(c) provides that a company must provide for a quorum of not less than 33-1/3 percent of the outstanding voting shares for any meeting of the holders of its common stock. While the New York Stock Exchange (NYSE) does not specify a minimum quorum, NYSE Rule 310.00(A) leans toward the Delaware default standard, giving "careful consideration to provisions fixing any proportion less than a majority of the outstanding shares as the quorum for shareholders' meetings," although not objecting to "reasonably lesser quorum requirements in cases where the companies have agreed to make general proxy solicitations for future meetings of shareholders."

Where there is a proposal to reduce shareholder meeting quorum requirements below a majority of shares outstanding,² Institutional Shareholder Services (ISS), a proxy advisor, will weigh the facts and circumstances in determining what vote to recommend. ISS states its preference for a quorum threshold to be kept as close to a majority of shares outstanding as is achievable. ISS changed its quorum policy in 2023, from a generally "against" recommendation to a case-by-case approach for proposals reducing meeting quorums below a

² See ISS US Proxy Voting Guidelines: Benchmark Policy Recommendations (effective for meetings on or after February 1, 2025). ISS will take into consideration (i) the new quorum threshold requested; (ii) the rationale presented for the reduction; (iii) the market capitalization of the company (size, inclusion in indices); (iv) the company's ownership structure; (v) previous voting turnout attempts to achieve quorum; (vi) any provisions or commitments to restore quorum to a majority of shares outstanding, should voter turnout improve sufficiently; and (vii) other factors as appropriate.

majority in response to the growing number of smaller companies with large retail ownership that have been unable to meet quorum requirements for annual meetings.

Voting Approval Standards

If there is a quorum, the next step is determining whether there are sufficient votes to approve a matter. The number of votes required for approval depends on the matter on which shareholders are voting.

The DGCL specifies voting standards for certain matters and then provides a default voting standard for all other matters. Per DGCL § 216(3), directors by default are elected by a plurality of the shares present in person or by proxy at the meeting and entitled to vote in the election of directors. With plurality voting, the nominees who receive the most “for” votes are elected to the board until all board seats are filled. In an uncontested election, where the number of nominees and available board seats are equal, every nominee is elected upon receiving just one “for” vote. Removal of a director requires the approval of a majority of the shares entitled to vote in the election of directors under the default standard of DGCL §141(k).

Most charter amendments (DGCL § 242(b)(1)), mergers (DGCL § 251(c)), conversions (DGCL § 266(b)), sales of all or substantially all assets (DGCL § 271(a)), and dissolutions (DGCL § 275(b)) require the approval of a majority of the outstanding shares entitled to vote on the matter. A company’s organizational documents may require a higher vote. See DGCL § 102(b)(4). Since August 2023, certain charter amendments can be approved by a majority of the votes cast, rather than a majority of the outstanding shares, unless otherwise expressly required in a company’s charter (but superseding any conflicting voting standard in a company’s bylaws). See DGCL Section 242(d). This standard applies to amendments that increase or decrease the number of authorized shares or effect a reverse stock split, if the shares are listed on a national securities exchange and the corporation meets the listing requirements relating to the minimum number of holders immediately after the amendment becomes effective.

Generally, all other matters require the approval of a majority of shares present in person or by proxy at a meeting and entitled to vote on the matter, per DGCL § 216(2). However, Delaware permits companies to change this default standard (to, for instance, the majority of votes cast standard) in their charters or bylaws.

Both the NYSE Rule 312.07 and Nasdaq Rule 5635(e) provide that where any matters require shareholder approval, the minimum vote that will constitute shareholder approval is a majority of votes cast on the proposal. Note that the NYSE and Nasdaq rules provide for a *minimum* standard and if a company’s charter or bylaws provide for a higher default voting standard, such as a majority of shares present in person or by proxy and entitled to vote on the matter, that higher standard would govern.

Annex A to this article contains a chart that shows the calculation method, the effect of abstentions, the effect of broker non-votes, the effect of unsubmitted proxy cards (i.e., failure to vote), and the effect of stockholder unmarked votes on submitted proxy cards, in each case under specified voting standards. These concepts are discussed in more detail below.

Director Election Voting Options Under Different Voting Standards

Rule 14a-4(b) under the Exchange Act requires proxy cards for all director elections to include an “against” option instead of a “withhold authority to vote” option if governing law (together with a company’s charter or

bylaws) gives legal effect to a vote against a director nominee. When applicable law (together with a company's charter or bylaws) does not give legal effect to a vote against a director nominee, the proxy card may not include an "against" option, and there must be a "withhold" option. A company under the Delaware default of plurality voting in director elections can permit only "for" or "withhold" votes.

