TSX VENTURE EXCHANGE AMENDS EQUITY COMPENSATION POLICIES

Posted on December 6, 2021

Categories: Insights, Publications

On November 24, 2021, the TSX Venture Exchange (the "**TSXV**" or the "**Exchange**") published a bulletin announcing certain amendments to its policies regarding security based compensation (the "**Security Based Compensation Changes**") which took effect immediately.[1] The Security Based Compensation Changes represent a significant change to the TSXV's existing policies by (1) clarifying the rules for classes of compensation securities other than stock options, such as deferred share units ("**DSU**"), performance share units ("**PSU**"), restricted share units ("**RSU**") and stock appreciation rights ("**SAR**" and together with DSU, PSU and RSU, the "**New Compensation Securities**"), (2) permitting the exercise of stock options on a cashless and net exercise basis and (3) codifying certain of the TSXV's pre-existing unwritten rules governing security based compensation plans and grants.

These changes immediately impact all TSXV issuers and the manner in which they attract and retain talent as these changes provide issuers with enhanced flexibility to structure share compensation arrangements.

Additional Types of Security Based Compensation

Prior to the Security Based Compensation Changes coming into effect, TSXV Policy 4.4 – *Incentive Stock Options* (the "**Former Policy**")[2] only explicitly contemplated stock options as the form of share compensation which TSXV issuers could offer, leaving ambiguity with respect to how these rules applied to other types of compensation security grants, including the New Compensation Securities. The Exchange has amended the Former Policy, now "Policy 4.4 – *Security Based Compensation*" (the "**Amended Policy**")[3], to contemplate, and include rules for, the New Compensation Securities.

The Amended Policy clarifies that many of the same rules that apply to stock options will apply to New Compensation Securities with some important distinctions. For example, the Amended Policy provides that New Compensation Securities may not vest for a period of at least one year from the date of grant or issuance, subject to acceleration in limited circumstances. In addition, persons providing investor relations services may only be granted stock options and the grant of options to these persons must vest in stages of a period of not less than 12 months under the Amended Policy.

New Categories of Security Based Compensation Plans

Under the Former Policy, only two types of stock option plans were expressly permitted: a "rolling" stock option plan, permitting issuers to reserve for issuance under the exercise of stock options up to a maximum of 10% of the issued shares of the Issuer at the time of grant and a "fixed" stock option plan, permitting issuers to reserve for issuance under the exercise of stock options up to a maximum of 20% of the issued shares of the issuer as of the date of implementation of the plan.

The Amended Policy provides that four categories of security based compensation plans are now permitted. The "rolling" and "fixed" plans remain available to issuers, expanded to permit the issuance of the New Compensation Securities. In addition, the Amended Policy provides for two new additional categories of security based compensation plans:

(a) **Hybrid Category** – Issuers may implement a combined stock option plan under which issuers may reserve for issuance under the exercise of stock options up to a maximum of 10% of the issuer's issued and outstanding shares at the time of grant and a "fixed" New Compensation Securities plan (excluding the grants of stock options) under which the Issuer may reserve for issuance shares issuable up to a maximum of 10% of the issuer's issued and outstanding shares as of the date of implementation of the most recent "fixed" New Compensation Securities plan.

(b) **Fixed Stock Option Plan up to 10%** - Effectively a new subset of the pre-existing "fixed up to 20%" category, discussed above, permitting a fixed number up to 10% of the issuer's issued and outstanding shares only, and limited to stock options grants only.

Subject to certain exceptions, issuers must obtain yearly approval of any "rolling" stock option plan and must obtain shareholder approval of any "fixed" security based compensation plan at the time it is implemented and when the number of shares issuable under the security based compensation plan is amended. The "Fixed Stock Option Plan up to 10%" category may be implemented without shareholder approval subject to certain requirements, including that it does not permit cashless exercise of stock options.

Security Based Compensation Outside of a Plan

The Amended Policy provides that issuers may issue security based compensation outside of a security based compensation plan in the following circumstances:

(a) **Securities for Services Requirements** – The Amended Policy permits securities to be issued for services subject to satisfying numerous requirements set forth in the Amended Policy and TSXV Policy 4.3 - *Shares for Debt* ("**Policy 4.3**")[4], and in each case subject to the prior approval of the TSXV. The Amended Policy requires, among other things, that such issuances be comprised solely of listed shares if the recipient is non-arm's length to the issuer or its affiliates, the securities are not issued until after the services have been provided, the deemed value of the securities is determined after the date the services are provided and is not less than the discounted market price at such time, and such securities are not issued for services for investor relations activities, promotional or market making activities. This clarification is likely a result of some recent regulatory actions where there has been some abuse in the market with respect to the arrangements involving the issuance of securities for services.

