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Like Herding Cats: An Analysis of Common State-Law Shareholder Meeting Questions

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For many registered investment companies under the Investment Company Act of 1940 (1940 Act) (which we will refer to generally as funds), persuading retail investors to vote their shares at shareholder meetings can be a challenge. This challenge can be compounded by the somewhat arcane rules relating to shareholder meeting mechanics. This article addresses some common questions that arise for funds in the context of shareholder meetings, including questions surrounding the treatment of broker non-votes and their impact on the outcome of proposals submitted at a shareholder meeting, who has the power to adjourn or postpone a meeting (and the difference between adjournment and postponement), and the manner in which shares are counted for purposes of determining the establishment of a quorum and for voting. These are a few of the seemingly uncomplicated issues that can prove vexing when they arise in particular instances. To aid in-house and outside fund counsel, we set forth in this article some of the general principles used in addressing these issues.

While we hope the discussion of these principles is useful, the answers to many of the questions that arise in connection with a particular fund will depend on a number of factors. Two of the most important are: (1) the fund's jurisdiction of organization (shareholder meeting matters are generally a function of state law); and (2) the form of organization of the fund (for example, corporation, business trust, limited liability company, statutory trust, etc., because shareholder meeting mechanics can vary by entity type within the laws of one state). To keep things as simple as possible for purposes of this article, we have limited our discussion to Delaware statutory trusts (DSTs), since they are today the most prevalent entity for the formation of mutual funds.[1]

Before discussing the various shareholder meeting topics, we offer a preliminary statement about DSTs. DSTs are not subject to the provisions of the Delaware General Corporation Law (DGCL) governing meetings of stockholders. DSTs are governed by the Delaware Statutory Trust Act (DSTA), which contains few provisions expressly regulating meetings of shareholders. This aspect of the DSTA is a double-edged sword. On the positive side, the DSTA allows funds to craft their own rules with a high degree of certainty that those rules will be applied as drafted. If a fund does not favor a 60-day outer limit on adjournments, for example, it can extend it to 120 days by so providing in the governing instrument. If a fund believes a minimum quorum of one-third is too high, it can elect to use a different threshold, such as 20 percent, by so providing in the governing instrument.

On the negative side, there is not one set of rules for the practitioner to learn. Those who prepare proxy

statements for funds must therefore resist the urge to copy and paste the disclosure from another fund's proxy statement regarding the effect of broker non-votes or how to determine a quorum. It is imperative that the fund review its specific documents and adjust its disclosure accordingly. Nonetheless, in our experience, most funds follow the corporate rules fairly closely; thus, knowledge of the basic statutory requirements, together with the relevant case law, can be helpful.

Broker Non-Votes

We start our discussion with what is not, in the first instance, a Delaware law driven concept—the broker non-vote.[2] In fact, it is not a legal concept but instead a label commonly applied to the non-actions of brokers as a consequence of the rules of the New York Stock Exchange (NYSE). Brokers are subject to the NYSE rules regardless of whether or not they are acting with respect to shares listed on the NYSE. In the context of Delaware corporations, Delaware courts have recognized the NYSE's restrictions on brokers and have used those restrictions when interpreting their effect under Delaware law (to date, no Delaware court has discussed broker non-votes in the context of a DST). To understand the effect of broker non-votes, one needs to first look to the NYSE rules and, to the extent applicable, the applicable voting standard. One can then proceed to understand how Delaware law treats broker non-votes. One complicating factor is that the 1940 Act has mandatory vote requirements for certain matters, and the language in the 1940 Act, as we will discuss below, does not correspond directly to any language in the DSTA or to any other language analyzed to date by a Delaware court; this fact potentially complicates the treatment of broker non-votes further.

What Is a Broker Non-Vote?

Many shareholders in 1940 Act funds hold their shares beneficially, and their shares are registered in "street name" with a bank, broker, trustee, or other nominee (collectively referred to in this article as brokers). When shareholders are entitled to vote on a matter, the broker in whose name the securities are held will request voting instructions from the beneficial owner of the securities. A beneficial owner's failure to provide voting instructions may limit the broker's ability to vote those shares (uninstructed shares), and if the matter that has been submitted to shareholders for a vote is one on which a broker needs affirmative direction from a beneficial owner (and it has not received such direction), a broker non-vote will be considered to have occurred.

