Canadian Coalition for
GOOD GOVERNANCE

THE VOICE OF THE SHAREHOLDER

December 12, 2007

Toronto Stock Exchange
Ontario Securities Commission

<u>SENT VIA EMAIL</u>
Toronto Stock Exchange
Attention: Deanna Dobrowsky, Legal Counsel, Market Policy and Structure
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And
Ontario Securities Commission
Attention: Cindy Petlock, Manager, Market Regulation – Capital Markets
(cpetlock@osc.gov.on.ca)

Re: Submission of the Canadian Coalition for Good Governance to the Toronto Stock Exchange re: Request for Comments, Security Holder Approval Requirements for Acquisitions (TSX Company Manual, Section 6.11)

This submission is made on behalf of the members of the Canadian Coalition for Good Governance (CCGG). The membership of the CCGG consists of 49 institutional investors (listed in the appendix) that manage, in aggregate, approximately C$1.3 trillion. The submission addresses the nine questions presented in the request for comments, dated October 12, 2007 and represents the collective view of the CCGG members.

<u>Questions</u>

1. Should security holder approval be required for the issue of securities as full or partial consideration for the acquisition of a public company in a transaction negotiated at arm's length where insiders receive 10% or less of the securities issued? Why?

Yes. CCGG members believe that the requirement for security holder approval for significant acquisitions is appropriate and forms part of an important system of checks and balances needed to protect investors and maintain investor confidence for the following reasons.

1. Other major stock exchanges (NYSE, Amex, NASDAQ, London, Johannesburg, and Hong Kong) prohibit listed issuers from issuing more than a specified percentage of its issued shares without shareholder approval. This specified percentage is 20 to 30 percent and there are no exceptions relating to acquisitions.

2. The NYSE viewed the implementation of the rule in 1955 as “closing a loophole” in the laws requiring shareholder approval in the case of mergers, consolidations or recapitalizations, but not acquisitions. In 1989, it expressed its belief that approval of certain significant corporate transactions is an important aspect of its corporate governance listing standards and that the rule’s purpose is to ensure shareholder ratification of significant issuances of securities. The purpose of the TSX or NYSE rule has also been described as "to ensure fair dealing prior to the consummation of a transaction", to "protect the integrity of [the shareholders'] investment", "to ensure fairness to all shareholders", "to preserve investor confidence in the capital markets", "to protect [investors] from dilution of their economic position or voting rights without a prior shareholder vote".

3. The OSC has stated that it approves the principle that securities regulation (including the rules of the TSX) may apply a standard which is higher than the standard required at corporate law because securities regulation prescribes, on a very current basis, standards designed to preserve investor confidence in the capital markets.

4. Although the TSX published changes to Part 6 of the Company Manual in 2002 and 2004, section 611(d) did not appear until the final version with the result that interested parties did not have an opportunity to comment on this specific provision. The TSX did not provide any substantive discussion of the reason for the exemption, although it seems to have been in response to submissions that called for the codification of exemptions that were typically granted by TSX staff. There was no real public consultation on this change nor was there public consultation when discretionary exemptions were granted, so there is very little public information explaining the rationale or discussing the merits of the exemption.

5. We understand that the original rationale for granting discretionary exemptions was that there was wide distribution of securities and comprehensive disclosure documents (albeit not directed to the offeror securityholders). On more of a secondary basis, the exemption also allowed offerors in a competitive bid situation to react quickly to other offers. We do not agree with either of these rationales and believe the exemption is inconsistent with the standards required to preserve investor confidence. At least when granting discretionary exemptions one would presume that TSX staff must have been convinced that it was in the best interests of the listed company (and its shareholders) to be able to issue the shares to make the acquisition without being subject to the delay and potential uncertainty that would be caused by a shareholder vote. The delay issue (at least with respect to take-over bids) might have been more of an issue prior to 1999 when the minimum deposit period for a take-over bid was 21 days instead of the current 35 days.

