

ALERT  
November 13, 2007

### Majority Voting in Director Elections—An Activist Success Story

#### 66% of S&P 500 and 57% of Fortune 500 Adopt Majority Voting in Director Elections Prior to Start of 2008 Proxy Season

As demonstrated by the November 2007 edition of the *Study of Majority Voting in Director Elections* (view at <http://www.ngelaw.com/files/upload/majoritystudy111207.pdf>) by Claudia H. Allen, partner and chair of the Corporate Governance Practice Group of Neal Gerber Eisenberg, majority voting for the election of directors, once considered a fringe concept, has become the prevailing election standard among large public companies. As issuers prepare for the 2008 proxy season, a few statistics and examples serve to underscore that majority voting has become a relatively mature, as well as widespread, movement:

- 66% of the companies in the S&P 500 and over 57% of the companies in the Fortune 500 have adopted a form of majority voting, notwithstanding robust levels of merger and acquisition activity earlier in 2007 which resulted in many companies with majority vote provisions being taken private. By way of contrast, when the *Study* was initially published in February 2006, only 16% of the companies in the S&P 500 were known to have adopted a form of majority voting;
- Majority voting is not found at large cap companies alone. Consistent with other governance trends which have trickled down to the broader market, such as declassifying boards, majority voting has been adopted by mid-cap, small cap and some micro-cap companies;
- Majority voting provisions are appearing in a variety of contexts:
  - Such provisions are being included in the governance documents of companies being spun-off. Examples include Discover Financial Services LLC, Kraft Foods, Inc., Teradata Corporation and, as contemplated by the registration statement filed in September 2007, Philip Morris International Inc.;
  - Companies being taken public, such as Care Real Estate Investment Trust, Concho Resources, Inc., CVR Energy, Inc., SandRidge Energy, Inc., VMware, Inc. and, as contemplated by the registration statement filed in September 2007, RiskMetrics Group, Inc. (the acquiror of Institutional Shareholder Services), have provided for majority voting; and
  - When it emerged from bankruptcy protection in 2007, Delta Air Lines had a majority vote bylaw;
- States have been responding to the majority vote movement through legislation which enables boards and/or stockholders to provide for forms of majority voting and/or

permit contingent, irrevocable director resignations. States that have addressed majority voting include: California, Delaware, Nevada, North Dakota, Ohio, Utah, Virginia and Washington. States that permit such contingent, irrevocable resignations include: Delaware, Maine, Texas, Utah and Virginia, and legislation to permit such resignations was introduced in Oklahoma;

- Average support levels for majority vote stockholder proposals have risen from 12% in 2004 to in excess of 50% in 2007, according to Institutional Shareholder Services [hereinafter referred to together with the ISS Governance Services division of RiskMetrics Group, Inc. as “ISS”]. Moreover, ISS reported that more than 70 of 150 majority vote proposals presented by stockholders in 2007 were withdrawn, primarily because targeted companies agreed to adopt a majority vote bylaw or, to the extent required by applicable state law or a company’s existing organizational documents, present a charter amendment to stockholders; and
- In 2007, partly as the result of the high level of negotiated settlements with proponents described above, the number of management proposals and stockholder proposals on majority voting was approximately equal. In contrast, only two management proposals were included in 2006 proxy statements, while ISS reported that 94 stockholder proposals on majority voting went to a vote in 2006.

Notwithstanding considerable concern over the manner in which majority voting might be used by hedge funds, unions and other activists, in 2007 only one director received a majority against vote at a company with majority voting. Mae Jemison, an incumbent director at Gen-Probe, Inc., received a majority against vote based upon her failure to attend at least 75% of board meetings held in 2006. After consulting with ISS, the board declined to accept her resignation, with the understanding that the attendance issue would be addressed. Additionally, companies including Alaska Air Group, Inc., General Motors Corporation, Motorola, Inc. and Tandy Brands Accessories weathered actual or threatened proxy contests in 2007 with majority voting provisions in place. Note, however, that each of those companies had included a carve-out for contested elections in its majority voting provisions. In 2007, dissatisfied stockholders also targeted specific directors at companies with majority voting, including certain directors at CVS Caremark Corporation, International Paper Company, Verizon Communications, Inc. and Yahoo! Inc. None of the targeted directors received a majority against/withhold vote. Nonetheless, the relevant directors and boards appear to have examined the voting results closely, with certain targeted directors at CVS Caremark Corporation and Yahoo! Inc. subsequently resigning.

While there were no major disruptions caused by majority voting in 2007, it will take a longer period of time to assess the impact of this governance practice. Moreover, during the relatively brief history of the majority vote movement, few companies have weathered proxy seasons in a down market with majority voting in place. In the interim, it appears that the potential power of majority voting will be strengthened over time by factors such as: (a) the likely demise of brokers’ ability to vote uninstructed client shares in uncontested elections pursuant to current NYSE Rule 452, (b) the SEC’s e-proxy rules which could facilitate “vote no” campaigns and (c) pressure on mutual funds concerning their voting records.

