



Pension Investment
Association of Canada

Association canadienne des
gestionnaires de caisses de retraite

May 25, 2009

Toronto Stock Exchange
The Exchange Tower
130 King Street West
Toronto, ON M5X 1J2
Email: tsxrequestforcomments@tsx.com

Attention: Michal Pomotov
Legal Counsel

**Re: Amendments to Part VI of the Toronto Stock Exchange Company Manual
(April 3, 2009)**

This submission is made by the Pension Investment Association of Canada (“PIAC”) in response to the request for comments published April 3, 2009 by Toronto Stock Exchange (“TSX”) on proposed changes to Part IV of the TSX Company Manual (the “Manual”) relating to security holder approval requirements for acquisitions (the “Amendment”).

PIAC has been the national voice for Canadian pension funds since 1977. Senior investment professionals employed by PIAC's member funds are responsible for the oversight and management of over \$940 billion in assets on behalf of millions of Canadians. PIAC's mission is to promote sound investment practices and good governance for the benefit of pension plan sponsors and beneficiaries.

General Comments

We applaud TSX for proposing the Amendment and strongly agree with TSX's position that security holders should be provided with an opportunity to vote on acquisitions which may significantly alter their investments through dilution.

We agree with the positions taken by TSX in the Amendment that:

- companies listed on TSX must meet higher standards than private, unlisted issuers;

- directors and management must impart information regarding a transaction so that security holders can understand and consider such transaction;
- it is appropriate for TSX to have rules requiring security holder approval even though there is no such requirement under corporate law;
- it is not appropriate for publicly traded issuers to have the ability to issue an unlimited number of securities for acquisitions without obtaining security holder approval;
- dilution is the appropriate bright line test for security holder approval;
- seeking security holder approval of dilutive transactions is not inconsistent with the exercise of the directors' fiduciary duty; and
- security holder approval requirements should be imposed equally on all issuers listed on TSX.

However, we don't agree that 50% is the appropriate level of dilution. We don't believe that there should be a difference between the acquisition of a public and a private company and we continue to believe, as noted in our comment letter of December 12, 2007, that Subsection 611(d) should be deleted without any amendments to Subsection 611(c). This would result in security holder approval being required in all cases where the number of securities issued in payment of the purchase price for an acquisition exceeds 25% of the number of securities which are outstanding. We believe that this level of dilution is significant and may significantly alter the nature of a security holder's investment.

Specific Comments

The following are our comments on the specific questions set out in the request for comments, which are reproduced below in italics and numbered to correspond to the request for comments.

1. Is it appropriate to maintain the exemption from security holder approval for the acquisition of public companies, provided the acquisition does not significantly alter the nature of the security holder's investment through dilution?

As noted above, we believe security holder approval should be required in all cases where the number of securities issued or issuable in payment of the purchase price for an acquisition exceeds 25% of the number of securities outstanding. We do not agree that acquisitions of public companies should be treated differently than acquisitions of private companies.

The fact that prospectus level disclosure regarding a potential acquisition is available should not eliminate the rights of security holders to determine whether they wish to be

diluted as a result of the proposed transaction. Although information may be available to allow market participants to better assess the merits of a transaction, without a requirement for security holder approval a security holder will not have a say in the transaction and the only real means to reject the transaction is for a security holder to sell their securities. The result, as was illustrated in the proposed acquisition by HudBay Minerals Inc. (“HudBay”) of Lundin Mining Corporation (the “HudBay Transaction”), is not favourable for long term security holders.

We also don't agree that there is a large increase in the degree of discipline imposed on the acquirer simply because the company being acquired is public and believe that the best way to ensure discipline, public scrutiny and disclosure is to require security holder approval in all cases of dilutive share issuances. As noted by TSX in the Amendment and seen in the HudBay Transaction, other remedies available to security holders such as derivative actions, oppression remedies or proxy contests may not be viable alternatives for security holders.

2. Will the Amendment dampen M&A activity? Will it make transactions more difficult to complete? How much of an impact will the Amendment have on deal certainty?

