

13.1.6 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 VI of the Manual relating to certain requirements and exemptions for acquisitions of investment funds (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 December 14, 2009 to:

Michal Pomotov
Legal Counsel
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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
Acting Director
Ontario Securities Commission
20 Queen Street West
Toronto, Ontario M5H 3S8
Fax: (416) 595-8940
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Comments will be publicly available unless confidentiality is requested.

Overview

On April 3, 2009, TSX published a Request for Comments (the “2009 RFC”) on its security holder approval requirements for acquisitions. In response to the 2009 RFC, a concern was raised regarding the application of security holder approval requirements for acquisitions of investment funds. Also, certain market participants have recently expressed interest in TSX codifying security holder approval requirements for investment funds that are being acquired.

Further to the 2009 RFC, TSX amended its rules for security holder approval requirements for acquisitions (the “2009 RFC Amendment”). TSX is publishing this Request for Comments in part because of the impact of the 2009 RFC Amendment on investment funds. TSX requires security holder approval for the issuance of securities as full or partial consideration for an acquisition where such number of securities exceeds 25% of the issued and outstanding securities of the listed issuer (Subsection 611(c)). Prior to the 2009 RFC Amendment, a listed issuer acquiring a public company (a reporting issuer or issuer of equivalent status having 50 or more beneficial security holders, excluding insiders and employees) (Subsection 611(d)) was generally exempt from Subsection 611(c). Investment funds engaged in permitted mergers were therefore generally exempt from the security holder approval requirement.

This Request for Comments proposes Amendments to Part VI of the Manual: (i) to require security holder approval by investment funds that are the subject of an acquisition, unless certain conditions are met; and (ii) to provide an exemption from the security holder approval requirement in Subsection 611(c) for an acquirer investment fund, subject to certain conditions being met.

This Request for Comments explains the rationale and objective of the Amendments and seeks public comment. Following the comment period, TSX will determine whether to implement the Amendments, based on the comments it receives. If TSX determines to implement the Amendments as proposed, they will be published, together with a summary of the comments received, prior to implementation. If the Amendments are materially modified or withdrawn, TSX will publish a further Request for Comments or subsequent notice, together with a summary of the comments received.

Summary of the Amendments

Subsection 604(g) Security holder approval

TSX is proposing to require security holder approval of an investment fund which is the subject of an acquisition, unless certain conditions are met. In particular, the target fund must provide its security holders with a redemption right for cash proceeds prior to completion of the acquisition, which cannot be for less than net asset value ("NAV") of the fund. If specific security holder approval is not being sought for the acquisition, it has been TSX practice to require investment funds to offer their security holders a redemption right for cash proceeds at NAV prior to being acquired. TSX seeks to codify this practice in the Manual to improve transparency for market participants.

Subsection 611(d) Exemption from security holder approval

TSX is also proposing to exempt an investment fund from the security holder approval requirement for acquisitions exceeding 25% dilution as set out in Subsection 611(c), provided that certain conditions are met. In particular, the consideration offered by the acquiring investment fund cannot exceed the NAV of the investment fund that is the subject of the acquisition.

Text of the Amendments

TSX is proposing to add a new Subsection 604(g) as follows:

Sec. 604. Security Holder Approval.

(g) When a listed issuer that is an investment fund is being acquired, TSX will require that such investment fund obtain security holder approval for the acquisition, unless all of the following conditions are met:

- (i) the listed issuer has a permitted merger clause in its constating documents which permits the acquisition of the listed issuer without security holder approval;
- (ii) the consideration offered to security holders of the listed issuer for the acquisition has a value that is not less than NAV;
- (iii) the independent review committee of the listed issuer being acquired has: (A) determined that the investment objectives, valuation procedures and fee structure of the listed issuer and the acquiring issuer are substantially the same; and (B) approved the acquisition; and
- (iv) the listed issuer is providing its security holders with a redemption right for cash proceeds which are not less than its NAV, together with adequate notice and description of such redemption right and the acquisition.

TSX is proposing to amend Subsection 611(c) and add a new Subsection 611(d) as follows:

Sec. 611. Acquisitions.

(c) Subject to Subsection 611(d), security holder approval will be required in those instances where the number of securities issued or issuable in payment of the purchase price for an acquisition exceeds 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis.

(d) Subject to Subsection 611(b), TSX will not require security holder approval where the listed issuer is an investment fund and all of the following conditions are met:

- (i) the issuer being acquired is an investment fund that calculates and publishes its NAV at least once a month;
- (ii) the consideration being offered for the acquisition does not exceed the NAV of the investment fund that is the subject of the acquisition; and
- (iii) the independent review committee of the acquiring listed issuer has: (A) determined that the investment objectives of the listed issuer and the issuer being acquired are substantially the same; and (B) approved the acquisition; and

(iv) the number of securities issued or issuable in payment of the purchase price for the acquisition does not exceed 100% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis.

