



Via Email

November 5, 2012

Mr. Michal Pomotov
Legal Counsel
Toronto Stock Exchange
The Exchange Tower
130 King Street West
Toronto, Ontario M5X 1J2

Re: Amendments to Part IV of the TSX Company Manual¹

Dear Mr. Pomotov:

I am writing to you on behalf of the Council of Institutional Investors (“Council”) to express our general support for the Toronto Stock Exchange’s (“TSX”) proposed changes to Part IV of the TSX Company Manual (“Manual”). Founded in 1985, the Council is a Washington, DC based nonprofit, nonpartisan association of public, corporate and union employee benefit plans, foundations and endowments with combined assets that exceed \$ 3 trillion. Our members are large, long-term shareowners responsible for safeguarding the retirement savings of millions of American workers.²

As you are aware, at most public companies in the United States, directors in uncontested elections continue to be elected by a plurality of votes cast, rather than by a majority of votes cast.³ Thus, like in Canada, many U.S. public companies continue to follow an antiquated, or as some have described “truly bizarre,”⁴ voting process whereby a director is elected or reelected “so long as she receives *any* votes in her favor, even if ninety percent or more the shareholders vote against her.”⁵

¹ Request for Comments on Amendments to Part IV of the TSX Company Manual, 35 OSCB 9168 (proposed Oct. 4, 2012), http://www.osc.gov.on.ca/en/Marketplaces_xxr-tsx_20121004_rfc-amend-manual.htm.

² For more information about the Council of Institutional Investors (Council) and its members, please visit the Council’s Web site at <http://www.cii.org/about>. Of note, the Council currently has three members that are based in Canada.

³ See, e.g., Bruce Kistler, “State of Play, A Snapshot of U.S. Corporate Governance in 2012,” ISS Corporate Services 12 (July 19, 2012) (on file with Council) (“the S&P 500 is the only index with more than one-half of its constituents using a majority vote standard”).

⁴ Alyce Lomax, “Public Companies’ Public Enemies,” Motley Fool 2 (July 27, 2012), <http://www.fool.com/investing/general/2012/07/27/public-companies-public-enemies.aspx> (commenting that plurality voting whereby a director can be elected with a single vote is “a voting policy that is truly bizarre”).

⁵ Lisa M. Fairfax, “Shareholder Democracy” 85 (Carolina Academic Press 2011) (on file with Council).

Council membership approved policies have long supported majority voting in the uncontested election of directors. Our policy states:

2.2 Director Elections: Directors in uncontested elections should be elected by a majority of the votes cast. In contested elections, plurality voting should apply. An election is contested when there are more director candidates than there are available board seats. Directors who fail to receive the support of a majority of votes cast should step down from the board and not be reappointed. A modest transition period may be appropriate under certain circumstances, such as for directors keeping the company in compliance with legal or listing standards. But any director who does not receive the majority of votes cast should leave the board as soon as practicable.⁶

Our policy is based on the widely accepted view by investors in the U.S. and market participants in most developed markets,⁷ that majority voting in uncontested elections “ensures that shareowners’ votes count and makes directors more accountable to shareowners.”⁸

The support for majority voting in the U.S. continues to grow. More than 70 percent of S&P 500 companies have adopted a majority voting standard⁹ up from just 16 percent in 2006.¹⁰ Moreover, during the 2012 proxy season, the support for shareowner resolutions to adopt majority voting averaged more than 61 percent, an all-time high for such proposals.¹¹

⁶ Council of Institutional Investors, Corporate Governance Policies, § 2.2 **Director Elections** (last updated Oct. 5, 2012), [http://www.cii.org/UserFiles/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL\(2\).pdf](http://www.cii.org/UserFiles/CII%20Corp%20Gov%20Policies%20Full%20and%20Current%2010-5-12%20FINAL(2).pdf).

⁷ See, e.g., Lisa M. Fairfax at 141 (noting that “most other developed markets already have a majority vote standard for director elections”).

⁸ See, e.g., Investors Working Group, “U.S. Financial Regulatory Reform: The Investors’ Perspective” 22 (July 2009), [http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors%27%20Working%20Group%20Report%20\(July%202009\).pdf](http://www.cii.org/UserFiles/file/resource%20center/investment%20issues/Investors%27%20Working%20Group%20Report%20(July%202009).pdf).

⁹ See, e.g., Bruce Kistler at 12.

¹⁰ Claudia H. Allen, “Study of Majority Voting in Director Elections,” Neal, Gerber & Eisenberg LLP 1 (last updated Nov. 12, 2007), <http://www.ngelaw.com/files/Uploads/Documents/majoritystudy111207.pdf> (“when this Study was initially published in February 2006, only 16% of the companies in the S&P 500 were known to have adopted a form of majority voting”).

¹¹ Institutional Shareholder Services, Voting Results Database (last visited Nov. 5, 2012) (on file with Council).

