

Legal update

TSX provides guidance on director election requirements

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Just in time for the 2017 shareholder meeting season, the Toronto Stock Exchange (TSX) has released new guidance regarding its majority voting requirements and the use of advance notice policies. While there are no new rules relating to these two director election issues, the notice provides guidance to help issuers comply with the existing rules and includes examples of policy provisions that do not comply.

The TSX guidance on majority voting follows hot on the heels of the federal government announcement of proposed changes to the *Canada Business Corporations Act* (CBCA) which, if enacted, would enshrine majority voting in federal corporate legislation. The TSX guidance on advance notice policies is consistent with that articulated by the proxy advisory firms in their most recent voting guidelines.

Majority voting

The TSX introduced a requirement in June 2014 that each director of a TSX-listed issuer must be elected by a majority of the votes cast by shareholders, other than at contested shareholder meetings, failing which he or she must immediately tender his or her resignation. Because corporate law currently only allows shareholders to vote “for” or “withhold” their vote, a director would still be elected even if he or she only received one vote in favour and 100 votes were “withheld.” The majority voting policy provides a way for the will of the shareholders to prevail, by forcing a director who does not receive a majority of the votes to resign, absent exceptional circumstances that permit the board to refuse to accept the resignation.

The proposed amendments to the CBCA would require each nominee director to receive a majority of votes to be elected in the first place so that a resignation policy would not be needed. The CBCA proposed amendments go further than the TSX requirements, however, by providing that a nominee that does not receive a majority of the votes cast cannot be appointed a director by the board before the next shareholders’ meeting (except if required to comply with CBCA requirements to have at least two directors who are not officers or employees of the corporation or to satisfy Canadian residency requirements). For additional information regarding the proposed CBCA amendments, click [here](#) and [here](#).

The key elements of the TSX requirements for a company’s majority voting policy and process are as follows:

Director must immediately tender his/her resignation

- It is insufficient for the policy to state that directors are *expected* to resign if they do not receive a majority of the votes cast; the policy must *require* an immediate offer to resign.

- It is advisable to include provisions in the policy to support the resignation requirement, such as a condition that all nominees agree to the terms of the policy in order to be permitted to stand for election/re-election. Another suggestion is a provision that if a director refuses to tender his or her resignation, such director will not be nominated the following year.

Board must make a determination within 90 days

- The TSX requires the board to determine whether or not to accept the resignation within 90 days of the shareholders' meeting and the timeframe must be included in the policy.

Board must accept the resignation absent exceptional circumstances

- Exceptional circumstances are expected to be just that – exceptional. They are also expected to be non-recurring.
- Examples of exceptional circumstances may include: (i) the issuer would not otherwise be compliant with applicable laws, regulations or commercial agreements; (ii) the director is a key member of a special committee and his or her departure would jeopardize its mandate; and (iii) the policy was used to force out one or more directors for a reason inconsistent with the policy objectives of the TSX requirement.
- Examples of factors or circumstances that the TSX does not generally consider exceptional include: the director's length of service, qualifications, attendance at meetings, experience or contributions to the issuer.
- If the policy delegates the consideration of the resignation to a committee, the policy must still provide that the board as a whole must accept the resignation subject to exceptional circumstances.

Director cannot participate in the meeting where the resignation is considered

- A director who has tendered his or her resignation must not attend any part of the committee or board meeting at which the resignation is discussed or voted on, unless his or her presence is required for quorum purposes, in which case the director can attend but may not speak or otherwise participate in any part of the meeting.

Company must issue a press release and provide a copy to the TSX

- The company must promptly issue a press release with the board's decision and, if the board has determined not to accept a resignation, the news release must fully state the reasons for that decision.
- A copy of the news release must be provided to the TSX.

Advance notice policies

An advance notice by-law or policy allows an issuer to fix a deadline by which shareholders must submit director nominations and stipulate the information that must be included in the nomination notice. It effectively prevents dissidents from ambushing a shareholders' meeting by nominating directors from the floor. The TSX has acknowledged in its notice that such policies may be legitimately used to preserve shareholder interests, provided they do not unreasonably limit the ability of shareholders to nominate directors. Institutional Shareholder Services (ISS) and Glass Lewis hold similar views and will generally support an advance notice policy provided it meets certain requirements.

The TSX has provided the following guidance regarding advance notice policies, which is generally consistent with the proxy voting guidelines published by ISS and Glass Lewis:

Notification periods prior to a meeting to nominate directors

- The TSX supports the following notice periods in an advance notice policy:
 - *for annual and general meetings if notice of the meeting is given at least 50 days prior to the meeting date:* shareholders should have the ability to provide notice of director nominations at any time until 30 days prior to the meeting

- *for annual and general meetings if notice of the meeting is given less than 50 days prior to the meeting date:* shareholders should be able to provide notice of nominations at any time until the 10th day following notice of the meeting
- *for special meetings:* shareholders should be able to provide notice of nominations at any time until the 15th day following notice of the meeting
- The TSX expects an issuer that adopts an advance notice policy to do so sufficiently in advance of the shareholder meeting to allow any shareholders wishing to nominate directors to comply with the notice periods.

Requirements and procedures for nominators and nominees

- The requirements and procedures imposed on a nominating shareholder or a nominee director cannot be more onerous than those for management and board nominees. For example, an agreement, questionnaire, form of written consent or personal information form should not be required from the nominating shareholder and nominee director, unless such document is also required from management and board nominees.
- A nominating shareholder should not be required to be present at the shareholder meeting.
- A nominating shareholder should not be required to provide unduly burdensome or unnecessary disclosure, such as the date he or she became a shareholder. However, it is acceptable to require the nominating shareholder to disclose his or her economic and voting position.

Board discretion

- The policy must give the issuer's board discretion to waive any provision of the policy.

For more information, the TSX Staff Notice is accessible [here](#).

Katherine Prusinkiewicz

For further information, please contact one of the following lawyers:

> Thierry Dorval	Montréal	+1 514.847.4528	thierry.dorval@nortonrosefulbright.com
> Paul Fitzgerald	Toronto	+1 416.216.3941	paul.fitzgerald@nortonrosefulbright.com
> Kathy L. Krug	Calgary	+1 403.267.9528	kathy.krug@nortonrosefulbright.com
> David Hunter	Vancouver	+1 604.641.4963	david.hunter@nortonrosefulbright.com

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