A blackline of the proposed Amendments is attached at Appendix A.

Rationale and Discussion of the Amendment

In this section we discuss the rationale for: (i) requiring security holder approval of an acquisition by a target investment fund unless certain conditions are met; and (ii) exempting an investment fund from the Subsection 611(c) security holder approval requirement provided certain conditions are met.

(i) Security Holder Approval Requirements for Target Investment Funds

Certain concerns have been raised by market participants regarding investment funds which are the subject of an acquisition. Because investment funds are typically created by a declaration of trust or similar constating documents, they are not generally subject to the protections of a corporate statute such as the *Canadian Business Corporations Act*, which generally would provide that target security holders must approve an acquisition. In addition, the constating documents of some investment funds have a "permitted merger" clause which allows the fund to be acquired without the approval of its security holders provided that certain conditions have been met.

TSX does permit investment funds to include a permitted merger clause in their constating documents. However, when an investment fund is being acquired, TSX has, as a matter of practice, required that the investment fund provide a redemption right to its security holders for cash proceeds based on NAV, unless the target fund seeks specific security holder approval for the acquisition. Subsection 604(g) will codify this practice and clarify TSX's position on the redemption right to be provided to security holders.

TSX is concerned about the protection of security holders in funds with a permitted merger clause because they potentially permit fundamental alterations in an investment to occur without security holder approval. For example, permitted mergers can result in: (i) indirect extension of the life of the investment fund if security holders are merged into a fund with a longer term; (ii) change in termination rights, such that security holders that would otherwise be able to obtain cash proceeds upon the termination of the fund are merged into a fund with different termination rights; and (iii) change in redemption rights or other fundamental terms of the investment fund.

For conventional mutual funds, there is a requirement in National Instrument 81-102 that the funds participating in a merger transaction bear none of the costs and expenses associated with the transaction. For conventional mutual funds, the rationale is that such mergers benefit fund managers, not necessarily security holders.

Accordingly, we are proposing to formally require that an investment fund which is the subject of an acquisition must obtain security holder approval for the acquisition, unless: (i) security holders are provided with a redemption right for cash proceeds equal to NAV; (ii) the investment objectives, valuation procedures and fee structure of the acquirer and target are substantially similar, as determined by the target fund's independent review committee, and the independent review committee of the target fund has approved the acquisition; and (iii) adequate notice of the redemption right and a description of the acquisition are provided to all security holders in order to allow them to make an informed decision whether to exercise their redemption rights.

Questions:

Please comment on the following questions:

1. Is it appropriate for TSX to require security holder approval of an acquisition by a listed investment fund which is the subject of an acquisition?
2. Should security holder approval be required in all instances, regardless of any conditions that may be met? Please explain your response with reference to investor protection and the costs of seeking security holder approval.
3. Are the proposed conditions to permit an acquisition without security holder approval appropriate?
4. Are there additional conditions that should be required to permit an acquisition without security holder approval? If so, what are they?
5. Should an investment fund be permitted to deduct the administrative expenses involved in exercising the redemption right? If so, would it be appropriate to cap the administrative expenses that could be charged, and at what level?

6. Is it appropriate that the independent review committee determine whether the investment objectives, valuation procedures and fee structure of the funds are substantially similar? Is there anything else that the independent review committee of the fund should specifically be required to review in order for an acquisition to proceed without security holder approval?
7. Is it appropriate that TSX require that the investment funds participating in a merger bear none of the costs and expenses associated with the transaction?

(ii) Exemption from Security Holder Approval Requirement for Acquiring Investment Funds

In response to the 2009 RFC, TSX received a comment letter suggesting that closed end investment funds should not be subject to a dilution test for security holder approval of an acquisition of another investment fund. It was submitted that for investment funds with a permitted merger clause, there are sufficient investor protections because of TSX practice with respect to such mergers and because of conflict of interest provisions under securities legislation, including review of the transaction by the fund's independent review committee.

Investment funds are generally different than other listed issuers in that their purpose is typically exposure to, or investment in, a specified sector, rather than an operating business. Investment funds typically calculate and publish their NAV frequently. Because of the nature of an investment fund, control issues do not typically arise, and normally there is no premium offered in connection with an acquisition. The consideration offered for the acquisition of an investment fund is generally equal to the NAV of the target investment fund. Security holders in the acquiring fund do not therefore suffer economic dilution because they are diluted only in respect of their percentage ownership of the acquiring fund. In contrast, it would be unusual for the acquisition of an operating business not to be done at a premium. In addition, investment funds typically do not hold an annual security holder meeting, making the cost considerations of requiring security holder approval particularly relevant.

