13.2.2 TSX Request for Comments – Amendments to Part VI of the TSX Company Manual

TORONTO STOCK EXCHANGE

REQUEST FOR COMMENTS

AMENDMENTS TO PART VI OF THE
TORONTO STOCK EXCHANGE ("TSX") COMPANY MANUAL
(THE "MANUAL")

TSX is publishing proposed changes to Part III, Part V and Part VI of the Manual (the "Amendments"). The Amendments are being published for a 30-day comment period.

The Amendments will be effective upon approval by the Ontario Securities Commission (the "OSC") following public notice and comment. Comments should be in writing and delivered by March 7, 2011 to:

Michal Pomotov
Legal Counsel
Toronto Stock Exchange
The Exchange Tower
130 King Street West
Toronto, Ontario M5X 1J2
Fax: (416) 947-4461
Email: tsxrequestforcomments@tsx.com

A copy should also be provided to:

Susan Greenglass
Director
Market Regulation
Ontario Securities Commission
20 Queen Street West
Toronto, Ontario M5H 3S8
Fax: (416) 595-8940
Email: marketregulation@osc.gov.on.ca

Comments will be publicly available unless confidentiality is requested.

Overview

TSX is seeking public comment on Amendments to the Manual. This Request for Comments explains the rationale and objectives of the Amendments. Following the comment period, TSX will review and consider the comments received and implement the Amendments, as proposed or as modified as a result of comments.

Summary of the Amendments

TSX is proposing:

A. to introduce a new subsection in Section 319 for a new subcategory of minimum listing requirements for oil & gas development stage companies;

B. to amend Subsections 501(c), 604(a)(ii) and 611(b) to provide for aggregation of transactions involving insiders over a six-month period;

C. to amend Subsection 613(c) to provide that no security holder approval will be required for employment inducements provided that the aggregate number of securities issued to officers under the exemption in the one-year preceding period is not more than 2% of the number of securities outstanding; and

D. to delete Subsection 614(n)(v) which provides that a rights offering must be unconditional.

<u>**Rationale and Discussion of the Amendments**</u>

A. Original Listing Requirements for Oil & Gas Development Stage Issuers

Recently, TSX has received several applications and inquiries about companies with large development stage projects. For example, oil sands projects often do not have proved developed reserves, which are a requirement under current TSX standards. In order to list such issuers, we have granted an exception to the reserve requirement. In granting such exemption, we have taken into account numerous factors, such as the level of contingent resources, market capitalization, the size of the initial public offering and the amount of cash on hand, in lieu of proved developed reserves.

The proposed new subcategory will facilitate the listing of development stage oil & gas issuers and has been developed based on our experience with recent applicants and inquiries. We believe that publishing these standards will (i) improve transparency and fairness since there may be issuers that do not apply for listing believing they cannot qualify based on our current standards, and (ii) establish appropriate standards for issuers listing under such category.

The proposed key requirements are:

(a) contingent resources of $500 million;

(b) a minimum market value of the issued securities to be listed of $200 million;

(c) a clearly defined development plan which will advance the property;

(d) sufficient funds for an 18-month period or to bring the property into commercial production; and

(e) an appropriate capital structure.

Based on the applicants and inquiries we have received, the contingent resources requirement is consistent with exemptions granted to date. The requirement is intended to set high standards for issuers listing under this subcategory. We may exclude certain resources due to the nature of the contingency associated with them. For example, contingent resources may be excluded if TSX does not believe the technology under development is sufficiently advanced to extract the resource and therefore to merit inclusion.

The market capitalization requirement of $200 million is intended to ensure that the market value is high enough to support the resource valuation in the technical report and the significant capital expenditures typically required for such projects. We generally expect that the market capitalization requirement will not be a barrier to entry, provided that the contingent resources requirement has been met.

The remaining requirements are consistent with other listing categories to ensure that an issuer has sufficient funds for an 18-month period and will be able to advance their project.

The value of the contingent resources will be required to be calculated the same way the value of proved developed reserves is calculated under our current requirements, as the net present value of future cash flows before income taxes, prepared on a forecast basis, and discounted, as set out in proposed Footnote 30B. The calculation for proved developed reserves is in Footnote 30 and includes a discount rate of 20%. It is proposed that the discount rate for calculating proved developed reserves and the value of contingent resources should both be set at 10%. At the time the discount rate was set for the calculation of proved developed reserves, interest rates were significantly higher, and a higher discount rate was therefore appropriate. Given the current interest rate environment, a discount rate of 20% is no longer appropriate. Footnote 30 will be revised to introduce a discount rate of 10%.

