



California Corporate & Securities Law

It's Time To Count The Indifferent!

By Keith Paul Bishop on October 27, 2011

Although Broc Romanek recently [reported](#) that so far this year 43 companies have failed to achieve majority support for “say-on-pay”, the reality is that this is a miniscule percentage of the total number of publicly traded companies.

Moreover, even failure can be a matter of perspective. In one of the recent cases cited by Broc, the company, Hemispherx Biopharma, Inc., reported that “44.1% of the votes cast were in favor of executive compensation, while 37.0% of the votes cast were against and 18.9% of the votes cast abstained”. (This wording is more than a bit odd because an abstention is by definition a vote not cast. Based on the company’s proxy card, I think it would be more accurate to say that 18.9% of the proxies returned were marked with instructions that the proxy holder abstain from voting. See “[A Proxy Is Not A Vote And Why It Matters](#)“.)

Wait! If more votes were cast for than against, how can this be a failure?

Hemispherx is a Delaware corporation and it appears to require for shareholder action the affirmative vote of a majority of the shares present and entitled to vote. This means that absentions have the effect of a no vote. The shareholders failed to approve the say-on-pay resolution because the number of abstentions plus the number of votes cast against exceeded the number of votes cast for the proposal.

But is it really a failure?

The Dodd-Frank Act only requires a nonbinding advisory vote on executive compensation. If the purpose of the vote is to assess shareholder views, the most logical conclusion is that of the shareholders who actually expressed a preference, more shareholders approved than opposed of the company’s compensation practices. Thus, abstentions should be interpreted as neutrality, not opposition. By the way, this would have been the result if Hemispherx had adopted a majority of the votes cast rule for shareholder action.

The will of the indifferent majority should be respected.

It turns out that Hemispherx has an especially apathetic shareholder base. According to the company’s [Form 8-K](#), only 20.7% of its outstanding shares voted on the say-on-pay proposal. This means that a supermajority of the company’s shareholders did not choose to object to its pay practices. When you are trying to assess shareholder intent, the will of the indifferent should not be ignored.

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