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The Momentum, Motive, and Mouse-Kapades of the Majority Vote Movement

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THE MOMENTUM, MOTIVE, AND MOUSE-KAPADES OF THE MAJORITY VOTE MOVEMENT

BY JAY RAZZOUK*

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I. INTRODUCTION

The Walt Disney Company's annual shareholder meeting on March 3, 2004 was anything but a Cinderella tale.[1] Roy E. Disney and Stanley Gold, both ex-directors of Disney and one a nephew of Walt Disney himself, had rallied thousands of shareholders to challenge the incumbent board of directors.[2] The

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[1] Jim Jubak, *Why Are Shareholders so Powerless?*, Jubak's Journal, Mar. 9, 2004, http://moneycentral.msn.com/content/P75351.asp.

[2] Bruce Orwall & Brian Steinberg, *Disney Meeting: New Adventures in Dissidentland*, WALL ST. J., Mar. 3, 2004, at B1.

stakes were high. Michael Eisner, the chairman and chief executive officer, faced losing his title as chairman—if not more.[3] Although foretold by the Wall Street Journal the day before, the events that transpired were still breathtaking.[4] In an unprecedented display of shareholder disapproval, forty-three percent of the Disney shareholders withheld their vote from Eisner.[5] The other directors fared a little better, having anywhere between thirteen percent and twenty-four percent of the votes withheld from them.[6] While thirteen percent might sound like a small figure at first, it is actually quite staggering. Even having five percent of the votes withheld is considered "embarrassing" to that director.[7] The success of the Disney shareholders' revolt is even more amazing when one considers other factors such as the effect of broker votes.[8]

The victories for the Disney shareholders did not end with Eisner's embarrassment. Shortly after the votes were tallied, CalPERS, the employees' pension plan for the State of California, began calling for Eisner's resignation.[9] Eager to win favor with disgruntled shareholders, the board forced Eisner out of his chairmanship. Eisner maintained his position as CEO, but his little embarrassment became a "great humiliation."[10]

Disney's tumultuous directors' election reflected a greater movement by shareholders to take back power following the fall of Enron and the rise of Sarbanes-Oxley.[11] But the Disney debacle could also be considered the beginning of the majority vote movement. The battle fought at Disney's shareholder meeting highlighted many of the problems shareholders faced when trying to hold their corporate leadership accountable, if not shakeup the board altogether. This article will address those problems that shareholders have faced in implementing majority voting as well as the strides they have made in recent months. However, before delving into specific issues involving majority voting, this article will explain some of the basics of corporate democracy as well as the various approaches being taken to majority voting.

II. THE BASICS OF CORPORATE DEMOCRACY AND DIRECTOR ELECTIONS

Americans are familiar with the general basics of democracy. However, corporate democracy is different than what most people think. In fact, Henry G.

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[3] *Id.*

[4] *Id.*

[5] Floyd Norris, *Market Place: Corporate Democracy and the Power to Embarrass*, N.Y. TIMES, Mar. 4, 2004, at C1. *See also* Jubak, *supra* note 1; Stanley P. Gold, *Comments of Shamrock Holdings, Inc.* on S7-19-03, http://www.sec.gov/rules/proposed/s71903/shamrock032304.htm (last visited on Dec. 27, 2006).

[6] Jubak, *supra* note 1; Norris, *supra* note 5. The other nominees and the percentage of votes withheld are as follows: George J. Mitchell, 24%; Judith Estrin, 23%; John Bryson, 22%; Minica Lozano, 16%; Robert Matschullat, 16%; Leo O'Donovan, 16%; Robert Iger, 15%; Gary Wilson, 15%; John Chen, 14%; Aylwin Lewis, 13%. Jubak, *supra* note 1; Norris, *supra* note 5.

[7] Jubak, *supra* note 1; Norris, *supra* note 5.

[8] *See* discussion *infra* Part III.E.

[9] Norris, *supra* note 5.

[10] *See id.*

[11] *See id.*

Manne, Dean Emeritus of the George Mason University School of Law, states that: "If we had never used the word 'voting' in corporation law, there is a good chance that many critics would never have thought up the idea of shareholder democracy on their own, since the principle overt evidence of an overlap with the political process would then be missing."[12] While corporations generally run on the principle of "one share, one vote," it is usually very difficult for shareholders to nominate their own directors, remove sitting directors, and to pass binding resolutions.[13]

It thus would be beneficial to discuss some of the basics of corporate democracy before delving into the more complicated legal issues of majority voting. In subsections A, B and C, the article will define and contrast some of the most significant terms as they apply to majority voting. The article will end this section with a discussion of the two most prominent approaches for implementing a majority vote standard.

A. Plurality v. Majority Voting Standards

The majority vote movement can be boiled down to one simple question: which standard should be applied for director elections, plurality or majority? This article will discuss each standard below.

1. Plurality

In the context of director elections, a plurality vote means that a person may be elected as a director if he or she merely receives the *most* votes in the election.[14] Neither voting against a nominee nor withholding one's vote has any effect under plurality voting.[15] In fact, "most proxy cards provide shareholders with the opportunity to vote 'for' a nominee or to 'withhold' authority to vote for a nominee, but do not allow a shareholder to vote 'against' the nominee."[16] It should not come as a surprise that the SEC merely requires proxy cards to permit shareholders to withhold voting authority from a proxy holder, and only requires that shareholders be able to vote against a nominee if "state law gives effect to a vote 'against.'"[17]

The "most votes" standard is hardly a hurdle. Under a plurality vote standard, a nominee could theoretically become elected by merely one vote being cast.[18] Thus, a person could become elected to the board by receiving one "yes"

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[12] Henry G. Manne, "*The 'Corporate Democracy' Oxymoron*," WALL ST. J., Jan. 2, 2007, at A23.

[13] *Shareholder Democracy: Battling for Corporate America*, ECONOMIST, Mar. 11, 2006, at 63, *available at* 2006 WLNR 3985145 (hereinafter "Shareholder Democracy").

[14] Robert Profusek, *Majority Voting for Directors*, MONDAQ BUS. BRIEFING, Nov. 1, 2006, *available at* 2006 WL 19080088 (hereinafter "Profusek").

[15] Sheppard, Mullin, Richter & Hampton LLP, *Majority Vote in Director Elections: Alternate Standards*, Mar. 13, 2006, http://www.corporatesecuritieslawblog.com/9144-print.html (last visited Jan. 5, 2007) (hereinafter "Sheppard").

[16] *Id.*

[17] *Id.*

[18] Claudia H. Allen, *Updated Majority Voting Study Reveals Success of Activist-Driven Movement*, Oct. 10, 2006, http://www.ngelaw.com/news/pubs_detail.aspx?Type=5440&ID=652.

vote despite all other shareholders withholding their votes.[19] While such an outcome may seem grossly inconsistent with American notions of democracy, it is rather a moot point in reality. As the Disney director elections illustrated, boards will likely respect a significant shareholder protest. However, the primary criticism of plurality voting remains: it fails to give shareholders sufficient recourse when they become discontent with current management.[20] While shareholders have the option of offering their own slate of candidates, the expense of paying for a proxy contest often proves to be an insurmountable hurdle.[21]

Most corporate statutes use plurality voting as the default standard for director elections.[22] According to a report issued by the American Bar Association, "thirty-five jurisdictions provide expressly that directors are elected by plurality vote."[23] An often cited example, Delaware General Corporation Law ("DGCL") section 216(3) states: "Directors shall be elected by plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. . . ."[24] The Model Business Corporation Act ("MBCA") uses similar language, but permits a voting standard other than plurality if it is so "provided in the articles of incorporation."[25] Under both the DGCL and the MBCA, plurality voting for directors represents the exception to the general rule that shareholders must approve proposals and otherwise conduct their business with an affirmative majority vote.[26]

Why would corporations long use (and most states provide for) a voting standard that seems incongruent with basic democratic principles and the shareholders' right to elect the board of their choosing? One of the key reasons is that plurality voting ensures that every board seat will get filled.[27] In Delaware, for example, "plurality voting was adopted to address a concern that directors may not receive the required majority vote in an election contest in which there are more nominees than open positions on the board of directors."[28] Additionally, commentary to DGCL "explains that the Delaware General Assembly adopted the plurality vote standard to address a similar concern that none of the candidates seeking office in a contested election would receive the required majority vote."[29] Granted, in both scenarios, Delaware lawmakers were contemplating contested elections. However, it appears that Delaware lawmakers were ultimately concerned with the possibility of vacancy, not how it happened.

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[19] Profusek, *supra* note 14.

[20] Stinson, Morrison, *Hecker, LLP, Supporters of Majority Voting Bolstered by Recent Legislative Changes*, Sept. 27, 2006, http://www.stinsonmoheck.com/legalpublications/smhlupage.asp?key=429 (hereinafter "Stinson").

[21] *See* Stinson, *supra* note 20.

[22] Profusek, *supra* note 14.

[23] American Bar Association, Report of the Committee on Corporate Laws on Voting by Shareholders for the Election of Directors, Mar. 13, 2006, at 6 (citing commentary to the Model Business Corporations Act) (hereinafter "ABA Report").

[24] DEL. CODE ANN. tit. 8, § 216(3) (2007).

[25] MODEL BUS. CORP. ACT §7.28(a) (1984).

[26] *See* ABA Report, *supra* note 23, at 7-8

[27] ABA Report, *supra* 23, at 8.

[28] *Id.*

[29] *Id.*

In fact, the Delaware General Assembly's concern over board vacancies was so great that it additionally enacted "the holdover rule."[30] The holdover rule ensures that the board continues to function despite a failure of shareholders to elect directors by requiring a director to remain on the board until he or she can be replaced.[31] Thus, as will be discussed in more depth later, the holdover rule goes as far as to require a director defeated in an election to remain in office until his or her successor is chosen.[32] There are several sound business reasons for preventing vacancies, and these too will be addressed later in this article.[33]

A second reason for plurality voting is that it nearly guarantees the election of management's slate of nominees. While that may hardly seem altruistic, it could very well be in a company's best interests. In the age of Sarbanes-Oxley and unprecedented regulation of board composition,[34] searching for qualified directors is an increasingly arduous task. By serving on a board, the directors are essentially putting their necks on the line should anything go wrong. In times past, it was easy for imperial CEOs or other controlling figures to stack their boards with yes-men. Today, plurality voting helps prevent activist shareholders[35] from running their own slate of nominees, thus better protecting the company's long term mission and keeping the board properly constituted.