## Executive Summary

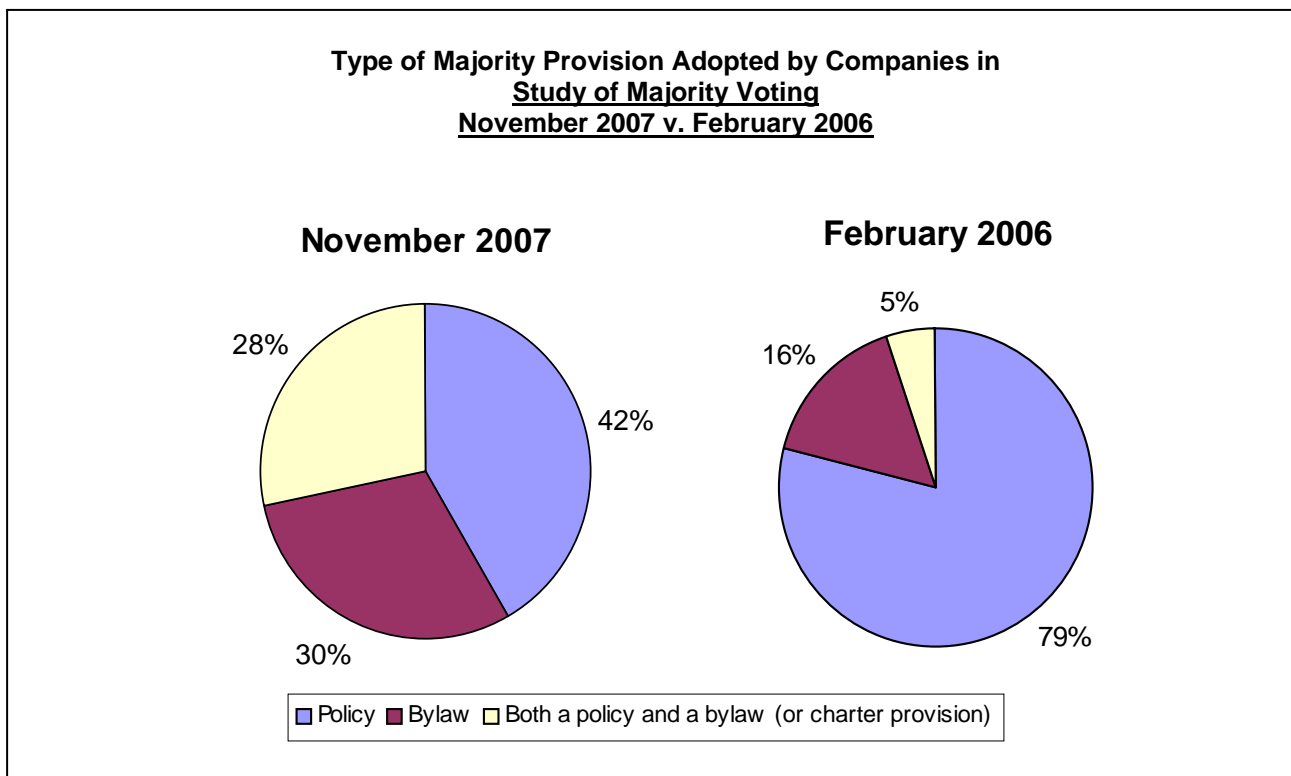
Until recently, virtually all directors of U.S. public companies were elected under a “plurality” vote standard. Under such a standard, the nominees with the largest number of votes are elected as directors, up to the maximum number of directors to be chosen at the election, without regard to votes “withheld”, “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 accompanying *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.** 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 or charter provisions has steadily increased (Figure 1). Of the 534 companies listed in the *Study* as having taken definitive action, 223 (42%) adopted policies, 160 (30%) adopted bylaws (or, in three cases, a charter provision, and in eight other cases, charter and bylaw provisions) and 151 (28%) adopted both a policy and bylaw (or, in 14 cases, majority policies which complement majority vote charter provisions and, in six cases, majority vote policies which complement charter and bylaw provisions). The comparable percentages in February 2006 were 79%, 16% and 5%, respectively, thus emphasizing the shift away from policies and toward binding majority vote bylaw (and charter) provisions. Of the 160 companies which adopted bylaws, 20 (13%) adopted Plurality-Plus Bylaws, and of the 151 companies which adopted both a bylaw and a policy, nine (6%) adopted Plurality-Plus Bylaws. Examined from a different perspective, of the 534 companies, 252 (47%) retained a plurality election standard, but added a discretionary policy addressing the status of nominees who receive a majority withhold vote, while 282 (53%) adopted a true majority election standard (Figure 2). The comparable percentages were 80% and 20% in February 2006, again highlighting that true majority vote bylaws (and charter provisions) are increasingly becoming the standard.

