Do you need shareholder approval for a voting agreement? TSX outlines position

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The Toronto Stock Exchange (TSX) has published guidance with respect to voting agreements between a listed issuer and one or more of its shareholders.

Takeaways

- The TSX will generally not review Voting Agreements that are (i) not linked to otherwise reviewable transactions or (ii) entered into independent of a treasury issuance to the covenanting securityholder.
- Voting Agreements that have been approved by disinterested securityholders or that allow a covenanting securityholder to abstain, or not participate, in a securityholder vote are generally acceptable to the TSX.
- Voting Agreements that materially affect control of the listed issuer (as determined based on enumerated factors) will require disinterested securityholder approval.

What is a Voting Agreement?

On February 27, 2023, the TSX published Staff Notice 2023-0001 Voting Agreements (the Staff Notice) formalizing their position with respect to Voting Agreements. The Staff Notice defines a “Voting Agreement” as an agreement between or among a listed issuer and one or more of its securityholders that requires the securityholder(s) to vote, or cause to be voted, any voting securities that they hold, or over which they exercises control or direction, directly or indirectly, as directed by management or in favour of one or more management proposals. As noted in the Staff Notice, Voting Agreements are most commonly seen in the context of director election but may also be used in relation to certain transactions or corporate actions.

When will TSX review a Voting Agreement?

Not all Voting Agreements will be reviewed by the TSX. In particular, Voting Agreements entered into independent of a treasury issuance of listed or convertible securities to the covenanting securityholder (or its affiliates) are generally not reviewed by the TSX. The TSX will review Voting Agreements in the context of reviewable

transaction under Part V *Special Requirements for Non-Exempt Issuers* or Part VI *Changes in Capital Structure of Listed Issuers* of the TSX Company Manual or as material agreements in connection with original listings under Part III *Original Listing Requirements.*

The TSX will generally accept a Voting Agreement if:

- Disinterested securityholder approval for the Voting Agreement has been obtained; or
- The covenanting securityholder is permitted to abstain or not participate in a securityholder vote pursuant to the terms of the Voting Agreement.

Material effect on control

The TSX's primary concern with respect to Voting Agreements is whether they materially affect control of the listed issuer. The TSX Company Manual defines "materially affect control" as "the ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders". The definition further provides that whether a security holder has such an ability will depend on the circumstances of a particular case and that transactions resulting in a single securityholder or a combination of securityholders acting in concert holding more than 20% of the issuer's voting securities will be considered to materially affect control. The Staff Notice notes that the TSX generally considers Voting Agreements to have a material effect on control of the issuer.

If the TSX will not accept the Voting Agreement based on the conditions noted above, it will consider the following factors to determine whether the Voting Agreement would have a material effect on control of the issuer and, ultimately, whether securityholder approval will be required:

- Proposed term of the Voting Agreement;
- Whether the Voting Agreement results in a block sufficient to influence the outcome of a vote (typically 20% of the issued and outstanding voting securities of the issuer, but may be as low as 10%);
- The context in which the Voting Agreement is being entered into; and
- The consequences to the covenanting securityholder for breaching the Voting Agreement.

TSX-listed issuers that plan to enter into Voting Agreement should take the TSX's Staff Notice into consideration going forward.

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