

ALERT
October 10, 2006

**Updated Study Reveals Success of Activist-Driven Movement
As 36% of S&P 500 and 31% of Fortune 500 Adopt Majority Voting**

As demonstrated by the October 5, 2006 edition of the Study of Majority Voting in Director Elections (view at http://www.ngelaw.com/files/upload/majority_callen_100506.pdf) by Claudia H. Allen, partner and chair of the Corporate Governance Practice Group of Neal Gerber Eisenberg, majority voting has remained at the forefront of corporate governance debates. The continuing high profile of this issue reflects simultaneous progress on at least three levels: (1) the success of majority vote stockholder proposals, (2) legislative activity in Delaware and California designed to facilitate adoption of majority voting, as well as amendments to the Model Business Corporation Act permitting adoption of a limited form of majority voting, and (3) the decision of an increasingly material number of S&P 500 and Fortune 500 companies to adopt majority voting provisions. Moreover, the movement has continued to be fueled by stockholder outrage over executive compensation packages and activists' complaints that stockholders are generally unable to hold boards accountable for their decisions on compensation and other issues.

Reflecting the remarkable velocity of the majority vote movement, the October 5, 2006 update of the Study indicates that, taking into account the limited number of companies which had preexisting majority vote bylaws or charter provisions, at least 36% of the companies in the S&P 500 and 31% of the companies in the Fortune 500 have adopted forms of majority voting, compared to 16% of the S&P 500 when the Study was initially published approximately seven and one-half months ago. During this same time period, the number of companies in the Study nearly tripled. Additionally, the number of companies adopting majority vote provisions spiked in September 2006, as companies prepared for the 2007 proxy season. September was marked by the most robust level of majority vote bylaw adoptions to date, as well as the fact that the level of majority vote bylaw activity equaled the level of policy activity. Emphasizing that majority voting is becoming the norm, during a two-week period beginning near the end of September, Exxon Mobil Corporation, Wal-Mart Stores, Inc. and General Motors Corporation, the top three companies in the Fortune 500, all adopted majority vote provisions.

Executive Summary

Until recently, virtually all directors of U.S. public companies were elected under a "plurality" vote standard. Under such a standard, the nominees with the largest number of votes are elected as directors, up to the maximum number of directors to be chosen at the election, without regard to votes "withheld", "against" or not cast. A nominee in an election to be decided by a plurality could theoretically be elected with as little as one vote, thereby ensuring that, in an uncontested election, nominees slated by a board will be elected and that board seats will not be left vacant. Following the apparent failure of the Securities and Exchange Commission's ("SEC") 2003 initiative to give large, long-term security holders direct access to a company's proxy statement

for purposes of nominating a limited number of director candidates, stockholder activists began exploring a majority voting standard (and related changes in state corporate laws, the preponderance of which provide for plurality voting as the default voting standard) as an alternative mechanism which would make stockholder votes cast against a nominee meaningful.

The accompanying Study of recently adopted provisions regarding majority voting in director elections is arranged alphabetically by company and highlights whether a company has adopted: (a) a policy addressing the consequences of a director otherwise elected by a plurality vote failing to garner a majority vote or (b) a binding bylaw (or, in a limited number of cases, charter provision) which requires that a nominee receive a majority vote in order to be elected. Additionally, the Study identifies those bylaws which are functionally majority vote policies tied to a plurality voting standard (“Plurality-Plus Bylaws”), the existence of which underscores the need to examine the substance as well as the form of each majority voting provision. The following trends are worth noting:

Policy vs. Bylaw/Charter. The Study indicates that a clear majority of companies that have taken definitive action have adopted policies rather than bylaws or charter provisions (Figure 1), although since the Study was first published, the relative percentage of companies adopting

