

# VOLUNTARY DELISTING AND DEFERENCE: TSX PROPOSES CHANGES TO THE COMPANY MANUAL

Posted on January 26, 2015

Categories: [Insights](#), [Publications](#)

On January 22, 2015, the Toronto Stock Exchange ("**TSX**" or the "**Exchange**") published two proposed public interest amendments to the TSX Company Manual (the "**Manual**") for public comment. The first proposed amendment is a change to section 720 of the Manual that adds a number of requirements for listed issuers seeking to voluntarily delist (the "**Delisting Amendments**").<sup>[1]</sup> The Delisting Amendments should be of interest to issuers who are considering a voluntary delisting application, particularly those issuers who are not planning to list in another market or to undertake a going private transaction or similar near term liquidity event.

The second amendment is a series of changes, primarily to Parts IV and VI of the Manual that establish a formal set of rules governing when the TSX will defer to the policies and practices of other exchanges in respect of issuers listed on more than one exchange (the "**Deference Amendments**").<sup>[2]</sup> The Deference Amendments should be of interest to issuers who are listed on more than one exchange with less than 25% of their securities trading within Canada, and will potentially reduce current overlapping exchange obligations for such issuers.

## Delisting Amendments

The TSX's proposed amendments to section 720 of the Manual aim to ensure that all security holders are treated fairly when an issuer voluntarily delists. Under the present rules, an issuer can delist without first seeking security holder approval. While the Exchange has noted such outcomes are rare, this has occasionally resulted in security holders being deprived of a fair and orderly market for their securities if the issuer does not list on another exchange or go through a near term liquidity event, such as a going private transaction. Without liquidity, the TSX is concerned that such security holders may become vulnerable to predatory take-over bids, management buy-outs or other similar transactions.

To avoid these outcomes, the TSX's proposed amendments will require an issuer to seek the approval of a majority of the holders of the affected class or series of securities as a precondition for voluntary delisting, unless the issuer can satisfy the Exchange that:

1. an acceptable alternative market exists or will exist for the listed securities on or about the proposed delisting date;

2. there will be a near term liquidity event, such as a going private transaction, and all of the material conditions of the transaction have been satisfied and the likelihood of non-completion is remote;
3. the listed issuer is under delisting review for failure to comply with TSX policies and it is unlikely that the TSX will be satisfied that the issuer will cure these deficiencies within the prescribed time; or
4. in the case of listed securities other than shares, if the listed securities are convertible, exercisable or exchangeable at the holder's option into another class of listed securities.

In order to minimize the additional costs and regulatory burden of complying with the proposed amendments, the TSX proposes to allow issuers to use the procedure in Subsection 604(d) of the Manual to obtain approval for a delisting application, whereby the issuer could satisfy the approval requirements by obtaining written approval of a majority of the security holders of the affected class or series, without needing to hold a formal meeting. However, the Exchange has also proposed that certain security holders will be excluded from voting, including insiders who have an interest that materially differs from other security holders or any security holder that holds more than 50% of the issued securities of the affected class or series.

The proposed voluntary delisting process requires the issuer to apply to the Exchange by letter, outlining: (a) the reasons for the application; (b) whether security holder approval will be sought, and if not, why; and (c) the proposed date of delisting. However, in addition to a certified copy of a directors' resolution authorizing the application to delist, the proposed amendments will require an issuer to provide a draft copy of a press release to be pre-cleared by the Exchange. The Exchange's goal with this new requirement is to improve the consistency of information about the voluntary delisting that is generally available to the market.

### **Deference Amendments**

The Deference Amendments aim to align TSX practices with those of other major exchanges, the majority of which have formalized rules and frameworks for exempting issuers who are listed on two or more exchanges or marketplaces ("**interlisted issuers**") from certain exchange requirements. The TSX currently exempts interlisted issuers from certain requirements pursuant to section 602(g) of the Manual. The Deference Amendments are an incremental change to these exemptions, amending Parts IV and VI of the Manual and making ancillary changes to Parts I and III.

The Deference Amendments propose to create two types of exemptions: (a) transaction exemptions; and (b) corporate governance exemptions. These exemptions will only be available to interlisted issuers that meet the eligibility criteria set out in the proposed amendments. In proposing these changes, the TSX is recognizing that corporate statutes and market requirements in other jurisdictions or markets address similar policy objectives to those in Canada, and warrant greater deference to reduce the regulatory burden of certain interlisted issuers. The proposed changes aim to reduce this burden and create a transparent set of rules for obtaining

interlisted issuer exemptions while ensuring the exemptions do not compromise the quality of TSX's marketplace.

