

ALERT  
February 7, 2007

**Updated Study Reveals Majority Voting in Director Elections  
Tops 50% Among S&P 500 as 2007 Proxy Season Gets Underway**

As demonstrated by the February 2007 edition of the Study of Majority Voting in Director Elections (view at [http://www.ngelaw.com/files/upload/majority\\_callen\\_020707.pdf](http://www.ngelaw.com/files/upload/majority_callen_020707.pdf)) by Claudia H. Allen, partner and chair of the Corporate Governance Practice Group of Neal Gerber Eisenberg, as the 2007 proxy season gets underway, majority voting once again appears to be the issue attracting the largest number of stockholder proposals. However, majority voting is no longer a controversial governance practice adopted by a small minority of companies. Over 52% of the companies in the S&P 500 have adopted a majority vote policy, bylaw and/or charter provision, compared to fewer than 20% of the companies in that index when the Study of Majority Voting in Director Elections was originally published, in February 2006.

The rate of change is striking, given that majority voting is not mandated by law or stock exchange listing standards. Moreover, while most companies were adopting non-binding majority voting policies one year ago, the trend since September 2006 generally favors the adoption of binding bylaw amendments. In that regard, a number of companies, such as Chevron Corporation, General Dynamics Corporation, Hewlett-Packard Company, Marsh & McLennan Companies, Inc., Raytheon Company and Wells Fargo & Company, which had previously adopted policies, recently adopted true majority vote bylaws. A second group of companies, including Aetna, Inc., Capital One Financial Corporation, The Chubb Corporation, General Electric Company, H.J. Heinz Company, PerkinElmer, Inc., PitneyBowes, Inc., UnitedHealth Group Incorporated, The Walt Disney Company and WellPoint, Inc., which had previously adopted majority vote policies or bylaws which were functionally policies, are putting majority vote charter provisions or true majority vote bylaw provisions to a stockholder vote at their 2007 annual meetings. The transformation occurring among large cap companies also appears to be prompting other public companies to act.

In many respects, the debate over majority voting is moving from the issue of whether it constitutes an advisable governance practice, to the substance and form of majority voting provisions and how this relatively new tool will be used by stockholders, including activist hedge funds. While majority voting emerged largely as a response to the apparent failure of the SEC's 2003 proxy access initiative, concurrent governance trends, including board declassification, the termination or elimination of poison pills and other forms of "shark repellent", the Securities and Exchange Commission's ("SEC") recent adoption of rules concerning the electronic availability of proxy materials (which rules may be used after July 1, 2007), the anticipated elimination of broker voting in uncontested elections and the increasing power of activist investors, have made majority voting a particularly potent tool. Continuing stockholder dissatisfaction with executive compensation practices, which could be fueled by the enhanced disclosures concerning executive compensation that will appear in proxies for 2007 annual meetings, as well as option-backdating, could make some investors more inclined to exercise their rights to withhold or vote against management candidates. At a company with majority voting, a formerly symbolic withhold vote

could now result in the potential removal of an incumbent candidate or failure to elect a new candidate. The key issue which will only be addressed over time is how selectively stockholders will use the power afforded by majority voting, and whether majority voting will ultimately serve to benefit all stockholders or only special interest groups.