NYSE Rule 452 and Broker Non-Votes

Rule 452 of the NYSE governs the ability of brokers to vote shares by proxy, delineating between those situations in which the broker has received voting instructions from the beneficial owner and those situations in which the broker has not received such instructions.[3] The application of Rule 452 is not limited to those funds whose shares are listed on the NYSE. Instead, Rule 452 applies to all brokers that are members of the NYSE, and to shares listed on both the NYSE and on other securities exchanges.[4]

Under Rule 452, brokers are permitted to vote uninstructed shares on "discretionary" matters. A broker may not, however, vote an uninstructed share on "non-discretionary" matters, and a broker non-vote will occur.[5] In circumstances where brokers have not received instruction on shares and there is at least one non-discretionary matter to be brought before a meeting of shareholders, the brokers may vote the uninstructed shares by proxy on the discretionary matters so long as they physically cross out the portions of the proxy card relating to matters for which they lack discretion.[6] In this case, while votes may be cast for uninstructed shares on discretionary matters, no vote is cast on any non-discretionary matter, causing a broker non-vote to occur for uninstructed shares with respect to such matter.

Rule 452 does not set forth a bright-line rule for identifying discretionary and non-discretionary

matters, thus potentially creating significant confusion as to the effect of broker non-votes under Rule 452. The NYSE's commentary on Rule 452 attempts to provide some clarity on those matters over which brokers have discretionary authority to vote uninstructed shares.[7] However, the list is by design incomplete, and it is presented as guidelines rather than gospel.

One particular item of interest for funds is the treatment of the election of directors under the NYSE rules. The supplemental materials to Rule 452 identify the "election of directors" as a non-discretionary matter.[8] This treatment was clarified in 2010, with the following qualification added: "provided, however, that this prohibition shall not apply in the case of a company registered under the Investment Company Act of 1940."[9] Accordingly, the election of directors for 1940 Act funds is considered a discretionary matter, and one on which a broker may vote uninstructed shares.

Impact of Broker Non-Votes on Quorum Requirements and Matters Submitted to Shareholder Vote

The DSTA has very few provisions with respect to the formalities of shareholder meetings; in fact, neither shareholder meetings nor even shareholder votes are required under the DSTA.[10] Unlike the DGCL, there are no minimum quorum requirements;[11] thus, a fund may set forth the quorum requirements in its governing instrument. In addition, unlike the DGCL, the DSTA has almost no default voting thresholds, and the limited statutory requirements that do exist can be overridden in the governing instrument of a DST.[12] Accordingly, any determinations of the impact of broker non-votes on quorum or voting calculations will necessarily depend on the content of a fund's governing instrument, at least as it relates to matters in which only state law is applicable.

Common Voting Standards and Treatment under Delaware Law

While there is substantial variation, in our experience the governing instruments of most 1940 Act funds organized as DSTs generally contain required voting and quorum standards[13] that follow one of two frameworks, or make specific reference to the 1940 Act voting standard (discussed in more detail below). These standards usually contain language such as (1) a majority of the shares entitled to vote on a matter, present in person or represented by proxy,[14] or (2) the affirmative vote of a proportion of the shares or voting power present at the meeting and entitled to vote thereat (which also may be phrased as "shares present").[15] Generally, courts will interpret these standards under the laws of the state of formation of the entity. The meaning of each of these standards (albeit, in a fact-specific context) under Delaware law applicable to Delaware corporations was considered by the Supreme Court of Delaware in *Berlin v. Emerald Partners*.[16]

In *Berlin*, the Court considered a vote at a special meeting on a business combination (the Merger) where a corporation's certificate of incorporation stated that certain mergers and combinations required "[t]he affirmative vote of 66% of the voting power present (those entitled to vote on the matter),[17] in person or by proxy, at such meeting, excluding all voting securities owned beneficially, by the Acquiring Entity."[18] Mergers are one of the specifically enumerated non-discretionary matters under Rule 452; therefore, brokers lacked discretion to vote uninstructed shares on the Merger proposal. In addition to the Merger, a discretionary matter was also scheduled to be voted on. Accordingly, brokers submitted proxies to vote uninstructed shares on the discretionary matter but withheld the authority to vote such shares on the Merger, causing broker non-votes to occur in connection with the vote on the Merger.