(b) **Compensation Owed to Non-Arm's Length Parties** – Under Policy 4.3, the Exchange may deny acceptance of any shares for debt transaction if the debt relates to management fees of more than $2,500 per month. Under the Amended Policy, the limit is increased to $5,000 per month per person and $10,000 per month in aggregate per issuer and requires such issuances be comprised solely of listed shares.

(c) **One Time Payments as Inducement or Severance** – Subject to prior approval of the TSXV, the Amended Policy enables issuers to issue listed shares as an inducement or as severance without shareholder approval provided the maximum number of shares is limited to: 1% of the issued shares for any particular issuance, 1% of the issued shares to any one person in any 12 month period and 2% of the issued shares to all persons in aggregate in any 12 month period.

Where an issuer wishes to loan funds to a person for the purpose of acquiring securities of the issuer, such loan must first be approved by the disinterested shareholders.

The TSXV will consider an application from an issuer to grant or issue security based compensation outside of a security based compensation plan in other situations provided that the issuer obtains disinterested shareholder approval at a shareholder meeting or by written consent.

Other Changes

In addition to the above amendments, the Security Based Compensation Changes provide:

(a) **Cashless Exercise or Net Exercise** – Under the Former Policy, the exercise price of stock options was required to be paid in cash. The Amended Policy permits stock options to be exercised using a "cashless exercise" or "net exercise" which is a significant change as previously this feature was limited to TSX issuers and not something which TSXV issuers could offer under the terms of their stock option plans. A cashless exercise requires a broker lending the option recipient money to purchase the shares underlying the stock options and then selling a sufficient number of shares to repay the loan with the option recipient receiving either the balance of shares after the sale or cash proceeds from the balance of the shares. Under a net exercise, an option recipient does not pay the issuer an exercise price but receives the number of underlying listed shares equal to the quotient by dividing the product of the number of stock options being exercised multiplied by the difference between the VWAP[5] of the underlying shares and the exercise price of the stock options by the VWAP of the underlying shares. As a result, this will facilitate the exercise of the options of "in the money" by executives, directors and other eligible participants of a TSXV stock option plan without having to put in place any arrangements for financing the exercise of such options. This is clearly a positive development and should be well received by market participants.

(b) **Form 4G** – The former Form 4G has been expanded to address the New Compensation Securities and to include "snapshot" summaries of outstanding security based compensation plans and outstanding security based compensation. The new Form 4G[6] is a simplified reporting form and will no longer be used to apply to the Exchange for its acceptance of a proposed amendment to Security Based Compensation and instead a letter will be required for such acceptance of a proposed amendment.

Transitional Provisions

The Security Based Compensation Changes came into effect as of November 24, 2021. The Amended Policy permits security based compensation plans filed with the Exchange prior to November 24, 2021 (a "**Legacy Security Based Compensation Plan**") to remain in force in accordance with their existing terms. Any outstanding security based compensation plan that does not comply with the Amended Policy will, however, need to be amended to comply with the Amended Policy the next time it is placed before shareholders for approval. Furthermore, any security based compensation granted, issued or amended after November 23, 2021, other than Legacy Security Based Compensation must comply with the Amended Policy.

Conclusion

In light of the Security Based Compensation Changes, companies listed on the TSXV will need to revisit their existing equity compensation plans to consider what amendments may be required to their plans going forward. The adoption of the Security Based Compensation Changes also provides companies with an opportunity to consider other available alternatives for equity compensation that will enable them to incentive directors, management, employees and external consultants while preserving cash.

If you have any questions regarding the Security Based Compensation Changes or require assistance updating your security based compensation plan, members of McMillan's Capital Markets Group would be pleased to assist you.

[1] TSX Venture Exchange Bulletin RE Policy 4.4 – Security Based Compensation (November 24, 2021).
[2] TSX Venture Exchange, "Policy 4.4 – Incentive Stock Options" (as at May 8, 2013).
[3] TSX Venture Exchange, "Policy 4.4 – Security Based Compensation" (as at November 24, 2021).
[4] TSX Venture Exchange, "Policy 4.3 – Shares for Debt" (as at June 14, 2010).

[5] "**VWAP**" means the volume weighted average trading price of the issuer's listed shares on the Exchange calculated by dividing the total value by the total volume of such securities traded for the five trading days immediately preceding the exercise of the subject stock option. Where appropriate, the Exchange may exclude internal crosses and certain other special terms trades from the calculation.
[6] TSX Venture Exchange, "Form 4G – Security Based Compensation" (as at November 24, 2021).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.