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

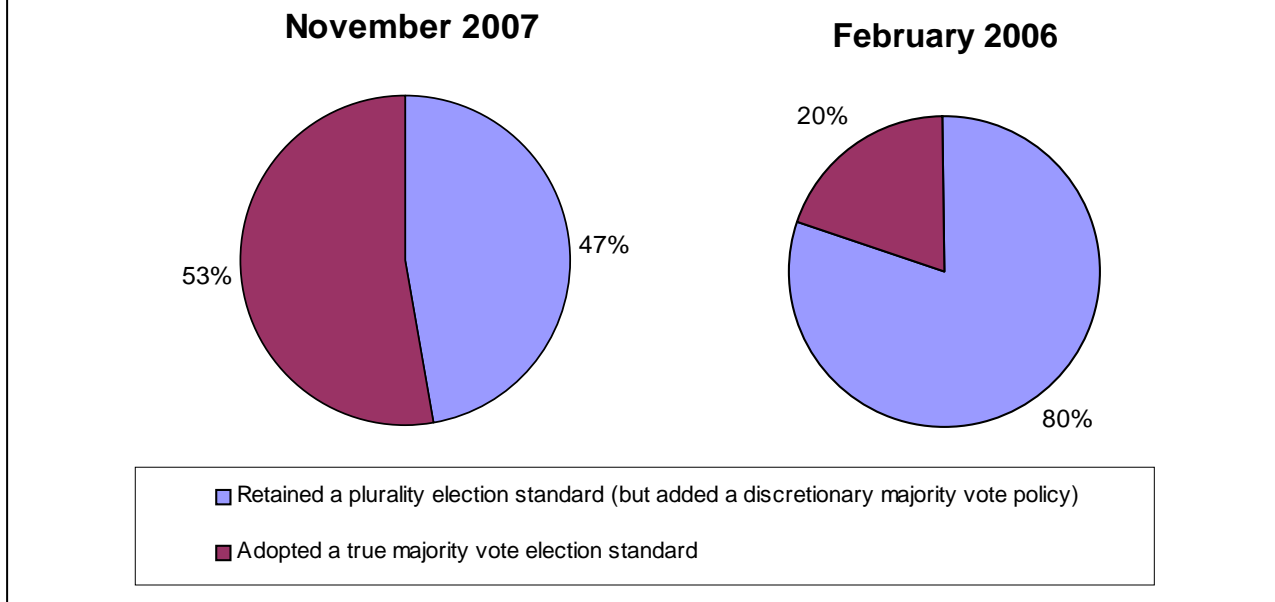
fueled, in part, by ISS announcing on November 18, 2005 that, although it would generally support stockholder proposals calling for directors to be elected by a majority of votes cast, it would consider recommending against such proposals if companies adopted formal governance principles that presented “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.



**Figure 1**

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.

**Analysis of Voting Standards Adopted by  
Companies in Study of Majority Voting  
November 2007 v. February 2006**



**Figure 2**

Intel Corporation’s adoption on January 19, 2006 of a majority vote bylaw, which includes a director resignation policy addressing the issue of holdover directors, marked the beginning of the increase in the number of majority vote bylaws adopted, a trend which began to accelerate in the Fall of 2006. Of the 310 other majority vote bylaws (and charter provisions) described in the *Study* (which number includes 29 Plurality-Plus Bylaws), 288 (93%) were adopted subsequent to Intel Corporation’s action. Additionally, of such 311 majority vote bylaws (and charter provisions), 272 (87%) are accompanied by a resignation policy addressing the status of holdover directors in the bylaw itself (or, in one case, charter provision) or in a separate policy. Of such 272 companies, 182 (67%) have included the resignation policy within the bylaw (or, in one case, charter provision), as was originally done by Intel Corporation, while 90 (33%) have only 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.

During the 2006 proxy season, a limited number of companies sought stockholder approval of board-recommended charter amendments providing 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 a majority vote charter provision in 2006. 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., H.J. Heinz Company, PerkinElmer, Inc., Pitney Bowes Inc., UnitedHealth Group Incorporated and WellPoint, Inc., all of which had majority vote policies in place, were among the companies which presented majority vote charter amendments (and, in certain cases, accompanying bylaw amendments) for stockholder approval at their 2007 annual meetings. In most of these cases, companies were restricted by the existing provisions of their charters or applicable state law from changing the existing plurality director election standard through any means other than a stockholder approved charter amendment.

Other developments in majority voting have involved 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 or against 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, such provisions address the practical issue of the director who simply refuses to tender a resignation letter. Beginning in September 2006, a 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 or against 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 Corporation also removed the provision in its majority vote bylaw mandating that a director receiving a majority against vote recuse himself 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, The Boeing Company, Ca, Inc., FedEx Corporation, Pacific Gas and Electric Company, PG&E Corporation, Reliant Energy, Inc., Temple-Inland, Inc., Verizon Communications, Inc. and Weyerhaeuser Company. 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.

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. These developments further increased the momentum behind the adoption of true majority vote bylaws and charter provisions. The October 25, 2007 decision of Pfizer Inc., the first company to have adopted a majority vote policy, to formally change its

director election standard through adoption of a true majority vote bylaw, also shifted momentum in favor of true majority vote provisions.

One of the most recent trends in majority voting has been the appearance of bylaws which limit the terms of holdover directors or those who were elected by a plurality, but failed to garner a majority vote, to 90 days. These bylaws reflect legislation in California (Cisco Systems, Inc., Pacific Gas and Electric Company, PG&E Corporation and Quest Software, Inc.), Utah (Union Pacific Corporation and Zions Bancorporation) and Washington (Microsoft Corporation, Nordstrom, Inc. and Weyerhaeuser Company) which specifically permit such shortened terms.

