VIA FACSIMILE AND FIRST CLASS MAIL

August 11, 2011

Mr. Frederick H. Alexander
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street, 18th Floor
P.O. Box 1347
Wilmington, DE 19899-1347

Re: Voting by Shareowners for the Election of Directors

Dear Mr. Alexander:

I am writing to you in your capacity as Chair of the Delaware State Bar Association's Section of Corporate Law ("Section") on behalf of the Council of Institutional Investors ("Council"). The Council is a nonprofit, nonpartisan association of public, corporate, and union employee benefit plans, foundations, and endowments with combined assets that exceed $3 trillion dollars. Founded in 1985, the Council is recognized as a significant voice for corporate governance practices and shareowner rights.[1]

The purpose of this letter is to respectfully request that the Section consider recommending to the Delaware legislature an amendment to Section 216(3) of the Delaware General Corporation Law ("DGCL") to provide for majority voting as the default standard in director elections.[2]

[1] For more information about the Council of Institutional Investors ("Council") and its members, please visit the Council's website at http://www.cii.org/.
[2] Del. Code Ann. tit. 8, § 216(3) (Michie Supp. 2010) ("Directors shall be elected by a 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").

Council members support majority voting

As you may be aware, the Council's membership approved policy on director elections states:

> **2.2 Director Elections**: Directors in uncontested elections should be elected by a majority of the votes cast. In contested elections, plurality voting should apply. An election is contested when there are more director candidates than there are available board seats. Directors who fail to receive the support of a majority of votes cast should step down from the board and not be reappointed. A modest transition period may be appropriate under certain circumstances, such as for directors keeping the company in compliance with legal or listing standards. But any director who does not receive the majority of votes cast should leave the board as soon as practicable.[3]

Our director election policy is based on the view, long accepted in the United Kingdom, Germany, and other European nations, that a plurality standard for the uncontested election of directors, under which a director may be elected even though a majority of shares are withheld from the nominee, is inherently unfair and undemocratic.[4]

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[3] Council of Institutional Investors, Corporate Governance Policies § 2.2 **Director Elections** (Sept. 29, 2010), http://www.cii.org/UserFiles/file/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2009-29-10%20FINAL.pdf.

[4] *See, e.g., Hearing on Corporate Governance and Citizens United Before the H. Subcomm. on Capital Mkts. of the Comm. on Fin. Servs.,* 111th Cong. 11 (Mar. 11, 2010) (Full text of statement of Ann Yerger, Executive Director, Council of Institutional Investors), http://www.cii.org/UserFiles/file/03-11-10%20AY%20Political%20Contributions%20Testimony.pdf [hereinafter Hearing].

We are pleased that in recent years, consistent with our policy, there has been a movement, primarily by larger corporations in the United States ("US"), to adopt majority voting.[5] Since 2003, approximately 820 public corporations in total have adopted a majority vote standard, including 397 corporations that comprise seventy-eight percent of the S&P 500 Index.[6]

The benefits of a majority vote standard are many: it democratizes the corporate electoral process; it puts real voting power in the hands of investors with minimal disruption to corporate affairs; and it makes boards' more representative of, and accountable to, shareowners.[7]

Financial crisis confirms need for majority voting

The lack of accountability of corporate board's was highlighted during the financial crisis.[8] As the Investors Working Group ("IWG"), a nonpartisan blue ribbon panel of experts sponsored by the CFA Institute and the Council, concluded:

> Boards were often complacent, failing to challenge or rein in reckless senior executives who threw caution to the wind. And too many boards approved executive compensation plans that rewarded excessive risk-taking.

[5] *See* Letter from Edward J. Durkin, Director, Corporate Affairs Department, United Brotherhood of Carpenters to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission 5 (May 20, 2011), http://www.sec.gov/rules/petitions/2011/petn4-630.pdf (noting that since 2003, "hundreds of corporations have voluntarily adopted a majority vote standard as the vote standard in director elections, thereby assuring that shareholder votes have a 'legal effect' in determining the outcome of director elections") [hereinafter Durkin]; *see also* Lisa M. Fairfax, *The Model Business Corporation Act at Sixty: Shareholders and Their Influence,* 74 Law & Cont. Problems 19, 23 (2011), http://www.law.duke.edu/journals/lcp/lcptoc74winter2011 ("[W]hile fewer than thirty companies had a majority-vote regime in 2005, by 2008, 72% of S&P 500 companies and 62% of Fortune 500 companies had adopted some from of majority voting.") [hereinafter Fairfax].