## 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 SEC’s 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.

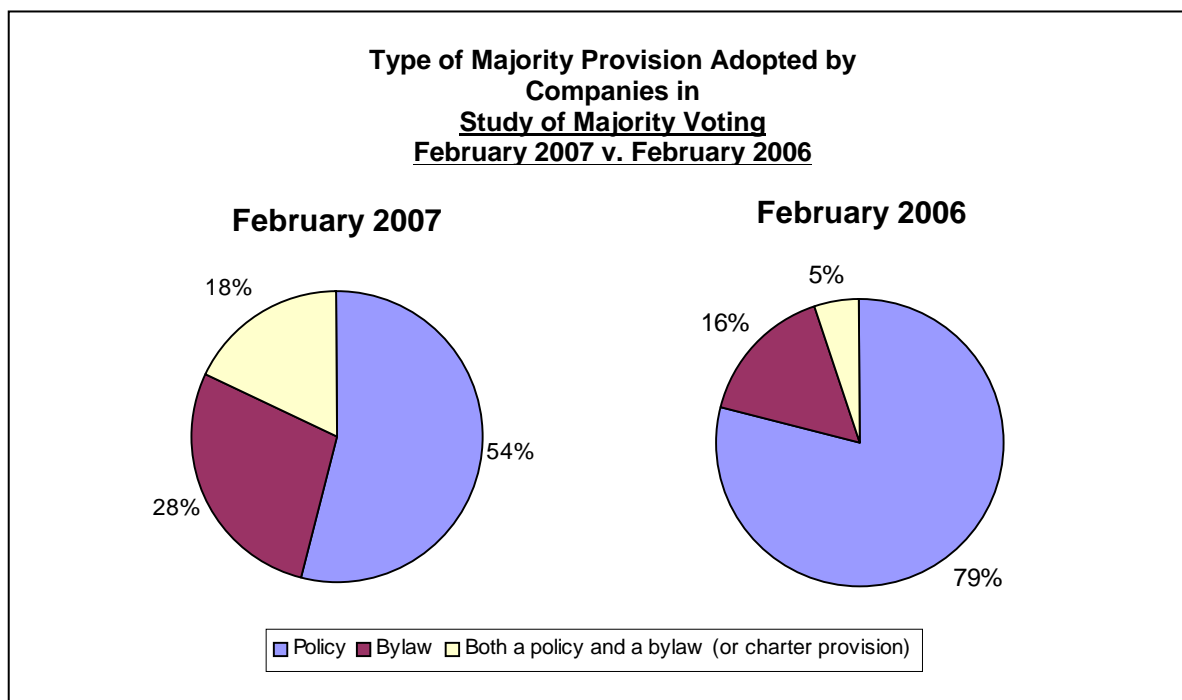
The Study of provisions adopted since September 2004 providing for majority voting in director elections is arranged alphabetically by company and highlights whether a company has adopted: (i) a policy addressing the consequences of a director otherwise elected by a plurality vote failing to garner a majority vote or (ii) 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 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 policies has continued to decline, while the percentage of companies adopting majority vote bylaws has steadily increased. Of the 371 companies listed in the Study, 201 (54%) adopted policies, 103 (28%) adopted bylaws (or, in one case, a charter provision, and in another case, charter and bylaw provisions) and 67 (18%) adopted both a policy and bylaw (or, in three cases, majority policies which complement majority vote charter provisions). The comparable percentages in February 2006 were 79%, 16% and 5%, respectively, thus emphasizing the pronounced increase in bylaw activity. Of the 103 companies which adopted bylaws, 15 (4%) adopted Plurality-Plus Bylaws, and of the 67 companies which adopted both a bylaw and a policy, eight (2%) adopted Plurality-Plus Bylaws. An additional 12 companies listed in the Study have publicly announced an intention to adopt some form of majority voting (in some cases, subject to stockholder approval) and, ten companies with existing majority voting policies (or, in two cases, Plurality-Plus Bylaws) have announced their intention to present majority vote bylaw or charter provisions for stockholder approval at their 2007 annual meetings. Examined from a

different perspective, of the 371 companies, 224 (60%) retained a plurality election standard, but added a discretionary policy addressing the status of nominees who receive a majority withhold vote, while 145 (40%) adopted a true majority election standard (Figure 2). The comparable percentages were 80% and 20% in February 2006, again highlighting the relative increase in true majority vote adoptions.

