



2017-0001

March 9, 2017

**Subsection 461.3  
Majority Voting Requirement**

**Subsections 461.1 — 461.4  
Director Election Requirements  
Advance Notice Policies**

**STAFF NOTICE TO APPLICANTS, LISTED ISSUERS, SECURITIES LAWYERS AND PARTICIPATING ORGANIZATIONS**

Toronto Stock Exchange ("**TSX**") is providing guidance with respect to the following Sections of the TSX Company Manual (the "**Manual**"): (i) the majority voting requirement in Subsection 461.3 ("**Majority Voting Requirement**"), and (ii) the use of advance notice policies in the context of director election requirements in Subsections 461.1–461.4 ("**Director Election Requirements**").

**1. Majority Voting Requirement**

Majority voting was introduced to improve corporate governance standards in Canada by providing a meaningful way for security holders to hold individual directors accountable. TSX believes that the Majority Voting Requirement introduced on June 30, 2014 enhances transparency and improves the governance dialogue between issuers, security holders and other stakeholders.

Subsection 461.3 of the Manual requires that each director must be elected by a majority of the votes cast with respect to his or her election, other than at contested meetings. To comply with the Majority Voting Requirement, issuers are required to adopt a majority voting policy (a "**Majority Voting Policy**"), unless they otherwise satisfy the Majority Voting Requirement in a manner acceptable to TSX. TSX requires each Majority Voting Policy to substantially provide for the specific requirements set out in Subsections 461.3 (a) to (e) of the Manual (the "**Policy Requirements**").

TSX conducted a review of 200 randomly selected Majority Voting Policies (the "**Reviewed Policies**") from TSX-listed issuers to assess compliance with the Policy Requirements. In its review and based on its experience from the 2015 and 2016 proxy seasons, TSX identified a number of deficiencies in the Reviewed Policies, as well as inconsistencies with the policy objectives of the Majority Voting Requirement. The findings and guidance in this section of this Staff Notice are intended to clarify the Policy Requirements. This guidance supplements the guidance provided in TSX Staff Notice 2015-0002.

*Key Findings*

*As a result of the review, TSX found that:*

- *certain Reviewed Policies did not have the effect of requiring a director to tender his or her resignation immediately if he or she was not elected by a majority of votes cast;*
- *certain Reviewed Policies did not provide a time frame for the board of directors to render a decision as to whether or not to accept a resignation or the time frame was outside the 90 day period permitted by TSX;*
- *certain Reviewed Policies did not specifically require the board of directors to accept the resignation of a director who was not elected by a majority of votes cast, absent exceptional circumstances;*
- *a number of the factors identified as exceptional circumstances in the Reviewed Policies were inconsistent with the policy objectives of the Majority Voting Requirement;*
- *very few of the Reviewed Policies contained the requirement to provide a copy of the news release with the board of directors' decision to TSX; and*
- *certain Reviewed Policies contained additional requirements that may have the effect of circumventing the policy objectives of the Majority Voting Requirement.*

#### Policy Requirements

- I. Subsection 461.3(a) — any director must immediately tender his or her resignation to the board of directors if he or she is not elected by at least a majority (50% + 1) of votes cast with respect to his or her election.*

TSX found that certain Reviewed Policies contained provisions that any director not elected by at least a majority of the votes cast (each, a "**Subject Director**") is "expected to resign" or "generally expected to resign". Issuers are expected to ensure that their Majority Voting Policies have the effect of requiring the Subject Director to tender his or her resignation immediately if not elected by a majority of votes cast. TSX understands that this requirement may need to be supplemented with additional provisions in order to be effective, such as:

- a requirement that all proposed nominees and directors agree to the terms of the Majority Voting Policy in order to be nominated for election; or
- a provision that if a Subject Director refuses to tender his or her resignation, such director will not be nominated for election the following year.

In addition, a Subject Director who refuses to tender his or her resignation would be in breach of Section 716 of the Manual. Such refusal may cause TSX to review the director's suitability to be involved in the capacity of a director, officer or other insider of TSX-listed issuers.

- II. Subsection 461.3(b) — the board shall determine whether or not to accept the resignation within 90 days after the date of the relevant security holders' meeting. The board shall accept the resignation absent exceptional circumstances.*

TSX found that certain Reviewed Policies did not provide a time frame for the board of directors of the issuer (the "**Board**") to render a decision or that it was outside the 90 day period

permitted by TSX. This is contrary to the Policy Requirements and TSX expects issuers to have a provision setting out a time period to make a determination within the allotted 90 day period.

TSX also found that certain Reviewed Policies did not specifically require the Board to accept the resignation of a Subject Director, absent exceptional circumstances. This is contrary to the Policy Requirements and TSX expects issuers to have a provision that requires the Board to accept the resignation of a Subject Director absent exceptional circumstances.

