

# Vote Calculation Methodologies

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# Contents

- Introduction..... 3
  - Case In Point: Impact of Calculation Choice..... 3
- Findings..... 4
  - Vote Counting Methodology by Company..... 4
  - Consistency of Shareholder/Management Proposal Methodologies ..... 6
  - The Effect of State Law on Vote Calculation Methodologies ..... 6
    - Delaware..... 6
    - Maryland ..... 7
    - California and Minnesota..... 7
    - Ohio..... 8
    - Bermuda ..... 8
- Methodology ..... 9
- Appendix ..... 11

# Introduction

This purpose of this project is to evaluate how companies in the S&P 500 and Russell 1000 determine “passage” of both shareholder and management proposals. Specifically, the project reviewed the following:

- Vote counting methodology by company – whether broker non-votes or abstentions were used in calculations of votes cast in favor. This is meaningful because different methodologies can impact whether a proposal is considered to have passed.
- Consistency of vote methodology between management proposals and shareholder proposals. Higher passage thresholds can be achieved by including broker non-votes or abstentions in the denominator when calculating certain proposals.
- Effect of state law on vote calculation methodologies was also considered. Some states impose different requirements to include broker non-votes or abstentions. Companies incorporated in other states that do not require such inclusion, may still have chosen to do so under their own bylaws.

## Case In Point: Impact of Calculation Choice

Below is a case study from Nabors Industries 2013 Annual Meeting, where two proposals received less than majority support based on the company’s methodology. However, the outcome would have been otherwise if broker non-votes were excluded from the calculation:

<b>Proposal #7</b>	<b>Nabors Calculation: <u>Including</u> Broker non-votes</b>	<b>Market Standard: <u>Excluding</u> Broker non-votes</b>
Votes For	138,901,515	138,901,515
Votes Against	117,887,239	117,887,239
Abstentions	499,968	499,968
Broker non-votes	23,133,967	-
<b>TOTAL</b>	<b>280,422,689</b>	<b>257,288,722</b>
<b>% For Votes/Total</b>	<b>49.53%</b>	<b>53.99%</b>

<b>Proposal #10</b>	<b>Nabors Calculation: <u>Including</u> Broker non-votes</b>	<b>Market Standard: <u>Excluding</u> Broker non-votes</b>
Votes For	130,962,251	130,962,251
Votes Against	125,618,933	125,618,933
Abstentions	707,538	707,538
Broker non-votes	23,133,967	-
<b>TOTAL</b>	<b>280,422,689</b>	<b>257,288,722</b>
<b>% For Votes/Total</b>	<b>46.70%</b>	<b>50.90%</b>

# Findings

## Vote Counting Methodology by Company

### Abstentions

An abstained vote, or abstention, is a vote that is not cast either for or against an issue, but is still "cast."

The findings conclude that abstention data for the S&P 500 and Russell 1000 is nearly the same:

- 52% of companies include abstentions
- Just under 48% exclude them
- Less than 1% include them only if they are necessary to constitute a quorum (this represents three companies, two incorporated in Minnesota and one in California).

*Note:* The effect of State Law is discussed in greater detail below.

In general, the data on this point suggests there is no clear consensus about what it means for a share to be "cast" or "voted," and whether abstaining is an act of voting. It also suggests some difference of opinion about whether it is reasonable to calculate votes---as Delaware law permits---out of all shares entitled to vote on a matter, even if they have not actually voted "yes" or "no." Many companies will use the standard of "majority of shares voted on the proposal," or "shares entitled to vote on the matter," but some companies define each of these standards to include abstentions, while others define each to exclude them. Similarly, among companies that use the standard "shares entitled to vote at the meeting," some define this to include abstentions, and others to exclude them.

### Broker Non-votes

A broker non-vote occurs when shares typically by a broker, and are not given instruction as to how to vote. The brokers do not have discretionary power to vote these shares on "non-routine" matters and thus a broker non-vote results.

The data show an overwhelming majority, or 94% of companies in both the S&P 500 and the Russell 1000 exclude broker non-votes from the denominator when calculating the passage of shareholder proposals. Of the firms that do include broker non-votes, some are incorporated in states where the default standard under state law dictates the inclusion of uninstructed shares, either in all cases or only when those shares must be counted to achieve a quorum at the annual meeting.

