

A QUICK PRIMER ON TABULATING AND REPORTING VOTING RESULTS

- The first commandment when it comes to tabulating and reporting Meeting results is this: “Always prove every item to the Quorum” (Doing this, as we reminded last year, would immediately have uncovered the tens of millions of votes that went missing in last year’s election of directors at Yahoo. We must also admit that we have broken this commandment ourselves...to our most grievous dismay.)
- What does this mean in practice? Add up (and ideally, have your tabulating system automatically add up) the For, Withheld, Against, Abstain and any “non-votes” and “no-votes” (in the case of offsetting split-votes by co-fiduciaries) for each director and each item on the ballot – to be sure that each of the totals you’re reporting are the same as the total you’re reporting as the Quorum.
- What is the Quorum? It is the sum-total of all the shares (or voting power, if there are classes of stock with more or less than one vote per share that are entitled to be part of the quorum) that are “present at the meeting in person or by proxy”. (Thus, there may be a different quorum, please note, for different agenda items).
- Please note too that simply being present in the meeting hall – even if one does not cast one’s vote on a single matter – is normally considered as being “present” for the purposes of determining whether or not there IS a quorum. But this is only important to consider where there is the possibility that some voters may try to postpone or prevent a meeting by preventing a quorum from being present. If this may be a potential issue, have every attendee sign in, and verify the shares they have.
- The second commandment of tabulating and reporting is to always know – and to always disclose in the proxy statement – exactly what it takes for a proposal to “pass”. These facts should always be findable in a company’s Articles of Incorporation or By-laws. Typically they arise from the corporate code of the company’s state of incorporation, but very often, the company, or its shareholders, have adopted special provisions (like a super-majority provision, for eg.) that supersede the “standard” state law provisions.
- A very important corollary to the second commandment - let’s call it the third commandment - is to pay particular attention to all the “classes” of stock your company may have outstanding, since shareowners of such classes may or may not have a vote on particular matters, and often, the voting power is more, or less, than one vote per share. (Every single year we encounter dozens of cases where this critical information – on exactly what it takes to pass a proposal -- is not disclosed, or in some cases is disclosed on one page, but contradicted on another...or is contradicted by an “explanation” – like the wacky explanations of the effect of abstentions and of “broker non-votes” that are being gratuitously inserted like mad these days by eager-beaver lawyers).
- The most common standard for “passing” a proposal - and generally the easiest to meet - is “a majority of the shares present at the meeting in person or by proxy”...or, in other words, one-half the Quorum (once there IS a quorum of course) plus one vote. Thus, many proposals can “pass” with as little as 25% of the outstanding shares plus one vote.
- The next most common standard for passing a proposal is “a majority of the votes cast”: Here is where it becomes important to recognize that “abstentions” – and so-called “broker-non-votes” are NOT “votes cast”...and thus, such votes and “non votes” make it harder for the proponent to get the needed Yes votes. Only the For and Against votes count – and they are the only votes to be included in the denominator if you feel obliged to report percentages.
- Many proposals – and typically, the most important ones to shareholders in terms of the economic implications – require “a majority of the shares outstanding” – and often of “the total voting power” to be cast in favor of the proposal if there are additional classes of stock outstanding.
- Some proposals – like proposals to change the Bylaws, oust directors or to merge the company - require a “super-majority” - often two-thirds or even more of the shares outstanding to be cast in favor, in order to pass.
- Several “standards” currently exist for electing directors, so it is critically important to know exactly what standard applies: The majority of public companies still have a “plurality standard”, where votes may be “Withheld” from a director, but where there is no opportunity to cast an “Against” vote. Thus, as long as a director gets even one vote “For”, he or she will be elected, unless there is a “proxy fight” with a competing slate. A rapidly growing number of companies have adopted a “majority voting standard” where shareholders get to vote “For”, “Against” or to “Abstain” on the election of each director candidate. (We were also amazed this year to see how many companies that said they had majority voting failed to give shareholders the For, Against and Withheld choices!) While most such companies simply require more “For” votes than “Against” votes to get elected, some require directors to attain a majority of the Quorum, or even a majority of the shares outstanding.