

Update

Corporate Securities Law

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Governance Initiatives Keep Coming - Open Letter from RiskMetrics on Individual Board Elections

RiskMetrics Group (“RMG”), a major institutional shareholder advisory group, has changed its policy concerning the election of directors to the boards of Canadian public issuers. In an open letter to all TSX-listed issuers, RMG urged the adoption of voting for directors on an individual basis (rather than on a slate basis) and indicated that starting next February it would recommend that its institutional clients withhold votes on all slates.

Canadian boards have historically been elected by slate, meaning that shareholders vote for the directors who are up for election together as a group, rather than for each director individually. Shareholders have two options: they can either vote for the entire slate or they can withhold their votes. Recently, however, an increasing number of issuers have adopted individual voting, where shareholders can vote for or withhold in respect of each director individually. According to RMG, as of December, 2008 36% of S&P/TSX Composite Index companies had slate ballots (although by June of 2009 the number had apparently declined to 25%).

This trend towards individual voting dovetails with the Canadian Coalition for Good

Governance’s *Corporate Governance Guidelines for Building High Performance Boards*, which sets as one of its minimum standards that shareholders should be allowed to vote for individual directors. Further, a similar trend in favour of shareholder involvement in electing boards is visible in the United States, where the Securities and Exchange Commission has proposed new rules that would allow shareholders holding 1%, 3% or 5% of shares, depending on the size of the company, to nominate their own directors to be included in a company’s proxy materials.

RMG, like other supporters of voting for directors on an individual basis, argues that by insulating individual directors in a larger, indivisible group, slate ballots protect those directors from shareholder action (and thus from proper accountability) and prevent institutional shareholders from effectively implementing governance policies.

RMG’s open letter is further evidence of the enduring trend in favour of activist shareholder involvement and increasing governance-oriented reform. Issuers whose directors are elected on a slate basis should be aware of RMG’s new policy for the 2010 proxy season.

The TSX had recently signaled that it would more actively consider using its approval rights in the context of prospectus offerings, and its recent denial of a proposed prospectus offering by OPTI Canada Inc. (“OPTI”) is a clear indication that the ground has shifted.

The TSX’s Company Manual provides that the TSX has discretion to apply the rules applicable to private placements, including the rules as to the maximum discount to market price that will be permitted without prior shareholder approval, to a prospectus distribution. In exercising that discretion “the TSX will consider factors such as:

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(i) the method of the distribution; (ii) the participation of insiders; (iii) the number of placees; (iv) the offering price; and (v) the economic dilution.”

In late June, OPTI announced that it had reached an agreement with a syndicate of underwriters for a public offering. The public offering price was at a discount that exceeded the maximum permissible under the private placement rules (absent shareholder approval). OPTI announced that the TSX would not accept notice of the financing without shareholder approval, which OPTI stated could not be obtained in a practicable timeframe. There was no indication from the TSX or OPTI as to whether any factors other than the discount in the offering price influenced the TSX’s decision.

The end of the story for OPTI is that it will proceed with its offering. A new agreement was reached, at a price that was accepted by the TSX without any requirement for shareholder approval, in part because the offering price is 5¢ higher than the initial price, but largely because OPTI’s share price had fallen approximately 30% in reaction to the TSX’s initial refusal.

Issuers should keep in mind the TSX’s increased willingness to use its discretion to actively scrutinize prospectus offerings, and to apply elements of its private placement rules to prospectus deals.