In explaining the high success rate for majority voting proposals in the U.S. this past year, California State Teachers' Retirement System Director of Corporate Governance, and current Council chair, Anne Sheehan stated:

[The] 'success rate this year clearly indicates that companies recognize the importance of providing shareholders with a meaningful voice in the voting process.' . . . 'Today's economic challenges underscore the importance of board accountability. Holding directors to a reasonable election standard is a fundamental step in maintaining the integrity of a company's leadership and trust of its shareholders.'¹²

Finally, we note that a recent examination of majority withhold votes for 175 director nominees at Russell 3000 companies between July 1, 2009 and June 30, 2012, provides the following empirical evidence of the benefits of adopting a majority voting standard:

[I]nvestors who wish to make boards more responsive to shareholder voting would do well to continue advocating the adoption of majority voting, even for smaller firms, since companies with *majority voting standards are more likely than others to remove directors who receive majority support. Companies with anything other than a plurality election standard are also far more likely to provide disclosure regarding their response to majority withhold votes.* Therefore, investor pressure to move away from plurality voting may also improve transparency on this topic.¹³

For all of the above reasons, we generally support TSX mandating that its listed issuers adopt majority voting.

¹² Press Release, California State Teachers' Retirement System, "CalSTRS 2012 Proxy Season Successful in Advancing Majority Voting" 1 (Aug. 3, 2012), <http://www.calstrs.com/Newsroom/2012/news080312.aspx>.

¹³ IRRC Institute & GMI Ratings, "The Election of Corporate Directors: What Happens When Shareowners Withhold a Majority of Votes from Director Nominees?" 15 (Aug. 2012), http://gmitest.net/wp-content/uploads/2012/08/GMIRatings_IRRC_082012.pdf (emphasis added).

In addition, we believe it would be useful for TSX to provide specific guidance, in the drafting of the amendment to the Manual, and in the strongest language possible, that it expects that the board of directors will typically accept the resignation of a director that receives a majority of “Withhold” votes. We, however, believe that it would be substantially more useful to investors and the markets, if TSX provides specific guidance in the drafting of the amendment *requiring* that the board accept the resignation of a director that receives a majority of withhold votes.

We note the recent empirical evidence indicating that even with a majority standard in place “only half of [unelected] directors at companies with majority standards” step down,¹⁴ and that there is little evidence indicating that the reason failed directors are retained by boards is to maintain compliance with the company’s legislative and regulatory requirements.¹⁵ For those, and other reasons described therein, we recently issued letters (see attached) to the American Bar Association and the Delaware State Bar Association, requesting their support of modest revisions to the Model Business Corporation Act and the Delaware General Corporation Law, respectively, to require majority voting in the uncontested election of directors at public companies as a mandatory standard.¹⁶

Under the proposed majority voting regime set forth in the attached letters, if a director fails to receive the affirmative vote of more shares in favor of that director’s continuing service than opposed, the director is not elected.¹⁷ If, as a result, there is a failure to elect sufficient directors to constitute a lawful board, plurality voting rules would permit the existing board to be reconstituted for a ninety day holdover period.¹⁸

During the holdover period, those directors who had received a majority of affirmative votes would appoint the number of directors necessary to constitute a lawful board.¹⁹ Importantly, those directors who had not received a majority of affirmative votes would not be eligible to be reappointed to fill the vacant seats.²⁰

¹⁴ *Id.* at 2.

¹⁵ See *id.* at 7-12 (none of the company disclosures identified in the report explicitly describes a circumstance when failed directors were retained by the board to maintain compliance with the company’s legislative and regulatory requirements).

¹⁶ Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Mr. A. Gilchrist Sparks III, Morris, Nichols, Arsht & Tunnell LLP 1 (Oct. 25, 2012), http://www.cii.org/UserFiles/file/10_25_12_cii_aba_majorityvoting_letter.pdf (see Attachment I & I.A) [Hereinafter ABA Letter]; Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Mr. Norman M. Monhait, Rosenthal, Monhait & Goddess, P.A. 1 (Oct. 25, 2012), http://www.cii.org/UserFiles/file/10_25_12_cii_delaware_majorityvoting_letter.pdf (see Attachment II & II.A) [Hereinafter DGCL Letter].

¹⁷ ABA Letter, *supra* note 16, at 3; DGCL Letter, *supra* note 16, at 2.

¹⁸ *Id.*

¹⁹ ABA Letter, *supra* note 16, at 3-4; DGCL Letter, *supra* note 16, at 2.

²⁰ *Id.* (footnotes omitted).

While the proposed majority voting regime described in our attached letters would result from modest revisions to corporate law, we would respectfully request that TSX give careful consideration to adopting an analogous majority voting regime through modest amendments to the Manual.

We appreciate the opportunity to respond to your proposed changes to the Manual. If you should have any questions regarding this letter, please do not hesitate to contact me directly at 202.261.7081 or jeff@cii.org.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel

Attachments

cc: Ms. Susan Greenglass, Director, Market Regulation, Ontario Securities
Commission