Only 36 firms in the sample (under 4%) always include broker non-votes in the denominator of the calculation. (Except for *AIG* and *Hospitality Properties Trust*, all the firms in this group use the same standard for both management and shareholder proposals.) The firms are listed below.

**26 companies incorporated in states where the state law default does not include broker non-votes**

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3D Systems  
AIG  
American Capital Agency Corp.  
Cameron International  
Cheniere Energy  
CoreLogic  
Cytec Industries  
Brookdale Senior Living  
First Citizens BancShares  
First Republic Bank San Francisco  
Hershey  
Hospitality Properties Trust  
Ingredion Incorporated  
International Paper  
Nabors Industries  
Occidental  
People's United Financial  
Prologis  
Realogy Holdings  
Reliance Steel & Aluminum  
Seadrill Limited  
Spirit AeroSystems Holdings  
Taubman Centers  
Texas Instruments  
Universal Health Services  
White Mountains Insurance Group

**Nine companies incorporated in Ohio\*, where the state law default includes broker non-votes**

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*Big Lots*  
*DDR Corp.*  
*Forest City Enterprises*  
*Goodyear Tire*  
*J.M. Smucker*  
*Lincoln Electric*  
*Nordson Corp.*  
*Parker-Hannafin*  
*Scotts Miracle-Gro*

\*It is not clear that the state law prohibits companies from adopting a less stringent standard, and one Ohio-incorporated firm in the Russell 1000, DSW, has done so.

**Company incorporated in Switzerland\***

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TE Connectivity, Ltd.

\*Legal framework on this matter has not yet been investigated

Other than *Nabors Industries*, the only company in this list that has had a recent shareholder proposal with a vote tally close enough for these methodological issues to be significant is *International Paper*, which is incorporated in New York.

Interestingly, the company released an 8K announcing that shareholders approved a non-binding proposal, although according to the company's stated calculation methodology it would have failed.

## Consistency of Shareholder/Management Proposal Methodologies

Only two companies in the S&P 500 and Russell 1000 Indices systematically treat shareholder proposals differently from management proposals.

- *AIG*, where a majority of shares outstanding are required to approve shareholder proposals, but a majority of shares cast for or against a proposal (which excludes abstentions and broker non-votes) is required to approve management proposals. This means that shareholder proposals at *AIG* are subjected to a much higher---and in practice, impossible---standard, while management proposals are calculated in the way most likely to facilitate passage.
- *Hospitality Properties Trust*, a Maryland real estate investment trust (REIT). Any proposals other than the election of Trustees require the support 75% of “votes entitled to be cast” on the matter (which presumably means shares outstanding), unless the matter has been previously approved by the Board of Trustees. In that case, the vote required for approval is much lower: “a majority of the votes cast” at a shareholder meeting.

A third company, *Quest Diagnostics*, amended its bylaws to provide that Say on Pay vote results will be calculated out of votes cast for and against the proposal (excluding abstentions and broker non- votes), while the company standard for other management and shareholder proposals remains a majority of votes entitled to vote on the matter (which for non-routine items, would include abstentions but exclude broker non-votes). This means that at *Quest*, vote calculation methods make it somewhat easier for the executive pay plan to receive non-binding approval than for other managerial or shareholder proposals to pass.

All other firms in the sample applied the same standard to calculation of votes on shareholder proposals and those on non-routine managerial proposals other than charter amendments and new share issuance.

## The Effect of State Law on Vote Calculation Methodologies

### Delaware

The corporate law defaults in Delaware, where the largest number of companies are incorporated, states proposals should be approved by a “majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter.” This seems to be universally interpreted to exclude the broker non-votes attached to uninstructed shares.