As noted in Appendix A to the Amendment, there is no substantive evidence to support whether security holder approval requirements will discourage acquisitions or make transactions more difficult to complete.

As noted in the Amendment, there is increasing globalization of investments. The New York Stock Exchange (“NYSE”), American Stock Exchange (“AMEX”), NASDAQ National Market (“NASDAQ”), London Stock Exchange, Johannesburg Stock Exchange and Stock Exchange of Hong Kong each require security holder approval for issuances of shares in connection with an acquisition that would result in dilution in excess of 20-50%, depending on the exchange, and do not contain exemptions for acquisitions of public companies. In particular, NYSE, AMEX and NASDAQ, on which many TSX-listed issuers are inter-listed, require security holder approval for stock issuances that would have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance.

Requiring security holder approval for all issuances exceeding 25% of the outstanding securities of the issuer would therefore generally bring TSX in line with other exchanges and would instil in investors the same confidence in the Canadian market that they have in other markets.

We do not believe that security holder approval in these cases will dampen M&A activity or make transactions significantly more difficult to complete. Transactions that are fair and reasonable to an acquiror's security holders will proceed as proposed. Although we acknowledge that there would be additional marginal costs involved in holding a meeting to obtain such approval, as owners of the company we support the company incurring these expenses on our behalf.

The Ontario Securities Commission (the “OSC”) in its decision of April 28, 2009, In The Matter of HudBay Minerals Inc. (the “HudBay Decision”), recognized the importance of “deal certainty” and “regulatory certainty” to the parties, but concluded that “the fair treatment of HudBay shareholders is fundamentally more important than considerations such as deal or regulatory certainty in assessing the impact of the Transaction on the quality of the marketplace.” The OSC in the HudBay Decision recognized that requiring security holder approval does not undermine confidence in our capital markets, but actually fosters confidence.

3. Do you think the Amendment will affect the competitiveness of issuers listed on TSX? If so how?

No, as noted in our response to question 2 above, companies listed on various other stock exchanges that require security holder approval regularly pursue acquisitions of public companies. As noted in the HudBay Decision, “the protection of the public interest is a primary goal of the TSX”.

4. Do you think that the Amendment strikes the appropriate balance between the interests of security holders, issuers and other market participants? Why or why not?

As noted above, we agree that security holder approval should be required for all proposed issuances of shares that would significantly dilute the economic positions or voting rights of security holders, including in connection with acquisitions of public companies. Since most Canadian issuers have unlimited authorized share capital, there is no limit on the amount of dilution that security holders may experience as the result of an issuance of shares by an issuer acquiring a widely-held reporting issuer. The OSC in the HudBay Decision carefully considered the impact of shareholder approval on the interests of market participants and market practice; they weighed and balanced factors such as deal and regulatory certainty, the fair treatment of the companies and the shareholders and required shareholder approval.

We agree with TSX and the OSC that 100% dilution is extreme and definitely not an appropriate level of dilution. Although a 50% threshold is better than 100%, we believe it is still does not adequately protect the interests of shareholders and is still an excessive level of dilution. We consider dilution of between 25% and 50% of the issued and outstanding shares of a particular issuer to be significant enough to warrant shareholder participation in the decision making process. We believe that 25% dilution is appropriate given the rules of other exchanges, market participants’ expectations and the application of Section 603.

We are of the view that Subsection 611(d) should simply be eliminated so that security holder approval is required where the number of securities issued exceeds 25% of the outstanding securities of the acquiring issuer for the acquisition of a public or private company. Considering that the U.S. exchanges have dilution limits that are lower than 25% a dilution limit of 25% is not overly restrictive and would strike a more appropriate balance between the interests of security holders, issuers and other market participants. We believe that requiring shareholder approval in these instances is an important

governance process, provides fairness for all shareholders and enhances confidence in capital markets. Security holders should have the right to participate in decisions involving fundamental changes to a company such as a significant acquisition, since it may involve significant changes in the structure, directors and officers and/or business operations of the company, all of which are ultimately related to the risk of their investment.

