

# Update

## Corporate Securities Law

September 28, 2009

### TSX to Require Shareholder Vote in Certain M&A Transactions

The Toronto Stock Exchange (“**TSX**”) has announced that, effective November 24, 2009, a listed issuer will be required to obtain the approval of its securityholders when the securities proposed to be issued as consideration for the acquisition of a target would increase the number of the listed issuer’s outstanding securities by 25% or more (on a non-diluted basis), regardless of whether the target is closely or widely-held. This requirement represents a significant departure from historical practice pursuant to which acquisitions of widely-held targets were exempt from the TSX’s shareholder approval requirements (subject to the TSX’s general discretion to impose conditions on issuances).

The TSX’s requirements in this regard are of particular significance as neither securities nor corporate law in Canada requires approval by an issuer’s securityholders in arm’s length acquisition transactions.

The amendment to the TSX rules follows the decision of the Ontario Securities Commission (the “**OSC**”) in connection with the proposed (and since abandoned) acquisition by HudBay Minerals Inc. (“**Hudbay**”) of Lundin Mining Corp., in which the OSC overturned a determination by the TSX not to require approval of the HudBay shareholders for the transaction, which would have resulted in HudBay issuing more than 100% of its then

outstanding shares. In that decision, the OSC concluded that the “quality of the market-place...would be significantly undermined” if shareholder approval were not required. The OSC’s decision, and the background to the issue of acquiror shareholder approval which has been the focus of much attention and comment, are outlined in our update entitled “*The HudBay Minerals Proceedings and the Return of Acquiror-Side Shareholder Approval Rights*” dated January 26, 2009.

There has been much debate about acquiror-side securityholder approval requirements. The imposition of a requirement for securityholder approval reflects the perspective, publicly expressed by some institutional shareholders, that shareholders should “have a say” in dilutive transactions and that there is no reason to distinguish between acquisitions of public and private targets for this purpose. The securityholder approval requirement also is consistent with the approach utilized by many international stock exchanges (U.S. exchanges typically require securityholder approval at 20% dilution and other foreign exchanges at 25%). Concerns about the requirement of securityholder approval tend to focus on the fact that this requirement can be expected (as the TSX acknowledges) to result in increased execution risk and cost (both directly and as a result of the higher execution risk) for acquisitive Canadian issuers.

The TSX had earlier this year proposed to require securityholder approval in connection with acquisitions of widely-held targets only where the securities to be issued in payment for the acquisition would result in greater than 50% dilution. The details of the TSX’s original proposal are outlined in our update entitled “*TSX Rule Change Proposed to Require Acquiror Shareholder Approval in Certain Public M&A Transactions*” dated April 13, 2009.

# Goodmans<sup>LLP</sup> Update

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In its notice the TSX observed that it had retained discretion, in extraordinary circumstances, to exempt issuers from the securityholder approval requirement in appropriate circumstances.

The new requirement will not have any retroactive effect, so that any transaction for which the TSX has been notified in writing prior to November 24, 2009 will not be subject to this change in the TSX rules. It remains to be seen how parties to transactions that are agreed to in the interim will approach the question of whether approval by the acquiror's shareholders should be obtained, and who should bear the risk of such approval not being obtained, in transactions that are agreed to that would result in an increase in the number of outstanding shares of the acquiror by 25% or more. It also remains to be seen what approach the TSX will take (under its general discretionary powers) in connection with those transactions.

Please contact any member of the Goodmans corporate securities team to discuss this amendment.

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