In a director election governed by a true majority voting standard (as compared to a "plurality plus" majority voting standard), both of which are discussed below, shareholders who neither support nor oppose a director nominee must be given an opportunity to "abstain" rather than "withhold authority to vote" under Rule 14a-4(b). A Delaware corporation that has adopted a true majority voting standard in director elections must provide "for," "against," and "abstain" voting options.

Majority Voting in Director Elections

While the plurality voting standard in director elections remains the default standard under Delaware law, many companies have voluntarily adopted a majority voting standard in director elections through governance policies or provisions in their charters or bylaws. There is no standard legal definition of the meaning of majority voting in director elections. Companies have adopted a variety of approaches. The Council for Institutional Investors (CII) groups the majority voting standards that have developed into three buckets, which it refers to as (1) plurality plus, (2) majority voting with board-rejectable resignation, and (3) consequential majority voting. As discussed below, majority voting provisions generally provide for some holdover period for a defeated director to provide time to recruit a suitable replacement and provide assurance of continued compliance with corporate governance requirements.

Under the *plurality plus* standard, a company, either through a governance policy or a bylaw provision, requires that a majority-opposed director (for whom "withhold" votes exceed "for" votes) must tender such director's resignation to the board. A nominee who fails to receive majority support is nevertheless legally elected for another term, subject to board acceptance of the individual's resignation. The voting options in such director elections, like the voting options for the default plurality voting standard, are "for" and "withhold."

With *majority voting with board-rejectable resignation*, uncontested nominees must receive more "for" votes than "against" votes to be elected. This standard results in majority-opposed nominees not being legally re-elected to a new term but remaining as a "holdover director." Most companies with this standard require such holdover director to submit a resignation to the board. Under the terms of the requirement, similar to the plurality plus standard, the board retains ultimate control over whether the individual resigns from the board or stays. The voting options under this standard are "for," "against," and "abstain."

Consequential majority voting requires an uncontested nominee to receive more "for" votes than "against" votes in order to be elected and establishes a time period after the election at which an unelected director may no longer serve on the board. The voting options under this standard are "for," "against," and "abstain." With consequential majority voting, a resignation upon failure to receive more "for" than "against" votes could be made automatic and not subject to board acceptance. Shareholders have ultimate control over whether a director departs the board with consequential majority voting.

Cumulative Voting in Director Elections

Cumulative voting is relatively rare among large US public companies, with approximately 3 percent to 4 percent of the S&P 500 currently providing for it. Per DGCL § 214, if a certificate of incorporation provides for cumulative voting for director elections, each shareholder is entitled to as many votes as shall equal the number of votes which such holder would be entitled to cast for the election of directors with respect to such holder's shares of stock multiplied by the number of directors to be elected by such holder, and such holder may cast all of such votes for a single director or may distribute them among the director nominees.

Effect of Abstention Votes

Abstentions occur when a shareholder present at a meeting in person or by proxy makes an affirmative decision not to vote on a matter by marking "abstain" on the voting card. Failing to mark a vote for a meeting proposal on a submitted proxy card generally does not count as an abstention and is instead a stockholder unmarked vote. The treatment of stockholder unmarked votes is discussed below under the heading "Effect of Stockholder Unmarked Votes."

Abstentions are considered present and entitled to vote on a matter and thus count for quorum purposes. An abstention counts as a vote "against" any proposal where the voting standard is "a majority of the shares present and entitled to vote," "a majority of the votes (or voting power) present or represented by proxy," or "a majority of the outstanding shares." When the voting standard is "a majority of votes cast," Delaware law treats abstentions as having no effect because the abstained shares are not considered votes cast for or against the proposal and are, instead, the affirmative decision not to vote for or against.

Before November 2021, the NYSE provided guidance that abstentions are treated as against votes under the "majority of votes cast" standard. Since November 2021, NYSE Rule 312.07 provides that a company must calculate the votes cast in accordance with its governing documents and applicable state law. Nasdaq rules are silent with regard to whether abstentions should be treated as votes cast, but Nasdaq staff in FAQ ID No. 202 state that "a company must calculate the 'votes cast' in accordance with its governing documents and any applicable state law."

Effect of Withhold Votes

Under the default plurality voting standard of the DGCL for director elections, a shareholder can vote "for" or may vote "withhold." Withhold is similar to abstain but is used in instances in which nominees run unopposed and therefore only need a single vote to earn a plurality. Withhold votes are present for quorum purposes. Other than in connection with a plurality plus majority voting standard, which is discussed above, a withhold vote has no legal effect on the election's outcome on its own, but it can serve as an expression of shareholder dissatisfaction. If a company organized in Delaware amends its charter or bylaws to give legal effect to a vote against a director nominee, Rule 14a-4(b) under the Exchange Act requires the proxy card for the director election to include an "against" option instead of a "withhold" option.

