

13.2 Marketplaces

13.2.1 Notice of Approval – Amendments to Part VI of the TSX Company Manual

TORONTO STOCK EXCHANGE

NOTICE OF APPROVAL

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

Introduction

In accordance with the Protocol for Commission Oversight of Toronto Stock Exchange Rule Proposals (the “Protocol”) between the Ontario Securities Commission (the “OSC”) and Toronto Stock Exchange (“TSX”), TSX has adopted, and the OSC has approved, amendments (the “Amendments”) to Part VI of the TSX Company Manual (the “Manual”) which are attached at **Appendix A**. The Amendments are public interest amendments to the Manual, together with ancillary non-public interest amendments. The Amendments were published for public comment in a request for comments on November 13, 2009 (“Request for Comments”).

Reasons for the Amendments

In 2009, TSX published a request for comments on its security holder approval requirements for acquisitions. In response, a concern was raised regarding the application of security holder approval requirements for acquisitions of investment funds. Effective November 24, 2009, TSX amended its rules for security holder approval requirements for acquisitions and now 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. Prior to the amendment, a listed issuer acquiring a public company was generally exempt from the security holder approval requirement, and investment funds engaged in permitted mergers were therefore generally exempt from the security holder approval requirement.

In addition, certain market participants have recently expressed interest in TSX codifying security holder approval requirements for investment funds that are being acquired.

Summary of the Amendments

TSX received two comment letters in response to the Request for Comments. A summary of the comments together with TSX’s responses is attached at **Appendix B**. TSX has made non-material changes since the Request for Comments, based on both the public comments and the OSC’s comments, and in relation to questions asked in the Request for Comments. A blacklined version of the Amendments showing the changes since the Request for Comments is attached as **Appendix C**.

Subsection 604(g) Security holder approval for target investment funds

TSX will require security holder approval of an investment fund which is the subject of an acquisition, unless certain conditions are met, as proposed in the Request for Comments. However, as a result of comments received, we have clarified that the requirement applies to acquisitions of funds or assets. We have also specified that there must be a minimum of 20 business days notice to security holders of the redemption right and that notice by press release will be acceptable. The conditions have been amended to require the fund manager, rather than the Independent Review Committee (“IRC”), to make certain determinations, and to then refer the transaction to its IRC for approval, to be more consistent with the role of an IRC and the requirements in National Instrument 81-102. We have also specified that the funds cannot bear any of the costs and expenses associated with the transaction in order to be exempt from the security holder approval requirement.

Subsection 611(d) Exemption for acquiror investment funds from security holder approval required under Subsection 611(c)

TSX will 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, as proposed in the Request for Comments. However, as a result of comments received, the conditions have been amended to require the fund manager, rather than the IRC, to make certain determinations, and to then refer the transaction to its IRC for approval, to be more consistent with the role of an IRC and the requirements in National Instrument 81-102. We have also specified that the funds cannot bear any of the costs and expenses associated with the transaction in order to be exempt from the security holder approval requirement.

Text of the Amendments

The Amendments are attached at **Appendix A**.

Effective Date

The Amendments will become effective on August 16, 2010 (the "Effective Date"). The Amendments will not have any retroactive effect. However, as advised in the Request for Comments, TSX will consider applications by investment funds made prior to the Effective Date for a discretionary exemption from the security holder approval requirement in Subsection 611(c) provided the terms set out in this Final Notice of Approval are present.

APPENDIX A

AMENDMENTS TO PART VI OF THE TSX COMPANY MANUAL
SUBSECTION 604(G) AND SUBSECTION 611(D)

Sec. 604(g). Security Holder Approval

(g) When a listed issuer that is an investment fund: (i) is being acquired, or (ii) transfers its assets; and after the transaction will cease to continue and its security holders will become security holders of another investment fund, TSX will require that such listed issuer obtain security holder approval for the transaction, unless all of the following conditions are met:

- (i) the listed issuer has a permitted merger clause in its constating documents which permits the transaction by the listed issuer without security holder approval;
- (ii) the consideration offered to security holders of the listed issuer for the transaction has a value that is not less than NAV;
- (iii) the manager of the listed issuer has determined that the investment objectives, valuation procedures and fee structure of the listed issuer and the acquiring issuer are substantially the same, has made such representations to its IRC, and has referred the transaction to its IRC for approval;
- (iv) the IRC of the listed issuer has approved the transaction;
- (v) the listed issuer is providing its security holders with a redemption right for cash proceeds which are not less than NAV, together with not less than 20 business days notice by press release including a description of such redemption right and the transaction; and
- (vi) the investment funds participating in the transaction bear none of the costs and expenses associated with the transaction.

Sec. 611. Acquisitions.

(d) 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(s) 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 manager of the acquiring listed issuer has determined that the assets being acquired are consistent with the acquiring issuer's investment objectives, has made such representations to its IRC, and has referred the transaction to its IRC for approval;
- (iv) the IRC of the acquiring listed issuer has approved the acquisition;
- (v) 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; and
- (vi) the investment funds participating in the transaction bear none of the costs and expenses associated with the transaction.

