

After Slight Text Changes, the SEC Staff Decides Proposal Governing Company Access to Vote Tallies Cannot Be Excluded

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Several companies excluded proposals this season related to their receipt of periodic vote tallies from Broadridge after receiving no-action letter decisions similar to the SEC staff's views from two years ago. The proposals asked boards to adopt bylaws so that the running tally of votes cast for matters on the proxy card would not be made available to management or the board, and cannot be used to solicit votes.

The proponent of the proposal proclaims that the objective is "confidential voting," although the real purpose seems to be curtailing corporate solicitation. The version of the proposal that the SEC staff decided could be excluded asked for the bylaws to govern the tallies related to the "outcome of votes cast by proxy on uncontested matters," and included all management proposals seeking approval of executive pay, proposals required by law to be subject to shareholder vote and shareholder proposals.

The proposal carved out director elections and vote levels necessary to monitor quorums. The criticism in the proposal focused on executive pay proposals, claiming that management can monitor voting results and "then decide to spend shareholder money to influence the outcome on matters where they have a direct self-interest... such as the ratification of lucrative stock options and to obtain more votes for their high executive pay."

The SEC staff permitted these proposals to be excluded on ordinary business grounds. Unlike in some instances when no explanation is provided, the staff specifically noted that the proposals related to the monitoring of preliminary voting results with respect to matters that *may* (emphasis added) relate to the companies' ordinary business.

But recently, the SEC staff determined that a slightly different version of [the proposal](#) cannot be excluded. This version of the proposal, now called "Executive Pay Confidential Voting" instead of "Confidential Voting," also affected vote tallies, but the text had changed and now addressed "the outcome of votes cast by proxy on certain executive pay matters." It also stated that it was limited to "executive pay items." The same criticism on management solicitations from the other proposals was also included.

The company cited no more than five no-action letters this season where the SEC staff allowed for exclusion of the prior version of the proposal, but it appears the staff found this proposal to be sufficiently different. The staff noted that this proposal relates to the monitoring of preliminary voting results *with respect to executive compensation matters* (emphasis added), and does not seek to micromanage the company, such that the company may not omit the proposal from its proxy materials in reliance on the ordinary business exception. The staff also rejected the other arguments made by the company.

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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