

ASSOCIATION YEAR 2010-2011

**CHAIR**

Lynne B. Barr  
Exchange Place  
53 State Street  
Boston, MA 02109

**CHAIR-ELECT**

Linda J. Rusch  
P.O. Box 3528  
721 North Cincinnati Street  
Spokane, WA 99220

**VICE CHAIR**

Martin E. Lybeck  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006

**SECRETARY**

Dixie L. Johnson  
Suite 800  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004

**BUDGET OFFICER**

Renie Yoshida Grohl  
8300 Fox Hound Run, NE  
Warren, OH 44484

**CONTENT OFFICER**

Marsha E. Simms  
767 5th Avenue  
New York, NY 10153

**IMMEDIATE PAST CHAIR**

Nathaniel L. Dolner  
4221 West Boy Scout Boulevard  
Suite 1000  
Tampa, FL 33607

**SECTION DELEGATES TO  
THE ABA HOUSE OF DELEGATES**

Mary Beth M. Clary  
Naples, FL

Barbara Mendel Mayden  
Nashville, TN

Mauri B. Pascover  
St. Louis, MO

Hon. Elizabeth S. Stong  
Brooklyn, NY

**COUNCIL**

Mitchell L. Bach  
Philadelphia, PA

Conrad G. Goodkind  
Milwaukee, WI

Paul (Chip) L. Lion III  
Palo Alto, CA

Timothy M. Lupinacci  
Birmingham, AL

Jacqueline Parker  
Cherry Hill, NJ

Margaret M. Foran  
Newark, NJ

Lawrence A. Hamermesh  
Wilmington, DE

Myles V. Lynk  
Tempe, AZ

Christopher J. Rockers  
Kansas City, MO

Jolene A. Yee  
Modesto, CA

Doneene Keemer Damon  
Wilmington, DE

Jean K. FitzSimon  
Philadelphia, PA

Lawrence A. Goldman  
Newark, NJ

Joel I. Greenberg  
New York, NY

Donald C. Lampe  
Greensboro, NC

Patrick T. Clendenen  
Boston, MA

Frances Gauthier  
Wilmington, DE

Samantha Horn  
Toronto, ON

Jonathan C. Lipson  
Philadelphia, PA

Peter J. Walsh, Jr.  
Wilmington, DE

**BOARD OF GOVERNORS LIAISON**

Stephen L. Tober  
Portsmouth, NH

**SECTION DIRECTOR**

Susan Daly Tobias  
Chicago, IL

(312) 988-6244  
[suedaly@staff.abanet.org](mailto:suedaly@staff.abanet.org)

October 25, 2011

**BY EMAIL AND BY U.S. MAIL**

Jeff Mahoney, Esquire  
General Counsel  
Council of Institutional Investors  
888 17<sup>th</sup> Street, NW  
Suite 500  
Washington, DC 20006-3310

Re: Voting by Shareowners for the Election of Directors

Dear Mr. Mahoney:

Thank you for your letter of August 11, 2011 on behalf of the Council of Institutional Investors (the "Council"). The Corporate Laws Committee reviewed and discussed your letter during its September meetings and, for the reasons set forth below, the Committee does not believe that reopening consideration of Section 7.28(a) of the Model Business Corporation Act ("MBCA") at this time is warranted.

As noted in your letter, the Committee considered issues relating to voting by shareholders for the election of directors, including revising Section 7.28(a), beginning in 2005 and ultimately determined to adopt a new Section 10.22 of the MBCA and companion amendments in 2006.<sup>1</sup>

The Committee undertook an extensive and transparent deliberative process in connection with the provisions adopted in 2006, beginning with the formation of a Director Election Task Force. On June 22, 2005, the Committee released its Discussion Paper on Voting by Shareholders for the Election of Directors, which included three possible alternatives to the Section 7.28(a) default rule. The Discussion Paper highlighted that the Committee was focusing on the "statutory default alternatives rather than the method under the Model Act of departing from the statutory default