Director accountability is a common reason offered in support of repealing plurality voting for director elections.[36] Because so many director elections are uncontested, the argument goes that there is very little recourse for objecting shareholders.[37] "The critics also contend that [the plurality vote] system does not offer a means to effect change to the composition of the current board, unless a shareholder or group of shareholders takes the time and incurs the expense of running one or more rival nominees for election."[38]

2. *Majority Vote Standard*

Under the majority vote standard, a person must receive a majority of the

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[30] *See id.* at 9.

[31] *Id.* (citing MOD. BUS. CORP. ACT ANN., § 8.05 at 8-47 (Official Comment)).

[32] *See* ABA Report, *supra* 23, at 8.

[33] *See* discussion *infra* Part IV.

[34] *See generally* Robert V. Hale II, *The Uncertain Efficacy of Executive Sessions Under the NYSE's Revised Listing Standards*, 61 BUS. LAW. 1413 (2006); Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375 (2006).

[35] Through out this article there are references to "activist shareholders." It would probably take up an entire article to define exactly what "activist shareholders" are and what they do. Many publications seem to take for granted that the reader knows what "activist" means. *See, e.g.*, Kara Scannell, *SEC to Investors: More Internet, Less Hedge Funds*, WALL ST. J., Dec. 14, 2006, at C1, *available at* http://online.wsj.com/article/SB116606337394949792.html. While this article may appear to use the term with a negative connotation, it should be noted that not all shareholder activism is bad. *See* Avital Louria Hahn, *Retaking the High Ground: Companies Are Fighting Back Against the Shareholder Activism' of Hedge Funds*, INV. DEALERS' DIGEST, May 19, 2006. It is not the representation of shareholder interests that is frowned upon in this article, but rather the use of such pretenses as a guise for a group's self interests.

[36] ABA Report, *supra* note 23, at 10.

[37] *Id.*

[38] *Id.*

votes cast in the election in order to obtain directorship.[39] Should the nominee fail to acquire such a vote, the board generally would be required to take action in accordance with the corporate bylaws or a corporate governance policy.[40] Majority voting provisions can come in all shapes, sizes and colors. Currently, there is almost no substantive law dictating the form a majority voting provision must take.[41] Generally corporations have implemented the majority vote standard in two ways: 1) adoption of a corporate governance policy; or 2) an amendment to the corporation's bylaws.

An obvious benefit of majority voting is that it gives greater control to the shareholders. It is the duty of the directors to manage the business while shareholders are expected to be largely hands-off.[42] Thus, if a shareholder's primary means of influencing the company is through the election of the board,[43] it would only make sense that the shareholder should have the right to vote against any director nominee that he or she disagrees with. Majority voting is also often advocated on the grounds that it helps shareholders hold the board of directors more "accountable."[44] Critics of corporate democracy, though, emphasize that the brilliance behind American capitalism is the separation of shareholders from management.[45] Those critics claim that management requires "the space and discretion to be able to go about the business of wealth creation."[46] Additionally, some experts go as far as to say that shareholders "may not deserve" corporate democracy because institutional investors now own two-thirds of the shares of American companies.[47] Right or wrong, majority voting satisfies shareholders' democratic expectations of fairness and democracy, whereas plurality voting is perceived to be inherently unfair and "undemocratic."[48]

While the purported purpose of the majority vote movement is to improve shareholder democracy, many majority vote policies or bylaws may have a reverse effect. Keith Bishop, an attorney at Buchalter, Nemer, Fields, & Younger, LLP, asserts that "majority voting will in many instances actually vitiate shareholder democracy by replacing elected directors with appointed directors."[49] Even if the board accepts the defeated director's resignation (assuming there is such a

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[39] Profusek, *supra* note 14.

[40] *See id.*

[41] The State of California has gone the farthest in addressing majority voting in a statute. The relevant statute, Cal. Corp. Code §708.5 (West 2007), basically says that a corporation may not use majority voting if it uses cumulative voting.

[42] *See* DEL. CODE ANN. tit. 8, § 141(a) (2007).

[43] It should be noted that some extraordinary items may be put to a vote before shareholders.

[44] *See* Geri L. Dreiling, *Power to the Shareholders: ABA Panel Would Give Corporations More Flexibility to Change Director Elections*, ABA J. E-REPORT, Mar. 10, 2006, *available at* 5 No. 10 ABAJEREP 4; Profusek, *supra* note 14.

[45] Shareholder Democracy, *supra* note 13.

[46] *Id.*

[47] *Id.*

[48] *See* Dreiling, *supra* note 44.

[49] Keith Paul Bishop, *Majority Voting Could Harm Shareholder Interests*, L.A. DAILY J., May 11, 2006, *available at* http://www.buchalter.com/bt/index.php?option=com_content&task=view&id=92&Itemid=77 (last visited Oct. 30, 2007) (hereinafter "Bishop").

provision), the board will in "most instances" select a replacement director without calling for another election.[50] But such a result might not be a total loss: the shareholders would have defeated a candidate they did not want. Additionally, the shareholders may have conveyed a message to the other directors that they could be next if the shareholders remain unhappy. In the case of the shareholder revolt at Disney, it did not even take a majority of opposing votes to shake up the corporate leadership.[51]

Another criticism of majority voting is that it could lead to the loss of a hard-to-replace director.[52] Remember that in order to be traded on a stock exchange, a company must meet strict listing requirements.[53] Listing requirements dealing specifically with board composition make it very difficult for a company to fill a vacant board seat.[54] Tack on federal securities regulations such as Sarbanes-Oxley, along with practical hurdles such as the looming threat of personal and corporate liability, and suddenly the pool of potential replacements becomes very small indeed.[55] As mentioned above, the corporation unable to fill a vacancy in time could face more problems than just delistment.

Some critics of majority voting also warn that it could lead to a total "decapitation" of the board, where not a single director is elected.[56] Without any directors, the corporation would have no other choice but endure the expense of another election.[57] Meanwhile, the lack of leadership would have a very disruptive effect on the corporation.[58]

Another valid concern for the majority vote movement is that activist shareholders are trying to apply a universal voting system that may not work for all corporations. In a committee report, the ABA expressed concern that "if shareholders were permitted unilaterally to adopt majority voting proposals, there could be a tendency for shareholders to support a universal 'one-size-fits-all' election system that may not suit all corporations."[59] For that reason, the ABA committee proposed requiring "alternative director election systems" to be adopted by amending the articles of incorporation.[60] By requiring "alternative director election systems" to be placed in the articles, such an amendment to adopt majority voting would require both the approval of the board and the shareholders, thus precluding unilateral action.[61] The committee report described the ideal process as the board exercising due care, seeking out the advise of experts, weighing the costs

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[50] *Id.*

[51] *See* Dennis K. Berman, *Boardroom Defenestration: As Proxy Season Heats Up, Companies Consider Rules to Boot Unwanted Directors*, WALL ST. J., Mar. 16, 2006, at B1, *available at* http://oneline.wsj.com/article/SB114247593853999714.html.

[52] Bishop, *supra* note 49.

[53] *Id.*

[54] *Id.*

[55] *See id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] ABA Report, *supra* note 23, at 24.

[60] *Id.*; *see infra* pp. 172-73.

[61] *See* ABA Report, *supra* note 23, at 24.

and benefits of the different systems, and then presenting shareholders with the board's reasons for adopting the proposed election system.[62] The process would then end with the shareholders voting to adopt the system.[63]

B. Contested vs. Uncontested Elections

Elections can generally be divided into two types: contested and uncontested. An ucontested election generally occurs when the number of candidates does not exceed the number of positions to be filled.[64] However, the election will usually be considered contested if there are more candidates running than there are positions to be filled.[65] Director elections for publicly traded companies are seldom contested.[66] Although SEC proxy rules give shareholders the option of running their own slate of candidates, waging a proxy war demands considerable time and money.[67] While management's slate of candidates is sent out on the company's proxy at the company's expense, shareholders must pay all costs to run their alternative slate of candidates. "Without the support of a broad proxy solicitation effort, a candidate has little chance of election."[68]

Many majority vote policies and bylaws draw a clear distinction between contested and uncontested elections.[69] Plurality voting appears to remain alive and well in the case of contested elections. It is in the realm of uncontested elections that the majority vote standard is making headway. Nearly every discussion of majority voting is set in the context of uncontested elections. One likely reason for the focus on uncontested elections relates to a common critique of plurality voting: that an uncontested candidate can win the election by receiving just one vote because he or she would still have won the most votes.[70] The seemingly egregious result not only provides some justification to use the majority vote standard, but probably has also caused the movement to zero in on uncontested elections.

C. Votes Cast v. Votes Outstanding

Majority vote standards can come in at least two varieties: majority of votes cast or majority of shares outstanding. Which standard a company picks could have a huge impact on the elections. Pfizer's corporate governance policy initiates the resignation process following a withholding of a majority of the votes *cast*.[71]

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[62] *See id.* at 24-25.

[63] *See id.* at 25.

[64] Bishop, *supra* note 49.

[65] *Id.*

[66] *Id.*

[67] *See id.*

[68] *Id.*

[69] *See e.g.*, Pfizer, Inc,, Our Corporate Governance Principles, at 1 ¶ 7, http://media.pfizer.com/files/investors/corporate_governance/cg_principles.pdf (last visited Jan. 7, 2008) (hereinafter "Pfizer CGP"), and Intel Corporation, Intel Corporation Bylaws, at 6, art. III § 1 (Jan. 17, 2007), http://www.intel.com/intel/finance/docs/bylaws.pdf (hereinafter "Intel Bylaws").

[70] Bishop, *supra* note 49.

[71] Sheppard, *supra* note 15; *see also* Pfizer CGP, *supra* note 69, at 1, ¶ 7.