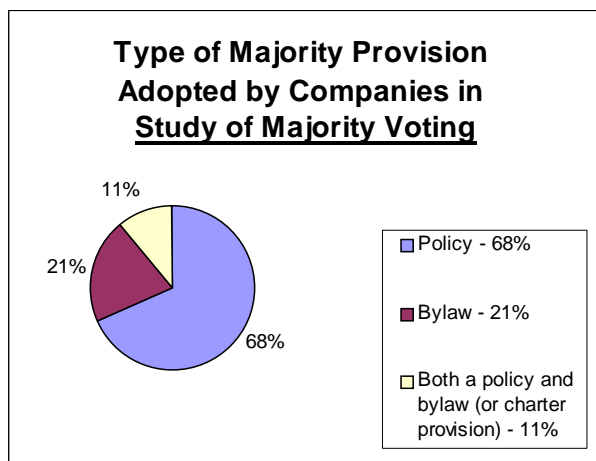


Figure 1

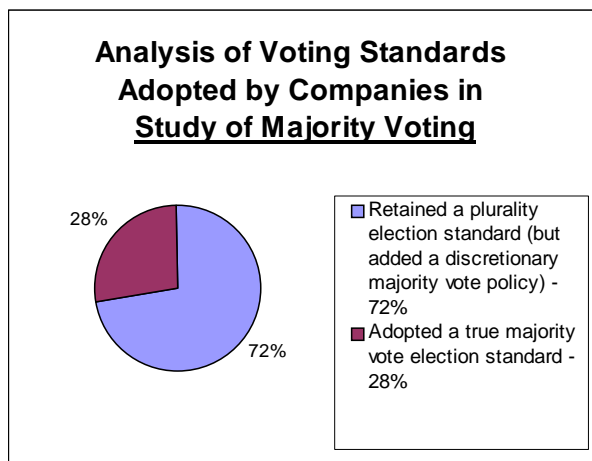


Figure 2

policies has continued to decline, while the percentage of companies adopting majority vote bylaws has increased. Of 250 companies listed in the Study, 170 (68%) adopted policies, 52 (21%) adopted bylaws (or, in one case, a charter provision) and 28 (11%) adopted both a policy and bylaw (or, in three cases, majority policies which complement majority vote charter provisions). The comparable percentages in February were 79%, 16% and 5%, respectively, thus emphasizing the relative increase in bylaw activity. Of the 52 companies which adopted bylaws, five (2%) adopted Plurality-Plus Bylaws, and of the 28 companies which adopted both a bylaw and a policy, six (2%) adopted Plurality-Plus Bylaws. An additional ten companies listed in the Study have publicly announced an intention to adopt some form of majority voting. Examined from a different perspective, of the 250 companies, 181 (72%) retained a plurality election standard, but added a discretionary policy addressing the status of nominees who receive a majority withhold vote, while 69 (28%) adopted a true majority election standard (Figure 2). The

comparable percentages were 80% and 20% in February, again highlighting the relative increase in true majority vote adoptions.

Initially, many companies followed the lead of Pfizer, Inc., which adopted a majority vote policy on June 23, 2005 and then amended its policy on October 27, 2005 to include a detailed director resignation policy addressing the status of director nominees who fail to receive support from a majority of votes cast. The trend toward including detailed director resignation policies was also fueled, in part, by Institutional Shareholder Services (“ISS”) announcing on November 18, 2005 that, although it would generally support stockholder proposals calling for directors to be elected by a majority of votes cast, it would consider recommending against such proposals if companies adopted formal governance principles that presented “a meaningful alternative to the majority voting standard” and included, at a minimum, certain stipulated elements addressing the status of nominees who fail to receive support from a majority of votes cast.

However, some of the enthusiasm for adopting a majority vote policy was muted by FAQs issued by ISS in December 2005 indicating that: (i) ISS would only support “true majority voting standard policies” which address the state-law holdover rule and (ii) ISS’s policy did not constitute a blueprint for a policy acceptable to ISS. ISS only recommended against the majority proposal at General Electric Company on the basis of these criteria. Moreover, the SEC’s denial of Hewlett-Packard Company’s request to exclude a non-binding, precatory majority vote stockholder proposal from its 2006 proxy statement, on the grounds that the majority vote policy previously adopted by HP “substantially implemented” the substance of the proposal (together with the SEC’s denial of relief to all other companies making similar arguments), also served to make the adoption of a policy less attractive.

Since Intel Corporation adopted a majority vote bylaw on January 19, 2006, which includes a director resignation policy addressing the issue of holdover directors, there has been a marked uptick in the number of majority vote bylaws adopted. Of the 68 other majority vote bylaws described in the Study (which number excludes the eleven Plurality-Plus Bylaws), 59 (87%) were adopted subsequent to Intel’s action. Additionally, of such 68 other majority vote bylaws, 55 (81%) are accompanied by a resignation policy addressing the status of holdover directors in the bylaw itself or in a separate policy.

