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Majority Voting in Director Elections:
A Look Back and A Look Ahead

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The momentum towards majority voting in the election of directors has continued to build inexorably. ISS has reported that more than 140 majority vote stockholder proposals were filed in the 2006 proxy season. Largely in response to these proposals, over 25% of the companies in the S&P 500 now have some form of majority voting provision in place, a particularly high percentage given the limited number of companies that had majority voting before the recent movement. Most of these companies have adopted one of two alternatives: (i) a director resignation policy or (ii) a majority voting by-law. Companies that have adopted some form of majority voting provision include Berkshire Hathaway, Dell, Intel, Microsoft, Pfizer, Time Warner and Walt Disney.

Other evidence in 2006 of the continuing momentum towards majority voting includes the following:

- The ABA Committee on Corporate Laws adopted, in late June 2006, amendments to the Model Business Corporation Act (MBCA) to facilitate the adoption of majority voting by-laws by either the board of directors or stockholders (despite continuing to provide for plurality voting in the absence of specific charter or by-law provisions providing for majority voting).
- The Delaware legislature has, effective August 1, 2006, adopted certain amendments to the Delaware General Corporation Law relating to majority voting (to enforce director resignations and to facilitate the adoption of majority voting by-laws by either the board or stockholders).
- Chairman Cox of the Securities and Exchange Commission (SEC) recently announced that he is "completely supportive" of majority voting.
- There are rumors suggesting that 200 majority voting stockholder proposals will be submitted in 2007.

I. THE BIRTH OF THE MAJORITY VOTE MOVEMENT

The push for majority voting from activist stockholders arose out of dissatisfaction with the director election process that had been building for years. Most states, including Delaware, provide for plurality voting for the election of directors as the default standard and most public companies have traditionally not adopted a different standard. Plurality voting means that those nominees who receive the most votes for their election, up to the number of available seats, are elected to the board, without regard to the number of votes against or not cast. Plurality voting was designed, in part, to address a concern that none of the candidates seeking office in a contested election would receive the required majority vote. Critics of the current system claim that the prohibitive cost of soliciting votes

leads to virtually all director elections being uncontested. Stockholders are given proxy cards that allow them to vote for the election of a nominee or withhold authority to cast their votes. Under the plurality voting standard, a nominee could win even if he or she received more withhold votes than votes for his or her election. While withhold votes are an effective means to communicate dissatisfaction and have symbolic value, they have no legal consequence as no amount of "withhold' votes can defeat a nominee under a plurality voting standard.

As a means to address perceived problems in the election of directors, stockholder activists initially focused their efforts on the stockholder access rule proposed by the SEC in October 2003. The stockholder access rule provided qualified stockholders with the right to nominate one or more directors under certain circumstances. The corporation would be required to list these nominees on the proxy ballot, thereby sparing the nominators the substantial costs of conducting a proxy contest. After the SEC's stockholder access proposal stalled, stockholder activists focused on majority voting as an alternative.

Under majority voting, a candidate would be elected as a director only if such candidate receives a majority of the votes cast. Majority voting is not untested, as it is standard practice in a number of European nations (e.g., U.K., Germany and France) and is either required or the default standard in Illinois and Missouri. A number of companies in the S&P 500 domiciled in the U.S. had majority voting prior to the advent of the majority voting movement, including U.S. Bancorp, Best Buy and Lockheed Martin. Stockholder activists seek to use majority voting as a vehicle to attach real consequences to a vote where a majority of stockholders reject the nominee. ISS contends that the failure of a director to win a majority vote would have the desirable consequence of precipitating boardroom action and putting pressure on boards to negotiate a solution with dissatisfied stockholders.

The most persistent argument against majority voting is the specter of "failed elections," in which one or more directors are not seated on the board. The adverse consequences of a failed election could trigger change of control provisions in the corporation's debt instruments, adversely affect the corporation's ability to comply with listing standards (due to the loss of independent directors) or constitute a breach of a senior executive's employment agreement (if such executive were not elected).

