

Spotlight on Shareholder Proposals: Majority Voting

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Proposals to elect directors by a majority vote fared well this season, averaging 56.6% at 31 companies as of early June. This was the topic with the most number of submissions, as Carpenters, CalPERS and other proponents sent over 80 shareholder proposals to companies, almost twice as many as in 2010. Activists were angered by the fact that the requirement for all public companies to adopt majority voting was dropped from the final version of the Dodd-Frank Act. Many companies decided to proceed with implementation and negotiate for withdrawal of the proposal rather than putting it to a shareholder vote.

Analysis of the voting results for the shareholder proposals that ended up in proxy statements is complicated by the fact that the term “majority voting” is often used to include both: (a) policies in corporate governance principles that continue to retain plurality voting but require a director that received more “withhold” rather than “for” votes to submit his or her resignation (sometimes known as a “director resignation policy”) and (b) majority voting standards in charters or bylaws that also demand the same type of director resignation, but triggered by whether the director received more “against” rather than “for” votes. Both standards need the additional step of a director offering to resign based on the election results because of state law holdover statutes that severely restrict the involuntary removal of a director, regardless of the amount of votes cast. Both standards also provide boards with ample discretion to accept or reject a director’s offer of resignation.

Shareholder proposals request that the charter or bylaws require majority voting, as activists consider director resignation policies in governance principles to be merely symbolic resolutions that are legally unenforceable and easily changed by later board decision without public fanfare. However, most shareholder proposals fail to pass if a company maintains plurality voting but has a director resignation policy in place, given the similar effect of adopting majority voting in charters or bylaws. During this season, more than 85% of the companies where the proposal was not approved already had a director resignation policy, including at Caterpillar, Baker Hughes, Duke Energy and Kellogg.

As expected then, the proposals succeeded at over 90% of the companies without a director resignation policy, most notably this season at Apple. CalPERS campaigned for the proposal, declaring: “We’re asking for an election, not a coronation of the board.” Apple argued that the adoption of majority voting would harm the company given the unusual complexity of California state law, which requires not only the affirmative vote of a majority of the shares but also the affirmative vote of more than half of the shares required for a quorum. In addition, under California’s mandatory termination law, a director’s term in office would simply end 90 days after failing to receive the requisite votes. Apple’s explanations, however, went unappreciated by the more than 73% of its shareholders that supported the proposal, signifying a major win for CalPERS.

Two other companies, Qualcomm and BB&T Corporation, failed to convince shareholders that they had adequate substitutions in place. Their policies require only board review if a director receives more “withhold” rather than “for” votes, without triggering director resignation.

Even companies with director resignation policies will often agree to adopt majority voting without putting the shareholder proposal to a vote, as Pepsi did this year. Companies that need charter amendments to implement majority voting must include a management proposal asking for shareholder support, which were overwhelmingly supported.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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