The Court ultimately held that these broker non-votes should not count toward the "universe" of voting power present on the Merger.[19] Plainly speaking, the Court's ruling was that if broker non-votes occur in connection with the vote on a matter, the shares for which the broker non-votes occur are not deemed present and entitled to vote on such a matter.[20] As such, if the voting threshold or quorum requirements in the governing instrument of a DST

make reference to "a majority of the [*voting power*] present [*and entitled to vote on the matter*]," then any broker non-votes likely will be excluded from both the numerator and denominator of any voting threshold calculation under Delaware law.[21]

It is worth pausing here to note that the Court also considered the difference "between the *presence*[22] of voting securities and "voting power present," in the context of examining the corporation's quorum requirements that mandated that 80 percent of shares were required to be present.[23] The Court noted that "[a] stockholder can be present for quorum purposes and yet not vote, because a stockholder has a right to attend the meeting but has 'no legal duty to vote at all.'"[24] The Court further noted:

> Just as the quorum once established, will not be defeated by a stockholder who participates in part of the meeting but does not vote or leaves the meeting, it also will not be defeated merely because the stockholder who is present by proxy did not provide authority for his representative to vote on all proposals.[25]

Accordingly, it appears that the Court acknowledged a difference between "voting power/present and entitled to vote thereon" on the one hand and "present/present and entitled to vote at the meeting" on the other,[26] at least in the context of a quorum.[27] Under a "present/present and entitled to vote at the meeting" standard, where at least one discretionary item is on the agenda at a meeting, a broker non-vote will count as a vote against a non-discretionary matter at the same meeting. If there are no discretionary matters on the agenda for a meeting, a broker non-vote will not occur, as they are not entitled to vote on *any* matter at the meeting.

Voting Standard for 1940 Act Required Votes

Under the 1940 Act, certain actions, such as certain changes to investment policy and approval of an investment advisor,[28] require a vote under the 1940 Act's voting standard, which will govern in the absence of more stringent state law standards (which, in the context of DSTs, are nonexistent by statute and therefore would only exist to the extent set forth in the governing instrument). This standard might be the most complicated and the most important to in-house and outside fund counsel. A 1940 Act vote requires the following:

> The vote of a majority of the outstanding voting securities of a company means the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities **present at** such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less.[29]

This voting standard combines both a voting standard and quorum elements. To hold a vote, the fund must meet a *de facto* quorum of 50 percent of all outstanding shares; to pass a vote, the fund must receive an affirmative vote of 67 percent of the shares "present."

There are multiple possible interpretations of this standard, but we will focus on two interpretations: (1) based on the Court's ruling in *Berlin* (which was with regard to a quorum requirement, not a voting threshold), "present" really means "present and entitled to vote at the meeting," and therefore broker non-votes should be counted towards the denominator where a discretionary matter is on the agenda and thus as a "no-vote" (an interpretation we believe is bolstered by the events in the Securities and Exchange Commission's (SEC) no-action letter with regards to *Kohlberg Capital Corp.*[30]); and (ii) "present" really is intended to mean "present and entitled to vote thereon," and therefore … what is the consequence?

As previously mentioned, the Court in *Berlin* differentiated between those shares that were "present" and the "voting power present." The *Berlin* court, for quorum purposes, counted broker non-votes as being "present" for a meeting, but not being "present and entitled to vote on the matter" for purposes of the shareholder vote on the non-discretionary matter.

We believe that this interpretation of "present" in *Berlin* was followed in the fact pattern referenced in the *Kohlberg* no-action letter. The fact pattern in *Kohlberg* is worth reviewing, as, though the voting standard was not the issue brought for SEC consideration, it illustrates, in a somewhat unique way, the care that in-house and outside fund counsel should take when deciding on voting thresholds for their documents and in setting meetings.[31]

In *Kohlberg*, a closed-end investment company registered under the 1940 Act and organized as a Delaware corporation, sought shareholder approval at its annual meeting to sell shares of its common stock or warrants, options, or rights to acquire its common stock at a price below the then-current NAV of such stock (the Proposal)[32] (a non-discretionary matter).[33] At the annual meeting, Kohlberg also sought approval of discretionary matters, including the election of directors and ratification of an independent accounting firm.[34]

