



## New rules for director elections

With proxy season around the corner, the focus of many public companies will turn to issues surrounding the election of directors. For companies listed on the Toronto Stock Exchange, there are new rules in place for director elections aimed at improving corporate governance. Board members will now have to grapple with efforts by regulators to bring director election practices in Canada up to the standards of other major international jurisdictions. This quiz surveys some of the situations public companies may have to navigate under the new rules.

**1** The current board of Public Co. (a TSX-listed issuer) are all friends from business school and would like to continue working together. One director, Ben D. Rules, does not enjoy a high level of shareholder support. If given the option, the shareholders would much prefer to elect Seymour Value to the board. In the past, shareholders haven't been able to add Value to the board because Public Co. used "slate-style" voting and he never made the management list. Will the shareholders be able to elect Value this year?

(A) Yes  
(B) No  
(C) Maybe, it depends

**2** The board of Public Co. hasn't decided whether to adopt a majority voting policy. They've been busy trying to finalize their financial statements in time for the annual general shareholder meeting. One board member, Justin Case, thinks they should "leave it open" and decide on the adoption of a majority voting policy after they see how the votes come in at the meeting. Should the board follow Case's lead?

(A) Yes  
(B) No  
(C) Maybe, it depends

**3** In accordance with TSX rules, Public Co. decides to hold an election on an individual basis that is not contested. One current and up-for-election board member is Ben D. Rules. He receives 4,000 "withhold" votes and 25 "yes" votes. Public Co. does not have a majority voting policy. Is Rules validly elected?

(A) Yes  
(B) No  
(C) Maybe, it depends

**4** Public Co. always counts the votes at its shareholder meetings by a show of hands. The proxy advisor, Mark Aldavotes, dutifully counts all 4,025 votes for the director elections. Rules is embarrassed about how poorly the vote went for him. In the past, Public Co.'s press officer, Rhoda Report, always skips the specific voting results and only indicates who was or was not elected to the board. Should Rules be relieved?

(A) Yes  
(B) No  
(C) Maybe, it depends

**5** Public Co. is incorporated under the Canada Business Corporations Act and has four members on the board of directors. The sole resident Canadian director, Aida Canuck, wants to resign from the board. Can she walk away?

(A) Yes  
(B) No  
(C) Maybe, it depends



**1** (C) Maybe, it depends. Recent amendments now mandate individual election of directors rather than slate-style voting. So, Seymour Value now has a better opportunity to be elected than before. Previously, the shareholders would have only had a chance to elect Value if a shareholder put forward an entire new slate of nominee directors for election. Now, it is arguably easier for him to be elected to the board, since a shareholder only has to propose one nominee rather than an entire board. That being said, Value still needs to collect sufficient votes to win.

**2** (B) No. Issuers are now required to disclose their adoption or non-adoption of a majority voting policy in their Management Information Circular. The TSX hopes this disclosure will have the effect of forcing companies to consider and educate themselves on director election practices. Also note that the TSX is considering adopting a firm rule requiring issuers to adopt a majority voting policy. The current version of the amendments was open for comment until Nov. 5, 2012 and — depending on the nature and extent of the comments received and TSX opinion — the proposed effective date for adopting a mandatory majority voting policy could be as early as Dec. 31, 2013.

**3** (A) Yes. When an uncontested election occurs, if a director receives even one “yes” vote then that individual is validly elected. The new rules require that, in such a situation, the TSX be notified, at which point the issuer will need to explain to the TSX its intentions and corporate governance practices in light of the voting results. The TSX will also have a discussion with the director to understand how the vote results may affect his/her views about serving as a director. Even after the adoption of a majority voting policy, the election would still be valid but the director may, as a result of the majority voting policy, be forced to resign.

**4** (B) No. Following each meeting of security holders at which there is a vote on the election of directors, issuers

are required to disclose the results of the vote in a news release. Under the pre-amendment rules, it was permissible to elect directors by show of hands and subsequently not disclose the exact number of votes received for each director in the press release. Now, the TSX has closed that loophole. Even if the vote is by show of hands, the news release is required to disclose the exact number of votes received for each director on an individual basis.

**5** (C) Maybe, it depends. If Canuck resigns there will be no resident Canadian director on the board, which means the company will be in violation of the CBCA rule requiring a minimum of 25 per cent of directors be resident Canadians. Strictly speaking a director can resign at any time, although in this case the board would not be properly constituted if Canuck did resign. A director should consider their fiduciary duties to the company before considering resignation. This question highlights one of the potential downsides of individual voting for directors because slate-style voting ensures there are an appropriate total number of directors elected as well as an appropriate number of directors with particular qualities such as Canadian residency or audit committee experience.

### YOUR RANKING?

- **One or less correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three or four correct:** *very well done, but not perfect*
- **Five correct:** *excellent*

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