**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, 66% of the companies in the S&P 500 and over 57% 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 19% of the companies in the S&P 500 have adopted a majority vote policy, 25% have adopted a majority vote bylaw or charter provision (of which 2% consists of Plurality-Plus Bylaws) and 22% 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, 22% 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 44% of the companies in the S&P 500 have adopted a true majority vote election standard. As to the Fortune 500, approximately 17% of the companies in that index have adopted a policy, 22% have adopted a bylaw (or charter) provision (of which 2% consists of Plurality-Plus Bylaws) and 19% have adopted a policy and bylaw (or charter) provision (of which 1% consists of policies and Plurality-Plus Bylaws). This translates into approximately 19% of the companies in the Fortune 500 having retained a plurality election standard which is augmented by a majority vote policy, and approximately 38% of the companies in that index having adopted a true majority election standard. Thus, for both the S&P 500 and Fortune 500, companies which have adopted true majority vote bylaws (or charter provisions) outnumber those which have adopted majority vote policies or Plurality-Plus Bylaws by a ratio of 2:1.

**Votes Cast vs. Votes Outstanding.** Of the 374 policies reflected in the *Study*, 371 (99%) are based upon a majority of votes cast standard (which, for these purposes, includes standards such as a majority of shares present and voting or a majority of the quorum). 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. Of the 311 majority vote bylaw (and charter) provisions described in the *Study* (which number includes the 29 Plurality-Plus Bylaws), 310 (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 anticipated elimination for the 2009 proxy season of the

right of brokers to vote uninstructed client shares in uncontested elections pursuant to current NYSE Rule 452, a change which could have a material impact on elections.

**Uncontested Elections.** Of the 374 policies described in the *Study*, 345 (92%) contain a carve-out for contested elections. As to bylaws, 286 of the 311 (92%) majority vote bylaw (and charter) provisions described in the *Study* (which numbers include the 29 Plurality-Plus Bylaws) 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. In that regard, management's 2007 proposal at Schering-Plough Corporation to adopt a majority vote charter provision which did not include a carve-out for contested elections was defeated. That proposal was the only management proposal concerning the implementation of majority voting known to have failed to date in 2007. 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 generally sought 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, 2006 amendments to the Model Business Corporation Act, and amendments to the corporation codes in California, North Dakota, Utah and Washington, which permit various forms 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, 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 followed by other companies, including BIOLASE Technology, Inc., Boston Scientific Corporation, Comverse Technology, Inc., CVS Caremark Corporation, Electronic Data Systems Corporation, Exxon Mobil Corporation, FedEx Corporation, General Motors Corporation, MBIA, Inc., Office Depot, Inc., Pactiv Corporation, J.C. Penney Company, Inc., Plum Creek Timber Company, Inc., The Proctor & Gamble

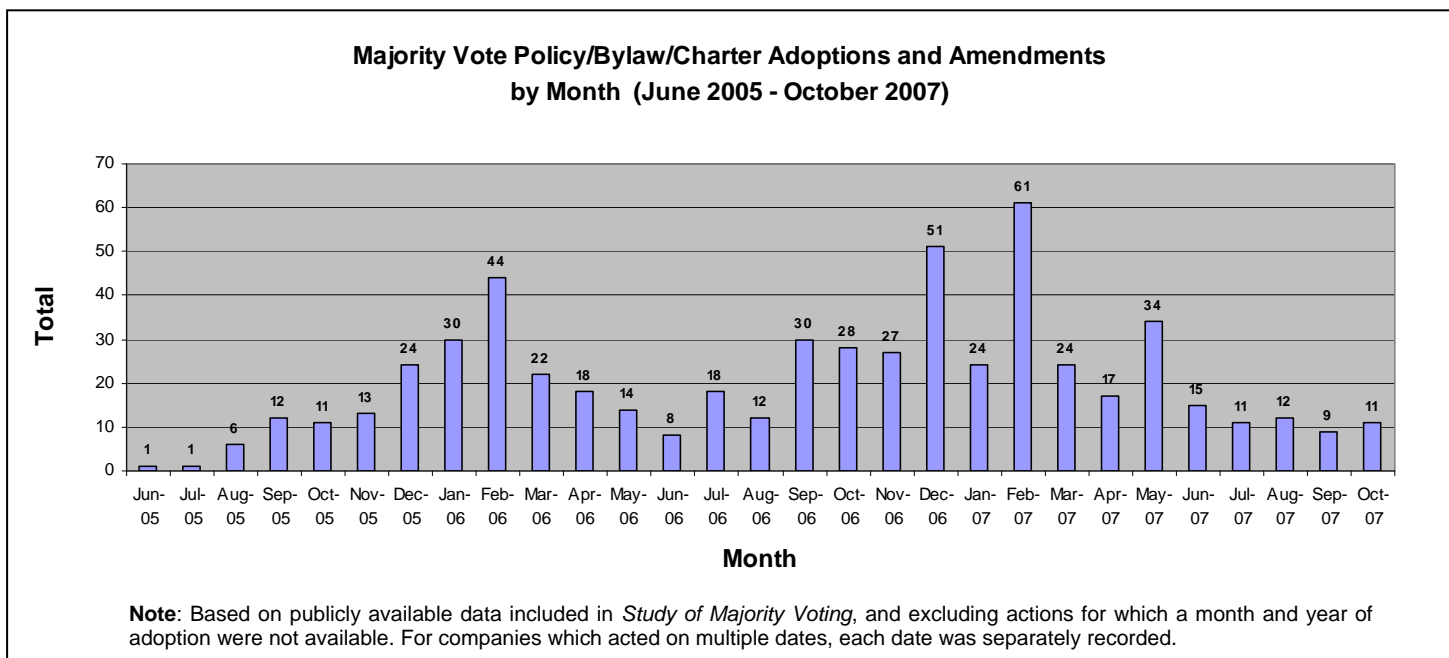
Company, Qwest Communications International Inc., Schering-Plough Corporation, Temple-Inland, Inc. and Yum! Brands, Inc., when it indicated that a tendered resignation would be accepted “absent a compelling reason.” The Goldman Sachs Group, Inc. employed a somewhat looser standard by providing that a tendered resignation will be accepted absent a “significant reason,” while R.R. Donnelley & Sons Company adopted a broader standard providing that a resignation will be accepted unless the board determines that the best interests of the company and its stockholders would not be served by doing so. Taking a stronger 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, and HNI Corporation adopted a policy simply providing that a director who does not receive the requisite vote will resign. Companies such as Citigroup Inc. and Del Monte Corporation have adopted standards providing that resignations will become effective after a specified period unless the board affirmatively takes other action.

