



Via Email

October 25, 2012

Mr. A. Gilchrist Sparks III  
Morris, Nichols, Arsht & Tunnell LLP  
1201 North Market Street, 18<sup>th</sup> Floor  
Wilmington, DE 19899-1347

*Re: Voting by Shareowners for the Election of Directors*

Dear Mr. Sparks:

I am writing to you again in your capacity as Chair of the American Bar Association Business Law Section's Committee on Corporate Laws ("Committee") on behalf of the Council of Institutional Investors ("Council").<sup>1</sup> The purpose of this letter is to respectfully request that the Committee amend the Model Business Corporation Act ("MBCA") to require majority voting in the uncontested election of directors at public companies.

Founded in 1985, 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. Our members are large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers.<sup>2</sup>

As you are aware, at most public companies in the United States, directors in uncontested elections continue to be elected by a plurality of votes cast, rather than by a majority of votes cast.<sup>3</sup> Thus, many U.S. public companies continue to

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<sup>1</sup> This letter is, in part, a follow-up to our letters sent to you Dec. 1, 2011, and Aug. 11, 2011, requesting that the American Bar Association Business Law Section's Committee on Corporate Laws consider amending the Model Business Corporation Act to provide for majority voting as the default rule in director elections. Those letters are available from the Council of Institutional Investors' ("Council") Web site at <http://www.cii.org/UserFiles/file/resource%20center/correspondence/2011/12-01-11%20-%20Council%20letter%20to%20Chair%20of%20American%20Bar%20Association%20Business%20Law%20Section%E2%80%99s%20Committee%20on%20Corporate%20Laws%20on%20majority%20voting.pdf> and [http://www.cii.org/UserFiles/file/resource%20center/correspondence/2011/August%2011%202011%20ABA%20Letter%20\(final\).pdf](http://www.cii.org/UserFiles/file/resource%20center/correspondence/2011/August%2011%202011%20ABA%20Letter%20(final).pdf), respectively.

<sup>2</sup> For more information about the Council and its members, please visit the Council's Web site at <http://www.cii.org/about>.

<sup>3</sup> See, e.g., Bruce Kistler, "State of Play, A snapshot of US Corporate Governance in 2012," ISS Corporate Services 12 (July 19, 2012) (on file with Council) ("the S&P 500 is the only index with more than one-half of its constituents using a majority vote standard").

follow an antiquated, or as some have described “truly bizarre,”<sup>4</sup> voting process whereby a director is elected or reelected “so long as she receives *any* votes in her favor, even if ninety percent or more the shareholders vote against her.”<sup>5</sup>

Council membership approved policies have long supported majority voting in the uncontested election of directors. Our policy 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.<sup>6</sup>

Our policy is based on the widely accepted view in the U.S. and in most developed markets,<sup>7</sup> that majority voting in uncontested elections “ensures that shareowners’ votes count and makes directors more accountable to shareowners.”<sup>8</sup>

The support for majority voting continues to grow. More than 70 percent of S&P 500 companies have adopted a majority voting standard<sup>9</sup> up from just 16 percent

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<sup>4</sup> Alyce Lomax, “Public Companies’ Public Enemies,” Motley Fool 2 (July 27, 2012), <http://www.fool.com/investing/general/2012/07/27/public-companies-public-enemies.aspx> (commenting that plurality voting whereby a director can be elected with a single vote is “a voting policy that is truly bizarre”).

<sup>5</sup> Lisa M. Fairfax, “Shareholder Democracy” 85 (Carolina Academic Press 2011) (on file with Council).

<sup>6</sup> Council of Institutional Investors, Corporate Governance Policies, § **2.2 Director Elections** (last updated Oct. 5, 2012), [http://www.cii.org/UserFiles/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL\(2\).pdf](http://www.cii.org/UserFiles/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL(2).pdf).

<sup>7</sup> See, e.g., Lisa M. Fairfax at 141 (noting that “most other developed markets already have a majority vote standard for director elections”).

