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Dear Michael and Susan:

Amendments to Part IV of The Toronto Stock Exchange ("TSX") Company Manual (the "Manual") (September 9, 2011)

Individual Annual Voting and Majority Voting for Uncontested Director Elections

Thank you for the opportunity to provide comments on the proposed Amendments to Part IV of the TSX Manual (the "Amendments").

1. Appropriateness of TSX Involvement in Corporate Governance of its Listed Reporting Issuers

It is undoubtedly within the appropriate jurisdiction of the TSX, as a recognized exchange in Ontario, to implement the Amendments, subject to any terms and conditions that may be imposed by the Ontario Securities Commission.

The subject matter of the Amendments, namely, corporate governance of its listed reporting issuers, in this case relating to annual and individual elections of directors by shareholders and the timely and efficient disclosure of majority voting practices, is a central issue for shareholders concerning the management of the companies in which they invest and concerning stakeholder confidence in our capital markets. Confidence in our capital markets is adversely affected, both internationally and domestically, when applicable Canadian corporate governance requirements and practices for public companies listed here lag behind those of principal foreign capital markets such as the U.S. and the U.K.

The right of the shareholders to elect the directors of the company is arguably the most fundamental right that shareholders have. In Ontario, the *Business Corporations Act* does not specify the manner by which shareholders shall elect directors, other than where the articles provide for cumulative voting. Applicable law in Ontario provides, however, by regulation and a national securities law instrument, that the form of proxy for the election of directors cannot

provide the shareholders the right to vote 'for' or 'against' the election of directors, whether the election is to be a vote on a slate of director nominees or on nominees individually, and requires that the form of proxy can only provide the shareholders the right to vote 'for' or to 'withhold from voting' for the election of directors. The consequences of this legal restriction on the shareholders' right to vote for the election of directors is that, because 'withheld' votes are not counted, directors who receive the most 'for' votes are elected – this is referred to as the "plurality system". Directors can therefore be elected even though shareholders 'withhold' a majority of the votes cast (namely, the aggregate of the 'for' votes and the 'withheld' votes) for the election of a slate of directors or individual directors. Where a majority of the shareholder votes cast for the election of directors are 'withheld' votes, there is a credible basis to conclude that such a vote is a judgment by the holders of the voting majority that it is no longer appropriate for those less-than-majority director candidates to serve (or continue to serve) as directors of that public company.

In Canada, over 50 percent of companies in the S&P/TSX Composite Index have a Majority Voting policy (106 out of 199 companies) for uncontested director elections, according to the Clarkson Centre for Board Effectiveness. In the United States, approximately 80 percent of the S&P 500 companies and 60 percent of the Russell 1000 have adopted some form of majority voting policies or bylaw provisions, according to the California Public Employees' Retirement System (Calpers). A recent survey of the 2011 corporate governance practices of the 100 largest U.S. companies by Shearman & Sterling LLP discloses that there has been a dramatic increase in their voting standards through the increased use of majority voting, namely, from 11 companies in 2006 to 85 of the top 100 companies in 2011. On each side of the border, it is predominantly the larger public companies that have adopted majority voting.

The principles contained in the recommendations of the Canadian Coalition for Good Governance contained in its policy "*Majority Voting Policy*" (Revised, March 2011) are also important and should be followed.

Plurality voting should continue to be used for contested elections for directors, whether or not such a contested election involves a formal proxy contest. In a contested election, a director is elected to the board by virtue of having received the most 'for' votes. A contested election for directors is one where the number of candidates nominated for election exceeds the number of positions on the board to be filled. Where there is a contested election for directors, it should be specified that a separate vote of shareholders by ballot shall be taken with respect to each candidate nominated for election as a director.

2. <u>Have the Amendments Struck an Appropriate Balance?</u>

In the current circumstances, at this time, the recommendations of the TSX not to mandate majority voting but affirmatively to mandate annual and individual (not slate) director elections are appropriate. As the recognition of the importance of the rights of shareholders in the election of boards of directors expand, further amendments to the listing requirements in this aspect of corporate governance can encourage improved and effective shareholder involvement.