#### *Eligibility Criteria*

To be eligible for either exemption, the interlisted issuer must: (a) be listed on a "Recognized Exchange; and (b) have had less than 25% of the overall trading volume of their listed securities occurring on all Canadian marketplaces in the 12 months preceding the application (an "**Eligible Interlisted Issuer**"). The amendments define a "Recognized Exchange" as including the major international exchanges (NYSE, NYSE MKT, NASDAQ, AIM, LSE, ASX, and HKSE) and others as determined by the Exchange from time to time.

To be eligible for the corporate governance exemptions, the interlisted issuer must be an Eligible Interlisted Issuer and be incorporated or organized in a "Recognized Jurisdiction" (an "**Eligible International Interlisted Issuer**"). The amendments define "Recognized Jurisdiction" as including Australia, England and the State of Delaware and other jurisdictions with corporate statutes substantially modelled after these jurisdictions.

#### *Transaction Exemptions*

Section 602(g) of the Manual already contains certain transaction exemptions for Eligible Interlisted Issuers. In addition to these existing transaction exemptions, the Deference Amendments will also add exemptions for Eligible Interlisted Issuers from the following requirements:

1. special requirements for non-exempt issuers (s. 501);
2. prospectus offerings (s. 606);
3. convertible securities (s. 610);
4. securities issued to registered charities (s. 612); and
5. rights offerings (s. 614).

To obtain these exemptions, an Eligible Interlisted Issuer must notify the Exchange using the form of notice under section 602(e), and must include: (a) a notification that the issuer is relying upon a transaction exemption; (b) the Recognized Exchange(s) on which the issuer is listed; and (c) evidence that the volume of trading on all Canadian marketplaces in the 12 months before the application was less than 25%. The Exchange will then confirm acceptance, conditional upon evidence that the transaction has been accepted by a Recognized Exchange or confirmation from legal counsel in the local jurisdiction that the proposed transaction is in compliance with applicable rules. The issuer must also disclose that it intends to or has relied on the exemption in section 602.1 of the Manual in all press releases issued in connection with the transaction.

#### *Corporate Governance Exemptions*

The Deference Amendments also propose a new exemption from certain corporate governance requirements in the Manual. Under the proposed amendments, Eligible International Interlisted Issuers could apply to be exempt from the following corporate governance requirements:

1. Director Election Requirements (ss. 461.1-461.4); and
2. Annual Meeting (s. 464).

The proposed process for obtaining a corporate governance exemption is slightly different than the process for obtaining a transaction exemption. Instead of the notice procedure under section 602(e), an Eligible International Interlisted Issuer wishing to obtain a corporate governance exemption must apply to the TSX by letter with evidence that it meets the Eligible International Interlisted Issuer criteria. In addition, the issuer must disclose that it has been exempted for the year from the corporate governance requirements and the issuer's reliance on the section 401.1 exemption in its press release issued in connection with the issuer's annual meeting or proxy circular.

The amendments also allow other International Interlisted Issuers that are outside of a "Recognized Jurisdiction" (i.e. not an Eligible International Interlisted Issuer) to apply to the TSX for discretionary relief on an annual basis from these corporate governance requirements. However, Canadian interlisted issuers cannot apply for a discretionary exemption from these corporate governance requirements.

### **Comment Period**

The Delisting Amendments are open for comment for a period of 30 days, which expires on February 23, 2015. The Exchange is seeking comments regarding the appropriateness of the amendment in general, and the appropriateness of specific procedures for obtaining security holder approval.

The Deference Amendments are open for comment for a period of 45 days, which expires on March 9, 2015. The Exchange is requesting comments on the general appropriateness of the Deference Amendments, the appropriateness of the proposed trading threshold, the appropriateness of the types of transactions that should be exempt, the appropriateness of the definitions of recognized exchange and recognized jurisdiction, and whether there should be other requirements before the Exchange should defer to another exchange or jurisdiction.

Please contact the author listed below or a member of our Capital Markets Group if you have any questions or require assistance with the preparation of a comment letter.

by Scott Kuehn

1 Toronto Stock Exchange, [\*Amendments to Toronto Stock Exchange Company Manual\*](#) (January 22, 2015)

[Section 720].

2 Toronto Stock Exchange, [\*Amendments to Toronto Stock Exchange Company Manual\*](#) (January 22, 2015) [Deference Amendments].

### **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.

© McMillan LLP 2015