During the 2006 proxy season, a limited number of companies sought stockholder approval of board-recommended charter amendments, which provide for a majority vote standard. ISS referred to the amendment proposed by Progress Energy, Inc. and subsequently approved by its stockholders, as “the new gold standard”, presumably because a binding voting standard contained in a charter may not be further amended without a stockholder vote. Lowe’s Companies, Inc. also sought and obtained stockholder approval for majority vote charter provisions in 2006, and following stockholder approval of a 2006 majority vote proposal, despite having had a majority vote policy in place, The Chubb Corporation announced that it would submit a majority vote charter amendment to its stockholders at the company’s 2007 annual meeting.

The most recent developments in majority voting have involved attempts to address potential enforceability issues raised by the resignation requirements in certain bylaws. Arguments have been made that mandating the tender of a resignation following a majority withhold vote

effectively constitutes director removal, and that under the laws of Delaware and most other states, only stockholders possess the power to remove directors. Additionally, the new provisions address the practical issue of the director who simply refuses to tender a resignation letter. Beginning in September, a relatively new generation of provisions began to appear, as exemplified by the resignation provisions in the majority vote bylaw of General Motors Corporation. Such provisions require that a nominee submit an irrevocable resignation, contingent upon receiving a majority withhold vote, as a condition to being nominated.