2A. <u>Enhanced Disclosure concerning the Discretion of the Board to Accept Resignations</u>

If the board of directors has an unlimited, overly broad or arbitrary discretion whether or not to accept the resignation of a director who fails to receive a majority of the votes cast in an uncontested election, the vote of the shareholders electing directors becomes merely advisory and the majority voting policy is ineffective and illusionary.

Compared to 'Say on Pay' shareholder votes, which are appropriately advisory and non-binding in light of the subject matter of the vote (compensation policies and practices are properly within the duties of the board of directors), the election of directors is clearly and wholly within the proper jurisdiction of shareholders, and not the board of directors. As a matter of principle, shareholder votes on the election of directors should not be second-guessed by the board. A board decision not to accept the will of a majority shareholder vote under a majority voting policy by refusing to accept the resignation of a director who did not receive a majority of the votes cast is a contrary, overriding judgment by the board.

In such circumstances, the integrity of the director election process and acceptance of the recognized principle of shareholder majority rights are challenged. It may be appropriate to provide for a reasonable period of time (up to 90 days) for the effective date of the board's required acceptance of the resignation of a director in order to allow for an orderly transition to fill the vacancy that will result from the mandated resignation, or, in the event that a majority of the members of the board nominated for election fail to receive a majority of the votes cast, to call a special meeting of shareholders to vote on new nominees to replace the directors who were rejected by the shareholders.

While this comment is not recommending that there be a mandated form of majority voting policy by the TSX as part of the Amendments at this time, it does recommend that the text of the proposed amendment to Section 461.3 of the Manual be expanded to require meaningful disclosure of the principles and policy that the board of directors will apply to its decision on receipt of a tendered resignation where a director receives a majority of 'withheld' votes, as well as prompt and effective disclosure of the reasons why the board did not accept the tendered resignation where it so decides.

3. Will Majority Voting Disclosures Encourage its Adoption and Shareholders' Understanding?

Requiring listed reporting issuers to disclose their practices and policies in connection with majority voting for the uncontested election of directors at annual shareholder meetings will bring to the attention of a great many directors of public companies, who are currently unaware of the mechanics of the director election process, the deficiencies in the legal restrictions presently limiting the rights of shareholders in the election of directors. The requirement to disclose the issuer's practices will force directors to consider the underlying rationale for adopting majority voting policies.

Such disclosure will also provide the company's shareholders and investors with material information, not only whether the issuer has adopted majority voting, but also with respect to encouraging the adoption of improved practices for the election of directors.

4. Mandating a Majority Voting Policy

It is my view that mandating a majority voting policy for uncontested director elections for all TSX issuers is premature at this time. There are a number of legal issues that require study with respect to such a mandatory remedy and with respect to the consideration of alternative recommendations for replacing or otherwise ameliorating the current regulatory restrictions on the rights of shareholders to elect directors of their choice. In connection with such a study, there are several ancillary issues to be considered including proxy access for shareholders (in addition to the access afforded to incumbent directors and management) to nominate individuals for election as directors and including easing, facilitating and reducing the cost for shareholders to nominate individuals for election outside the management nomination and proxy process and to solicit proxies for such non-management nominees.

5. Possible Negative Impacts from the Amendments

The content of the Text of the Amendments, set out in Appendix A to the TSX notice, is quite benign. It is difficult to foresee realistic negative impacts flowing to public companies and their shareholders, to investors or to the efficiency or integrity of our capital markets as a result of adopting such enhanced corporate governance practices relating to the election of directors. I also doubt that qualified, responsible and eligible individuals will decide not to stand for election as directors of listed public companies because of the adoption of the Amendments.

6. Requiring Disclosure of Vote Results

There should be no adverse consequences and a number of beneficial aspects to require a company to disclose annually the vote results for the election of its directors. Why should such vote results not be disclosed? It is material information for shareholders and investors as well as other stakeholders in the company. Directors themselves should be interested in this aspect of the assessment of their performance by shareholders who, in theory, have the right to elect them as directors and who are one of the primary constituencies for whose benefit directors fulfill their responsibilities.

Such disclosure can be effected without requiring that all elections of directors must be by ballot.

Yours very truly,

H. Garfield Emerson, Q.C.