Similarly, General Motors Corporation ("GMC") bylaws specifically provide that: "[E]ach nominee shall be elected a director by the vote of the *majority of the votes cast*."[72] GMC's bylaws take things one step further, stating that "'abstentions' will not count as a [vote] cast with respect to that director."[73] Thus GMC requires its shareholders to affirmatively vote "against" a director if they want their opposition to count—abstaining is not enough. Even if fifty-one percent of GMC's shareholders withhold their votes, the director nominee could still become elected assuming a majority of the votes actually cast were "for" the nominee.

Office Depot has taken the other approach, requiring a withholding of a majority of the shares outstanding.[74] Its Corporate Governance Guidelines require the resignation of any nominee for director in an uncontested election if "a majority of the shares of the Company that are outstanding and entitled to vote in such election are designated to be 'withheld' from or are voted 'against' his or her election."[75] Merely abstaining from voting probably would not count against a director under Office Depot's guidelines. The guidelines require that the shares actually be designated as "withheld" or "against,"[76] reflecting the options the shareholder would have on the proxy card.[77]

D. *Different Approaches by Corporations*

1. *Pfizer Model/Approach (Modified Plurality/Director Resignation Policy)*

Recognized as a leader of corporate governance, Pfizer has been a key pioneer of majority voting in director elections.[78] Pfizer, Inc. amended its "corporate governance principles" in June 2005, marking what some consider a "turning point" for the majority vote movement.[79] Since then, commentators often use the term "Pfizer approach" to label director resignation policies. However, the implementation of such policies may also be referred to as the "modified plurality"

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[72] General Motors Corporation, General Motors Corporation Bylaws, at 9, art. II, § 2.2(b) (Mar. 5, 2007), http://www.gm.com/corporate/investor_information/docs/corp_gov/bylaws.pdf (emphasis added) (hereinafter "GMC Bylaws").

[73] *Id.*

[74] Sheppard, *supra* note 15.

[75] Office Depot, Inc., Corporate Governance Guidelines, at 2, §5 (July 2005), http://media.corporate-ir.net/media_files/irol/94/94746/corpgov/guidelines_9_26_05.pdf. Reproduced in full below, section 5 states that: "Any nominee for director in an uncontested election as to whom a majority of the shares of the Company that are outstanding and entitled to vote in such election are designated to be "withheld" from or are voted "against" his or her election shall tender his or her resignation for consideration by the Corporate Governance & Nominating Committee. The Governance Committee shall evaluate the best interests of the Company and its shareholders and shall recommend to the Board the action to be taken with respect to such tendered resignation."

[76] *Id.*

[77] *See* Sheppard, *supra* note 15.

[78] *See Shareholders Gaining Proxy Power*, CFO MAGAZINE, Mar. 3, 2006, *available at* 2006 WL 3984483 (hereinafter "Gaining Power").

[79] *Id.*; *see also* Profusek, *supra* note 14.

approach.[80]

There appears to be some confusion as to what the Pfizer approach really is. Some people lump any majority vote policy into the Pfizer category if it requires the resignation of a candidate who fails to receive a majority vote. The key feature of the Pfizer approach is that resignation is required by a policy (adopted by the board), as opposed to a Bylaws amendment (which may be more difficult to adopt or later modify). However, the actual approach taken by Pfizer is far more complex.

Pfizer's director resignation policy operates in three phases.[81] First, a nominee for director in an uncontested election who receives more "withheld" votes than "for" is required to submit his or her resignation to the Corporate Governance Committee of the Pfizer board.[82] Next, the Corporate Governance Committee (or some comparable committee) must consider the resignation and offer its recommendation to the full board of directors. Third, the full board must determine how to act on the tendered resignation.[83] Once a decision has been reached, the board must release its conclusion and reveal its decision-making process.[84] The director who submitted his or her resignation may not take part in the consideration of that resignation.[85] However, the nominee is considered duly elected until the full board accepts the resignation.[86]

As of November of 2006, more than 150 companies had implemented

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[80] Latham & Watkins, M&A Deal Commentary—Majority Voting for Directors Revisited, http://www.lw.com/upload/pubContent/_pdf/pub1472_1.pdf, Jan. 25, 2006, at 1 (last visited Jan. 3, 2007).

[81] Paragraph 7 of the Pfizer CGP, states: "Voting for Directors. In an uncontested election, any nominee for Director who receives a greater number of votes "withheld" from his or her election than votes "for" such election (a "Majority Withheld Vote") shall promptly tender his or her resignation following certification of the shareholder vote.

The Corporate Governance Committee shall promptly consider the resignation offer, and a range of possible responses based on the circumstances that led to the Majority Withheld Vote, if known, and make a recommendation to the Board. The Board will act on the Corporate Governance Committee's recommendation within 90 days following certification of the shareholder vote.

Thereafter, the Board will promptly disclose its decision-making process and decision regarding whether to accept the Director's resignation offer (or the reason(s) for rejecting the resignation offer, if applicable) in a Form 8-K furnished to the Securities and Exchange Commission.

Any Director who tenders his or her resignation pursuant to this provision shall not participate in the Corporate Governance Committee recommendation or Board action regarding whether to accept the resignation offer.

However, if each member of the Corporate Governance Committee received a Majority Withheld Vote at the same election, then the independent Directors who did not receive a Majority Withheld Vote shall appoint a committee amongst themselves to consider the resignation offers and recommend to the Board whether to accept them.

However, if the only Directors who did not receive a Majority Withheld Vote in the same election constitute three or fewer Directors, all Directors may participate in the action regarding whether to accept the resignation offers."

See Pfizer CGP, *supra* note 69, at 1 ¶ 7.

[82] It should be emphasized again that this three-step process only applies to uncontested elections.

[83] Pfizer CGP, *supra* note 69, at 1 ¶ 7.

[84] *Id.*

[85] *Id.* at 2.

[86] Sheppard, *supra* note 15.

policies similar to Pfizer's.[87] Those companies included Wells Fargo & Company, The Walt Disney Company, Johnson and Johnson, Circuit City, Hewlett-Packard, and Microsoft.[88] Though popular with management, the Pfizer approach has been criticized by such groups as the United Brotherhood of Carpenters and Joiners of America.[89] Critics claim that the Pfizer approach fails to actually implement a majority vote standard because the required resignation under the policy is not legally enforceable.[90] The issue of enforcing the resignations will be discussed later in this article.[91]

2. *The Intel Approach (Bylaws Amendment)*

The second well-recognized approach to majority voting was popularized by a bylaws amendment made by Intel in January 2006.[92] Under the Intel approach, each director is required to receive a "majority of the votes cast," which the bylaws explicates as meaning "the number of shares voted for a director must exceed the number of votes cast against that director."[93] A nominee running for director for the first time would not actually be elected should he or she fail to receive a majority of affirmative votes.[94] Such a person would never even get a chance to step into the board room.

However, a nominee who is already serving as director would be treated differently. Intel, like many corporations, is registered in the state of Delaware.[95] Delaware's corporate statutes require a director to continue serving on the board until there is a successor to take his or her place, as is the case in most other states.[96] Thus, Intel, similar to Pfizer, had to implement a resignation policy. The resignation and consideration process under the Intel approach is very similar to that of the Pfizer approach. The director who failed to be elected would first be required to tender his or her resignation.[97] The Corporate Governance and Nomination Committee would then make its recommendation to the board. Lastly, the board itself would decide what action to take, including whether to accept or

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[87] Profusek, *supra* note 14.

[88] *Id.*; *see also* Shepperd, *supra* note 15.

[89] Profusek, *supra* note 14.

[90] *Id.*

[91] See discussion *infra* Part IV.B.

[92] Profusek, *supra* note 14.

[93] *See* Intel Corporation Bylaws, *supra* note 69.

[94] Profusek, *supra* note 14.

[95] Intel Bylaws, *supra* note 69 at 1, art. I, §1.

[96] Profusek, *supra* note 14.

[97] Article III, § 1 of the Intel Bylaws states that: "The Corporate Governance and Nominating Committee has established procedures under which any director who is not elected shall offer to tender his or her resignation to the Board. The Corporate Governance and Nominating Committee will make a recommendation to the Board on whether to accept or reject the resignation, or whether other action should be taken. The Board will act on the Committee's recommendation and publicly disclose its decision and the rationale behind it within 90 days from the date of the certification of the election results."

Intel Bylaws, *supra* note 69 at 7, art. III, § 1.

reject the resignation.[98]

If the Pfizer approach and the Intel approach seem to be the same, it is because they very much are the same. The primary difference is not in how they function, but where they are located.[99] Under Pfizer's approach, the majority voting policy is implemented in the corporate governance principles; whereas under Intel's approach, the corporate bylaws were amended to require majority voting. Amending the bylaws generally lends more permanence and legitimacy to the corporation's adoption of majority voting, making it no surprise that the Intel approach has been praised by many shareholder activists.[100] The United Brotherhood of Carpenters and Joiners of America, which worked with Intel on the bylaws amendment, has given Intel "overwhelming public support."[101] Additionally, the Institutional Shareholder Services ("ISS") went so far as to declare Intel's amendment the "gold standard" for majority voting.[102] Not everyone is happy, though. "[T]he most outspoken stockholder activists have advocated bylaws that can be changed only with stockholder approval and under which a director who fails to receive a majority of the vote must resign immediately."[103] To those activist shareholders, a typical bylaws amendment shares the weaknesses of a corporate governance policy: it is not beyond the reach of the board, and its enforceability is questionable.