Delaware-incorporated *3D Systems*, *American Capital Agency Corp.*, *Brookdale Senior Living*, *Cameron International*, *Cheniere Energy*, *CoreLogic*, *Cytec Industries*, *First Citizens BancShares*, *Hershey*, *Ingredion Incorporated*, *Occidental*, *People’s United Financial*, *Realty Holdings*, *Spirit AeroSystems Holdings*, *Texas Instruments* and *Universal Health Services*, have written their bylaws

to require approval by a majority of shares voted at the meeting or counted for quorum at the meeting. None of these companies have had any recent shareholder proposals with close vote tallies for which these methodological issues would be significant. Also note that Delaware-incorporated *Taubman Centers* requires 2/3 of outstanding shares for all proposals.

In contrast to the treatment of broker non-votes (in Delaware), no clear consensus seems to exist among companies regarding abstentions. In our research, if a company stated only that its voting standard was a majority of "shares entitled to vote on the proposal," and made no further mention of its treatment of abstentions, we have recorded it as including abstentions in the denominator of its vote calculations. Our rationale for this is that abstentions are an explicit instruction from the shareowner, which is very different from a non-vote. Indeed, we are aware that some institutional investors abstain on shareholder proposals when they wish to convey support for the general subject matter, but have reservations about the specific action requested. However, many companies that espoused the "shares entitled to vote on the proposal" standard went on to state that they excluded abstentions from their calculations.

### **Maryland**

Maryland law specifies that results should be calculated out of votes cast. As in Delaware, this seems to be universally understood to exclude broker non-votes. However, we identified one company, *Prologis*, which included a provision in their bylaws to permit the use of broker non-votes. Also similar to Delaware, opinions vary as to whether abstentions should be considered "votes cast."

### **California and Minnesota**

In California and Minnesota, state law imposes a two-part requirement for proposals to be adopted. They must receive 1) a majority of shares voted at the meeting (for California) or "on the matter" (for Minnesota) and 2) a majority of votes necessary for a quorum at the meeting. All of the companies incorporated in these states, therefore, would include abstentions and broker non-votes in vote calculations if they were close to not making quorum, and had needed to include those shares to be able to hold a meeting.

If California companies did not state otherwise, we assumed that the first part of the requirement, shares "voted at the meeting," included broker non-votes, because those shares are voted on routine proposals such as auditor ratification. Most of these companies explicitly stated that they excluded broker non-votes from their definition of "shares voted," and have therefore been recorded as "SOMETIMES" including broker-non-votes (e.g., only if necessary to make quorum). Note that *First Republic Bank San Francisco* and *Reliance Steel & Aluminum* are incorporated in California where state defaults do not mandate the inclusion of broker non-votes, but have written their bylaws to do so.

The companies incorporated in California and Minnesota vary as to whether they consider “abstentions” to be shares voted, and whether they therefore include them when calculating passage under the first part of their state law requirements. All of the companies, however, include abstentions if necessary to make quorum. This means that some of these companies always include abstentions (and are marked YES for this field), and some of the companies only include abstentions if necessary for quorum (and are marked SOMETIMES for this field).

### **Ohio**

Ohio law requires management and shareholder proposals to be approved by a majority of shares outstanding; unless they specifically wrote their bylaws to provide otherwise. The Ohio-incorporated companies (previously identified) therefore include both abstentions and broker non-votes in the denominator of their calculations.

### **Bermuda**

Bermuda Law does not mandate the inclusion of broker non-votes, but companies may have written their bylaws to do so. *Nabors Industries*, *Seadrill Limited*, and *White Mountains Insurance Group* are such examples incorporated in Bermuda.

# Methodology

This project examined the methodologies Russell 1000 companies use to calculate passage of shareholder proposals. After excluding companies with foreign incorporation and no relevant documents, as well as recent spinoffs for which filings are not yet available, relevant documents were available for 987 firms, 498 in the S&P 500 and 489 outside it. Two non-S&P 500 firms were then excluded from the study because their minority shareholders have essentially no voting power: *Eaton Vance*, whose voting stock is privately held, and *Erie Indemnity*, where the founding family controls 99 percent of the vote. The total number of companies in the study consequently fell to 985.

