

Questions about Fairness of Dell Voting Proposal

[Legal analysis of change in practice](#)
[Investor policies supporting majority of votes cast](#)
[Fairness of minority obstruction](#)

Though voting processes had not been included among the issues defined for attention in the Dell Valuation project, participants in past Forum programs that addressed related issues have encouraged a report clarifying some of the confusion associated with the buyer group proposal of a change in requirements for shareholder approval.¹

Legal analysis of change in practice

Those of you with questions about the legal foundations of both the old and proposed new variations of “majority of the minority” voting, or about the arguments being presented, are encouraged to read the following commentary that was published a day before Dell submitted his proposal to the special committee:

- [July 22, 2013, Leonard Chazen of Covington & Burling published in *Law360*: "Did The Dell Majority-Of-The-Minority Clause Go Too Far?"](#)

Investor policies supporting majority of votes cast

Decisions by a majority of *votes cast* is strongly advocated by proxy advisors such as ISS² and by most institutional investors³ in elections of directors, for reasons that may be similarly applicable to shareholder decisions about buyout proposals.⁴

Most governance experts and investors also advocate excluding “broker non-votes” – the votes cast by intermediaries for beneficial shareholders who do not actually cast votes – from anything other than routine, uncontested actions such as auditor ratifications.

Both of these policy positions would suggest investor support for eliminating the influence of non-voted shares in a buyout decision. For a determination of support by shareholders who are unaffiliated with the buyout’s proponent, especially in the context of a state

¹ See [July 24, 2013 Wall Street Journal: "Dell Buyout Group Calls for Change in Voting Requirements."](#)

² See [January 31, 2013, ISS 2013 U.S. Proxy Voting Summary Guidelines](#), page 20: “Generally vote FOR management proposals to adopt a majority of votes cast standard for directors in uncontested elections. Vote AGAINST if no carve-out for a plurality vote standard in contested elections is included.”

³ See, for example, the [CalPERS website](#) statement of its policy: “CalPERS believes that in an uncontested director election, a majority of proxies cast should be required to elect a director. In a contested election, a plurality of proxies cast should be required to elect a director.”

⁴ For a history of investor advocacy of the “majority of votes cast” standard, with a summary of arguments for and against it, see [September 2012, Holly Gregory of Weil Gotshal & Manges in *Practical Law*, "Trends in Director Elections."](#)

law that separately requires approval by a majority of all outstanding shares, it is difficult to think of any rational justification for counting the non-votes.

Fairness of minority obstruction

The Dell situation has raised important questions not only about the fairness of counting non-votes in a “majority of minority” approval, but also about the practicality of allowing a relatively small minority of shareholders to block a transaction. In this case, opposition by less than a third of shares has been able to hold up a transaction that the rest of the company’s shareholders either want or are willing to accept.



For those of you concerned with appraisal rights, the proposed change in voting would of course have the advantage of allowing a non-vote that respects the requirements of Delaware law without impairing the rights of shareholders who want to vote for or against the transaction.

Your comments will be welcomed.

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