5. What are the principal costs and benefits of the approach proposed in the Amendment? Please explain your response with reference to the various stakeholders.

The exemption from obtaining security holder approval for dilutive issuances in connection with acquisitions of public companies in section 611(d) of the Manual reduces confidence in the Canadian market, as illustrated most recently by the HudBay Transaction. A requirement for security holder approval in all cases of dilutive acquisitions will improve the quality and integrity of the marketplace and ensure the fair treatment of all security holders.

As noted in our response to question 2 above, we don't believe that the requirement to obtain security holder approval should make transactions significantly more difficult for issuers to complete, although we acknowledge that there would be additional marginal costs involved in holding a meeting to obtain such approval. As owners of the company, we support the company incurring these expenses on our behalf.

6. Do you believe that the Amendment will lead to transactions being structured to avoid security holder approval? If so, do you believe that this would be inappropriate and if so, why?

It is difficult to speculate whether requiring an acquiring company to obtain security holder approval will lead to transactions being structured to avoid this. As noted above, companies listed on various other stock exchanges regularly pursue acquisitions of public companies and obtain the necessary security holder approval. We, along with TSX, the OSC and the market recognize the value of security holder approval. Providing security holders with the opportunity to approve the issuance of common shares which will have a dilutive affect on their holdings is good governance and will increase investor confidence in Canadian capital markets. Good boards and management teams understand that they can best serve the corporation by taking a long-term view of its best interests and those of the security holders.

7. Is a level of dilution other than that set out in the Amendment more appropriate e.g. 25%, 30%, 40%, 75%, 100%? If so, why?

Yes, we believe that a 25% level of dilution is more appropriate than that which is set out in the Amendment. See comments above (in particular our response to question 4) for details.

8. If your response to question 7 is positive, please consider the costs and benefits of requiring security holder approval at such a dilution level. Please explain your response with reference to the various stakeholders.

See response to question 5.

9. Would the 50% dilution proposed in the Amendment provide a bright line test which would obviate the application of Section 603 with respect to public company acquisitions in all but extraordinary circumstances? If not, why not?

We agree with TSX that it needs to develop and apply rules that are consistent and transparent and feel that the 50% dilution proposed in the Amendment does not provide a sufficient bright line test which would obviate the application of Section 603. This level of dilution is still too high and transactions at this level will continue to have a negative impact on the quality of the marketplace. As noted by TSX in the Amendment, dilution alone does not always address all of the relevant factors. Other factors of the transaction, such as the premium paid, may be contentious and make the transaction objectionable even though the proposed dilution is below 50%. We agree that there will be a relatively limited number of these objectionable transactions if the TSX sets a reasonable dilution level beyond which security holder approval is required. We believe 25% is the appropriate dilution level. If the dilution level was set at 25% this should obviate the application of Section 603.

10. Is it appropriate to permit security holder approval of acquisitions in writing rather than at a meeting? If not, why?

Yes, provided that all of the applicable requirements of Part VI were applied and complied with.

11. Should security holders have the flexibility to vote on security holder approval requirements for dilutive acquisitions on an annual basis? Why or why not?

We agree with TSX's position on this point and its belief that the negative aspects and uncertainty outweigh any positive benefits of a blanket approval method.

12. What costs and benefits are there in providing such flexibility? Do you agree that the costs outweigh the benefits?

As noted in our response to question 11 we agree with TSX's position on this point.

We appreciate the opportunity to respond to your request for comments and hope that you find our feedback relevant. We urge TSX to revise the Amendment to require security holder approval for the issuance of securities in payment of the purchase price

for an acquisition of a public company which exceeds 25% of the number of issued and outstanding shares of the relevant listed issuer.

Please contact me or Eleanor Farrell, Chair of PIAC's Corporate Governance Committee, (efarrell@cppib.ca, 416.868.6377) if we can be of further assistance.

Yours sincerely,

A handwritten signature in black ink, appearing to read "G. McDade".

Gayle McDade
Chair

c.c. Susan Greenglass, Manager, Market Regulation
Ontario Securities Commission