At the annual meeting, brokers voted uninstructed shares for the discretionary matters but did not vote on the Proposal. Accordingly, broker non-votes for those shares were recorded.[35] The broker non-votes were deemed "present" at the annual meeting and therefore counted in the denominator for purposes of the 1940 Act threshold.[36] As a result of falling one percent short of the 67 percent requirement, the Proposal was not approved.[37]

Two weeks later the special meeting was held, and the only matter brought for shareholder vote was the Proposal, meaning there were no discretionary matters on which brokers could vote uninstructed shares.[38] Kohlberg took the position that "the absence of a routine matter on the proxy card for which broker discretionary voting was permitted meant that there were no broker non-votes present at the Special Meeting."[39] The Proposal was passed at the special meeting.

In its proxy, Kohlberg stated that "[t]he absence of a routine matter on the proxy card for which broker discretionary voting was permitted meant that there were no broker non-votes 'present' at the Special Meeting."[40] Accordingly, at the special meeting, broker non-votes were omitted from the calculation at the meeting entirely.

If this voting standard seems familiar, it is because it is a vote of the shares "present at the meeting and entitled to vote thereat," (the methodology the Court in *Berlin* used to determine a quorum based on the shares present). Where there was no discretionary item on the agenda, Kohlberg disregarded the broker non-votes entirely, and they did not count as present, either for the 50 percent requirement for the vote to be taken, or the 67 percent required for it to pass. Although we are not aware of a case squarely confirming this interpretation, we believe that the Kohlberg letter is instructive and should be considered by in-house and outside fund counsel when drafting proxy statements and counting votes.

Nevertheless, we note that an alternative, more stringent interpretation of "present" would be that "present" really means "present and entitled to vote thereon." In some respects, this more stringent construction might be preferable. Interpreting "present" in this way would have saved Kohlberg the significant administrative burden and expense of calling a special meeting two weeks after the annual meeting. If it had interpreted the 1940 Act in this way, broker non-votes would not have counted towards the denominator for the vote on the Proposal, and the Proposal would have passed at the annual meeting.

Important Considerations for Drafting/Calling Meetings

Because the DSTA provides DSTs with considerable freedom in drafting the particulars of shareholder meetings and votes, including setting

quorum requirements and thresholds, we think it is possible that a fund could mitigate the potential of an adverse (and costly) result like that in *Kohlberg* by (1) providing for the bifurcation of meetings in its governing instrument between discretionary and non-discretionary matters, and (2) defining "present" in its governing instrument. Certain fund agreements already incorporate a similar concept, whereby the existence of a quorum is determined on a matter-by-matter basis, but the lack of a quorum on one matter does not prevent a quorum from being reached for another (for example, a quorum is only reached for a given matter if some proportion of the shares entitled to vote on that matter are present). It would require minimal reworking to turn these individual matters into separate meetings, thus altering the number of affirmative votes needed to pass a proposal.

As a result of an admittedly unlikely set of circumstances, Kohlberg was put into the costly position of being forced to call a special meeting two weeks after its annual meeting to avoid broker non-votes as being "present" at the meeting. But what if the governing instrument of a DST provided that where both discretionary and non-discretionary matters are to be brought before a meeting of the shareholders, that meeting shall be deemed to constitute two separate meetings? In the *Kohlberg* context, at least, this construct would have changed the result. Instead of calling a second meeting two weeks later, the Proposal would have passed at one meeting, where only non-discretionary matters were considered (and broker non-votes would have been excluded).

What if the definition of "present" in the governing instrument of a DST was modified so that "present" was defined as "present and entitled to vote thereon" for purposes of votes under the 1940 Act? In that case, in the *Kohlberg* fact pattern, the fund would have been able to pass the Proposal at the annual meeting, as the broker non-votes were not entitled to vote on the Proposal. Accordingly, providing a definition of "present" in a governing instrument might help avoid a situation like that in *Kohlberg*, by mandating the more stringent present and entitled to vote thereon standard.