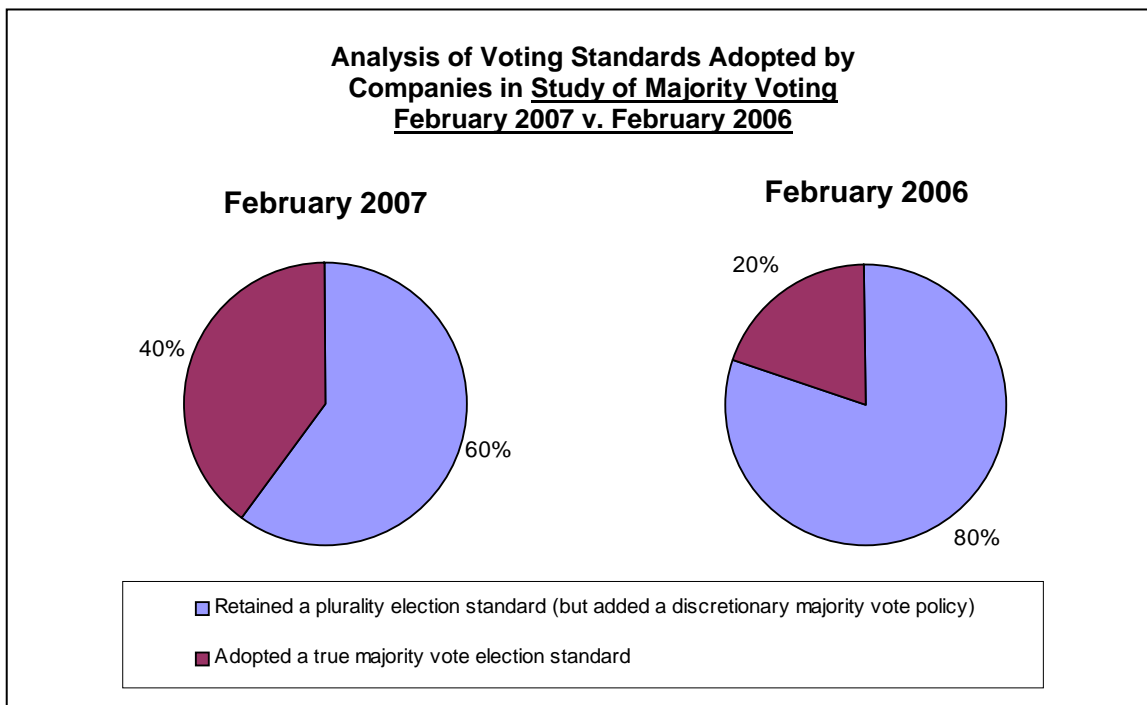
Initially, many companies followed the lead of Pfizer, Inc., which adopted a majority vote policy on June 23, 2005 and then amended its policy on October 27, 2005 to include a detailed director resignation policy addressing the status of director nominees who fail to receive support from a majority of 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 (“HP”) 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.



**Figure 1**

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, a trend which began to accelerate in the Fall of 2006. Of the 146 other majority vote bylaws described in the Study (which number excludes the 23 Plurality-Plus Bylaws and includes four majority vote charter provisions), 134 (92%) were adopted subsequent to Intel Corporation’s action. Additionally, of such 147 majority vote bylaws, 130 (88%) are accompanied by a resignation policy addressing the status of holdover directors in the bylaw itself or in a separate policy. Of such 130 companies, 94 (72%) have included the resignation policy within the bylaw, as was originally done by Intel Corporation, while 36 (28%) have included the resignation policy within their governance guidelines or a similar document. Dell, Inc. was the first company to adopt such a separate resignation policy for incumbent directors, when it acted on January 31, 2006.



**Figure 2**

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. In addition, Aetna, Inc., Capital One Financial Corporation, General Electric Company, H.J. Heinz Company, PerkinElmer, Inc., UnitedHealth Group Incorporated and WellPoint, Inc., all of which have majority vote policies (or, in the case of General Electric Company, a majority vote policy and Plurality-Plus Bylaw), have announced that they will present majority vote charter amendments (and, in certain cases, accompanying bylaw amendments) for stockholder approval at their 2007 annual meetings.

Recent developments in majority voting have included attempts to address potential enforceability issues raised by the resignation and recusal 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.

