A Proxy Is Not A Vote And Why It Matters

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As discussed in this prior post, the Securities and Exchange Commission recently proposed rule amendments to implement the Dodd-Frank Act's executive compensation advisory votes mandates. Regrettably, the SEC's proposal perpetuates the common misconception that executing a proxy is the same as voting. For example, the SEC's proposed Rule 14a-4(b)(3) refers to "[a] form of proxy *which provides for a shareholder vote* on the frequency shareholder votes to approve the compensation of executives . . .".

The California General Corporation Law makes a clear distinction between a proxy and a vote by defining a proxy as "a written authorization signed or an electronic transmission authorized by a shareholder or the shareholder's attorney in fact *giving another person or persons power to vote* with respect to the shares of such shareholder". Cal. Corp. Code § 178. The agent is called a "proxyholder". *See* Legislative Comment to Cal. Corp. Code § 604. California's definition is not out of the mainstream. In fact, its statutory definition of "proxy" is substantively the same as that enunciated by the Delaware Supreme Court: "[T]he relationship between grantor and recipient of a proxy is one of agency . . .". *Moran v. Household Int'l, Inc.,* 500 A.2d 1346, 1355 (Del. 1985).

Thus, it should be clear that merely signing a proxy doesn't count as a vote or even presence at a meeting. (If a proxy were a vote, it would be a ballot.) The reason is that the appointed proxy holder must still go to the meeting and vote. If the proxyholder fails to show up, or shows up but fails to vote, the shareholder will not have voted even though the proxy is valid.

The confusion between a proxy and vote is also evidenced in the SEC's proposed requirement that a form of proxy include a box marked "abstain". Properly, this box should be marked "withhold" because that is what the shareholder is doing – withholding a grant of authority to the proxy holder to vote on the shareholder's behalf. A shareholder can also withhold authority by not signing a proxy card (although this would withhold authority to vote on all matters). This distinction is important because some people wrongly consider proxy cards marked "withhold" to be votes against a proposal.

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