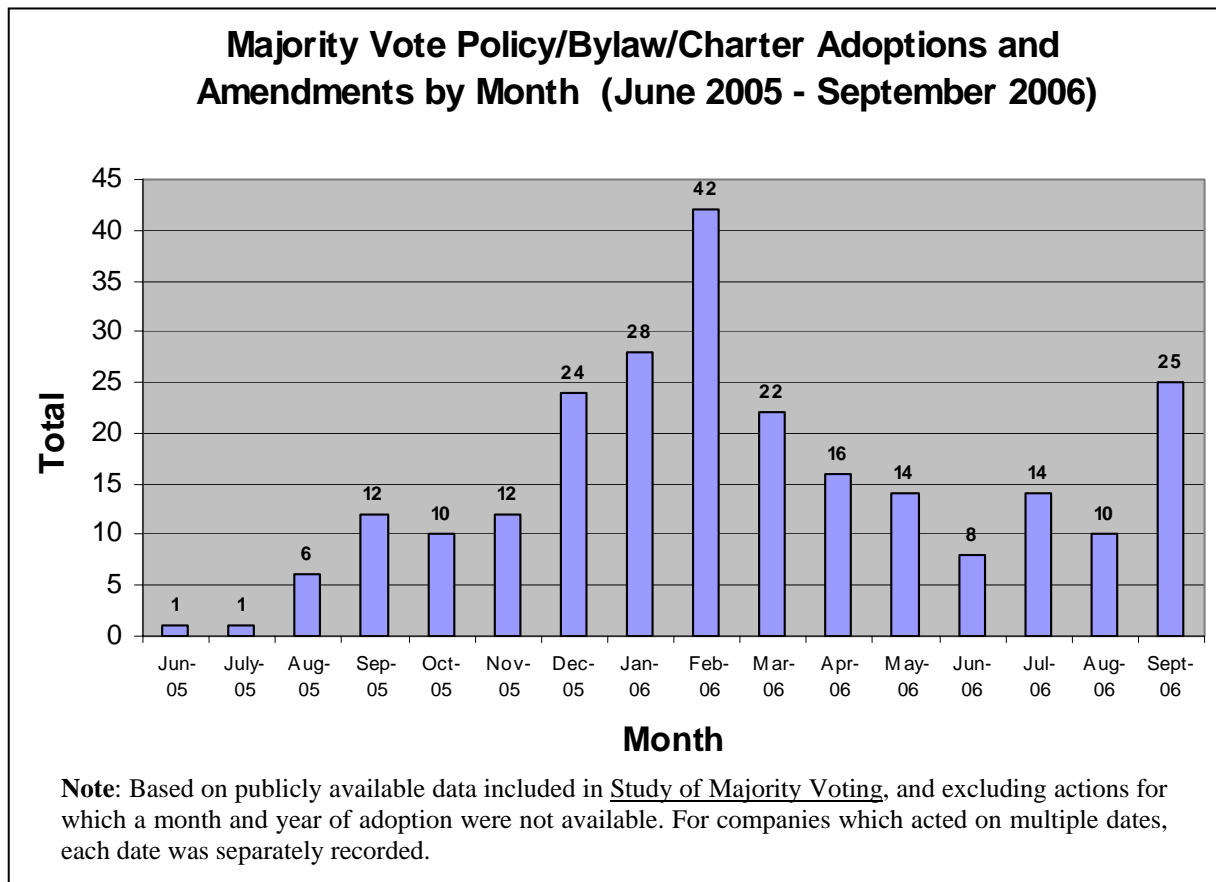


Figure 3

To date, and taking into account the limited number of majority vote bylaws which pre-dated the recent movement, at least 36% of the companies in the S&P 500 and 31% of the companies in the Fortune 500 have adopted a majority vote policy, bylaw and/or charter provision.

Votes Cast vs. Votes Outstanding. Of the 198 policies reflected in the Study, 193 (97.5%) are based upon a majority of votes cast standard. The above-described positions of ISS and the SEC served to limit the utility of adopting the more rigorous standard of a majority of outstanding votes, and, as indicated in the Study, two companies that originally adopted policies based upon votes outstanding have modified their policies to refer to a majority of votes cast, while a third

adopted a true majority vote bylaw. Of the 69 majority vote bylaw provisions described in the Study (which number excludes the eleven Plurality-Plus Bylaws), 67 (97%) require that a nominee receive the affirmative vote of a majority of votes cast, rather than the more rigorous standard of a majority of votes outstanding. The latter standard could, as a practical matter, make it very difficult to elect a director.

Uncontested Elections. Of the 198 policies described in the Study, 182 (92%) contain a carve-out for contested elections. As to bylaws, 57 of the 69 (83%) majority vote bylaw provisions described in the Study (which numbers exclude the eleven Plurality-Plus Bylaws) contain a carve-out for contested elections providing that directors will be elected by a plurality vote in