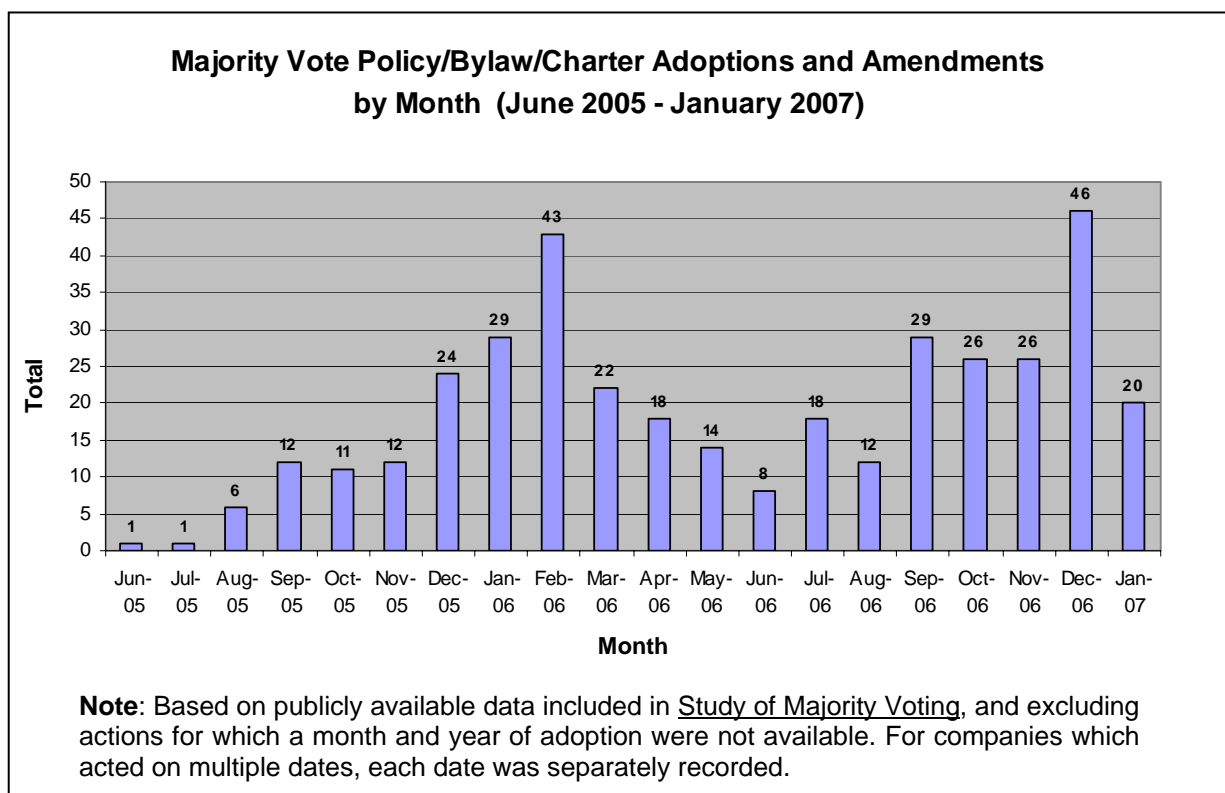
Intel Corporation also responded to some of these legal and practical concerns when it amended its majority vote bylaw in January 2007 to move the general text of the resignation policy into the company's governance guidelines. Those guidelines now provide that director nominees must annually submit a contingent resignation. Seemingly in view of the potential argument under Delaware law that a director may only have his or her power to act on a matter circumscribed by the company's certificate of incorporation, Intel also removed the provision in its majority vote bylaw mandating that a director receiving a majority against vote recuse him or herself from all deliberations relating to his or her tendered resignation.

Another recent development is illustrated by the majority vote bylaws adopted by Bank of America Corporation and Verizon Communications Inc. These companies voluntarily included provisions in their recently adopted majority vote bylaws indicating that such provisions may not be amended without stockholder approval, although not mandated by state law. BIOLASE Technology Inc. adopted a variant of such a "lock-in" by providing that its majority vote bylaw may only be amended with the approval of five independent directors.

Finally, in the Fall of 2006, General Electric Company, the only company that had succeeded in satisfying ISS's non-exclusive criteria for an acceptable alternative to true majority voting, announced that it would seek stockholder approval of a majority vote charter amendment at its 2007 annual meeting and ISS announced that it had eliminated the possibility of supporting alternatives to true majority voting.

