

Scrapped Proxy-Vote Reforms Bring Relief, Confusion

By Karlee Weinmann

Law360, New York (February 11, 2014, 5:39 PM ET) -- Attorneys generally welcomed Monday's news that a top provider of proxy vote-tallying services had scrapped controversial reforms it revealed last week, but many are still scratching their heads as to how such a stark and potentially damaging policy change landed on the books in the first place.

Broadridge Financial Solutions Inc.'s tweaks would have restricted proxy contest participants' access to complete, real-time vote results. In a framework closely aligned with Canadian rules, the activist and the company would only have been able to see ballots cast in favor of their respective proposals unless they inked a confidentiality agreement.

But an abrupt about-face on Monday preserved complete access to interim vote tallies, keeping intact a more open system that attorneys working in the shareholder activism space have long favored.

"The trouble I've had is that everything we see is always wanting more transparency as opposed to less transparency," said Barry Genkin, head of Blank Rome LLP's shareholder activism practice. "One of the things that this change would've created would be less transparency."

Last week's unexpected introduction of the now-canceled reforms exposed the vulnerability of the proxy vote marketplace, which relies heavily on independent firms to provide vote-counting services and serve other advisory roles. Broadridge says it tabulates votes for the vast majority of U.S. proxy battles, making it an integral part of an industry that has grown rapidly as shareholder activism becomes more mainstream.

A bulk of the rulemaking that guides proxy fights is handled by the U.S. Securities and Exchange Commission, but Broadridge and a group of privately run proxy advisers hold an important piece of the puzzle. Where the SEC opens itself to comments after it introduces a new policy idea, a closed-door operation like Broadridge is free to devise reforms on its own.

"It's worked fairly well for a long time to have Broadridge make its own policy changes, but like proxy advisory firms who have a significant amount of influence and no real competition, Broadridge also has no real competition," said Alston & Bird LLP's Keith Gottfried, who focuses on shareholder activism. "In that area, there probably is room for a regulator to step in."

Broadridge's critics have sounded off since Thursday, when the company unveiled its plans without giving a full explanation for the shift. Some insiders argued that the adjustments would have propped up

activists, who would be able to mask their vote totals and limit target companies' ability to forecast outcomes.

But others saw merit in the confidentiality provision of the revised policy, which Gottfried said would have protected the sanctity of voting data — similar to most other election systems.

Still, shareholder activism attorneys on both sides of the table questioned how big a burden the reduced transparency would be. The original framework for vote-counting, wherein all parties can see full, real-time vote results, leaves all proxy contest participants better equipped to predict the likely outcome, understand voter trends and shape more effective outreach efforts, said David Rosewater, a shareholder activism expert at Schulte Roth & Zabel LLP.

"The more uncertainty there is, the more potential there is for misassessing your likelihood of getting what you want, and that can affect your willingness to settle one way or the other," he said.

In a brief notice Monday, Broadridge said it had backpedaled on its plans after an internal review, but did not explain its rationale for pursuing or ditching the adjustments. It also did not address the backlash, or say whether it was the outcry that pushed it away from the changes.

In a separate statement emailed to Law360 on Tuesday, Broadridge Chief Regulatory Officer Chuck Callan reiterated that the company had backed off after it took a closer look at the previously announced adjustments, but did not specifically address the rationale behind the decision.

"Thursday's communication of a procedural change was made without the benefit of normal internal review," he said. "The long-standing procedure for reporting interim vote tallies of each side's card to both sides of a proxy contest remains in effect."

Broadridge pursued the reforms after a dustup in May between JPMorgan Chase & Co. and a collection of displeased shareholders, mainly pension funds, hoping to separate the company's top executive and chairman positions. Before the voting window closed, Broadridge shielded interim results from the stockholders in response to a request from a banking industry group, saying its contract with JPMorgan did not require it to share the real-time results.

Given that, like independent proxy advisers, Broadridge is free to adjust its own protocols without gathering outside input, practitioners risk winding up in the lurch when it reshuffles its protocols. But Rosewater says an evolving framework for waging proxy fights is just part of the job.

"You just have to make sure that you keep an eye out for it, so that you can assimilate the change quickly into your thinking and adjust your strategy if you have to," Rosewater said. "In the end, you hope whether you're on the activist side or the company side that the best ideas win out."

--Editing by Elizabeth Bowen and Katherine Rautenberg.