Questions:

1. Should TSX introduce listing requirements for applicants with contingent resources?

2. Should issuers that do not have reserves be listed under the oil and gas category?

3. Should specific contingencies be excluded? If so, what are they?

4. Is $500 million an appropriate value for contingent resources? If not, please explain.

5. Is $200 million an appropriate market capitalization? If not, please explain.

6. Is it appropriate to reduce the discount rate from 20% to 10%? Should the proved developed reserves requirements in Section 319 ($3 million) and Section 319.1 ($7.5 million) be increased in conjunction with the discount rate adjustment?

B. Aggregation of Consideration to Insiders

The private placement rules in Subsection 607(g)(ii) provide that insider transactions be aggregated over a six-month period in order to determine security holder approval requirements. This requirement was adopted to prevent issuers from avoiding security holder approval requirements by separating insider transactions into smaller tranches over a relatively short period of time. In transactions other than private placements, it has come to TSX's attention that issuers may seek to avoid security holder approval by similarly separating insider transactions into smaller tranches. Where such matters have come to the attention of TSX, TSX has exercised discretion to aggregate insider transactions over the six-month period preceding the transaction when determining whether security holder approval is required under: (i) Subsection 501(c) in relation to non-exempt issuers; (ii) Subsection 604(a)(ii) in relation to consideration to insiders; and (iii) Subsection 611(b) in relation to acquisitions. TSX is proposing to formally change each of these sections to pre-empt avoidance of security holder approval requirements and improve rule transparency and consistency for issuers.

Questions:

7. Is it appropriate to aggregate all consideration to insiders for the purposes of the security holder approval requirement? If not, please explain.

8. Is 10% the appropriate threshold for consideration of securities provided to insiders?

C. Employment Inducement Exemption from Security Holder Approval

Although TSX continues to support the exemption from security holder approval for security based compensation arrangements used as employment inducements, as set out in Subsection 613(c), TSX has become concerned that the limit of 2% per person can be potentially excessive and subject to abuse. The dilution suffered in such circumstances may be quite high if, for example, 2% is simultaneously offered to several officers as part of a corporate reorganization. Therefore, TSX is proposing to amend Subsection 613(c) to provide that no security holder approval will be required for employment inducements provided that the aggregate number of securities issued to officers under the exemption in the one-year preceding period is not more than 2% of the number of securities outstanding. At this level, we believe that issuers will still be able to use employment inducements without causing excessive dilution for security holders without their approval.

Questions:

9. Is it appropriate to aggregate employment inducements over a one-year period for the purposes of the security holder approval requirement? If not, explain.

10. Is 2% the appropriate threshold for consideration of securities provided as employment inducements? If not, what would be a suitable alternative threshold? Please provide support for your response.

D. Rights Offerings

Subsection 614(n)(v) of the Manual provides that a rights offering must be unconditional. TSX has therefore not allowed rights offerings where a condition had to be met in order to receive the securities upon exercising the rights, such as a minimum offering size. TSX is proposing to remove this requirement allowing for more flexibility in structuring rights offerings.

We believe that the requirement that rights offerings be unconditional was introduced principally to prevent: (i) the distribution of securities (i.e., the rights) whose value may be difficult to assess because the securities underlying the rights may not be issuable; (ii) uncertainty in the value of the securities underlying the rights which are trading "ex-distribution"; and (iii) trading in securities that may ultimately have no value in the event that the condition attached to the exercise of the right is not fulfilled.

In proposing this amendment, we considered the extensive disclosure framework under securities legislation in respect of rights offerings. Security holders receive a rights certificate as well as a circular or prospectus with detailed disclosure of the rights offering, which would disclose any conditions attached to the exercise of the rights. The circular or prospectus is also readily accessible on SEDAR. In order to fulfil timely disclosure obligations, the listed issuer's press releases must also fully describe the principal terms of the rights offering, including any conditions attached to the exercise of the rights. Therefore, there does not appear to be any impediment to security holders and investors having access to the required information to assess the value of the rights and securities underlying the rights and to make an informed investment decision.

In addition, market participants in Canada have grown more accustomed over the years to pricing and trading "contingent" securities such as subscription receipts. It has been TSX experience that market participants can adequately price such

securities and trade them in an orderly fashion. TSX has allowed rights offerings where rights are exercisable into subscription receipts which have been completed without any negative ramifications. While there was no condition attached to the issuance of the subscription receipts, there were conditions attached to the issuance of the securities underlying the subscription receipts. Considering the increased accessibility and availability of information to investors and increased investor sophistication, we believe any risk to market participants of conditional rights offerings is mitigated.

