

## Corporate Securities Law

March 13, 2017

### Toronto Stock Exchange Provides Guidance on Majority Voting and Advance Notice Policies

On March 9, 2017, the Toronto Stock Exchange (TSX) published a new Staff Notice regarding its review of listed issuers' use of majority voting policies and advance notice policies/bylaws. The Staff Notice includes detailed guidance that will be useful to issuers in designing (or refining) and applying these policies in a manner consistent with the policy objectives of the TSX's director election requirements.

#### Majority Voting Policies

TSX rules require that issuers adopt a majority voting policy to substantially provide for the majority voting requirements set out in the TSX's rules, including that:

- any director immediately tender his or her resignation if he or she is not elected by at least a majority of votes cast with respect to his or her election (other than at a contested meeting), and
- the board accept any such resignation, absent "exceptional circumstances".

The TSX conducted a review of 200 randomly selected majority voting policies to assess compliance with its majority voting requirements. As a result of that review and its experience since these requirements came into force in 2014, the TSX has provided additional guidance to listed issuers regarding these policies.

Much of the guidance reminds issuers that various aspects of majority voting policies must not only strictly comply with the TSX's rules, but with the policy objectives underlying the majority voting requirements.

The TSX will scrutinize provisions that have the effect of circumventing or frustrating the majority voting requirements (e.g., the exclusion of certain nominees or groups of nominees – such as insiders – from the policy's application), or that otherwise provide individual directors or the board with discretion to take actions that are inconsistent with (or refrain from taking actions that are required by) the majority voting requirements.

Most significantly, the Staff Notice also directly addresses the important question of what "exceptional circumstances" may permit a board to refuse to accept a resignation tendered under a majority voting policy. Some market participants have expressed concern that boards have taken an unduly broad interpretation of the phrase "exceptional circumstances" to avoid the effects of the majority voting requirements.

The Staff Notice provides the following examples of potentially exceptional circumstances:

- the issuer would not be compliant with legal or contractual requirements as a result of accepting the director's resignation,
- the director is a key member of an active committee and accepting the resignation of the director could jeopardize the achievement of the committee's mandate, or
- majority voting was used for a purpose inconsistent with the policy objectives of the majority voting requirement (which could include using an issuer's majority voting policy as an indirect means to obtain control of the board).

The TSX also indicated that it generally does not consider a director's length of service, qualifications, attendance at meetings, experience or general contributions to the issuer to be exceptional circumstances (given that this information is typically available to security holders when they make their voting decision).

# Goodmans<sup>LLP</sup> Update

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Issuers should be aware that the TSX has indicated that it will contact an issuer whose board does not accept a resignation tendered under a majority voting policy to ensure the board's decision is reasonable and, even if so, that the board is taking steps to ensure that the circumstance does not recur the following year.

## **Advance Notice Policies**

The Staff Notice also discusses listed issuers' increasing use of advance notice policies and bylaws and their relationship with the TSX's director election requirements. While the TSX recognizes that advance notice policies may be legitimately used to preserve security holders' interests, the Staff Notice highlights some concerns that the TSX identified in its review of a select sample of issuers' advance notice policies. Most significantly, the TSX views advance notice policies that:

- provide for an unreasonably short period before a shareholders meeting to nominate directors, and
- impose requirements and procedures on a nominating security holder or a nominee director that are more onerous than requirements for management and board nominees (such as burdensome information or disclosure requirements),

as potentially inconsistent with the policy objectives of the director election requirements. In this regard, the TSX has stated that it believes the current guidelines published by Glass, Lewis & Co., LLC and Institutional Shareholder Services Inc. for Canada regarding notification periods in advance notice policies are generally satisfactory.

The Staff Notice indicates that the TSX also expects that:

- issuers will adopt advance notice policies sufficiently in advance of shareholder meetings to allow security holders to comply with the notice periods, and
- an advance notice policy will grant the board discretion to waive any provision of the policy.

## **Conclusion**

The TSX has indicated that it is in the process of conducting another review of majority voting policies and that it will continue to monitor notice periods in advance notice policies. In light of the TSX's focus on these matters and the detailed guidance in the Staff Notice, it would be prudent for listed issuers to review (and amend, if necessary) their majority voting policies to ensure they strictly comply with the majority voting requirements. Issuers who have, or are considering adopting, an advance notice policy or bylaw should similarly ensure that its requirements – in particular notification periods – are consistent with the guidelines provided in the Staff Notice.

Please contact any member of our Corporate Securities Group to discuss the Staff Notice or its implications for your entity's policies and bylaws.