

# Update

## Corporate Securities Law

April 29, 2009

### TSX Provides Guidance on Financial Hardship Exemption to Securityholder Approvals

The Toronto Stock Exchange (the “TSX” or the “Exchange”) has released guidance on the use of the “financial hardship exemption” to avoid securityholder approval requirements for certain transactions.

The Exchange’s rules generally require securityholder approval of certain transactions, including issuances of securities that (i) materially affect control of the issuer, (ii) provide consideration to insiders of 10% or more of the issuer’s market capitalization, (iii) offer pricing at a greater discount than the limits prescribed by the Exchange, and (iv) involve an issuance, at a discount to market, of more than 25% of the issuer’s outstanding securities. As described in our update entitled “*TSX Rule Change Proposed to Require Acquiror Shareholder Approval in Certain Public M&A Transactions*” dated April 13, 2009, it is proposed that securityholder approval will be required in a greater number of public M&A transactions.

The “financial hardship” exemption was introduced in 2005 to permit listed issuers to enter into transactions in a timely and efficient manner (shareholder approval can be a time and resource consuming process) in circumstances of financial

difficulty. Reliance on the exemption was relatively straightforward; the TSX relied entirely on the listed issuer’s board concluding that the issuer was in financial distress and that the transaction was in the best interests of the issuer.

The TSX’s proposed new rules reflect that a much higher degree of scrutiny will be applied to the use of the exemption.

From a procedural perspective, the Exchange will now require that the following be filed:

1. A detailed description of:
  - a. the events and factors which led to and contributed to the listed issuer being in serious financial difficulty and whether such information has previously been publicly disclosed,
  - b. alternatives considered by management and the board of the listed issuer to improve the listed issuer's financial situation,
  - c. the manner in which the proposed transaction will remedy the financial problems of the listed issuer, including 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,
  - d. why the listed issuer is not able to seek securityholder approval, including consideration of whether approval in writing is possible, particularly if the listed issuer is closely held, and
  - e. any other material information.
2. An explanation as to why the proposed transaction is reasonable for the listed issuer under the circumstances.

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3. If insiders are participating in the transaction:
  - (a) confirmation that no such insider was involved in the negotiations on behalf of the listed issuer,
  - (b) information about other parties that have been approached by the listed issuer to participate in the proposed transaction and what role, if any, such insider played in those negotiations on behalf of the listed issuer, and
  - (c) any other contemplated transactions (as applicable).
4. A list of the names of financial and legal advisors retained by the listed issuer, its board of directors or the committee of the board (if applicable) and the role such advisors, board of directors or the committee of the board 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.

Issuers proposing to rely on the exemption will continue to be required to issue a press release at least five business days in advance of the closing of the transaction, disclosing the reasons for the issuer's serious financial difficulty, the proposed use of proceeds, the material terms of the transaction and that reliance is being placed on the financial hardship exemption. Notably, the TSX has indicated that it will not provide conditional approval of the transaction until five days *after* issuance of the press release, affording the issuer's securityholders an opportunity to react.

The TSX will continue its practice of placing an issuer relying on the "financial hardship" exemption under review for continued listing.

Relying on the financial hardship exemption will now be more difficult for an issuer, a consideration of increasing importance given present market conditions.