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Brian G. Cartwright, Esq.
General Counsel
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20459

Dear Mr. Cartwright:

I am writing in response the Securities Exchange Commission's request for public comment (File No. 4-537) on their continuing examination of shareholder access to the corporate proxy for publicly traded corporations. I recently completed an article on majority voting in elections of Delaware corporations that will be published in the May 2007 edition of *The Business Lawyer*. *See* J.W. Verret, *Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting in Delaware Corporate Elections*. 63 THE BUSINESS LAWYER__ (May 2007)(forthcoming). This letter is intended to summarize my findings on the interaction of majority voting with proxy access and present the alternative proposal for contested majority vote elections that my article explores. The following summary highlights my findings.

Those in favor of proxy access want a method for a majority of dispersed shareholders to legitimately express their preference for board membership. Those opposed to proxy access express a fear of the divisive presence of special interest directors. The conflict between advocates and detractors of proxy access stems, in part, from the structural limitations of plurality voting, a method used to prevent failed elections in which more than two candidates are up for a single board seat and none of them obtain a majority vote in favor. However, a voting method which could be an effective compromise is majority voting for contested elections, combined with instantaneous runoff voting (using an ordinal ballot to rank candidates, with a top rank resulting in a vote for a candidate in the first round, and then tallying any runoff results using each voting instruction's top rank among the candidates left in the runoff). It would allow a majority of shareholders to express their preference for and against candidates, it would limit special interest directors because candidates would need majority support, the runoff would mean the failed election problem of majority voting has been solved, and there would be no need for the expense of a second round of solicitations to obtain runoff results. The SEC could encourage this method by, for instance, limiting the application of a proxy access rule to companies that have an instantaneous runoff/majority voting bylaw in place. Though it is not my intention to suggest that such a voting system may not present its

own unique challenges, I do suggest that it has been wrongfully left off the table of alternatives explored to resolve the present deadlock on this issue.

Delaware recently amended their corporation law to protect shareholder bylaws defining the vote threshold for corporate elections. The amendment requires shareholder approval to alter a shareholder-adopted bylaw specifying the vote required to win a board election. This has resulted in board-adopted majority voting bylaws, but only for uncontested elections, by nearly half of boards comprising the S&P 500. This is likely intended to forestall more onerous shareholder-adopted majority bylaws, and ensure that such bylaws are not protected by the Delaware amendment. Some would claim that the growing popularity of majority voting limits the need for proxy access. However, that oversimplifies the analysis. Though board-adopted bylaws were initiated under the auspices of facilitating shareholder withhold vote campaigns to enhance director accountability, their reach and effect is highly limited. For instance, most of the bylaws adopted give the board discretion in determining whether to accept a board member's required resignation upon the occurrence of a majority withhold vote against that director. The state law consequences of a board's decision to reject such resignation are unclear, but would perhaps be protected by the business judgment rule.

Majority voting is a vital element to the SEC's consideration of proxy access, as the two are already poised to interact in some unexpected ways. As one simple example, if though proxy access a director nominee is elected by a mere plurality vote, and a majority of the shareholders can be rallied against that candidate in a subsequent election, then a majority vote bylaw for uncontested elections would allow the board of directors to institute a withhold vote campaign against the insurgent in a subsequent election. Thus, to the extent that one believes that facilitating shareholder nominations is a positive development, the majority voting capability may, in some instances, limit its effect.

The shareholder franchise is the underlying edifice for state corporate law. This is especially true in Delaware, the nation's leading source of that body of law. I applaud the SEC's commitment to protecting shareholder's state law voting rights. I also urge careful consideration of the interaction between majority voting and proxy access as well as a thoughtful examination of instantaneous runoff majority voting.

Sincerely,

J.W. Verret