

The Meaning (or Absence Thereof) of Abstentions

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When shareholders mark “abstain” on a ballot, what does it mean? Does the meaning differ depending on whether it’s to elect a director, vote on say-on-pay or a shareholder proposal? The effect of abstentions in determining the pass/fail rate for an item depends on state law and corporate governance documents, but should they be excluded if we’re trying to examine different companies’ results for comparability?

You may be aware that it is ISS policy to ignore abstentions when reporting the results of shareholder proposals, citing Rule 14a-8(i)(12). The approval rate of shareholder proposals determined by ISS feeds into their policy of recommending against boards for failure to implement proposals that receive majority support two out of three years in a row. If abstentions were counted, it would decrease the level of support for these proposals. Given the close votes received on written consent and special meeting proposals in recent years at some companies, whether or not abstentions are counted sometimes matter.

We’re not aware that such a policy exists yet for say-on-pay. In his RiskMetrics Insights blog, Ted Allen reports results that includes abstentions, as duly noted in the articles. As a management proposal, abstentions have the opposite effect on say-on-pay than for shareholder proposals, by decreasing the level of support. In both cases, the companies come out looking worse.

Thus far, abstentions have played a minor role in say-on-pay results, averaging about 1.9% of votes. However, abstentions played the deciding role in causing Motorola to report a failed vote in 2010, a similar fate faced by Hemispherx BioPharma and Cooper Industries this year. Hemispherx had nearly 16% in abstentions. In the U.K., investors often “abstain” against say-on-pay in the first instance to express a milder form of dissatisfaction with executive compensation.

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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