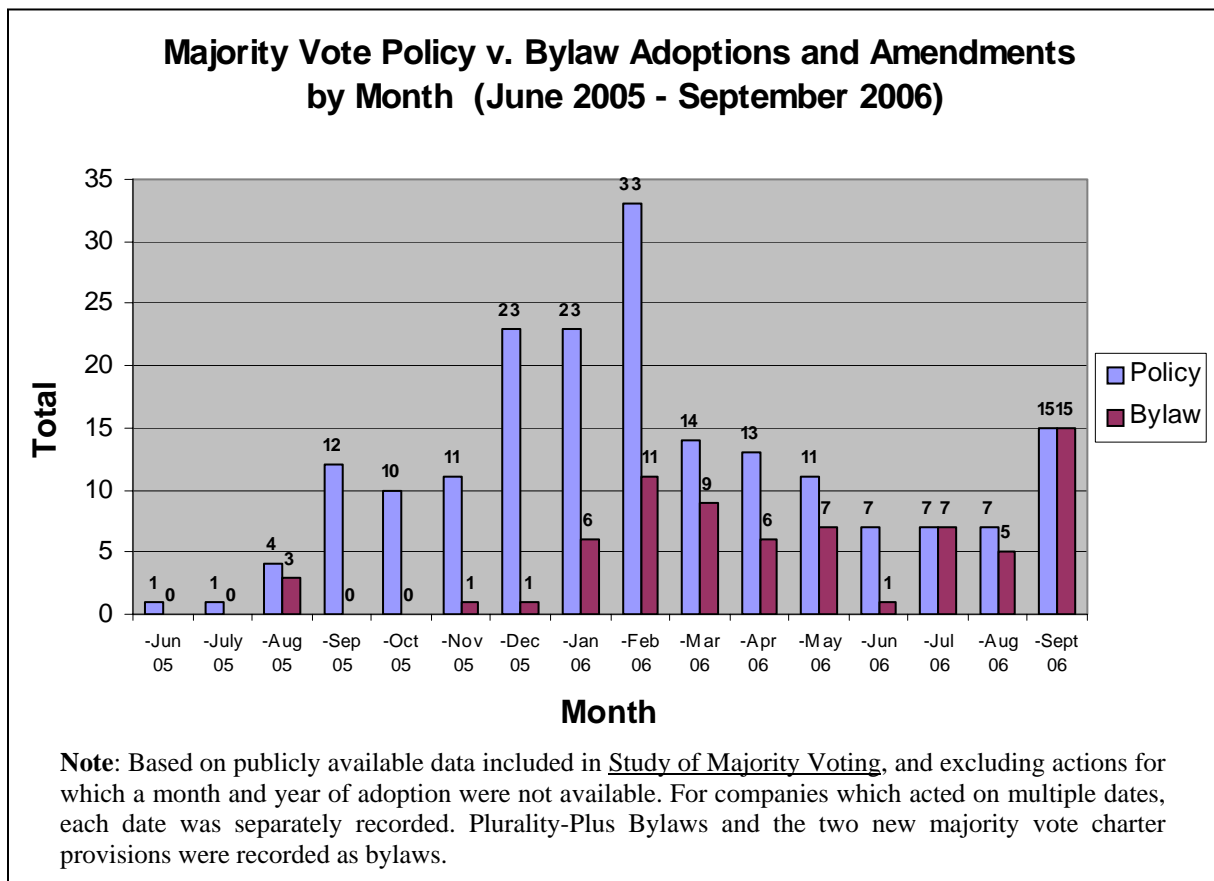


Figure 4

such situations. By not including such a carve-out in a majority vote bylaw, a board could effectively create a takeover deterrent, knowing that if no candidates receive support from a majority of the votes cast, the holdover rule will keep the incumbent directors in office. Some companies have grappled with the difficulties of defining a “contested election” to avoid potentially problematic situations such as those created by a stockholder nominating a competing candidate and then withdrawing that nomination shortly before the election in order to have a majority standard apply after votes have been cast.

Influence of Stockholder Activism. The majority vote movement has largely been driven by stockholder activists, including, in particular, the building trades unions. ISS reports that more than 150 majority vote proposals were filed for the 2006 proxy season (including at least 66 from the United Brotherhood of Carpenters and Joiners of America (“UBCJA”)), marking a material increase from the 89 filed in 2005 (of which the 62 that came to a stockholder vote received average support of 44%, and 17 received majority support) and the 12 filed in 2004 (which received average support of 12%). According to ISS, average stockholder support for majority voting proposals to date in 2006 was 47.8%. It appears that a number of majority vote policies and bylaws were adopted in the face of an imminent stockholder proposal, in response to the receipt of such a proposal or in response to stockholder litigation. There has also been a marked incidence of majority vote bylaws or policies being announced as part of a package of corporate governance reforms, such as board declassification. Moreover, as the time for printing and mailing 2006 proxy statements drew near, the pace of adopting majority vote policies and bylaws increased. As indicated in Figures 3 and 4, the rate of adoptions picked up as the 2006 proxy season drew near, peaking in February 2006. Activity tapered as the proxy season wore-on, and then picked up markedly in September 2006 as companies considered the results of the 2006 proxy season and prepared for 2007. Figure 4 also emphasizes the increase in bylaw adoptions which followed Intel’s actions and the positive response thereto from ISS and certain activists. Of the 250 companies that took definitive action, over 70% adopted policies and/or bylaws (or amendments to the foregoing) in the period from January 1, 2006 through the date hereof.

Finally, changes in the voting policies of mutual funds managed by Vanguard, Fidelity, Putnam and certain others who have generally opposed director majority vote proposals, and who are under pressure from activists to support majority voting, could have a material impact on the majority vote movement.

Industry Breakdown. Manufacturing is the industry sector in which the largest number of companies have adopted a form of majority voting, presumably because of the strong union presence in manufacturing and the involvement of unions in promoting majority voting. Of the companies listed in the Study, 39% are in manufacturing (compared to 34% in February), followed by 23% in finance and insurance, 7% in retail trade, 6% in utilities, 5% in information, 4% in professional, scientific and technical services, 4% in mining and 4% in transportation and warehousing, as determined in accordance with the North American Industry Classification System (Figure 5).

State Law Changes. In connection with the focus on director election standards, changes are also occurring on the state law level. Among other things: (i) the Committee on Corporate Laws of the American Bar Association adopted changes to the Model Business Corporation Act which permit stockholders to adopt a bylaw providing for a limited form of majority voting, (ii) California recently enacted legislation permitting companies incorporated in California to elect directors by a majority of votes cast and (iii) Delaware adopted changes to the Delaware General Corporation Law, effective August 1, 2006, which allow stockholders to adopt a bylaw (not subject to amendment by the board) prescribing the voting standard for director elections.