Many notable corporations, including Dell Inc., PepsiCo, Inc. and Texas Instruments, have adopted majority vote standards similar to Intel.[104] One survey taken in November of 2006 counted at least forty-five companies that have adopted bylaws amendments similar to Intel.[105] A different survey, looking at 250 companies, counted sixty-eight majority vote bylaws in addition to Intel's.[106] The same study noted that fifty-nine (or eighty-seven percent) of those companies amended their bylaws after Intel adopted majority voting in January of 2006.[107] Also like Intel, fifty-five (or eighty-one percent) of those companies accompany their majority vote bylaws with a resignation policy (either in the bylaws or as a separate policy) mandating what happens in the case of a holdover director.[108]

III. RECENT MANIFESTATIONS OF THE MAJORITY VOTE MOVEMENT

The majority vote movement has taken on many forms and is now being waged on many battlegrounds. The brunt of the battle is being fought in corporate boardrooms and on their proxies.[109] Fearful of a proxy war, some corporations

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98 *Id.*
99 Profusek, *supra* note 14.
100 *Id.*
101 Gaining Power, *supra* note 78.
102 Profusek, *supra* note 14.
103 *Id.*
104 *See* Sheppard, *supra* note 15.
105 Profusek, *supra* note 14.
106 Allen, *supra* note 18.
107 *Id.*
108 *Id.*
109 *See* discussion *infra* Part III.A.

have raised white flags without giving a fight. A second offensive in the majority vote movement has been launched in state legislatures. Both California and Delaware have recently made contributions to the movement.[110] Additionally, the American Bar Association appears to be in the final stages of revamping its Model Business Corporation Act ("MBCA").[111] On a related matter, the NYSE has voted to amend a rule that may reduce the voting power of brokers, thus possibly impacting direction elections.[112] All eyes, though, have been watching the SEC as it continues to navigate between the opposing sides of the debate.[113]

A. *Corporations*

The most direct, if not obvious, manifestation of the majority vote movement has been the recent adoption of majority voting by numerous corporations. Those corporations come in all shapes and sizes. Honeywell International Inc., the world's largest manufacturer of airplane controls, adopted a majority vote policy similar to Pfizer's in late 2006.[114] Around the same time, the PepsiCo bottler PepsiAmericas amended its bylaws following the Intel approach.[115] Several days later, Lexmark International Inc. also amended its bylaws to implement majority voting in uncontested director elections.[116] With the 2006 proxy season ending on such a strong note for majority voting, it may be an indication that 2007 will prove fruitful for the majority movement as well.

B. *California*

Maintaining the state's leadership in the protection of minority shareholder interests,[117] the California legislature recently made its contribution to the majority vote movement. On September 30, 2006,[118] the California legislature passed a new law that would allow certain listed corporations to "amend [their] articles of incorporation or bylaws to provide that, in an uncontested election, approval of the shareholders . . . shall be required to elect a director."[119]

Before January 1, 2007,[120] California Corporations Code ("CCC") section 708 required a plurality vote standard, thus apparently preventing corporations from using a majority vote standard. [121] Section 708 also gave no legal effect to

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[110] *See* discussion *infra* Parts III.B, III.C.

[111] *See* discussion *infra* Part III.D.

[112] *See* discussion *infra* Part III.E.

[113] *See infra* p. 175.

[114] Kathleen Lynn, *Honeywell to Increase Dividend by 10 Percent*, NEW JERSEY RECORD, Dec. 12, 2006, at L11, *available at* 2006 WLNR 21438074.

[115] *Addition to PepsiAmericas Board Announced*, JUST-DRINKS, Dec. 19, 2006, *available at* 2006 WLNR 22107048.

[116] Business Notes, LEXINGTON HERALD-LEADER, Dec. 21, 2006, at B7, *available at* 2006 WLNR 22277490.

[117] *See* Bishop, *supra* note 49.

[118] Profusek, *supra* note 14.

[119] CAL. CORP. CODE § 708.5(b) (2007).

[120] Profusek, *supra* note 14.

[121] Sheppard, *supra* note 15.

votes against and votes withheld.[122] Thus, before the recent amendments, California statutory law represented a double whammy to the majority vote movement. First, it required plurality vote. And second, it rendered null votes withheld or exercised against a candidate.

The amendments to the CCC not only eliminated the statutory barriers, but also went further by specifically providing for majority voting. First §708(c) was amended to provide an exception when an election fell under section 708.5.[123] Section 708.5 was then added to the code.[124] Section 708.5 essentially provides for majority voting in director elections where the following requirements have been met: 1) the corporation is a "listed corporation;"[125] 2) the corporation "has eliminated cumulative voting;" 3) the election falls under the definition of an "uncontested election;" and 4) the corporation has amended its articles of incorporation or bylaws to require that a director receive the "approval of the shareholders" in order to be elected.[126] Where all the requirements are met, but "an incumbent director fails to be elected by approval of the shareholders," that incumbent director may continue serving for a ninety day period from the date the election results are determined or until a replacement is found, whichever comes earlier.[127] The incumbent director may also choose to resign before either of the two events occurs.[128] While it is clear how these amendments to the CCC can boost the majority vote movement, it has yet to be seen how corporations will make use of section 708.5.[129] It is just too soon since the new law took effect.[130]

C. Delaware

Delaware's role in the development of corporate law is undisputed. While Delaware is generally known for being "management-friendly," the state legislature gave a tremendous boost to the majority vote movement back in June of 2006. As a response to a "growing push from institutional investors and other shareholder activist groups for a majority vote standard for the election of directors," the Delaware legislature amended two sections of the DGCL.[131] While

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[122] CAL. CORP. CODE § 708(c) (2006); *see also* Sheppard, *supra* note 15.

[123] CAL CORP. CODE §708(c) as amended reads:

> Except as provided in section 708.5, in any election of directors, the candidates receiving the highest number of affirmative votes of the shares entitled to be voted for them up to the number of directors to be elected by those shares are elected; votes against the director and votes withheld shall have no legal effect.

[124] *See* SB 1207, 2006 Leg., (Ca. 2006), *available at* http://www.corp.ca.gov/pol/leginfo/sb_1207.pdf.

[125] CAL. CORP. CODE § 705.5(a)(2) defines "Listed corporation" as "a domestic corporation that qualifies as a listed corporation under subdivision (d) of Section 301.5."

[126] CAL. CORP. CODE § 705.5(b).

[127] CAL. CORP. CODE § 708.5(c). *Cf. infra* discussion *infra* III.D.

[128] *See* CAL. CORP. CODE § 708.5(c).

[129] Profusek, *supra* note 14.

[130] *Id.*

[131] Bass, Berry & Sims PLC, *Delaware Approves Majority Vote Amendments to the Delaware General Corporation Law*, July 13, 2006, http://www.bassberry.com/files/Publication/9539400a-c5af-4e82-8c89-0a004169647e/Presentation/PublicationAttachment/c1fb0deb-935b-488d-ba7a-0b93d210d9f9/C&S%20Alert%20July%2013,%202006.pdf, at 1 (hereinafter "Bass").

neither amendment mandated majority voting in uncontested director elections, the amendments provide two key tools which could help corporations implement a majority vote standard.[132]

The first crucial amendment addressed the issue of a director who refuses to resign.[133] It was "far from clear" whether a corporation could enforce a resignation agreement against a director who claimed that "his or her fiduciary duties (or perhaps other reasons) required the director to refuse to resign."[134] To address this issue, section 141(b) of the DGCL was amended to permit directors to form "irrevocable" agreements that they will resign should they fail "to receive a specified vote for reelection."[135] This means that a corporation could require its directors, before an election, to enter into such an "irrevocable" agreement and then enforce that agreement (with the state of Delaware's blessing) should the director fail to receive the requisite vote. It should be emphasized that the amendment to §141(b) neither mandates majority voting nor requires irrevocable resignation agreements.[136]

Section 141(b) wasn't the only section of the DGCL amended in 2006 to instigate majority voting. The Delaware legislature also amended section 216 by adding: "A bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors."[137] Thus, the statute prohibits the board of directors of a corporation from unilaterally modifying or eliminating a bylaw that the shareholders amended to specify the amount of votes required to become elected as a director.[138] Section 216 was amended to "address concerns expressed by institutional investors that, even if they proposed and adopted a bylaw requiring majority voting . . . , the Board of Directors simply could amend the newly-adopted bylaw to restore plurality voting."[139] Like the amendment to section 141(b), the amendment to section 216 was not intended to require majority voting. As amended, section 216 should equally protect shareholder-approved amendments to the bylaws, whether they specify majority voting or plurality voting.

Because the amendments to section 141(b) and section 216 just took effect

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[132] Howard Rice Nemerovski Canady Falk & Rabkin, *Delaware Adopts Provisions to Accommodate Majority Voting Standard for Directors*, June 29, 2006, http://www.howardrice.com/uploads/content/AlertDelawareVoting0606.htm (hereinafter "Howard Rice"); *see also* Bass, *supra* note 131, at 1.

[133] As part of the June amendment, the following two sentences were added to §141(b) of the DGCL: "A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable."

[134] Michael B. Tumas, John F. Grossbaur, & Roxanne L. Houtman, *Delaware Addresses Majority Voting: The 2006 Amendments to the General Corporation Law*, Aug. 3, 2006, http://www.hg.org/articles/article_1518.html.

[135] DEL. CODE ANN. tit. 8, § 141(b) (2007). *See also* Howard Rice, *supra* note 126; Tumas, *supra* note 134.

[136] Howard Rice, *supra* note 132.

[137] DEL. CODE ANN. tit. 8 §216 (2006).

[138] *See* Howard Rice, *supra* note 132.

[139] Tumas, *supra* note 134.

on August 1, 2006,[140] their full impact on the majority vote movement remains to be seen. "The new Delaware provisions should make it easier to implement mandatory resignation provisions since directors could be asked to execute irrevocable agreements in advance, including as a requirement for initially being nominated to the board."[141] Thus, Delaware corporations that have not jumped aboard the majority vote bandwagon will likely face continued, if not increased, pressure to adopt some form of majority voting.[142] Despite the boost to the majority vote movement, not all activist shareholders are expected to be happy. Activist shareholders who had hoped that majority voting would become mandated for uncontested director elections might still be dissatisfied with the DGCL.[143] However, the amendments to §141 and §216 were "consistent with the [DGCL's] enabling approach, as they facilitate the adoption of corporate bylaws and policies imposing a specific voting standard for director elections and providing corporations with a means to enforce such policies."[144] Thus, even though a board of directors is not required to, it could garner favor with shareholders by adopting majority vote provisions that utilize the DGCL's recent amendments.[145]

Some corporations have already adopted majority vote provisions to make use of the amended DGCL. This "new generation of provisions" first made its appearance in September of 2006,[146] a month after the DGCL amendments took effect. In October of 2006, General Motors Corporation announced that it too had amended its bylaws to "require director nominees to submit irrevocable resignations as a condition to being nominated."[147] GMC's bylaws provide that the irrevocability of the resignation be contingent upon not one, but two events.[148] Those two events are: 1) the nominee failing to receive a majority of the votes cast, and (2) the board properly accepting the resignation.[149] GMC's new bylaws are an impressive application of DGCL §141(b), which allows the resignation to be made dependent upon the "happening of an event or *events*."[150]

Additionally, GMC's new bylaws exemplify how a corporation can grant shareholders majority voting and yet still maintain significant control over the outcome. To let the otherwise defeated nominee remain as a director, the GMC board must merely conclude it would be "in the best interests of the Corporation."[151] And even if the board decided to accept the nominee's

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[140] Howard Rice, *supra* note 132.