TSX is therefore proposing to exempt listed investment funds acquiring other investment funds from the security holder approval requirement in Subsection 611(c), provided that certain conditions are met. One of the key concerns addressed by Subsection 611(c) is that an acquisition may fundamentally alter a security holder's investment through dilution. We believe that this concern is not relevant for security holders in investment funds, provided that the proposed conditions are met. However, no exemption will be available if dilution is over 100%. This restriction is to mirror a restriction applicable to conventional mutual funds subject to National Instrument 81-102. As conditions to providing an exemption from the security holder approval requirement: (i) the fund must calculate and report NAV at least monthly; (ii) a premium is not permitted; the consideration offered may not exceed NAV of the investment fund that is the subject of the acquisition; (iii) the investment objectives of the investment fund, as determined by the independent review committee, must be substantially similar, and the independent review committee of the acquirer fund must approve the acquisition; and (iv) dilution cannot exceed 100%.

Questions:

Please comment on the following questions:

8. Is it appropriate to provide investment funds with an exemption from the security holder approval requirement set out in Subsection 611(c)? If not, please explain.
9. Should security holder approval be required for an investment fund acquirer where dilution is more than 25%, regardless of any conditions that may be met? Please explain your response with reference to investor protection and the costs of seeking security holder approval.
10. Are there any circumstances under which the proposed exemption should not apply (i.e., for conventional mutual funds, there is no exemption from security holder approval if the transaction is a material change for the acquirer fund)?
11. Are the proposed conditions for an exemption from the security holder approval requirement appropriate?
12. Are there additional conditions that should be added in order to permit the exemption from security holder approval? If so, what are they?
13. Is it appropriate that the independent review committee determine whether the investment objectives of the funds are substantially similar? Is there anything else that the independent review committee of the fund should specifically be required to review in order for an acquisition to proceed without security holder approval?

Ancillary Proposed Rule Amendments

The following ancillary rule amendments are non-public interest and will only be made at the effective time of Amendments.

Part I – Introduction

Definitions will be added. The definition of “investment fund”, currently in Subsection 628(vii) of the Manual, will be moved to Part I and will be updated. See **Appendix B**.

Question:

14. Are there additional ancillary rule amendments, not discussed in this Request for Comments, to consider in adopting the Amendments?

Transition

Given that the 2009 RFC Amendment has been approved and will be effective on November 24, 2009, TSX recognizes that investment funds will not have an exemption from security holder approval requirements for acquisitions subject to Subsection 611(c). TSX will consider on a case by case basis applications by investment funds for a discretionary exemption from the security holder approval requirement in Subsection 611(c) provided the terms set out in this Request for Comments are present.

Public Interest

TSX is publishing the Amendments for a 30-day comment period, which expires December 14, 2009. The Amendments will only become effective following public notice and the approval of the OSC.

APPENDIX A

PROPOSED PUBLIC INTEREST AMENDMENTS TO PART VI OF
THE TORONTO STOCK EXCHANGE COMPANY MANUAL

Sec. 604(g). Security Holder Approval

(g) When a listed issuer that is an investment fund is being acquired, TSX will require that such investment fund obtain security holder approval for the acquisition, unless all of the following conditions are met:

(i) the listed issuer has a permitted merger clause in its constating documents which permits the acquisition of the listed issuer without security holder approval;

(ii) the consideration offered to security holders of the listed issuer for the acquisition has a value that is not less than NAV;

(iii) the independent review committee of the listed issuer being acquired has: (A) determined that the investment objectives, valuation procedures and fee structure of the listed issuer and the acquiring issuer are substantially the same; and (B) approved the acquisition; and

(iv) the listed issuer is providing its security holders with a redemption right for cash proceeds which are not less than NAV, together with adequate notice and description of such redemption right and the acquisition.

Sec. 611. Acquisitions.

(c) Subject to Subsection 611(d), sSecurity holder approval will be required in those instances where the number of securities issued or issuable in payment of the purchase price for an acquisition exceeds 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis.

(d) ~~Intentionally deleted.~~ Subject to Subsection 611(b), TSX will not require security holder approval where the acquiring listed issuer is an investment fund and all of the following conditions are met:

(i) the issuer being acquired is an investment fund that calculates and publishes its NAV at least once a month;

(ii) the consideration being offered for the acquisition does not exceed the NAV of the investment fund that is the subject of the acquisition;

(iii) the independent review committee of the acquiring listed issuer has: (A) determined that the investment objectives of the listed issuer and the issuer being acquired are substantially the same; and (B) approved the acquisition; and

(iv) the number of securities issued or issuable in payment of the purchase price for the acquisition does not exceed 100% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis.

APPENDIX B

PROPOSED NON-PUBLIC INTEREST ANCILLARY AMENDMENTS TO PART I OF
THE TORONTO STOCK EXCHANGE COMPANY MANUAL

Interpretation

“investment fund” has the same definition found in the OSA National Instrument 51-102 – *Continuous Disclosure Obligations*.

“IRC” means the independent review committee of an investment fund established under National Instrument 81-107 – *Independent Review Committee for Investment Funds*;

“NAV” means net asset value and has the same meaning as provided in National Instrument 81-106 – *Investment Fund Continuous Disclosure*;