If I Were A Carpenter, I'd Build A Better Proxy

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As reported by Broc Romanek on May 24, 2011 in The Proxy Season Blog, the United Brotherhood of Carpenters and Joiners of America recently filed a petition for rule making with the Securities and Exchange Commission. The Carpenters would like to see the elimination of the "withhold" option on proxies with respect to the election of directors. They argue that this is a vestige of the "plurality vote standard" era and "is not a valid vote option under any vote standard".

I agree with the Carpenters that the withhold option on a proxy is not a valid *vote* option under California law. However, this is because the Carpenters have conflated the execution of a proxy with voting, a subject that I discussed in "A Proxy is not a Vote and Why It Matters".

California mandates a plurality voting rule for the election of directors – meaning the winning candidates are those who receive the highest number of affirmative votes entitled to vote up to the number of directors to be elected. California Corporations Code § 708(c). The Code further specifically provides that votes against or withheld have no legal effect. For example, in an election of three directors in which votes are cast as set forth below, Messrs. Mulligan, Dedalus and Bloom will be elected. This will be the case even though all three received more votes against and even though Mr. Bloom received only one affirmative vote.

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Candidate	For	Against
Buck Mulligan	1,950	2,000
Stephen Dedalus	850	2,000
Leopold Bloom	1	2,000
Larry O'Rourke	0	0

In 2006, the Legislature added Corporations Code Section 708.5 to allow "listed corporations" (Section 301.5(d)) to adopt a form of majority voting provided they have amended their articles or bylaws to eliminate cumulative voting pursuant to Section 301.5(a) . These corporations may amend their articles or bylaws to provide that in an "uncontested election" the "approval of the shareholders" (Section 153) is required to elect a director.

To be elected under an "approval of the shareholders" standard, a director must receive the affirmative vote of a majority of the shares present and *voting* at a duly held meeting at which a quorum is present. Note that the statute does not refer to a majority of the votes cast for the particular candidate. Recently, I noticed that one California corporation misdescribed the vote required in its proxy statement as follows: "Under majority voting, a nominee must receive more votes 'FOR' than 'AGAINST' his or her election to be elected as a director."

California, however, adds an extra twist by also requiring that a candidate receive the affirmative vote at least a majority of the required quorum. For purposes of this requirement an abstention could impact the election. This is illustrated by the following example (assuming 10,000 shares of voting stock issued and outstanding and a required quorum of a majority of the shares entitled to vote):

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Candidate	For	Against	Abstain
Buck Mulligan	4,000	2,000	0
Stephen Dedalus	3,000	2,000	1,000
Leopold Bloom	2,500	2,000	1,500

In this example, Messrs. Mulligan is elected because he received the affirmative vote of at least a majority of the shares represented and voting at the meeting (*i.e.,* more than 3,000 votes) and at least a majority of the required quorum (*i.e.,* at least 2,501 votes). Mr. Dedalus is not elected because he did not receive a majority of the shares represented and voting at the meeting (even though he received more than a majority of the shares voting with respect to his candidacy). This is why the proxy statement quoted above is incorrect. Mr. Bloom is not elected because he received neither the affirmative vote of at least a majority of the shares voting at the meeting nor a majority of the required quorum.

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