Following adoption of a majority vote charter amendment in April 2007, General Electric Company eliminated the “compelling reason” language from its majority vote provisions. Similarly, JPMorgan Chase & Co. eliminated compelling reason language when it adopted a majority vote bylaw in July 2007.

**Influence of Stockholder Activism.** The majority vote movement has largely been driven by stockholder activists, including, in particular, the building trades unions. ISS reported that approximately 150 proposals were filed for the 2007 proxy season, 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. The 2007 proxy season was notable for the number of proposals that were withdrawn. According to ISS, at least 70 of the proposals were withdrawn, primarily because the relevant companies agreed to adopt a majority vote bylaw, or to put the necessary charter amendments to a stockholder vote. Of the proposals withdrawn, ISS reported that approximately 40 had been presented by the UBCJA. Average support for 2007 majority vote stockholder proposals which went to a vote was over 50% according to ISS. Research conducted for the *Study* indicates that in 2007 at least 17 stockholder proposals on majority voting passed and that at least 39 management proposals to implement or facilitate the adoption of majority voting passed. 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 38 passed. The 2006 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%). The *Study* demonstrates 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. During the 2007 proxy

season, February was the most active month, followed by May, during which activity spiked as the result of stockholder approval of majority vote charter and bylaw provisions at 2007 annual meetings. 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 bylaws (and charter provisions) included in the *Study*, approximately 93% were adopted or amended in the period from January 1, 2006 to the present, while approximately 45% were adopted in the period from January 1, 2007 to the present. With respect to policies, approximately 87% were adopted or amended in the period from January 1, 2006 to the present, while approximately 34% were adopted in the period from January 1, 2007 to the present.

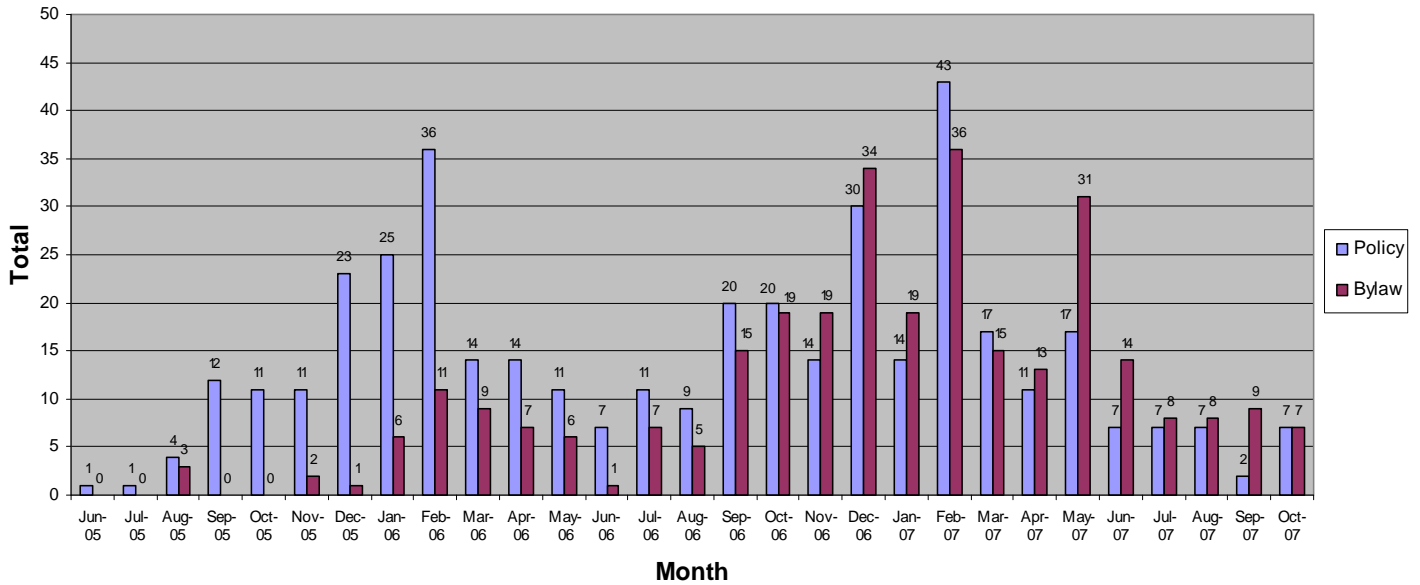
Finally, changes in the voting policies of mutual funds managed by Vanguard, Fidelity, Putnam and certain other managers which originally opposed director majority vote proposals, and which are under pressure from activists to support majority voting, could also have an impact on the majority vote movement. In that regard, it is worth noting that stockholder activists have sought to shine a spotlight on the voting record of mutual funds.