### *Board Determination*

TSX found that several Reviewed Policies delegate consideration of the resignation of a Subject Director to a committee of the Board and specifically state that the committee is expected to recommend that the Board accept the resignation of the Subject Director, absent exceptional circumstances. Some of these Reviewed Policies did not also include a requirement for the Board to accept the resignation absent exceptional circumstances. To be compliant with the Majority Voting Requirement, Majority Voting Policies must state that the Board will accept the resignation absent exceptional circumstances.

### *Exceptional Circumstances*

When a Board determines not to accept a Subject Director's resignation, TSX will contact the issuer to discuss the exceptional circumstances, including the steps the Board is taking to prepare for the next director election. TSX reviews each situation on a case-by-case basis, taking into account the unique factors applicable to each issuer. Exceptional circumstances are expected to meet a high threshold. Examples of exceptional circumstances may include:

- the issuer would not be compliant with corporate or securities law requirements, applicable regulations or commercial agreements regarding the composition of the Board as a result of accepting the Subject Director's resignation;
- the Subject Director is a key member of an established, active Special Committee which has a defined term or mandate (such as a strategic review) and accepting the resignation of such Subject Director would jeopardize the achievement of the Special Committee's mandate; or
- majority voting was used for a purpose inconsistent with the policy objectives of the Majority Voting Requirement. Please see the Notice of Approval Amendments to Part IV of the Manual dated February 13, 2014.

Many of the Reviewed Policies provided guidance regarding the factors the Board should consider in making its determination of whether to accept a Subject Director's resignation or what factors would be considered as exceptional circumstances. TSX found that a number of the identified factors were inconsistent with the policy objectives of the Majority Voting Requirement. Generally, TSX does not consider the following factors to be exceptional circumstances, especially given that such information is typically available to security holders when they make their voting decision:

- the director's length of service;

- the director's qualifications;
- the director's attendance at meetings;
- the director's experience; or
- the director's contributions to the issuer.

TSX expects that an exceptional circumstance is not a reoccurring event. An issuer that determines not to accept the resignation of a Subject Director based on an exceptional circumstance one year is expected to take active steps to resolve the exceptional circumstance for the following year. Such steps may include developing an evergreen list of potential directors to draw upon in the event the Subject Director does not receive the support of security holders in the future.

*III. Subsection 461.3(d) — a director who tenders a resignation pursuant to the Policy will not participate in any meeting of the board or any sub-committee of the board at which the resignation is considered.*

TSX considers the phrase "participate in any meeting" to include attendance at the meeting. A Subject Director must not attend any part of a meeting of the Board or any sub-committee of the Board at which his or her resignation is discussed or a related resolution is voted upon. If the Subject Director must attend the meeting in order to satisfy quorum requirements, then the Subject Director must not speak or otherwise participate in any part of the meeting where his or her resignation is discussed or considered or a related resolution is voted upon.

*IV. Subsection 461.3(e) — the listed issuer shall promptly issue a news release with the board's decision, a copy of which must be provided to TSX. If the board determines not to accept a resignation, the news release must fully state the reasons for that decision.*

Very few of the Reviewed Policies contained the requirement to provide a copy of the news release with the Board's decision to TSX. This Policy Requirement may be included in the Majority Voting Policy or another policy or procedure of the issuer in order to ensure that the press release is provided to TSX. TSX reminds issuers that the news release must fully state the reasons for not accepting the Subject Director's resignation in order for security holders to understand the considerations of the Board.

#### Circumventing the Majority Voting Requirement

TSX found that certain Reviewed Policies contained additional requirements that may have the effect of circumventing the policy objectives of the Majority Voting Requirement. As previously stated, avoidance or frustration of the Majority Voting Requirement, through any means, will be considered a failure to comply with it. Provisions that TSX considers to be inconsistent with the Majority Voting Requirement or its policy objectives include:

- a higher quorum requirement for the election of directors compared to the quorum requirement for other resolutions; and

- Majority Voting Policies that exclude certain nominees, such as insider nominees or incumbent directors from certain requirements or that otherwise treat certain nominees more favourably than other nominees.

Issuers should assess their Majority Voting Policies in light of this Staff Notice. Majority Voting Policies that are not compliant with the Policy Requirements should be amended as soon as practicable and sufficiently in advance of the next meeting of security holders at which directors are elected to allow nominees to comply.

TSX is currently conducting another review of Majority Voting Policies adopted by TSX-listed issuers to assess compliance with the Policy Requirements.

TSX will continue to monitor the corporate governance landscape in Canada and internationally, as well as the effects of the Majority Voting Requirement on its issuers and the marketplace.