[6] Durkin, *supra* note 5, at 6 & app. I & II.

[7] *See, e.g.,* Press Release, California Public Employees' Retirement System, *CalPERS Seeks Majority Vote for Apple Director Elections* 1 (Feb. 3, 2011), http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2011/feb/apple-direct-elect.xml ("'We believe a majority voting standard is necessary to provide shareowners better protection for the long-term – accountability is our best protection in the face of uncertainty.'").

[8] *See, e.g.,* A Report by the Investors' Working Group, *U.S. Financial Regulatory Reform, The Investors' Perspective* 22 (July 2009), http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors'%20Working%20Group%20Report%20(July%202009).pdf ("Majority voting in uncontested elections ensures that shareowners' votes count and makes directors more accountable to shareowners.").

> But shareowners currently have few ways to hold directors' feet to the fire. The primary role of shareowners is to elect and remove directors, but major roadblocks bar the way. . . . [R]elatively few U.S. companies have adopted majority voting for directors. Most elect directors using the plurality standard, by which shareowners may vote for, but not against, a nominee. If they oppose a particular nominee, they may only withhold their votes. As a consequence, a nominee only needs one "for" vote to be elected and unseating a director is virtually impossible.[9]

The US Senate Committee on Banking, Housing, and Urban Affairs generally agreed with the findings and recommendations of the IWG on the need for a majority vote standard.[10] As a result, Section 971 of the base text of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), as approved by the Senate, would have required the US Securities and Exchange Commission to "direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer who has on their board members that did not receive a majority vote in uncontested board elections . . . ."[11]

While Section 971 was ultimately dropped from Dodd-Frank during the Conference Committee negotiations, investors' desire for majority voting in uncontested elections of directors has not, and it is not inconceivable that such legislation could once again arise at the federal level.

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[9] *Id.*
[10] S. Comm. on Banking, Hous. & Urban Affairs, 111th Cong., Rep. on S. 3217, *The Restoring American Financial Stability Act* 118 (Mar. 22, 2010), http://banking.senate.gov/public/_files/RAFSAPostedCommitteeReport.pdf ("The Committee believes that in the uncommon circumstance where a majority of shareholders voting in an uncontested election prefer that a nominee not serve on a board, it is fair and appropriate for their wishes to be honored.").
[11] *Id*.

We note that several major institutional investors, including the Florida State Board of Administration, the California State Teachers' Retirement System, the California Public Employees' Retirement System, and the United Brotherhood of Carpenters and Joiners of America have been very active during the 2011 proxy season in supporting a majority vote standard by issuing letters to corporations and submitting shareowner proposals. So far this year, nearly three of every five majority vote shareowner proposals have received majority support.[12] This statistic does not include a number of companies that voluntarily adopted such a reform in response to a shareowner resolution that was withdrawn before a vote.[13]

Majority voting would not be disruptive to corporate boards

A common criticism of majority voting by some issuers is that it would result in frequent changes that would be disruptive to corporate boards.[14] The data, however, suggest a different reality.

We note that on average less than one percent of corporate directors are rejected by shareowner voting each year.[15] We also note that Dodd-Frank's introduction of mandatory advisory votes on executive compensation ("say-on-pay") beginning this proxy season appears to provide an alternate avenue for shareowners to express their discontent with directors.[16]

[12] Institutional Shareholder Services, Voting Analytics Database (last viewed Aug. 11, 2011) (on file with Council) [hereinafter ISS Voting].
[13] Institutional Shareholder Services, Checklist Database (last viewed Aug. 11, 2011) (on file with Council) (indicating that eighteen proposals to adopt majority voting in 2011 were withdrawn by the proponent before being voted on).
[14] *See, e.g.,* Jeff Green, *America's Teflon Corporate Boards*, Bus. Week, July 14, 2011, at 2, http://www.businessweek.com/magazine/americas-teflon-corporate-boards-07142011.html (quoting a former corporate director commenting that majority voting is "'like . . . a short-term pendulum swinging into the board room") [hereinafter Green].
[15] *Id.* at 2 (quoting Anne Sheehan, director of corporate governance, California State Teachers' Retirement System, commenting that "[l]ess than 1 percent of directors are rejected each year, so majority votes wouldn't be disruptive").
[16] *See, e.g.,* Ted Allen, *HSN's Board Declines to Accept Director Resignation*, ISS (May 24, 2011, 4.32 PM), http://blog.issgovernance.com/gov/2011/05/hsns-board-declines-to-accept-director-resignation.html ("According to ISS data, 12 directors of U.S. companies have failed to receive majority support this year, primarily because Dodd-Frank Act's 'say on pay' mandate is leading to fewer 'withhold' votes against compensation committee members.").