<sup>8</sup> See, e.g., 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%27%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors%27%20Working%20Group%20Report%20(July%202009).pdf).

<sup>9</sup> See, e.g., Bruce Kistler at 12.

in 2006.<sup>10</sup> Moreover, during the 2012 proxy season, the support for shareowner resolutions to adopt majority voting averaged more than 61 percent, an all-time high for such proposals.<sup>11</sup>

In explaining the high success rate for majority voting proposals, California State Teachers' Retirement System Director of Corporate Governance, and current Council chair, Anne Sheehan recently stated:

[The] 'success rate this year clearly indicates that companies recognize the importance of providing shareholders with a meaningful voice in the voting process.' . . . 'Today's economic challenges underscore the importance of board accountability. Holding directors to a reasonable election standard is a fundamental step in maintaining the integrity of a company's leadership and trust of its shareholders.'<sup>12</sup>

The Council believes the time has come for the Committee to demonstrate its recognition of, and commitment to, meaningful investor voting rights and improved board accountability by amending the MBCA to require majority voting in the uncontested election of directors for public companies. To assist the Committee in accomplishing that task, we have attached a draft of proposed revisions to the MBCA with related commentary.

The proposed revisions are designed to revise the standard for director elections under the MBCA from a plurality voting to a majority voting standard for public companies. Under the proposed majority voting regime set forth in the attachment, if a director fails to receive the affirmative vote of more shares in favor of that director's continuing service than opposed, the director is not elected. If, as a result, there is a failure to elect sufficient directors to constitute a lawful board according to the company's organizing documents, plurality voting rules would permit the existing board to be reconstituted for a 90-day holdover period.

During the holdover period, those directors who had received a majority of affirmative votes would appoint the number of directors necessary to constitute a

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<sup>10</sup> Claudia H. Allen, "Study of Majority Voting in Director Elections," Neal, Gerber & Eisenberg LLP 1 (last updated Nov. 12, 2007), <http://www.ngelaw.com/files/Uploads/Documents/majoritystudy111207.pdf> ("when this Study was initially published in February 2006, only 16% of the companies in the S&P 500 were known to have adopted a form of majority voting").

<sup>11</sup> Institutional Shareholder Services, Voting Results Database (last visited Aug. 9, 2012) (on file with Council).

<sup>12</sup> Press Release, California State Teachers' Retirement System, "CalSTRS 2012 Proxy Season Successful in Advancing Majority Voting" 1 (Aug. 3, 2012), <http://www.calstrs.com/Newsroom/2012/news080312.aspx>.

lawful board. Importantly, those directors who had not received a majority of affirmative votes would not be eligible to be reappointed to fill the vacant seats.<sup>13</sup>

We believe the proposed revisions to the MBCA as described in the attachment are operational, reflect the fundamental right and desire of shareowners to have a meaningful voice in director elections, and strike an appropriate balance between board power and board accountability. We, however, would welcome the opportunity to meet with you or the Committee in person to discuss the proposed revisions in more detail. In the meantime, if you have any questions, please do not hesitate to contact me directly at 202.261.7081 or [jeff@cii.org](mailto:jeff@cii.org).

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney  
General Counsel

Attachment

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<sup>13</sup> This provision would prohibit the existing indefensible practice of directors continuing to serve on boards even after a majority of shareowners have withheld their vote for those directors. IRRIC Institute & GMI Ratings, "The Election of Corporate Directors: What Happens When Shareowners Withhold a Majority of Votes from Director Nominees?" 2 (Aug. 2012), [http://gmitest.net/wp-content/uploads/2012/08/GMIRatings\\_IRRC\\_082012.pdf](http://gmitest.net/wp-content/uploads/2012/08/GMIRatings_IRRC_082012.pdf) (finding that "[o]nly 5% of the majority withhold votes . . . led directly to director removal").