

Securities Client Alert



NYSE Proposes Change to How Abstentions Are Counted

By Jeffrey T. Haughey

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In late September 2021, the [NYSE filed a proposal](#) with the SEC to amend Section 312.07 of its Listed Company Manual to change how a company calculates the number of votes need to approve action subject to that section “in accordance with its own governing documents and any applicable law.” The SEC has until November 19, 2021 to decide whether or not to approve this proposal.

There has been confusion among existing listed companies because the existing policy requires companies to count abstentions as votes “against” proposals subject to the NYSE Section 3.07 even though a listed company’s bylaws or other governing documents may provide that abstentions would have no impact on the vote. This is currently permitted by the corporate law in states such as Delaware and Oklahoma if so provided in the company’s governing documents.

Section 312.07 applies to proposals that require shareholder approval under Sections 303A.08 and 312.03, such as equity plans and certain stock issuances to “related parties,” those exceeding 20% of total voting power or those leading to a change of control.

The proposed amendment of Section 312.07 provides that a company must calculate the votes cast with respect to proposals subject to 312.07 in accordance with its own governing documents and applicable state law. Nasdaq has published the following FAQ on this topic: “Nasdaq does not define the term “votes cast.” As such, a company must calculate the “votes cast” in accordance with its governing documents and any applicable state law.”

If permitted by applicable state law, a listed company may wish to consider changing its calculation of voting for matters other than the election of directors to a “votes cast” standard to eliminate the treatment of abstentions as no votes on such matters. Companies should also confirm that the voting standards for all matters are properly used in their proxy statements under their applicable governing law and governing documents.

For questions regarding NYSE’s proposal to change how abstentions are counted, please contact your GableGotwals attorney or a member of our [Corporate & Securities team](#).



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