More specifically, so far in the 2011 proxy season, only one company−Stewart Information Services Corporation−has had both a say-on-pay proposal and a director candidate fail to receive majority support.[17] Thus, the data appears to indicate that shareowners are discerning in how they voice disapproval of a corporation's actions, thus making it highly unlikely that a binding majority vote standard would be disruptive to boards.

The DGCL should be amended to provide for majority voting as the default standard

As you are well aware, Section 216(3) of the DGCL establishes a plurality voting standard as the default standard for director elections absent a specification in the certificate of incorporation or bylaws of the corporation specifying a different standard.[18] As a result, many companies incorporated in Delaware adopt the plurality voting standard by default.[19] In our view, the DGCL plurality voting default standard inhibits the adoption of majority voting.

We note that despite the movement to adopt a majority vote standard in recent years at primarily larger companies, many midsize and smaller public corporations, perhaps because of fewer shareowner proposals directed at those companies,[20] have not altered their voting practices.[21] The disappointing result is that, currently at most public corporations, directors who fail to receive a majority of votes cast rarely resign.[22]

[17] *See* ISS Voting, *supra* note 12 (In this case, the director, Dr. W. Arthur Porter, had failed to receive majority support for two consecutive years, and Institutional Shareholder Services recommended "withhold" votes for all directors due to a lack of responsiveness.).
[18] Del. Code Ann. tit. 8, § 216(3).
[19] *See, e.g.,* Durkin *supra* note 5, at 5 n.21 ("Traditionally, corporations incorporated in Delaware . . . chose the plurality vote standard – either by defaulting to the standard established by state corporate law or by providing for a plurality vote standard in their governance documents.").
[20] *See, e.g.*, ISS Voting *supra* note 12 (indicating that more than three-quarters of the majority voting proposals that came to a vote in 2010 were at S&P 500 companies).
[21] *See, e.g.,* Hearing, *supra* note 4, at 12 ("Over half (54.5 percent) of the companies in the Russell 1000, and nearly three-quarters (74.9 percent) of the companies in the Russell 3000, still use a straight plurality voting standard for director elections.").
[22] *See, e.g.,* Green, *supra* note 14, at 1 ("In the past three years more than 200 directors at U.S. companies, from Cablevision Systems and shopping network owner HSN to SiriusXM Radio and Taser International, have failed to receive a majority of votes[] [i]n all but a few cases the rejected directors stayed . . . .").

For example, in 2010, fifty-nine corporations had at least one director that failed to obtain a majority of the votes cast, and at fifty-four of those companies the rejected directors did not resign from the board.[23] Moreover, so far this year, of the forty-three directors who have received less than majority support, only one has resigned.[24]

For all of the above reasons, the Council respectfully submits that the time has come for the Section and the Delaware legislature to take a leadership role and consider amending the DGCL to adopt a majority vote standard as the default. Such an amendment would better reflect the fundamental right and desire of shareowners' to have a meaningful voice in director elections and the growing trend among prominent, well-respected corporations to adopt this key corporate governance reform.

We appreciate the Section's important work in the area of corporate law and thank you for considering the views of investors. We would welcome the opportunity to meet with you in person to discuss these issues in more detail. If you have any questions, please feel free to contact me directly at 202.261.7081 or jeff@cii.org.

Sincerely,

Jeff Mahoney
General Counsel

[23] *See, e.g.,* ISS Voting, *supra* note 12.
[24] *Id.;* The one director that resigned was B. Doyle Mitchell of Radio One, Inc. and the resignation was before the annual meeting. Radio One, Form 8-K, **Item 5.02(a)** (May 24, 2011), http://biz.yahoo.com/e/110524/roia8-k.html ("On May 16, 2011, prior to the 2011 meeting of stockholders . . . B. Doyle Mitchell, Jr. submitted his resignation from the Board of Directors of Radio One, Inc. . . . including a prospective resignation if he were re-elected at the 2011 Meeting to serve until the 2012 annual meeting of stockholders.").