

Corporate Securities Law

November 6, 2017

TSX Clarifies Disclosure Expectations for Private Placements in Wake of *Eco Oro*

On November 2, 2017 the Toronto Stock Exchange (TSX) released a Staff Notice (the “Staff Notice”) that seeks to clarify the TSX’s expectations with respect to what information companies seeking TSX approval for a private placement are to provide. The Staff Notice, which follows the recent decision of the Ontario Securities Commission in *In the Matter of Eco Oro Minerals Corp.*, appears to confirm the TSX is more closely scrutinizing not only private placement terms but also all relevant circumstances surrounding a company when deciding whether to approve a private placement and, if approved, whether to impose conditions (such as prior shareholder approval).

Background

All listed companies must obtain the TSX’s approval of a proposed private placement. Under the TSX’s policies, private placements that would “materially affect control” of a listed company require prior approval of the company’s shareholders as a condition to their completion. A transaction materially affects control if it provides a shareholder (or group of shareholders acting together) with the ability to influence the outcome of a shareholder vote, including the ability to block significant transactions, taking into account all relevant circumstances (such as the presence or absence of other large shareholders, prior voting patterns of other shareholders and the distribution of the company’s voting shares). A transaction that results, or could result, in a new 20% voting position held by one shareholder or a group of shareholders acting together is deemed to materially affect control, absent unusual circumstances. Transactions resulting in a new position of less than 20% of the voting securities may also materially affect control, depending on the circumstances outlined above.

The OSC (which reviews TSX decisions) generally affords a high degree of deference to TSX decisions regarding the application of its policies, including whether a proposed private placement materially affects control of a company. One exception to that rule is if the TSX makes its decision without all relevant information.

In *Eco Oro*, the OSC overturned a TSX decision to approve a private placement by Eco Oro Minerals Corp.— without requiring shareholder approval — implemented in the midst of a proxy contest to replace the Eco Oro board (see our June 23, 2017 Update, *OSC Clarifies Basis for Intervening in Eco Oro Tactical Private Placement*). In that case, the OSC concluded the TSX was not aware of all relevant circumstances surrounding Eco Oro’s private placement (including the pending proxy contest), in part due to the OSC’s view that (i) Eco Oro was “less than forthcoming” in its disclosure to the TSX, and (ii) the TSX failed to make sufficient inquiries (such as reviewing public filings related to Eco Oro) regarding the circumstances surrounding the transaction. For that reason (among others), the OSC did not afford any deference to the TSX’s decision.

The OSC also clarified that a private placement is considered to “materially affect control” of a company even if it only has a transient effect on control (such as impacting the results of a vote at a particular meeting) and whether or not “control” is obtained by an individual shareholder or group of shareholders acting together. This requires a careful analysis of the relevant circumstances surrounding a company at the time of the relevant private placement.

Finally, in *Eco Oro* the OSC expressed the view that if the TSX is in doubt about the effect of a private placement on control of a company, it should generally exercise its discretion to require shareholder approval or public disclosure of the private placement before closing to give stakeholders an opportunity to raise concerns with the TSX.

Goodman's Update

The Staff Notice

As part of the process of obtaining TSX approval of a private placement, the company must submit a completed Form 11 to the TSX, and a director or officer of the company must certify the form is complete and does not contain any misrepresentations.

Form 11 was designed, in part, for companies to provide the TSX with key information regarding the private placement. The Staff Notice expresses the TSX's expectation that a Form 11 include "any relevant significant matters" such as:

- any upcoming shareholder meeting for which a record date has or is shortly expected to be determined,
- any pending mergers, acquisitions, take-over bids, changes to capital structure or other significant transactions, and
- any details regarding potential dissident shareholders and/or anticipated proxy contests.

The Staff Notice indicates this information is in addition to "any further information or documentation that may be requested by TSX".

This clarification appears to directly respond to the *Eco Oro* decision and, in particular, the OSC's direction that the TSX make sufficient inquiries about the circumstances of a private placement. At this point, the impact of *Eco Oro* on the TSX's process for reviewing a private placement, and the circumstances in which it will require a delayed closing or shareholder approval, is still being assessed. Thus far, we have observed the TSX is more carefully scrutinizing private placements and more frequently requiring delayed closings. The Staff Notice may be further evidence of this trend.

Given the OSC will generally not defer to TSX decisions made on the basis of incomplete information, companies seeking to minimize the risk of a challenge to the TSX's approval of a private placement would be well advised to ensure their disclosure to the TSX is complete and accurate. More generally, the potential implementation of private placements in the context of

other potentially significant developments affecting a company (such as take-over bids and proxy contests) must be carefully considered as securities regulators have more recently demonstrated an increased propensity to scrutinize – and in some cases set aside – those transactions.

Please contact any member of our Corporate Securities Group to discuss these developments.