We also considered that US stock exchanges do not have a similar requirement. Market participants in the US are able to trade rights based on the information that is publicly available about the rights offering, including any conditions attached to the exercise of the rights. Removing this requirement will eliminate an inconsistency in regulatory requirements, which presented issues for interlisted issuers in particular.

We also note that Canadian Securities Administrators (CSA) members have expressed concerns about rights offerings without a minimum offering size where an issuer may not continue to operate as a going concern unless a minimum amount of funds is raised. In such circumstance, it may be preferable that the rights offering not close and the proceeds be returned to subscribers. Removing this requirement will provide flexibility for listed issuers to impose conditions on a rights offering for the benefit of investors.

We are not aware of any trading concerns with respect to a conditional rights offering. Furthermore, it is our understanding that back offices and CDS have mechanisms in place to either issue the securities underlying the rights or refund subscription proceeds.

Based on all of these factors, the purposes of the requirement that rights offerings must be unconditional do not appear to be as relevant as in the past.

With the proposed amendment, the distribution of the rights will remain unconditional as the record date for a rights offering must still be set at least seven trading days in advance once: (i) all deficiencies raised by TSX are resolved; (ii) clearances for the rights offering have been obtained from all securities commissions; (iii) all the terms of the rights offering are finalized; and (iv) all documents have been received by TSX, as contemplated in Subsection 614(e) of the Manual.

Questions:

11. Will the elimination of the requirement that rights offerings be unconditional have any negative effect on market participants such as the holders of the listed securities or buyers of the rights in the secondary market? If so, please explain.

12. Should TSX introduce specific disclosure requirements for rights offerings as a result of eliminating the requirement that rights offerings be unconditional? If so, what should the requirements be?

13. Should conditional rights offerings be subject to certain prerequisites? If so, under which circumstances should TSX approve a conditional rights offering?

Text of the Amendments

TSX is proposing the Amendments as set out in **Appendix A**.

<u>Public Interest</u>

TSX is publishing the Amendments for a 30-day comment period, which expires March 7, 2011. The Amendments will only become effective following public notice and the approval of the OSC.

APPENDIX A

PROPOSED AMENDMENTS TO THE TSX COMPANY MANUAL

Minimum Listing Requirements for Oil and Gas Companies

Sec. 319. Requirements for Eligibility for Listing Non-Exempt Issuers[28]

(b) Oil & Gas Development Stage Companies

(i) contingent resources[30A] of $500,000,000[30B];

(ii) a minimum market value of the issued securities that are to be listed of at least $200,000,000;

(iii) a clearly defined development plan, satisfactory to the Exchange, which can reasonably be expected to advance the property; [x3]

(iv) adequate funds to either: (A) execute the development plan and cover all other capital expenditures as well as general, administrative and debt service expenses, for a period of 18 months with an allowance for contingencies; or (B) bring the property into commercial production, and adequate working capital to fund all budgeted capital expenditures and carry on the business. A management-prepared 18-month projection (by quarter) of sources and uses of funds detailing all planned and required expenditures signed by the Chief Financial Officer must be submitted. The projection must also include actual financial results for the most recently completed quarter; and

(iv) an appropriate capital structure.

[30] - The Company must submit a technical report prepared by an independent technical consultant that conforms to National Instrument 51-101 and be acceptable to the Exchange. Reports prepared in conformity with other reporting systems deemed by the Exchange to be equivalent of National Instrument 51-101 will normally be acceptable also. The value of reserves should be calculated as the net present value of future cash flows before income taxes, prepared on a forecast basis, and discounted at a rate of ~~20~~10%. The Exchange may, at its discretion, also require the provision of a price sensitivity analysis.

[30A] – "contingent resources" are defined in accordance with Canadian Oil and Gas Evaluation Handbook and National Instrument 51-101, however the Exchange in its discretion may exclude certain resources classified as contingent resources after taking into consideration the nature of the contingency. The Exchange strongly recommends pre-consultation with the Exchange for any applicant applying under this listing category.

[30B] – The Company must submit a technical report prepared by an independent technical consultant that conforms to National Instrument 51-101 and be acceptable to the Exchange. Reports prepared in conformity with other reporting systems deemed by the Exchange to be the equivalent of National Instrument 51-101 will normally be acceptable also. The value of the resources should be calculated as the best case scenario of the net present value of future cash flows before income taxes, prepared on a forecast basis, and discounted at a rate of 10%. The Exchange may, at its discretion, also require the provision of a price sensitivity analysis.