**S&P 500 and Fortune 500.** To date, and taking into account the limited number of majority vote bylaws which pre-dated the recent movement, over 52% of the companies in the S&P 500 and over 45% of the companies in the Fortune 500 (an index which includes some companies that do not have public equity) have adopted a majority vote policy, bylaw and/or charter provision. Further breaking down these percentages, approximately 22% of the companies in the S&P 500 have adopted a majority vote policy, 21% have adopted a majority vote bylaw or charter provision (of which 2% consists of Plurality-Plus Bylaws) and 10% have adopted a majority vote

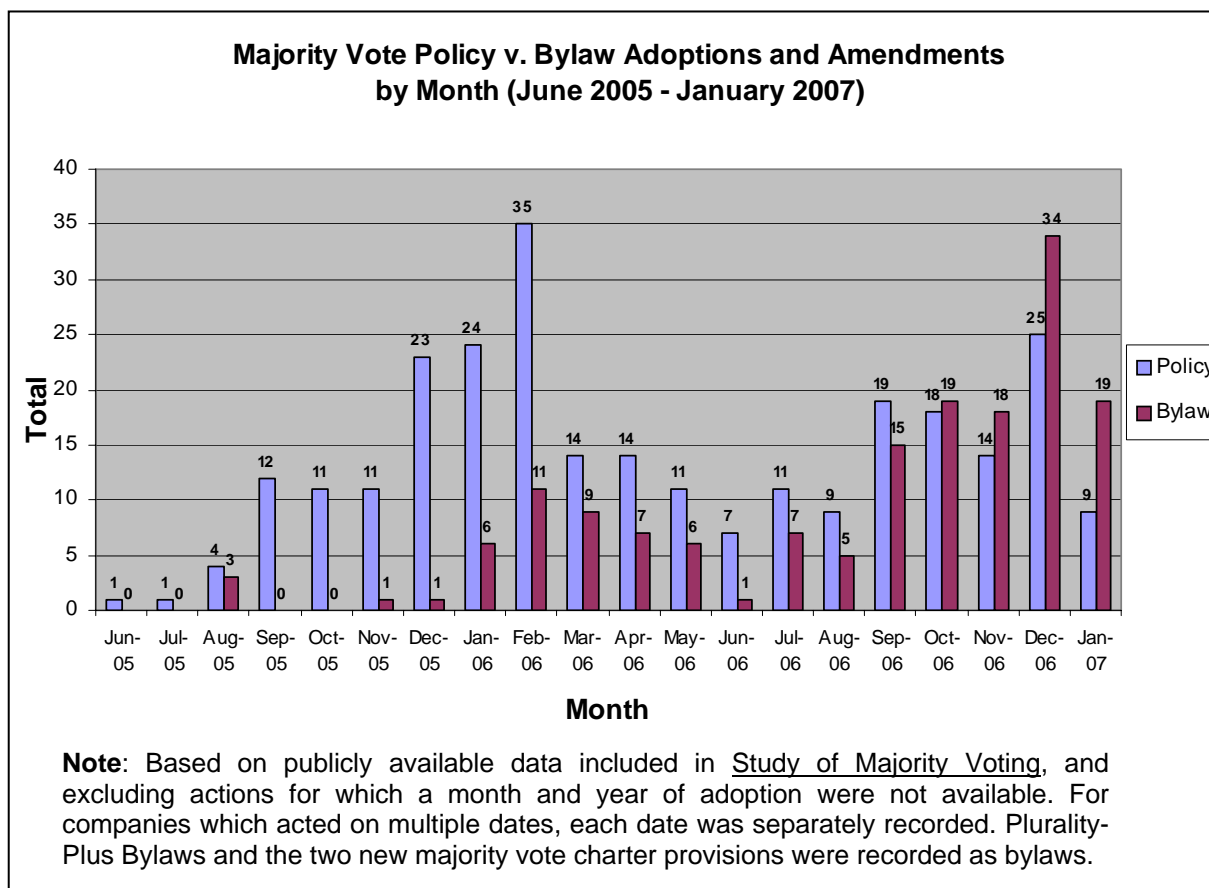
policy and bylaw (or charter) provision (of which 1% consists of policies and Plurality-Plus Bylaws). From the point of view of election standards, approximately 25% of the companies in the S&P 500 have retained a plurality election standard, but added a discretionary policy addressing the status of nominees who fail to receive a majority vote, and approximately 28% of the companies in the S&P 500 have adopted a true majority vote election standard. As to the Fortune 500, approximately 20% of the companies in that index have adopted a policy, 17% have adopted a bylaw or charter provision (of which 2% consists of Plurality-Plus Bylaws) and 9% have adopted a policy and bylaw (or charter) provision (of which 1% consists of policies and Plurality-Plus Bylaws). This translates into approximately 23% of the companies in the Fortune 500 having retained a plurality election standard which is augmented by a majority vote policy, and approximately 23% of the companies in that index having adopted a true majority election standard.