We express no view as to whether a court or the SEC would approve of such measures, but, in each case, the vote would still require 50 percent of all outstanding shares. It therefore seems unlikely that such measures would be viewed unfavorably. As the somewhat perverse result in *Kohlberg* shows, careful consideration should be given to which voting standards and quorum requirements are selected for a DST's governing instrument, as they can have significant impact on shareholder votes through the treatment of broker non-votes.

Shareholder Meetings—Adjournments, Postponements, and Recesses

Funds commonly face the issue of whether they may delay bringing a vote on a matter that was originally intended to be brought before such meeting once the meeting has been called. Among the possible options are adjournments, postponements, and recesses, which we will discuss in turn below. Granular elements of shareholder meetings, including the formalities of adjournments, postponements, or recesses, are not addressed in the DSTA. As such, these corporate formalities will be governed by the terms of the trust agreement, bylaws, or similar documents. In the absence of an express provision in the documents, it is likely that a Delaware court would look to corporate precedent, whether statutory or from an established body of case law, if the Court were to weigh in on issues of adjournment, postponement, or recess for DSTs.

Adjournments

When a meeting is called and then convened (including prior to taking any shareholder vote scheduled for such meeting), an "adjournment" has occurred.[41] In the corporate context, and subject to equitable considerations (assuming a quorum

is present), a Delaware corporation is specifically empowered under Section 222 of the DGCL to adjourn a meeting of shareholders. Under the DGCL, adjournment is considered a continuation of a meeting and, as such, has certain benefits, namely, depending on the circumstances, dispensing with the need for the establishment of a new record date or the mailing of a new notice. The DSTA has no statutorily recognized concept of "adjournment," but it is likely that a court would look to the DGCL when analyzing possible adjournments declared at shareholder meetings of funds organized as DSTs and registered under the 1940 Act.[42]

Among the possible benefits of an adjournment under the DGCL are that (1) the record date for a noticed meeting that is adjourned will remain the record date (subject to certain equitable factors) for any adjourned session (unless the board of directors sets a new record date for the adjourned session),[43] (2) adjourning can allow enough time for a company to re-solicit proxies,[44] (3) because the reconvened session is a continuation of the initial meeting of the stockholders, no quorum count is necessary (if a quorum was present at the initial meeting); (4) where a quorum does not exist, a quorum may be called to allow time to gather a quorum at a later date;[45] and (5) any business that could be conducted at the original meeting may be considered at the adjourned session.[46] Generally speaking, and absent relevant provisions in a corporation's bylaws once a meeting of stockholders has been formally convened and the presence of a quorum acknowledged, the power to adjourn defaults to common-law. However, the governing instrument of a DST may give another person—for example, the chair of the meeting—power to adjourn a meeting of shareholders.

In the corporate context, the Court has held that a corporation is not required to give notice to its stockholders that the corporation intends to adjourn the meeting before the meeting is held. Also, the Court has determined that a corporation's failure to disclose, during the period between the announcement of the adjournment and the adjourned session, that: (1) the corporation adjourned the meeting without closing the polls on a proposal; (2) the proposal would have failed to pass had the meeting not been adjourned; (3) the stockholders could still vote or change their votes during the adjournment period; or (4) the corporation would continue to solicit votes during the adjournment, did not significantly alter the "total mix" of information made available to stockholders in deciding how to vote, and therefore the absence of such disclosures did not meet the test for materiality.[47]

Postponements

Unlike adjournments, postponements are not a statutory creation in Delaware. Delaware courts have nonetheless held that once fixed, the date for a stockholder meeting may be postponed by the board of directors.[48] Postponement occurs "after [the meeting] has been designated, but before it is convened," unlike adjournments, which are called and then convened.[49]

Unlike an adjournment, where a quorum exists so long as a quorum was present at the meeting prior to adjournment, at a postponed meeting a quorum must be present in order for the corporation to transact any business at the postponed meeting.[50] When postponing a meeting, the burden will be on the board to demonstrate that there existed a legitimate corporate objective, their actions were reasonable in relation to the directors' objective, and the postponement of the meeting did not preclude the shareholders from exercising their right to vote or coerce them into voting a particular way.[51] *Mercier* provides an example of one of the most practical uses of postponement—to delay a meeting and allow the board to solicit additional proxies in favor of a merger the board believes to be in the best interests of a fund.[52] In *Mercier*, the Court of Chancery held that a board could postpone a meeting where the directors: (1) believe that the merger is in the best interests of the stockholders; (2) know that if the meeting proceeds, the stockholders will vote down the merger; (3) reasonably fear that in

the wake of the merger's rejection, the acquirer will walk away from the deal and the corporation's stock price will plummet; (4) want more time to communicate with and provide information to the stockholders before the stockholders vote on the merger and risk the irrevocable loss of the pending offer; and (5) reschedule the meeting within a reasonable time period.

