

## TSX AMENDS DIRECTOR ELECTION RULES AND PROPOSES A MAJORITY VOTING REQUIREMENT

GENEVIÈVE FOURNIER

ISSUES SURROUNDING THE ELECTION OF DIRECTORS OF PUBLIC COMPANIES GAINED THE ATTENTION OF CANADIAN SECURITIES REGULATORS IN THE LAST YEARS DUE TO CONCERNS EXPRESSED BY LARGE INSTITUTIONAL INVESTORS THAT CURRENT CANADIAN RULES REGARDING THE ELECTION OF DIRECTORS WERE NOT DEMOCRATIC NOR ALIGNED WITH CURRENT PRACTICES IN OTHER COUNTRIES.

In January 2011, the Ontario Securities Commission (the "OSC") published a Staff Notice advising that it was assessing whether reforms to securities laws were appropriate to facilitate individual director voting and majority voting for director elections.

Following such initiative, the Toronto Stock Exchange ("TSX") published for public comment, in September 2011, a series of proposed amendments to its Company Manual that relate to how a listed issuer elects the members of its board of directors. Considering that a majority of commenters supported such amendments and that the OSC approved same, TSX announced on October 4, 2012 the adoption of the proposed amendments to its Company Manual. The new rules require TSX listed issuers to:

- (I) elect directors annually, prohibiting staggered boards;
- (II) elect directors individually, prohibiting elections of board slates as a whole;
- (III) disclose by way of press release the votes received for the election of each director;
- (IV) disclose in its proxy circular whether a majority voting policy has been adopted and if not, explain the practices for electing directors and the reason for not adopting a majority voting policy; and
- (V) disclose to TSX if a director receives a majority of "withhold" votes in the case that the issuer does not have a majority voting policy. TSX will follow up with the issuer and the director where a director has not received majority votes.

The final amendments will come into force on December 31, 2012. The amendments will not have retroactive effect, so that issuers for which security holder meetings have already been set and for which proxy materials have already been sent to security holders, will be unaffected by the amendments until their next security holder meeting at which directors will be elected.

TSX further announced on October 4, 2012, that it is seeking public comment on additional proposed amendments to its Company Manual that would require issuers listed on TSX to have majority voting for director elections at uncontested meetings. Issuers would be able to comply with such a requirement by adopting a majority voting policy. The comment period ends on November 5, 2012, and TSX anticipates that the amendments, subject to the approval of the OSC, would become effective as of December 31, 2013.

Under current Canadian corporate law, security holders have the option to either vote "for" or "withhold" their votes for the directors (however, only votes cast "for" a nominee are counted). This can lead to a result where a director may be elected even if more votes were withheld than were cast in favour of his or her election.

When a majority voting policy is adopted, the "withhold" votes are considered "against" votes and counted as part of the total votes cast. A typical majority voting policy provides that a director who receives a majority of "withhold" votes must tender his/her resignation, and the board will generally accept such resignation, absent exceptional circumstances, and publicly announce its decision by issuing a news release. Some majority voting policies provide that the board must accept the director's resignation, although such policies are less common. In either type of policy, a director who receives a majority of "withhold" votes would still be elected as a matter of law, but a majority voting policy is designed to ensure that only those directors who receive a majority of votes in their favour remain on the board.

It is interesting to note that a significant number of issuers in the S&P/TSX Composite Index have already voluntarily adopted individual director elections (approximately 83% of issuers according to TSX) and annual director elections (approximately 98% of issuers according to TSX). According to the Canadian Coalition for Good Governance, which represents most of Canada's largest institutional investors, 61% of the listed issuers in the S&P/TSX Composite Index have also voluntarily adopted majority voting.

Discussions and proposals to improve the effectiveness of corporate governance in Canada are expected to continue. The OSC Staff Notice and the TSX amendments and proposed amendments described above are the largest regulatory initiatives to date toward granting Canadian security holders a more effective voice in electing directors.

#### GENEVIÈVE FOURNIER

514 877-3055

[gfournier@lavery.ca](mailto:gfournier@lavery.ca)

#### YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE SECURITIES LAW GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

JOSIANNE BEAUDRY 514 877-2998 [jbeaudry@lavery.ca](mailto:jbeaudry@lavery.ca)  
 MAXIME BERGERON 514 878-5663 [mbergeron@lavery.ca](mailto:mbergeron@lavery.ca)  
 MICHEL BLOUIN 514 877-3041 [mblouin@lavery.ca](mailto:mblouin@lavery.ca)  
 RENÉ BRANCHAUD 514 877-3040 [rbranchaud@lavery.ca](mailto:rbranchaud@lavery.ca)  
 GÉRARD COULOMBE 514 878-5526 [gcoulombe@lavery.ca](mailto:gcoulombe@lavery.ca)  
 MARTIN J. EDWARDS 418 266-3078 [medwards@lavery.ca](mailto:medwards@lavery.ca)  
 GENEVIÈVE FOURNIER 514 877-3055 [gfournier@lavery.ca](mailto:gfournier@lavery.ca)  
 MICHÈLE GAMACHE 514 877-2921 [mgamache@lavery.ca](mailto:mgamache@lavery.ca)  
 DENISE HOUDE 514 878-5583 [dhoud@lavery.ca](mailto:dhoud@lavery.ca)  
 ANDRÉ LAURIN 514 877-2987 [alaurin@lavery.ca](mailto:alaurin@lavery.ca)  
 GUILLAUME LAVOIE 514 877-2943 [glavoie@lavery.ca](mailto:glavoie@lavery.ca)  
 JEAN MARTEL 514 877-2969 [jmartel@lavery.ca](mailto:jmartel@lavery.ca)  
 NIS MOLLER 514 878-5585 [nmoller@lavery.ca](mailto:nmoller@lavery.ca)  
 SYLVIE C. PARENT 514 877-2967 [scparent@lavery.ca](mailto:scparent@lavery.ca)  
 CARL M. RAVINSKY 514 878-5594 [cravinsky@lavery.ca](mailto:cravinsky@lavery.ca)  
 MARC ROCHEFORT 514 878-5587 [mrochefort@lavery.ca](mailto:mrochefort@lavery.ca)  
 MICHEL SERVANT 514 877-2915 [mservant@lavery.ca](mailto:mservant@lavery.ca)  
 JEAN TESSIER 514 877-2907 [jtessier@lavery.ca](mailto:jtessier@lavery.ca)  
 SÉBASTIEN VÉZINA 514 877-2964 [svezina@lavery.ca](mailto:svezina@lavery.ca)

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