**Figure 3**

**Votes Cast vs. Votes Outstanding.** Of the 268 policies reflected in the Study, 263 (98%) 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 147 majority vote bylaw provisions described in the Study (which number excludes the 23 Plurality-Plus Bylaws and includes four majority vote charter provisions), 145 (99%) 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. To avoid any potential arguments as to which votes should be considered “cast”, many companies have specifically stated that abstentions and broker non-votes should be excluded. These exclusions serve to make the pool of votes “cast” more limited, thus making it somewhat easier to achieve a majority vote. Additionally, excluding broker non-votes takes into account the likely elimination for the 2008 proxy season of the right of brokers to vote uninstructed client shares in uncontested elections, a change which could have a material impact on elections.



**Figure 4**

**Uncontested Elections.** Of the 268 policies described in the Study, 249 (93%) contain a carve-out for contested elections. As to bylaws, 133 of the 147 (90%) majority vote bylaw provisions described in the Study (which numbers exclude the 23 Plurality-Plus Bylaws and include four majority vote charter provisions) contain a carve-out for contested elections providing that directors will be elected by a plurality vote in 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.

Companies have started to define a “contested election” as one in which (i) the corporation receives a notice that a stockholder has nominated a person for election as a director, generally in accordance with bylaw provisions for advance notice of nominations, and (ii) such nomination has not been withdrawn on or prior to a specified date (often the tenth day preceding the date on which the corporation mails notice of the meeting to the stockholders). Additionally, as discussed below, a new California statute and recent amendments to the Model Business Corporation Act, both of which permit a limited form of majority voting, create cut-offs for determining whether an election is contested.

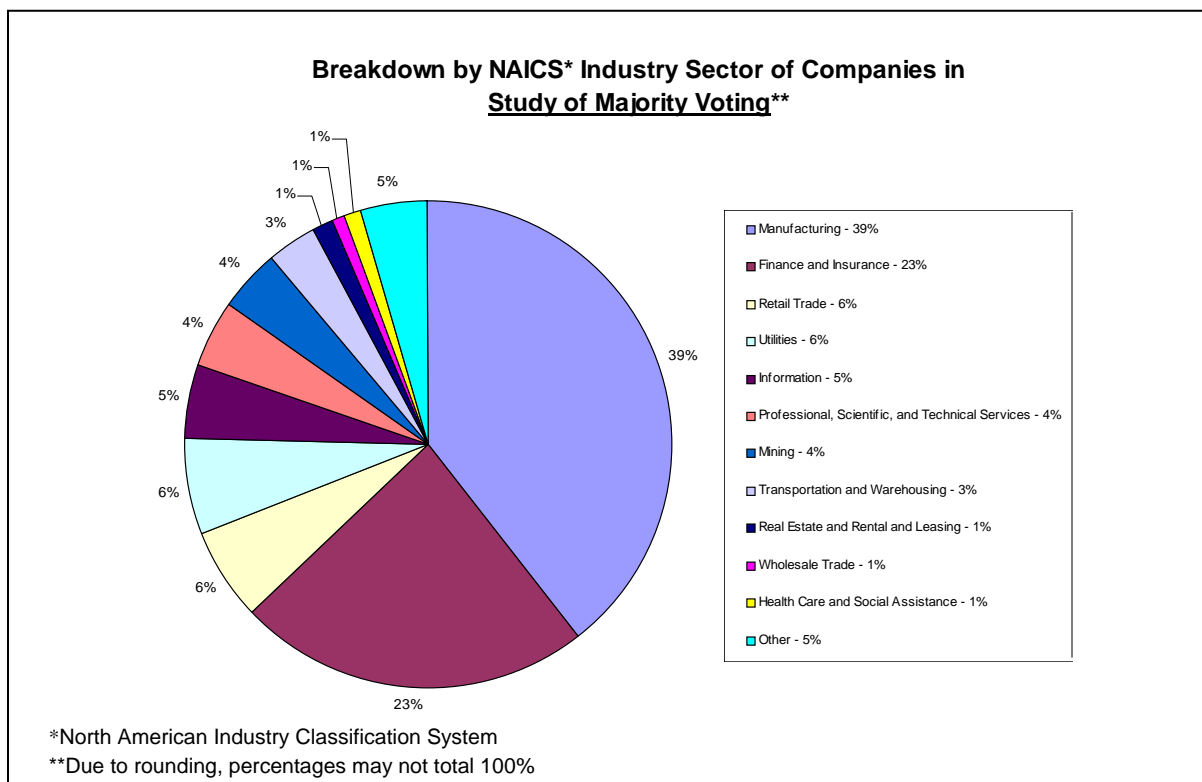
**Acceptance of Tendered Resignations.** Most director resignation policies, whether or not limited to incumbents and whether included in a bylaw or a separate document, tend to give directors broad discretion in considering what factors to take into account when determining whether to accept a tendered resignation. Among the factors which have been cited in resignation policies are: (i) stated reason that stockholders “withheld” votes or voted “against” a director, (ii) whether the underlying cause or causes of the vote are curable, (iii) a director’s length of service, qualifications and contributions, (iv) the overall composition of the board (including whether accepting a resignation would cause a company to fail to meet any applicable SEC or listing requirements), (v) the availability of other qualified director candidates, (vi) whether stockholders cumulated their votes with respect to the director in question, (vii) the percentage of outstanding shares represented by the “withhold” vote and (viii) whether the acceptance of a resignation would trigger a default or breach under a material agreement or a severance payment to an executive.