While the DGCL requires that the board deliver to the shareholders, not less than 10 nor more than 60 days before the date of the rescheduled meeting, a new notice of the time, date, and place, if any, and in the case of a special meeting the purpose or purposes of the meeting, no such requirement exists under the DSTA.[53] However, in the absence of an express provision in the governing instrument of a DST, we believe a court would be likely to impute the same requirements on a DST.

The record date for the rescheduled meeting may, subject to equitable factors, be the record date for the original meeting if the rescheduled meeting is not held more than 60 or less than 10 days after the original record date.[54]

Recesses

As with postponement, recesses of meetings of shareholders are not specifically provided for in the DGCL or DSTA. In contrast to postponement, and similar to an adjournment, a recess of a stockholders meeting occurs after a meeting has convened. A recess may be declared unilaterally by the chair of a meeting;[55] however, an unreasonable use of the power to recess a meeting of shareholders will be subject to review for breach of fiduciary duty and inequitable conduct, subject to any relevant provisions in the organizational documents.[56]

Case law on recesses is scant, even in the corporate context, but the Court of Chancery has found that the chair of a meeting of stockholders to elect a slate of directors breached her fiduciary duties by declaring a three-hour "lunch break"—which the Court referred to as a "lupper"—during which two large shareholders were convinced to switch their votes. Whether the same would have held true for a DST, where election of directors is a "routine" matter, remains to be seen.[57]

Recesses and adjournments are similar, but can be distinguished by their length (recesses should be brief, while adjournments may be more substantial) and purpose (recesses are intended to provide short breaks to shareholders and directors, while adjournments provide a full opportunity to address substantive voting or quorum issues.[58] Given their brevity and limited purpose, recesses may not be useful for addressing significant issues (perhaps explaining the relative paucity of case law), but may be more commonly used.

Conclusion

As we hope the above discussion highlights, funds and their counsel should pay particular attention to ensuring that they have adequately considered and disclosed the relevant shareholder meeting standards. This is particularly true for the treatment of broker non-votes, where in the past stockholder-plaintiff firms have asserted claims challenging the effectiveness of various corporate actions on the basis that the disclosure in a proxy statement as to the effect of broker non-votes was materially misleading.[59] Funds and counsel's vigilance, however, should not stop here, but should carry over into the meetings themselves, even for seemingly mundane matters such as adjournment, postponement, and recess.

Mr. Peterson and **Mr. Zeberkiewicz** are directors, and **Jonathan M. Kaplowitz** is an associate, of Richards, Layton & Finger, P.A., in Wilmington, DE. The views expressed herein are those of the authors and are not necessarily the views of Richards, Layton & Finger or its clients.

NOTES

1 According to the 2019 Investment Company Fact Book, published by the Investment Company

Institute, approximately 40 percent of all registered mutual funds are organized as Delaware statutory trusts.

[2] John Mark Zeberkiewicz and Robert B. Greco, an associate of Richards, Layton & Finger, P.A., previously published "Determining and Disclosing the Effect of Broker Non-Votes," *The Review of Securities & Commodities Regulation*, April 18, 2018, which discusses broker non-votes in the context of Delaware corporations and provides an in-depth discussion of some of the related issues.

[3] *See* Rule 452, New York Stock Exchange Rules (NYSE).

[4] *See* SEC Release No. 34-60215, at 20 n.69 (July 1, 2009).

[5] NYSE Rule 452.13.

[6] *Id.*

[7] *Id.* Rule 452.11.

[8] *Id.* Rule 452.

[9] *Id.* Rule 452.11(19).