## 2. Advance Notice Policies

The Director Election Requirements were adopted to strengthen the Canadian corporate governance regime and support the integrity and reputation of the Canadian capital markets. As previously stated in TSX Staff Notice 2015-0002, the avoidance of these policy objectives through by-law provisions or other means that have the effect of frustrating or circumventing the Director Election Requirements will be considered a failure to comply with such requirements. For the purposes of this Staff Notice, "**Meeting**" means any meeting of security holders of a TSX-listed issuer, whether annual or special, at which directors are elected.

Section 461.1 of the Manual requires that at each annual meeting, the Board permit security holders of each class or series to vote on the election of all directors to be elected by such class or series. Annual elections of directors provide security holders with the opportunity to hold directors accountable on an annual basis.

Many TSX-listed issuers have chosen to adopt policies and by-laws prescribing timeframes and procedures to nominate directors for election to the Board ("**Advance Notice Policies**"). TSX recognizes that nominating directors for election to the Board during or shortly before a Meeting may be viewed as unreasonable since it may not provide security holders with sufficient time to evaluate the new information and it may be unexpected by security holders, particularly those who have granted discretionary authority to a proxy. TSX also recognizes that issuers require adequate notice of nominees for election to the Board. Accordingly, TSX acknowledges that Advance Notice Policies may be legitimately used to preserve security holder interests, provided such policies do not unreasonably limit the ability of security holders to nominate directors for election to the Board.

As part of its ongoing issuer reviews, TSX randomly selected 25 Advance Notice Policies adopted by TSX-listed issuers for review. In its review and based on its experience from past proxy seasons, TSX identified a number of concerns in connection with the use of Advance Notice Policies. The guidance in this section of this Staff Notice are intended to clarify TSX's expectations with respect to the Director Election Requirement and the use of Advance Notice Policies.

TSX believes that the current guidelines published by Glass, Lewis & Co., LLC and Institutional Shareholder Services Inc. for Canada regarding notification periods prior to a Meeting to

nominate directors (each, a "**Notice Period**") in Advance Notice Policies are generally satisfactory. TSX considers the following examples as consistent with the policy objectives of the Director Election Requirement:

- In the case of an annual and general Meeting ("**AGM**"), a Notice Period ending at least 30 days before the Meeting date.
- If the AGM is to be held on a date that is less than 50 days after the first public announcement of the date of the AGM (the "**Notice Date**"), a Notice Period of at least 10 days following the Notice Date.
- In the case of a special Meeting called for the purpose of electing directors (whether or not also called for other purposes), a Notice Period of at least 15 days following the Notice Date.
- Requirements and procedures imposed on a nominating security holder or a nominee director that are not more onerous than requirements for management and Board nominees.

TSX believes that the following examples of provisions in Advance Notice Policies are not consistent with the policy objectives of the Director Election Requirement:

- Requiring the nominating security holder to be present at the Meeting at which his or her nominee is standing for election for the nomination to be accepted, notwithstanding the number of votes obtained by such nominee.
- Requiring the nominating security holder to provide unduly burdensome or unnecessary disclosure, such as the dates when such security holder acquired securities of the issuer or other information that is irrelevant for security holders to make an informed decision with respect to director elections. TSX does, however, support the disclosure of the nominating security holder's economic and voting position.
- "Requiring the nominee or nominating security holder to complete a TSX Reporting Form 4 — *Personal Information Form* (or its equivalent) (the "**PIF**") for the nomination to be accepted, unless the PIF is also required by the issuer from management and Board nominees.
- Requiring the nominating security holder to complete a questionnaire, make representations, submit an agreement or provide a written consent in the form specified by the issuer, unless such questionnaire, representations, agreement or written consent is also required by the issuer from management and Board nominees.

TSX notes that the preceding list is not exhaustive and there may be other provisions in Advance Notice Policies that frustrate or circumvent the policy objectives of the Director Election Requirement. Issuers are encouraged to discuss novel provisions with TSX prior to adoption.

TSX expects that an Advance Notice Policy will give the Board the discretion to waive any provision of the Advance Notice Policy.

In addition, TSX expects issuers to adopt Advance Notice Policies sufficiently in advance of Meetings in order to allow security holders to comply with the Notice Periods. Issuers must also ensure that security holders have timely and adequate notice of matters to be considered at Meetings, as required under Section 459 of the Manual.

Issuers should assess their Advance Notice Policies in light of this Staff Notice. Advance Notice Policies that are not compliant with the Director Election Requirements should be amended as soon as practicable and sufficiently in advance of the next meeting of security holders at which directors are elected.

TSX will continue to monitor Notice Periods to ensure they are not being used inconsistently with policy objectives of the Director Election Requirements.

Issuers that have questions regarding the Majority Voting Requirements, the Advance Notice Policies or the guidance in this Staff Notice should contact Valérie Douville ([valerie.douville@tmx.com](mailto:valerie.douville@tmx.com) or 514.788.2426).