However, General Electric Company began a practice recently followed by other companies, such as General Motors Corporation, JPMorgan Chase & Co., Pactiv Corporation, The Procter & Gamble Company and Qwest Communications International Inc., when it indicated that a tendered resignation would be accepted “absent a compelling reason.” The Goldman Sachs Group, Inc. employed a somewhat looser standard by providing that a tendered resignation will be accepted absent a “significant reason.” Taking a somewhat different tack, Exelon Corporation adopted a Plurality-Plus Bylaw which provides that a resignation will automatically be accepted if it is tendered by a candidate who is not an incumbent.

**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 approximately 110 majority proposals have already been filed for 2007, including approximately 100 from the United Brotherhood of Carpenters and Joiners of America (“UBCJA”) and other labor unions, and that more than 150 majority vote proposals were filed for the 2006 proxy season (including at least 66 from the UBCJA). ISS has indicated that of the 94 proposals for 2006 that proceeded to a stockholder vote, average support was approximately 48%, and the research conducted for the Study indicates that at least 39 passed. These statistics reflect a material increase from the 89 proposals 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%). 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 and 2007 proxy statements drew near, the pace of adopting majority vote provisions increased, as indicated in Figures 3 and 4. For the 2006 proxy season, activity peaked in February, 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. To date, the most active month included in the 2007 proxy season has been December 2006. Figure 4 also emphasizes the increase in bylaw adoptions which followed Intel Corporation's actions and the positive response thereto from ISS and certain activists. Of the 371 companies that took definitive action, approximately 80% adopted policies and/or bylaws or charter provisions (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.



**Figure 5**

**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 2006), followed by 23% in finance and insurance, 6% in retail trade, 6% in utilities, 5% in information, 4% in professional, scientific and technical services, 4% in mining and 3% 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 adopted legislation, effective January 1, 2007, which permits companies incorporated in California to elect directors by a majority of votes cast, (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 and (iv) by submitting over 12 proposals seeking to have Ohio corporations (which are not currently permitted to have a majority election standard) reincorporate in Delaware, the UBCJA and other unions have been seeking to prompt changes to Ohio law. 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. A marked number of the majority vote policies and bylaws adopted since the effective date of the Delaware statute have called for the advance tender of irrevocable, contingent resignations.

