



TSX Initiatives

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Securityholder Approval For Acquisitions Involving Security Issuances

The TSX has proposed changes to its Company Manual with respect to securityholder approval for certain transactions.

Section 611(c) of the Company Manual requires security holder approval where the number of securities issued in payment of the purchase price for an acquisition exceeds 25 per cent of the acquiror's outstanding securities. Section 611(d), however, provides an exemption to this requirement where the target is a public company.

The proposed change would require, in part, securityholder approval in situations where the number of securities issued or issuable in payment of the purchase price for an acquisition of a reporting issuer (or equivalent status) having 50 or more beneficial securityholders, excluding insiders and employees, exceeds 50 per cent of the number of securities of the issuer which are outstanding, on a non-diluted basis.

The TSX is accepting comments on the proposed change until May 4, 2009.

Amendments to Securityholder Rights Plans After the Commencement of a Take-over Bid

The TSX has recently provided guidance on amendments of securityholder rights plans after the announcement or commencement of a hostile take-over bid.

The Company Manual requires that issuers obtain the written consent of the TSX prior to adopting an amendment to a rights plan. If an amendment to a plan can be reasonably perceived to have been proposed as a response to a specific or contemplated take-over bid, the TSX will treat such an amendment as a new plan. As such, the TSX has stated that it will normally defer its decision to consent to an amendment to a rights plan until the applicable Canadian securities administrator has determined whether it will intervene in connection with the amendment. If the applicable Canadian securities administrator does not intervene, the TSX will

generally not object to the adoption of the amendment, subject to securityholder approval. Notwithstanding any amendment provision contained in the plan, the TSX will require securityholder approval for the amendment.

Some rights plans have provisions allowing parties that have launched a take-over bid to be excluded from voting on plan amendments. The TSX guidance also notes that amendment provisions or any other provisions which require the approval of securityholders, and purport to exclude the votes of certain securityholders, must be specifically identified in the issuer's application to the TSX for approval of the plan.

Guidance on Financial Hardship Exemption

The TSX will generally require securityholder approval as a condition of acceptance of a share issuance by an issuer if the issuance (i) materially affects control of the issuer; or (ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the issuer and has not been negotiated at arm's length.

Pursuant to subsection 604(e) of the Company Manual, upon written application, an issuer will be exempted from the securityholder approval requirement if the issuer provides the TSX with a resolution of the issuer's board of directors stating, among other things, that the issuer is in serious financial difficulty (the "financial hardship exemption").

On April 27, 2009, the TSX provided guidance on submissions it will expect in connection with the use of the financial hardship exemption. An issuer which has determined that it may rely on the financial hardship exemption must provide the TSX with certain information beyond that required by subsection 604(e), including:

- a detailed description of the events and factors which led to and contributed to the issuer being in serious financial difficulty (e.g. breach or potential breach of debt covenants, inability to meet debt obligations, working capital deficiencies, inability to fund property payment, etc.) and whether such information has previously been publicly disclosed;
- a detailed description of alternatives considered by management and the board of directors to improve the issuer's financial situation;

- in light of any other alternatives considered by the management and the board of directors, an explanation as to why the proposed transaction is reasonable for the issuer under the circumstances;
- if insiders are participating in the transaction: (a) confirmation that the insiders were not involved in the negotiations on behalf of the issuer, (b) information about other parties that have been approached by the issuer to participate in the proposed transaction and what role, if any, such insiders played in those negotiations on behalf of the issuer, and (c) any other contemplated transactions (as applicable);
- the manner in which the proposed transaction will remedy the financial problems of the issuer, which should include a budget of sources and uses of capital for a six month period, a description of how long the funds raised in the proposed transaction will sustain the issuer and how the issuer will address any anticipated capital deficiencies;
- details concerning why the issuer is not able to seek securityholder approval, including consideration of whether approval in writing is possible, particularly if the issuer is closely held;
- the names of financial and legal advisors retained by the issuer, its board of directors or any committee of the board (if applicable) and the role such advisors, board of directors or committee have played in considering alternatives and in structuring the transaction and, in particular, details as to any opinion they have arrived at in relation to the transaction and its fairness to securityholders;
- any other material information in respect of the proposed transaction and the financial situation of the issuer which may be relevant to the TSX; and
- a draft press release detailing the reasons for the issuer's serious financial difficulty and the proposed use of proceeds, as well as the material terms of the transaction and that the issuer has relied on the financial hardship exemption.

The TSX's notice states that the ability of an issuer to use the financial hardship exemption will be based on the unique facts and circumstances of the issuer and the transaction, and that the TSX will consider previous reliance by the issuer on the exemption. The TSX concludes the notice by saying that it will generally not accept issuers using the financial hardship exemption for transactions that do not lead to an inflow of cash or reduction of a financial liability.

This update is intended as a summary only and should not be regarded or relied upon as advice to any specific client or regarding any specific situation.

If you would like further information regarding the issues discussed in this update or if you wish to discuss any aspect of this commentary, please feel free to contact us.

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