

CII Advocates for Consequential Majority Voting, a Departure from Common Practice

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The Council of Institutional Investors has published an [FAQ](#) on majority voting for directors in which it advocates for “consequential majority voting,” a form of majority voting in director elections that essentially removes board discretion if a director receives less than majority support.

90% of S&P 500 companies have a traditional form of majority voting, compared to only 29% of Russell 3000 companies. Most mid-cap and small-cap companies elect directors under a plurality vote system, where the nominees who receive the most “for” votes are elected until all board seats are filled. In an uncontested election, given that the number of nominees is equal to the number of board seats available, a nominee can be elected with one vote.

In response to criticisms about plurality voting, some companies have adopted “plurality plus.” A director who receives more “withhold” votes than “for” votes would tender his or her resignation to the board, although that director is legally elected to the board. The board has discretion to accept or reject that resignation.

Plurality plus came under criticism as well, for being a symbolic gesture with no legal impact. Companies then adopted majority voting for director elections. In the most common form, uncontested director nominees must receive more “for” votes than “against” votes to be legally elected. A director who is not elected does not immediately leave the board; instead however, that director offers to resign from the board, and the board makes a decision on whether to accept that resignation.

According to the FAQ, given its widespread prevalence, CII currently accepts this form of majority voting if the company already has it in place and the board has a good faith commitment to replace those “unelected” directors within a reasonable period of time. But CII advocates for consequential majority voting as a best practice.

Under consequential majority voting, a director submits an irrevocable resignation upon appointment to the board. The FAQ contains a form of Delaware bylaw that requires the resignation to automatically become effective if the director fails to receive a majority of votes cast upon the earlier of (a) the selection of a replacement director by the board or (b) up to 90 or 180 days after the election. CII recognizes that such a provision could cause the company to breach contracts, listing standards or other documents, but believes that the holdover period is sufficient to alleviate those concerns.

Microsoft is cited in the FAQ as a company with consequential director elections. Under the company's bylaws, an incumbent nominee in an uncontested election who does not receive a majority vote serves as a holdover director until the earliest of 90 days after the voting results are determined, the date on which the board fills the seat as a vacancy or the date of the director's resignation.

Failure to receive majority support is highly unusual, with just 47 directors affected in 2016 at 28 companies in the Russell 3000, or less than 1% of the entire index. According to CII, voting standards have an impact on whether those directors remain on their boards. At plurality plus companies between 2013 to 2016, 24% departed from their boards. By comparison, more than 75% of directors at companies with majority voting who were not elected in the same period left. CII wants consequential majority voting to ensure that all directors who do not receive majority support depart their boards.

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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