

TSX PROVIDES GUIDANCE ON VOTING AGREEMENTS

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Background

On February 27, 2023, the Toronto Stock Exchange (the “**TSX**”) issued [Staff Notice 2023-0001 – Voting Agreements](#) (the “**Staff Notice**”) providing guidance on how voting agreements (“**Voting Agreements**”) between a TSX-listed issuer (an “**Issuer**”) and its securityholders are currently addressed by the TSX. Voting Agreements can require a securityholder to vote in a manner as directed by management or require that they vote in favour of management proposals. Voting Agreements often require a securityholder to vote in favour of management’s director nominees but may include broader provisions relating to, for example, compensation matters, corporate actions and any special business.

Review Where “Materially Affect Control”

The Staff Notice provides that the TSX will review Voting Agreements entered into in connection with:

1. original listings under Part III - *Original Listing Requirements* of the TSX Company Manual (the “**Manual**”) as part of the TSX review of existing material agreements;
2. transactions under Part V - *Special Requirements for Non-Exempt Issuers* of the Manual; and
3. transactions under Part VI - *Changes in Capital Structure of Listed Issuers* of the Manual.

The TSX will review Voting Agreements entered into in the context of the above transactions to determine whether the Voting Agreements “materially affect control” of the Issuer – meaning that any securityholder or combination of securityholders acting together has the ability to influence the outcome of a vote of securityholders. If the TSX determines in the affirmative, based on a factual analysis of the Issuer’s circumstances, the Issuer will generally be required to obtain disinterested securityholder approval of the transaction as a condition of TSX acceptance.

The Staff Notice confirms that Voting Agreements that are: (i) entered into by an Issuer independent of a treasury issuance of listed or convertible securities to the covenanting securityholder or its affiliates; or (ii) not linked, directly or indirectly, to a transaction that is otherwise reviewable by the TSX under Part V or Part VI of the Manual, are generally not reviewed by the TSX.

Conditions for Acceptance of a Voting Agreement

In connection with its review of a transaction, the TSX will accept a Voting Agreement if one of the following conditions is met:

1. the Issuer has obtained disinterested securityholder approval for the Voting Agreement; or
2. the Voting Agreement allows a covenanting securityholder to abstain, or not participate, in a securityholder vote.

If a Voting Agreement does not meet one of the conditions above, the following factors will be considered by the TSX to determine whether the Voting Agreement would have a material effect on control of the Issuer:

1. the proposed term of the Voting Agreement (i.e. is it time-limited, or based on the completion of a specific transaction, such as a lock-up agreement or voting support agreement in the context of a merger or acquisition, or does the Voting Agreement continue for a multi-year or indefinite period?);
2. whether the Voting Agreement results in a block sufficient to influence the outcome of a vote (which the TSX indicates may occur at as low as 10% and is typically regarded as more than 20% of the issued and outstanding voting securities of the Issuer, on a non-diluted basis, including the securities controlled by management, including in connection with other Voting Agreements, and any other securityholders acting jointly and in concert);
3. the context in which the Voting Agreement is being entered into; and
4. the consequences to the covenanting securityholder for breaching the Voting Agreement.

Going Forward

Issuers and securityholders that are considering entering into a Voting Agreement will want to consider whether such agreement contains provisions that could be considered to materially affect control of the Issuer and, if so, whether it is more beneficial to retain these provisions and seek disinterested shareholder approval or provide more permissive voting covenants, including abstention. The authors and any member of McMillan's Capital Markets & Securities Group would be pleased to assist further.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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