

## Corporate Securities Law

September 16, 2011

### New Governance Proposals from the TSX

On September 9, 2011, the Toronto Stock Exchange (“TSX”) published for comment proposed amendments that would require all listed issuers – including those with a principal listing on another exchange – to:

- hold annual elections for all directors (rather than permitting staggered votes, which allow a portion of the directors to be elected annually for a multi-year period);
- elect directors individually (rather than by slate);
- disclose annually in management information circulars whether a majority voting policy for the annual election of directors has been adopted and, if not, explain the issuer’s practices for electing directors and the reasons for not adopting a majority voting policy; and
- advise the TSX if a director receives a majority of “withheld” votes (if a majority voting policy has not been adopted).

Interestingly, these amendments have been proposed by the TSX while the Ontario Securities Commission (“OSC”) is seeking comment on its January 10, 2011 OSC Staff Notice 54-701 – *Regulatory Developments Regarding Shareholder Democracy Issues*, including comment on whether OSC staff should develop proposals in respect of the election of directors and the scope of any such proposals. The TSX has provided no context for the timing of its initiative, which is open for comment until October 11, 2011.

#### Highlights of the Proposed Amendments

##### *Annual Election of All Directors*

Under the various Canadian corporate law statutes, a company is permitted to provide for a staggered election of directors, resulting in a subset of directors being

elected each year. Staggered elections are viewed by some as a means of entrenching the members of the board, as it would require a series of elections, over a number of years, in order for shareholder votes to result in an overhaul or material change of sitting directors. According to the TSX, while staggered boards are more common in other major international jurisdictions, the overwhelming majority (98%) of TSX-listed issuers already conduct annual elections. The proposed amendments would require that all TSX-listed issuers hold annual elections for all of their directors. Companies that have staggered boards in which only a subset of the directors are elected each year (approximately 2% of listed issuers according to the TSX), generally would have to amend their articles or other constating documents (which would require shareholder approval) to permit annual election of all directors. This proposal may be the most controversial for issuers incorporated or organized outside of Canada whose principal trading market is not the TSX (if no exception is made for them).

##### **Individual Election of Directors**

The proposed amendments would also require that TSX-listed issuers provide shareholders with the right to vote for each director individually at each annual meeting, rather than voting for the entire board as a slate. The TSX has indicated that it believes that individual voting provides valuable insight into the level of support that shareholders hold for each director. According to the TSX, a large majority of TSX-listed issuers (83%) currently hold individual director elections, consistent with the growing trend by proxy advisory firms to recommend that shareholders vote against slate boards.

##### **Disclosure of Voting Results**

Under existing Canadian disclosure requirements, if a vote for the election of directors is conducted by a show of hands, disclosure of the precise number of votes received for (and withheld from voting) in respect of each director is not required. The TSX has indicated that it believes that disclosure of the number of votes received for each director (whether voted for or withheld from voting) is valuable information for

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shareholders of the issuer. In this context, the TSX is seeking comment as to whether TSX-listed issuers should be required to disclose specific results of votes related to the election of directors (or whether, to fit into the existing disclosure requirements respecting voting results, to require all elections of directors to be conducted by ballot).

## **Disclosure re: Majority Voting Policies**

Under current corporate and securities laws, shareholders can vote “for” or “withhold” their vote in elections of directors. Under this “plurality voting standard”, a director (or slate of directors) could be elected with limited support. Under a majority voting policy, a director who receives less votes than the number of votes that are “withheld” generally would be required to tender his/her resignation, and the board generally would accept that resignation, absent unusual circumstances. Under those policies, the decision by the board as to the acceptance of the resignation is announced by way of press release.

The proposed amendments would not require TSX-listed issuers to adopt a majority voting policy but would require the issuers to disclose in their annual proxy circulars whether they have adopted such a policy and, if not, to disclose the rationale for not doing so.

The TSX also would require a listed issuer that did not adopt a majority voting policy to advise the TSX if a director receives a majority of “withhold” votes. The TSX states that in such circumstances, it intends to follow up with the issuer to confirm the issuer’s intentions and corporate governance practices in light of the voting results and would similarly call the director to understand how the voting results may affect his/her views about continuing to serve as a director.

Please contact any member of the Goodmans Corporate Securities Group to discuss the implications of these proposed regulations.