Effect of Broker Non-Votes

Shares can be held either directly with a company, in registered form, or indirectly through a broker (or other securities intermediary), in beneficial form. Under NYSE Rule 452, brokers who do not receive voting

instructions from their beneficial owner clients have the discretion to vote uninstructed shares on certain routine discretionary matters, but not on matters the NYSE determines are non-routine. Because Rule 452 applies to all brokers that are members of the NYSE, it applies to both shares listed on the NYSE and shares listed on other securities exchanges, such as Nasdaq.

NYSE's supplementary materials relating to Rule 452 list certain matters considered non-routine, as to which brokers lack discretionary authority to vote. Categories of non-routine matters listed include, among others, director elections, contested matters, significant transactions, and proposals that significantly affect shareholder rights or the company's structure. For any matters not specifically identified as non-routine, practitioners may want to contact the NYSE to seek guidance regarding the application of Rule 452 with respect to such matters.

For stockholder meetings where brokers are prohibited from voting uninstructed shares on at least one proposal to be brought before the meeting, but retain discretionary authority over one or more other proposals, under NYSE Rule 452.13 the brokers may vote the uninstructed shares by proxy on the discretionary matters as long as they physically cross out the portions of the proxy card relating to matters for which they lack discretion. In such case, no vote is cast on any non-discretionary matters, causing a "broker non-vote" to occur for the uninstructed shares with respect to such matter.

Uninstructed shares held with a broker will count for quorum purposes under Delaware law so long as at least one discretionary item is on the meeting's agenda, subject to the broker's election to exercise such discretionary voting authority. Including auditor ratification on the proxy ballot is often a way for companies to ensure a quorum is met at the shareholder meeting, as broker votes on this routine matter count toward the total shares present. Over the years, the NYSE has reduced the number of matters that it views as discretionary under Rule 452, leaving auditor ratification as the only discretionary matter for a typical annual stockholder meeting.

Delaware law considers broker non-votes to be shares *not* entitled to vote. See *Berlin v. Emerald Partners*, 552 A.2d 482 (1988). Consequently, where the voting standard is "a majority of the shares present and entitled to vote on the matter," broker non-votes have no effect, counting neither as a vote for/against the proposal nor toward the number of shares or voting power present and entitled to vote on the matter. Where the voting standard is a majority of the votes cast, a broker non-vote has no effect because the vote is not cast for or against the proposal. Where the voting standard is a majority of the quorum (i.e., a majority of shares present and entitled to vote at the meeting) or a majority of the outstanding shares entitled to vote on the matter, a broker non-vote counts as a vote against a proposal.

When discretionary votes are permitted by brokers under NYSE Rule 452, some brokers vote with a company's board. Other brokers vote in proportion to how their voting customers vote. Some brokers do not vote at all, including Charles Schwab/TD Ameritrade and Robinhood, which have instituted policies not to utilize their discretionary voting authority.

When brokers do not utilize discretionary voting authority, this reduces the number of shares that are present at a meeting and count toward the quorum. For companies with a large retail shareholder base, the absence of discretionary votes by certain brokers can make it more challenging to reach a quorum.

Effect of Unsubmitted Proxy Card

If shares are held in record form, the effect of failing to submit a proxy card (or vote electronically) for such shares means the shares will not be voted or be present for purposes of calculating quorum. For shares held in "street name" with a broker, failing to submit a proxy card or instruction (or vote electronically) means the shares may be voted at the discretion of the broker only on routine matters (e.g., auditor ratification) and the shares will not be voted on non-routine matters (e.g., election of directors).

Effect of Stockholder Unmarked Vote(s) on Submitted Proxy Card

When a stockholder returns a signed proxy card but does not mark a vote on a proposal, does anyone have discretionary authority to submit a vote for such stockholder's shares on such proposal? For shares held in beneficial form with a broker, the broker does not have authority to vote such shares because the stockholder has affirmatively given proxy authority to the named proxy holders. Do the proxy holders have discretionary authority to vote such shares on such proposal?

The SEC staff confirmed that, in accordance with Rule 14a-4(b)(1), a proxy holder could use its discretionary authority to vote in situations where the stockholder returned a proxy without specifying how to vote, so long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified. See SEC Staff Compliance & Disclosure Interpretation (C&DI) 139.09. However, the SEC staff indicated in a separate C&DI 139.08, that in director elections, if a stockholder voted for certain directors but less than the maximum number of directors for which the stockholder could vote, the proxy holder could not use its discretionary authority to vote for additional directors up to the maximum number. The SEC staff assumes an undervoted proxy card director vote is a choice made by the stockholder that should be respected.

