

Litigation Alleging Failure to Properly Count Abstentions for Determining Approval of Existing Equity Plan Causes Company to Delay Annual Meeting

June 5, 2014 | Client Update | 3-minute read

Facing a lawsuit alleging that shares were improperly awarded because of the failure to count abstentions in determining whether an equity plan received shareholder approval, Cheniere Energy [announced](#) that it is delaying its annual meeting, originally scheduled for June 12, until September. A copy of the [complaint](#) is attached as an exhibit to the company's release.

Plaintiff filed suit in the Delaware Court of Chancery to recover 25 million shares that it accuses the company of improperly awarding to employees, consultants and directors under a 2011 incentive plan and to enjoin the upcoming 2014 until a recent bylaw amending the voting standard is invalidated. The 2011 incentive plan was originally approved by a fairly wide margin at the 2011 annual meeting. Finding that it needed to increase the number of shares under the plan, the company convened a special meeting in February 2013 to seek shareholder approval to make an additional 25 million available for grant. The voting outcome was more narrow than in 2011. The company ultimately disclosed that it had received the requisite approval and granted more than 17 million restricted stock awards after the special meeting, but the plaintiff alleges that the plan actually did not pass and received less than 45% in favor, if the company had properly counted abstentions as "no" votes.

The company's bylaws at the time indicated that approval of the matter required "the vote of the record holders of a majority of the shares entitled to vote thereat, present in person or by proxy." As the plaintiff notes, this provision is similar to the default standard in Delaware corporation laws, which Delaware courts have interpreted to require that abstentions be counted as votes "against" the matter.

In April 2014, the company amended its bylaws so that abstentions would not count where a minimum vote of shareholders is required under the charter, bylaws or the rules of any listing exchange. The 2014 proxy statement includes a proposal to increase the shares under the 2011 incentive plan by 30 million, and indicates abstentions would have no effect. The plaintiff is also seeking to invalidate this bylaw in its action.

As we previously [discussed](#), the fate of abstentions remains a bit of a mystery even among companies that purport to use the same standards. We have also discussed how some shareholder proponents have submitted [proposals](#) asking companies to ignore abstentions so that shareholder proposals could be more favorably counted.

Adding to all this confusion is the fact that, unlike Nasdaq, the NYSE imposes its own vote-counting standard on matters that the listing exchange requires seeking shareholder approval. In addition to state law standards, approval of a majority of votes cast is necessary, but NYSE has its own interpretation and considers abstentions to be a vote "cast," unlike under Delaware law. For NYSE equity plan and other proposals then, regardless of corporate bylaws, abstentions end up being a vote against the proposals.

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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