**Figure 3**

**Industry Breakdown.** Manufacturing is the industry sector in which the largest number of companies have adopted a form of majority voting, perhaps in part 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 24% 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).

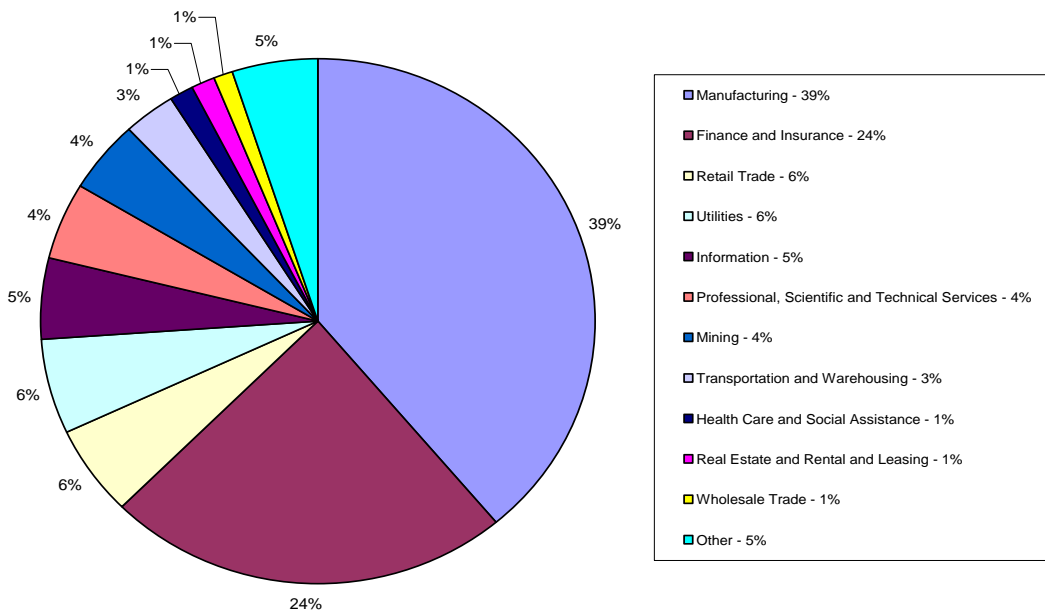
**Majority Vote Policy v. Bylaw Adoptions and Amendments  
by Month (June 2005 - October 2007)**



**Note:** Based on publicly available data included in *Study of Majority Voting*, and excluding actions for which a month and year of adoption were not available. For companies which acted on multiple dates, each date was separately recorded. Plurality-Plus Bylaws and majority vote charter provisions were recorded as bylaws.