Interpretation

"investment fund" has the same definition found in the OSA.

"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;

APPENDIX B

SUMMARY OF COMMENTS

PART VI – CHANGES IN CAPITAL STRUCTURE OF LISTED ISSUERS

Two comment letters were submitted in response to the Request for Comments published on November 13, 2009 (the “Request for Comments”). One comment letter is from the investment management practice group at Borden Ladner Gervais (“BLG”) and the second letter requested confidentiality (“Confidential Commenter”).

Capitalized terms used and not otherwise defined shall have the meaning given in the Request for Comments.

Summarized Comments Received	TSX Response
(i) Security Holder Approval Requirements for Target Investment Funds	
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?	
It was submitted that it is appropriate for TSX to require security holder approval, but only if the fund’s constating documents do not authorize the fund manager to otherwise complete the acquisition. (Confidential Commenter)	Similar to NI 81-102, there are circumstances where security holder approval will always be required. TSX is not satisfied that the existence of permitted merger provisions in the fund’s constating documents is sufficient to override security holder rights. However, the existence of such provisions in the fund’s constating documents is relevant in the proposed exemption in Subsection 604(g).
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.	
It was submitted that where the fund’s constating documents authorize an acquisition without unitholder approval, and this provision has been publicly disclosed, then the fund should not be required to obtain security holder approval and incur the costs. (Confidential Commenter)	Please see the response to Question 1.
3. Are the proposed conditions to permit an acquisition without security holder approval appropriate?	
It was submitted that if investors have a redemption right in advance of closing the acquisition, then determinations such as whether the investment objectives or fee structures are similar are not necessary. (Confidential Commenter)	Similar to National Instrument 81-102, there are situations where security holder approval is required and no exemptions from security holder approval are provided. TSX does not agree that the existence of a redemption right is sufficient to exempt security holder approval rights. The goal is to ensure some parity for investors who stay in the merged fund, similar to what is provided for conventional mutual funds under NI 81-102.
4. Are there any additional conditions that should be required to permit an acquisition without security holder approval? If so, what are they?	
<p>It was proposed that the conditions more closely mirror those present in NI 81-102 Section 5.3(2). (Confidential Commenter)</p> <p>It was also proposed that the redemption right only be exercisable until the date on which a security holder in the terminating fund would have been entitled to exercise such a redemption right had the acquisition not been completed. (Confidential Commenter)</p>	<p>TSX has considered the conditions applicable to conventional mutual fund mergers in proposing the Amendments. However, TSX does not regulate all matters related to acquisitions, and as such has not added certain of the suggested provisions. For example, TSX does not require that the funds involved must be managed by the same manager or an affiliate of the manager. TSX will also not require that the acquisition be completed on a tax deferred rollover basis. TSX does agree that notice of the acquisition should be prescribed, and has amended the rule to provide that notice be given not less than 20 business days prior to completion of the acquisition.</p> <p>TSX will require the redemption right without limiting the exercise date in order to ensure the full effect of the redemption right.</p>

Summarized Comments Received	TSX Response
<p>5. Should the 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?</p>	
<p>It was submitted that security holders exercising the redemption right should pay the administrative costs of the redemption. One submission cited the choice of the investor to exercise the redemption right and the fact that the transaction is either contemplated by the fund's constating documents or approved by security holders. (Confidential Commenter) The other submission described such charge as appropriate since it is a new right being given to security holders, which has been approved by the fund's IRC. (BLG)</p>	<p>TSX views the provision of the redemption right as being given in part in lieu of the fund being required to obtain security holder approval. The provision of the redemption right is in connection with providing an exemption from security holder approval which is a cost saving to the fund.</p> <p>No submissions were provided with respect to an appropriate level of administrative expenses or cap on such expenses which would be fair to impose on security holders who would otherwise have an approval right. No deduction of administrative expenses for the exercise of the redemption right will therefore be permitted if a fund is relying on the exemption from security holder approval.</p>
<p>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?</p>	
<p>Commenters submitted that it was not appropriate for the IRC to make all of the determinations proposed in the Amendments as the IRC contemplated under NI 81-107 was not constituted to make all such assessments. (Confidential Commenter)</p> <p>The IRC for mutual funds approves certain transactions, but NI 81-102 and NI 81-107 do not mandate a particular decision-making process by the IRC. It was proposed that the role of the IRC should be consistent for mutual funds and for listed investment funds. (BLG)</p> <p>It was also submitted that assessments with respect to matters such as investment objectives and fees are more appropriately made by the manager of the fund. (Confidential Commenter)</p>	<p>TSX is satisfied that the relevant assessments of investment objectives, valuation procedures and fee structures may be made by the manager of the fund. TSX will require that the manager has made such determination and will make such representations to the IRC when presenting the transactions to the IRC for approval. The IRC will then be required to approve the acquisition in accordance with its usual procedures before the transaction may proceed.</p>
<p>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?</p>	
<p>It was submitted that it would be appropriate for funds to bear the costs of the transaction. It was proposed that it is appropriate because the only ways for listed funds to grow is to complete public offerings or acquisitions. It was submitted that the costs of acquisitions would disincline managers from completing otherwise beneficial mergers. (Confidential Commenter)</p>	<p>TSX is satisfied that it is appropriate to mirror the rule applicable to conventional mutual funds with respect to costs and expenses of mergers. The requirement is in connection with providing an exemption from security holder approval which is a cost saving to the fund. TSX understands that funds will take into account all relevant costs in assessing the benefits of the acquisition. This requirement helps focus the assessment of the transaction on the best interests of the fund.</p>

