

Toronto Stock Exchange proposes to amend public company acquisition buy-side security holder approval requirement

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The Toronto Stock Exchange (TSX) is proposing to amend the requirement for buy-side security holder approval in connection with a dilutive acquisition by a listed acquirer of a target public company. The proposed amendment would permit the acquirer to increase the number of its securities issuable to target company security holders by up to an additional 25% of the security holder-approved fixed number of securities without seeking further acquirer security holder approval. The TSX believes this amendment will provide welcome flexibility to an acquirer that needs to increase the consideration offered in an acquisition for a target public company – in response to a competing bid or other market developments – whether the acquisition is proceeding by means of a take-over bid, arrangement or other form of public company acquisition.

Background

Since November 24, 2009, the TSX has required a listed acquirer to obtain the approval of its own security holders for the issuance of more than 25% of the acquirer's listed issued and outstanding securities in connection with an acquisition of a target public company. The approval must be in respect of a fixed maximum number of securities. An acquirer is not permitted to issue a number of securities in excess of the approved maximum number of securities without obtaining further security holder approval. As a practical matter, acquirers will not request approval for more securities than the number contemplated by a publicly announced acquisition since to do so would signal a willingness to increase the consideration being offered.

The TSX noted that the recent changes to the take-over bid regime, including a minimum 105-day initial deposit period and minimum tender threshold of at least 50%, result in a longer exposure period for an acquirer in the context of an unsolicited offer which could expose the acquirer to increased market risk or increase the opportunity for a competing bid. Responding to market developments or a competing bid may be more difficult for an acquirer offering share consideration when prior security holder approval must be obtained.

Proposed amendments

The TSX has published for comment until July 16, 2018 proposed amendments to TSX Staff Notice 2012-003. The proposed amendments will permit an acquirer to issue up to an additional 25% of the fixed number of securities previously approved for issuance by the acquirer's security holders without seeking further security holder approval. The amendments will become effective upon the TSX publishing a final amended Staff Notice.

The proposed amendments are limited in scope. The additional securities must be issuable to target company security holders pursuant to an increase in the consideration offered in the acquisition and cannot be issuable in any other circumstances. To ensure that the acquirer's

security holders are provided with sufficient information to make a reasonably informed decision, an acquirer will be required to include the following statement in its proxy circular prepared in connection with seeking the required security holder approval:

"TSX will generally not require further security holder approval for the issuance of up to an additional [X] securities, such number being 25% of the number of securities approved by security holders for the transaction."

Alternatives considered

The TSX considered amending the requirement to obtain approval of security holders for a fixed number of securities by affording the board of directors of the acquirer the discretion, in accordance with the board's fiduciary duties, to vary the security holder approved number of securities constituting all or some of the offered consideration. The TSX rejected this alternative because it would not provide security holders with sufficient information for the purpose of considering approval and because providing the acquirer's board of directors with unlimited discretion was too significant a departure from the TSX's general approach to security holder approval.

The TSX also considered maintaining the current requirements. The TSX believes that some flexibility is warranted and reasonable provided that there are limitations associated with the flexibility.

Request for comments

The TSX is seeking comments on the proposed amendments, including specifically with respect to the following questions:

1. Are the proposed amendments an appropriate balance in terms of providing flexibility to compete with superior proposals and security holder approval? If not, why not?
2. Are either of the alternatives more appropriate. If so, why?
3. If the TSX varies the disclosure and approval requirements as proposed, should the amended more flexible requirements be limited to formal take-over bids subject to the full 105-day initial deposit period? Should the relief be available to friendly deals where the initial deposit period is 35 days? Should it be available for all public company acquisitions (i.e., plans of arrangement, amalgamations, etc.)?
4. Should the TSX consider expanding the proposed amendments to other security holder approval requirements under TSX rules, such as private placements and acquisitions more generally (i.e., asset acquisitions and private company acquisitions)? If so, why?
5. Is the additional 25% limit based on the number of securities approved for issuance an appropriate threshold? Is there a lower or higher number that would be more appropriate? Is it appropriate to base the limitation on the number of securities subject to security holder approval?

Comments should be submitted in writing and delivered by July 16, 2018. If you have any questions regarding the proposed amendments or would like assistance with providing comments to the TSX, please contact any member of our [M&A group](#).