[141] *Id.*

[142] *See* Bass, *supra* note 131, at 2; Stinson, *supra* note 20.

[143] Howard Rice, *supra* note 132; *see also* Tumas, *supra* note 134 (claiming "institutional stockholders have called for the replacement of the default plurality vote standard with a majority vote default rule").

[144] Tumas, *supra* note 134.

[145] *See* Howard Rice, *supra* note 132.

[146] Allen, *supra* note 18.

[147] *GM Board Amends Bylaws and Corporate Governance Policies*, Oct. 3, 2006, http://media.gm.com/servlet/GatewayServlet?target=http://image.emerald.gm.com/gmnews/viewmonthlyreleasedetail.do?domain=74&docid=29405.

[148] GMC Bylaws, *supra* note 72, at §2.2(d)(i).

[149] *Id.*

[150] GMC Bylaws, *supra* note 72, at §2.2(f) (emphasis added).

[151] GMC Bylaws, *supra* note 72, at §2.2(d)(iii).

resignation, the bylaws provide that GMC's board would fill the vacancy.[152] Thus, GMC's new bylaws demonstrate that even though Delaware may have eliminated some issues regarding holdover directors, a corporation still can have tremendous influence over the results of an election.

D. *MBCA*[153]

Among the most persuasive entities of corporate law is the American Bar Association ("ABA"). The ABA is responsible for the Model Business Corporation Act ("MBCA"), which serves as a template for state legislatures to adopt.[154] In a discussion paper dated June 22, 2005, the Committee on Corporate Laws of the Section of Business Law (hereinafter "CL Committee") "posed certain issues and approaches to be considered in its study of possible amendments to the [MBCA]."[155] The "certain issues and approaches" specifically concerned the MBCA's default standard of plurality voting.[156] MBCA section 7.28(a) currently states, "[u]nless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast."[157]

Even though the MBCA provided the exception for majority voting if it was stipulated in the articles of incorporation, the CL Committee was feeling pressure to change. E. Norman Veasey, chairman of the committee, stated that "[w]e felt that we were the most objective and experienced group to take a careful look into the history of plurality voting, the options for changing it, and, to the extent we can see them, the unintended consequences of making the changes."[158] The chairman, himself, might have especially felt compelled to confront the issue. Having been chief justice of the Delaware Supreme Court, Veasey was likely aware of the effort in Delaware to reform the DGCL.[159]

The discussion paper presented three possible "approaches" to amending the default rule.[160] The first approach offered to outright replace the default plurality vote standard with a majority vote standard.[161] The second approach was to maintain plurality voting for directors, but specify a "minimum" plurality that

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[152] GMC Bylaws, *supra* note 72, at §2.2(e) & (g).

[153] Stinson, *supra* note 20.

[154] The MBCA is not legally binding per se, but it would become the law should it be enacted as a statute by a state legislature. *See* MODEL BUS. CORP. ACT §1.02 (2002), *available at* http://www.abanet.org/buslaw/library/onlinepublications/mbca2002.pdf.

[155] American Bar Association, *Corporate Laws Committee Releases Preliminary Report on Director Voting*, Jan. 17, 2006, http://www.abanet.org/buslaw/committees/CL270000pub/directorvoting/20060117000000.pdf, at 1 (hereinafter "ABA I").

[156] *Id.* at 2.

[157] MODEL BUS. CORP. ACT §7.28(a).

[158] Geri L. Dreiling, *Power to the Shareholders: ABA Panel Would Give Corporations More Flexibility to Change Director Elections*, A.B.A. J. E-REPORT, Mar. 10, 2006, *available at* 5 No. 10 ABAJEREP 4 (Westlaw).

[159] *Id.*

[160] ABA Report, *supra* note 23, at 11.

[161] *Id.* at 11-12.

would have to be received by a director candidate in order to become elected.[162] The third approach presented in the discussion paper was to "retain the current plurality vote default rule but specifically authorize against votes with consequences where a director receives a plurality vote but more votes against than for election."[163] Each approach would have only applied to uncontested elections.[164]

On January 17, 2006, the committee issued its preliminary report on "Voting by Shareholders for the Election of Directors."[165] The preliminary report recognized the complexities of switching to majority vote as a default.[166] On March 13, 2006, the committee published the "Report of the Committee on Corporate Laws on Voting by Shareholders for the Election of Directors" (hereinafter "ABA Report").[167] In the ABA Report, the committee stated that it "decided that it [was] not advisable to alter the existing plurality default rule."[168] The committee stated that it "was ultimately persuaded that the potential negative consequences of failed elections, combined with the uncertainty of applying an untested voting standard as the default rule for public corporations, warrants the retention of the plurality voting rule."[169] Thus, the committee chose not to propose any of the three approaches highlighted in the Discussion Paper.[170] Instead, it proposed a completely different approach, one consistent with the principles of flexibility and enablement.[171]

The approach proposed in the ABA Report was really two-fold. First, a new section, section 10.22, would be added to the MBCA. Section 10.22 would "allow shareholders to opt into an election system" already supplied by the MBCA by placing pre-manufactured language into the corporation's bylaws.[172] Second, if the board and shareholders wished to adopt an alternative election system, then they could do so by placing an amendment in the articles of incorporation.[173] If a company goes the route of a bylaw amendment, shareholders may vote "for" or "against" a candidate, or even abstain.[174] Where a candidate wins a plurality of the vote but receives more votes "against" than "for," he or she may sit on the board for the earlier of "90 days from the date on which the voting results are determined" or until a replacement is chosen by the board.[175] However, no matter

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[162] *Id.* at 12.

[163] *Id.*

[164] *Id.* at 13 (the actual language used in the Report was "non-contested").

[165] ABA I, *supra* note 155, at 1.

[166] *Id.* at 1-2.

[167] ABA Report, *supra* note 23, at front page (unnumbered).

[168] *Id.* at 13.

[169] *Id.* at 13-14.

[170] *Id.* at 14.

[171] *See id.* at 19.

[172] *See id.* at 25; *see also* Akin, Gump, Straus, Haur & Feld, LLP, *Hot Topic for 2006 Proxy Season: Majority Voting in Director Elections*, Jan. 27, 2006, http://www.akingump.com/docs/publication/839.pdf, at 3 (hereinafter "Akin Gump").

[173] *See* ABA Report, *supra* note 23, at 24.

[174] Akin Gump, *supra* note 172, at 3; *see also* ABA Report, *supra* note 23, at A-4.

[175] ABA Report, *supra* note 23, at A-5; *see also* Akin Gump, *supra* note 172, at 3.

what, a director who fails to receive more "for" than "against" votes may not sit on the board beyond the ninety-day period.[176] Should the ninety-day period expire, the board may either replace the director or reduce the board's size.[177] The committee recognized the amendments as a "limited modification" to the MBCA's holdover rule.[178]

The ABA Report's proposal marked a significant change in attitude as to contested elections. The original discussion paper specified that the three approaches considered would apply only to "non-contested" elections. However, the committee stated in its later report that the proposed amendments, specifically section 10.22, would apply to both contested and uncontested elections.[179] The committee explained that "the 'failed election' consequences for some corporations and other concerns make it unwise to propose a universally applicable change in the statutory plurality default rule."[180] Thus, perhaps in a concession to appease as many groups as possible, the committee essentially said that it would not prevent its proposed rules from applying to contested elections, but it expects that to be a factor that is weighed by companies considering a majority vote standard.

The MBCA is the bedrock of corporate law for many states.[181] Should the proposed changes to the MBCA become adopted, the new rules "would apply universally to all corporations governed by the [MBCA's] provisions where those corporations have not opted out of the plurality default rule in their articles of incorporation."[182] However, the amendments currently "do not impose any mandatory requirements on public companies."[183] They nonetheless have given a boost to the majority vote movement.[184]

E. *NYSE Broker Vote Rule*

The New York Stock Exchange has recently taken action that could significantly impact director elections and perhaps the majority vote movement. As alluded to earlier, the votes of stock brokers had a significant impact on the Disney director elections in 2004. While "45% of the votes were cast against, or 'withheld' from," Michael Eisner, "hundreds of millions of shares cast *for* Mr. Eisner were voted on behalf of stockholders who never returned their broker-supplied proxies querying how they wanted to vote."[185] In other words, had those

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[176] ABA Report, *supra* note 23, at A-5.

[177] Akin Gump, *supra* note 172, at 3.

[178] ABA Report, *supra* note 23, at 32. The holdover rule may be found in the MBCA at § 8.05(e).

[179] *Id.* at 13 (the committee noted that "the concept of a 'contested election' would require an exceedingly complex definition" and that any exclusion would ultimately be "unnecessary"); *see also id.* at 31.

[180] ABA Report, *supra* note 23, at 2.

[181] Profusek, *supra* note 14.

[182] ABA Report, *supra* note 23, at 2.

[183] Profusek, *supra* note 14.