Planning for Potential Adjournment

If a quorum is not obtained or one or more proposals do not have sufficient votes to pass, to address the need to obtain a quorum and/or solicit additional votes, companies may seek to adjourn the meeting. This requires planning in advance and consideration of a company's bylaws, state law, and SEC positions.

Bylaws generally provide wide authority to adjourn a meeting. Often, bylaws provide that, whether or not a quorum is present, a meeting may be adjourned either by the chair of the meeting or by the vote of a majority of the shares present in person or represented by proxy. Under Delaware law, if a stockholder meeting is adjourned, and if the time and location of the reconvened meeting are announced at the time of adjournment, no additional notice to stockholders need be given unless (a) the adjournment is for greater than 30 days or (b) a new record date is fixed subsequent to adjournment. See DGCL §§ 222(c) and 213(a).

The SEC staff, however, has previously taken the position in certain comment letters, citing Rule 14a-4(d)(4) under the Exchange Act, that only stockholders may adjourn a meeting and that adjournment of a meeting to solicit additional proxies is a substantive proposal for which proxies must be independently solicited notwithstanding the provisions of the company's bylaws or state law.³ The SEC staff has also expressed a view

³ But see *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 792 (Del. Ch. 2007) (upholding a meeting postponement by the directors even though stockholders allegedly had not approved a proposal to adjourn or postpone the meeting, which

in comment letters that brokers do not have discretionary authority to vote for adjournment under Rule 452. The NYSE, however, takes the position that an adjournment proposal is routine where the underlying proposal for which adjournment may be sought is routine. It is recommended that companies obtain the NYSE's view on whether an adjournment proposal is routine.

Conclusion

Stockholder meeting voting standards are more complex than might be expected. With default voting standards under state law, many of which companies can modify in their charters and bylaws and that can then be trumped by special subject matter requirements, there can be confusion regarding which standard applies. Moreover, the law governing stockholder meeting voting standards is not static. Consequently, in advance of every stockholder meeting, voting standards should be carefully reviewed and accurately disclosed so they can be properly applied to better ensure a successful meeting.

proposal was described by the court as "included [in the proxy statement] as a result of a general practice of the SEC that encourages issuers to seek stockholder pre-approval for an adjournment").

Annex A
Voting Standards

Voting Standard	Plurality (DGCL § 216(3) default rule in director elections)	Majority of votes cast (more for than against)	Majority of shares present or represented by proxy and entitled to vote on the matter (DGCL § 216(2) default rule)	Majority of the votes (or voting power) present or represented by proxy	Majority of shares present or represented by proxy and entitled to vote at the meeting (majority of the quorum)	Majority of the outstanding shares entitled to vote on the matter
Calculation Method	Uncontested: At least one "for" vote Contested: Nominees receiving the most "for" votes, up to the number of available seats, are elected.	<u>for</u> for+against	<u>for</u> for+against+abstain	Same as majority of shares present or represented by proxy and entitled to vote <u>on the matter</u> (DGCL § 216(2) default rule), per Delaware Supreme Court ⁴	<u>for</u> for+against+abstain+broker non-vote	<u>for</u> all outstanding shares entitled to vote on the matter
Effect of Abstention	Withhold: No effect Abstain: N/A	No effect	Same as against vote		Same as against vote	Same as against vote
Effect of Broker Non-Vote	No effect	No effect	No effect		Same as against vote	Same as against vote
Effect of Unsubmitted Proxy Card (for shares held in street name)	No effect Brokers may not vote unsubmitted proxy in the election of directors.	Non-routine matter: No effect Routine matter: Brokers may vote at their discretion.			Non-routine matter: Same as against vote Routine matter: Brokers may vote at their discretion.	
Effect of Stockholder Unmarked Vote on Submitted Proxy Card	Proxy holder has discretionary authority, other than in director elections where a stockholder voted for certain but less than all director positions, so long as the form of proxy states in bold-faced type how the proxy holder will vote where no choice is specified. The broker cannot vote because the stockholder has appointed a proxy.					

⁴ *Berlin v. Emerald Partners*, 552 A.2d 482, 493 (Del. 1988).

Related People



Scott D. McKinney

Counsel

+1 202 419 2170

smckinney@Hunton.com



Steven M. Haas

Partner

+1 212 309 1102

shaas@Hunton.com



Scott H. Kimpel

Partner

+1 202 955 1524

skimpel@Hunton.com