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1 hot issues

TSX To Require Shareholder Approval of Acquisitions of Public Companies with 25% or more dilution of issued and outstanding securities by TSX Listed Issuers

Rule amendment comes into effect November 24, 2009

The Toronto Stock Exchange (TSX), on September 25, 2009 amended its Company Manual, which will require TSX listed issuers to obtain shareholder approval when they propose to issue securities in connection with the purchase of a public company where the securities to be issued exceed 25% of the TSX listed acquiror's outstanding securities (on a non-diluted basis). This will become effective on November 24, 2009 (Effective Date). Currently the TSX does not require listed issuers to obtain shareholder approval where securities are being issued in connection with the acquisition of a public company. When the amendments come into force on the Effective Date, the threshold dilution level will be the same for both public and private company acquisitions.

The amendments follow two prior public proposals of the TSX as well as the decision of the Ontario Securities Commission (OSC) In the Matter of HudBay Minerals Inc. (HudBay). In that decision, the OSC concluded that in the particular circumstances the fair treatment of shareholders and the public interest required shareholder approval for the issuance of securities of HudBay in its proposed acquisition of Lundin Mining Corp. which would have resulted in the dilution of HudBay shareholders of over 100%. Most major global stock exchanges require security holder approval in dilutive transactions, including the acquisition of a public company.

"Toronto Stock Exchange provides a high quality market that balances the costs and benefits of regulation and governance for companies of all sizes. We are focused on expanding the size and reach of Canada's capital markets, and are putting in place the right measures to maintain the confidence of investors," said Kevan Cowan, President, TSX Markets and Group Head of Equities. **"Today's announcement is in line with many of the world's major exchanges and provides us with an even stronger platform as we work to attract new investors and capital to Toronto Stock Exchange and to Canada."**

This rule amendment was the result of an extensive public consultation process and careful analysis of global trends and best practices. Submissions were received in the spring of 2009 from various stakeholder groups. Commenters were near unanimous in their views and called for security holder approval of public company acquisitions resulting in dilution exceeding a threshold at or below 25%. TSX submitted the rule amendment to the OSC, which formally reviewed the submission in mid-September and will publish its approval in its weekly bulletin today.

More details are available on www.tmx.com in the TSX Company Manual:

TSX Company Manual > Notices of Approval > Notice of Approval Amendments to Part VI of the Toronto Stock Exchange ("TSX") Company Manual (September 25, 2009) > Introduction

It should be noted that this amendment does NOT apply to TSX-Venture companies.

The following excerpts are from the Canadian Coalition for Good Governance (CCGG) letter - Request for Comment, dated May 4, 2009, by Doug Pearce, Chairman CCGG

What does this mean for corporate governance?

The CCGG which represents the interests of institutional investors (whose members collectively manage in excess of \$1.1 trillion of savings on behalf of most Canadians) and also promotes good governance practices in Canadian public companies and the improvement of the regulatory environment to best align the interests of boards and management with those of their shareholders to ultimately promote the efficiency and effectiveness of the Canadian capital markets, is pleased that the TSX has recognized that shareholder approval should be required for significantly dilutive acquisitions, irrespective of whether the target is a private or public company. CCGG members believe that requiring shareholder approval for significant acquisitions is important and forms part of a system of checks and balances needed to protect investors and maintain investor confidence.*

It is interesting to note that the New York Stock Exchange (NYSE), NASDAQ, London (LSE), Johannesburg (JSE) and Hong Kong exchanges all require shareholder approval for transactions that result in dilution ranging from 20% to 30%.

What does this mean for mergers and acquisitions (M&A) activity?

The CCGG does not believe that strategic acquisitions will be discouraged by the change nor do they feel it will make it more difficult for companies to compete. While it may affect the tactics used, obtaining shareholder approval will not necessarily require that a takeover bid remain open beyond the minimum 35 day deposit period.* Our members believe that good business judgment by directors should lead to the inclusion of shareholders in the decision-making process when considering important, enterprise changing acquisitions. With respect to deal certainty, the CCGG believes that once a dilution limit is established, parties will be able to plan their transactions accordingly.

What are the costs that can be expected?

The need for shareholder approval could lead to some increased costs, such as the cost of holding the meeting, higher prices or larger break-fees (although presumably shareholders would not allow an over-priced bid to proceed once they are able to vote), but in the view of our members, any additional costs would be immaterial in the context of the other expenses of the transaction and are outweighed by the need to ensure fairness to shareholders and the integrity of the Canadian Capital markets.

Do you expect that the Amendment will lead to transactions being structured to avoid shareholder approval?

The CCGG believes that the board of directors of a public company should seek the approval of its shareholders before proceeding with an acquisition of significant size, whether the consideration for the acquisition is shares or some other form of compensation. However, share issuances that result in dilution to existing shareholders are of more concern because they can fundamentally affect shareholders' economic interests. While issuers may choose to finance acquisitions through greater reliance on cash and debt in order to avoid the need for shareholder approval, doing so would not affect the integrity of a shareholder's ownership interest in the same way as a dilutive share issuance. Dilution is a particular concern in Canada because Canadian issuers, unlike issuers incorporated in the United States, almost invariably have unlimited authorized common share capital. Without the Amendment, the potential for a board of directors to fundamentally change a Canadian corporation through acquisitions without seeking shareholder approval would be alarming.

* Under National Instrument NI 54-101, the minimum time to initiate the shareholder meeting process and hold a shareholder meeting is 55 days. However, NI 54-101 provides that those time requirements may be abridged (ss.2.5 (1) and 2.20) as long as all materials are mailed to shareholders at least 21 days prior to the meeting.

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