[10] *See* Zeberkiewicz and Greco, "Determining and Disclosing the Effect of Broker Non-Votes," *The Review of Securities & Commodities Regulation*, April 18, 2018, *supra* n.2 and *infra* n.15.

[11] *See* 8 *Del. C.* § 216.

[12] *See, e.g.*, 8 *Del. C.* § 251(c); *id.* § 242(b)(1).

[13] Quorum requirements usually either contain similar language as that for required votes or specifically reference voting thresholds, so any analysis regarding the presence of a quorum will likely follow similar lines as the below discussion regarding voting thresholds.

[14] *See id*. This is the default quorum requirement under the DGCL for general matters.

[15] It is worth noting that other voting standards do exist, but as they are less common, we have refrained from significant discussion. For more information, please see Zeberkiewicz and Greco, *supra* n.10.

[16] Berlin v. Emerald Partners, 552 A.2d 482 (Del. 1988).

[17] It is worth noting that, in Delaware, "voting power present" is synonymous with "present and entitled to vote thereon" under *Berlin*.

[18] *Id.* at 491.

[19] "The shares represented by a limited proxy cannot be considered as part of the voting power present on a nondiscretionary proposal from which power has been withheld by crossing it out or otherwise." *Id.* at 494–95.

[20] Note, "[v]oting power present is synon[y]mous with the number of shares represented which are 'entitled to vote on the subject matter.'" *Id.* at 493 (*citing* 8 *Del. C.* § 216(2)).

[21] *Id.* at 492.

[22] We believe the Court views "present" as being substantially similar to present and entitled to vote at the meeting.

[23] *Id.* at 492 (emphasis added).

[24] *Id.* at 493 (citation omitted).

[25] *Id.*

[26] Broker non-votes will count as "present" for quorum purposes under Delaware law so long as at least one discretionary item is on the meeting's agenda; otherwise, broker non-votes will generally not occur and uninstructed shares will not be counted towards a quorum.

[27] *See also* In re Cheniere Energy, Inc., 2015 WL 1206722, at *5 (Del. Ch. Mar. 16, 2015) (ORDER) ("Any such vote will be subject to a 'majority of the shares present and entitled to vote' standard. For the avoidance of any doubt, pursuant to this standard, . . . broker non-votes will not be considered in determining the outcome of the resolution . . . .").

[28] *See, e.g.*, 1940 Act Section 13(a); 1940 Act Section 15(a).

[29] 1940 Act, definitions.

[30] Kohlberg Capital Corp., SEC No-Action Letter, 2009 WL 796667, at *1 (Mar. 12, 2009). In *Kohlberg*, the Delaware corporation interpreted "present" as "present and entitled to vote at the meeting." The company used this interpretation to call a special meeting at which only non-discretionary matters were on the agenda, and thus, broker non-votes were excluded from both the numerator and the denominator. We will examine this fact pattern in more detail below.

[31] The matter being brought before the SEC for consideration in *Kohlberg* was whether the Proposal could be approved at a special meeting rather than at an annual meeting under section 63(2)(A) of the 1940 Act, as a strict reading of the 1940 Act could have led to the interpretation that the Proposal could only have been voted on at an annual meeting. Accordingly, it was on this issue that the SEC elected not to pursue enforcement. However, as the no-action letter included a lengthy discussion of the voting standards, it is worthy of review and consideration.

[32] Under Section 63(2) of the 1940 Act,

> the holders of a majority of such business development company's outstanding voting securities, and the holders of a majority of such company's outstanding voting securities that are not affiliated persons of such company, approved such company's policy and practice of making such sales of securities at the last annual meeting of shareholders or partners within one year immediately prior to any such sale.

[33] Kohlberg Capital Corp., 2009 WL 796667, at *1.

[34] *Id.*

[35] *Id.*

[36] At the annual meeting, 9,776,147 shares voted in favor of the Proposal, 1,495,045 shares voted against the Proposal, 97,482 shares abstained from voting on the Proposal, and 3,442,382 broker non-votes were recorded, meaning the vote received 66% of the shares present (1 percent shy).

[37] Kohlberg Capital Corp., 2009 WL 796667, at *1.

[38] *Id.* at *2

[39] *Id.*

[40] *Id.* at *6.