In most jurisdictions, however, the prospect of failed elections under majority voting is mitigated by the holdover rule. The holdover rule, which is mandated for Delaware corporations by statute, provides that an incumbent director remains in office notwithstanding the failure to receive the required vote unless the director resigns or the stockholders remove the director (and, under the MBCA, if the number of directors is reduced). Indeed, ISS has cited the holdover rule as an impediment to implementation of "true" majority voting. In that connection, the ABA Committee on Corporate Laws recently adopted amendments to the MBCA allowing the certificate of incorporation to modify the holdover rule. The MBCA is a statutory blueprint followed by a number of states—but not Delaware.

II. THE RAPID GROWTH OF THE MAJORITY VOTE MOVEMENT

A. Stockholder Proposals

Against this backdrop majority vote stockholder proposals became increasingly prevalent and a high profile issue for activist stockholders. As recently as 2004, stockholder proposals recommending the implementation of majority voting were virtually nonexistent. The 2005 proxy season, however, was a much different story. ISS tracked 89 majority vote proposals that year, compared to a mere 14 from the 2004 proxy season. This "proposal boom" has continued in 2006, with ISS reporting that more than 140 majority vote stockholder proposals were filed for this year's proxy season.

Virtually all of the proposals for majority voting have been submitted by the United Brotherhood of Carpenters and Joiners and other building trade unions and pension funds. The proposals have been submitted under Rule 14a-8 to be voted on at the annual meeting and the SEC has generally been reluctant to approve the omission of these proposals. Most of these proposals have been precatory and simply recommend that the board implement majority voting (an example is included as Annex A to this memorandum).

A small number of these proposals have been in the form of binding by-law proposals (an example is included as Annex B to this memorandum). Binding by-law proposals to effect majority voting can generally be prepared in a form that would be legal in Delaware (under the MBCA majority voting can only be provided in the charter). A variation on the binding by-law voting proposal has been submitted by Lucian Bebchuk, a Professor at Harvard Law School and governance expert. His by-law proposal (included as Annex C to this memorandum) seeks to amend the by-laws of a subject company to provide that a director shall be ineligible to stand for election if that director were elected for the immediately preceding term in an uncontested election in which he or she received more "withheld" votes than "for" votes. While not yet subject to a court ruling, a reasonable case could be made that such a by-law is valid under Delaware law.

B. Corporations Respond to Majority Proposals

1. The Pfizer Approach and its Reception in the Governance Community. The most prevalent form of majority voting provision that has been adopted in response to stockholder demands is the Pfizer-style governance policy (included as Annex D to this memorandum). Pfizer was one of the first companies to adopt majority voting in some form to mitigate stockholder concerns about plurality voting, and its approach has been widely followed. The voting policy adopted by Pfizer in June 2005 (revised October 2005), which is incorporated in its governance principles, provides that in an uncontested election any nominee who receives a greater number of "withhold" votes than votes "for" must promptly offer his or her resignation. The Corporate Governance Committee (without the participation of the director that submitted the resignation) is then to consider the resignation offer and make a recommendation to the Board. The Board is obligated to act on the Corporate Governance Committee's recommendation within 90 days following certification of the stockholder vote. Thereafter, the Board is to promptly disclose its

decision regarding whether to accept such director's resignation and disclose it in a Form 8-K. The Pfizer policy does not apply in a contested election to mitigate the possibility of a failed election as well as a recognition that majority voting is unnecessary where stockholders are offered a choice among competing candidates.

Proponents of the Pfizer approach cite its flexibility in addressing situations in which immediate vacancies would be problematic, especially to the extent an immediate resignation would lead to the loss of the CEO, Chairman of the Audit Committee or other key director. Since Pfizer's adoption of its voting policy last June, over 100 companies have followed suit. The trigger for a resignation is typically whether more shares are "withheld" than cast "for" election, but a limited number of companies use a majority of the outstanding shares standard. Some commentators have pointed out that a majority of outstanding shares is a truer expression of stockholder will, but this standard has not won support from key stockholder groups and has been rarely used.

