

The Impact of the Elimination of Broker Discretionary Votes on Executive Compensation

May 18, 2011 | Client Update | 2-minute read

When the SEC decided to eliminate the ability of brokers to vote on a discretionary basis without specific client instruction for director elections in July 2009, many predicted that it would seriously affect the ability of directors to obtain majority support. The concern proved to be a false alarm. As a result, when the Dodd-Frank Act required the elimination of broker discretionary voting for executive compensation matters, including say-on-pay, there wasn't nearly the same chatter.

But it turns out that given the closeness of many of the failed say-on-pay votes, the reported broker non-votes would have made a real difference. We calculated that 7 of the 21 companies reporting failed votes so far would have passed, in some cases by a decent margin, if the non-votes had actually been counted as "for" say-on-pay, which is not an unreasonable assumption given these discretionary votes generally favored management. For one company, there were more broker non-votes reported than "for" votes.

Currently for most companies the only proxy item that brokers can continue to vote on without client direction is auditor ratification. In addition, many are not aware that the NYSE usually permits brokers to vote at their discretion on most management proposals to amend charters, including to declassify boards, eliminate supermajority provisions or allow special meetings of shareholders. Since NYSE Rule 452 governing discretionary voting has a specific list of "cannot vote" items, items not on the list, and not viewed as contested, can be marked as a broker-may-vote matter by the NYSE.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.