

New ISS Policy Covers Novel Proposals on Proxy Vote Tallies and Vote Counting Methods

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A number of shareholder proposals this season are focused on aspects of proxy voting, leading ISS to adopt a new policy at the end of January on how it will evaluate these proposals.

A novel proposal this year titled, “Enhanced Confidential Voting” seeks to prohibit management and board from having access to interim vote tallies used for proxy solicitations, following the controversy over Broadridge’s decision in 2013, which still stands, that it will no longer provide those tallies to shareholder proponents that had used Broadridge to disseminate its own exempt soliciting material to shareholders. ISS reports 14 such proposals were submitted, primarily from John Chevedden. A number are being challenged at the SEC, arguing that the proposal is vague and misleading and implicates ordinary business activities regarding the conduct of annual meetings. Omnicom has instead filed suit against Chevedden.

Another fairly new proposal, reportedly sent to nine companies, asks boards to adopt an approach to vote counting for management and shareholder proposals that would ignore abstentions. The proposal does not quite address the fact that while having abstentions count as “against” votes would lower the support for shareholder proposals, generally that would mean it also decreases the support for say-on-pay proposals. There have also been some accusations that companies use different methods for determining voting results for management and shareholder proposals.

The vote-counting proposals also follow another 2013 proxy season controversy when there was some dispute as to whether three proposals passed at Nabors, a Bermuda-based company. The company counted both abstentions and broker non-votes against its shareholder proposals on proxy access, independent chair and shareholder votes on golden parachutes, all of which would have received majority support without the additional “against” votes.

The ISS policy attempts to address “proxy voting mechanics” and covers in one policy confidential voting, confidentiality of vote tallies and companies’ vote-counting methodology. The policy examines several factors on a case-by-case basis, including: (a) the scope and structure of the proposal; (b) the company’s stated confidential voting policy (or other relevant policies) and whether it ensures a “level playing field” by providing shareholder proponents with equal access to vote information prior to the annual meeting; (c) the company’s vote standard for management and shareholder proposals and whether it ensures consistency and fairness in the proxy voting process and maintains the integrity of vote results; (d) whether the company’s disclosure regarding its vote counting method and other relevant voting policies with respect to management and shareholder proposals are consistent and clear; (e) any recent controversies or concerns related to the company’s proxy voting mechanics; (f) any unintended consequences resulting from implementation of the proposal; and (g) any other factors that may be relevant.

What is particularly unclear in this new policy is the reference to the “level playing field” and “equal access to vote information,” and whether to obtain a favorable ISS recommendation on the shareholder proposals regarding vote tallies, companies would need to adopt the policy that Verizon recently instituted, which we discussed [here](#).

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.

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