



California Corporate & Securities Law

Why Is There No Withhold Box?

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The Securities and Exchange Commission has long required that a form of proxy relating to matters other than election to office provide a means to specify by boxes a choice between approval or disapproval of, or abstention with respect to, each separate matter to be voted on at the meeting. Rule 14a-4(b)(1). More recently, the SEC in its final [Say-on-Pay rules](#) has required that a form of proxy include an abstention option with respect to the advisory vote on the frequency of advisory votes on executive compensation. Rule 14a-4(b)(3). Notably, the SEC does not require that a proxy offer shareholders the option *to withhold authority* to vote on these matters.^[1]

Is this a mere technical oversight or could the inclusion of a “withhold” option make a difference? The answer would seem to depend on the voting rule being applied to the particular question and how the courts will view a withhold instruction.

If the voting rule for stockholder action is approval by a majority of the outstanding shares entitled to vote (*See, e.g.*, Cal. Corp. Code § 152 and DGCL § 242(b)), then the failure to vote affirmatively, whether by reason of abstention or withholding of proxy authority, will have the effect of a “NO” vote.

If the voting rule requires the affirmative vote of a majority of the shares present and entitled to vote on the subject matter (*See, e.g.*, DGCL § 216), then an abstention will also have the effect of a “NO” vote. Why is this so? When a shareholder attends a meeting and abstains (*i.e.*, doesn’t vote either for or against), the shareholder is considered present (she’s at the meeting) and entitled to vote (she could vote, but has chosen not to do so). Because a proxy holder is the agent of the shareholder, the proxy holder is acting on behalf of her principal at the meeting. Thus, when a shareholder directs her proxy to abstain, the result should be the same as if the shareholder had attended the meeting and abstained. *See Licht v. Storage Technology Corp.* (C.A. 524-N, May 6, 2005, revised May 13, 2005).

Is the situation any different if a shareholder withholds authority from a proxy holder to vote on a particular matter? Conceptually, it seems that there could be a difference. Indeed, the Delaware Supreme Court in *Berlin v. Emerald Partners*, 552 A.2d 482 (1988) held that shares are not “voting power present” when the proxy holder has been given a “limited proxy” that does not empower the proxy holder to vote on a particular

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matter. 552 A.2d at 493. However, that case involved broker non-votes (*i.e.*, shares held in street name with respect to which brokers do not have discretion to vote in the absence of instructions from the beneficial owners). The Delaware Supreme Court considered these to be “limited” proxies and held that shares are not “voting power present” if the proxy holder has been granted a “limited” proxy that “does not empower” the proxy holder to vote on a particular matter. Thus, broker non-votes do not count as votes against when the voting rule is a majority of those present and entitled to vote.

Providing shareholders with a means to withhold authority from their proxies would create an additional option for shareholders when the applicable voting rule is a majority of the shares present and entitled to vote. (This assumes that a court would treat the withhold option as a limited proxy as in *Berlin*). Presently, a shareholder of record who is indifferent to a proposal has no means to express her indifference. As discussed above, checking the abstain box is not a neutral choice – it has the same effect as voting against the proposal. Ironically, a shareholder who holds through a broker has a neutral option with respect to non-discretionary proposals because she can simply fail to provide instructions to the broker. It seems that it is time to reevaluate the proxy and put all shareholders on an equal footing.

Arguably, a proxy card that allows a shareholder to instruct her proxy to vote for, against, abstain or to withhold authority to vote on a matter is distinguishable from the proxy card at issue in the *North Fork Bancorp.* case. In that case, Vice Chancellor Lamb found that proxy cards that offered only the choices of “for” and “withhold” with respect to the election of directors (under a majority, rather than plurality, rule) were not limited proxies as described in *Berlin*. The withhold option on a proxy card that, unlike the card at issue in *North Fork Bancorp.*, offers the full panoply of choices should logically be viewed as withholding all authority to vote on that matter.

[1] The SEC had originally proposed to require that a form of proxy with respect to election of directors include an “against” box. However, this was thought to be misleading in the case of corporations with a plurality vote standard. The SEC adopted the “withhold” concept as a mechanism for shareholders to express dissent beyond a mere abstention. *See North Fork Bancorp., Inc. v. Toal*, 825 A. 2d 860 (Del: Ch. 2000).

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