Part V Special Requirements for Non-Exempt Issuers

Sec. 501.

(c) Transactions involving insiders or other related parties of the non-exempt issuer[1] (both as defined in Part I) and which (i) do not involve an issuance or potential issuance of listed securities; or (ii) that are initiated or undertaken by the non-exempt issuer and materially affect control (as defined in Part I) require TSX acceptance under this Part V before the non-exempt issuer may proceed with the proposed transaction. Failure to comply with this provision may result in the suspension and delisting of the non-exempt issuer's listed securities (see Part VII of this Manual).

If the value of the consideration to be received by the insider or other related party exceeds 2% of the market capitalization of the issuer, TSX will require that:

[1] For the purposes of this section, "transactions involving insiders and other related parties of the non-exempt issuer" includes, but is not limited to, (a) services rendered for which fees and commissions are payable; (b) purchases and sales of assets; (c) interest to be received by an insider or other related party pursuant to a loan, but does not include the principal amount of a loan which must be repaid; and (d) a loan by a non-exempt issuer to an insider or a related party, which includes both the principal and interest on any loan.

(i) the proposed transaction be approved by the board on the recommendation of the directors who are unrelated to the transaction; and

(ii) the value of the consideration be established in an independent report, other than for executive or director compensation for services rendered unless the consideration appears to be commercially unreasonable, as determined by TSX.

In addition, if the value of the consideration to be received by the insider or other related party exceeds 10% of the market capitalization of the issuer, TSX will require that the transaction be approved by the issuer's security holders, other than the insider or other related party.

During any six-month period, transactions with insiders or other related parties will be aggregated for the purposes of this Subsection.

Sec. 604. Security Holder Approval

(a) In addition to any specific requirement for security holder approval, TSX will generally require security holder approval as a condition of acceptance of a notice under Section 602 if in the opinion of TSX, the transaction:

(i) materially affects control of the listed issuer; or

(ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer, during any six-month period, and has not been negotiated at arm's length.

If any insider of the listed issuer has a beneficial interest, direct or indirect, in the proposed transaction which differs from other security holders of the same class TSX will regard such a transaction as not having been negotiated at arm's length.

Sec. 611. Acquisitions

(b) Security holder approval will be required in those instances where the number of securities issued or issuable to insiders as a group, together with any securities issued or made issuable to insiders as a group for acquisitions during the preceding six months, in payment of the purchase price for an acquisition exceeds 10% of the number of securities of the listed issuer which are outstanding on a non-diluted basis, prior to the date of closing of the transaction. Insiders receiving securities pursuant to the transaction are not eligible to vote their securities in respect of such approval.

Sec. 613.

Exception to the Requirement for Security Holder Approval—Employment Inducements

(c) Security holder approval is not required for security based compensation arrangements used as an inducement to ~~a~~ person(s) or company(ies) not previously employed by and not previously an insider of the listed issuer, ~~to enter~~provided that: i) such person(s) or company(ies) enters into a contract of full time employment as an officer of the listed issuer~~, provided that~~; and ii) the number of securities made issuable ~~to such person or company~~pursuant to this Subsection during any twelve month period do not exceed in aggregate 2% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date ~~of the arrangement~~this exemption is first used during such twelve month period.

Sec. 614.

(n) The following requirements apply to rights which are listed on TSX, although TSX may, in appropriate circumstances, apply these requirements to rights not so listed:

(i) once the rights have been listed on TSX, TSX will not permit the essential terms of the rights offering, such as the exercise price or the expiry date, to be amended. However, under extremely exceptional circumstances, such as an unexpected postal disruption, TSX may grant an exemption from the requirement that the expiry date not be extended;

(ii) the rights offering must be open for a period of at least twenty-one (21) calendar days following the date on which the rights offering circular is sent to security holders or such longer period as is necessary to ensure that security holders, including security holders residing in foreign countries, will have sufficient time to exercise or sell their rights on an informed basis;

(iii) security holders must receive exactly one right for each security held. An exemption from this requirement will be considered if the rights offering entitles security holders to purchase more than one security for each security held (prior to giving effect to any additional subscription privilege); and

(iv) if the listed issuer proposes to provide a rounding mechanism, whereby security holders not holding a number of securities equally divisible by a specified number would have their entitlements adjusted upward, adequate arrangements must be made to ensure that beneficial owners of securities registered in the names of CDS, banks, trust companies, investment dealers or similar institutions will be treated, for purposes of such additional entitlements, as though they were registered security holders~~; and~~.

~~(v) the rights offering must be unconditional.~~