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GEORGIA FACILITATES MAJORITY VOTING FOR PUBLIC COMPANY DIRECTOR ELECTIONS

As a result of recent amendments to the Georgia Business Corporation Code ("GBCC"), beginning on July 1, 2008 Georgia public companies will be able to adopt a bylaw requiring a majority vote standard in director elections.[1] If adopted, such a bylaw would require director nominees to receive a majority of the votes cast in order to be elected or reelected to the company's board of directors. The amendments also confirm that a director's resignation may be conditioned upon the happening of a future event, such as a less-than-majority shareholder vote, and that such a conditional resignation can be made irrevocable.

In general, directors of Georgia corporations have been elected pursuant to a plurality voting standard (*i.e.*, the nominee with the most votes in his or her favor is elected). Accordingly, a nominee in an uncontested election could, in theory, receive a single vote and still be elected to the company's board of directors. Furthermore, if a Georgia public company desired to implement a majority voting standard (or other alternative standard), it was necessary for the company to amend its articles of incorporation. The amendments to the GBCC are intended to provide boards of directors of Georgia public companies with greater flexibility in addressing shareholder concerns and marketplace developments. In this regard, the amendments make it less burdensome and time consuming for a Georgia public company to change the voting standard for the election of its directors.

TRENDS IN MAJORITY VOTING

Until recently, plurality voting for the election of directors was the clear standard for U.S. public corporations. Majority voting proponents began to gain traction earlier this decade following several large

1. See Senate Bill 436, which was signed into law by Governor Perdue on May 6, 2008.

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corporate scandals and a stalled attempt by the Securities and Exchange Commission to adopt rules that would have made it easier for shareholders to nominate directors. As a result, institutional and other activist shareholders pressured public companies to enact perceived corporate governance improvements, including the application of majority voting standards to uncontested elections of directors. These efforts were typically embodied in shareholder proposals advocating majority voting that were to be included in a company's proxy statement and submitted to a nonbinding shareholder vote.

In response to the majority voting movement, the boards of many U.S. public companies took action to implement some form of majority voting system. Many of the early corporate responses were in the form of so-called "Pfizer policies," after the corporate governance policy adopted by Pfizer Inc. in 2005. The Pfizer policy required a nominee who failed to receive a majority of the votes cast in his or her uncontested election to tender his or her resignation to the board promptly after the certification of the election results. The board and its corporate governance committee then had to consider the resignation in light of any factors they considered appropriate. The board was required to determine whether to accept the tendered resignation within 90 days following the election, and to disclose both its decision and the reasons for rejecting any tendered resignation.

The boards of other companies adopted bylaws that require nominees in uncontested elections to receive a majority of votes cast in order to be elected to the board, following the model adopted by Intel Corporation in 2006 (which included a resignation mechanism similar to Pfizer's). The Intel model has been endorsed by a number of majority voting proponents. Notably, in October 2007, Pfizer's board elevated its corporate governance policy to a bylaw.

The strength of the majority voting movement continued to be evident in the 2007 proxy season, in which, according to the proxy advisory firm Laurel Hill Advisory Group, 130 shareholder proposals relating to majority voting were filed, and those proposals ultimately submitted to a shareholder vote received, on average, the support of 49 percent of the votes cast. Furthermore, according to Laurel Hill Advisory Group, more than half of *Fortune* 500 companies have implemented some form of majority voting system for director elections.

AMENDMENTS TO THE GBCC

Previously, under Section 14-2-728 of the GBCC, unless otherwise provided in the articles of incorporation, public company directors were elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum was present. As a result, a public company had to adopt an amendment to its articles of incorporation in order to change from a plurality standard to a majority voting or other standard for director elections, a time-consuming approach requiring a proxy solicitation and shareholder approval. As previously mentioned, the new legislation offers a Georgia public company the alternative of a board-adopted bylaw to change the voting standard and was intended to allow a board of directors to respond quickly to shareholders' concerns and to provide flexibility to the board as circumstances change. Privately held corporations will continue to be required to amend their articles of incorporation in order to deviate from the default plurality voting standard, as will public companies whose articles of incorporation specifically mandate the plurality standard.

Unless the articles of incorporation provide otherwise, shareholders may not adopt a bylaw changing the plurality standard for election of directors, nor may they amend (although they may repeal) such a bylaw adopted by the board of directors of a public company. The ability of the board of directors and shareholders together to amend a company's articles of incorporation is not impacted by the amendments to the GBCC.

The amendments to the GBCC also confirm a Georgia public company's ability to condition a director's resignation on the happening of a future event (such as the failure to obtain a majority of affirmative votes in an election) and to cause such a resignation to be irrevocable. A director resignation mechanism (particularly the irrevocability feature) is essential to a majority voting approach in that Georgia law (like Delaware and other jurisdictions) has established a "holdover rule" for director elections (*i.e.*, despite the expiration of a director's term, the director remains on the board until his or her successor is elected and qualified or until there is a decrease in the number of directors). The amendments follow the approach of Delaware law and remove certain

technical concerns and fiduciary duty issues surrounding such conditional resignations.

IMPACT AND NEXT STEPS

Under the amendments to the GBCC, directors now have several options. In considering the various options, we note that there is not a simple off-the-shelf approach for all Georgia public companies, and, accordingly, each company will need to consider what action to take, if any, in light of its own particular circumstances. Furthermore, careful attention should be given to issues that will be somewhat individual to each company, including a company's shareholder composition, the existing provisions of its articles of incorporation and bylaws, contractual covenants, and stock exchange requirements.

First, a company's board of directors may decide to refrain from taking any action until it becomes clear what the company's shareholders desire, especially if the company has not received shareholder pressure to adopt majority voting. Refraining from taking any action may also be prudent for those companies that fear the risks associated with failed elections (*i.e.*, elections that result in a vacancy on the board with no assurance that it will be filled), especially in light of pending amendments to the New York Stock Exchange rules that, when effective, will prohibit brokers from voting shares in favor of management's director candidates without express instructions.

Alternatively, a board of directors may choose to seize control of the issue and, as a result of the amendments to the GBCC, will now be able to craft a bylaw amendment that it should be able to implement quickly and amend in the future as necessary.

The board of directors, relying presumably on the approach endorsed in the amendments to the GBCC, could adopt a Pfizer-style approach, which does not affirmatively change the bylaws or articles, but which requires a nominee to offer to resign if he or she fails to receive a majority vote. However, in light of the amendments to the GBCC and the evolution of majority voting practices in general, activist shareholders may contend that a Pfizer-style approach is inadequate.

Finally, the board of directors may decide to go through the process of amending the company's articles of incorporation. However, because amending the articles of incorporation would require both director and shareholder approval, it is unlikely that a company would choose this route absent strong shareholder pressure to do so.

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