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January 23, 2012

Jeff Mahoney, Esquire
General Counsel
Council of Institutional Investors
888 17th Street, N.W., Suite 500
Washington, D.C. 20006-3310

Dear Mr. Mahoney:

The Council of the Corporation Law Section of the Delaware State Bar Association (the "Council") has been engaged in considerable study and deliberation on the matter you raised in your letter to me dated August 11, 2011 (the "August 11 letter"). Based upon that study and deliberation, the Council has determined not to propose an amendment to Section 216(3) of the Delaware General Corporation Law (the "DGCL") as your August 11 letter proposed. Because of the considerable importance of your organization and its members in the governance of publicly traded Delaware corporations, however, the Council believes that it is important to set out the considerations that underlie our determination.

At the outset, we stress that the Council has made no determination that a majority voting standard for the election of directors is beneficial or harmful to any individual corporation and its stockholders, or to aggregate stockholder wealth or economic efficiency. We are aware of at least some empirical studies on the point, but we do not find any of them so compelling as to dictate the content of our response to your August 11 letter. *Compare* William Sjostrom, Jr. and Young Sang Kim, *Majority Voting for the Election of Directors*, 40 Conn. L. Rev. 459 (2007) (finding no statistically significant market reaction to adoption of majority vote provisions) *with* Yonca Ertimur and Fabrizio Ferri, *Does the Director Election System Matter? Evidence from Majority Voting*, (August 18, 2011), available at http://ssrn.com/abstract=1880974 (measuring shareholder perception of the value of majority

voting).[1] As discussed below, the uncertainty as to whether either voting standard is superior significantly informs our determination not to propose a statutory change.

As we understand its proposal, CII agrees with us that corporations should retain flexibility to choose between majority and plurality voting. Indeed, CII agrees with us that stockholders should be able to make this choice unilaterally (and, as discussed below, Delaware has led the way in empowering them to do so). As we understand it, however, CII also believes that it would be beneficial to corporations if the regime that applied *in the absence of a positive choice*, i.e., the default rule, were changed from plurality to majority voting. Based on the three considerations discussed below, however, we respectfully disagree.

First, and not surprisingly given the importance of the matter, most public corporations have already affirmatively chosen a director election voting standard, so the practical impact of a change in the default standard would affect only a small minority of Delaware's public corporations. Second, for that minority of corporations, changing a default rule potentially defeats settled expectations, a result that we believe should be avoided in administering an enabling statutory scheme in the absence of compelling evidence that the existing default standard is harmful. Finally, whether or not majority voting is more beneficial than plurality voting, it is certainly more complex and variable. As a result, a majority voting default regime raises serious issues not raised by a plurality default. For all of these reasons, discussed in more detail below, we made a determination not to propose a change to the default rule.

VERY FEW CORPORATIONS DEFAULT INTO A VOTING REGIME

A change in the default standard would have remarkably little impact on publicly traded corporations. As corroborated by a sampling of Delaware corporations (*see* Evidence Relating to the Effect of Prescribing Majority Voting in the Election of Directors as the Default Voting Standard, available at http://blogs.law.widener.edu/delcorp/, posted Sep. 21, 2011), the vast majority of publicly traded Delaware corporations (95%, in the sample of Russell 2000 small cap index companies) already regulate the voting standard in their bylaws, and a change in the default rule would therefore have no effect on them. As a result, a change would have no effect on most publicly traded companies, but would, as discussed further below, single out a small group for disparate treatment.

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[1] We are not aware of any empirical studies that examine the long history of default plurality voting. We believe that in assessing the effect of any provision of the DGCL, default or otherwise, it is critical to take a long view: drawing any conclusion from the existence of a default rule during one particular crisis or downturn, while ignoring the effect of that same rule during expansionary periods, would appear to be a serious methodological mistake.

WHERE THE STATUTE ENABLES A CHOICE, THE DEFAULT RULE SHOULD NOT BE CHANGED IN THE ABSENCE OF STRONG EVIDENCE THAT THE DEFAULT RULE IS HARMFUL

Even if the impact is limited, changing a statutory default rule affects legitimately settled expectations, and thereby raises fundamental concerns under an enabling legal regime. While any change in positive law can unsettle expectations, the change of a default rule can be especially pernicious, because (by definition) it involves reversing choices that have been made by persons subject to the regime. If we agree that corporations should have the flexibility to choose an election regime, and if boards of directors and stockholders have implemented plurality voting by choosing to acquiesce in the default rule, why upend that choice?