Members of the Canadian Coalition for Good Governance believe that the board of directors of a public company should seek the approval of its shareholders before proceeding with an acquisition of significant size, whether the consideration for the acquisition is in the form of shares or some other form of compensation. But dilution through share issuances is of particular concern because Canadian issuers, unlike issuers incorporated in the United States, almost invariably have unlimited authorized common share capital. The potential for a board of directors to fundamentally change a Canadian corporation through acquisitions without seeking shareholder approval is alarming under current regulations.

2. If you responded affirmatively to Question 1, please comment on whether approval should be required only if the issue exceeds a certain dilution level and, if so, what constitutes an appropriate dilution level. Should Subsection 611(d) (which provides for the security holder approval exemption) simply be eliminated? Is a level of dilution other than that set out in Subsection 611(c) (which provides that security holder approval is required where the number of securities issued in payment of the purchase price for an acquisition exceeds 25% of the number of outstanding securities of the issuer) more appropriate e.g. 35% or 50%? If so, why?

Approval should be required if equity dilution exceeds, at most, 25 percent of outstanding common shares as contemplated in 611(c). This threshold level is consistent with existing approval requirements for discounted private placements specified in the TSX Manual. However, members of the CCGG would prefer to see the threshold at 20 percent and note that such a threshold would align us with the US markets where the threshold for shareholder approval is also set at 20 percent.

3. Should factors other than voting dilution, such as the relative premium to a target company's stock price or enterprise value, be taken into consideration in determining if security holder approval is required? If so, what are the appropriate factors and why?

CCGG members advocate the use of a common equity dilution test. With other measures based on share prices, including takeover bid premiums, it becomes very difficult to determine one ideal threshold. Such a threshold may fluctuate based on market conditions and the appropriate metric may vary across the spectrum of industries. In the case of a private placement that exceeds the 25 percent dilution threshold and is priced at a premium to market value, shareholder approval is not required under TSX rules. Yet market conditions may be such that premium to market pricing in such a placement could still be below fair value and thus be very dilutive to shareholders. Equity dilution is a simple and relevant test.

4. Does imposing security holder approval requirements discourage acquisitions?

TSX-listed resource companies generally rely on acquisitions to grow. The TSX notes that these issuers rely on equity as their primary source of funding to finance acquisitions. There is a worry that a vote requirement will curtail acquisitions, thereby limiting growth of our resources sector.

We believe the worry is unfounded and draw attention to the technology companies listed on the NASDAQ, an exchange that requires approval for acquisitions exceeding 20 percent dilution. Technology companies mirror resource companies in so far as they rely on equity as currency for making acquisitions. The requirement for a vote did not appear to discourage acquisitions by NASDAQ-listed technology companies over the last 15 years.

5. Does the requirement for security holder approval of the acquiror make transactions more difficult to complete, particularly where a premium is being paid for the securities of the target?

CCGG members do not believe that strategic acquisitions will be discouraged by the requirement to obtain such approval. While it may affect tactics used, obtaining shareholder approval will not necessarily require that a takeover bid remain open beyond the minimum 35 day deposit period[1]. The requirement for a vote on a major acquisition is consistent with the standards required to preserve investor confidence.

The payment of a premium on its own should not be a considered a hurdle. What matters is the proposed business model and strategy after the acquisition and how effectively that is related to shareholders. As noted above, a bid premium may not be a good indicator of the merits of a transaction. CCGG members, as long-term partners in business, are more interested in the effect of an acquisition on the business model and strategy of an acquiring firm. Involving shareholders through a vote on a key acquisition affecting corporate strategy builds shareholder trust.

6. Is this an appropriate issue for security holder approval or should the decision to make an arm's length acquisition using securities be left to the business judgment of the board of directors of the acquiror?

CCGG members believe that good business judgment would lead to the inclusion of shareholders in the decision-making process when considering important, enterprise changing acquisitions. While we are aware that advisors on arms-length mergers and acquisitions generally advise boards of acquiring firms that have the benefit of expert counsel to proceed without obtaining shareholder approval, there have been cases where acquiring boards have voluntarily taken acquisition proposals to shareholders for their approval[2].

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[1] Under NI 54-101, the minimum time in days to initiate the shareholder meeting process and hold a shareholder meeting is 55 days. However the Instrument provides that these time requirements may be abridged (sect 2.20 and 2.5(1)), as long as all materials are mailed to shareholders at least 21 days prior to the meeting.