**Figure 4**

**Breakdown by NAICS\* Industry Sector of Companies in  
Study of Majority Voting\*\***



\*North American Industry Classification System

\*\*Due to rounding, percentages may not total 100%

**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:

- The Committee on Corporate Laws of the American Bar Association adopted changes to the Model Business Corporation Act in 2006 which permit stockholders to adopt a bylaw limiting the term of a director who receives more votes “against” than “for” to a period not to exceed 90 days;
- California adopted legislation, effective January 1, 2007, which permits companies incorporated in California to elect directors by a majority of votes cast and to limit the term of holdover directors to 90 days;
- 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;
- Nevada amended the Nevada General Corporation Law, effective October 1, 2007, to permit Nevada corporations to adopt majority voting through a bylaw or charter provision;
- North Dakota adopted the North Dakota Publicly Traded Corporations Act, which allows public companies incorporated in North Dakota after July 1, 2007 to opt-into a group of “shareholder-friendly” governance provisions, including majority voting;
- Ohio adopted amendments to the Ohio General Corporation Law permitting Ohio public companies to include majority vote election standards in their charters, beginning January 1, 2008. Prior to the amendments, Ohio law mandated plurality voting. The amendments were prompted by the UBCJA and other unions submitting proposals to 14 Ohio corporations requesting that they reincorporate in Delaware so that they could adopt majority voting;
- Utah adopted changes to the Utah Revised Business Corporation Act, effective April 30, 2007, providing that Utah public companies may adopt bylaw provisions which stipulate that a nominee who receives more votes “against” than “for” shall serve for a term which does not exceed 90-days;
- Virginia adopted changes to the Virginia Stock Corporation Act, effective July 1, 2007, which permit Virginia corporations to provide for majority voting through a bylaw amendment (as well as a charter amendment) and;
- Washington amended the Washington Business Corporations Act, effective July 22, 2007, to permit: (i) adoption of majority voting through a bylaw amendment (as well as a charter provision), (ii) limiting the term of holdover directors to 90-days or less through a bylaw amendment and (iii) limiting terms of nominees who are elected under a plurality standard without receiving a majority vote through a charter amendment.
- Irrevocable, Contingent Resignations. Additionally, amendments to the Model Business Corporation Act, the Delaware General Corporation Law, the Maine Business Corporation Act, the Texas Business Organizations Code, the Utah Revised Business Corporation Act and the Virginia Stock Corporations Act 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 provided for the advance tender of irrevocable, contingent resignations.

Although the *Study* reflects activity by companies incorporated in 35 states, 61% (327) of the companies are incorporated in Delaware, followed by 4.5% (24) in Maryland, 3.5% (19) in New York and 2.5% (14) in Ohio. 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 rise in the number of Plurality-Plus Bylaws to 29.

**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. At least 38 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 31 (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 34 companies where proposals passed in 2006 (which number excludes the four companies where management supported majority vote proposals or management proposed majority vote charter provisions), all subsequently adopted new or additional majority vote provisions. 29 (85%) of those companies adopted a bylaw or charter provision, either alone or in combination with a policy, while three (9%) adopted a policy and two (6%) adopted a Plurality-Plus Bylaw.

**2007 Proxy Season Voting Trends.** The number of majority vote-related proposals that went to a vote in 2007 was down from the number of such proposals in 2006, reflecting high levels of activity by companies which voluntarily adopted majority voting or chose to do so preemptively in the face of actual or threatened stockholder proposals, and the high number of proposals which were withdrawn after negotiations between proponents and companies. Data available for 2007 indicates that 90 majority-related proposals have appeared to date on the ballot at 88 companies. Both Kohl's Corporation and HNI Corporation had competing management and stockholder proposals on majority voting. In both of those cases, the management proposals passed. 44 of the 90 proposals were from management, while 46 were from stockholders. Settlements between proponents and companies explain, in good measure, the 44 management proposals, of which 39 have been approved by stockholders to date in 2007. In contrast, only two such proposals were

presented and approved in 2006. The only management proposal known to have failed in 2007, was at Schering-Plough Corporation where management's proposal did not include a carve-out for contested elections. As to stockholder majority vote proposals, ISS data demonstrates average support levels over 50%, and publicly available data indicates that at least 17 such proposals, none of which were binding, have passed to date in 2007. Of the 17 stockholder proposals that passed in 2007, seven (41%) were at companies that had adopted a majority vote policy, three (18%) were at companies that had adopted a Plurality-Plus Bylaw and seven (41%) were at companies that had neither a policy nor a Plurality-Plus Bylaw in place.

**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 proposed elimination 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 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 through a "vote no" campaign), (iv) the influence of proxy advisory firms such as RiskMetrics Group, Inc., (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. Nonetheless, recent turmoil in the credit markets may blunt the ability of some activists to effect changes, such as those involving stock buy-backs or the sale of a company.

**2008: What Lies Ahead?** As companies prepare for the 2008 proxy season begins, a number of points are worth bearing in mind:

- **Continued Push from Activists and Greater Engagement with 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. Emphasizing that activists do not find majority vote policies adequate, some proponents of majority voting have signaled that in 2008 they intend to target companies which have adopted policies, but not majority vote bylaws (or charter provisions). Moreover, some proponents have shown a tendency to repeatedly submit proposals at a given company until the company adopts true majority vote provisions. Additionally, groups such as the Council of Institutional Investors and Change to Win have been pushing for the elimination of broker voting (which will magnify the impact of majority voting) on the theory that broker discretionary voting gives

management's nominees an unfair advantage and thus undermines the integrity of director elections.

Organizations such as TIAA-CREF, which were not previously known to have submitted majority vote proposals, did so in 2007. TIAA-CREF submitted ten non-binding majority vote stockholder proposals for 2007, all of which were settled as a result of the unnamed companies agreeing to adopt majority vote bylaws. The 2007 on-line campaign mounted by Eric Jackson, a stockholder of Yahoo! Inc., to oust seven directors, including Terry Semel, due to dissatisfaction with Mr. Semel's compensation as CEO, illustrates another interesting aspect of stockholder activism. While Mr. Semel did not receive a majority against vote, three other directors received more than a 30% withhold vote and Mr. Semel subsequently resigned as CEO, while remaining on the board. Eric Jackson was reported to have owned only 45 shares of Yahoo! Inc. when he mounted his on-line campaign, which included use of a blog and YouTube videos. The impact of the actions of TIAA-CREF and Eric Jackson appear to reinforce the notion that many majority vote provisions are being adopted as a result of behind the scenes negotiations and that the power of majority voting, which is not limited to situations in which a director has received a majority withhold/against vote, often plays out behind the scenes.