Although the Study reflects activity by companies incorporated in 29 states, 64% (239) of the companies are incorporated in Delaware, followed by 4% (16) in Maryland and 4% (16) in New York. Notably, Delaware is among the minority of states which currently permit changes to the director election standard through either the bylaws or a company's charter. Thus, for companies which are incorporated in jurisdictions, such as Model Act states, which do not generally permit changing the director election standard through a bylaw amendment, if the board is not willing to present a charter amendment for stockholder approval, but nonetheless wishes to adopt a form of majority voting, the only viable options are majority vote policies or Plurality-Plus Bylaws. This situation may help explain the recent increase in the number of Plurality-Plus Bylaws. 15 of the 23 Plurality-Plus Bylaws identified in the Study were adopted in the period from September 1 through January 31, 2007.

**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 39 majority vote proposals 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 passed in 2006, only seven (18%) were at companies which had adopted a majority vote policy, while 32 (82%) 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 35 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), 24 (69%) have formally responded: two have announced an intention to present a bylaw and/or charter amendment at their 2007 annual meetings, two have adopted majority vote policies, three have adopted Plurality-Plus Bylaws, ten have adopted true majority bylaws and seven have adopted true majority vote bylaws accompanied by 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, (iii) the SEC's recently adopted electronic proxy rules which would largely allow proxy materials to be distributed through the internet (thus enhancing the ability of a dissident to commence a proxy fight or to target selected directors), (iv) the influence of proxy advisory firms such as ISS, (v) the potential impact of "empty voting" (in which voting control is separated from economic ownership) and over-voting (in which more shares are voted than are entitled to vote) and (vi) the increased power of stockholder activists, a "perfect storm" is brewing which is shifting power toward stockholders and leading to increased levels of engagement between boards and stockholders. As to the influence of activists, the latest edition of The Conference Board's Institutional Investment Report indicates that within the categories of institutional investors, "activist" state and local pension funds, which have been among the most outspoken on the subject of governance reforms, have increased their percentage share of the equity markets in the United States from 2.9% in 1980 to 9.8% in 2005.

**2007: What Lies Ahead?** As the 2007 proxy season begins, 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. After the 2006 proxy season, Patrick McGurn, ISS' executive vice president stated: "investors could be looking at a tidal wave of majority vote resolutions in 2007." Moreover, organizations such as TIAA-CREF, which were not previously known to have submitted majority vote proposals, have indicated that they intended to present majority vote stockholder proposals for 2007, some of which could be binding.
- **More Binding Proposals.** The push for binding stockholder proposals will also likely be driven by the amendments to the Delaware General Corporation Law and, potentially, other state corporation codes, which amendments are intended to facilitate stockholder adoption of forms of majority voting. 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, indicated that it intended to file binding proposals for 2007,

including at companies where it presented binding proposals in 2006. Additionally, ISS has indicated that the UBCJA intends to submit binding proposals at approximately 15 companies where the proposal has already gone to two stockholder votes and has achieved average support above 45%. Interestingly, the boards of some Delaware corporations may 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).

- **Greater Acceptance.** Emphasizing the increasingly mainstream nature of majority voting, the November 30, 2006 Interim Report of the Committee on Capital Markets Regulation stated that majority voting “must be the cornerstone of any system of shareholder rights,” while a report issued on January 31, 2007 by a joint task force of the National Association of Corporate Directors and the Council of Institutional Investors opined that directors should be elected by a majority of votes cast.
- **Proxy Access.** The concept of “proxy access” has also 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. However, the SEC has repeatedly rescheduled consideration of any such proposals. Following the SEC staff’s denial of no-action relief to Hewlett-Packard Company with respect to a 2007 proxy access proposal, SEC Chairman Cox indicated that the Commission would likely seek to address the proposal in advance of the 2008 proxy season. The proxy access proposal at Hewlett-Packard Company is scheduled for a stockholder vote on March 14, 2007 and proxy access proposals have also been presented to Reliant Energy, Inc. and UnitedHealth Group Incorporated for inclusion in their 2007 proxy statements. Ironically, majority voting was an outgrowth of the apparent failure of proxy access, and now 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. For instance the use of empty voting at a company with majority voting could theoretically be used to seek to destabilize the board. Empty voting has the potential to run counter to the

basic corporate governance concept that stockholders vote in the best interests of the company in which they are stockholders. In a January 22, 2007 speech, SEC Commissioner Atkins warned of the risk of hedge funds employing empty voting. 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 rise of majority voting, in its many forms, as a mainstream governance practice.

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