The Pfizer approach has been unpopular with activist institutional investors. Ed Durkin, Director of Corporate Affairs at the Carpenters Union, said that adoption of a Pfizer-style director's resignation policy is inadequate: "The companies have not adopted a majority vote standard, rather they've adopted legally unenforceable (at least in Delaware) resignation policies to cover the situation when directors get elected under the Company's plurality vote standard, but the level of symbolic "withheld" votes exceeds a certain level." Similarly, ISS has made it clear that it supports a "true" majority voting standard and will "generally recommend for" majority voting proposals even if a subject company has previously adopted a Pfizer-style director resignation policy. ISS has noted that director resignation policies lack the force of a by-law amendment and may be altered with relative ease. To be sure, ISS has indicated that it may recommend against a majority voting proposal if a subject company has previously adopted a resignation policy that presents a meaningful alternative or effective equivalent to majority voting. Nonetheless, for ISS to "even consider" whether the proposed alternative is equal to or better than a majority voting proposal, the policy must articulate the following elements:

- A clear and reasonable timetable for all decision-making regarding the nominee's status;
- A process for determining the nominee's status that is managed by the independent directors and that excludes the nominee in question;
- A range of remedies that can be considered concerning the nominee (for example, acceptance of the resignation, maintaining the director but curing the underlying causes of the withheld votes, etc.); and
- Prompt disclosure (via an SEC filing) of the final decision regarding the nominee's status and a full explanation of how the decision was reached.

The burden of proof is clearly on the board to explain and to justify an alternative to majority voting. With respect to companies which recently adopted Pfizer-style resignation policies and subsequently received majority voting proposals, we understand that this proxy season ISS has recommended votes for each majority voting proposal other than a proposal received by General Electric.

Moreover, the General Electric situation is distinguishable from Pfizer's policy as General Electric incorporated its resignation policy in its by-laws (another company that used this approach was Time Warner). ISS found this significant as it stated, "[b]y adopting a robust director resignation policy in its by-laws, the company has effected change immediately and has created an acceptable alternative at this time." General Electric's resignation policy by-law was also distinguishable from the Pfizer policy as it provides that the General Electric board will accept the resignation of a director that fails to obtain a majority of votes absent a "compelling reason." While there is inherent ambiguity in such a standard, General Electric has explained that "a compelling reason could include, without limitation, a situation in which a director nominee was the target of a "vote no" campaign on an illegitimate basis, such as racial discrimination, or on the basis of misinformation—or the resignation would cause the company to be in violation of its constituent documents or regulatory requirements." Given the strength of the majority voting movement, however, there is reason to be skeptical that ISS or other activists would support the General Electric approach in most other cases.

2. The Intel Approach and its Implications. The leading alternative to the Pfizer model, which was popularized by Intel, provides for majority voting in the by-laws. Intel's by-laws (included as Annex E to this memorandum) provide that in uncontested elections each director will be elected by the vote of the majority of votes cast. A majority of votes cast means that the number of shares voted "for" a director must exceed the number of votes cast "against" that director. If a director were not elected, the director is obligated to offer his or her resignation to the board. The Corporate Governance and Nominating Committee would then make a recommendation to the Board on whether to accept or reject the resignation or whether other action should be taken. The Board will publicly disclose its decision and the rationale behind it within 90 days of the certification of the election results. To implement the Intel approach, proxy cards need to be revised to accommodate "for" and "against" votes.

Since Intel adopted its majority vote by-law in January 2006, at least 30 companies have adopted majority vote by-laws (including Dell and United Technologies). The attractiveness of the Intel approach is that it addresses the risks of a failed election in a flexible manner, but also is appealing to stockholder activists. There is no risk that Intel will be left without one or more directors following the failure to obtain a majority of votes cast. The holdover rule, in combination with the by-law, assures that directors will remain in office until the resignation is accepted or rejected. Unlike a resignation policy, however, new nominees who fail to obtain a majority of votes would not join the Board as the holdover rule has no application in that context.

To date, the Intel approach has been warmly embraced by the activist investor community. Mr. Durkin said that "Intel has got it right. They have set the standard." This view was echoed by Pat McGurn, Executive Vice President of ISS, who viewed the Intel approach as the "gold standard".

