

Major Governance Changes at Nabors, But Vote-Counting Method Continues to Draw Criticism Amidst Questions About the Meaning of Abstentions

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In one fell swoop, Nabors Industries recently [announced](#) a number of significant governance changes that adopt the resolutions of several of the most common shareholder proposals, including: proxy access for shareholders owning 5% or more of the company's shares for at least three years and a willingness to review and possibly lower that threshold in three years; separating the roles of Chair and CEO following the current Chair and CEO's tenure; limiting severance payments to 2.99 times an executive's salary and bonus; and asking shareholders to vote on its poison pill. In addition, the company amended its governance guidelines to clarify that the lead director may add agenda items for board meetings and include gender in its diversity considerations, as well as implementing a policy to require the board's reasoning if any director resignations are not accepted under its majority voting director resignation policy.

The press release acknowledges that the changes are the results of ongoing discussions with CalSTRS and Blue Harbor Group, Nabors' largest shareholder. The company has long been a target of criticism, beginning with its failure to take action after strong votes to declassify the board. Two years ago, CalSTRS declared victory on its proxy access proposal at Nabors, its first ever, only to have the company determine that the proposal failed when they included broker non-votes and abstentions in the calculation, as permitted for a Bermuda-based company. A proposal seeking an independent chair was also mired in the same controversy. In 2013, the company failed its say-on-pay vote, and two directors also received more "withhold" votes than votes in support, while an independent chair proposal again received 49.5% support under the company's calculation (but with a majority in favor without broker non-votes and abstentions). Notwithstanding the accommodations Nabors is now adopting, CalPERS indicated that it will continue to pursue a change to Nabors' bylaws to remove broker non-votes from being counted.

Vote-counting methodologies can be surprisingly controversial, as outlined in a [report](#) that CalPERS commissioned, which evaluates how S&P 500 and Russell 1000 companies determine when both management and shareholder proposals have passed, with an emphasis on the calculation impact of broker non-votes and abstentions and whether companies took consistent approaches across all proposals. The report notes that while proxy rules require disclosure of the impact of abstentions and broker non-votes, some companies are nonetheless silent as to what approach they follow.

The CalPERS report found that 52% of companies included abstentions in their vote-counting methodologies, meaning that they count as "against" votes. However, the same voting standard may be interpreted differently even by companies incorporated in the same state, including fairly well-established standards regarding shares "entitled to vote" for Delaware companies, under which there is case law indicating that abstentions would be included in the denominator. While the vast majority of companies do not include broker non-votes other than for quorum purposes if not incorporated in Ohio (where inclusion is the default rule), 26 companies do factor in those votes when determining the passage of proposals. In addition, the report mentions three companies that have an "easier" standard for management proposals to obtain approval than for shareholder proposals, for example, using majority of votes cast for approval of management proposals while shareholder proposals require majority of outstanding in favor, or using majority of votes cast for say-on-pay (which would not count abstentions as "against" votes) while shareholder proposals are subject to majority of shares entitled to vote (so that abstentions represented votes opposing those proposals).

What abstentions actually represent remain a mystery. Several press reports have criticized Warren Buffett for voting “abstain” on the equity plan proposal put forth at the Coca-Cola annual meeting, which came under some scrutiny from certain investors. While Mr. Buffett indicated in [interviews](#) that the abstentions “obviously means we don’t approve of the plan,” under the company’s voting standard, abstentions have no impact and are not the equivalent of “against” votes. It is notable, however, that the plan would have passed even if to “abstain” had the same impact as to vote “against.” Perhaps ironically, several recent shareholder proposals by Investor Voice seek exactly this approach, where abstentions have no impact and are not counted as “for” or “against.” Investor Voice believes this to be the most “fair” representative of “democratic voting,” presumably because their primary concern lies with the outcome of shareholder proposals rather than proposals like the equity plan, or even say-on-pay.

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

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