

TSX Toughens Rules for Director Elections

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For companies listed on the Toronto Stock Exchange (“**TSX**”), the New Year will bring new rules for director elections. The TSX will be strengthening corporate governance standards by incorporating changes to the TSX Company Manual (the “**Manual**”) which will, among other things, require the election of directors to occur on an individual basis. The changes will also mandate annual director elections as well as disclosure of all voting results and majority voting policies. The modifications were first published for public comment on September 9, 2011. Effective December 31, 2012, these amendments to the Manual (the “**Amendments**”) will require Issuers listed on the TSX to:

- (1) elect directors individually;
- (2) hold annual elections for all directors;^[1]
- (3) disclose annually in their Management Information Circular:
 - (a) whether they have adopted a majority voting policy for directors for uncontested meetings; and
 - (b) if not, to explain; (i) their practices for electing directors; and (ii) why they have not adopted a majority voting policy;
- (4) advise the TSX if a director receives a majority of “withhold” votes (if a majority voting policy has not been adopted); and
- (5) promptly issue a news release providing detailed disclosure of the voting results for the election of directors. Security holder meetings which have already been set and for which proxy materials have already been approved by the TSX, will be unaffected by the Amendments until their next meeting at which directors are to be elected. As a result, Issuers with meetings scheduled for early 2013, will likely be unaffected by the amendments.

Electing Directors Individually

The TSX believes that the election of directors on an individual basis provides insight into the level of support that each director enjoys. A majority of comment letters received by the TSX supported moving to individual voting for directors, at least partly, to avoid the drawbacks of slate-style election of directors. Slate-style voting permits the election of a fixed group of directors on an all or none basis, which considerably circumscribes voter choice. At the same time, slate-style elections ensure that there is an appropriate total number of directors elected as well as an appropriate number of directors with particular qualities (i.e. Canadian resident status, Audit Committee qualified, etc.).

Holding Annual Elections for All Directors

The Amendments will require the election of all directors at each annual meeting of holders of listed securities. However, the TSX has also stated that if security holder approval is required under an Issuer's constating documents to implement the requirement for annual director elections and security holders vote against such a resolution, then the TSX will not hold the Issuer in breach of its rules. However, in such circumstances, the Issuer will be required to again present a resolution to security holders within the following three years and must confirm their support for the approval of the resolution.

Disclosure of Director Voting Policies in Management Information Circulars

Issuers will also now be required to disclose their adoption or non-adoption of a majority voting policy in their Management Information Circulars. This disclosure will have the effect of forcing the board of directors to consider and educate themselves on director election practices. The TSX stated that while some commentators would have preferred a mandatory majority voting policy requirement, the current Amendments require only the disclosure of whether an Issuer has adopted a majority voting policy. However, the TSX is also considering adopting a rule requiring Issuers to formally adopt a majority voting policy. The current version of the amendments was open for comment until November 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 December 31, 2013.

Advising the TSX if a Director Receives a Majority of "Withhold" Votes

According to the TSX, majority voting policies support good governance by (i) providing a way for security holders to signal their approval or disapproval of each individual separately and (ii) requiring Issuers to examine directors that do not have the support of the majority of security holders. Under the current rules, when an uncontested election is held, even if a director receives a majority of "withhold" votes, that individual is validly elected. The Amendments will 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.

Promptly Issuing a News Release Providing Detailed Disclosure of Voting Results

Following each meeting of security holders at which there is a vote on the election of directors, Issuers will be required to disclose the detailed results of the vote in a news release. Section 11.3 of National Instrument 51-102 – Continuous Disclosure Obligations, already mandated non-venture reporting Issuers to file a report of voting results that discloses the outcome of each vote at a meeting of security holders and, if the vote was conducted by ballot, the number or percentage of votes cast for, against or withheld from the vote. Since existing laws permit the election of directors by show of hands, it is currently permissible to elect directors by show of hands and subsequently not disclose the votes received for each director. The Amendments state that even if the vote is by show of hands, the news release will be required to disclose the votes received for each director on an individual basis.

[1] According to the TSX, 98% of Issuers in the S&P/TSX Composite Index already hold annual elections, but it is not currently a requirement.



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