III. RECENT DEVELOPMENTS

A. Amendments to the MBCA

In June 2006, an ABA Committee on Corporate Laws adopted amendments to the MBCA relating to voting by stockholders in the election of directors. The amendments authorize a company's board or stockholders to adopt a by-law under which directors would be elected by a plurality vote but would serve for no more than 90 days if the director receives more votes "against" than "for" election (under the amendments the statutory holdover rule is conformed to permit this result). The directors would be empowered to fill the vacancy created by early termination with any qualified individual. The provision contains an exception for contested elections. The by-law designed by the ABA Committee is a useful addition to the mix of proposals on stockholder voting but the fixed 90-day termination period offers less flexibility than the Intel or Pfizer approaches which allow the board to decline or defer a director resignation based on facts and circumstances.

The ABA Committee also effected other amendments to the MBCA related to majority voting, including (i) amendments that would permit articles of incorporation provisions to eliminate the holdover rule and otherwise allow corporations to fashion majority voting systems and (ii) amendments to facilitate majority voting policies by expressly recognizing that a director resignation conditioned on the failure to receive a specified vote may be irrevocable.

B. Changes in Delaware Law

A bill has been approved by the Delaware legislature that is designed to facilitate majority voting. The two key provisions of the bill, which became effective on August 1, 2006, provide that:

- a by-law adopted by a vote of stockholders prescribing the required vote for the election of directors (e.g., majority voting) cannot be altered by the board without stockholder consent; and
- a resignation may be made effective upon the happening of a future event (e.g., failure to obtain a majority vote), coupled with authority granted in the same section to make resignations irreversible.

Some commentators have noted that the enforceability of the latter provision could ultimately serve as a vehicle to facilitate the activists' goal of achieving "true" majority voting. Other commentators have suggested that the remaining doubt as to the enforceability of director resignations may enhance the acceptance of Pfizer-style majority voting policies. There is merit to this point as some activists have cited the lack of enforceable resignations as one basis for their objection to Pfizer-style policies. Nonetheless, we would expect that the enhanced enforceability of director resignation policies will not be sufficient to stem the tide towards majority voting by-laws, particularly given ISS's focus on the force of a by-law amendment.

C. Potential Changes in Broker Voting

A legal committee formed by the New York Stock Exchange (NYSE) has recommended an amendment of Rule 452 to prohibit broker voting without instructions on any proposed election of directors. Following NYSE and SEC approval, the proposal could be effective as early as the 2007 proxy season. The current Rule 452 allows broker voting in uncontested elections, including elections that are the subject of withhold campaigns, if the broker does not receive voting instructions from the beneficial owner within a specified period. If the rule were changed, a consequence would likely be less "for" votes for directors being elected. This would enhance the likelihood that a "withhold" or "against" campaign would be successful, although the practical significance would need to be assessed in terms of the number of broker votes that are typically voted in any given election. Under either a majority voting policy or by-law that contemplates "for" and "against" votes, however, shares not voted as a result of the rule change would not be counted as voted "against." The adoption of the SEC's proposed internet proxy rules (allowing proxy materials to be distributed via the internet) is a related development that will only enhance the likelihood of activist stockholders instituting a proxy contest or otherwise targeting select directors for defeat.

IV. THE FUTURE OF THE MAJORITY VOTE MOVEMENT

A. Results of the 2006 Proxy Season

The 2006 proxy season results are substantially complete, and the returns show significant support for majority voting, particularly at corporations that have not adopted either director resignation policies or majority voting by-laws. ISS has indicated that stockholder resolutions are averaging 54.5% of votes cast at 33 companies that have not adopted a director resignation policy or majority voting by-law. Majority vote proposals at companies that have resignation policies are not doing as well, averaging 42.3% of votes cast at 47 meetings this season. This has led some commentators to claim that Pfizer-style resignation policies are sufficient and should satisfy the desire of governance advocates for majority voting. This has proven to be an overstatement as stockholder proposals for majority voting received 59.2% at Borders, 51.8% at Chubb, 54% at EMC, 56.8% at Office Depot, 60.1% at PerkinElmer, 55.9% at Raytheon and 50.4% at Williams Companies (and each of these companies had a resignation policy). Indeed, a binding by-law proposal (which was supported by ISS) won a surprising 49% support at Honeywell (which also had a resignation policy) and 53% at Qwest (which did not have a resignation policy). The Bebchuk binding by-law proposal, which renders directors ineligible for future elections if they fail to win a majority of votes, received approximately 33% at General Dynamics and was recommended by ISS.