Additionally, the amendments to the Model Business Corporation Act and the Delaware General Corporation Law provide that resignations may be made effective upon the happening of a future event (such as the failure to receive a majority vote), coupled with authority to make such resignations irrevocable.

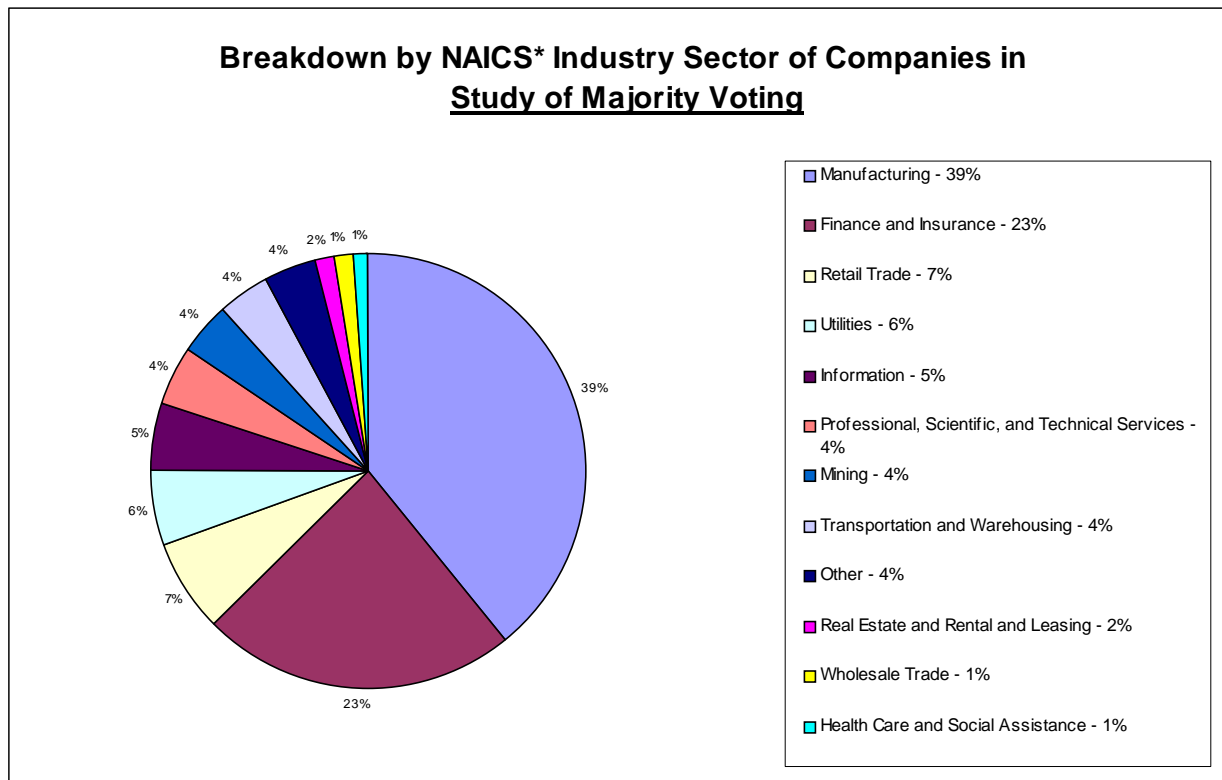


Figure 5

2006 Proxy Season Voting Trends. The 2006 proxy season was marked by a number of trends: (i) proposals tended to be defeated at companies which had adopted majority voting policies (although the proposals generally received material support) and (ii) proposals often passed at companies which had not adopted a majority vote provision. Based upon publicly-available data, at least 36 majority vote proposals have already passed during the 2006 proxy season, materially exceeding the number of proposals that passed during the 2005 season. ISS reported that, with respect to the first 78 proposals to go to a vote in 2006, average support was 55.1% at companies which did not have a majority vote policy in place, compared to 42.3% at companies which had such a policy. Of the proposals which have passed to date in 2006, only seven (19%) were at companies which had adopted a majority vote policy, while 29 (81%) were at companies that had not adopted a policy (including Lowe’s Companies, Inc. and Progress Energy, Inc. which sought stockholder approval for majority vote charter provisions and Marriott International, Inc. and Host Hotels and Resorts, Inc., which supported union majority proposals). To date, of the 32 companies where proposals passed in 2006 (which number excludes the four companies where management supported majority vote proposals or presented proposed majority vote charter provisions), 11 (34%) have formally responded: seven have adopted true majority vote standards

(in one case accompanied by a policy), one has committed to do so in 2007, two have adopted Plurality-Plus Bylaws and one has adopted a policy.