[184] *Id.*

[185] Phyllis Plitch, *NYSE Studies Ending 'Broker Votes': Possible Rule Change Aims to Give Individual Investors More Say in Board Elections*, WALL ST. J., June 9, 2006, at C3 (hereinafter "Plitch").

votes from stockbrokers been counted, Eisner would have failed to receive a majority of votes in his favor.[186] After subtracting the broker directed vote, fifty-five percent of shareholders withheld their vote from Eisner.[187] Disney of course did not have a majority vote standard at the time, so he would have prevailed anyways. However, the Disney 2004 election demonstrates how the stockbroker vote may determine the outcome of a director election if the corporation applies a majority vote standard.

The average investor might be shocked to learn that when he or she purchases stock in a company, the actual stock certificates stay with someone else.[188] Most stocks are actually physically retained by stock brokers or banks in "street name" on behalf of the individual investors.[189] NYSE Rule 452[190] permits brokers to vote with shares held in street name on certain "routine" matters if the brokers do not receive voting instructions from individual shareholders at least 10 days before the meeting at which the issue would be considered.[191] As it turns out, director nominations are generally considered a "routine" matter.[192] Thus under the NYSE "broker vote rule," banks and brokers can participate in director elections if the actual shareholders fail to cast their vote. That would be similar to letting the Electoral College chose the next President of the United States if the American citizens fail to vote. But to make matters worst (at least in the eyes of activist shareholders), brokers "have historically voted in favor of the board's director nominees."[193]

The NYSE convened a special committee to review NYSE Rule 452. On October 24, 2006, the NYSE approved amending Rule 452 "to eliminate broker discretionary voting on the election of directors."[194] The proposed amendment

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[186] *See id.*

[187] William Baue, *Disney Vote and California Bill May Affect SEC Shareowner Director Nomination Rule*, Mar. 10, 2004, http://www.socialfunds.com/news/article.cgi/article1363.html.

[188] *See* Plitch, *supra* note 185.

[189] *Id.*

[190] *See* NYSE, Inc., NYSE Rule 452 (2008), *available at* http://rules.nyse.com/nysetools/Exchangeviewer.asp?SelectedNode=chp_1_5&manual=/nyse/nyse_rules/nyse-rules/. (Hereinafter referred to as the "broker vote rule"). NYSE Rule 452 reads in part: "A member organization shall give or authorize the giving of a proxy for stock registered in its name, or in the name of its nominee, at the direction of the beneficial owner. If the stock is not in the control or possession of the member organization, satisfactory proof of the beneficial ownership as of the record date may be required."

The rule continues: "A member organization which has transmitted proxy soliciting material to the beneficial owner of stock . . . and which has not received instructions from the beneficial owner . . . by the date specified in the statement accompanying such material, may give or authorize the giving of a proxy to voted such stock, provided the person in the member organization giving or authorizing the giving of the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any other matter which may affect substantially the rights or privileges of such stock."

[191] *Voting for Directors is Changed*, WALL ST. J., Oct. 25, 2006, at C3 (hereinafter "Voting is Changed"); *see also* Plitch, *supra* note 185.

[192] *Voting is Changed, supra* note 191; *see also* Plitch, *supra* note 185.

[193] Akin Gump, *supra* note 172, at 3.

[194] Press Release: NYSE Adopts Proxy Working Group Recommendation to Eliminate Broker Voting in 2008, http://www.nyse.com/press/1161166307645.html (hereinafter "NYSE Press Release").

was then filed with the SEC where it now awaits final approval before it can take effect.[195] The NYSE hoped the amendment could take effect for the 2008 proxy season.[196] However, if the SEC delays in approving the rule, it might not be in effect until after the 2008 proxy season.

While activist shareholders might be celebrating the demise of the broker vote rule, there are sound reasons for keeping it. Some people warn that the elimination of the broker vote rule could "leav[e] directors more exposed to the will of shareholders."[197] And while that may very well be the goal of some activist shareholders, it could significantly affect the average investor whose interests are separate, and sometimes contrary to, those of the activist shareholders. Should the board become vulnerable to the whim of special interests, the silent (and likely unsophisticated) majority may find itself in a worse position than had plurality voting and the broker vote rule been maintained. By itself, the vulnerability to special interests may not be reason enough to maintain the broker vote rule, but there are other such reasons.

Some corporate bylaws have strict quorum requirements which state that if insufficient shares are represented at the meeting, any shareholder vote would be considered invalid.[198] Supposedly, many individual shareholders fail to submit instructions to their brokers.[199] Perhaps many of them do not even open the envelopes they receive from their brokers.[200] Corporations of diluted ownership could thus face a serious challenge in getting enough shares present at a meeting if brokers can no longer step in and fill the gap.

So what does this have to do with majority voting? Even assuming that a corporation has enough shares voting at the meeting to satisfy quorum requirements, the corporation may still struggle to get a sufficient number of votes. This situation could arise where the majority voting standard for directors requires candidates to receive "for" votes amounting to a majority of shares outstanding. In such a situation, if fifty percent of the shares were voting at the election, the candidates would have to receive a one hundred percent affirmative vote. If holdover rules or other safety measures do not kick in, that corporation would likely be left without a board and thus face all the consequences thereof. For this reason, corporations should at least avoid adopting a majority vote standard that would require a director candidate to receive an affirmative vote equal to a majority of the shares *outstanding*.

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[195] Richard P. Swanson & Darlene F. Routh, *Shareholders Ready for Battle: Second Circuit Ruling, along with Other Changes, Portends a Wave of Proxy Fights*, 236 N.Y.L.J. 9, *available on Westlaw at* 11/20/2006 N.Y.L.J. 9; *see also Voting is Changed*, *supra* note 191; *and* NYSE Press Release, *supra* note 194.

[196] NYSE Press Release, *supra* note 194; *see also Voting is Changed*, *supra* note 191;

[197] *See Voting is Changed*, *supra* note 191.

[198] *See e.g.*, Intel Bylaws, *supra* note 69 at 3, art. II §5 (requiring the presence of at least a majority of shares outstanding entitled to vote), GMC Bylaws, *supra* note 72, at 3, art. 1, §§ 1.5, 1.9 (requiring the presence of at least one-third of the shares outstanding entitled to vote, though it is unclear whether votes taken in the absence of a quorum would be valid).

[199] *See generally* Plitch, *supra* note 185.

[200] *See id.*

F. Shareholder Activists

The actions and policies of the shareholder activists is worthy of a paper in itself, thus not much discussion will be spent directly on shareholder activists. However, the actions of shareholder activists have indirectly been covered by discussing the other manifestations of the majority vote movement. Many of those changes were brought about by the hard efforts of shareholder activists. The California amendments to the CCC were largely the work of CalPERS and CalSTRS.[201] The United Brotherhood of Carpenters and Joiners of America worked with Intel to craft Intel's bylaws amendment.[202] Numerous shareholder activist groups submitted their comments to the ABA when it was considering the amendments to the MBCA.[203] While the examples cited above are just the tip of the iceberg, it would be beyond the scope of this article to go more in-depth.

IV. SPECIAL ISSUES IMPLICATING MAJORITY VOTING

Majority voting does not involve a simple tweak of the system. Numerous issues may arise following the implementation of majority voting which could threaten the well-being of a corporation. The company might risk breaching pre-existing contracts or delistment from a stock exchange should there be a failed election. A fierce legal battle might erupt should a director choose to hold-over. Additionally, special securities laws may come into play when a corporation refuses to open its proxy statement to shareholder proposals. This article will address each scenario respectively below.

A. Failed Elections

Perhaps the issue that arises most from the implementation of majority voting is that of the failed election. "A failed election occurs when one or more directors are not seated on the board for any reason, including the failure to receive the requisite vote."[204] The consequences that can arise from a failed election are vast. The company could be found in material breach of a contract.[205] A change-of-control provision in any number of agreements could be triggered.[206] Further, the corporation could face becoming delisted from a stock exchange.[207]

B. Required Resignation & Holdover Directors

A related, though different, issue is the holdover director. The situation occurs when, following a failed election, the incumbent director refuses to resign

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[201] *See* Profusek, *supra* note 14 at 3.

[202] Gaining Power, *supra* note 78.

[203] ABA Report, *supra* note 23, at 2.

[204] Profusek, *supra* note 14.

[205] *Id.*

[206] *Id.*

[207] *Id.*

despite being required to do so by the majority vote provision.[208] Some states have statutes that require director resignations to be voluntary rather than compelled.[209] "Section 301(b) of [California's] Corporations Code provides that a director continues to hold office until a successor is elected and qualified. This means that if a nominee is a sitting director, he or she will continue as a director notwithstanding the fact that she was not elected."[210] Similarly, Delaware's holdover rule, DGCL §141, states that a "director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal."[211] Should that director fail to remain on the board until a successor is found, he or she could be liable for breaching the fiduciary duty owed to the corporation.[212]

The holdover rule represents a serious hurdle for activist shareholders and the majority vote movement. If shareholders are successful at withholding their votes from an incumbent director and the director fails to receive an affirmative majority vote, the holdover rule will kick in and the director will keep his or her seat. If shareholders manage to run a candidate against an incumbent director and the shareholder's candidate receives more votes but fails to receive a majority of votes, the holdover rule will likewise take effect.[213] In holdover rule jurisdictions, it thus will be nearly impossible for shareholders to claim real victory. In order to replace an unpopular director, the shareholders would essentially have to run their own candidate and make sure that the candidate receives a majority of the vote. But keep in mind that nearly every majority vote provision adopted by a corporation applies only to uncontested elections.

C. Rule 14a—8

Special issues under the federal securities laws arise when shareholders attempt to propose a majority vote standard via their corporation's proxy statement. While shareholders may distribute their own proxy statements, they generally strive to get their proposals placed on the corporation's proxy statement so that the corporation will bear the cost. Thanks to the SEC's Rule 14a—8, though, corporations are not obliged to accept every proposal they receive. Entitled "Shareholder Proposals," Rule 14a—8 "addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."[214]

Rule 14a—8 sets forth several roadblocks that a shareholder must overcome

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[208] *Id.*

[209] *Id.*

[210] Bishop, *supra* note 49.

[211] DEL. CODE ANN. tit. 8, § 141(b) (2006). *See also* Akin Gump, *supra* note 172, at 3.

[212] Profusek, *supra* note 14.