B. Looking Forward to the 2007 Proxy Season

There are suggestions that the 2007 proxy season could bring over 200 majority voting proposals. ISS is now considering its guidelines for the 2007 proxy season which should be published on a preliminary basis in late August and finalized in mid-November. In that connection, on July 28,

2006, ISS publicly stated that its policy on majority voting in director elections is under review and that changes are likely. In general, we would expect majority voting stockholder proposals for the 2007 proxy season to focus on companies that have not adopted a majority voting by-law (whether or not they have adopted a majority voting policy). An issue that remains to be seen, however, is whether the Intel style majority voting by-law remains the gold standard. Activists may seek to include in majority voting stockholder proposals provisions that modify an Intel style majority voting by-law to move it even closer to "true" majority voting and/or propose majority voting by-laws that may only be amended by stockholders (whether or not initially adopted by the directors). These proposals may also increasingly be in the form of binding by-law proposals. Majority voting proposals that are binding receive stricter scrutiny from ISS because such resolutions do not merely advocate a principle, but give rise to technical drafting issues. The drafting issues arise because if the binding by-law proposal is passed, the by-law is implemented in the exact form that it has been proposed.

C. Considerations for Today's Boards of Directors

To the extent that a company elects to take action on majority voting, whether proactively or in response to a stockholder proposal, we generally view an Intel style majority voting by-law as, on balance, the most constructive approach. Of the current approaches commonly pursued, our view is that, subject to future developments, the Intel approach has the highest likelihood of providing closure on a potential issue with activists with little downside. As noted, the Intel by-law has no risk of resulting in a failed election. This is also the case in a contested election because the Intel by-law is not applicable in a contested election. Moreover, as is the case with a governance policy, a majority voting by-law adopted by the board can unilaterally be amended by the board. Our view is greatly influenced by the continued vitality in Delaware of the director holdover rule, which diminishes the significance of differences between a resignation policy and a majority voting by-law. This view might change if we had reason to believe that Delaware were about to change the mandated holdover rule, but the likelihood of such a change is remote.

The principal remaining question is whether a company should proactively adopt a majority voting by-law or wait until a stockholder proposal is received. The key advantages to deferring action is that adoption of a majority voting by-law may be unnecessary in the absence of a stockholder proposal and delay allows any subsequent action to be better tailored to future developments (e.g., new ISS policies, particularly given ISS's recent indications that it intends to make changes to its policy on majority voting). Moreover, even if adoption of a majority voting by-law were deferred until a stockholder proposal were received, adoption at that point could cause the proponent to withdraw the proposal (or cause it to be voted down). In contrast, the main advantage of adopting a majority voting by-law is that it may allow an issuer to avoid being tangled up in a stockholder proposal that reflects more aggressive and deeper election reforms. Adoption of a majority voting by-law proactively provides a "first mover" type of advantage, allowing a company to craft its desired implementation strategy without the overhang of a pending proposal and the prospect of either a negotiation or, if negotiations fail, a vote on the proposal at the annual meeting. This advantage is particularly relevant if activists use the changes in Delaware law and the MBCA to

pursue reforms that more closely replicate "true" majority voting. In that connection, proactively adopting a majority voting by-law provision could address potentially more aggressive proposals by reducing the likelihood of receiving a majority voting proposal at all. To be sure, a company that receives an unpalatably burdensome majority voting stockholder proposal could adopt a less stringent majority voting by-law at that time and seek, under SEC rules, to exclude the stockholder proposal on the grounds that it had been "substantially implemented." Companies should not, however, rely on this possibility in making their decision given the SEC's favorable predisposition towards majority voting.

In summary, the decision as to whether a company should, at this time, adopt a majority voting by-law must balance the risk of prematurely adopting a majority voting by-law (given, for example, that a change in circumstances will render a previously adopted by-law obsolete) against the risk of failing to be timely in adopting a majority voting by-law (given that the absence of a majority voting by-law may induce the submission of a more burdensome majority voting stockholder proposal that would otherwise not have been submitted if a less burdensome majority voting by-law had previously been adopted). The only certainty is that the issue of whether to adopt a majority voting by-law is worthy of serious consideration.

