January 9, 2006

SEC Denies Exclusion of Majority Voting Shareholder Proposal from Proxy Materials

The SEC Staff has denied the "no-action" request of Hewlett-Packard Company to exclude from its 2006 proxy materials a shareholder proposal requesting that the company's board of directors amend the company's governance documents to mandate a majority vote standard in the election of directors (letter dated January 5, 2006 and publicly available January 9, 2006). Hewlett-Packard sought the no-action relief on grounds that the precatory shareholder proposal had been "substantially implemented" as contemplated by the Exchange Act rules because the company had previously adopted a corporate governance guideline requiring a director nominee receiving a greater number of votes "withheld" from his or her election than votes "for" election to tender his or her resignation for consideration by the board.

Hewlett-Packard's no-action request was the first of a series of such requests submitted by companies in recent months. While Hewlett-Packard's corporate governance policy did not include many of the elements contained in ISS' policy for a "meaningful alternative" to a true majority vote standard, the SEC Staff's denial of Hewlett-Packard's request makes it likely that the Staff will deny the no-action requests of other companies seeking relief on the same grounds. Indeed, it should be noted that in addition to having adopted the director resignation governance guideline, Hewlett-Packard's charter provides for the relatively rare feature of cumulative voting, a mechanism which promotes minority shareholder influence in director elections.

We continue to believe that unless and until there is a change to the prevailing corporate law establishing plurality voting as the norm, the adoption of a corporate governance guideline is a flexible and appropriate response to the shareholder resolutions calling for a majority vote standard. However, with the SEC's Hewlett-Packard decision, we can expect these proposals to come to a vote at a number of companies and, absent a meaningful governance guideline, to continue the trend of last year to receive significant support. It remains to be seen what the level of support will be where a company has adopted a governance guideline of the type we have recommended.

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