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Somewhere a Big "Gulp" Can Be Heard - Effect of "Abstentions" on Shareholder Voting

The issues encountered by Cheniere Energy over the past few months should provide a good wake-up call to everyone involved with shareholder approval of equity compensation plans of public companies. Somewhere, when the question of whether or not Cheniere did in fact obtain requisite shareholder approval of the share reload of its equity plan is asked, an audible "gulp" can probably be heard for a fair distance.

The question at issue is whether "abstentions" provided as part of a shareholder vote on the plan reload were to be "disregarded" in determining shareholder approval, which is what the company's proxy statement had stated, or whether "abstentions" were to be counted as votes "against," which is what the plaintiff in the shareholder derivative suit/class action complaint alleged, seeking to recover 25 million shares of Cheniere stock, many of which apparently have already been awarded to Cheniere's employees and directors.

In the complaint, plaintiff alleged that at Cheniere's February 1, 2013, special shareholders' meeting called to seek shareholder approval of a 25 million share increase to its equity plan, Cheniere stated in its proxy statement that, for shareholder votes other than director elections, "abstentions and broker non-votes represented by proxies will not be taken into account." The shareholder vote at the February 2013 special meeting resulted in 77 million shares voted in favor, 58 million shares voted against and approximately 36 million abstentions. The company determined and reported on Form 8-K that the proposed plan reload was therefore approved by shareholders and, according to the complaint, as of a year later, Cheniere had awarded approximately 17 million shares out of this 2013 plan reload, with the plaintiff alleging that none of these additional share issuances were valid.

Cheniere is incorporated in Delaware and is listed on the NYSE. Its bylaws at the time read that, for a vote such as this, "the vote of the record holders of a majority of the Shares entitled to vote thereat, present in person or by proxy, shall decide any question brought before the meeting." That bylaw is substantially identical to the Delaware "default rule," which provides that, unless otherwise provided in the charter or bylaws, 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 should be the act of the stockholders." Delaware case law and commentators on Delaware law have traditionally viewed this standard as resulting in "abstentions" having the effect of negative votes. Likewise, the NYSE shareholder approval rule applicable to approval of equity compensation plans (which requires the approval of a majority of the votes "cast") also considers abstentions to be votes against. Many companies, however, describe different effects of "abstentions" in their proxy statements.

The above complaint was brought in May 2014, prior to Cheniere's annual meeting scheduled for early June 2014, at which time Cheniere had proposed to approve further new plan shares, totaling an additional 30 million shares.

In response to this complaint, Cheniere announced that it was postponing its 2014 Annual Meeting of Shareholders from June until September 2014. Cheniere later disclosed that it was withdrawing consideration of these additional equity shares that were to be submitted to shareholders for approval.

The upshot of all of this, plainly, is the need to be vigilant at all times in double-checking the voting standard applicable to any shareholder vote. What is often given cursory review and consideration may, as in the case of Cheniere, have tremendous fallout. Measure twice, cut once, as they say.