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If you have any questions regarding these important developments, please do not hesitate to contact Casey Cogut (212-455-2550; ccogut@stblaw.com), John Finley (212-455-2583; jfinley@stblaw.com); Andrew Keller (212-455-3577; akeller@stblaw.com), George Krouse (212-455-2730; gkrouse@stblaw.com) or your relationship partner. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate developments, can be obtained from our website, www.simpsonthacher.com.

Annex A

Example of Precatory Majority Vote Proposal

(proposal contained in Morgan Stanley's 2006 proxy statement, dated February 24, 2006)

RESOLVED that the stockholders of Morgan Stanley urge the Board of Directors to take all necessary actions to require that a director be elected by a favorable majority of (a) votes cast for the nominees plus (b) votes withheld from the nominee, unless (x) the number of nominees exceeds the number of directors to be elected and (y) proxies are solicited by or on behalf of a person other than Morgan Stanley. In conjunction with specifying a majority vote threshold, the Board should address the status of incumbent directors who do not receive the required number of votes and who would be considered "holdover" directors under the law of Delaware, where Morgan Stanley is incorporated, and the procedure for filling any vacancy that arises as a result of an incumbent director's failure to obtain the required vote.

Annex B

Example of Binding By-Law Majority Vote Proposal

(proposal contained in Honeywell International's 2006 proxy statement, dated March 13, 2006)

RESOLVED, that the stockholders of Honeywell International Inc. ("Honeywell") amend the bylaws to replace the last sentence of Article II, section 7, which currently provides for a majority vote standard for all matters other than director election, with the following sentence:

> "At each meeting of Stockholders, except as otherwise provided by law or in the Certificate of Incorporation or these By-laws, in all matters, the affirmative vote of the majority of shares present in person or represented by proxy and entitled to vote on the subject matter shall be the act of the Stockholders; provided, however, that in an election of directors, if the number of nominees exceeds the number of directors to be elected, the directors shall be elected by the vote of a plurality of the shares represented in person or by proxy at any such meeting."

Annex C

Binding By-Law Majority Vote Proposal Submitted By Lucian Bebchuk

(proposal contained in General Dynamics Corp.'s 2006 proxy statement, dated March 31, 2006)

It is hereby RESOLVED that pursuant to Section 109 of the Delaware General Corporation Law, 8 Del. C. § 109, and Article XI of the Company's By-Laws, Article III, Section 2 of the Company's By-Laws, entitled "Number, Qualifications and Term of Office," is hereby amended by adding the following sentence immediately before the final two sentences:

> "In no event shall a director stand for election if that director was elected for an immediately preceding term in an uncontested election in which he or she received more "withheld" votes than "for" votes."

Annex D

Pfizer's Corporate Governance Policy on Voting for Directors

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.

Annex E

Intel Corporation's By-Law on Voting for Directors

(adopted January 18, 2006)

ARTICLE III
Directors

Section 1. Number and Term of Office. The number of directors which shall constitute the whole Board of Directors shall be not less than nine (9) nor more than fifteen (15), the exact number of directors to be fixed from time to time within such range by a duly adopted resolution of the Board of Directors. This range shall not be altered without stockholder approval. Except as provided in Section 3 of this Article, each director shall be elected by the vote of the majority of the votes cast with respect to the director at any meeting for the election of directors at which a quorum is present, provided that if the number of nominees exceeds the number of directors to be elected, the directors shall be elected by the vote of a plurality of the shares represented in person or by proxy at any such meeting and entitled to vote on the election of directors. For purposes of this Section, a majority of the votes cast means that the number of shares voted "for" a director must exceed the number of votes cast "against" that director. If a director is not elected, the director 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. The director who tenders his or her resignation will not participate in the Board's decision. Directors shall hold office until the next annual meeting and until their successors shall be duly elected and qualified. Directors need not be stockholders. If, for any cause, the Board of Directors shall not have been elected at an annual meeting, they may be elected as soon thereafter as convenient at a special meeting of the stockholders called for that purpose in the manner provided in these Bylaws.