Data was collected in August and September 2013 from the most recently issued proxy for each company. In cases where proxy language was ambiguous, bylaws and/or charters were also consulted; if the latter documents were also ambiguous or silent, reference was made to the corporate law of the state in which the company is incorporated. In addition, a check of bylaws was conducted for 1) any company whose proxy statement indicated it *included* broker non-votes when calculating passage of shareholder proposals; and 2) any company incorporated in California, Minnesota, or Ohio whose proxy did not indicate it did *not* include broker non-votes. For each company, the following data points were collected:

- Whether the company uses a different vote calculation methodology to determine passage of shareholder proposals and passage of non-routine management proposals on topics other than Amendments to the Certificate of Incorporation or the issuance of new shares;
- Whether the company includes abstentions in the denominator of the fraction used to calculate passage of shareholder proposals;
- Whether the company includes uninstructed shares (also called “broker non-votes”) in the denominator of the fraction used to calculate passage of shareholder proposals.

In cases where our research uncovered a conflict between the proxy and charter or bylaws, the charter and bylaws were assumed to be authoritative. This occurred for two S&P 500 companies, *salesforce.com* and *Stericycle*, whose bylaws indicated broker non-votes are excluded although their proxies claimed they were included. It also occurred for four companies outside the S&P 500.

*Forest City Enterprises* and *Big Lots*, both incorporated in Ohio, have charters that follow state law defaults in mandating the standard of majority of shares outstanding for a proposal to pass (a standard that would include both abstentions and broker non-votes in the denominator). Both companies’ proxies indicated a less stringent standard.

At Delaware-incorporated *Cinemark Holdings* and Wisconsin-incorporated *Regal Beloit*, the opposite situation exists: the most recent proxy for each company indicates that non-routine items require approval by a majority of shares voted at the meeting (including broker non-votes), while the bylaws indicate they require a majority of shares present and entitled to vote on the matter in question (excluding broker non-votes).

Finally, there was one non-S&P company, Minnesota-incorporated *Techne Corp*, whose proxy indicated a standard of "present and entitled to vote on the matter," omitting the Minnesota law requirement that proposals also receive support from a majority of shares necessary for quorum. As the company's bylaws indicate that proposals pass by the standard explained in the proxy unless otherwise required by law, we have marked the company as including broker non-votes if necessary for quorum.

There was also one non-S&P company, *Home Away*, whose proxy indicated a two-part standard including a majority of shares necessary for quorum, which suggests that the company would include abstentions and broker non-votes in some cases. However, the company's bylaws do not state this, and it is incorporated in Delaware, where this is not required. Therefore, the company was marked as excluding broker non -votes and abstentions.

# Appendix

## Definitions

Broker Non-Votes: Such votes occur when shares are held in "street name", typically by a broker, and are not given instruction as to how to vote. The brokers do not have discretionary power to vote these shares on "non-routine" matters and thus a broker non-vote results.

Abstained Vote: An abstained vote, or abstention, is a vote that is not cast either for or against an issue, but still "cast", as opposed to a "non-vote". Some companies calculate these as votes that have been cast, in effect giving them the same consequence as a vote *against* the proposal.

Routine Votes: Proposals that are considered "routine" are items for which brokers are entitled to vote their clients' shares. (Commonly the brokers vote in line with the recommendation of management.) The most common routine matter is the ratification of the company's auditor and, as a result, broker non-votes are rarely seen with regard to these voting outcomes.

Non-Routine Votes: Non-routine matters are issues that brokers are not allowed to vote on without their client's instruction. These comprise the majority of issues and most commonly include the election of directors and the advisory approval of the company's executive compensation. Therefore these matters commonly have broker non-votes reported among the vote results.

## Jurisdiction Requirements

Delaware code section 216: (2) In all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders; - See more at: <http://codes.lp.findlaw.com/decode/8/1/VII/216#sthash.Jx81vHHt.dpuf>.

Bermuda law: "At any general meeting of a company any question proposed for consideration shall be decided on a simple majority of votes or by such majority as the bye-laws of the company may prescribe, and such majority shall be ascertained in accordance with this section."  
See  
<http://www.bma.bm/legislation/Companies/Companies%20Act%201981.pdf>.

Maryland: (2) A majority of all the votes cast at a meeting at which a quorum is present is sufficient to approve any matter which properly comes before the meeting. See:  
<http://law.justia.com/codes/maryland/2010/corporations-and-associations/title-2/subtitle-5/2-506/>.