[41] The Court has listed some occasions where adjournment of the meeting of stockholders would be "entirely justified," including "where there is evidence of vote fraud or a disruption in the proxy process."

[42] Note that the Court, *in dicta*, has analogized to corporate law when discussing adjournment with regards to a DST. *See* Saba Capital Master Fund, Ltd. v. Blackrock Credit Allocation Income Tr., 2019 WL 2711281, at *8 (Del. Ch. June 27, 2019) (citing Opportunity Partners L.P. v. Hill Int'l, Inc., 2015 WL 3582350, at *4 (Del. Ch. June 5, 2015)), *judgment entered*, 2019 WL 2869781 (Del. Ch. July 2, 2019), *and aff'd in part, rev'd in part*, 2020 WL 131370 (Del. Jan. 13, 2020), reh'g denied (Jan. 29, 2020), and *aff'd in part, rev'd in part*, 2020 WL 131370 (Del. Jan. 13, 2020), *reh'g denied* (Jan. 29, 2020).

[43] 8 *Del. C.* § 213(a). The equitable factors that may be considered by a court include (i) the reason(s) for the adjournment, (ii) the "staleness" of the record date in view of the trading activity of the corporation's stock, (iii) the length of the adjournment, and (iv) any factual developments that have occurred during the interim.

[44] Opportunity Partners L.P. v. Hill Int'l, Inc., 2015 WL 3582350, at *4 (Del. Ch. June 5, 2015), *aff'd*, 119 A.3d 30 (Del. 2015).

[45] State of Wis. Inv. Bd. v. Peerless Sys. Corp., 2000 WL 1805376 (Del. Ch. Dec. 4, 2000).

[46] Atterbury v. Consol. Coppermines Corp., 20 A.2d 743 (Del. Ch. 1941).

[47] MAI Basic Four, Inc. v. Prime Computer, Inc., 1989 WL 63900 (Del. Ch. June 13, 1989). *See also Huffington v. Enstar Corp.*, 1984 WL 8209, at *2 (Del. Ch. Apr. 25, 1984); but see Peerless Sys. Corp., 2000 WL 1805376.

[48] *MAI Basic Four*, 1989 WL 63900, at *1. *See also Huffington*, 1984 WL 8209, at *2.

[49] Aprahamian v. HBO & Co., 531 A.2d 1204, 1208 (Del. Ch. 1987).

[50] 8 *Del. C.* § 216.

[51] Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786 (Del. Ch. 2007).

[52] *Id.*

[53] 8 *Del. C.* § 213(a); Gintel v. Xtra Corp., 1990 WL 1098684 (Del. Ch. Feb. 27, 1990).

[54] *See, e.g.*, In re MONY Grp. S'holder Litig., 853 A.2d 661 (Del. Ch. 2004).

[55] Am. Int'l Rent a Car, Inc. v. Cross, 1984 WL 8204 (Del. Ch. May 9, 1984) (assuming the chair possessed the technical authority to recess the meeting).

[56] Portnoy v. Cryo-Cell Int'l, Inc., 940 A.2d 43 (Del. Ch. 2008).

[57] *Id.* at 77 (concluding that the lunch break was "inequitable" in this situation and comparing the chair to a "corrupted soccer referee, intent on adding extra time so that the game would end only when her favored team had a sure lead").

[58] *See Portnoy*, 940 A.2d 43 (discussing a lunch recess); *Cross*, 1984 WL 8204 (same*); S'holders Protective Comm. v. Cal. Time Petroleum, 1971 WL* 321 (Del. Ch. Sept. 23, 1971) (recess to permit the counting of proxies to determine quorum). *See also* Corp. Law Comm. & Corp. Governance Comm., Am. Bar Ass'n, Handbook For The Conduct Of Shareholders' Meetings 90 (2d ed. 2010) (recognizing that "issues will sometimes arise at a meeting of shareholders that are better addressed by a 'recess' of the meeting" such as "waiting for a late-arriving shareholder or filing a certificate of amendment to the corporation's charter before the next item of business at the meeting").

[59] *See, e.g.*, Amended and Supplemented Complaint, *Patel v. Galena Biopharma, Inc.*, C.A. No. 2017-0325-JTL (Del. Ch. June 2, 2017).