[213] *See* CII, Effects of Contested Elections and Cumulative Voting on Companies Electing Directors by Majority Vote, http://www.cii.org/majority/pdf/Ed%20Durkin's%20Responses%20to%20Majority%20Voting%20Questions.pdf (last visited Jan. 1, 2008).

[214] *Id.*

before he or she can force a corporation to put his or her proposal on its proxy statement. First, the shareholder must be personally eligible to submit a proposal.[215] Second, that shareholder "may submit no more than one proposal to a company for a particular shareholders' meeting."[216] Third, the proposal cannot exceed 500 words in length.[217] Fourth, the shareholder must satisfy the deadline for submitting a proposal.[218] The failure to meet just one of these requirements could entitle the corporation (by means of the board) to exclude the proposal from its proxy statement.[219] Assuming that all the eligibility and procedural requirements have been satisfied, the corporation may still exclude the proposal if it falls under one of thirteen categories enumerated in Rule 14a—8.[220]

Like any other shareholder proposal, a shareholder proposal to adopt a majority voting standard could fall under the domain of Rule 14a—8 when the shareholder hopes to include it on the corporation's proxy. Corporations looking to keep such proposals off their proxies have generally turned to two regulation-supplied justifications for exclusion. The first justification is found under 14a—8(i)(9), which states that the board may exclude a shareholder proposal if it "directly conflicts with one of the company's own proposals" being submitted at the same shareholder meeting.[221] Thus a company that has yet to implement a majority vote policy may offer its own proposal and claim that it "directly conflicts" with the shareholder's proposal.[222] Where there actually is a direct conflict between the two proposals, the board's proposal would then become mutually exclusive of the other under 14a—8.[223] On the other hand, a corporation whose board has already implemented majority voting for directors in some form would have to rely on a different basis for exclusion. Such corporations have often turned to subrule (i)(10), which allows the exclusion of a shareholder proposal from the corporation's proxy "[i]f the company has already substantially implemented the proposal[.]" Of course, in such a situation, the key issue will be whether the shareholder's proposal has already been "substantially implemented."

The SEC has given little guidance as to what "directly conflicts" and "substantial implemented" mean in the context of majority vote proposals.[224] However, in a denial of no-action relief to Hewlett-Packard ("HP"), the SEC has shed some light onto what is required for substantial implementation. HP was faced with a proposal from the United Brotherhood of Carpenters Pension Fund to implement a majority vote standard for director elections.[225] The proposal

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[215] 17 C.F.R. § 240.14a-8(b) (2007).

[216] § 240.14a-8(c).

[217] § 240.14a-8(d).

[218] § 240.14a-8(e).

[219] 17 C.F.R § 240.14a-8(f)(1) (2007).

[220] *See generally* § 240.14a-8(i).

[221] § 240.14a-8(i)(9).

[222] Latham & Watkins, *supra* note 80, at 1.

[223] *Id.*

[224] *Id.* at 3.

[225] David B.H. Martin & Keir D. Gumbs, *SEC Rejects Company's Argument that Majority Voting Policy Substantially Implements Majority Vote Shareholder Proposal*, CORPORATE COUNSEL WEEKLY, Jan. 18, 2006, *available at* http://www.cov.com/files/Publication/4a3be7ed-054a-4112-a3a1-

specifically requested HP's board to "'initiate the appropriate process' to amend [HP's] governance documents to provide that director nominees be elected by the affirmative vote of the majority of votes cast."[226] Unwilling to cave in, HP considered excluding the pension fund's proposal under Rule 14a—8(i)(10) and turned to the SEC for confirmation.[227] HP queried the SEC staff as to whether it would take no-enforcement action against HP should the company proceed under 14a—8(i)(10).[228] HP argued that its majority voting policy already in place was sufficient grounds to find substantial implementation of the pension fund's proposal.[229] However, "[t]he SEC staff rejected Hewlett-Packard's arguments and denied no-action relief."[230] The SEC staff did not provide their grounds for rejecting HP's no-action request.[231] Some experts interpret the staff's decision to mean that "location matters."[232] HP's original majority vote standard was implemented in a corporate governance policy. However, the pension fund's proposal was calling for an amendment to the company's corporate documents (such as bylaws or articles of incorporation).[233] Implementation in the bylaws or articles of incorporation "affords the principle of majority vote elections more formality and standing under state law than may attend a voluntary board policy adopted by discrete resolution."[234] No-action responses by the SEC staff on other matters additionally support the notion that "location matters."[235] So, the lesson to be learned: a majority voting standard implemented in a corporate governance policy might not be enough to ward off under Rule 14a—8(i)(10) a shareholder's proposal to implement majority voting in the corporate bylaws or articles of incorporation.

One basis under 14a—8 for excluding shareholder proposals facially seems applicable to majority vote proposals. However, such is not the case. Rule 14a—8(i)(8) allows a corporation to exclude a shareholder proposal if it "relates to an election for membership on the company's board of directors."[236] Given this vague language, it would seem that a board could exclude any shareholder proposal dealing with director elections, including those proposing to alter the election process for future elections.[237] However, the history of the regulation, and a 1976 SEC interpretation, indicates that Rule 14a—8(i)(8) was originally intended

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c9d3f48f7915/Presentation/PublicationAttachment/ddc8738a-b2dd-4f86-939a-d5891fd33660/oid13698.pdf (hereinafter "Martin").

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *See id.*

[230] Martin, *supra* note 225.

[231] *Id.*

[232] *Id.*

[233] *See id.*

[234] *Id.*

[235] Martin, *supra* note 225.

[236] 17 C.F.R. § 240.14a-8(i)(8) (2007).

[237] At least one court has appeared reluctant to interpret the word "an" as restricting 14a-8 to just shareholder proposals dealing with a specific election. *See Am. Fed'n of State, County & Mun. Employees Pension Plan v. Am. Int'l Group*, 462 F.3d 121, 125-26 (2d Cir. 2006). *See also* Swanson, *supra* note 195.

to exclude only proposals that "would result in an immediate election contest."[238] Thus under the old interpretation, only "specific shareholder nominations for specific board seats" could be excluded under 14a—8(i)(8).[239] As of the 1990s, the SEC began taking a more liberal approach to the rule, "permit[ing] the exclusion not only of specific board nominees, but also proposals concerning the method of nomination of directors, or the conduct of shareholder meetings and election contests."[240] Federation of State, County and Municipal Employees (hereinafter "FSCME"), along with other pension funds and institutional investors, submitted a proposal for Disney's 2005 annual meeting, which if approved would have allowed shareholders to put their own slate of director nominees on the company's proxy.[241] Consistent with its modern interpretation, the SEC granted Disney a no-action letter, thus allowing Disney to exclude the proposal under 14a—8(i)(8).[242]

Despite the SEC's modern stance, the FSCME later persuaded the Second Circuit of the United States Court of Appeals to roll back the clock on 14a—8(i)(8).[243] In *American Federation of State, County & Municipal Employees Pension Plan v. American International Group*, the Second Circuit held that a company could not exclude under 14a—8(i)(8) a shareholder proposal to open the corporation's proxy to director nominations by shareholders.[244] While ironically implying that it was deferring to the interpretation of the SEC, the court chose to go with the 1976 SEC interpretation, rather than the commission's modern approach.[245] The SEC was scheduled to consider 14a—8(i)(8) and the Second Circuit's decision on December 13, of 2006.[246] While *American Federation* dealt with proxy access for director nominations, it likely could have implications for the majority vote movement.[247] Especially for the short term, 14a—8(i)(8) does not seem to be a viable basis to exclude majority vote proposals.

While the Second Circuit seems eager to open up the corporate proxy, some people are warning against it. Those opposed warn that an open proxy could allow public companies to become "hijacked" by special interests (such as unions and environmentalists) whose interests are incongruent with the typical shareholder.[248] Such concerns are attributed to defeating the SEC's stab at opening the corporate

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[238] *Am. Fed'n*, 462 F.3d at 127; *see also infra*. note 276 at 156.

[239] Swanson, *supra* note 195.

[240] *Id.*

[241] Bruce Orwall & Deborah Solomon, *SEC Says Disney Can Exclude Shareholder Resolution After All*, WALL ST. J., Dec. 29, 2004, at B1, *available at* http://online.wsj.com/article/ SB110427868779811557.html.

[242] *See* The Walt Disney Company, SEC No-Action Letter (Dec. 28, 2004), *available on* LexisNexis *at* 2004 SEC No-Act. Lexis 909.

[243] *Am. Fed'n*, 162 F.3d at 123; *see also* Swanson, *supra* note 195.

[244] Swanson, *supra* note 195.

[245] *Am. Fed'n*, 162 F.3d at 130-31; Swanson, *supra* note 195.

[246] Swanson, *supra* note 195.

[247] *See generally id.*

[248] Jeremy Grant & Francesco Guerrera, *SEC to Tackle Majority Voting Issue*, FIN. T., Jan. 23, 2007), *available on Westlaw* at 2007 WLNR 1419553.

proxy back in 2005.[249] Given the increasing aggressive tactics of hedge funds and other activist shareholders, some say the argument to keep proxies closed is even stronger.[250] Due to the reluctance of corporations, the SEC and lawmakers to expand proxy access, activist shareholders have turned to other techniques, especially majority voting. Thus, it is no coincidence that the SEC's decision to not expand proxy accessibility shortly preceded the majority vote movement.

V. TRENDS & PREDICTIONS

Ever since the Disney debacle in 2004, there has been a clear trend toward majority voting. According to one study, in 2005, seventy-nine "majority vote" proposals were filed by shareholders.[251] That number rose to 150 the following year.[252] Thus, as of 2006, more than a quarter of the companies in the S&P 500 have a majority voting policy in one form or another.[253] A similar study, published in October of 2006, showed that about thirty-six percent of S&P 500 companies and thirty-one percent of Fortune 500 companies have implemented some form of majority voting for directors.[254] Just seven and a half months earlier, only sixteen percent of the S&P 500 companies had adopted majority voting—meaning the number more than doubled in less than a year.[255] "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."[256] And these numbers do not take into account the flurry of majority voting proposals and policies approved in just December of 2006.