Minnesota law: Subdivision 1. Majority required.  
Except for the election of directors, which is governed by section [302A.215](#), the shareholders shall take action by the affirmative vote of the holders of the greater of (1) a majority of the voting power of the shares present and entitled to vote on that item of business, or (2) a majority of the voting power of the minimum number of the shares entitled to vote that would constitute a quorum for the transaction of business at the meeting, except where this chapter or the articles require a larger proportion or number. If the articles require a larger proportion or number than is required by this chapter for a particular action, the articles control.

California law: 153. "Approved by (or approval of) the shareholders" means approved or ratified by the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present (which shares voting affirmatively also constitute at least a majority of the required quorum) or by the written consent of shareholders (Section 603) or by the affirmative vote or written consent of such greater proportion (including all) of the shares of any class or series as may be provided in the articles or in this division for all or any specified shareholder action.

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=corp&group=00001-01000&file=100-195>

Ohio law:

1701.52 Vote of shareholders required - proportion.

Notwithstanding any provision in sections [1701.01](#) to [1701.98](#), inclusive, of the Revised Code requiring for any purpose the vote, consent, waiver, or release of the holders of a designated proportion (but less than all) of the shares of any particular class or of each class, the articles may provide that for such purpose the vote, consent, waiver, or release of the holders of a greater or lesser proportion of the shares of such particular class or of each class shall be required, but unless otherwise expressly permitted by such sections such proportion shall be not less than a majority.

### **Company-specific Documents**

AIG Bylaws:

Section 1.13. Approval of Stockholder Proposals. Except as otherwise required by law, any matter (other than a nomination for director) that has been properly brought before an annual or special meeting of stockholders of the Corporation by a stockholder (including a Nominee Holder) in compliance with the procedures set forth in Section 1.12 and any stockholder proposal pursuant to Rule 14a-8 shall require for approval thereof the affirmative vote of the holders of not less than a majority of all outstanding shares of Common Stock of the Corporation and all other outstanding shares of stock of the Corporation entitled to vote on such matter, with such outstanding shares of Common Stock and other stock considered for this purpose as a single class. Any vote of stockholders required by this Section 1.13 shall be in addition to any other vote of stockholders of the Corporation that may be required by law, the certificate of incorporation or these by-laws, by any agreement with a national securities exchange or otherwise.

Quest Diagnostics:

In all matters other than the election of directors and the matters addressed in paragraph (c) of this Section 1.05, unless otherwise provided by the Certificate of Incorporation, the rules or regulations of any stock exchange applicable to the Corporation,

or applicable law or pursuant to any regulation applicable to the Corporation or its securities, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders. The required vote in the election of directors is set forth in Section 2.03 of the By-Laws.

(c)Notwithstanding anything to the contrary set forth in these By-Laws, the non-binding advisory votes pursuant to Sections 14A(a)(1) and 14A(a)(2) of the Exchange Act (as defined in Section 1.06), and the rules and regulations promulgated thereunder, shall require the affirmative vote of a majority of the votes cast thereon; provided that for purposes of any such vote, neither abstentions nor broker non-votes shall count as votes cast.

#### Hospitality Properties Trust (HPT)

##### HPT Proxy:

The affirmative vote of a majority of the votes cast will be necessary to elect the nominee for Trustee described in proposal 1, to approve the resolution regarding named executive officer compensation described in proposal 2 and to ratify the appointment of Ernst & Young LLP as our independent registered public accounting firm in proposal 3. The affirmative vote of 75% of our outstanding common shares is required for the approval of the shareholder proposals described in proposals 4 and 5.

##### HPT Bylaws:

For all matters to be voted upon by shareholders other than the election of Trustees, unless otherwise required by applicable law, by the listing requirements of the principal exchange on which the Trust's common shares are listed or by a specific provision of the Declaration of Trust, the vote required for approval shall be the affirmative vote of 75% of the votes entitled to be cast for each such matter unless such matter has been previously approved by the Board of Trustees, in which case the vote required for approval shall be a majority of the votes cast at a meeting of shareholders duly called and at which a quorum is present.