<sup>1</sup> The companion provisions included amendments to: (a) Section 8.05(e), permitting articles of incorporation to modify or eliminate the director holdover rule, thus permitting corporations to fashion majority voting systems in which an incumbent director could not be seated on the board or could be seated only for a limited period of time if that director fails to receive a required vote; (b) Section 8.05(b), permitting articles of incorporation to provide for a shorter term than one year based on voting results; and (c) Section 8.07, clarifying and expressly recognizing that a director's resignation can be effective upon the failure to achieve a specified vote coupled with board acceptance of the resignation, and that such a resignation may be irrevocable, thus facilitating adoption of majority voting provisions.

provision.” The Discussion Paper solicited comments on those alternatives as well as suggestions regarding any other proposals to amend the MBCA provisions relating to director elections. The Committee subsequently issued a press release on September 26, 2005, describing the status of its deliberations, followed by a press release on December 5, 2005, which highlighted that the Committee had “considered all comments and proposals, as well as the consequences of each . . . .” The Committee then issued a Preliminary Report on Voting by Shareholders for the Election of Directors on January 17, 2006, which was publicized through a press release. The Preliminary Report included proposed changes to the MBCA relating to the election process, together with an extensive analysis. Recognizing that “the matter of voting by shareholders for the election of directors is a vitally important aspect of the Model Act,” the Preliminary Report indicated that the Committee was adding an additional step to its customary process for the consideration of amendments to the MBCA by seeking comments on the amendments before publishing them in *The Business Lawyer*. On March 13, 2006, the Committee issued its final Report on Voting By Shareholders for the Election of Directors, including proposed MBCA amendments, in advance of publication in *The Business Lawyer*. See 61 BUS. LAW. 399 (2006). The press release announcing the Report stated:

Because of the high level of public interest in the proper regime relating to the process of voting by shareholders for the election of directors, the Committee is proceeding cautiously and deliberately by taking the unusual step of providing three opportunities for public comment.

The Committee ultimately adopted amendments relating to voting by shareholders for the election of directors on June 20, 2006, following a comment period that ended May 30, 2006. The Committee again issued a press release to update the public. Throughout the Committee’s deliberative process, all comments received by the Committee were reviewed by the Committee and made publicly available on the Committee’s webpage.

There are, as the Council is aware, many viewpoints on the substantive question of whether majority voting should be the default standard under state corporate law, and the Committee considered these viewpoints carefully in its review. Section 10.22, as ultimately adopted at the conclusion of this process, permits boards or shareholders to implement a majority voting regime by amendment of a company’s bylaws. As noted in your letter, the adoption of Section 10.22 provided additional impetus for many larger, as well as smaller, public companies to adopt majority voting standards. Moreover, we note that majority voting has been adopted in various forms and the approach to majority voting continues to evolve.

In this context, and given the Committee’s very extensive and relatively recent consideration and action on this issue, the Committee does not believe that a new review of Section 7.28(a) of the MBCA is warranted at this time. The MBCA is primarily an enabling statute, and Section 10.22 provides a clear path to implement

Jeff Mahoney, Esquire

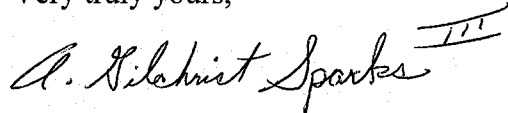
October 25, 2011

Page 3

majority voting at any company whose board or shareholders so desire. The adoption of majority voting by a significant number of public companies since 2006, and the continuing adoption by additional companies every year, provide evidence that an enabling approach is quite viable for the implementation of majority voting. The Committee also believes that a cautious approach to making changes to the MBCA is prudent, and that the results of the 2006 adoption of new Section 10.22 and amendments to state corporation codes should continue to be monitored before changes to the MBCA in this area are again considered.

While I understand that the Council would have preferred a different response, I hope the Council will appreciate the Committee's reasoning in not reopening consideration of amendments to Section 7.28(a) at this time. We appreciate the Council's input.

Very truly yours,

A handwritten signature in cursive script that reads "A. Gilchrist Sparks, III". The signature is written in dark ink and is positioned above the printed name.

A. Gilchrist Sparks, III

Chairman, Corporate Laws Committee

/lrg