One study shows that a "clear majority of companies" have adopted majority voting through policies rather than amendments to bylaws or articles of incorporation.[257] However, since the publication of that study, "the relative percentage of companies adopting polices has continued to decline, while the percentage of companies adopting majority vote bylaws has increased."[258] Recent statutory changes may additionally lead to a rise in bylaws amendments compared to policies. With the warm reaction Intel received following the amendment to its bylaws, other companies are likely to follow suit. For some companies, it may be worth while to fall under the good graces of activist shareholders, and institutional investors in general. Stocks can be made more attractive to shareholders by increasing corporate democracy, which to them "translates into improved

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[249] *See id.*

[250] *Id.*

[251] Majority Voting Debate and Hedge Fund Activists Dominate 2005 Proxy Season; Proxy Expert Georgeson Publishes Findings in Its 18th Annual Corporate Governance Review, BUS. WIRE, Dec. 8, 2005, http://www.findarticles.com/p/articles/mi_m0EIN/is_2005_Dec_8/ai_n15925310.

[252] Profusek, *supra* note 14.

[253] *Id.*

[254] Allen, *supra* note 18.

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

shareholder value."[259]

Lawmakers and other rule-making authorities appear to be trending toward support of the movement. In 2006, California lawmakers adopted the California Corporate Code to allow certain bylaws amendments implementing majority voting for directors. In the same year, the Delaware General Corporation Law was also amended to help companies adopt majority voting. Additionally, an ABA committee issued its final report on how to amend the Model Business Corporation Law to support to majority voting.[260] The states of California and Delaware and the ABA represent three persuasive bodies in terms of corporate law. Nearly simultaneously, they all removed hurdles impeding the advance of the majority vote movement.

In the preview of their aims for 2007, institutional investors and other activist investors have indicated that they are not through with pushing for majority voting. The ISS, according to its policy for the 2007 proxy season, "will recommend that shareholders vote for both precatory [(i.e., nonbinding)] and binding resolutions requesting that a board amend the company's bylaws to state that directors must be elected by a majority of votes cast."[261] This marks a significant change in policy: last year the ISS showed unwillingness to support a majority vote proposal if the targeted company already had adopted a corporate governance principle on the issue.[262]

Majority voting is really just one facet of a larger shift of power in favor of shareholders. Institutional investors, for example, have been coming to boards of publicly-traded companies with "wish lists" of corporate governance reforms.[263] In addition to director elections, these "requests" have touched on ""'executive compensation and shareholder approval requirements.[264] Moreover, some activist shareholders have been pushing for amendments to allow shareholders to remove directors without cause by nothing more than a simple majority vote.[265] Some people have branded this a "recall provision" because "at any time after an election, shareholders would have the power to undo the results."[266] Such provisions are criticized as being "unnecessarily intrusive," disruptive to the functioning of the board and undesirable because they create uncertainty.[267] However, if the trend continues to declassify boards and put directors up for election annual, the effectiveness—and likely the demand for—recall provisions will subside.[268]

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[259] Les Greenberg, *'Corporate Democracy' Ultimately Means Improved Shareholder Value*, WALL ST. J., Jan. 4, 2007, at B4, *available at* http://online.wsj.com/article/SB116787567292266664.html.

[260] Profusek, *supra* note 14.

[261] David A. Katz & Laura A. McIntosh, *Institutional Investors Ready Proxy Season 'Wish Lists'*, 236 N.Y.L.J. 5 (2006), *available on* Westlaw *at* 11/30/2006 N.Y.L.J. 5 (hereinafter "McIntosh").

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] McIntosh, *supra* note 261.

[267] *Id.*

[268] *See id.*

VI. CONCLUSION

Whether majority voting is just the flavor of the month or the rallying cry of a long lasting movement remains to be seen. However, there is no doubt that accomplishments of the majority vote movement, within such a short amount of time, have been breathtaking. However, there are two main concerns regarding the movement. First, what are its implications for corporate democracy in general? And, on a somewhat related matter, what will be the unforeseen consequences of this movement?

Since the Dot Com bust and the fall of Enron, shareholders have begun to ask questions of what corporate democracy means, and how they can be more involved in the affairs of the company.[269] While there may be some justification to shifting some power to the hands of shareholders, it should only be done with caution and restraint. As stated in the *Economist*, "[t]he balance between owners and managers that has underpinned America's version of capitalism and made it the best in the world at creating wealth is a delicate one."[270] Both sides of the majority vote movement present valid arguments and concerns. While on the one hand directors need to be held accountable to the shareholders, on the other hand shareholders, especially shareholders with their own individual agendas, should not be in a position to hijack the board. Just as most revolutions end up establishing a new autocratic regime, majority voting may only empower shareholder activists at the expense of unsophisticated investors.

The great philosopher Heraclitus supposedly once said: "The only constant is change." Change is inevitable, and is perpetual. And it often brings with it unforeseen results. While the unknown risks of change make a weak argument against pursuing change, they at least demand caution and contemplation. Much attention has been given to the majority vote movement, but little attention has been given to other creative alternative solutions being proposed. The 'approach proposed by the ABA's CL Committee, while perhaps unnecessarily complex and conciliatory, represents a solution derived after much discussion and contemplation. Its goal of having shareholders and directors working together to develop an election process may be idealistic, but it is the ideal that should be pursued. When the board acts independently of the shareholders by enacting a bylaws amendment or corporate governance policy, the shareholders should be suspicious. Where a group of activist shareholders mandate a vote on their majority vote proposal, management should likewise be suspicious. Only when both sides work together and in good faith to address each other's respective concerns will the final product be clean of suspicion. And despite representing compromise, the final product should bring great satisfaction to both sides. Such a process appears to have paid off well for Intel.[271] Management should stand firm in maintaining the firm's compliance with governing statutes and listing requirements, but now does not seem to be the time for the board to argue that its judgment should be trusted absolutely.

Let us return one last time to the heated elections of the Disney board. The

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[269] *See* Shareholder Democracy: *Ownership Matters*, ECONOMIST, Mar. 11, 2006, at 55.

[270] *Id.*

[271] *See* discussion *supra* page 14.

shareholder protest showed that while a withholding of forty-three percent of the vote could not officially defeat an incumbent director, a majority vote standard was not necessary to give disgruntled shareholders what they wanted. The Disney board caved to the demands of shareholders who did not even represent a majority of the votes.[272] The victories went beyond the ejectment of Eisner from is chairmanship. In August of 2005, Disney's board announced that it had adopted a policy to require the "voluntary" resignation of incumbent directors who fail to win an affirmative majority vote.[273] But like any genie, the Disney's board had a third wish to grant. On December 22, 2006, Disney announced that it would amend the corporate bylaws to fully implement majority voting in director elections.[274] Thus the saga ends with the "underdog-defeats-the-big-guy" scenario befitting of any Disney movie.[275]

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[272] *See* Norris, *supra* note 5.

[273] *See* Merissa Marr, *Disney Adopts Majority-Vote Rule*, WALL ST. J., Aug. 19, 2005, at B3; *see also* The Walt Disney Company, *Corporate Governance Guidelines*, http://corporate.disney.go.com/corporate/guidelines.html (last visited Dec. 27, 2006).

[274] The Walt Disney Company, *The Walt Disney Company Agrees to Adopt Majority Voting Bylaws for Board of Directors Elections*, Dec. 22, 2006, http://corporate.disney.go.com/news/corporate/2006/2006_1222_majority_voting_bylaws.html.

[275] The Majority Vote Movement can be characterized as fluid and evolving. This footnote is an attempt to highlight some of the news relating to the Majority Vote Movement since this article was first written. First, the statistics show that the Majority Vote Movement remains alive and well. An updated study has revealed that sixty-six percent of S&P 500 companies and more than fifty-seven percent of Fortune 500 companies have implemented some form of majority voting. CLAUDIA H. ALLEN, NEAL, GERBER & EISENBERG LLP, STUDY OF MAJORITY VOTING IN DIRECTOR ELECTIONS 1 (Nov. 12, 2007), http://www.ngelaw.com/files/upload/majoritystudy111207.pdf. Some mid-cap, small cap and micro-cap companies, as well as some recently spun-off or gone-public companies have also adopted majority voting provisions. *Id*

State legislatures have increasingly weighed in on the Majority Vote Movement. Several states in addition to California and Delaware have now addressed majority voting, including: Nevada, North Dakota, Ohio, Utah, Virginia and Washington. *Id.* Maine, Texas, Utah and Virginia have joined have joined Delaware to specifically allow "contingent, irrevocable director resignations." *Id.*

In contrast to the helpful attitude of the state legislatures, the federal government has dealt a blow to the Majority Vote Movement. On July 27, 2007, the SEC published a release interpreting and amending Rule 14a—8. Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 34-56161, 72 Fed. Reg. 43488, 43489 (Aug. 3, 2007) (to be codified at 17 C.F.R. pt. 1), available at http://www.sec.gov/rules/proposed/2007/34-56161fr.pdf. Remember that Rule 14a—8 provides for when a corporation must include a shareholder proposal on a proxy statement, and when a corporation may exclude such a proposal. *See* discussion *supra* Part IV.C. Currently Rule 14a—8(i)(8) permits a company to exclude a proposal if it "relates to an election for membership on the company's board of directors." 17 C.F.R. § 240.14a-8(i)(8) (2007). The SEC's new interpretation of the Rule 14a—8(i)(8) exclusion clarifies that the exclusion is broad enough to include shareholder proposals relating to future elections, and is thus not limited to proposals relating only to current elections. Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 43493. Moreover, the SEC is proposing amending Rule 14a—8(i)(8) to permit exclusion where "the proposal relates to a nomination or an election for membership on the company's board of directors . . . or a procedure for such nomination or election." Shareholder Proposals Relating to the Election of Directors, 72 Fed. Reg. at 43493 (emphasis added). The clarified interpretation and proposed amendment do not represent a recent change-in-course by the SEC, but rather a reaction to the Second Circuit's decision in *American Federation of State, County & Municipal Employees Pension Plan v. American International Group*, 462 F.3d 121, 125-26 (2d Cir. 2006). *See supra* p. 180.