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May 4, 2009

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Dear Sir and Madam:

Re: TSX Request for Comments – Security Holder Approval Requirements for Acquisitions

The Investment Industry Association of Canada appreciates the opportunity to comment on the latest proposed amendment to the TSX security holder approval requirements, published April 3, 2009. We recognize that the OSC decision to require security holder approval for the HudBay Minerals Inc./ Lundin Mining Corp. transaction has focused attention on transactions involving acquisitions of public issuers; however, we are concerned that applying the outcome of this isolated regulatory decision to all such transactions will have a significant detrimental effect on Canadian public markets.

We re-iterate the position expressed in our response to the October 2007 request for comments on this issue that the exemption from security holder approval for acquisitions involving publicly listed targets is appropriate for the Canadian marketplace. Although there may be isolated situations where discretion to impose security holder approval in such circumstances is appropriate, it is important to ensure that the interests of the marketplace as a whole are not compromised by regulating in response to individual decisions. The existing requirements are appropriate for the nature of the Canadian public issuer environment, in terms of issuer size and sectoral considerations.

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Our responses to the questions posed in the Request for Comments are as follows:

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?

The exemption from security holder approval for the acquisition of public companies is appropriate and necessary. As noted in the Request for Comments, there are a number of factors that differentiate public vs. private issuers, such as the availability of public information, prospectus level disclosure requirements and readily ascertainable market valuations. In addition the directors' fiduciary duty and the fact that such transactions are often subject to intense public scrutiny help ensure that such transactions are undertaken within the framework of significant managerial discipline exercised for the benefit of shareholders on both sides of the transaction. IIAC believes that these factors provide sufficient safeguards to maintain the current complete exemption from security holder approval rather than the proposed partial exemption.

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?

Aside from the significant direct costs of obtaining security holder approval, reducing the scope of the exemption will result in higher indirect or friction costs. Security holder approval requirements introduce a new element of risk into proposed transactions. The resulting higher break fees and higher risk premiums will ultimately drive up the cost of the acquisition.

The element of uncertainty should not be underestimated as a factor in the decision process of both acquirors and targets. This uncertainty will likely have a detrimental effect on the number of transactions undertaken. In a competitive takeover bid situation, when forced to choose between a transaction requiring security holder approval, and one without such a requirement, the costs and uncertainty can easily tip the balance in favor of the bidder with the less burdensome regulatory regime.

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

As noted in the Request for Comments, where TSX issuers and foreign acquirors are competing for strategic assets, the requirement for security holder approval may be a determining factor in the cost/benefit analysis of the bids. This may result in lost opportunities for TSX issuers, or it may require such issuers to pay more for assets to balance out the direct and indirect costs associated with security holder approval.

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

Before imposing new requirements on the marketplace, regulators must take into account a number of elements to ensure that a rule that may appear to address an issue for one group of participants or in one particular sector does not have more far reaching unintended consequences for other market participants, and for the market as a whole. Factors relating to ease of capital raising, competition, governance and costs to all parties involved must be examined on an industry-wide, not only a transaction by transaction basis.

Viewed from that perspective, the Amendment does not strike the appropriate balance between the interests of security holders, issuers and other market participants. The proposal focuses narrowly on the interests of the security holders of the acquiror, without adequately taking into account the consequences for all other market participants. Although the Request for Comments acknowledges that the Amendment may result in increased direct and indirect costs, delays in deal completion, introduction of uncertainty in transactions and negative effects on competition, the rationale behind the Amendment appears to place a disproportionate weight on the potential and uncertain benefits to the small group of stakeholders. We are concerned that the outcome of isolated transactions such HudBay/Lundin are being used as a basis to impose a costly and wide ranging regulatory requirement that may not be necessary or desired by any of the parties in most cases. We question whether any analysis has been done to ascertain if public issuers are in favour of this requirement and whether transactions to which it would have applied would not have been pursued had the requirement been in effect.

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It is not clear to us that the potential benefits of imposing security holder approval outweigh the considerable costs.

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.

As noted above, there are significant direct costs of obtaining security holder approval, including the costs of preparing the required documents and holding the meeting. In addition there are the indirect or friction costs created by introducing uncertainty and risk into the transaction, such as higher break fees and higher risk premiums which increase the cost of the acquisition. These costs are borne by the security holders of the acquiror. However, ultimately in a merged operation, all security holders including those of the acquiror and target will have paid for the requirement. On a more macro level, TSX issuers will be disadvantaged as this requirement will likely impede their ability to compete for assets against other bidders not burdened with similar requirements. Recognizing the Canadian marketplace has a unique concentration of smaller, resource-based issuers, it is critical that the institutions serving those issuers provide a competitive environment that will allow these issuers to grow using the capital available to them. A significant portion of the Canadian public issuer market is comprised of issuers that are dependent on equity financing as opposed to cash and debt financing.

6. Do you expect 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?

Given the costs and uncertainty introduced into a transaction requiring security holder approval, it would not be surprising if certain transactions are structured to avoid such approval. The requirement may lead certain issuers to set up structures that are not as straightforward, utilize much needed cash or cause an issuer to take on a significant debt burden to avoid the issues associated with obtaining security holder approval.

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Provided that the proper analysis has been done in determining the costs and benefits of restructuring the transaction versus obtaining security holder approval, this may be an appropriate corporate decision. In many cases, particularly for smaller issuers in the resource sector, the flexibility to restructure the transactions will not be available, leaving issuers dependent on an unnecessarily costly option.

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

For the reasons expressed above, we believe that the current exemption is appropriate. However, if a bright line dilution threshold for security holder approval were to be set, a 100% level is appropriate. This level is one where a change of control of the acquiring issuer could be reasonably deemed to have taken place.

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 7, above.

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 believe that predictability with respect to regulatory requirements is extremely important and that the exercise of TSX discretion to impose additional requirements should therefore be reserved for extraordinary circumstances, regardless of whether and at what level of dilution a bright line security holder requirement applies.

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

If security holder approval is required, issuers should be able to obtain such approval in writing. This does not diminish security holder rights in any way, and will assist in defraying some of the costs of holding a meeting.

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

If security holder approval does become a requirement for certain transactions, we believe the issuer should be given the flexibility to act quickly and minimize costs for such transactions. As such, issuers should have the option of asking security holders to vote for blanket approval of acquisitions involving the issuance of shares in excess of the new guidelines on an annual basis at the AGM or EGM of the issuer company. Although the argument may be made that this does not provide security holders with information about any particular transaction, it does allow them to make the determination in advance if they wish to forego specific information about the transaction, in favour of providing the issuer with greater flexibility and cost savings. If security holders are not comfortable with pre-approval, they can defeat the motion and require such transactions to be subject to specific approval. Blanket security holder approval should not become a necessary annual requirement, but should be at the discretion of the issuer to put the proposition to a vote of security holders in any given year.

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

See response to question 11, above

We respectfully request consideration of our foregoing comments. If you have any questions, please do not hesitate to contact me.

Yours sincerely,

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