The Shifting Balance of Power. In considering the impact of the majority vote movement, it is important to recognize that majority voting has not come to the fore alone. Combined with: (i) the successful on-going movements to declassify boards, thereby forcing all directors to stand for election annually, and to eliminate other takeover deterrents, such as poison pills and supermajority stockholder approval requirements, (ii) the New York Stock Exchange's review (and anticipated elimination for the 2008 proxy season) of the provision in the broker-vote rule (Rule 452) which has generally allowed brokers to vote uninstructed client shares in favor of management's slate in uncontested elections, and (iii) the SEC's proposed electronic proxy rules which would allow proxy materials to be distributed through the internet (thus potentially enhancing the ability of a dissident to commence a proxy fight or to target selected directors), a "perfect storm" is brewing which is shifting power toward stockholders.

2007: What Lies Ahead? As companies begin to prepare for the 2007 proxy season, a number of points are worth bearing in mind:

- **Continued Push from Activists.** To date, majority voting has been a tremendously successful movement, and the stockholder activist community shows no apparent interest in letting the momentum ebb. Patrick McGurn, ISS' executive vice president stated: "investors could be looking at a tidal wave of majority vote resolutions in 2007." Moreover, the UBCJA has indicated to ISS that it is planning to file at least as many majority vote proposals in 2007 as it did in 2006 and that the "language of the supporting statements will vary from company to company, depending on whether or not they have a Pfizer-type resignation policy." At the same time, the American Federation of State, County and Municipal Employees ("AFSCME"), which submitted a small number of binding majority vote stockholder proposals during 2006 that received unexpectedly substantial support, has indicated that it intends to continue filing binding proposals in 2007 and that it will refile at companies where it presented binding proposals in 2006.
- **More Binding Proposals.** The push for binding stockholder proposals will also likely be driven by the amendments to the Delaware General Corporation Law, the Model Business Corporation Act and, potentially, other state corporation codes, which amendments are intended to facilitate stockholder adoption of forms of majority voting. Interestingly, the boards of some Delaware corporations may decide to preemptively adopt majority voting bylaw amendments so that the board will retain the ability to further amend such bylaws (knowing that if the stockholders adopt a binding majority vote bylaw, it may not be further amended by the board under the recent amendments to the Delaware General Corporation Law).
- **Proxy Access.** The concept of "proxy access" has also potentially been revived by the September 6, 2006 decision of the United States Court of Appeals for the Second Circuit in the case brought by AFSCME against American International Group, Inc. ("AIG"). That case involved AFSCME's attempt to put a binding bylaw amendment proposal before AIG's stockholders which would allow large, long-term holders of AIG's stock access to

management's proxy in subsequent years for purposes of nominating competing candidates. The Second Circuit found that such a proposal was not properly excludable under Rule 14a-8 of the proxy rules, thereby disagreeing with the position taken by the SEC staff. The SEC quickly thereafter scheduled an October 18, 2006 open meeting to consider amendments to Rule 14a-8 in order to ensure uniformity of treatment of such proposals for the 2007 proxy season. Ironically, majority voting was an outgrowth of the apparent failure of proxy access, and depending upon how the SEC attempts to address the Second Circuit opinion, there is a possibility of both movements moving ahead. The movements are generally complementary in that most majority vote provisions do not apply in contested elections, and proxy access fundamentally involves creating contested elections.

- **Unintended Consequences?** While majority voting is intended to increase director accountability, it remains to be seen how this increased stockholder power will be used, particularly by those who may be focused upon short-term gain. While majority voting has been supported by a broad range of constituencies, such groups may not have an identity of interest after majority voting is enacted at a given company.

Since companies are continuing to address majority voting and those that have adopted policies have sought varying degrees of publicity for their response to the majority vote movement, the statistics in this summary cannot be viewed as definitive. Nonetheless, the Study reveals a number of distinct trends, including the dominance of majority voting during the 2006 proxy season, and the apparent reality that majority voting, in one of its forms, is swiftly becoming a mainstream governance practice.

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