Many activists have welcomed the increasing levels of negotiated settlements involving majority voting as indicative of a new era of engagement between boards and stockholders. In that regard, it is worth noting that Spencer Stuart's *2007 Board Index* found that 37% of respondents to its annual survey reported that their boards had direct contact with stockholder groups over the past year, up from 22% in 2006. Moreover, in June 2007, Pfizer Inc. announced that it had instituted a policy under which members of its board will meet with the company's largest institutional stockholders on an annual basis to listen to their comments on governance policies and practices, including executive compensation. UnitedHealth Group Incorporated and Converse Technology, Inc. were also reported to have formed advisory committees to give their large, long-term stockholders the opportunity to provide input on certain governance issues.

- **The Threat of Binding Proposals.** While there has been concern on the part of companies as to the possibility of receiving binding majority vote proposals from stockholders, relatively few have been presented. In 2007, only four binding stockholder majority vote proposals were included in proxy statements, and as of the date of the *Study*, three of those proposals have gone to a vote, with none of them passing. At the beginning of the 2007 proxy season, 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 reported that the UBCJA intended to submit binding proposals in 2007 at approximately 15 companies where the proposal has already gone to two stockholder votes and had achieved average support above 45%. It is not clear how many binding proposals were ultimately presented to companies by stockholders in 2007. AFSCME is reportedly intending to present binding proposals at certain

companies in 2008, including companies which have adopted policies without changing the underlying director election standard to a majority. When considering that no binding stockholder proposals on majority voting have passed, it is worth remembering that many investors are more reluctant to support binding stockholder proposals (which would amend a company's bylaws) than they are to support non-binding proposals which send a message to the board as to stockholder sentiment. Additionally, 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.
- **Continuing Evolution of Provisions.** As the majority vote movement has matured, majority voting provisions have continued to evolve, and there has been considerable use of novel provisions. For example: (a) the majority vote bylaw of Systemax Inc, which was adopted in connection with the settlement of stockholder derivative litigation, remained in force for one year only, (b) the majority vote policy adopted by Citrix Systems, Inc. has a double trigger, which requires that a nominee receive a withhold vote from a majority of votes cast, and that the withhold vote represent at least 35% of the outstanding shares of the company, (c) the majority vote charter amendment adopted by Borders Group, Inc. differs from other such amendments by including director resignation provisions therein, (d) Newmont Mining Corporation adopted a majority vote policy that applies to incumbent directors only, (e) MBIA, Inc. has a policy which specifies that the committee considering a tendered resignation will receive a recommendation on the matter from the CEO and (f) The Adams Express Company, Kohl's Corporation, PerkinElmer, Inc., Petroleum & Resources, Inc. and Tidewater, Inc. adopted charter or bylaw provisions which give the boards of these companies discretion as to whether they should adopt majority voting in the future. The variety of provisions illustrated by the *Study* can be explained in part by the enabling nature of state corporation laws which have allowed companies to craft provisions that suit their specific situations.
- **Proxy Access.** While the debate over proxy access was restarted in 2006, the SEC has not yet taken action on the conflicting proposals approved at its July 25, 2007 open meeting. Many institutional investors opposed both proposals, on the theory that the proposal allowing companies to exclude any stockholder proposal concerning the director election process would frustrate state law, while the proposal to permit holders of a 5% interest to present a proposal on proxy access would be available to only the largest holders. Both Barney Frank, the chairman of the House Financial Services Committee, and Christopher Dodd, the chairman of the Senate Banking Committee, urged the SEC to defer action on proxy access. At the beginning of

November 2007, SEC Chairman Cox stated that the SEC “should go back to the drawing board,” yet again, in early 2008 on the issue of proxy access. At the same time, he reiterated his intent to have a rule in place for the 2008 proxy season, although he noted that such rule might be for the “short-run.” While the debate has raged over proxy access, only four companies received proxy access proposals for the 2007 proxy access. The proposal at Reliant Energy, Inc. was withdrawn, and proposals at Hewlett Packard Company and UnitedHealth Group Incorporated received 43% and 45% support, respectively. Only the proposal at Cryo-Cell International Inc. passed.

Ironically, majority voting was an outgrowth of the apparent failure of proxy access, and there is a continuing 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. In that regard, Apria Healthcare Group, Inc. has a majority vote bylaw and a proxy access policy, Comverse Technology, Inc. adopted majority vote and proxy access bylaws in 2007, and RiskMetrics Group, Inc. has indicated that it intends to adopt majority voting and proxy access when it goes public.

- **Unintended Consequences?** While majority voting is intended to increase director accountability and foster a greater level of dialogue between boards and stockholders, it is still unclear how this increased stockholder power will be used over time, 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 establishment of majority voting, in its many forms, as a mainstream governance practice.

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*The complete 465-page Study may be accessed via the firm's website at*  
<http://www.ngelaw.com/files/upload/majoritystudy111207.pdf>

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