Such a change would also have an element of arbitrary discrimination as well; it would affect a corporation that implemented plurality voting through the default mechanism, but would not affect an otherwise identical corporation whose directors or stockholders had implemented plurality voting by adoption of a bylaw (even if the bylaw simply parroted the default rule). We believe that corporations should be able to rely on statutory default rules without having to parrot them in their governing documents simply to address the possibility of a change in such a default rule. At the very least, we do not believe that we should recommend an amendment to the DGCL that defeats such reliance on a default rule unless we are convinced that the existing default rule is harmful. Indeed, some corporations may become subject to a new election rule without realizing it, leading to disclosure errors and costs associated with addressing such errors.

Perhaps this consideration would be less compelling if the default rule were impracticably difficult to avoid. In the present situation, however, if stockholders or directors at individual corporations find that the statutory default rule is not working satisfactorily—as may be the case in some of the instances you identify in your August 11 letter—the DGCL broadly enables an individual corporation to elect to adopt majority voting. Your August 11 letter invites us and the Delaware General Assembly to take a leadership role in addressing the default rule governing the election of directors. We respectfully suggest that the DGCL, which has long provided that stockholders may unilaterally amend the bylaws to change the election standard, has in fact taken such a leadership role. In 2006, Delaware adopted provisions specifically clarifying and fortifying the operation of a majority vote regime, by validating director resignations keyed to a failure to obtain a majority vote (DGCL Section 141(b)) and prohibiting directors from amending a stockholder-adopted bylaw prescribing a majority vote standard in the election of directors (DGCL Section 216).[2] Thus, recent history evidences that the law has

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[2] In fact, the DGCL, more than any other state corporate statute in the country, has led the states in enabling stockholders to establish the key rules of director elections. In particular, stockholders can unilaterally adopt bylaws establishing the terms of "proxy access"—a right that may become particularly significant now that the Securities and

(Continued. . .)

responded to changing circumstances, permitting the very empowerment of stockholders that you argue is needed in these times.

MAJORITY VOTING IS MORE COMPLEX AND VARIABLE THAN PLURALITY VOTING, AND IS THUS ILL-SUITED TO BEING THE DEFAULT RULE

Responsibly changing the default standard is not as simple as changing the word "plurality" to "majority" in DGCL Section 216. It would be highly adverse to stockholder interests to make such a change without carefully defining and preserving the application of the plurality vote standard in contested elections, particularly if contested elections become more frequent in a regime in which proxy access becomes increasingly prevalent. Accordingly, any statutory revision opting for a majority vote standard would require somewhat elaborate drafting to address appropriately the treatment of contested elections. A statutory default definition of contested election would have to address the complex interaction of advance notice bylaws, qualification provisions, proxy access provisions and any existing director classification.

The definition of contested election is not the only critical element of a majority voting regime. It must also provide for a transition period between the time of the failed election and the filling of any vacancies created thereby, as well as a method for filling those vacancies. The proper method for treating that transition may differ, depending, among other things, on the regulatory regime to which a corporation is subject.

These questions—how to identify precisely when an election is contested, how to deal with transition issues, and how to make majority voting work with all of a corporation's governance provisions—do not lend themselves to resolution by a simple default standard, and the attempt to design one could create a trap for the unwary. Thus, we believe that it is important that a majority voting structure be properly tailored to the corporation's particularized situation and other governance provisions at the time of implementation.

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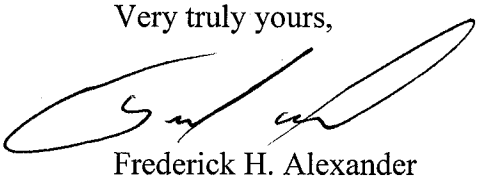
(. . . continued)

> Exchange Commission has eliminated Rule 14a-8 obstacles to the proposal of such bylaws through the Commission's shareholder proposal process. Likewise, stockholders can similarly adopt bylaws prescribing reimbursement for proxy contest expenses incurred by stockholders seeking to elect directors. These statutory provisions evidence that the DGCL permits stockholders to adopt bylaws addressing how the directors of the corporation may be elected.

For these reasons, the Council continues to believe that the DGCL should continue to focus on empowering stockholders at individual Delaware corporations to express their preferences as to voting standards through exercise of their statutory power to amend bylaws. Experience with majority voting is still relatively new, and other efforts to promote director accountability through the stockholder franchise—through proxy access bylaws or expense reimbursement bylaws—are even more untested. We will certainly be observing the use of such provisions with great interest, however, and we stand ready to recommend changes to the DGCL where necessary to address ambiguities or inappropriate limitations in the statutory framework. Indeed, we welcome your organization's input, formal or informal, in identifying and remedying such ambiguities or limitations.

Very truly yours,



Frederick H. Alexander

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