[2] In February 2005 Goldcorp sought approval for the issuance of 200,000,000 Goldcorp shares to enable the purchase Wheaton River Minerals. As noted on page 3 and 14 of the circular:
"Although Goldcorp does not believe that applicable corporate law and securities law requirements require the issuance of the Consideration Shares to be approved by the Goldcorp Shareholders, Goldcorp has included a condition in the Offer to Purchase that the Share Issuance Resolution be approved by the Goldcorp Shareholders at the Goldcorp Meeting."

Alcan's board intended to voluntarily seek shareholder approval for its three way merger with Pechiney and Allusuisse, which failed to win approval of European anti-trust regulators. An all-stock transaction with Alcan as the surviving entity, the deal represented dilution well in excess of 25%.

In Canada, where corporations generally have unlimited authorized share capital, there is a stronger case for the requirement to obtain shareholder approval for significant transactions involving equity swaps. Without it, there are insufficient checks and balances.

7. What are the possible unintended consequences of requiring security holder approval of an acquiror in a share exchange bid? Will this favour cash bids over share exchange bids? Will this result in acquirors increasing their leverage to make cash bids so as to avoid the need for security holder approval or the need to provide disclosure about the acquiror's strategy that could benefit its competitors?

Following are some possible consequences of requiring security holder approval for acquisitions:

- Greater reliance on cash and debt to finance acquisitions;
- More deal uncertainty could lead to a higher bid price and/or the negotiation of a large break fee, although presumably, shareholders will not allow an over-priced bid to proceed if they have a vote;
- The risk of competitive harm to an acquiring firm has not had the effect of deterring acquisitions by plan of arrangement, where the merits of the transaction are disclosed publicly to selling shareholders. A takeover bid circular is supposed to outline the rationale behind an acquisition as well.

8. If security holder approval is required, is approval by a majority vote of security holders the right threshold?

Yes, a simple majority approval for arms-length acquisitions.

9. Should issuers with a smaller market capitalization be exempted from the new proposal?

No, the same principles as outlined above apply to all publicly traded issuers.

Appendix - CCGG Members

Acuity Investment Management Inc.
Alberta Investment Management, Alberta Finance
Alberta Teachers' Retirement Fund Board
AMI Partners Inc.
Aurion Capital Management Inc.
Barclays Global Investors Canada Limited
BMO Harris Investment Management Inc.
British Columbia Investment Management Corporation (bcIMC)
Burgundy Asset Management Ltd.
Canada Post Corporation Registered Pension Plan
CIBC Global Asset Management
Colleges of Applied Arts and Technology Pension Plan (CAAT)
Connor, Clark & Lunn Investment Management
CPP Investment Board
Ethical Funds Company (The)
Fonds commun de placement des Régimes de retraite de l'Université Laval
Franklin Templeton Investments Corp.
Fiducie Globale des Régimes de Retraite de la Société de transport de Montréal
Greystone Managed Investments Inc.
Heathbridge Capital Management Ltd.
Hospitals of Ontario Pension Plan (HOOPP)
Jarislowsky Fraser Limited
J.P. Morgan Fleming Asset Management (Canada) Inc.
KBSH Capital Management Inc.
Leith Wheeler Investment Counsel Ltd.
Lincluden Investment Management
Mackenzie Financial Corporation
McLean Budden Limited
MD Management Limited
MFC Global Investment Management
New Brunswick Investment Management Corporation (NBIMC)
Ontario Municipal Employees Retirement Board (OMERS)
Ontario Pension Board
Ontario Teachers' Pension Plan (Teachers')
OPSEU Pension Trust
Pembroke Management Ltd.
Phillips, Hager & North Investment Management Ltd.
Public Sector Pension Investment Board (PSP Investments)
RBC Asset Management Inc.
Scotia Cassels Investment Counsel Limited
SEAMARK Asset Management Ltd.
Signature Funds (CI Investments)
Sionna Investment Managers Inc.

Standard Life Investments Inc.
State Street Canada
TD Asset Management Inc.
UBS Global Asset Management (Canada) Co.
Workers' Compensation Board - Alberta
York University Pension Fund