Summarized Comments Received	TSX Response
(ii) Exemption from Security Holder Approval Requirement for Acquiring Investment Funds	
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.	
It was submitted that no exemption should be required for funds because the acquiring fund is just acquiring assets. (Confidential Commenter)	Subsection 611(c) of the Manual requires security holder approval of an acquisition that results in more than 25% dilution. Acquisitions may include assets. A fund's constating documents which permit such an acquisition do not override the requirement in Subsection 611(c). However, the existence of such provisions in the fund's constating documents is relevant in the proposed exemption in Subsection 611(d).
9. Should security holder approval be required for an investment fund acquiror 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.	
It was submitted that if the consideration for the acquisition is at NAV, then there is no dilution of a security holder's investment and no security holder approval should be required. (Confidential Commenter)	As discussed in the Request for Comments, the key concerns for acquisitions by investment funds are not primarily related to dilution since consideration must be at NAV. However, the proposed exemption and conditions required to be eligible for the exemption are consistent with NI 81-102. There are issues involved in security holder approval rights beyond dilution. For example, there could be a change in the fund manager or the termination time of the fund. TSX does not agree that consideration at NAV is sufficient to exempt security holder approval rights without the proposed conditions being met.
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 acquiror fund)?	
It was submitted that security holder approval should only be required when consideration for the acquisition is not determined at NAV or the acquisition is material to the acquiror fund. (Confidential Commenter)	Security holder approval is required under Subsection 611(c) of the Manual when dilution from the acquisition is over 25%. TSX has set this bright line test for security approval requirements rather than a test such as materiality. See also the response at Question 9.
11. Are the proposed conditions for an exemption from the security holder approval requirement appropriate?	
See Question 10.	
12. Are there additional conditions that should be added in order to permit the exemption from security holder approval? If so, what are they?	
See Question 10.	
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?	
See Question 6.	
General	
It was submitted that subsection 604(g) could be interpreted as only applying to acquisitions of units of funds and not to mergers of funds or acquisitions of assets. (Confidential Commenter)	Subsection 604(g) is to apply broadly to acquisitions and mergers of funds and assets. Revisions have been made to reflect this more broad interpretation.

Summarized Comments Received	TSX Response
<p>It was submitted that it would be more appropriate for the Canadian securities regulators to make rules to apply to investment funds rather than TSX regulating only listed investment funds. (BLG) It was suggested that to the extent that the CSA develops rules regarding mergers or other acquisitions of public investment funds, that TSX commit to revise or delete its rules. It was also suggested that TSX ensure its rules are consistent with rules applicable to mutual funds under 81-102.</p>	<p>TSX has considered NI 81-102 and the rules applicable to conventional mutual funds, and has worked with the OSC in this regard. However, TSX does not regulate all of the same matters as the OSC, and, as such, the provisions are not identical. TSX believes, however, that they are consistent given differences between the regulatory regimes. TSX agrees that it will review its rules should the CSA develop rules that impact or overlap with its rules.</p>

APPENDIX C

BLACKLINED VERSION OF THE AMENDMENTS SHOWING CHANGES SINCE
THE NOVEMBER 13, 2009 REQUEST FOR COMMENTS

Sec. 604(g). Security Holder Approval

(g) When a listed issuer that is an investment fund: ~~(i) is being acquired, or (ii) transfers its assets; and after the transaction will cease to continue and its security holders will become security holders of another investment fund,~~ TSX will require that such investment fund listed issuer obtain security holder approval for the acquisition transaction, 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 transaction by the listed issuer without security holder approval;

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

(iii) the ~~independent review committee manager~~ manager 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, has made such representations to its IRC, and has referred the transaction to its IRC for approval;~~

(iv) the IRC of the listed issuer has approved the transaction;

~~(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~~ not less than 20 business days notice ~~and by press release including a~~ description of such redemption right and the ~~acquisition transaction;~~ and

(vi) the investment funds participating in the transaction bear none of the costs and expenses associated with the transaction.

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 acquiring listed issuer is an investment fund and all of the following conditions are met:

(i) the issuer being acquired is an investment fund (s) 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 manager~~ manager of the acquiring listed issuer has: ~~(A) determined that the assets being acquired are consistent with the acquiring issuer's investment objectives, has made such representations to its IRC, and has referred the transaction to its IRC for approval;~~

~~(iv) the IRC of the acquiring listed issuer and the issuer being acquired are substantially the same; and (B) has 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; and

(vi) the investment funds participating in the transaction bear none of the costs and expenses associated with the transaction.

Interpretation

“investment fund” has the same definition found in the OSA.

SROs, Marketplaces and Clearing Agencies

“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;