COMMENTARY ON TORONTO STOCK EXCHANGE AMENDMENTS AND THE PROPOSED AMENDMENT TO PART IV OF THE TORONTO STOCK EXCHANGE COMPANY MANUAL

BY: PRISCILLA BUNKE AND
CAITLIN GRAHAM

COMMENTARY ON TORONTO STOCK EXCHANGE AMENDMENTS AND THE PROPOSED AMENDMENT TO PART IV OF THE TORONTO STOCK EXCHANGE COMPANY MANUAL

I. BACKGROUND

On September 9, 2011, the Toronto Stock Exchange (the "**TSX**"), an exchange in the TMX Group, published a request for comments regarding a number of rule amendments to the Toronto Stock Exchange Company Manual[1] (the "**TSX Manual**") with respect to director election practices for TSX listed issuers. The amendments will require TSX listed issuers to: (i) annually elect directors; (ii) elect directors individually, as opposed to voting for a slate of directors; (iii) publicly disclose the votes received for the election of each director; (iv) disclose whether or not they have adopted a majority voting policy and if they have not, to explain this decision; and (v) disclose to the TSX if a director receives a majority of "withhold"[2] votes, if the issuer does not have a majority voting policy in place. These amendments have been approved by the Ontario Securities Commission (the "**OSC**") and adopted by the TSX. These amendments will come into force on December 31, 2012, and will apply to any meeting of securities holders that has not yet been scheduled and for which proxy materials have not yet been approved as of that date.

In response to its request for comment published on September 9, 2011, the TSX received comments in support of a requirement that voting for uncontested director elections[3] be conducted by mandatory majority. As a result of these comments, the TSX published a further proposed amendment to the TSX Manual that would require all TSX listed issuers to adopt a majority voting policy (the "**Proposed Amendment**").[4] If approved by the OSC and adopted by the TSX, the Proposed Amendment would replace the optional majority voting policy, discussed in part (v) of the rule amendments above, which allows plurality voting. Compliance with the Proposed Amendment could be achieved by a TSX listed issuer adopting a majority voting policy. The comment period for the Proposed Amendment closed November 5, 2012. The Proposed Amendment, if approved by the OSC and adopted by the TSX, will be effective December 31, 2013.

This paper provides a commentary regarding the amendments and the Proposed Amendment to corporate governance practices for TSX listed issuers and similar practices in the New York Stock Exchange (the "**NYSE**") and NASDAQ, thereby providing grounds for further analysis for inter-listed issuers.

II. INTRODUCTION

Currently in Canada, a plurality voting standard applies for electing directors unless a majority voting policy is adopted. Plurality voting requires security holders to vote "for" each director, or

[1] A copy of which is available here.
[2] "Withhold" votes are not defined in the TSX request for comment, but are votes that are not cast "for" a director.
[3] The TSX did not define "uncontested director elections" in its request for comment.
[4] The TSX request for comments from October 4, 2012 is available here.

the slate of directors, or "withhold" their vote. The director or the slate of directors is elected if there is one "for" vote, regardless of the number of "withhold" votes cast. In a majority voting system, a plurality voting standard still applies and security holders vote "for" a director or "withhold" their vote. By contrast, each vote is cast with respect to each individual director, not a slate of directors. Also, "withhold" votes are considered "against" votes and included in the total number of votes cast.[5]

Typically, a majority voting policy requires a director who receives a majority of "withhold" votes to tender his or her resignation. Absent exceptional circumstances,[6] the board of directors will generally accept that resignation, and publicly announce its decision in a news release, though it is not required to do so. Directors receiving a majority of withhold votes are still elected to the board of directors but only directors receiving a majority of "for" votes remain on the board of directors.

III. THE RATIONALE OF THE TSX FOR THE PROPOSED AMENDMENT

The TSX presented four rationales for the Proposed Amendment in its request for comments: the Proposed Amendment (i) will improve corporate governance standards; (ii) will work within the existing corporate governance regime; (iii) will strengthen Canada's international reputation; and (iv) has public support. Additionally, the TSX stated that the Proposed Amendment will provide security holders a meaningful way of holding directors accountable; enhance the dialogue between stakeholders; and improve transparency.

The TSX also considered whether mandatory majority voting would put some issuers offside corporate or securities laws; namely, the possibility that if sufficient director nominees are not supported, quorum or committee requirements may not be met. According to the TSX, issuers with a majority voting policy have not experienced this problem. The TSX cited the Canadian Coalition for Good Governance ("**CCGG**") in reporting that sixty-one percent of the listed issuers on the S&P/TSX Composite Index currently have a voluntary majority voting policy in place. However, the comment letter from CCGG to the TSX dated October 26, 2012, stated that 156 TSX-listed companies, representing 85% of the S&P/TSX Composite Index, have adopted CCGG's majority voting policy. A majority voting policy allows directors to be elected, notwithstanding failing to receive a majority of "for" votes. Directors not receiving a majority of "for" votes then resign at a later time, once the vacancies are filled. As a result, quorum and committee requirements may be met at all times, regardless of the outcome of the director election.

[5] As discussed above, the rule amendments coming into force on December 31, 2012, now require that directors are elected individually.

[6] It is unclear what is meant by "exceptional circumstances." The Canadian Coalition for Good Governance suggests, in its comment letter dated October 26, 2012, that exceptional circumstance would be very rare and would only "go to the timing of the resignation." A copy of the Comment Letter dated October 26, 2012 is available here.

IV. POINTS TO NOTE

The NYSE Listed Companies Manual[7] and the NASDAQ Rules[8] do not mandate majority voting policies or other requirements for the process of electing directors. Notably, inter-listed issuers filing disclosure forms in the United States may need to be aware of the Proposed Amendment with respect to disclosure obligations.

V. NOTES

We invite market participants and other stakeholders to discuss any comments and questions with us. If you require any assistance with respect to understanding the Proposed Amendment or implementing the amendments coming into force on December 31, 2012, we are available to assist you.

For more information regarding the regulation initiatives of the TSX or Canadian Securities Administrators and how it could impact your security trading operations, please contact:

Priscilla Bunke
403 268 6370
priscila.bunke@fmc-law.com

Caitlin Graham
403 268 7006
caitlin.graham@fmc-law.com

This commentary provides only an outline and does not constitute legal advice. Specific legal advice should be obtained before making any decisions regarding the Proposed Amendments.

[7] A copy of which is available here.
[8] A copy of which is available here.